CONCURRING OPINION

By the Honorable Mr. Justice Delfin Jaranilla
Member from the Republic of the Philippines

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We of the majority have written our decision in which I concur, but there being several points which, in my humble judgment, need further discussion and elucidation, I am constrained to write this concurring opinion.

CONSPIRACY UNDER THE CHARTER

We held in our opinion that a "common plan or conspiracy is stated to be a crime" only in Crimes against Peace and "has no application to Conventional War Crimes and Crimes against Humanity."

The pertinent Article 5 of the Charter provides as follows:

> "ARTICLE 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> "a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> "b. Conventional War Crimes: Namely, violations of the laws or customs of war;
>
> "c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution

> of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

In the first place, under the Charter, common plan or conspiracy is not mentioned as a crime in itself; as the judgment correctly holds, "the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements or assurances; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing." More specifically, the last offense may, for the sake of clearness, be divided into two kinds of participation; to wit, participation in the common plan, and participation in the conspiracy.

In these six offenses, the common plan or conspiracy is not named as a crime against peace. Although it may be contended that if to participate in a common plan or conspiracy is a crime, then the plan or conspiracy itself must also be a crime, a conviction for the plan or conspiracy itself, strictly speaking, cannot, therefore, be had under the terms of the Charter. Pursuant to said Article 5 of the Charter, conspiracy is not a crime any more than a common plan is. They are only a means for the commission of the crime. The offense is participation in either. The existence of both is not essential. There might have been a partial or no conspiracy at all; still an accused may be guilty of any of the

crimes against peace by participation only in a common plan.

Now the grounds of the majority opinion are that the provision in sub-paragraph (c) of the above-quoted Article 5 of the Charter; to wit, "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" relates exclusively to sub-paragraph (a), Crimes against Peace, "as this is the only category in which a common plan or conspiracy is stated to be a crime" and "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." In other words, the provision in question is held to relate only to the Crimes against Peace because participation in a common plan or conspiracy as an offense is mentioned only in Crimes against Peace and is allegedly not mentioned in Conventional War Crimes and in Crimes against Humanity.

The opinion seems to be based at least partly upon the fact that the prosecution did not challenge this view. But it should not be overlooked that the Tribunal, the prosecution and the defense cannot agree to disregard or infringe clear and mandatory provisions of the Charter.

This Article of the Charter is a fundamental one. Upon its correct interpretation depend findings by the Tribunal, which will not only affect vitally the liability of the defendants at bar, but also will potently influence future international

relations and the course of world history.

The conclusion arrived at by the majority seems contrary both to the letter and spirit of the said Article 5 of the Charter, upon the following grounds:

1. Violations of the laws or customs of war (Conventional War Crimes) are, likewise, in a general sense, violations of international law, and in violations of international law "a common plan or conspiracy" is applicable.

2. If the provision in question is to be considered as relating to "Crimes against Peace", of which it is not a part, with more reason it should, as it does, relate to "Crimes against Humanity", of which it is an integral part.

3. Such participation entails two responsibilities: (a) responsibility for direct participation, and (b) responsibility, by indirect participation, for the acts of those who executed the plan. Therefore, participants in the Crimes against Peace are also responsible for the acts of those who executed the common plan, although the provision therefor is not included in sub-paragraph (a).

4. There is no sense in holding that while said leaders, organizers, etc. mentioned under the Crimes against Humanity are responsible for the acts performed by others in execution of the common plan or conspiracy, they should not be held responsible for the acts directly performed by themselves. Hence, the provision in the "Crimes against Peace", covering participation as an offense, clearly applies also to "Crimes against Humanity" in the same manner that the provision in the

"Crimes against Humanity" regarding indirect participation, also applies to the "Crimes against Peace."

5. It certainly was not the intention of the Charter to provide for participation in a common plan or conspiracy as an offense in the "Crimes against Peace", and omit the same provision in "Conventional War Crimes" and "Crimes against Humanity". These last two crimes are as much the result of the wars of aggression waged by Japan, and in the wars of aggression there is liability for participation in a common plan or conspiracy.

6. It should be noted that the provision in question contains the qualification, "To commit <u>any of the foregoing crimes</u>". Now if this provision, as the majority holds, refers exclusively to the Crimes against Peace, it would have been, and should be, in the following form: "To commit <u>any of the acts or offenses mentioned in sub-paragraph (a)</u>". Furthermore, said statement would have been included in sub-paragraph (a) instead of in sub-paragraph (c). On the contrary, it constitutes the last part of the whole Article 5, or would have constituted a separate paragraph as in the Nuremberg Charter, thus, in either case, clearly relating to all the three major crimes <u>preceding</u> which are Crimes against Peace, Conventional War Crimes and Crimes against Humanity, as proved by the words "any of the <u>foregoing crimes</u>".

7. If this part of sub-paragraph (c) is ambiguous or doubtful, its first part is conclusive. This part directly relates the Crimes against Humanity to a common plan or conspiracy. Constituting the very definition of Crimes against Humanity, it

defines their commission as "in execution of or in connection with any crime within the jurisdiction of the Tribunal". This can only mean "in execution of or in connection with the planning, preparation, initiation or waging of a war of aggression or a war in violation of international law, treaties, agreements, or assurances (sub-paragraph a), or laws or customs of war (sub-paragraph b), or in execution of or in connection with a common plan or conspiracy for the accomplishment of any of the said crimes (sub-paragraphs (a) and (c)); for these are all crimes "within the jurisdiction of the Tribunal". In other words, sub-paragraph (c) itself, in its very definition of Crimes against Humanity, clearly provides for responsibility for murder and other inhumane acts committed in execution of or in connection with a common plan or conspiracy.

8. This intention of the Charter to provide for a common plan or conspiracy not only in Crimes against Peace, but also in Conventional War Crimes and Crimes against Humanity, is in complete consonance with the terms of the Cairo Conference, Potsdam Declaration and Term of Surrender in which the Allied Powers have clearly expressed their intention to bring to justice the "irresponsible" "self-willed militaristic advisers" and leaders of Japan who permitted the violations of laws or customs of war and the perpetration of crimes against humanity, and whom the allies have called "brutal enemies" and "war criminals". Certainly, these advisers and leaders, "brutal enemies" and "war criminals" referred to by the Allied Powers are those of the defendants in this case and possibly still others who, pursuant to a common plan or conspiracy, formulated

and directed the Japanese policies for an aggressive war. The Potsdam Declaration states that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners". This provision clearly distinguishes those who executed the cruelties and those who ordered or permitted them.

COUNTS ON PLANNING, PREPARATION AND INITIATION OF WARS OF AGGRESSION DISREGARDED

We have agreed that the Tribunal has jurisdiction only over the offenses set out in the Charter. This being the case, why should we abstain from considering the Counts on planning and preparation (Counts 6 to 17) and the Counts on initiation (Counts 18 to 26) which are specifically set out in the Charter as separate crimes against peace? To do so is to overlook Article 5 of the Charter which provides for such planning, preparation and initiation as separate offenses. The Charter makes it a clear duty of the Tribunal to pass judgment upon these offenses of planning, preparation and initiation. When the Charter provided that "the following acts or any of them are crimes coming within the jurisdiction of the Tribunal" and that "the Tribunal shall have the power to try and punish Far Eastern war criminals who * * are charged with" the said offenses, it means that the Tribunal shall try and punish the defendants for the said offenses with which they are charged, as covered by the Charter.

The conclusion arrived at by the majority implies that all

the defendants guilty of conspiracy in the waging of a war of aggression are necessarily also guilty of planning, preparing and initiating it. This is correct if all said defendants planned, prepared, initiated and waged it. It is incorrect, however, if there are defendants guilty only of planning and preparation and/or initiation. Shall the Tribunal therefore abstain from finding a defendant guilty, if he is, of planning and preparation only because he is not guilty of waging war? Furthermore, a defendant who had participated in the planning and preparation for war might have initiated it also or only waged it. Initiation and waging do not mean the same thing. Waging may, but does not necessarily, include initiation and initiation may be waging but is much more limited than the waging. Besides, initiation, like waging, does not necessarily involve planning and preparation for war, for a defendant might have taken part only in the actual initiation or waging of the war but not in the previous planning and preparation made for that purpose by some of the conspirators.

The planning and preparation defined in the Charter are, as intended by sub-paragraph (a) of Article 5 in enumerating the various crimes against peace, not those necessarily involved in or go hand in hand with the actual waging. They are principally the planning and preparation <u>previously undertaken</u> prior to the waging, and constitute separate offenses from that of the actual waging. Hence, those of the defendants who may be guilty of the waging of the war would not be guilty, in the same degree, of planning and preparation prior to and during the waging.

Some may be guilty of both, others may be guilty only of planning and preparation before or during the waging of the war. These differences in the degree of responsibility necessarily require a separate finding upon the Counts of planning, preparation and initiation as distinguished from waging.

It cannot therefore be reconciled how the conclusion reached can be correct, unless it intends that all those who waged the war, without exception and in the same degree, also planned it, prepared for it, initiated and waged it. Clearly this is not so, for we find that "not all the conspirators are parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end."

COUNTS ON MURDER AND OTHER ATROCITIES

While rejecting a common plan or conspiracy in murder, and therefore disregarding the corresponding Counts 39 to 52 (except 44), the Tribunal, realizing either its importance or its relation to murder, holds that murder is involved in the war of aggression. These conclusions - that conspiracy is not applicable to murder and that murder is involved in the war of aggression - are inconsistent. If murder is involved in the war of aggression, and there being, in the war of aggression, planning or conspiracy, then necessarily there was also planning or conspiracy in the murder. It is hard to understand how one who conspired to wage a war did not also conspire to commit murder which, as held, was involved in the plan or conspiracy to wage that war.

But the crime of murder contemplated in the Charter is

clearly not that ordinarily involved in a war, for if that is the case, what was then the need for the Charter to define murder and the other Crimes against Humanity as separate offenses coming within the jurisdiction of the Tribunal? This can only mean that the Crimes against Humanity, as thus defined, are distinct crimes under the jurisdiction of the Tribunal, apart from the killings ordinarily involved in a war, and upon which, as charged in the Indictment, the Tribunal is directed under the Charter to pass judgment.

The position taken on this point has the effect of nullifying this very important provision of the Charter and, together with it, the resolute intention of the Allied Powers, which have created this Tribunal, to bring to justice the "brutal enemies" and the "war criminals" not only for their wars of aggression, but also for their shocking "Crimes against Humanity."

The opinion further holds that if the war was lawful, then the charge of murder will necessarily fall, for a lawful war does not involve unlawful killings. That appears to be a very dangerous pronouncement. The leaders of a nation who wage a lawful war may then, with impunity, commit, or permit to be committed, murder and other crimes against humanity at will and without any discrimination. I cannot subscribe to such a theory which will shock mankind everywhere and at any time. It should be clear that a lawful war cannot justify the commission of crimes and atrocities, such as those contemplated in the Charter and proved in this case, which, perpetrated in cold blood and with so much lust and hatred, were entirely and definitely outside the necessity of warfare, lawful or unlawful.

CONSPIRACY WITH GERMANY AND ITALY

Our opinion holds "that although some of the conspirators clearly desired the achievement of these grandiose objects, nevertheless there is not sufficient evidence to justify a finding that the conspiracy charged in Count 5 has been proved." On the other hand, we have also held that "the conspirators brought about Japan's alliance with Germany and Italy, whose policies were as aggressive as their own, and whose support they desired both in the diplomatic and military fields." Parenthetically, it should be observed that the Tripartite Pact between Japan, Germany and Italy contemplated cooperation also in the political and economic fields.

Our latter holding is amply supported by the evidence and it is therefore not correct to find that the conspiracy charged in Count 5 has not been proved.

Count 5, it should be noted, does not charge joint actual waging of the war by Japan, Germany and Italy. It only charges a common plan or conspiracy between Japan, on the one hand, and Germany and Italy, on the other, the object of which was to secure the "domination of the whole world <u>each having special domination in its own sphere</u> * * and <u>for that purpose</u>" to "mutually assist one another to wage * * wars of aggression * * against any country which might oppose that purpose, and particularly against the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand, the Commonwealth of the Philippines,

and the Union of Soviet Socialist Republics."

Now there can be no question that, as we have held, Japan and its leaders "brought about Japan's alliance with Germany and Italy", for the said purposes. The very Tripartite Pact between Japan, Germany and Italy and the relations between them thereafter, as thoroughly discussed in our judgment, conclusively prove this conspiracy. The whole world knows and the evidence is overwhelming that Japan, Germany and Italy entered into said alliance in order to enable them, with their combined power and resources, to establish their respective spheres, Germany and Italy in Europe and Africa, and Japan in the Far East. This alliance was entered into when Germany and Italy were already engaged in their wars of aggression. The evidence has clearly established that Germany and Italy, during the war, helped Japan at least by restraining the Allied Powers in the Pacific; and that Japan, before and during the Pacific War, similarly helped Germany and Italy at least by restraining the Allied Powers in the Western Sphere. The fact that the parties to this alliance were unable, beyond the limits of their resources, to assist each other in a more effective manner cannot alter the existence and validity of their common plan and conspiracy and the purposes they sought to achieve pursuant thereto, which is all that is alleged in Count 5.

OBJECTION TO THE TRIBUNAL

It has been argued that the members of this Tribunal, being representatives of the victorious nations which defeated Japan, cannot administer justice and that the accused are denied a fair and impartial trial. As previously stated herein, the Potsdam Declaration and the Instrument of Surrender provided for this trial.

The Supreme Commander for the Allied Powers is duly authorized by the Instrument of Surrender to create and appoint a tribunal for the trial of the war criminal suspects, and that was exactly what has been implemented by the Supreme Commander in creating the Tribunal. Not only that, he established an International Military Tribunal composed of eleven members from eleven different Allied nations, carefully chosen as to their qualifications, fairness and impartiality. He could have created only a military commission composed of officers belonging to one nation. Neither the Potsdam Declaration nor the Instrument of Surrender contains any kind of limitation on the power of the victorious nations to create a competent and impartial tribunal that will try the accused, or on the power of the Supreme Commander to implement the carrying out of the purposes of the Potsdam Declaration and the provisions of the Instrument of Surrender. On the contrary, the surrender was unconditional with the exception of what refers to the Emperor.

Japan, having surrendered unconditionally and executed the Instrument of Surrender, providing for the trial of all war criminals and for the implementation of whatever may be necessary

to carry out such trial, cannot now validly object to what has been performed in accordance therewith; Japan has no right whatsoever to repudiate what she has solemnly entered into and undertaken by means of such an important and historic instrument.

Even without such Instrument, noted writers and authors of international law are agreed that a victor nation has the power and the right to apprehend, try and punish war criminals of the defeated state. An army which captures a war criminal who has violated the rules of war has the full power and right to prosecute and try the offender whether he is an enemy subject or not. Thus an army commander in the field creates a trial court or commission for the said purpose, appoints the members or judges thereof and the prosecutors from among his own officers who have fought with the enemy, and executes their judgment. The victorious army in the field does not appoint an enemy member to sit in its tribunal or military commission to try war criminals, and there is no such requirement anywhere either in national or international law.

The noted writer on international law, Oppenheim, states:

> "The right of the belligerent to punish during the war, such war criminals as fall in his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself after he has occupied all or part of the enemy territory and is thus in a position to seize as a condition of the armistice, impose on the authorities of the defeated state the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are in effect in his power. And, although normally the treaty of

peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated state the duty, as one of the provisions of the armistice or of the peace treaty, to surrender for trial persons accused of war crimes."

Another eminent writer expressed identical views when he said:

"A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the rules of war, if they afterward fall into his hands * * .

"To the exercise of the first of the above-mentioned rights, no objection can be felt so long as the belligerent confines himself to punishing breaches of universally recognized laws." (Hall on International Law, p. 495).

A kindred view was enunciated by Garner:

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

The Supreme Commander for the Allied Powers could have followed this same procedure, but in order to afford the top A war criminal suspects of Japan the greatest measure of a fair and impartial trial, he created, not a one-nation military commission, but an eleven-nation International Tribunal, appointed qualified and impartial members from their respective nations, and provided the Tribunal with a charter that has assured the application of democratic practices and guarantees as enjoyed by the foremost nations of the world. Can it be validly contended that this Tribunal, thus composed of highly qualified men and created pursuant to an agreement among the

Allied powers and to Japan's acceptance, has less power or is less independent and impartial than a one-nation military commission or a lone army commander to try and punish the said war criminal suspects pursuant to the said agreement and Japan's acceptance? Certainly what one nation can, in accordance with international law, do in said cases, a number of nations acting under a common agreement can likewise do with more reason. The fairness and impartiality of the members of the Tribunal are proven by the fact that the Tribunal has absolved the defendants of various charges and have differed on certain issues, and by the further fact that a member has rendered an opinion of acquittal although he belongs to one of the victorious nations. Having taken this position, the distinguished member from India who has discussed, argued and deliberated this case with his brethren in the Tribunal, has found no fault with their moral integrity, independence of character and rectitude of judgment in the discharge of their functions, and has therefore voted to overrule the defense challenge to the fairness and impartiality of the Tribunal.

Professor Hans Kelsen of the University of California supports this view in pointing out what kind of Tribunal should try war criminals. He says:

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

In fact, if any criticism should be made at all against

this Tribunal, it is only that the Tribunal has acted with so much leniency in favor of the accused and has afforded them, through their counsel, all the opportunity to present any and all pertinent defenses that they had, thus protracting the trial. Both the prosecution and the defense have been treated equally and afforded equal rights and privileges.

Furthermore, victorious states have the right to try war criminals pending the signing of the peace treaty, such as in the present case. Even granting that such a treaty has already been executed, unless otherwise provided, it will not in any way be an impediment to the carrying out of the Potsdam Declaration or the Instrument of Surrender, which do not impose any limitation or condition whatever under which the trial of the supposed war criminals can or should be carried out. No provision of any kind in international law which would impede the trial of criminal suspects as here has been cited.

THE MAXIM "NULLUM CRIMEN, SINE LEGE. NULLA POENA SINE LEGE"

Arguments have been adduced to the effect that the Charter of this Tribunal defined war crimes and contains provisions for the trial of war criminals, which cannot be held retroactive. Citing the maxim of nullum crimen sine lege, nulla poena sine lege, it is claimed that the offenders cannot be fairly punished for an act which at the time of its commission was not an offense and that the same offender must have had advanced notice that the act was a crime and that a penalty was attached to it. It is true that as a general principle of law a new enactment may

not apply to previous acts already committed because it may then be considered as ex post facto law. I believe that this cannot be well sustained in this case because we are not dealing with national laws of a country or a national violator of its laws, but we are concerned with international law and the violators of the same as the authors of international crimes.

Assuming the lack of domestic legislation or any other legislation on the subject, it does not follow that an international court cannot justifiably punish acts universally accepted as contrary to the law of nations. I am quite certain that this International Military Tribunal, created as an international court by the Allied Powers, may legally try and punish individuals who have violated the laws and customs of war which laws and customs of war are considered as part of the law of nations. There is no denying that this war is the most hideous, hateful and destructive wherein such untold atrocities have been perpetrated and committed. Shall we overlook and let calmly the international criminal acts go unnoticed and unpunished? The offenders of international law are citizens of the world and as such are subject to international law whether or not that law has been made part of the law of the land.

I quite agree with Professor Jorge Americano who, in his work, "New Foundation of International Law", sustains that this maxim is not applicable to international law:

> "The rule that there is no crime without a prior law defining it, and the rule that there is no penalty without prior legal commination, are not applicable to international law.
>
> "Such principles cannot hold, because the basis of

the category crime is different from that of the category harmful act in international law, and because only in the individual sphere is there any restriction on the tools with which crime is perpetrated and on the possibilities of violating the rights of others.

"In international law the possibilities become greater and greater as technical processes are perfected. Apart from specific agreements as to the fundamental rights of man, which international law sets out to secure, the permanence of the international community depends on such variable standards that the corresponding acts of violation cannot be predetermined." (pp. 38-9).

On this point, it should be pertinent to remember that long before the war the acts of Japan and her leaders had been the subject of strong repeated protests and warnings on the part of the Allied Powers. Even during the war, the Allied Powers continued to make such protests and warnings. Japan and her leaders were perfectly conscious that they were embarking on a war of conquest and of hate, in defiant violation of her commitments and of international law, and in the words of Secretary Hull, "of moral principles and legal principles and generally accepted axioms of friendly and profitable general international intercourse." They knew that in case of their defeat, they would be brought to justice for their crimes. The Allied Powers had made their position clear. Japan and her leaders accepted their terms. The defense of ex post facto law is, in this case, unsustainable.

ON INDIVIDUAL RESPONSIBILITY

The principle of individual responsibility is recognized in our Charter, which provides that:

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

The theory therefore that the state should be held liable, instead of the individual, is contrary to the above provision of the Charter. The idea that a state or a corporation commits crimes may now be considered as fiction. The accused cannot shield themselves in superior orders or in the fact that their acts were acts of a state. Neither can the accused of lower ranks protect themselves against the liability by order of their superiors, alleged as acts of state. Frankly speaking, crimes are always committed by persons, whether the act be that of the state.

It is true that international law deals with and obligates the family of nations, but there are instances in which it is very apparent that the subject matter is both reasonable and necessary to effective enforcement and that individual persons should uniformly be held accountable for violations. Such action will prevent peoples from taking advantage both in victory and defeat for the reason that they may feel certain of ultimate victory and they will commit unrestrained atrocities if these would be considered unpunishable; or when defeat impends, they may anticipate immunity and will commit unbridled atrocities on the theory that international law has not previously made them punishable.

With reference to individual responsibility, Professor

Philip C. Jessup, in his book entitled "A Modern Law of Nations" (1948), although he seems to indicate that there is no settled law on personal and individual responsibility, states that there is a general acceptance that international law directly applies to individuals as well as to states:

> "There is a considerable literature on the question whether this fundamental basis of the traditional law as a law between states only, is juridically and philosophically sound. It is frequently asserted that the principle is not an absolute one, since it admits of exceptions, notably in the case of piracy, where the pirate is said to be hostis humani generis, punishable by any state that apprehends him. The trials of war criminals have elicited learned discussions along the same lines. It is not intended here to continue such debates concerning the existing law. It is rather the purpose to take as a hypothesis the general acceptance of the thesis that international law does apply directly to the individual, that it does or can bind him as well as states directly and in the light of that hypothesis to re-examine the existing law as it has developed through the centuries to see what changes, what modifications would need to be made to fit the law to the new basis." (pp. 9, 10).

On this point Dr. Jessup states further:

> " x x The net result of the war trials, however, particularly in the light of the discussions attending them, must lead to the conclusion that the waging of aggressive war is considered an international crime regardless of whether the anthropomorphic fiction of the state or the flesh-and-blood cabinet or military officer is held liable to punishment. Under the traditional law the full acceptance of the illegality of war would have led to the conclusion that the state which waged war would be guilty of an illegal act; under the current development it is the individual who is held to have committed an internationally criminal act. The traditional system would have put the burden on the state to restrain the individual, whereas the precedent of the war trials suggests that pressure in the form of fear of punishment would be put on individuals to restrain the state. As international organization develops

and is perfected, it may be assumed that collective force will be used in case of necessity to restrain states or other groups in advance, but that punishment after the event will be visited on individuals and not on the group" (pp. 160-2).

The United States Supreme Court, in the recent case of Ex Parte Quirin (1942, 317 U.S. 1), reiterated this individual liability in the conduct of wars in these emphatic terms:

"From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of wars, the status, rights and duties of enemy nations as well as enemy individuals."

It has been argued that the proceedings, trial and decision of the Nuremberg International Military Tribunal should not be considered as a precedent. The United Nations, however, has not only so considered it, but has also supplemented the provisions of the Nuremberg Charter, as stated by Dr. Jessup:

"With respect to the central problem of war itself, the United Nations has already taken an important step to supplement the provisions of the Charter. On December 13, 1946, the General Assembly unanimously adopted a resolution in which it affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.'

"The General Assembly took note of the fact that 'similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East x x'" (pp. 160-2).

We cannot overlook the decision in the Nuremberg case which may now be considered as a precedent. But granting for the sake of argument that it is not, it should be unquestionably clear that a precedent in accordance with law and justice is laid down where there exists none. "The attainment of

justice is the fundamental aim of the courts; in the absence of statutory inhibition, they may take such steps, regarding matters properly before them, as will promote the administration of justice, and in exercising jurisdiction they should not permit irrelevant and immaterial matters to obstruct, delay, or defeat its administration" (21 C.J.S., Sec. 89, p. 139). Citing Chief Justice Stone as pointing out that "the problem x x of jurisprudence in the modern world is the reconciliation of the demands x x that law shall at once have continuity with the past and adaptability to the present and the future x x", Dr. Jessup again observes that "Ignorance of the progress already achieved in the development of international law over the past three centuries and blindness to the still primitive character of the international legal system are equally inimical to the future progress which must be made if all civilization is not to go the way of Hiroshima and Nagasaki" (p. 14).

ATOMIC BOMB

It has also been argued that the atomic bomb should not have been used by the Allies in the war against Japan, because it was inhuman and unwarranted. The purpose of the arguments, as I can see, was to minimize the responsibility of the defendants in this case for the atrocities and inhuman acts committed during the war. It may be pertinent to consider that World War II being an all-out war, the first global war of its kind, each and every inhabitant in the country at war constituted an element to win the war. The country itself was the main base of its army and was, therefore, subject to attack and destruction as such a base.

It is also pertinent to consider that whether a small firearm, a small demolition bomb, or the biggest caliber of artillery is employed in the course of an attack, regardless of its scale or usage, not only the civilian population or non-combatants located near the objectives or near the combatants may be killed, but also private homes and property within the range of battle may be destroyed. These are inevitable incidents of battle, and such non-combatants and private property are therefore inevitably as much exposed to the same danger of destruction in the dropping of an atomic bomb, only on a large scale.

No one disputes that the war just ended is a global one and all the nations involved had the right to use all their means to win it. Each nation had its own inherent right to manufacture any kind of arms in order to overcome its enemy. Germany, for example, manufactured the flying bombs and raided England mercilessly with such bombs. Japan itself manufactured its own flying balloons with which it attempted to bomb the United States.

May it, therefore, be alleged that Japan would not have used the atomic bomb, if she had had it, in her war against the Allied Powers? Moreover, when the atomic bomb was used on Japan, she had not as yet surrendered. While she was weakened because of her reverses and of the defeat of her allies in Europe, she was still occupying extensive portions of the Far East because her claws were still stretched out to Java, Singapore, the Philippines, Manchuria and others as a result of her aggression.

If a means is justified by an end, the use of the atomic bomb was justified, for it brought Japan to her knees and ended the horrible war. If the war had gone on longer, without the use of the atomic bomb, how many more thousands and thousands of helpless men, women and children would have needlessly died and suffered, and how much more destruction and devastation, hardly irreparable, would have been wrought?

Secretary of War Stimson, considering the question as to whether the atomic bombs had caused more damage than they prevented, said:

"The two atomic bombs which we had dropped were the only ones we had ready, and our rate of production at the time was very small. Had the war continued until the projected invasion on November 1, additional fire raids of B-29's would have been more destructive of life and property than the very limited number of atomic raids which we could have executed in the same period. But the atomic bomb was more than a weapon of terrible destruction, it was a psychological weapon. In March, 1945, our Air Forces had launched the first great incendiary raid on the Tokyo area. In this raid more damage was done and more casualties were inflicted than was the case at Hiroshima. Hundreds of bombers took part and hundreds of tons of incendiaries were dropped. Similar successive raids burned out a great part of the urban area of Japan, but the Japanese fought on. On August 6 one B-29 dropped a single atomic bomb on Hiroshima. Three days later a second bomb was dropped on Nagasaki and the war was over. So far as the Japanese could know, our ability to execute atomic attacks, if necessary by many planes at a time, was unlimited. As Dr. Karl Compton has said, 'it was not one atomic bomb, or two, which brought surrender; it was the experience of what an atomic bomb will actually do to a community, plus the dread of many more, that was effective'.

"The bomb thus served exactly the purpose we intended. The peace party was able to take the path of surrender, and the whole weight of the Emperor's prestige was exerted in favor of peace. When the Emperor ordered surrender, and the small but dangerous group of fanatics who opposed him were brought under control, the Japanese became so subdued that the great undertaking of occupation and disarmament was completed with unprecedented ease" ("On Active Service in Peace and War", by Stimson and Bundy, p. 630).

Secretary of War Stimson explains the decision to use the atomic bomb thus:

"Two great nations were approaching contact in a fight to a finish which would begin on November 1, 1945. Our enemy, Japan, commanded forces of somewhat over 5,000,000 armed men. Men of these armies had already inflicted upon us, in our break-through of the outer perimeter of their defenses, over 300,000 battle casualties. Enemy armies still unbeaten had the strength to cost us a million more. As long as the Japanese Government refused to

surrender, we should be forced to take and hold the ground, and smash the Japanese ground armies, by close-in fighting of the same desperate and costly kind that we had faced in the Pacific islands for nearly four years. x x

"My chief purpose was to end the war in victory with the least possible cost in the lives of the men in the armies which I had helped to raise. In the light of the alternatives which, on a fair estimate, were open to us, I believe that no man, in our position and subject to our responsibilities, holding in his hands a weapon of such possibilities for accomplishing this purpose and saving those lives, could have failed to use it and afterwards looked his countrymen in the face. x x

"The face of war is the face of death; death is an inevitable part of every order that a wartime leader gives. The decision to use the atomic bomb was a decision that brought death to over a hundred thousand Japanese. x x But this deliberate, premeditated destruction was our least abhorrent choice. The destruction of Hiroshima and Nagasaki put an end to the Japanese war. It stopped the fire raids, and the strangling blockade; it ended the ghastly specter of a clash of great land armies" (pp. 631-633).

DISSENTING OPINION OF THE
MEMBER FROM INDIA

The dissenting opinion of my brother Justice, member from India reads, in part, as follows:

> "A view seems to have been entertained in some quarters that as this Tribunal is set up by the victor nations, it is not competent to question their authority in respect of any of the provisions of the Charter establishing the Tribunal. x x
>
> "Those who entertain this view say:
>
> "1. That the 'sole sources of the powers of the judges of the Tribunal are the Charter and their appointments to act under the Charter';
>
> "2. That apart from the Charter they have no power at all; and
>
> "3. That each judge of this Tribunal accepted the appointment to sit under the Charter and that apart from the Charter he cannot sit at all nor pronounce any order at all.
>
> "From these they conclude that this Tribunal is not competent to try the question whether the Supreme Commander has exceeded his mandate, 'as the Charter has not remitted such a question to it'".

It then concludes:

> "That the Charter has not defined the crime in question; that it was not within the competence of its author to define any crime; that even if any crime would have been defined by the Charter that definition would have been ultra vires x x ; that it is within our competence to question its authority in this respect."

In the first place, ultra vires is a technical term which is applicable only to acts of a corporation not authorized by law or its Charter, and cannot therefore be applied in this case to the acts of the Supreme Commander for the Allied Powers.

We have already stated, in our decision, the reasons in support of the validity of the Tribunal's Charter. I wish,

however, to make additional observations principally upon whether the dissenting member who questions the validity of the Tribunal's Charter has the power to do so.

The dissenting member accepted his appointment by virtue of Article 2 of the Charter which provides as follows:

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

pursuant to the Special Proclamation establishing this Tribunal that "the constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter x x approved by me this day"; and, before entering upon his duties as a member of the Tribunal, he subscribed his oath of office.

Having done so, he unconditionally accepted not only the validity of the Charter and of all its provisions, such as the definition of the crimes against peace, the individual responsibility therefor, etc., but also the duties imposed upon him by the Charter "for the just and prompt trial and punishment of the major war criminals in the Far East." Not only that - and it is the most controlling consideration - he is thereby bound, contrary opinions he may have notwithstanding, to give effect to the provisions of the Charter which alone gave him jurisdiction and defined his functions.

To hold that the Charter is invalid is to hold that his appointment as such member is invalid *ab initio*, because he derives his appointment from the authority of the Charter. And if his appointment is invalid, it follows that he has no valid powers

at all, that all his acts are invalid, that his rendering any opinion at all is without any legal authority, and that therefore all his acts are what he himself has called "ultra vires".

I quite agree with Lord Wright, referring to the Nuremberg Charter, that "these provisions defined the law to be applied by the Tribunal and were binding on it" and that "the judges could not, of course, question the competency of their appointment and refuse to apply the definitions of the law laid down in the London agreement and in the Charter x x ". To the same effect, the Nuremberg Tribunal held that "these provisions are binding upon the Tribunal as the law to be applied to the case" and that "the jurisdiction of the Tribunal is defined in the agreement and in the Charter and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive and binding upon the Tribunal".

The Supreme Court of a country may declare a law unconstitutional and thereby override or overrule the Legislature which enacted the law or the Chief Executive who enforces that law, because above the Legislature and above the Chief Executive is the Constitution, the supreme law of the land which empowers the Supreme Court to do so and to uphold it. So also an international court created, say, by a number of nations with a charter of their own, may reverse the position of a minority group, which the court may find not in accordance with their common agreement, because above that minority group is the whole combination speaking through the charter of their common accord.

The dissenting opinion seems to have taken the position that this Tribunal is either a national supreme court or (unfortunately there is none yet) an international supreme court that is above the Allied Powers and the Supreme Commander and to which we owe our appointment. This is definitely not the case here. The Tribunal is not such a supreme court. Its constitution is its Charter, the only source of its creation, jurisdiction, powers and functions. Neither is the Tribunal a subordinate international court owing obedience, by formal agreement, to a higherer superior charter.

Contrary opinions that may be entertained by the members of the Tribunal in contradiction to the Charter are outside the scope of their powers contained and defined in the Charter and are beyond their functions. For instance, the Charter has defined that an aggressive war is a crime and has provided that those guilty of it are individually liable. Then the Charter further provides that "the Tribunal shall x x try and punish Far Eastern war criminals who x x are charged with offenses which include Crimes against Peace." May the members of the Tribunal, deriving their functions solely from the said Charter, say that said aggressive war is not a crime and that those who waged it should not be personally liable? With due respect, such a position, in my opinion, seems absurd.

The Tribunal may, in the proper exercise of its functions, acquit a defendant, on the ground that he has not been proven to have committed any of the crimes defined in the Charter, but

not on the ground, as the dissenting opinion holds, that aggressive war is not a crime.

A fortiori, the Allied Powers, in restraining Japan's aggression, clearly set forth their objectives, from which they declared they "will not deviate" and to which "there are no alternatives", and to accomplish which of the Japanese territory shall be occupied until "a new order of peace, security and justice" is established, "irresponsible militarism is driven from the world", "Japan's war-making power is destroyed", and "a peacefully inclined and responsible government" is instituted, all of which were accepted by Japan by virtue of the Instrument of Surrender.

INCOMMENSURATE PENALTIES

In our findings on the Counts of the Indictment, we emphasize the seriousness of a conspiracy to wage a war of aggression, thus:

> "These far-reaching plans for waging wars of aggression, and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object. That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of a gression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution is that death and suffering will be inflicted

on countless human beings."

I would add that a conspiracy gives more determination and daring to the conspirators by mutual assurances, encouragement and cooperation, virtually nullifying the likelihood of desistance from the intended course and consequently assuring the execution of the premeditated criminal act. Furthermore, to speak of this war is to speak of its myriad crimes, part and parcel of Japan's aggression.

The Allied Powers fought and persevered in order "to restrain and punish the aggression of Japan", and, in the Potsdam Declaration, they declared their objectives as follows:

> "(4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.
>
> "(5) Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.
>
> "(6) There must be eliminated for all time the authority and 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.
>
> "(7) Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.
>
> "(8) The terms of the Cairo Declaration shall be carried out x x.
>
> "(10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including

those who have visited cruelties upon our prisoners. x.x.

"(12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government."

To achieve these objectives, this Tribunal was therefore established "for the just and prompt trial and punishment of the major war criminals in the Far East."

In view of these vital and controlling pronouncements for the benefit of the whole world, I am constrained to differ on a few only of the penalties to be imposed by the Tribunal - they are, in my judgment, too lenient, not exemplary and deterrent, and not commensurate with the gravity of the offense or offenses committed. We are entitled to live in a world of law and peace. Our action may be construed as weakness and failure. There can be and there is no comparison between national crimes and these monstrous international crimes against peace, war crimes and crimes against humanity which are against all mankind and which should, therefore, transcend national considerations if civilization is, as it should, survive. As Secretary of War Stimson, in his book already cited, has said, "it is the enforcement of a moral obligation which dates back a generation"; that "it was not a trick of law which brought" the aggressors to the bar; "it was the 'massed angered forces of common humanity'", for "The man who makes aggressive war at all makes war against mankind" and "is a criminal"; and that "aggression x x is an offense so deep and so heinous that we cannot endure its repetition" (pp. 588-90).

As to the defendants who are afflicted with an incurable malady, I feel that they are entitled to such leniency as human conscience may permit.

CONCLUSION

With the foregoing considerations, I concur in the judgment of the Tribunal which we of the majority have written in this case.

DELFIN JARANILLA
Member, International Military
Tribunal for the Far East, from the
Republic of the Philippines