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 aggression 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 <u>these objectives</u> 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 <u>punishment</u> 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