PART A - CHAPTER II

THE LAW

(a) JURISDICTION OF THE TRIBUNAL

In our opinion the law of the Charter is decisive and binding on the Tribunal. This is a special tribunal set up by the Supreme Commander under authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. The Order of the Supreme Commander, which appointed the members of the Tribunal, states: "The "responsibilities, powers, and duties of the members of "the Tribunal are set forth in the Charter thereof..." 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.

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 conflicts with recognised 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.

The substantial grounds of the defence challenge to the jurisdiction of the Tribunal to hear and adjudicate

upon the charges contained in the Indictment are the following:

(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;

(5) The Instrument of Surrender which provides that the Declaration of Potsdam will be given effect imposes the condition that Conventional War Crimes as recognised by international law at the date of the Declaration (26 July, 1945) would be the only crimes prosecuted;

(6) Killings in the course of belligerent operations except in so far as they constitute violations of the rules of warfare or the laws and customs of war are the normal incidents of war and are not murder;

(7) Several of the accused being prisoners of war are triable by court martial as provided by the Geneva Convention 1929 and not by this Tribunal.

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 seven contentions advanced for the Defence but in view of the great importance of the questions of law involved the Tribunal will record its opinion on these questions.

After this Tribunal had in May 1946 dismissed

the defence motions and upheld the validity of its Charter and its jurisdiction thereunder, stating that the reasons for this decision would be given later, the International Military Tribunal sitting at Nuremberg delivered its verdicts on the first of October 1946. That Tribunal expressed inter alia the following opinions:

"The Charter is not an arbitrary exercise of "power on the part of the victorious nations but is the "expression of international law existing at the time of "its creation;"

"The question is what was the legal effect of "this pact (Pact of Paris August 27, 1928)? The "Nations who signed the pact or adhered to it uncondit-"ionally condemned recourse to war for the future as an "instrument of policy and expressly renounced it. After "the signing of the pact any nation resorting to war as "an instrument of national policy breaks the pact. In "the opinion of the Tribunal, the solemn renunciation of "war as an instrument of national policy necessarily "involves the proposition that such a war is illegal in "international law; and that those who plan and wage such "a war, with its inevitable and terrible consequences, are "committing a crime in so doing."

"The principle of international law which under "certain circumstances protects the representative of a "state cannot be applied to acts which are condemned as "criminal by international law. The authors of these acts "cannot shelter themselves behind their official position "in order to be freed from punishment in appropriate "proceedings."

"The maxim 'nullum crimen sine lege' is not a "limitation of sovereignty but is in general a principle "of justice. To assert that it is unjust to punish those

"who in defiance of treaties and assurances have attacked "neighbouring states without warning is obviously untrue "for in such circumstances the attacker must know that he "is doing wrong, and so far from it being unjust to "punish him, it would be unjust if his wrong were allowed "to go unpunished."

"The Charter specifically provides... 'the fact "'that a defendant acted pursuant to order of his Govern-"'ment or of a superior shall not free him from responsi-"'bility but may be considered in mitigation of punishment.' "This provision is in conformity with the laws of all "nations... The true test which is found in varying degrees "in the criminal law of most nations is not the existence of "the order but whether moral choice was in fact possible."

With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

The fifth ground of the Defence challenge to the Tribunal's jurisdiction is that under the Instrument of Surrender and the Declaration of Potsdam the only crimes for which it was contemplated that proceedings would be taken, being the only war crimes recognized by international law at the date of the Declaration of Potsdam, are Conventional War Crimes as mentioned in Article 5(b) of

the Charter.

Aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam, and there is no ground for the limited interpretation of the Charter which the defense seek to give it.

A special argument was advanced that in any event the Japanese Government, when they agreed to accept the terms of the Instrument of Surrender, did not in fact understand that those Japanese who were alleged to be responsible for the war would be prosecuted.

There is no basis in fact for this argument. It has been established to the satisfaction of the Tribunal that before the signature of the Instrument of Surrender the point in question had been considered by the Japanese Government and the then members of the Government, who advised the acceptance of the terms of the Instrument of Surrender, anticipated that those alleged to be responsible for the war would be put on trial. As early as the 10th of August, 1945, three weeks before the signing of the Instrument of Surrender, the Emperor said to the accused KIDO, "I could not bear the sight...of those "responsible for the war being punished...but I think now "is the time to bear the unbearable".

The sixth contention for the Defence; namely, that relating to the charges which allege the commission of murder will be discussed at a later point.

The seventh of these contentions is made on behalf of the four accused who surrendered as prisoners of war - ITAGAKI, KIMURA, MUTO and SATO. The submission made on their behalf is that they, being former members of the armed forces of Japan and prisoners of war, are triable as such by court martial under the articles of the Geneva Convention of 1929 relating to prisoners of

war, particularly Articles 60 and 63, and not by a tribunal constituted otherwise than under that Convention. This very point was decided by the Supreme Court of the United States of America in the Yamashita case. The late Chief Justice Stone, delivering the judgment for the majority of the Court said: "We "think it clear from the context of these recited "provisions that Part 3 and Article 63, which it con- "tains, apply only to judicial proceedings directed "against a prisoner of war for offences committed while "a prisoner of war. Section V gives no indication that "this part was designated to deal with offences other "than those referred to in Parts 1 and 2 of Chapter 3." With that conclusion and the reasoning by which it is reached the Tribunal respectfully agrees.

The challenge to the jurisdiction of the Tribunal wholly fails.

(b) RESPONSIBILITY FOR WAR CRIMES AGAINST PRISONERS

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 recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 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.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general 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) Officials in those departments which were concerned with the well-being of prisoners;

(4) Officials, whether civilian, military, or naval, having direct and immediate

control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

(1) They fail to establish such a system.

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They 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, or

(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand 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 enquiry 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.

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 ill-treatment of prisoners, is powerless to prevent future ill-treatment, 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 ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners.

So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental Officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they 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 then they are responsible for such future crimes.

(c) THE INDICTMENT

Under the heading of "Crimes Against Peace" 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. The Indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter.

A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the

conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive.

A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose therefore to abstain from consideration of Counts 18 to 26 inclusive.

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 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 Crime against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal. The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5 (a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by this Tribunal are those set out in the Charter. Article 5 (a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5(a) are "planning, preparation, initiating or waging" of a war of aggression. There is no specification of the crime of conspiracy to commit murder by the waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in Counts 37 and 38 and decline to entertain these charges.

In all there are 55 counts in the Indictment charged against the 25 defendants. In many of the counts

each of the accused is charged and in the remainder 10 or more are charged. In respect to Crimes against Peace alone there are for consideration no less than 756 separate charges.

This situation springs from the adoption by the Prosecution of the common practice of charging all matters upon which guilt is indicated by the evidence it proposes to adduce even though some of the charges are cumulative or alternative.

The foregoing consideration of the substance of the charges shows that this reduction of the counts for Crimes against Peace upon which a verdict need be given can be made without avoidance of the duty of the Tribunal and without injustice to defendants.

Counts 44 and 53 charge conspiracies to commit crimes in breach of the laws of war. For reasons already discussed we hold that the Charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes. This position is accepted by the Prosecution and no conviction is sought under these counts. These counts, accordingly, will be disregarded.

Insofar as the opinion expressed above with regard to Counts 37, 38, 44, and 53 may appear to be in conflict with the judgment of the Tribunal of the 17th May, 1946, whereby the motions going to the Tribunal's jurisdiction were dismissed, it is sufficient to say that the point was not raised at the hearing on the motions. At a much later date, after the Nuremberg judgment had been delivered, this matter was raised by counsel for one of the accused. On this topic the Tribunal concurs in the view of the Nuremberg Tribunal. Accordingly, upon

those counts, it accepts the admission of the Prosecution which is favorable to the defendants.

Counts 39 to 52 inclusive (omitting Count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out. In some of the counts the date is that upon which hostilities commenced at the place named, in others the date is that upon which the place was attacked in the course of an alleged illegal war already proceeding. In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (Counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified Treaty Articles (Counts 45 to 50). If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.

The foregoing observations relate to all the counts enumerated; i.e., Counts 39 to 52 (omitting 44). Counts 45 to 50 are stated obscurely. They charge murder at different places upon the dates mentioned by

unlawfully ordering, causing, and permitting Japanese armed forces to attack those places and to slaughter the inhabitants thereby unlawfully killing civilians and disarmed soldiers. From the language of these counts it is not quite clear whether it is intended to found the unlawful killings upon the unlawfulness of the attack or upon subsequent breaches of the laws of war or upon both. If the first is intended then the position is the same as in the earlier counts in this group. If breaches of the laws of war are founded upon then that is cumulative with the charges in Counts 54 and 55. For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive.