

**The Tokyo Tribunal: Perspectives on Law, History and Memory** Edited by Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová



# The Tokyo Tribunal: Perspectives on Law, History and Memory

Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (editors)

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**Front cover:** The picture shows judges, interpreters and court-reporters of the International Military Tribunal for the Far East (IMTFE) in session, 26 November 1946, former War Ministry Building in Tokyo. The picture is used here with the courtesy of the National Archives and Records Administration at College Park, Maryland, USA (NARA, 238-FE-46-66422).

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### FOREWORD BY THE SERIES EDITOR

The *Nuremberg Academy Series* seeks to cover relevant and topical areas in the field of international criminal law and includes work that is interdisciplinary or multidisciplinary bringing together academics and practitioners. Grounded in the legacy of the Nuremberg Principles – the foundation of contemporary international criminal law – it addresses persistent and pressing legal issues and explores the twenty-first century challenges encountered in accountability for core international crimes. The Series was established in April 2017 by the International Nuremberg Principles Academy, in co-operation with the Centre for International Law Research and Policy, to produce high-quality open access publications on international law published by the Torkel Opsahl Academic EPublisher ('TOAEP').

The first volume in the Series, *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, explored the deterrent effect of international criminal tribunals, including case studies on the deterrent effect in ten situations of four different international tribunals. The second volume, *Islam and International Criminal Law and Justice*, examined the universality of the Nuremberg Principles in a globalized world, concentrating in particular on Islamic perspectives and interrogating the relevancy and applicability of the Nuremberg Principles to notions of justice in the Muslim world.

This book, the third volume in the Series, presents a contemporary rereading of the Tokyo Tribunal, officially named the International Military Tribunal for the Far East ('IMTFE'), combining perspectives from law, history and the social sciences. The anthology offers a broad and rich spectrum of views by leading scholars and experts on the historical, legal, political and cultural significance of the trial that took place more than 70 years ago and remains of contemporary relevance today. The book thus provides new insights to the extensive literature on the Tokyo Tribunal that exists in both English and Japanese as the trial has received renewed attention in recent years. The ongoing interpretation and evaluation of the Tokyo Tribunal and contemporary war crimes trials and the duality of Tokyo and Nuremberg are cross-cutting concerns for the volume as a whole. The idea of the volume is based on an international conference organized by the International Nuremberg Principles Academy in Nuremberg marking the seventieth anniversary of the judgment of the IMTFE in 2018. The publication of this original, multidisciplinary collection of essays on the Tokyo Tribunal in the *Nuremberg Academy Series* is topical and timely given the seventy-fifth anniversary of the end of the Second World War in 2020. It is hoped that, as an open-access publication, this volume will be widely read by scholars, students and practitioners, including in Asia, as a contribution to the contemporary debates on law, history and memory.

The International Nuremberg Principles Academy takes this opportunity to thank the co-editors, the contributors and TOAEP for their productive collaboration and dedication in finalizing this volume.

> Viviane E. Dittrich Nuremberg Academy Series Editor Deputy Director, International Nuremberg Principles Academy

### **PREFACE BY THE EDITORS**

We would like to acknowledge the contributions and support of many experts and colleagues, without which this book would not have been possible. First and foremost, special thanks go to our colleagues and co-editors, for their commitment, expertise, collegial support and tireless efforts in bringing this publication to fruition.

The conference, which has been the foundation of this book, was made possible by the International Nuremberg Principles Academy and its dedicated staff and fully supported by its Director, Klaus Rackwitz. We gratefully acknowledge that the Foundation Board and Advisory Council of the International Nuremberg Principles Academy lend their full support to this project.

Most importantly, we would like to thank all the participants in the conference as well as all the authors and contributors to this volume for the inspiration and dedication to the book's subject and the development of international criminal law in general. It remains refreshing to see all the advancements in the field of international criminal law and in the study of tribunals and trials in law, history and the social sciences in a time of demanding challenges in the world. We are pleased that more and more knowledge and understanding on such a crucial subject is emerging given ongoing and contemporary debates over law and justice, as well as history and meaning.

Many thanks to the Torkel Opsahl Academic EPublisher ('TOAEP') for providing a publishing platform for this volume in the *Nuremberg Academy Series*. On a technical note, for the sake of consistency, TOAEP has adopted the Revised Hepburn regime for romanizing Japanese throughout, as a mainstream standard. Japanese names appear in the same style as Western names, that is, first name followed by surname.

Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová Nuremberg, Vienna and Tokyo, May 2020

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# LIST OF ABBREVIATIONS

CIA	Central Intelligence Agency
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	joint criminal enterprise
NOPAR	National Offenders Prevention and Rehabilitation Commission
POWs	prisoners of war
PRC	People's Republic of China
SCAP	Supreme Commander for the Allied Powers
SEP	Surrendered Enemy Personnel
SWNCC	State-War-Navy Coordinating Committee
UK	
	United Kingdom
UN	United Kingdom United Nations
UN UNWCC	

# PART I: INTRODUCTIONS

## Towards a Fuller Appreciation of the Tokyo Tribunal

### Viviane E. Dittrich and Jolana Makraiová\*

#### 1.1. Context of the Book

Accountability efforts and international criminal trials are a pervasive feature of peace and justice debates today as turning to law in response to international crimes has become more ubiquitous and commonplace. These efforts redirect attention to the experiences and the lasting significance of past international tribunals. Among them are the contemporaneous legal proceedings of the International Military Tribunal ('IMT') in Nuremberg and the International Military Tribunal for the Far East ('IMTFE') in Tokyo, which the Allied powers established as a response to the mass atrocities committed during the Second World War. Both historic trials laid an invaluable foundation for the edifice of modern international criminal law.

The holding of the trial in Tokyo, in particular, was a remarkable international undertaking at the time, despite numerous obstacles, shortcomings and criticisms by contemporaries and present-day scholars and observers. Since then, numerous aspects of the trial have been debated and

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challenged. In fact, from a strictly national viewpoint in Japan, the entire judicial process seems strongly contested. Today, its legacy is still forming. The intricate nexus of history, memory and justice continues to accompany varied accounts and assessments as dealing with the past continues. The ongoing interpretation and evaluation of the Tokyo Tribunal and contemporary war crimes trials emerge as a cross-cutting concern for this edited volume as a whole. The historical and political background of the Tribunal, its establishment, the substantive and procedural aspects of the trial itself, the judgment as well as the trial's receptions in Japan and globally are treated at length in various chapters that follow.

For now, by way of a brief overview, the IMTFE convened its sessions on 29 April 1946 and adjourned upon reading the judgment on 12 November 1948.<sup>1</sup> The Tokyo Tribunal had 11 judges and national prosecution teams from 11 countries: Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom and the United States. Based on a 55-count indictment, the International Prosecution Section originally indicted 28 senior-level defendants, among them former prime ministers, cabinet ministers, military leaders, and diplomats.<sup>2</sup> It tried leaders of the Empire of Japan for Class A (crimes against peace), Class B (conventional war crimes), and Class C (crimes against humanity) crimes. In 1948, all remaining defendants were convicted. The judgment, however, was not unanimous. The Tokyo Tribunal delivered one majority judgment, two concurring opinions, and three dissenting opinions.<sup>3</sup>

Both the Tokyo and the Nuremberg Tribunals, as mentioned, contributed significantly to the development of international criminal law and beyond.<sup>4</sup> Though not the first to hold individuals criminally responsible for international crimes, both trials represent a landmark development in international efforts to prosecute individuals for war crimes, crimes

<sup>&</sup>lt;sup>1</sup> See Annex referring to Charter of the International Military Tribunal for the Far East ('IMTFE'), 19 January 1946, amended 26 April 1946 ('IMTFE Charter'). The IMTFE Charter was created by a Special Proclamation of the Supreme Commander for the Allied Powers on 19 January 1946 (https://www.legal-tools.org/doc/a3c41c).

<sup>&</sup>lt;sup>2</sup> See IMTFE, Judgment, 4 November 1948 (https://www.legal-tools.org/doc/8bef6f/).

<sup>&</sup>lt;sup>3</sup> *Ibid.* 

<sup>&</sup>lt;sup>4</sup> The Nuremberg principles had been requested to be formulated by the International Law Commission while the IMTFE trials were ongoing. See Yuma Totani and David Cohen, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence*, Cambridge University Press, 2018, p. 7.

against humanity, and crimes against peace (known now as aggression). The significance of both judicial proceedings relates, *inter alia*, to individual criminal responsibility and a wealth of substantive and procedural matters. Despite important similarities to the Nuremberg Tribunal, the To-kyo Tribunal was distinct in its organization, jurisdiction and functioning as well as the complexities it faced. It has been referred to over the years as a sister institution or twin tribunal and the lesser-known tribunal of the two. In some existing scholarship, the existence of the Tribunal has been overlooked and key facts misstated.<sup>5</sup>

However, it seems that the importance of the Tokyo Tribunal and its lasting impact have been increasingly recognized. Questions have arisen regarding the relevance and precision of previous portrayals of the Tokyo Tribunal, given the dearth of comprehensive research, especially interdisciplinary research, and the related gaps in knowledge and understanding. A vibrant research field emanated in Japan decades ago, producing prolific and ground-breaking scholarship in Japanese.<sup>6</sup> Scholarship in English, however, was initially dominated by debates on 'victor's justice'.<sup>7</sup>

Nevertheless, when noting that the Tokyo Tribunal fell into obscurity and the relative paucity of scholarship since the holding of the trial, it is essential to recall the unavailability of trial transcripts over decades. A significant milestone, in this regard, was R. John Pritchard's publication of the trial transcripts in English in 1981.<sup>8</sup> Since then, English-language research has become more multifaceted and nuanced in terms of legal and historical perspectives on the trial. Following the turn of the millennium, we have seen a resurge in interest and burgeoning scholarship, especially in English,<sup>9</sup> but also in other languages such as German and Chinese.<sup>10</sup>

<sup>&</sup>lt;sup>5</sup> This is noted, *inter alios*, by Zachary D. Kaufman, "The Nuremberg Tribunal v. the Tokyo Tribunal: Designs, Staffs, and Operations", in *The John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 753-54.

<sup>&</sup>lt;sup>6</sup> See, especially, the scholarship by Kentarō Awaya, Yoshinobu Higurashi, Yasuaki Ōnuma, Toshio Okuhara, Hisakazu Fujita, Kōichi Miyazawa, and Kayoko Takeda.

<sup>&</sup>lt;sup>7</sup> Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, 1971.

<sup>&</sup>lt;sup>8</sup> R. John Pritchard, Sonia M. Zaide, and Donald Cameron Watt, *The Tokyo War Crimes Trial. Transcripts and Index*, 22 vols., Garland, New York, 1981. The trial transcripts are available in the ICC Legal Tools Database.

<sup>&</sup>lt;sup>9</sup> Most notably, see, for example, book-length accounts (in chronological order): Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy, Routledge, London, 2008; Yuma Totani, The Tokyo War Crimes Trial:

Moreover, new film adaptations, including for television, such as the Netflix series *Tokyo Trial* or the SMG News series *The Tokyo Trials* have gained prominence in recent years.<sup>11</sup> To date, a voluminous literature has been developing on the Tokyo Tribunal and continues to evolve.

More than 70 years on, there is heightened attention and noticeable scholarly activity. The year 2018 marked the seventieth anniversary of the delivery of the judgment of the IMTFE. A number of events world-wide, including in Asia, Australia and Europe, took place with a focus on the Tokyo Tribunal, its significance, and its legacies. Three main ones are briefly noted. First, in Nuremberg, an international conference was organized by the International Nuremberg Principles Academy ('Nuremberg Academy') from 17 to 19 May 2018.<sup>12</sup> Then, in Shanghai, an international symposium was organized by the Center for the Tokyo Trial Studies at Shanghai Jiao Tong University from 11 to 13 November 2018. Finally, in Tokyo, an anniversary event entitled "The Present-Day Significance of Nuremberg and Tokyo in Modern International Law", hosted by the Center for German and European Studies, was held at the University of Tokyo

The Pursuit of Justice in the Wake of World War II, Harvard University Press, Cambridge, 2008; Neil Boister and Robert Cryer, The Tokyo International Military Tribunal: A Reappraisal, Oxford University Press, 2008; Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited, Martinus Nijhoff, Leiden, 2011; Barak Kushner, Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice, Harvard University Press, Cambridge, 2015; Kerstin von Lingen (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil, Palgrave Macmillan, Cham, 2016; Kirsten Sellars (ed.), Trials for International Crimes in Asia, Cambridge University Press, 2016; Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, Japanese War Criminals: The Politics of Justice after the Second World War, Columbia University Press, New York, 2017; Kerstin von Lingen (ed.), Transcultural Justice at Tokyo: The Allied Struggle for Justice, 1946-1948, Brill, Leiden, 2018; Cohen and Totani, 2018, above note 4; Aleksandra Babovic, The Tokyo Trial, Justice, and the Postwar International Order, Palgrave Macmillan, London, 2019.

- <sup>10</sup> For German, see, for example, Philipp Osten, Der Tokioter Kriegsverbrecherprozeβ und die Japanische Rechtswissenschaft, Berliner Wissenschafts-Verlag, Berlin, 2003. For Chinese, see works of the Center for the Tokyo Trial Studies at Shanghai Jiao Tong University, for instance, CHENG Zhaoqi, SONG Zhiyong, ZHANG Sheng, ZHAI Yi'an and HE Qinhua, trans. Luxi Jin, Shuqing Min and Wensheng Qiu, The Tokyo Trial: Recollections and Perspectives from China, Cambridge University Press, Cambridge, 2016.
- <sup>11</sup> See, for example, Immi Tallgren, "Watching Tokyo Trial", in London Review of International Law, 2017, vol. 5, no. 2, pp. 291-316.
- <sup>12</sup> International Nuremberg Principles Academy, "70 Years Later: The International Military Tribunal for the Far East", Nuremberg, 17-19 May 2018 (available on its web site).

on 17 November 2018, with simultaneous English Japanese interpretation.  $^{13}$ 

This last event was organized not only to mark the seventieth anniversary of the Tokyo judgment, but also the twentieth anniversary of the Rome Statute of the International Criminal Court ('ICC'). Moreover, on 17 July 2018, the crime of aggression within the Rome Statute was activated, meaning that the ICC gained jurisdiction over the last crime falling under the umbrella of the most serious crimes of concern to the international community as a whole.<sup>14</sup> All three anniversaries and historical moments relate to the Tokyo Tribunal and its legacies. Debates continue to the present day regarding the historical, legal, political and cultural significance of the trial, demonstrating its contemporary resonance and relevance.

### 1.2. Origins and Purpose of the Book

This volume builds on the international conference entitled "70 Years Later: The International Military Tribunal for the Far East" organized by the Nuremberg Academy. Held in Courtroom 600 of the Nuremberg Palace of Justice in Germany, it was the most extensive event worldwide in 2018 related to this historical trial, receiving considerable international resonance and international media coverage.<sup>15</sup>

It brought together more than 30 distinguished legal scholars, historians, social scientists, judges and practitioners from America, Asia, Australia and Europe to discuss the trial's background and context, the similarities and differences of the Tribunals in Tokyo and Nuremberg, substantive and procedural law, obstacles and lessons learned, as well as the last-

<sup>&</sup>lt;sup>13</sup> Zentrum für Deutschland und Europastudien, Universität Tokyo, Komaba ('DESK'), "The Present-Day Significance of Nuremberg and Tokyo in Modern International Law", Tokyo, 17 November 2018 (available on its web site).

<sup>&</sup>lt;sup>14</sup> Rome Statute of the International Criminal Court, 17 July 1998, Article 5 ('ICC Statute') (https://www.legal-tools.org/doc/7b9af9/).

<sup>&</sup>lt;sup>15</sup> Two film teams (from NHK Japan and Shanghai TV) came to Nuremberg to cover the conference. See also MAO Xiao, HE Yingxin, ZHANG Wanlu, and LUO Qingyang, "70 Years Later: The International Military Tribunal for the Far East – An Overview of the International Conference Held by the International Nuremberg Principles Academy 17-19 May 2018", in *Amsterdam Law Forum*, 2019, vol. 11, p. 66. Philipp Osten [Firippu Osuten], "Tōkyō saiban hanketsu 70 shū-nen kokusai shimpojiumu" [International Conference "70 Years Later: The International Military Tribunal for the Far East"], in *Keihō Zasshi* (Journal of Criminal Law), 2020, vol. 59, no. 1, pp. 131–35.

ing impact that the Tokyo Trial and judgment have had on current international criminal law issues. The specific topics featured included, for example, the developments of international research on the Tokyo Tribunal and war crimes trials in East Asia, the importance of interdisciplinary approaches, and the reception of the Tokyo Trial inside and outside Japan. The conference also discussed the influence of the IMTFE on various modern international criminal law doctrines and tribunals, including the International Criminal Tribunal for the former Yugoslavia and the ICC.

The conference was opened by Yasuaki Ōnuma who delivered a specially recorded address via video. Ōnuma appealed for more nuanced and refined research on the Tokyo Tribunal and the principles arising from both the Tokyo and Nuremberg Tribunals, including various Asian perspectives on the subject.<sup>16</sup> Keynote speaker Yuma Totani offered a powerful *tour d'horizon* of the historiography on the Tokyo Trial and a longitudinal perspective on historical and legal scholarship. Totani drew on works published in both Japanese and English, including by trial observers, practitioners, legal scholars and historians. The conference and the resulting anthology were conceived as a counterpoint to the relative dearth of interdisciplinary research in the area and the need to explore further avenues of research.

The present volume showcases current research by 18 international experts, including many leading scholars on the Tokyo Trial who attended the conference, and captures contemporary readings of the Tokyo Tribunal and judgment and its historical, legal, political and cultural significance. Some sketch the contours of contemporary debates and challenge orthodoxies and dominant narratives or lacunae and provide re-orientation; some tackle contested areas and offer views that are critical of the whole process and the outcome; and still others provide lucid accounts of current understandings, underappreciated aspects or novel interpretations of the social lives and inner workings of the Tribunal, politico-historical dynamics, and legal questions. These wide-ranging issues are often discussed from varied perspectives and contributors sometimes draw markedly different conclusions, providing insightful accounts.

With contributions from both legal scholars and historians throughout, this three-part anthology deliberately features multiple readings of the trial and combines different disciplinary perspectives in all parts with a

<sup>&</sup>lt;sup>16</sup> Most regrettably, Yasuaki Ōnuma passed away in October 2018.

view to an interdisciplinary dialogue. Most importantly, the volume includes Japanese voices and expert perspectives. Nonetheless, it does not purport to provide a definitive account of the value of the Tokyo Trial and its judgment in international criminal law or history. Admittedly, the present volume does not and cannot do justice to the trial exhaustively as a legal, political, social and cultural process, but instead may thoroughly emphasize certain aspects, deepen common understanding, or reinvigorate and reorient ongoing debates. It is hoped to revitalize discussion and foster interest in multidisciplinary dialogues about this significant but complex and contested historical trial.

### **1.3.** Structure of the Book

The three parts dividing this book are:

- I. Foundations and Facets of the Trial;
- II. Dynamics and Dimensions of the Trial; and
- III. Receptions and Repercussions of the Trial.

This structure follows a logical sequence from the origins and characteristics of the historic trial itself to the perception and relevance of the trial today. Part I on "Foundations and Facets of the Trial", which traces the origins of the trial, the establishment and functioning of the Tribunal, contains five chapters. Part II on "Dynamics and Dimensions of the Trial" contains six contributions on procedural and substantive issues relating to the trial. Finally, Part III on "Receptions and Repercussions of the Trial" takes the trial beyond the immediate aftermath of the Second World War and explores its ongoing receptions and repercussions over time, inside and outside Japan, in light of the multifaceted notions of crime, punishment, justice and memory.

Besides the introduction, this anthology consists of 18 chapters, including the opening and concluding reflections. Gerry Simpson's opening reflections in Chapter 2 connect the chapters and themes of the present book with the wider scholarship and surge of interest in the Tokyo Trial. It provides a brilliant introduction to the field of study of the Tokyo Tribunal, with an emphasis on re-orienting the field and illuminating hidden histories, often marginalized actors, and obscured aspects of the trial. Simpson's coinage of the neologism 'Tokyoberg' cogently captures the idea of a single event, a transformative moment in the history of war crimes trials, and the conjunction between Tokyo and Nuremberg.

Part I opens with Chapter 3, in which David Crowe provides a comprehensive comparative perspective on the Tokyo and Nuremberg Trials. The chapter extensively covers the background preparation and planning of the trials and sheds light on the proceedings. Crowe effortlessly combines exploring the historical genesis of the proceedings with highlighting the legal issues that arose along the way, including challenges brought up by the accused during the proceedings and reasons behind dissenting opinions. In a comparative vein, the chapter pays special attention to the identified differences between the two trials. Crowe emphasizes their respective broader political contexts and the distinct dynamics on the ground, in Japan and Germany, while discussing the influence of Allied policy considerations and American leadership decisions. The chapter astutely addresses the complexities of the Tokyo Trial, including the complex indictment, the United States' decision not to indict the Emperor, the critique of 'victor's justice', and the perceived vengeance over Pearl Harbor. Crowe concludes that MacArthur's decision not to allow the publication of the transcripts "created a serious void that robbed scholars and others the opportunity to better understand the complex dynamics of the trial and its outcomes".

Chapter 4 places the notion of "transcultural justice" at the heart of the analysis as Kerstin von Lingen presents her research on the hitherto overlooked yet remarkable transcultural endeavour at Tokyo bringing together different national backgrounds, languages, ideologies and perceptions of justice. The chapter thoughtfully discusses the selection of judges and formations of transcultural norms of legality and legitimacy as well as notions of justice. Von Lingen also addresses head-on the context of colonial endeavours, structural difficulties behind the Tribunal and the 'team spirit' amongst the national teams. Finally, six fields of friction are identified when scrutinizing the human elements of the trial, including the challenges of daily life away from home for the international judges, the clash of legal cultures, the conduct of the trial, technical issues, and the social lives of Tribunal officials and staff yet to be fully studied. Von Lingen concludes by stressing that suitable personnel were hired to execute the duties of the trial, that a strong feeling of commitment and even 'duty' existed, and that ultimately so-called 'legal flows' emerged given the 'transcultural learning system' at the Tokyo Tribunal and beyond.

In Chapter 5, Diane Orentlicher explores the genesis of the IMTFE and its legal origins. She begins with a thoughtful account of the relative

neglect of the Tokyo Tribunal by legal scholars by elaborating on two key points: perceptions of Tokyo as "an echo of Nuremberg" and as an "American show" given US leadership and dominance. Orentlicher also provides a comparative perspective on the legal frameworks of the IMT and the IMTFE, revealing the identified derivation and differences between the two Charters and Tribunals. With a view to reconsidering the legal legacy of the Tokyo Tribunal, Orentlicher highlights a substantive contribution to the field of international criminal law and international jurisprudence that has long been obscured: the successful prosecutions of sexual violence as war crimes. She concludes that the Tokyo Tribunal's legacy has been recently revived and revisited in many aspects, including failures as well as successes of the Tribunal, which offer critical lessons for contemporary accountability efforts.

In Chapter 6, Diane Marie Amann addresses the critical and muchoverlooked role of women at the Tokyo Tribunal. Scrutinizing "glimpses of women", Amann contributes an insightful chapter that aims to challenge women's muted roles and marginal appearance in academic discourse and in three filmed accounts titled "Tokyo Trial" and to give a voice to the women who worked at the Tribunal. As Amann demonstrates, women served on legal teams as lawyers, and analysts, as well as stenographers and translators, in addition to secretaries and administrators. The chapter profiles seven women, mapping their respective roles and stories. In conclusion, Amann fittingly notes the difficulties in obtaining data and reliable information with respect to tracing women and makes a case for more research to be undertaken on questions of not just intersectionality, race, ethnicity, but also sexuality, gender, culture and class.

The last chapter in Part I, Chapter 7 sheds light on a so-far littleexplored facet of the judicial proceedings, namely translation and interpreting. Kayoko Takeda convincingly reveals the process of trial and error in establishing the interpreting system and procedures at the Tokyo Trial. She offers a detailed account of the translation, interpreting and running of the trial in different languages with 11 judges on the bench, most of them speaking in languages different from their mother tongues. Drawing on archival documents and records, Takeda assesses the three-tier interpreting mechanism with Japanese nationals as court interpreters and the error checking mechanism of monitors and language arbitration boards based on the past lessons from the Class B/C war criminal trials. She discusses the typical challenges of consecutive interpreting at the Tokyo Trial, the lack of available and competent interpreters, and the disruptions, negotiations and improvisations of procedural rules on interpretation.

Part II of the volume begins with Chapter 8, in which Yuma Totani provides a cogent account of the important topic of individual criminal responsibility. With a focus on theories of individual criminal responsibility and methods of proof, she outlines the prosecution and defence cases, bearing in mind the wider question of the legacy of the majority judgment. The topic of individual responsibility is addressed with a focus on competing modes of liability and linkage-based approaches with regards to evidence. The chapter reiterates the trial's importance not only for experts in the field but for future students who wish to explore the jurisprudence and the continuing relevance of this trial for international justice and accountability in the twenty-first century.

In Chapter 9, Robert Cribb offers a comprehensive assessment of the charges of conventional war crimes, particularly, the ill-treatment of prisoners of war and civilian internees brought before the IMTFE. Analysing the indictment and respective counts, the trial proceedings, the position of the defence as well the judgment itself, Cribb concludes that those crimes played a relatively subordinate role in the process. He draws attention to the fact that the IMTFE offered no absolute acquittals. He also highlights that the judges had the discretion to use various charges in their sentencing and dismiss charges as they deemed fit when determining the guilt of the accused. The chapter analyses in detail the differences between direct responsibility and command responsibility (Counts 54 and 55 respectively) and notes that all defendants found guilty of Count 54 and two defendants under Count 55 were sentenced to death.

Turning to crimes against peace, Chapter 10 presents an overview of the development of international criminal law with a particular focus on the crime of aggression. Donald Ferencz, the son of Benjamin Ferencz, the last living prosecutor from the Nuremberg Trial, argues that the legacy of the Tribunals with respect to the crime of aggression is intertwined and still unfolding. Ferencz offers his insightful reading of the early perceptions of the Nuremberg and Tokyo trials and the issue of *ex post facto* law there. The chapter outlines the journey from Nuremberg and Tokyo to the activation of the ICC's jurisdiction over the crime of aggression in 2018. Ferencz offers a tale of caution noting visible opposition by major powers and unique restrictions imposed upon the jurisdiction over that crime. Despite any imperfection, he concludes, the international tribunals have contributed to vital developments "in the direction of replacing the law of force with the force of law".

In Chapter 11, Marina Aksenova offers an analytical assessment of substantive law issues in the Tokyo Trial through the lens of 'constructed temporality', inviting readers to view international criminal law "as a 'puzzle' with various points of reference grounded in different interconnected and mutually enriching moments in time". Challenging the dominant narrative of a linear development of international criminal law, from Nuremberg to The Hague, Aksenova suggests that the discipline moves in circles and, thus, temporality is a mere construction. In this alternative view, Aksenova argues that the Tokyo ideas and concepts may pick up again at a later moment in time, focusing in particular on four issues: conspiracy, crime of aggression, war crimes, and superior responsibility. She demonstrates that the Tokyo judgment was highly factual and highlights the fact-based methodology adopted in Tokyo, and also in Nuremberg. In conclusion, she reflects on the idea of recurring legal problems, then and now, linking this to ongoing debates on the best ways to attribute individual responsibility for mass atrocities.

The next two chapters take a closer look at the Australian judge and President of the IMTFE, Sir William Webb; one focusses on examining the significance of the so-called "President's Judgment" and the other, on reassessing perceptions of his judicial performance and conduct.

In Chapter 12, David Cohen insightfully reveals a somewhat hidden dimension by giving prominence to the "President's Judgment", an unpublished and less known document compared to his concurring opinion. The starting point of the chapter is why Judge Webb refrained from publishing the typescript containing no less than 638 pages as his concurring opinion and what significance it has for the legacy of the Tribunal. Cohen cogently shows how the draft document addresses not only the substance of the trial but also, remarkably, individual defendants and individual acts at length. He notes that Judge Webb reasoned his conclusion both in fact and law. The chapter turns to short case studies of Hata, Hiranuma, Hirota, Kimura, Shigemitsu and Shimada. Cohen notes, *inter alia*, that Webb differed on the nature of the conspiracy charges and also implicated the Emperor in his draft judgment. Cohen concludes by noting that, among other possible reasons, Judge Webb did not publish the typescript as it would show "deep flaws" in the majority's approach; and in turn, that the views of other judges dominated the narrative of the judgment, the trial and their legacy as a whole.

Chapter 13 concludes Part II, in which Narrelle Morris critically and astutely reassesses the perceptions of Webb. It constructs the historical legacy of the IMTFE by looking at his role as a judge at the Tokyo Tribunal and his role as a judge in Australia. At the outset, she examines how judges shaped the IMTFE's opinion while concluding that Webb was indeed one of the few jurists of his time who had relevant extensive knowledge and practical experience. The nuanced chapter analyses his contradictory views, his presidency, the criticism of other judges against him, and public scrutiny that emerged over time in an effort to rehabilitate him. In concluding, she argues that the criticism surrounding Judge Webb stems from misunderstandings or lack of clarity regarding the difficulties that faced him and the bench at the IMTFE. Morris makes an appeal for new research related to the role of judges, critical acceptance of criticism, and more consideration of the broader context.

Part III of the volume begins with a focus on Japanese perspectives on the Tokyo Trial. In Chapter 14, Philipp Osten provides an insightful account of the crimes stipulated in the IMTFE Charter and their echo among contemporary Japanese legal scholars in the immediate wake of the Trial. The contribution sheds light on the contemporary receptions and legal debates within Japan, "more or less forgotten among Japanese jurists today" and "for the most part unknown outside of Japan". Following an account of the three crimes, Osten turns to the contemporary scholarly debates on the crimes, providing an engaging discussion about leading Japanese criminal law scholars and public international law scholars. He conveys the interesting observation that, surprisingly, most contemporary legal scholars in Japan held positive views of the concept of crimes despite their awareness of the many legal shortcomings, thus anticipating, to some extent, legal concepts that are now recognized in international criminal law. The chapter ends with a brief critical account of research on the Tokyo Trial in Japan, shedding light on the apparent reluctance to engage in further depth, scholarly neglect as well as reappraisals of the legal significance of the Tokyo Trial by the latest generation of Japanese scholars.

Regarding memory formation in Japan, Beatrice Trefalt offers an illuminating analysis of the role of the Tokyo Trial and its place in the development of broader attitudes towards the war and its aftermath from the perspective of Japanese studies in Chapter 15. With a focus on the domestic context of the IMTFE, Trefalt draws attention to the Japanese audiences of the trial and its aftermath. The chapter complements legal-historical analyses by offering a contextual approach as well as an articulate analysis of the daily press and magazines for general readership, and depictions of the Tokyo Trial and the individuals accused. The focus on language, narratives, constructions of meaning, and memories is noteworthy. Examining three different periods in the post-war life of the Tokyo Trial, Trefalt highlights that the trial had a broader cultural, social and symbolic meaning in Japan, in light of the ongoing contemporary debates, the political situation and contested memories and commemorations, and the nature of civil society.

The next two chapters turn to sentencing and subsequent developments in terms of punishment and prisons, albeit from different angles, and with distinct foci and approaches.

In Chapter 16, Sandra Wilson perceptively examines the role and reality of clemency for war criminals convicted by the IMTFE. At the outset, she sketches the context of the post-war discussions, including the forms and grounds of clemency, and how eventually clemency was extended to those convicted by the IMTFE, thus becoming a post-conviction reality. Wilson analyses the dealings with clemency for Japanese war criminals before 1952 within the context of the San Francisco Peace treaty. The negotiations that surrounded the release of IMTFE prisoners are a core focus and offer insights into the interplay of legal and political issues. The chapter offers a detailed account of the history of releases of individual prisoners against the backdrop of the changing political context, post-colonial politics, and evolving relations between Japan and other States. In conclusion, it is noted that the last Japanese war criminals left Sugamo Prison in May 1958, three weeks after the last German war criminals were released from Landsberg Prison.

Looking more closely at the social history of criminal trials and prisons, Franziska Seraphim offers a novel socio-empirical assessment of spaces of punishment in Chapter 17. The chapter insightfully analyses the legalities, temporalities and spatialities of the places of incarceration of war criminals drawing on the field of legal geography, with a focus on the nexus of the social, the legal, and the spatial. In light of the interplay of evolving policies to punish war criminals, penal practices, and carceral geographies, Seraphim explores the relational spatialities of imprisonment, networks of prisons, and social relations inside a prison. The focus is on the two prisons for the major war criminals, the Sugamo Prison in Japan and the Landsberg Prison in Germany. She considers their embeddedness in communities and recounts the stories of some prisoners, including Sasakawa in Japan and Krupp in Germany and their post-war return following incarceration. The chapter also captures how prisons acted as a pivot between international politics of justice and domestic politics of rehabilitation, and were centre points in the clemency programmes. This unique perspective allows a deeper understanding of the sense of place of prisons as spaces of punishment and the social history of the Tokyo Trial and ensuing developments.

Kuniko Ozaki, former judge at the ICC, considers the contemporary resonance of the Tokyo Tribunal in Chapter 18 and critically points to challenges, past and present. The chapter pinpoints lessons learned from procedural law, noting the importance of the IMTFE in shaping the founding instruments of contemporary international criminal tribunals, including provisions on fair trial and public hearing by a competent, independent and impartial tribunal, and the presumption of innocence. Turning to substantive law, Ozaki notes that the ICC has indeed adopted a different approach to individual criminal responsibility and command responsibility, as specified in Articles 25 and 28 of the Rome Statute. In her view, the effectiveness of any international criminal court is based on three requirements, namely, the legitimacy and integrity of the court, procedural guarantees of fair trial rights, and substantive law based on the principles of legality and individual culpability. The chapter concludes that the IMTFE fell short in terms of the above requirements and that the ad hoc Tribunals and the ICC face considerable challenges.

Finally, in concluding reflections, Christoph Safferling returns to a comparative perspective on Nuremberg and Tokyo. Chapter 19 provides some thoughtful forward-looking reflections, *inter alia*, on the scope of research on the Tokyo Trial, the long and rich tradition of a German-Japanese criminal law dialogue and academic exchange. Safferling sheds light on the broader social and political dynamics in Germany and Japan and sketches post-Second World War developments. Moreover, he high-lights the importance of continuously engaging with the Tokyo Tribunal today and exploring further new research avenues.

It appears timely to take stock more than 70 years after the judgment of the Tokyo Tribunal. 2020 marks 75 years after the end of the Second World War in the Asia-Pacific region, which from a different perspec-

tive also marks the historical devastation caused by the atomic bombs dropped over Hiroshima and Nagasaki. Anniversaries and commemorative settings provide opportune moments to stimulate further critical reflection, foster ongoing dialogue, and deepen understanding. Overall, this volume adds new insights to the extensive literature on the Tokyo Tribunal, its judgment and legacies, and seeks to stimulate further interest in the legal proceedings and historical context, as well as its long-term impact and ongoing significance. The book aims to contribute to ongoing reflections and evolving understandings of the role and resonance of the Tokyo Tribunal, as well as other contemporary war crimes trials and accountability efforts, and is an invitation to continue exploring fruitful avenues for research and scholarship in the future. As an open-access publication, it is hoped that the book is read widely as a contribution to contemporary debates on law, history and memory by capturing a rich array of perspectives on the Tokyo Trial and, more generally, the history and ongoing significance of war crimes trials.

# Opening Reflections: Tokyoberg

## Gerry Simpson\*

### 2.1. Introduction

For some time now, I have been using the term 'Tokyoberg' to refer to a transformative moment in the history of international criminal trials that took place between 1945 and 1948 in the two great cities of Nuremberg and Tokyo. It seems to me that these two trials can be understood as a single event in which a number of revolutions occurred in the way we understand, and articulate, the world of international legal diplomacy (for example, the emergence of individual responsibility, the criminalization of war, the invention of crimes against humanity). So, a book on the Tokyo Trial emanating from a conference on the same subject held in Nuremberg somehow exemplifies this conjunction (and, indeed, many of the chapters are explicitly comparative in this 'Tokyobergian' vein: see especially, David Crowe's illuminating study<sup>1</sup>).

The Tokyo Trial itself has been undergoing a two-decade long revival,<sup>2</sup> which in turn built on earlier works, both contemporaneous with

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<sup>&</sup>lt;sup>1</sup> David M. Crowe, "The Tokyo and Nuremberg International Military Tribunal Trials: A Comparative Study", chap. 3 below.

<sup>&</sup>lt;sup>2</sup> Most notably David Cohen and Yuma Totani, The Tokyo War Crimes Trials: Law, History, and Jurisprudence, Cambridge University Press, 2018; Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, London, 2008; Neil Boister and Robert Cryer, The Tokyo International Military Tribunal: A Reappraisal, Oxford University Press, 2008; Kerstin von Lingen (ed.), Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-1948, Brill, Leiden, 2018; Kerstin von Lingen (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in

the Trial,<sup>3</sup> and more recently in the 1970s and 80s.<sup>4</sup> All of this includes important writing on Justice Pal, Antonio Cassese's richly rewarding dialogue with Justice Röling, the scholarship of Kentarō Awaya, Yuma Totani's ground-breaking study and much, much more besides.<sup>5</sup>

This volume, brought to us by the International Nuremberg Principles Academy and co-edited by Viviane Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová, is an intelligently curated addition to this corpus. It is especially good at uncovering the hidden histories of the Tokyo Trial: events that happened in and around the Trial that were somehow not recognized as being part of it,<sup>6</sup> participants or groups of participants that were written out of history,<sup>7</sup> individuals who have been misrepresented,<sup>8</sup> and accounts and aspects of the Trial that have been obscured.<sup>9</sup>

- <sup>4</sup> Richard H. Minear, *Victors' Justice: Tokyo War Crimes Trial*, Princeton University Press, 1971. See also Ann Marie Prévost, "Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita", in *Human Rights Quarterly*, 1992, vol. 14, pp. 303-05.
- <sup>5</sup> Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008; On Pal, see Barry Hill, *Peacemongers*, University of Queensland Press, 2014; Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment*, Sanyal, Calcutta, 1953; Radhabinod Pal, *Crimes in International Relations*, University of Calcutta, 1953; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2; Keenan and Brown, 1950, see above note 3; and Appleman, 1954, see above note 3.
- <sup>6</sup> See Franziska Seraphim, "Spaces of Punishment", chap. 17 below.
- <sup>7</sup> See Diane Marie Amann, "Glimpses of Women at the Tokyo Tribunal", chap. 6 below.
- <sup>8</sup> See David Cohen, "The "President's Judgment" and Its Significance for the Tokyo Trial", chap. 12 below; Narrelle Morris, "Constructing the Historical Legacy of the International Military Tribunal for the Far East: Reassessing Perceptions of President William Webb", chap. 13 below; Diane Orentlicher, "The Tokyo Tribunal's Legal Origins and Contribu-

Asia, 1945-1956: Justice in Time of Turmoil, Palgrave Macmillan, Cham, 2016; Kirsten Sellars (ed.), Trials for International Crimes in Asia, Cambridge University Press, 2016; Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, Japanese War Criminals: The Politics of Justice After the Second World War, Columbia University Press, New York, 2017; Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in European Journal of International Law, 2010, vol. 21, no. 4, pp. 1085-1102; Kerstin von Lingen (ed.), Debating Collaboration and Complicity in War Crimes Trials in Asia, 1945-1956, Palgrave Macmillan, New York, 2017.

<sup>&</sup>lt;sup>3</sup> For discussion of contemporaneous Japanese scholarship, see chap. 14 below by Philipp Osten. From the American side, see Joseph Berry Keenan and Brendan Francis Brown, *Crimes against International Law*, Public Affairs Press, Washington, 1950; and John Alan Appleman, *Military Tribunals and International Crimes*, Bobbs Merrill Co., Indianapolis, 1954.

A reader of this volume has the experience of seeing the Trial anew from the perspective of the various Japanese publics, the relatives of Class A accused war criminals, the women who made the Trial a working concern, translators, diplomats, Japanese scholars, and many others.<sup>10</sup> And, to return to my initial observation, often, the authors treat Nuremberg and Tokyo as a single moment of innovation with Tokyo no longer what it has so long been, namely "a sister institution, nothing more", <sup>11</sup> a "lesser known sibling",<sup>12</sup> or a victim of American vengefulness over Pearl Harbor.<sup>13</sup>

It is to this question of innovation that I want to turn first, but this time thinking of the scholarship contained in these pages as a reorientation of the 'Tokyoberg' field.

## 2.2. Reorienting the Field

The authors tell us a great deal about contemporary war crimes trials: their origins, the repetitiveness of their concerns and dilemmas, their extraneous materials, and their discordant notes. We can perhaps get some sense, too, from a reading of this book, of how our beliefs and intuitions about war and law have changed, or stayed the same, over the last century. In particular, the examination of Tokyo's intersections and affiliations with some broader post-war debates – Japanese revisionism, Allied culpability, the continuing convulsions around the 'crime' of aggression, and the problem of history, memory and justice – gives this volume a very contemporary resonance.

tions to International Jurisprudence as Illustrated by Its Treatment of Sexual Violence", chap. 5 below.

<sup>&</sup>lt;sup>9</sup> Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, 2014; Philipp Osten, "Substantial Criminal Character' or 'Lawless Violence': Crimes in the Charter of the Tokyo Tribunal and Their Receptions in Contemporary Japanese Legal Scholarship", chap. 14 below; Orentlicher, chap. 5 below.

<sup>&</sup>lt;sup>10</sup> For an extremely useful set of primary documents, see Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, 2008.

<sup>&</sup>lt;sup>11</sup> Orentlicher, chap. 5 below, p. 86, quoting Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, London, 2008, p. 9.

<sup>&</sup>lt;sup>12</sup> See Morris, chap. 13 below, p. 275; Kerstin von Lingen, "The Tokyo Tribunal: A Transcultural Endeavour", chap. 4 below.

<sup>&</sup>lt;sup>13</sup> Orentlicher, chap. 5 below. See also Yuma Totani, "Individual Responsibility at the Tokyo Trial", chap. 8 below; Crowe, chap. 3 below.

Perhaps we should not be surprised by all of this. Kuniko Ozaki makes a specific plea to think of the International Military Tribunal for the Far East ('IMTFE') as facing problems (procedural, substantive, organizational) with enormous contemporary resonance. For Ozaki, the Tokyo Trial was, in some respects, and more than Nuremberg, a rehearsal of the later dilemmas facing the Hague Tribunals. But, as Marina Aksenova points out, I think correctly, international criminal law, as a field, is much more cvclical than linear. She uses the idea of "constructed temporality"<sup>14</sup> to show just how unchanging the pre-occupations of international criminal lawyers have been. As she demonstrates, much of the debate at Tokyo has re-appeared at different times throughout the century-long history of the discipline: the under- and over-inclusiveness of the definition of aggression,<sup>15</sup> the expansiveness of conspiracy theories,<sup>16</sup> and the insecure relationship between attention to facts and development of new modes of liability<sup>17</sup> (the emphasis, at Tokyo, most decidedly, on the former). Fortunately, no one spends much time on the hoary chestnut of 'Victor's Justice' (David Cohen and Crowe are rarities in having interesting things to say about it). This debate probably conceals more than it reveals. Don Ferencz, who has worked tirelessly to keep the crime of aggression on the agenda and who has written a very useful summary of those efforts in this volume, alludes to one of Robert Jackson's great epigrams on the subject ("to pass these defendants a poisoned chalice is to put it to our own lips as well") before revealing that he never said it.<sup>18</sup> And this idea of the unsaid runs through the chapters.<sup>19</sup>

In the end, Aksenova asserts that: "it was an achievement in itself that the debates about the destiny of the defendants took place within the parameters set out by a legal trial".<sup>20</sup> What sort of achievement was it though? Well, it was certainly a very bureaucratized achievement. Repeat-

<sup>16</sup> Totani, chap. 8 below; Cohen, chap. 12 below.

<sup>20</sup> Aksenova, chap. 11 below, p. 248.

<sup>&</sup>lt;sup>14</sup> Marina Aksenova, "Substantive Law Issues in the Tokyo Judgment: From Facts to Law?", chap. 11 below, pp. 225 ff.

<sup>&</sup>lt;sup>15</sup> See Donald M. Ferencz, "Nuremberg, Tokyo and the Crime of Aggression: An Intertwined and Still Unfolding Legacy", chap. 10 below.

<sup>&</sup>lt;sup>17</sup> Totani, chap. 8 below.

<sup>&</sup>lt;sup>18</sup> See Ferencz's discussion of John R. Barrett, "No Poisoned Chalice", The Jackson List, 2013, crediting the German film-maker, Ullabritt Horn, with having noticed the discrepancy (available on its web site).

<sup>&</sup>lt;sup>19</sup> *Ibid*.

edly in these chapters, one is introduced to the idea of the 'administered' trial. Indeed, as Beatrice Trefalt notes in relation to the 'stenographic trial':

Sugawara remembered enviously [that] his American counterparts could have whatever had been said in the morning typed up during lunchtime, and ready for the afternoon session, whereas the Japanese side could wait for up to a month for a typed record, so that "we experienced an unconditional surrender in administrative terms as well".<sup>21</sup>

Kayoko Takeda, too, discusses the Language Arbitration Board established by the Allies to determine the outcome of translation disputes while Sandra Wilson, an American historian based in Western Australia, usefully decentres trial and prosecution by showing how clemency became what she calls a "bureaucratic norm".<sup>22</sup>

A form of re-orientation is experienced, too, in the reading of the trial by Osten, who gives us a fresh perspective on the legacy of the various categories of criminality: aggression (ill-defined), crimes against humanity (a minor concern at Tokyo) and war crimes (where Tokyo left a rather important record of innovation). But Osten's achievement here is to revive interest in contemporary and near contemporary responses to the trial by Japanese scholars (Crowe does something similar with the Japanese defence lawyers). These range from the affirmative naturalism of Shigemitsu Dandō to the sceptical textualism of Kenzo Takayanagi (bemoaning the absence of a "penal consciousness" capable of undergirding the lawfulness of the trial). As Osten puts it: "Looking back upon the Japanese scholarly debate, the most surprising finding is that some of the most subtle and visionary assessments were publicized by legal scholars during or shortly after the trial".<sup>23</sup>

When it comes to categories of criminality, the crime of aggression, more than any other, has been subject to this re-orientation. This reorientation is very present in Cohen's rehabilitation of William Webb and

<sup>&</sup>lt;sup>21</sup> Beatrice Trefalt, "Remembering the Tokyo Trial, Then and Now: The Japanese Domestic Context of the International Military Tribunal for the Far East", chap. 15 below, p. 335, quoting Yutaka Sugawara, *Tōkyō saiban no shōtai* [The True Character of the Tokyo Trial], Jiji, Tokyo, 1961, p. 128, quoted in Sumitani, "Tōkyō saiban no kiroku" [Records of the Tokyo Trial], 3.

<sup>&</sup>lt;sup>22</sup> Sandra Wilson, "Clemency for War Criminals Convicted in the Tokyo Trials", chap. 16 below, p. 355.

<sup>&</sup>lt;sup>23</sup> Osten, chap. 14 below, p. 326.

in Ferencz's broadside against the Great Powers. It has long been a frustration of those engaged in international criminal law that neither Tokyo nor Nuremberg provided a workable definition of aggression (though as von Lingen points out, establishing evidence of aggression was much more complicated at Tokyo).<sup>24</sup>

Others, though, direct us away from our obsessions with aggression towards other criminal categories.<sup>25</sup> Robert Cribb, for example, wants us to re-focus on the Potsdam Declaration, with its emphasis on prisoners of war ('POWs') (and breaches of the 1929 Geneva Convention) in Article 10. Here, Cribb makes the interesting point that the prosecution of the Japanese for crimes against POWs (depictions of which were popularized later in films such as Bridge over the River Kwai and novels like The Far Road to the Deep North) was largely unsuccessful.<sup>26</sup> Most defendants were acquitted on these charges and the court refused to accept the prosecution strategy of combining a theory of collective responsibility with a mass of concrete evidence of atrocity (but with precious little linking of this mass to the defendants themselves). Totani also directs our attention away from the crime of aggression and towards the questions of individual responsibility (and the competing modes of liability and linkage-based approaches to the question of evidence, or lack thereof, attached to this idea) for war crimes embedded in Counts 54 and 55.27

In the end, all of this work reshapes our understanding of the Tokyo Trial and rejects the idea of the Trial as a one-off procedural event in which the leading Japanese war criminals were charged with the crime of aggression.

<sup>&</sup>lt;sup>24</sup> Perhaps Justice Pal's most persistent insight involved connecting international criminal law to a project for stabilizing and securing existing power distributions within international society. For him, the criminalization of aggression, in particular, was simply a way of freezing the status quo. The criminal repression of territorial change was meant to ensure that the frontiers created by the original sin of colonial maldistribution would remain fixed by the legitimating force of an international rule of law. Later, the deepening juridification of war was intended to remove armed struggle from the repertoire of anti-colonial, anti-Western political movements and states (this was his anti-imperialism).

<sup>&</sup>lt;sup>25</sup> For example: Totani, chap. 8 below, Orentlicher, chap. 5 below.

<sup>&</sup>lt;sup>26</sup> Robert Cribb, "'Conventional War Crimes': The International Military Tribunal for the Far East and the Ill-Treatment of Prisoners of War and Civilian Internees", chap. 9 below.

<sup>&</sup>lt;sup>27</sup> Totani, chap. 8 below.

## 2.3. Coming in from the Margins of History

Diane Marie Amann's chapter is a highly readable and significant adjustment to our thinking about the role of women in Tokyo, and especially a cohort of quite remarkable individuals. She uses three films to demonstrate the different ways in which the trial was represented before going on to profile seven women: Virginia Bowman, Lucille Brunner, Eleanor Jackson (a federal law clerk who ends up dancing with John Profumo), Helen Grigware Lambert, Grace Kanode Llewellyn, Bettie Renner, Coomee Strooker-Dantra, and Elaine B. Fischel (author of a noteworthy memoir).<sup>28</sup> Some of the stories are almost novelistic.

Fischel, who worked as a 'legal stenographer', had a remarkably colourful life in Tokyo: dining with the brother of the emperor, riding horses with Justice Röling, and conducting affairs with a man later revealed to be a KGB spy and with John Brannon, the defence attorney for the Japanese naval defendants. Later she went on to practise law for 60 years retiring as an attorney at ninety-five.<sup>29</sup>

Another Tokyo female lawyer, Grace Kanode Llewellyn was, according to Amann, probably the first female attorney to speak before an international war crimes tribunal, playing a notable role in developing the Prosecution case on some key matters. As Amann points out, not only are these women largely missing from the record or untraceable (the problem of the married name), but when they *are* placed on the record, they are described as 'secretaries' or 'reporters' even in cases when they are performing technical legal work (on which subject, there is an entertaining passage in Amann's chapter in which she discussed the 'Legal Portias' at the trial).<sup>30</sup>

Women were also much more present as victims than some accounts imply. Diane Orentlicher suggests that, though the Tribunal's treatment of sexual violence can be criticized on all sorts of grounds, it actually made a signal and early contribution to the notion that sexual violence could constitute a war crime (despite often being cited for the opposite position). The judgment makes it clear that crimes of sexual violence (at Nanking [Nanjing], for example) were recognized as being of the most

<sup>&</sup>lt;sup>28</sup> Elaine B. Fischel, *Defending the Enemy: Justice for the WWII Japanese War Criminals*, Bascom Hill Books, Minneapolis, 2009.

<sup>&</sup>lt;sup>29</sup> Amann, chap. 6 below, pp. 116 ff.

<sup>&</sup>lt;sup>30</sup> *Ibid.*, p. 120.

serious concern to the court – though, as Orentlicher acknowledges, this awareness did not extend to the enforced prostitution of women from Korea and other nations (often referred to as the 'comfort women' issue).<sup>31</sup>

Women played key roles in interpretation of the Nuremberg trial.<sup>32</sup> Translation at Tokyo, by contrast, was a largely male and much more anarchic affair, after which interpreters involved had very little reason to boast of having worked with the Tribunal.<sup>33</sup> This is not to understate the later problems experienced during the trials in the International Criminal Tribunal for the former Yugoslavia (even with the increasing professionalization of the trial translation).

Translators, though, have been largely absent as the subjects of international criminal law history.<sup>34</sup> Takeda describes the often-abortive effort of the occupying authorities to provide adequate translation for the trials, pointing out that the Allies were reduced to using Masakatsu Hamamoto, General Yamashita's personal interpreter, for official translation during his trial and setting up a Language Arbitration Board during the Tokyo Trial to settle disputes among interpreters and interpretations. Takeda quotes Justice Webb's unenthusiastic, procedurally dubious statement:

> Well, as I explained before, all this interpretation of every word is not required in the interests of justice. It is required in the interests of propaganda. That is the whole point. This elaborate system of interpreting every word does not obtain in any national court. We try murderers there. We try men who cannot speak the English language, but we do not have all of this interpreting. I would like the Japanese to understand that.<sup>35</sup>

For Takeda though, despite this, Nuremberg was one of the transformational moments in the history of interpretation, foreshadowing the

<sup>&</sup>lt;sup>31</sup> See Orentlicher, chap. 5 below, p. 75.

<sup>&</sup>lt;sup>32</sup> See also Amann, chap. 6 below.

<sup>&</sup>lt;sup>33</sup> See also Francesca Gaiba, The Origins of Simultaneous Interpretation: The Nuremberg Trial, University of Ottawa Press, 1998; Ellen Elias-Bursać, Translating Evidence and Interpreting Testimony at a War Crimes Tribunal: Working in a Tug-of-War, Palgrave Macmillan, London, 2015.

<sup>&</sup>lt;sup>34</sup> Crowe, chap. 3 below

<sup>&</sup>lt;sup>35</sup> *The Transcripts of the Proceedings of the International Military Tribunal for the Far East*, pp. 2405-06 (https://www.legal-tools.org/doc/b77967/).

new systems of translation deployed at the UN and in other post-war international organizations. And, as von Lingen argues on a broader canvas:

> The transcultural learning system of one of the first international tribunals enabled many of the staff present at Tokyo to later enrol with the emerging international institutions, especially within the UN. The Tokyo tribunal gave them possibilities to enrich their knowledge on the functioning of large international courts, and form something which could be termed 'legal flows', which left its marks on international criminal courts as we know them today.<sup>36</sup>

There is further decentring of the idea of prosecution and trial, and an attentiveness to the aftermath (war commemoration, national trials) of the Trial in the chapter by Trefalt, where she discusses the local audience for the Trial, an audience subject to a form of re-education through a trial intended to prepare Japan for re-engagement with the international community. She shows how the Tokyo Trial was very much part of daily life for Japanese people. As she puts it: "Even the words '*A-kyū senpan*' (Class A war criminal) became widely used to refer to a despised and badly treated individual".<sup>37</sup>

Trefalt does a good job showing how the Trial was really two trials from the perspective of its national audience. The trial at the beginning, when there was anger and resentment directed towards the leading war criminals (even  $T\bar{o}j\bar{o}$ 's botched suicide was held against him), was followed by a 'later trial' in which the Class A war criminals were partially redeemed through  $T\bar{o}j\bar{o}$ 's performance and by which time there had developed a growing suspicion about Allied motives (and a 'class' based resentment about the number of Class B and C prisoners serving out sentences in the absence of clemency).

This all links nicely to von Lingen's idea of "transcultural justice"<sup>38</sup> which specifically thinks of the trial as a cosmopolitan affair with individuals from many different places involved in the production of law and justice. Her chapter is an exercise in "restoring agency"<sup>39</sup> to these people.

<sup>&</sup>lt;sup>36</sup> Von Lingen, chap. 4 below.

<sup>&</sup>lt;sup>37</sup> Trefalt, chap. 15 below, p. 331.

<sup>&</sup>lt;sup>38</sup> *Ibid*.

<sup>&</sup>lt;sup>39</sup> *Ibid.*, p. 3.

The Tokyo in these chapters, then, becomes not just a repeated Nuremberg but a much more complicated inter-cultural negotiation and contestation<sup>40</sup> involving a plurality of often neglected actors.

## 2.4. The Hidden Trials

The Trial is more than the trial: it is a network of sometimes hidden legal norms, administrative procedures, alternative judgments, political decisions, bureaucratic routines, and carceral practices.

The hidden trial closest to the trial itself – indeed sitting at the very core of it - is Justice Webb's monumental unpublished draft judgment (found in the Australian National Archive and at the Australian War Memorial in Canberra). Cohen does a terrific job of excavating the significance and meaning of this document, neglected in favour of the judgment itself and the famous dissents by the likes of Justices Pal and Röling. Cohen begins by remarking that "while Webb agreed with the majority that all of the defendants should be found guilty, he disagreed with them on almost everything else".<sup>41</sup> As Cohen points out, a new legal order designed to place individual responsibility at the centre of international law, was hobbled from the outset by judges (at Nuremberg, Jerusalem and Tokyo) who were concerned to write sweeping accounts of conspiracies to wage war or destroy religious or ethnic groups without adducing evidence as to who had specifically committed such acts (at Tokyo, for example, only 5 per cent of the majority judgment is devoted to individual verdicts). Webb was an exception to this general rule, with his focus on individual defendants and their individual acts. Clearly, this is not the Webb of standard issue international law scholarship (a kind of bumbling, parochial Australian who managed to preside both imperiously and ineffectually).

Like Cohen, Narrelle Morris, who has already done so much useful work bringing the Australian war crimes experience to light, focuses on a rehearsal of Webb's contribution to the Tokyo Trial. This is also a reassessment of some myths that have grown up around the dissenting judges (Morris dismissed Pal's vaunted international law expertise and laments

<sup>&</sup>lt;sup>40</sup> *Ibid*.

<sup>&</sup>lt;sup>41</sup> Cohen, chap. 12 below, p. 252.

the fact that none of the other judges were still alive to dispute some of Röling's late-century claims about the Trial).<sup>42</sup>

Webb, in fact, was one of the few judges with any experience in international law-related matters (especially war crimes) and his reputation in Australia (as intelligent, affable, generous) is almost entirely at odds with his reputation as a judge at Tokyo (domineering, irritable, bluff). Morris also points how exacting Webb's role was on his family life (something that is usually passed over as a private matter). Morris does a good job of rehabilitating Webb, whose style she wants to position as an Anglo-Australian common-law robustness that may have offended the thin-skinned Americans and others (some of the tenacious assumptions about Webb can be traced back to John Appleman's book),<sup>43</sup> and whose complaints about the lack of air-conditioning were not examples of "tetchiness", but an effort to make sure justice was conducted in workable conditions (see Yoriko Otomo's work on air-conditioning and international law). It is worth quoting Cohen in full on Webb:

Webb, in his draft judgment, most fully fulfils the role of judge who weighs the evidence against each of the accused in turn on each of the charges against them and provides a reasoned decision in each individual case. He spared the majority the embarrassment his draft judgment would have caused if it had been published as his concurring opinion. Unfortunately, however, his decision not to adopt it as his concurring opinion has provided posterity with a very incomplete sense of the evidence before the court that on Webb's view justified the convictions of the accused. Webb's withdrawal of his comprehensive draft judgment thus enabled Pal, and to a lesser extent Röling, to discredit the trial as a whole in the eyes of many critics.<sup>44</sup>

But, along with this obscured judgment, the Trial had many hidden aftermaths. Trefalt shows how an event that both fed on and further exacerbated the polarization of views about the war was the enshrinement of convicted war criminals in the Yasukuni Shrine in Tokyo in the mid-1970s (something that had the paradoxical effect of ending the Emperor's visits

<sup>&</sup>lt;sup>42</sup> See B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity, Cambridge, 1993.

<sup>&</sup>lt;sup>43</sup> Appleman, 1954, see above note 3.

<sup>&</sup>lt;sup>44</sup> Cohen, chap. 12 below, p. 274.

to the shrine from this point), while Wilson's chapter, for example, demonstrates the way in which clemency became a lawful response to war crimes. As she notes, by the time the IMTFE verdicts were handed down, thousands of Japanese defendants had already been convicted in the national military tribunals while the prosecution of 5,700 Japanese military personnel was still ongoing. Meanwhile, convicted prisoners were incarcerated in Tokyo and around Asia and the Pacific.

Around this time, according to Wilson, the United States, the United Kingdom and their allies began to "soften their stance" on war criminals as part of a Cold War strategy and in response to agitations from (what we would now call) non-governmental organisations representing families of imprisoned war criminals.<sup>45</sup> Clemency boards became important parts of the post-war international criminal law architecture and became themselves 'entangled' in post-colonial politics (the decision to allow Pakistan to be represented on these boards, the choice of which China should represent the Chinese people, and so on).

The last Japanese war criminals left Sugamo Prison in May 1958, three weeks after the last German war criminals incarcerated in Landsberg Prison in Bavaria had been freed. As Wilson points out: despite all the Allied rhetoric about the exceptional nature of Japan's war crimes, relatively normal administrative arrangements had overtaken the justice process. Franziska Seraphim's richly-textured account of the social post-histories of the Tokyo Trial takes up this question of carceral geography in her account of the spatial and financial networks of power and legality operating in the aftermath of the trial – for instance, Gustav Krupp's and Ryōichi Sasakawa's philanthropic activities (some dedicated to the families of those tried and imprisoned as war criminals). For her, the trials played out as a continual shaping and reshaping of identity, of social relations and of hegemonic power across different spaces (procedural, physical and discursive). Seraphim's chapter, which ends by putting penology, social politics, and carceral practices at the heart of the war crimes programme, is a nuanced and original contribution to the literature on the Tokyo Trial, a literature greatly enhanced by this generous and original anthology.

<sup>&</sup>lt;sup>45</sup> See Sandra Wilson, "The Shifting Politics of Guilt: The Campaign for the Release of Japanese War Criminals", in Barak Kushner and Sherzod Muminov (eds.), *The Dismantling of Japan's Empire in East Asia: Deimperialization, Postwar Legitimation and Imperial Afterlife*, Routledge, London, 2017, pp. 87-106.

# PART II: FOUNDATIONS AND FACETS OF THE TRIAL

# The Tokyo and Nuremberg International Military Tribunal Trials: A Comparative Study

## **David M. Crowe<sup>\*</sup>**

#### 3.1. Introduction

The International Military Tribunals in Nuremberg and Tokyo ('IMT' and 'IMTFE' respectively) in the wake of World War II were meant to bring to justice the principal figures responsible for the most horrendous war in modern history. This chapter will take a comparative look at the planning for each trial, and explore Allied efforts to come to grips with the complex legal issues that faced those responsible for conducting both trials. It will also discuss the problems that each of the Allied judicial and prosecutorial teams faced once the trials began. These were the first major war crimes trials in history, and there were no precedents to guide the judges, the prosecution, and the defence when it came to the conduct of such trials.

Moreover, as the chapter will show, both trials were haunted by the experiences of the German and Japanese occupation of much of Europe and East Asia, which created their own set of challenges for the tribunals. The same was true when it came to the defeat of the Allies and the occupation of Japan and Germany. Though there were serious attempts to conduct both trials fairly, the judges and the prosecutors could not escape the massive population losses, the gruesome nature of German and Japanese war crimes and, at least for the United States, the attack on Pearl Harbor. This raised the prospect that a certain element of revenge was at play dur-

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ing both trials, particularly in Tokyo, which raised the question of 'victor's justice'.

## 3.2. Background

## 3.2.1. The Tokyo Trial

From the moment of his appointment as the Supreme Allied Commander, South West Pacific Area, General Douglas MacArthur had already, as he later recalled:

> formulated the policies I intended to follow, implementing them through the Emperor and the machinery of the imperial government. I was thoroughly familiar with Japanese administration, its weaknesses and its strengths, and felt the reform I contemplated were those which would bring Japan abreast of modern progressive thought and action. First destroy the military power. Punish war criminals. Build the structure of representative government.<sup>1</sup>

Yet, it would be wrong to think that MacArthur was the principal architect of the American occupation of Japan, including the trial of Japan's major war criminals. Many of the policies that MacArthur adopted, particularly in the early years of the occupation, were dictated by Washington. This was certainly the case with the planning of the IMTFE and the decision not to indict Emperor Hirohito as a war criminal.

The Japanese attack on Pearl Harbor on 7 December 1941 and Germany's declaration of war on the United States four days later caught the Allied powers by surprise, and led them to hold the Inter-Allied Conference (later, Commission) on the Punishment of War Crimes in London one month later, on 13 January 1942. There, they issued the Inter-Allied Declaration at St. James's Palace (to be distinguished from the eponymous Declaration of June 1941), which, referencing the 1907 Hague Convention IV (Convention Respecting the Laws and Customs of War on Land), stated that the Allied powers opposed retribution "by acts of vengeance on the part of the general public" when it came to the issue of war crimes. Noting that "international solidarity is necessary [...] in order to satisfy the sense of justice of the civilized world", the nine occupied countries:

<sup>&</sup>lt;sup>1</sup> Douglas MacArthur, *Reminiscences*, McGraw Hill, New York, 1964, pp. 282-83.

- 1. affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conception of an act of war or a political crime as understood by civilised nations,
- 2. take note of the declarations made in this respect on 25th October 1941 by the President of the United States of America and by the British Prime Minister [in separate statements, Roosevelt and Churchill warned Germany that it would face "retribution" for its crimes in Nazioccupied Europe],
- 3. place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetuated them or participated in them,
- 4. resolve to see to it in a spirit of international solidarity, that (*a*) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (*b*) that the sentences produced are carried out.<sup>2</sup>

A year and nine months later, in October 1943, the Allied powers created the United Nations War Crimes Commission ('UNWCC'), which would be responsible for developing policies to deal with the "detection, apprehension, trial and punishment of persons accused of war crimes".<sup>3</sup>

At the Inter-Allied Conference in January 1942, KING Wunsz (also known as KING Wenz, CHIN Wen-szu and JIN Wensi), the Republic of China's delegate, told other members that his country fully embraced the Declaration's ideals and "intended to apply the same principles to the Japanese occupying authorities in China when the time came".<sup>4</sup> Given the 'Europe-first' focus of the Allied powers, it is not surprising that it took a

<sup>&</sup>lt;sup>2</sup> Inter-Allied Information Committee, Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James's Palace, London on 13th January, 1942 and Relative Documents, His Majesty's Stationery Office, London ('HMSO'), July 1942. See also the United Nations War Crimes Commission ('UNWCC'), History of the United Nations War Crimes Commission and the Development of the Laws of War, HMSO, 1948, pp. 91-92, 105, 109-11 (https://www.legal-tools.org/doc/cac045/); Division of International Law of the Carnegie Endowment for International Peace (under the supervision of its director, James Brown Scott), The Proceedings of the Hague Peace Conferences: Translation of the Official Texts. The Conference of 1907, Oxford University Press, New York, 1920, pp. 87-88, 626-31.

<sup>&</sup>lt;sup>3</sup> United Nations Archives and Records Management Section, Summary of AG-042 United Nations War Crimes Commission (UNWCC) 1943-1948, p. 1.

<sup>&</sup>lt;sup>4</sup> UNWCC, 1948, p. 91, see above note 2.

while before they first warned Japan about its war crimes in Asia. On 1 November 1943, two days after the Moscow Conference ended, a Declaration on German Atrocities by Winston Churchill, Joseph Stalin and Franklin Roosevelt was adopted, which promised that they would go to the ends of the earth to find "Hitlerite Huns" who had committed "monstrous crimes". Such criminals would be "judged on the spot by the peoples whom they have outraged".<sup>5</sup> A few weeks later, Roosevelt, Churchill and CHIANG Kaishek issued the Cairo Declaration, which stated that they were "fighting this war to restrain and punish the aggression of Japan". The United Nations, it warned, would do whatever was militarily "necessary to procure the unconditional surrender of Japan".<sup>6</sup>

Many of the Allied nations in Europe and the Asia-Pacific region established independent investigatory bodies to work and share evidence of Axis war crimes with the UNWCC. In China, CHIANG's Nationalist government focused their investigative efforts on *hanjian*, an ancient term that the 1937 Regulations on Punishing *Hanjian* ('*Chengzhi hanjian tiaoli*') applied to anyone who collaborated with the Japanese.<sup>7</sup> The Australian government created three major commissions of inquiry to investigate Japanese war crimes, all led by Sir William Webb, the Chief Justice of Queensland who would later become President of the IMTFE.<sup>8</sup> On the other hand, Stalin created his own investigative body, the Extraordinary State Commission for Ascertaining and Investigating Atrocities Perpetrated by the German Fascist Invaders and Their Accomplices ('*Chrezvychainaia gosudarstvennaia kommissiia*'; 'ChGK'), and refused to work with the UNWCC.<sup>9</sup>

<sup>&</sup>lt;sup>5</sup> Franklin D. Roosevelt, Winston Churchill and Joseph Stalin, Moscow Declaration on German Atrocities, Annex 10 to Secret Protocol, Moscow Conference of Foreign Secretaries, signed 30 October 1943, adopted 1 November 1943 (https://www.legal-tools.org/doc/ 3c6e23/).

<sup>&</sup>lt;sup>6</sup> Franklin D. Roosevelt, CHIANG Kaishek, and Winston Churchill, "The Cairo Declaration", 26 November 1943.

<sup>&</sup>lt;sup>7</sup> XIA Yun, Down with Traitors: Justice and Nationalism in Wartime China, University of Washington Press, 2017, pp. 22-25; David M. Crowe, War Crimes, Genocide, and Justice: A Global History, Palgrave Macmillan, London, 2014, pp. 265-66.

<sup>&</sup>lt;sup>8</sup> D.C.S. Sissons, "The Australian War Crimes Trials and Investigations (1942-51)", pp. 4-10 (available on UC Berkeley's web site).

<sup>&</sup>lt;sup>9</sup> Marina Sorokina, "People and Procedures: Toward a History of the Investigation of Nazi Crimes in the USSR", in *Kritika: Explorations in Russian and Eurasian History*, 2005, vol. 6, no. 4, pp. 801-06; Alexander Victor Prusin, "Fascist Criminals to the Gallows!': The

In the 1920s and 1930s, Stalin oversaw the creation of a body of criminal law that gave the State extraordinary powers to prosecute anyone for what was perceived to be anti-Soviet and anti-Stalinist crimes. What followed were a series of 'show' trials that established important precedents that Stalin used in criminal proceedings during the Great Fatherland War (1941–45) against alleged collaborators and Axis war criminals. His refusal to join the UNWCC was driven by the fear that such membership would restrict his ability to conduct a-legal trials designed principally to highlight the sacrifices being made by the Soviet people to defeat the hated 'fascists'.<sup>10</sup>

## 3.2.2. The Nuremberg Trial

In the US, the planning for war crimes trials was part of the larger discussions about the defeat and occupation of Germany and Japan. The War and State Departments created separate teams of specialists to study these issues. In August 1944, the experts prepared a memorandum entitled "General Objective of United States Economic Policy with Respect to Germany". It argued that the Allies should learn from the lessons of Versailles and avoid the breakup of Germany because of its impact on Europe's economy and the possible resurgence of German nationalism. It also suggested that German industry should be restored to ensure "a minimum prescribed standard of living" which would enhance its ability to pay reparations and restitutions.<sup>11</sup>

The War Department also issued a handbook to guide field commanders who were about to move into Germany, which dealt with three aspects of the occupation:

- 1. possible conditions in Germany and the essentials of military government;
- 2. the 12 functions of an occupation, including "food, finance, and education and religion"; and

Holocaust and Soviet War Crimes Trials, December 1945–February 1946", in *Holocaust and Genocide Studies*, 2003, vol. 17, no. 1, p. 3.

<sup>&</sup>lt;sup>10</sup> David M. Crowe, "Introduction", in David M. Crowe (ed.), *Stalin's Soviet Justice: 'Show' Trials, War Crimes Trials, and Nuremberg*, Bloomsbury, 2019, p. 6.

<sup>&</sup>lt;sup>11</sup> United States Department of State, Foreign Relations of the United States Diplomatic Papers, 1944. General, Volume I, US Government Printing Office, 1966, p. 291, see also pp. 284, 285-87, 288, 295.

3. various ordinances and laws that would "constitute the legal bond between the Germans and military government".<sup>12</sup>

The handbook would also be used by the US as a blueprint for the planning of the occupation of Japan.

Hans Morgenthau, Roosevelt's Treasury Secretary and one of his most trusted advisers, received a copy of the handbook, and was stunned by what he read, particularly when it came to what he saw as a liberal programme of German "economic rehabilitation".<sup>13</sup> He wrote to the President about his concerns and told Henry Stimson, the Secretary of War, not to release the handbook because it gave him "the impression that Germany is to be restored just as much as the Netherlands or Belgium, and the people of Germany brought back as quickly as possible to their pre-war estate".<sup>14</sup>

Morgenthau drew up his own occupation plan – "Suggested Post-Surrender Program for Germany"<sup>15</sup> – that he wanted Roosevelt and Churchill to consider at the Quebec Conference in mid-September 1944. If adopted, it would have transformed Germany into "'a primarily pastoral community' too weak to threaten Europe and the world".<sup>16</sup> The War and State Departments voiced strong objections to it, particularly Stimson, who thought it would do nothing to "prevent war" and might even "breed it".<sup>17</sup> Though Churchill initially accepted the Morgenthau plan, both leaders soon backed away from it when it was leaked to the press.<sup>18</sup>

<sup>&</sup>lt;sup>12</sup> Earl F. Ziemke, *The U.S. Army and the Occupation of Germany, 1944–1946*, Center of Military History, US Army, Washington, D.C., 1975, vol. 3, pp. 83-84. See also United States Army and Navy Manual of Military Government and Civil Affairs, War Department, 22 December 1943, FM 27-5, pp. 6-7.

<sup>&</sup>lt;sup>13</sup> Ziemke, 1975, pp. 87-88, see above note 12.

<sup>&</sup>lt;sup>14</sup> Quoted in Roger Daniels, *Franklin Roosevelt: The War Years, 1939-1945*, University of Illinois Press, 2016, p. 421.

<sup>&</sup>lt;sup>15</sup> United States Department of State, Foreign Relations of the United States, Conference at Quebec, 1944, US Government Printing Office, 1972, pp. 101-08.

<sup>&</sup>lt;sup>16</sup> Roy Jenkins, *Churchill: A Biography*, Farrar, Straus, and Giroux, 2001, p. 754; Herbert Levy, *Henry Morgenthau, Jr.: The Remarkable Life of FDR's Secretary of the Treasury*, Skyhorse, New York, 2010, pp. 381-94.

<sup>&</sup>lt;sup>17</sup> United States Department of State, 1972, pp. 94-95, 100, see above note 15.

<sup>&</sup>lt;sup>18</sup> David B. Woolner, "Coming to Grips with the 'German Problem': Roosevelt, Churchill and the Morgenthau Plan at the Second Quebec Conference", in David B. Woolner (ed.), *The Second Quebec Conference Revisited: Waging War, Formulating Peace: Canada, Great Britain, and the United States in 1944-1945*, St. Martin's Press, New York, 1998, pp. 85-89.

The Morgenthau plan also suggested that the UN draw up a "list of the arch-criminals of this war whose obvious guilt has generally been recognized" and arrest them. Once they were properly identified, they should be executed by "firing squads". It also argued that other German criminals should be tried by Allied military commissions, while all members of the SS ('*Schutzstaffel*'), the Gestapo ('*Geheime Staatspolizei*'), "high officials of the police, S.A. ['*Schutzabteilung*'], and other security organizations", "high Government and Nazi Party officials" as well as all other "leading public figures closely identified with Nazism" should be detained until their guilt could be determined.<sup>19</sup>

Stalin had already begun aggressively to conduct 'show' trials of collaborators and Germans that were more political theatres than true legal proceedings. Several weeks after the Big Three issued the Moscow Declaration on Atrocities, Stalin suggested at a dinner in Tehran that the "German General Staff [...] be liquidated". When Churchill questioned him about this, the Soviet leader replied that "fifty thousand must be shot". Roosevelt, trying to lighten the mood, suggested they only shoot 49,000. Churchill stormed out of the room in anger, followed by Stalin who told him "they were playing" and had no intention of doing this.<sup>20</sup>

Churchill and Stalin discussed the question of war crimes trials in late 1944. The Soviet leader supported the idea out of fear that their critics would argue that the Allies were afraid to conduct such trials. More importantly, he thought such proceedings would be a way to show the world the sacrifices made by the Soviet military and people during the war.<sup>21</sup>

A few months earlier, Colonel Murray C. Bernays, a member of the US Army's Deputy Chief of Staff (as known as 'G-1'), wrote a memorandum that dealt with the prosecution of German war criminals. He opposed the summary executions of Nazi leaders because this would violate the very principles that had driven the UN to take up arms, and could lead to the "martyrdom of Nazi leaders like Hitler". However, he also thought the German people should have to face the guilt of their leaders as well as "their responsibility for the crimes committed by their government". He proposed that an international court charge various groups such as the Nazi party, the German government, the SS, the SA, the Gestapo and so on

<sup>&</sup>lt;sup>19</sup> United States Department of State, 1972, pp. 105-07, see above note 15.

<sup>&</sup>lt;sup>20</sup> *Ibid.*, p. 154.

<sup>&</sup>lt;sup>21</sup> *Ibid.*, pp. 92, 466-67; Crowe, 2014, pp. 155-56, see above note 7.

with conspiracy to commit murder, terrorism and the destruction of peaceful populations in violation of the laws of war.<sup>22</sup>

Bernays argued that the evidence used in these trials should be sufficient to prove the criminal intent of these organizations so that individual members could be held accountable for criminal acts other than conspiracy. He was aware that the use of the charge of conspiracy in an international criminal trial would be controversial, and noted that Aron Trainin, a Soviet jurist, had recently argued in *The Criminal Responsibility of the Hitlerites* that the charge of complicity, which was similar to conspiracy, should be used in war crimes indictments.<sup>23</sup>

Bernays' memorandum went through several revisions as it passed through the State and Justice Departments, but remained the nucleus of the US "Trial and Punishment of European War Criminals", which was released in early 1945 to help America's allies think more seriously about plans to conduct trials of major German war criminals.<sup>24</sup>

### 3.2.3. The London Conference

For the next few months, the question of war crimes trials remained unsettled. However, just before his death on 20 April 1945, President Roosevelt sent Judge Samuel Rosenman to London to discuss the issue with the British and the French. While both governments still seemed to favour summary executions,<sup>25</sup> the British War Cabinet had already concluded that for the principal Nazi leaders a full trial under judicial review was not out of the question. President Truman opposed the idea of summary executions, and in early May 1945, the British War Cabinet hesitantly agreed to support war crimes trials.<sup>26</sup> At the same time, Truman appointed US Supreme Court Justice Robert H. Jackson to be US Chief Counsel for the

<sup>&</sup>lt;sup>22</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Little, Brown and Co., Boston, 1992, pp. 35-36.

<sup>&</sup>lt;sup>23</sup> Ibid.; A.N. Trainin, Criminal Responsibility of the Hitlerities, Legal Publishing House, Moscow, 1944, pp. 109-17.

<sup>&</sup>lt;sup>24</sup> Crowe, 2014, pp. 158-59, see above note 7; International Conference on Military Trials, "Memorandum for the President: Trial and Punishment of Nazi War Criminals", Yale Law School, The Avalon Project, 22 January 1945, pp. 1-12 (available on the university's web site).

<sup>&</sup>lt;sup>25</sup> Samuel B. Hand, *Counsel and Advise: A Political Biography of Samuel I. Rosenman*, Garland, New York, 1979, pp. 196-97.

<sup>&</sup>lt;sup>26</sup> Taylor, 1992, pp. 32-33, see above note 22.

trials. In Jackson's view, the trials had to adhere to a code of judicial fairness.

The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial.<sup>27</sup>

Jackson moved his team to London in June 1945 to work with the UNWCC and the other major powers to plan for the trials.<sup>28</sup> A month earlier, the US presented the British, the French and the Soviets with a draft agreement for the conduct of such trials at the UN Conference in San Francisco.<sup>29</sup> The principal charge dealt with crimes committed while waging a war of aggression. It stated that those countries that chose to adhere to the agreement had

the right to charge and try defendants under this Agreement for violations of law other than those recited above (six were cited in the Declaration of Criminal Acts), including but not limited to atrocities and crimes committed in violation of the domestic law of any Axis Power or satellite or of any of the United Nations.<sup>30</sup>

It also laid out some key ideas about the conduct of the trials, which would be undertaken by Big Four military tribunals. It further stated that the guilt or innocence of Nazi Germany's leaders, their associates, and their principal organizations such as the SS and the Gestapo should be determined by the "*judicial* action of a military tribunal and not by political action of the Allied Governments". The alleged guilt of such leaders and their organizations should be based on their "voluntarily participation in a *common criminal enterprise*" which resulted in "Axis atrocities and war crimes".<sup>31</sup>

<sup>&</sup>lt;sup>27</sup> Robert H. Jackson, "The Rule of Law Among Nations", in *American Bar Association Journal*, 1945, vol. 19, pp. 140-41. This is the speech made by Justice Jackson before the American Society of International Law on 13 April 1945.

<sup>&</sup>lt;sup>28</sup> Crowe, 2014, pp. 245-49, 253-54, see above note 7.

<sup>&</sup>lt;sup>29</sup> United States Department of State, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, US Government Printing Office, Washington, DC, 1949, p. 22.

<sup>&</sup>lt;sup>30</sup> *Ibid.*, p. 24.

<sup>&</sup>lt;sup>31</sup> *Ibid.*, pp. 29-30.

The British suggested some modest changes to the American draft. On 6 June 1945, Jackson wrote to Truman that the US and the UK were working closely together, while France agreed "in principle" with the "American proposals".<sup>32</sup> On the other hand, the Soviets initially refused to respond to invitations to take part in the talks in London. Regardless, Jackson insisted that the UK, France and the US move forward with the discussions. In his 6 June 1945 report to President Truman, Jackson argued that the cases against major German war criminals

must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.<sup>33</sup>

The trials, he concluded, would revolve around the "crime which comprehends all lesser crimes [...] the crime of making unjustifiable war".<sup>34</sup>

In the meantime, the Soviets finally agreed to join the talks, and on 26 June 1945, the Big Four International Conference on Military Trials opened in London. The heads of each delegation – Robert Falco (France), Sir David Maxwell Fyfe (UK), General I.T. Nikitchenko (Soviet Union), and Robert Jackson (US) – would also play prominent roles in the Nuremberg Trial.<sup>35</sup> The discussions were intense but friendly. Many of the differences centred on certain Anglo-American and continental legal concepts, particularly the presentation of evidence, conspiracy and the trial of organizations. In addition to translation and interpretative issues, the Soviets struggled with terms like 'prosecutor' and their role in issuing an indictment. There were also differences about the location of the Allied Control Council and the trial.<sup>36</sup> Many of the issues raised by the Soviets were a reflection of their lack of knowledge regarding the basics of Western legal concepts, traditions and practices. The Soviet delegation was further handicapped by the fact that Stalin and his legal mouthpiece, An-

<sup>&</sup>lt;sup>32</sup> *Ibid.*, pp. 44-46.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, p. 48.

<sup>&</sup>lt;sup>34</sup> *Ibid.*, p. 51.

<sup>&</sup>lt;sup>35</sup> *Ibid.*, p. 441.

<sup>&</sup>lt;sup>36</sup> Ibid., pp. 71-85, 129-54, 259-79, 291-311, 327-59; Whitney Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, Southern Methodist University Press, Texas, 1999, pp. 11-22; Taylor, 1992, pp. 59-67, see above note 22.

drei Vyshinsky, micromanaged every aspect of the Soviet interaction with the other delegations.  $^{\rm 37}$ 

Jackson, who was frustrated with the problems created by what he saw as Soviet intransigence, flew to Potsdam at the end of July 1945 to discuss this with American officials. He was told to find a way to reach a compromise with the Soviets as long as it did not "derogate from the fundamental axioms of justice".<sup>38</sup> At this point, Sir William Jowitt, the new British Lord Chancellor, stepped in, and arranged for new meetings in London with the four delegations, which led to fresh talks. On 8 August 1945, Falco, Jackson, Jowitt, Nikitchenko and Trainin signed the Nuremberg Agreement and Charter which included the Charter of the IMT. These documents would guide not only the prosecution of war criminals at Nuremberg, but also in Tokyo.<sup>39</sup>

The Charter gave the IMT the authority to try and punish individuals from former Axis countries for crimes against peace, war crimes, crimes against humanity, as well as individuals involved in a common plan or conspiracy to commit such crimes. It could also declare any group to be a criminal organization if any of those under indictment belonged to such a group. Each of the signatory nations would appoint a Chief Prosecutor who would be part of a committee that would decide on whom to indict, approve the indictment, and draft the rules of procedure for the trial. Each nation sitting in judgment would appoint a judge and an alternate to serve on the tribunal. Decisions by the judges were to be by majority vote, though in the case of a tie the vote of the court's President would "be decisive". Defendants were to be afforded complete "fair trial" rights which included the translation of documents into German, an attorney of his own choosing, the presentation of documents to strengthen his case, and the right to cross-examine witnesses.<sup>40</sup>

The tribunal was to follow legal norms common to most Western criminal trials. It was also to conduct an "expeditious hearing of the issues

<sup>&</sup>lt;sup>37</sup> Irina Schulmeister-André and David M. Crowe, "'May Justice be Done': The Soviet Union and the London Conference (1945)", in Crowe, 2019, pp. 161-62, see above note 10; for a detailed study of the role of the Soviets at Nuremberg, see Irina Schulmeister-André, *Internationale Strafgerichtsbarkeit unter sowjestischem Einfluss: Der Beitrag der UdSSR zum Nürnberger Hauptkriegsverbrechersprozess*, Duncker & Humbolt, Berlin, 2016.

<sup>&</sup>lt;sup>38</sup> Taylor, 1992, p. 68, see above note 22.

<sup>&</sup>lt;sup>39</sup> Report of Robert H. Jackson, pp. 398-421, see above note 29.

<sup>&</sup>lt;sup>40</sup> *Ibid.*, pp. 425-26.

raised by the charges" and prevent any actions in the courtroom that would "cause unreasonable" delays. It was not to be bound by "technical rules of evidence" and the tribunal had the right to review any evidence before it was presented in court to determine its relevance to the proceedings. The final portions of the Charter provided an outline for the conduct of the trial from beginning to end, with separate articles on the judgment and sentence.<sup>41</sup>

## 3.3. Proceedings

## 3.3.1. The Nuremberg Trial

Work on the indictment began in mid-August 1945.<sup>42</sup> It included one of four criminal charges against each of the 24 defendants as well as the Nazi Party, the SS, the SD ('Sicherheitsdienst'), the Gestapo, the SA, and the principal German military leadership organizations. The trial opened in Berlin on 18 October 1945 with the reading of the indictment, and resumed a month later in Nuremberg. The US and the UK played the leading role in the trial, though some of the most dramatic evidence was introduced by the Soviet prosecutors. This included shocking US and Soviet films on the worst of German abuses in death and concentration camps. The trial, which most thought would only last a few months, took much longer, not only because of the large body of fresh evidence flowing into Nuremberg, but also because of the need to translate it into the tribunal's four official languages. This put the defence attorneys, who were understaffed and overwhelmed by these problems, at a disadvantage throughout the trial. The prosecutors were also handicapped by their lack of knowledge of continental law, the German language, and Nazi Germany's complex political and military system.<sup>43</sup> But as the trial progressed, the overwhelming body of evidence proved to be more than enough to find most of the defendants guilty of many of the crimes in the indictment.<sup>44</sup>

<sup>&</sup>lt;sup>41</sup> *Ibid.*, pp. 426-28.

<sup>&</sup>lt;sup>42</sup> Ann Tusa and John Tusa, *The Nuremberg Trial*, Skyhorse, 2010, p. 108; Taylor, 1992, pp. 113-15, see above note 22; Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression: Opinion and Judgement, US Government Printing Office, 1947, pp. 105-06 ('Nazi Conspiracy').

<sup>&</sup>lt;sup>43</sup> Taylor, 1992, pp. 173-77, 203, see above note 22; Bradley F. Smith, *Reaching Judgement at Nuremberg*, Basic Books, 1977, pp. 82-86.

<sup>&</sup>lt;sup>44</sup> Taylor, 1992, p. 306, see above note 22.

The prosecution divided the trial into four parts. The Americans opened with the overall charge of waging aggressive war, while the British dealt with crimes against humanity and, on occasion, joined the Americans in their cases against individual defendants. The French were responsible for war crimes and crimes against humanity in Western Europe, while the Soviets dealt with crimes against humanity in Eastern Europe and the Soviet Union. The prosecution finished its cases on 4 March 1946, followed by the defence cases, which ended on 25 July 1946.<sup>45</sup>

This was followed by the cases against the various Nazi organizations from mid to late August. On 31 August 1946, each defendant was given the opportunity to make a statement, and from 30 September to 1 October 1946, the judges read the judgments.<sup>46</sup> When they began their deliberations, the judges decided, against Soviet objections, that a tie vote would mean acquittal. Somehow, the judges found a way to finesse embarrassing issues like the Munich Accord, Stalin's two-year accord with Hitler, the Soviet invasion of Poland, the Katyn massacres in 1940, and French collaboration. In the end, after considerable disagreements, the judges sentenced 12 of the defendants to death, 3 to life, 4 to prison terms of 10–20 years, and acquitted 3 of all charges.<sup>47</sup> They declared the Leadership Corps of the Nazi Party, the Gestapo, the SD, and the SS to be criminal organizations, and stated:

> A member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the

<sup>&</sup>lt;sup>45</sup> Crowe, 2014, see above note 7; International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946*, 1947-1949, vol. 9, pp. 1-234 (available in various volumes in the ICC Legal Tools Database); David Patrick Maxwell Fyfe Kilmuir, *Political Adventure: The Memoirs of the Earl of Kilmuir*, Weidenfeld and Nicolson, 1964, p. 112; Francis Biddle, *In Brief Authority*, Doubleday, 1962, pp. 409-10; Taylor, 1992, pp. 238-39, see above note 22; Tusa and Tusa, 2010, pp. 270-71, see above note 42.

<sup>&</sup>lt;sup>46</sup> Lord Justice Col. Sir Geoffrey Lawrence from the United Kingdom served as the court's president, and Sir Norman Birkett, his alternate. Professor Henri Donnedieu de Vabres was France's judge, with Robert Falco, his alternate. Major Gen. Iona Nikitchenko was the Soviet judge, and Lt. Col. Alexander Volchkov, his alternate. Francis Biddle was the American judge with John J. Parker, his alternate. All eight judges were in attendance throughout the trial. The alternates could take part in discussions about the trial but had no voting rights.

<sup>&</sup>lt;sup>47</sup> Crowe, 2014, pp. 190-92, see above note 7.

crime of membership and be punished for that crime by death.  $^{48}\,$ 

Once the sentences were announced, Nikitchenko read his dissenting opinion on the acquittal of Schacht, von Papen and Fritzsche, and the decisions on Hess, the Reich Cabinet, the General Staff, and the OKW ('*Oberkommando der Wehrmacht*').<sup>49</sup> This was fully expected, as Stalin thought all of the defendants should be found guilty and shot, and that all of the accused groups should be declared criminal organizations.

Such objections did little to detract from the importance of the Nuremberg Trial, which remains one of the most important legal undertakings in history. Its precedents remain a cornerstone of international criminal law, and were enshrined in the UN General Assembly's 1946 Resolution 95 (I). The resolution affirmed the legal principles of the IMT Charter and judgment, and called for the creation of an international criminal code based on these precedents. Four years later, the UN's new International Law Commission went a step further and adopted the Nuremberg Principles, which were also drawn from the Charter and judgment. The seven principles began with statements on individual responsibility for criminal violations under international law. Principle VI declared that all four of the indictable war crimes laid out in the Nuremberg Charter were crimes under international law, while Principle VII declared that complicity, a legal concept developed by Vishinsky and Trainin, was also a crime under international criminal law.<sup>50</sup> These principles would later be cited in the decisions of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. They can also be

<sup>&</sup>lt;sup>48</sup> Nazi Conspiracy, pp. 85, 87-102, see above note 42.

<sup>&</sup>lt;sup>49</sup> *Ibid.*, pp. 166-88.

<sup>&</sup>lt;sup>50</sup> Antonio Cassese, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I)", in *United Nations Audiovisual Library of International Law*, 2009, pp. 1-5 (available on the Library's web site); International Law Commission, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", in *Yearbook of the International Law Commission*, 1950, vol. 2, para. 97 (https://www.legal-tools.org/doc/5164a6/); Valentyna Polunina, "The Human Face of Soviet Justice? Aron Trainin and the Origins of the Soviet Doctrine of International Criminal Law", in Crowe, 2019, pp. 131-32, see above note 10; see also Trainin, 1944, pp. 109-18, see above note 23; Vyshinsky introduced the charge of complicity in his closing remarks in the last of the major Moscow 'show' trials in 1938. David M. Crowe, "Late Imperial and Soviet 'Show' Trials, 1878-1938", in Crowe, 2019, pp. 64-65, see above note 10.

found in the Rome Statute, which gave birth to the permanent International Criminal Court.

# 3.3.2. The Tokyo Trial

The decisions of the IMTFE never came to enjoy the importance and prestige of the Nuremberg Tribunal, and was, quite erroneously, seen by some as an exercise in post-war 'victor's justice'. Like Nuremberg, planning for the Tokyo Trial was part of larger efforts to develop the US's occupation policy for Japan. In early 1943, the State Department created an Interdivisional Area Committee on the Far East to study occupation policies. A year later, the US created the State-War-Navy Coordinating Committee ('SWNCC') to oversee the development and implementation of such plans. Among its earliest documents was the Instrument of Surrender and Political-Military Problems in the Far East: United States Initial Postdefeat Policy Relating to Japan (SWNCC/150/4; 22 September 1945).<sup>51</sup>

According to James Forrestal, the Secretary of the Navy, no one in the SWNCC wanted to "hand Morgenthau these islands", nor subjugate them in any way, which raised questions about what exactly the US meant when it demanded Japan's "unconditional surrender". The Potsdam Proclamation of 26 July 1945 clarified this and stated that, though the Allies expected Japan's unconditional surrender, they also pledged to follow SWNCC's proposals about removing

> all obstacles to the revival and strengthening of democratic tendencies of the Japanese people. Freedom of speech, of religion, and thought, as well as respect of fundamental human rights shall be established.

The proclamation did not mention anything about the possible indictment of Emperor Hirohito for war crimes, topics that the SWNCC had been discussing for some time.<sup>52</sup> This was a question that haunted Allied prosecutors in the fall of 1945 as they began discussions about the trial.

<sup>&</sup>lt;sup>51</sup> Ian Toll, *Pacific Crucible: War at Sea in the Pacific, 1941-1942*, W.W. Norton & Company, New York, 2012, pp. 43-45, 59, 374, 478-79; Hugh Bolton, "Preparation for the Occupation of Japan", in *Journal of Asian Studies*, 1996, vol. 25, no. 2, pp. 203-05.

<sup>&</sup>lt;sup>52</sup> Michael Neiberg, Potsdam: The End of World War II and the Remaking of Europe, Basic Books, 2015, p. 238; Crowe, 2014, p. 154, see above note 7; Neil Boister and Robert Cryer (eds.), Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments, Oxford University Press, 2008, pp. 1-2.

Hugh Bolton, who prepared a report on this question for the State Department, suggested that the

imperial family be placed under protective custody but the Emperor be given access to his advisers. Furthermore, he should delegate to his subordinates the carrying out of their administrative duties so the occupation forces would be able to use the maximum number of Japanese officials. If this plan is impracticable, then the occupying authorities could suspend all of the functions of the Emperor.<sup>53</sup>

SWNCC/150/4 supported this approach and strongly recommended that MacArthur follow this moderate path when dealing with Hirohito.<sup>54</sup> MacArthur agreed, and concluded that the Emperor was an important figurehead in the Japanese consciousness. He also feared that if the Emperor was tried, convicted and hanged as a war criminal, a guerrilla war would probably break out that would require "at least one million reinforcements should such action be taken".<sup>55</sup>

The SWNCC also sent MacArthur several directives in September 1945 that dealt with the question of war criminals. The first simply told him that anyone accused of being a war criminal was to be arrested, tried and convicted of such crimes.<sup>56</sup> Later that month, it sent him more precise guidelines for dealing with this issue: "Identification, Apprehension and Trial of Persons Suspected of War Crimes". It ordered MacArthur not to take any action against the Emperor until he received special instructions from Washington. It also gave MacArthur the power to create special military courts and their rules of procedure.<sup>57</sup>

If MacArthur had any doubts about how to deal with Hirohito, they disappeared after his meeting with him on 22 September 1945. He later

<sup>&</sup>lt;sup>53</sup> Bolton, 1996, p. 205, see above note 51.

<sup>&</sup>lt;sup>54</sup> Noah Berlin, "Constitutional Conflict with the Japanese Imperial Role: Accession, Yasukuni Shrine, and Obligatory Reformation", in *Journal of Constitutional Law*, 1998, vol. 1, no. 2, p. 391.

<sup>&</sup>lt;sup>55</sup> MacArthur, 1964, pp. 279-80, see above note 1.

<sup>&</sup>lt;sup>56</sup> State-War-Navy Coordinating Committee, "Political-Military Priorities in the Far East: United States Initial Post-Defeat Policy Relating of Japan", National Diet Library Digital Collections, SWNCC 150/3, 22 August 1945, p. 6 (available on the official web site of the Library).

<sup>&</sup>lt;sup>57</sup> Douglas MacArthur Archives, SWNCC, RG 9, Box 159, Folder, 'War Crimes, Sept. 45-June 46', "Identification, Apprehension and Trial of Persons Suspected of War Crimes", 22 September 1945, pp. 1-2.

wrote that the Emperor took full responsibility for the political and military decisions made during the war, and saw himself simply as a constitutional monarch. John Dower sees this more as an "ornamental version" of what was actually said during the meeting, though whatever took place established the basis for a strong relationship between both men.<sup>58</sup>

This, however, did not deter MacArthur from proposing the trial of Japan's wartime cabinet, led by Hideki Tōjō, for the murder of Americans at Pearl Harbor. The White House rejected this idea, and prompted Mac-Arthur, who was determined to assert his authority to conduct such proceedings, to order the trial of General Tomoyuki Yamashita and General Masaharu Honma [Homma], who had played prominent roles in the conquest and occupation of the Philippines.<sup>59</sup> MacArthur, who had been driven from the Philippines in 1942, later wrote that the "bitter memories and heartaches [of those losses and tragedies] will never leave me".<sup>60</sup>

What followed were two trials in Manila in late 1945 (Yamashita) and early 1946 (Honma) that were widely criticized for their unfairness. Robert Shaplen, a reporter for *Newsweek* who attended the Yamashita trial, wrote that most of the reporters in the courtroom were convinced that Yamashita's fate was decided before the trial began. Both Yamashita and Homma were convicted and sentenced to death, decisions that were appealed to the US Supreme Court. Though the majority of the justices concurred with them, Justices Wiley Rutledge and Frank Murphy concluded that both trials failed to guarantee Yamashita and Honma their most basic due process rights. Moreover, both defendants were charged with the crime of command responsibility which, according to Gary Solis, had no precedent in US military law at the time. MacArthur, who had the final say in these trials, considered them just and fair.<sup>61</sup>

<sup>&</sup>lt;sup>58</sup> Berlin, 1998, p. 395, see above note 54; MacArthur, 1964, pp. 287-288, see above note 1; John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, W.W. Norton & Company, 1999, pp. 295-96; D. Clayton James, *The Years of MacArthur. Volume III: Triumph and Disaster, 1945–1964*, Houghton Mifflin, Boston, 1985, vol. 3, p. 322.

<sup>&</sup>lt;sup>59</sup> MacArthur Archives, RG9, Box 159, Folder 'War Crimes, Sept. 45-June 46', "MacArthur to WARCOS", 7 October 1945, p. 1; *ibid.*, Washington to CINCAFPAC [MacArthur], 11 October 1945, p. 1.

<sup>&</sup>lt;sup>60</sup> MacArthur, 1964, p. 146, see above note 1.

<sup>&</sup>lt;sup>61</sup> UNWCC, Law Reports of Trials of War Criminals, 1948, vol. 4, pp. 3-4, 37-63 (https:// www.legal-tools.org/doc/2cfea3/); Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, 2010, p. 383; Peter Maguire, *Law and War: International Law and American History*, Columbia University Press, 2010,

While MacArthur was planning the trials in Manila, President Truman appointed Joseph B. Keenan, a seasoned criminal lawyer who worked as a 'crime buster' under J. Edgar Hoover and was close to President Roosevelt, to be the IMTFE's Chief Prosecutor.<sup>62</sup> Though MacArthur was worried that Keenan might undercut the work of Colonel Alva C. Carpenter, who was already planning Class B and C trials, he was reassured by Secretary of War Robert P. Patterson that Keenan was fully under MacArthur's command and would only be handling Class A war criminals.<sup>63</sup> All of the defendants in the Tokyo Trial were charged with crimes against peace, while the Class B and C charges were reserved for national trials of defendants who had committed conventional war crimes and crimes against humanity.<sup>64</sup> Keenan, who was already fearful of running afoul of MacArthur, was in full agreement with this. Over time, MacArthur and Keenan established a strong personal relationship, particularly as criticism of the Tokyo Trial intensified over the next few years.<sup>65</sup>

From the outset, planning for the Tokyo Tribunal faced a number of daunting problems that were never fully overcome. For one, MacArthur was determined to dominate the proceedings from start to finish, though in 1946, some prosecutors rebelled and forced him to take a less controlling role when it came to the trial. Nevertheless, MacArthur did everything possible to ensure that the Far Eastern Commission, the Allied body

p. 107; Hampton Sides, "The Trial of General Homma", in *American Heritage*, February/ March 2007, vol. 58, no. 1, pp. 2, 17-19.

<sup>&</sup>lt;sup>62</sup> Papers of Joseph B. Keenan ('Keenan Papers'), "Joseph B. Keenan Biography", Harvard University, Box 2, n.d., pp. 1-8.

<sup>&</sup>lt;sup>63</sup> The idea for Class A, B and C trials first came up in late 1944, as part of the War Department's discussion of plans for the trial of German war criminals. See War Department Office Chief of Staff, "Memorandum for Lt. Colonel Murray C. Bernays", in *The War Crimes Trial at Nuremberg*, Harry S. Truman Presidential Library and Museum, 22 November 1944, G-1, p. 2 (available on the Harry S. Truman Library and Museum's web site).

<sup>&</sup>lt;sup>64</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008, p. l.

<sup>&</sup>lt;sup>65</sup> MacArthur Archives, RG 9, Box 159, Folder 'War Crimes, Sept. 45-June 46', "CIN-CAFPAC ADV to WARCOS", 25 October 1945, p. 1; *ibid.*, "CINCAFPAC ADV (MAC-ARTHUR PERSONAL) to Washington (SECRETARY OF STATE)", 2 November 1945, p. 1; *ibid.*, "WASHINGON (SECRETARY OF WAR) to CINCAFPAC ADV (PERSON-AL FOR MACARTHUR)", 14 November 1945, p. 1; *ibid.*, "CINCAFPAC ADV TO WARSEC", 17 November 1945, pp. 1-2; *ibid.*, "WASHINGTON (SECRETARY OF STATE PATTERSON)", 18 November 1945, p. 1; *ibid.*, "John J. McCloy to General Douglas MacArthur", 19 November 1945, pp. 1-3.

that was supposed to advise the US on occupation policies in Japan, remained under his full control.<sup>66</sup> When the Australians tried to convince the Far Eastern Commission to indict the Emperor for war crimes, MacArthur warned its members that if they did, they should prepare for an "indefinite military occupation" involving a million Allied troops.<sup>67</sup>

Unfortunately, MacArthur's self-assured manner did not rub off on Keenan, and almost from the moment he arrived in Tokyo he was overwhelmed by the workload and organizational difficulties. He also had doubts about not indicting Hirohito and thought that the institution of the Emperor was "still highly dangerous and one that will have to be done away with before there will be any solid foundation for reasonable expectation of peace".<sup>68</sup>

In February 1946, Arthur Comyns-Carr, the British head of the prosecutors' Executive Committee,<sup>69</sup> sent Keenan a memorandum that raised concerns about his approach to the preparation of the prosecution's cases. It argued that the Chief Prosecutor was spending too much time interrogating individual suspects, and needed to focus on securing "the ruling that planning and waging aggressive war constituted a crime in international law".<sup>70</sup> He also suggested that Keenan select 15–20 defendants who were "representative of the responsibility of various criminal acts or incidents". He added that while the Japanese public generally supported such a trial, this could quickly change if the trial was prolonged. Moreover, Comyns-Carr argued that the Tokyo Trial would not garner the same international interest as the one in Nuremberg, and once the latter was over, the whole subject of international trials would "fall to a vanishing point". Consequently, in selecting defendants, the question of who was and who was not a major war criminal became a question "of degree". The key issues in selecting defendants, he went on, should be their involvement in Japan's various acts of aggression and their "negligible

<sup>&</sup>lt;sup>66</sup> Boister and Cryer, 2008, pp. 21-22, see above note 64; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008, p. 28.

<sup>&</sup>lt;sup>67</sup> "Memorandum of Interview with General of the Army Douglas MacArthur", National Diet Library, 30 January 1946, pp. 3-4 (available on the Library's official web site).

<sup>&</sup>lt;sup>68</sup> Keenan Papers, "Joseph B. Keenan to Kenneth McKellar", Box 2, 26 December 1945, pp. 1-2.

<sup>&</sup>lt;sup>69</sup> It was made up of Keenan, each nation's associate prosecutors, and their staffs.

<sup>&</sup>lt;sup>70</sup> Totani, 2008, p. 66, see above note 66.

chances of acquittal". The most obvious defendants would be former members of the highest organs of State and war, including the Emperor's Imperial Conference and Privy Council.<sup>71</sup> Keenan accepted most of these suggestions but resented what he considered to be British efforts to run the trial.<sup>72</sup>

At this point, the tribunal still faced a number of serious issues including the selection of defendants, the Charter, and the final selection of those nations which would make up the tribunal. MacArthur, Keenan and other members of the prosecution team spent months working on the Charter and its Rules of Procedure, which were issued on 25–26 April 1946. Though modelled on the Nuremberg Charter, there were some differences that centred on trying to avoid some of the problems that the prosecution was facing in Germany. Yet the fact that MacArthur and Keenan rejected suggestions that the US send a liaison officer from Nuremberg to help with trial planning underscored their determination to conduct the Tokyo Trial without help from Jackson and his team in Germany.<sup>73</sup>

Though both charters were similar in length, the IMTFE Charter consisted of 17 articles as opposed to Nuremberg's 30 articles. It was broken down into five sections as opposed to Nuremberg's seven. Articles 1 to 4 dealt with the basic creation and structure of the tribunal, while Articles 5 to 7 (Articles 6 to13 of the Nuremberg Charter) dealt with the question of jurisdiction. Articles 9 to 10 (Article 16 of the Nuremberg Charter) discussed the question of a fair trial, and Articles 11 to 15 (Articles 17 to 25 of the Nuremberg Charter) dealt with the powers of the tribunal and the conduct of the trial. Articles 16 to 17 (Articles 26 to 30 of the Nuremberg Charter) briefly touched on questions of judgment and sentencing. The nine rules of procedure, which were discussed in Article 9, allowed the court to amend or change any of these rules to ensure "a fair and ex-

<sup>&</sup>lt;sup>71</sup> Boister and Cryer, 2008, pp. 53-54, see above note 64; Totani, 2008, pp. 67-69, see above note 66.

<sup>&</sup>lt;sup>72</sup> Keenan Papers, "Joseph B. Keenan to Joseph Bossong", Box 2, 13 August 1946, p. 2.

<sup>&</sup>lt;sup>73</sup> MacArthur Archives, RG9, Box 159, Folder 'War Crimes, Sept. 45-June 46', "Assistant Secretary of War to MacArthur", 27 September 1945, p. 1. MacArthur never responded to this suggestion; David M. Crowe, "MacArthur, Keenan and the American Quest for Justice at the IMFTE", in Kerstin von Lingen (ed.), *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-1948*, Brill, Leiden, 2018, vol. 117, p. 73; Bernays was supposed to go to Japan to help Keenan but retired at the end of 1945.

peditious trial". The IMTFE Charter also gave MacArthur, as Supreme Allied Commander, South West Pacific Area, the power to appoint judges, the trial's President, and the General Secretary, whose Secretariat would

> [r]eceive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.<sup>74</sup>

Diplomatically, MacArthur thought it best to allow each of the countries that would sit in judgment in Tokyo to nominate their own judges. But unlike Nuremberg, where each country had alternate judges, there were none at the IMTFE, which meant that if a judge was away from court for any length of time, as often happened, his country would not be represented in court. Moreover, most of the judges, though trained as criminal lawyers, had little experience with international criminal law or military commissions.<sup>75</sup>

In the midst of selecting the judges, the prosecutors began preparing the indictment. MacArthur pushed hard to have the charge of murder included because of the attack on Pearl Harbor. However, most of the prosecutors opposed this idea because it might complicate the principal charge: the conspiracy to wage aggressive war.<sup>76</sup> What complicated all of this was the fact that even though 36 of the 55 counts in the indictment dealt with crimes against peace, it was going to be difficult to prove that there had been a cohesive political-military centre in Japan during the war that could be found guilty of conspiracy. This was doubly so given the decision not to indict Hirohito. The French judge, Henri Bernard, said as much in his dissenting opinion that the failure to indict the Emperor "nullified" the trial and made the accused mere "accomplices".<sup>77</sup>

Comyns-Carr, who outlined the general plan for the trial for the other prosecutors, emphasized the importance of focusing on Japan's acts

<sup>&</sup>lt;sup>74</sup> Charter of the International Military Tribunal for the Far East, 26 April 1946, in Boister and Cryer, 2008, pp. 7-15, see above note 52 (also annexed to this volume).

<sup>&</sup>lt;sup>75</sup> The 11 judges were Sir William F. Webb, the Tribunal's President (Australia), Edward S. McDougall (Canada), MEI Ju'ao (China), Henri Bernard (France), Radhabinod Pal (India), Bernard V.A. Röling (The Netherlands), Erima Northcroft (New Zealand), Delfin Jaranilla (Philippines), Lord Patrick (UK), J.P. Higgins/Gen. Myron Cramer (US), and Gen. Ivan Zaryanov (USSR).

<sup>&</sup>lt;sup>76</sup> Boister and Cryer, 2008, p. 157, see above note 64.

<sup>&</sup>lt;sup>77</sup> Crowe, 2014, p. 205, see above note 7; Boister and Cryer, 2008, p. 676, see above note 52.

of aggression and related crimes throughout Asia. He argued that the guiding principle in selecting defendants was choosing 15 or so who were "representative of the responsibility of the various criminal acts or incidents". Each defendant should also represent a phase of Japan's various acts of aggression and be considered one of Japan's "principal leaders".<sup>78</sup> Some of the prosecutors questioned this approach and thought it was better to emphasize each defendant's individual guilt as opposed to their institutional affiliations. Keenan supported Comyns-Carr's approach and argued that the main goal of the trial was to establish the precedent that those who wage aggressive war were Class A war criminals who violated the "rules of civilization".<sup>79</sup>

In the end, the prosecution adopted a 55-count indictment with three categories – crimes against peace (counts 1 to 36), murder (counts 37 to 52), and conventional war crimes and crimes against humanity (counts 53 to 55). Comyns-Carr later explained that they decided to include murder because it was important to document the fact that those who initiated aggressive war should be considered as nothing more than "ordinary murderers" who deserved their own "special criminal category".<sup>80</sup> In this context, the prosecution tried to prove throughout the trial that the widespread nature of Japanese crimes across Asia was such that the only conclusion one could reach was that "those in leadership circles must have authorized the commission of war crimes as a general policy of the Japanese war and military occupation".<sup>81</sup>

But the various atrocities, war crimes, and crimes against humanity documented in court proceedings were filtered through the charge of a conspiracy to wage aggressive war, which meant that such crimes did not carry the same weight in the Tokyo Trial than they did at Nuremberg.<sup>82</sup> Keenan tried to get the prosecutors to drop the war crimes charges because he thought it would be hard to link them to some of the defendants.

<sup>&</sup>lt;sup>78</sup> Boister and Cryer, 2008, pp. 53-54, see above note 64.

<sup>&</sup>lt;sup>79</sup> Totani, 2008, pp. 22, 67, 68-69, see above note 66.

<sup>&</sup>lt;sup>80</sup> At the Trial's end, the judges rejected Counts 18 to 26 and 39 to 53 which they considered obscure or redundant; A.S. Comyns-Carr, "The Judgement of the International Military Tribunal for the Far East", in *Transactions of the Grotius Society*, 1948, vol. 34, p. 142; Totani, 2008, pp. 105-07, see above note 66.

<sup>&</sup>lt;sup>81</sup> Totani, 2008, pp. 107-08, see above note 66.

<sup>&</sup>lt;sup>82</sup> Boister and Cryer, 2008, pp. 73, 97-98, see above note 64.

However, such crimes were essential to the cases presented by the Chinese, Filipino and British Commonwealth prosecutors.<sup>83</sup>

The prosecution initially held the upper hand in the proceedings, though this changed when the Japanese and American defence lawyers put up an unexpectedly rigorous defence of their clients. This was doubly surprising given the numerous problems the defence lawyers faced from the outset of the trial. Initially, the idea was that, like the German lawyers in Nuremberg, the defendants would have Japanese lawyers. But the Japanese lawyers soon asked MacArthur for help since some of them did not speak English and were unfamiliar with Anglo-American legal principles. Over time, MacArthur was able to bring in young civilian and military lawyers to help their Japanese colleagues. The defence also suffered from lack of time to prepare its cases, inadequate translation and secretarial services, as well as office space. This forced the defence to request frequent extensions and adjournments that prolonged the trial and annoyed the judges and prosecution. This led to questions about the "fair trial criteria under international law" used during the trial.<sup>84</sup>

The language issue was particularly significant, especially when it came to documents or testimonies in Japanese or English. Ultimately, the tribunal created a Language Arbitration Board that required the slow translation of evidence or testimony in court that, according to one prosecutor, slowed the pace of the trial by "one-fifth of its normal pace".<sup>85</sup> Regardless of these challenges, the defence did a better job than the prosecution at addressing some of the core charges against their clients.<sup>86</sup>

The defence attorneys, whose presentations lasted almost as long as the entire Nuremberg Trial (24 February 1947–12 January 1948), did little to challenge the prosecution's charges of war crimes and crimes against humanity. Instead, they focused on countering the charge that the defendants were "individually responsible for the widespread atrocities". They argued that there was no evidence that such crimes took place with the

<sup>&</sup>lt;sup>83</sup> Ibid., p. 179; R. John Pritchard (ed.), The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, Edward Mellen Press, Lewiston, 1998, vol. 9, pp. 3892, 4610; ibid., vol. 11, pp. 4612-15, 4629-35, 4638, 4642; ibid., vol. 27, pp. 12468-69, 12576-77; ibid., vol. 29, pp. 13422-24, 13456-548, 13526-28, 13651-52; ibid., vol. 32, pp. 15035, 15037, 15040.

<sup>&</sup>lt;sup>84</sup> Boister and Cryer, 2008, p. 90, see above note 64.

<sup>&</sup>lt;sup>85</sup> Dower, 1999, p. 458, see above note 58.

<sup>&</sup>lt;sup>86</sup> Pritchard, 1998, vol. 2, see above note 83.

knowledge or orders of the central government.<sup>87</sup> In their attempt to counter such ties, the defence also pointed to differences between Western and Japanese cultural and legal norms as well as the impact that European and American colonialism in Asia had on Japan.<sup>88</sup>

These points were most poignantly raised by several of the eminent Japanese attorneys who appeared before the tribunal. Kenzō Takayanagi challenged the alleged link between Japan's top leaders and the atrocities committed throughout Asia, while Dr. Fusaaki Uzawa, Japan's chief defence attorney, questioned whether aggressive war was truly an international crime under "world law". He noted that the UK had earlier raised questions about the applicability of the Kellogg-Briand Pact on the right of nations to wage wars of "necessary self-defense". Japan was not Nazi Germany, he added, and while the Nuremberg Tribunal had little difficulty proving the 'aggressive' nature of the Nazi war in Europe, the court would have to view such a charge against Japan "*ipso dixit* (asserted but not proven), if not subservient to popular prejudices or a willful travesty of history".<sup>89</sup>

But it was Ichirō Kiyose who laid out the key elements of the Japanese case in his opening remarks in February 1947, who challenged the idea that Japan committed widespread war crimes.<sup>90</sup> He argued that Japan's policies during the war centred on three things: "independence, abolition of racial discrimination, and fundamental principles of democracy". He noted that from the moment that the US forced the opening of Japan in 1853, the key goal of Japanese leaders was to preserve the country's independence and sovereignty. Moreover, he found the charge of racial discrimination to be absurd. Instead, Japan promoted a spirit of racial tolerance as part of its effort to counter such discrimination in East Asia. It also tried to create a new spirit of unity *vis-à-vis* earlier Western efforts to carve out spheres of influence in China. Japan's 'new order', the  $k\bar{o}d\bar{o}$ (imperial way), emphasized "benevolence, righteousness and moral courage", and respected "courtesy and honor".<sup>91</sup> He also challenged the con-

<sup>&</sup>lt;sup>87</sup> Totani, 2008, p. 182, see above note 66.

<sup>&</sup>lt;sup>88</sup> Crowe, 2014, p. 226, see above note 7.

<sup>&</sup>lt;sup>89</sup> Pritchard, 1998, vol. 88, pp. 42078, 42187-88, 42201-04, see above note 83.

<sup>&</sup>lt;sup>90</sup> The Nuremberg indictment dealt only with crimes committed from 1 September 1939 to 8 May 1945, while the Tokyo indictment charged the defendants with crimes dating back to 1 January 1928.

<sup>&</sup>lt;sup>91</sup> Pritchard, 1998, vol. 37, pp. 17017-19, 17021, 17024-26, 17028, see above note 83.

cept of conspiracy and the murder charges, arguing that they were based on *ex post facto* law.<sup>92</sup>

Takayanagi added that the crimes laid out in the IMTFE Charter were 'declaratory' and not accepted concepts in international law. This was particularly true for the charge of conspiracy. Other defence attorneys noted, for example, that the Nuremberg Tribunal had ruled that merely holding an important position in government at the time when a certain incident took place did not establish that "said accused is guilty of a crime against peace".<sup>93</sup> Takayanagi made a similar argument regarding war crimes and the prosecution's efforts to compare such crimes to those committed by Nazi Germany. Kiyose added that Japan's leaders "strongly desired" its troops strictly to observe the laws of war, but admitted that in the chaos during the latter part of the war, it was possible that such crimes might have been committed.<sup>94</sup>

Takayanagi also argued that Allied efforts to try the Japanese defendants for war crimes was a form of "negative criminality" which the American delegation at the Paris Peace Conference in 1919 defined as "responsibility for failure to prevent 'conventional' war crimes and that negligence in preventing death is only considered to be non-capital manslaughter in England".<sup>95</sup> His comments were part of the defence's efforts to challenge the prosecution's contention that the Hague and Geneva Conventions were part of the larger body of customary international law.<sup>96</sup>

William Logan, one of the more prominent American defence attorneys, stated in his summation on 10 March 1948 that it was the Allied powers, not Japan, that brought war to the Pacific. This was one of the underlying defence themes throughout the trial. From Japan's perspective, he argued, the war was premeditated, while its roots could be traced back to nineteenth century Western imperialism and colonialism in East Asia.

<sup>&</sup>lt;sup>92</sup> *Ibid.*, pp. 17058-59.

<sup>&</sup>lt;sup>93</sup> Ibid., pp. 42113-15; ibid., vol. 59, p. 28278; while the Nuremberg Tribunal did decide that the General Staff and High Command were not criminal organizations, it declared that both organizations were responsible for widespread suffering of millions of people and were a "disgrace to the honorable profession of arms […] although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste". See Nazi Conspiracy, pp. 85-86, see above note 42.

<sup>&</sup>lt;sup>94</sup> Pritchard, 1998, vol. 37, pp. 17060-61, see above note 83.

<sup>&</sup>lt;sup>95</sup> *Ibid.*, vol. 88, p. 42202.

<sup>&</sup>lt;sup>96</sup> *Ibid.*, vol. 89, pp. 42494-513.

Japan could never hope to defeat the Allied powers in a major war, which meant that Japan's role in the war was merely an attempt

to exercise its internationally recognized sovereign right of self-defense against encroachments by foreign powers which threatened its very existence – a decision which no authority questions as being their prerogative.<sup>97</sup>

One dimension of this argument was an idea that the Japanese attorneys found particularly offensive: Keenan's statement at the beginning of the trial that the war was "a part of the determined battle of civilization to preserve the entire world from destruction".<sup>98</sup> From the prosecution's perspective, "there was a juridical concept of 'civilization' that demanded the prosecution of aggression".<sup>99</sup> Takayanagi and Kiyose both questioned what the Allies meant by 'civilization' and thought the victors had used the term to retaliate arbitrarily against Japan.<sup>100</sup> Masajirō Takikawa, one of the members of the defence team, wondered after the trial if the court had used the idea of 'civilization' as a cover for "the primitive idea of retaliation". Takayanagi agreed, and reminded the court in the spring of 1948 that the prosecution had insisted that the trial be "conducted in order to protect civilization". He concurred with this idea, but wondered if 'respect for treaties' and 'impartiality of trials' should be included in this concept.<sup>101</sup>

These points seem to have had little impact on most of the judges, who found all of the defendants guilty of some or all of the 10 counts accepted by the Tribunal between 4 and 12 November 1948. All were found guilty of waging aggressive war, while 19 were convicted of war crimes

<sup>&</sup>lt;sup>97</sup> *Ibid.*, vol. 90, p. 43053.

<sup>&</sup>lt;sup>98</sup> *Ibid.*, vol. 2, p. 384.

<sup>&</sup>lt;sup>99</sup> Boister and Cryer, 2008, p. 279, see above note 64; Robert Jackson made a similar statement in his opening remarks before the Nuremberg Tribunal: "The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated". Robert H. Jackson, *The Case Against Nazi War Criminals: Opening Statement for the United States and Other Documents*, Alfred A. Knopf, New York, 1946, p. 3.

<sup>&</sup>lt;sup>100</sup> Yasuaki Ōnuma, "The Tokyo Trial: Between Law and Reason", in Chihiro Hosoya, Nisuke Andō, Yasuaki Ōnuma, and Richard H. Minear (eds.), *The Tokyo War Crimes Trial: An International Symposium*, Kodansha International, Tokyo, 1986, p. 47; Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy*, Routledge, London, 2008, p. 72; Pritchard, 1998, vol. 2, p. 189, see above note 83.

<sup>&</sup>lt;sup>101</sup> Pritchard, 1998, vol. 2, p. 189, see above note 83.

and crimes against humanity. Seven of the defendants were sentenced to death, while 16 received life sentences. Two of the defendants received sentences of 7–20 years, while two died during the trial. Another had the charges against him dropped because of mental illness.<sup>102</sup>

Justices Webb, Bernard and Röling wrote separate opinions that challenged some of these rulings, while Justice Pal wrote his own judgment. Webb and Bernard strongly disagreed with the decision not to indict Emperor Hirohito, while Röling wrote his dissenting opinion to try to convince MacArthur to reduce some of the defendants' sentences. On the other hand, Röling also thought that some of those given life sentences should have been condemned to death.<sup>103</sup>

Justice Pal would have none of this and voted to acquit all of the defendants. He questioned the authority of the Tribunal and its Charter, and argued that aggressive war was not an international crime. Consequently, he wrote, the trial itself was "only a sham employment of legal process for the satisfaction of a thirst for revenge", while the charges were based on ex post facto law.<sup>104</sup> He also reminded the court of Justice Jackson's statement at Nuremberg that the plans by one nation to dominate another are "the worst of crimes", and called the US-led Allied boycott of Japan before the conflict an act of war.<sup>105</sup> He also agreed with the defence about Western policies of colonial domination, boycotts and the use of atomic weapons. Some thought, he argued, that the use of such weaponry introduced "the new and unpredictable age of soul". But the use of atomic weapons in Hiroshima and Nagasaki did not awaken what some hoped would bring about "a unity of humanity, linked to all our fellow human beings, irrespective of race, creed, or color, by bonds which have been fused unbreakably in the diabolical heat of these explosions". In the end, Justice Pal concluded, there was no "justification" for these "inhuman blasts".<sup>106</sup>

MacArthur and Keenan were extremely sensitive to such criticism, which had been mounting for years. In the end, it led MacArthur, in conversations with Keenan, to turn down requests from the Judge Advocate

<sup>&</sup>lt;sup>102</sup> Crowe, 2014, pp. 210-12, see above note 7.

<sup>&</sup>lt;sup>103</sup> Boister and Cryer, 2008, pp. 632-39, 676-77, 775-807, see above note 52.

<sup>&</sup>lt;sup>104</sup> *Ibid.*, pp. 819, 827, 829, 837.

<sup>&</sup>lt;sup>105</sup> *Ibid.*, pp. 867, 923.

<sup>&</sup>lt;sup>107</sup> *Ibid.*, p. 867.

General and the State Department to publish all or some of the most important parts of the trial's transcripts, something MacArthur decided against because of "financial and practical reasons". According to Colonel Carpenter, the

> basic principles involved [in the Tokyo Trial] have all been embodied in the historical presentation of the German trial and it is believed there is little independent interest in the Japanese version.<sup>107</sup>

This decision robbed historians, legal scholars, and jurists of a body of evidence that would have had a profound impact on the study of this important period in global history. It also limited the use of such history, evidence and precedents in some of the important *ad hoc* trials in the late twentieth and twenty-first centuries. Fortunately, though belatedly, jurists and scholars are now able to study the IMTFE as one of the most important trials in the history of international criminal law.

# 3.4. Conclusion

While Justice Pal certainly made some valid points about the trial, it must still be seen in a very different light than its sister trial in Nuremberg. The nature of the defeat and occupation of Nazi Germany differed from that of Japan. Moreover, the defeat of Germany was the principal goal of the Allied powers, and planning for its occupation dictated the pace of discussions about the Nuremberg Trial.

The same would not be the case for Japan because until Hiroshima and Nagasaki, it was expected to take up to two years to conquer the Japanese home islands. The US, which had borne the brunt of the fighting in the Pacific, felt, particularly in light of Pearl Harbor, that it had earned the right to occupy Japan and rebuild it in a way to ensure it was never again a threat to American interests in the Pacific.

But unlike the question of trying major war criminals in Germany, the US took it upon itself and General Douglas MacArthur to initiate plans for the trial of major Japanese war criminals. Using the IMT Charter as a model, Washington and MacArthur began planning for the trial with-

<sup>&</sup>lt;sup>108</sup> MacArthur Archives, RG 9, Box 160-F, 'War Crimes, Nov. 48-May 509', "Alva C. Carpenter to DA WASH DC", 22 May 1950, p. 1; the full transcripts and evidence from the Nuremberg trial were published soon after the trial ended and are now available online. The transcripts of the Tokyo Trial were only published in 1981 and only recently have become available in the ICC Legal Tools Database.

out any direct contact with US officials in Germany. Moreover, it was decided that the principal thrust of the trial would centre around crimes against peace and aggression. Consequently, defendants were chosen because they were representatives of the Japanese military, leadership and civilian organizations that played a role in the planning and execution of the war in East Asia and the Pacific. At the same time, the US and its 10 allies that oversaw the proceedings never gave any serious thought to Jackson's idea about the possibility of finding some of those in the dock not guilty.

Both trials had flaws that affected the pace of the proceedings and their outcomes. Nuremberg was a much simpler trial to conduct because only four countries sat in judgment. The only outliers were the Soviet judicial and prosecution teams who suffered from lack of experience with Western style trials. But this did not affect the pace of the trial in Germany, and, generally speaking, each defendant, who was represented by German counsel, received a fair trial. This was not the case with the Tokyo Trial, which was handicapped by a complex indictment, 11 prosecution teams, and 11 judges with very diverse backgrounds. Some of the countries that sat in judgment in Tokyo were former colonial powers that saw the proceedings as an opportunity to regain a foothold in East Asia. This, coupled with the US decision not to indict the Emperor, serious language problems, the inadequate leadership of Joseph B. Keenan, and a youthful, inexperienced defence team drawn primarily from the US, saw a trial increasingly fraught with dissension. Most importantly, MacArthur's decision not to allow the publication of the trial's transcripts created a serious void that robbed scholars and others the opportunity to understand the complex dynamics of the trial and its outcome better.

# The Tokyo Tribunal: A Transcultural Endeavour

## Kerstin von Lingen\*

## 4.1. Introduction

There is a popular book, written in 1987, whose title is telling: *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials.*<sup>1</sup> It was written by one of the accredited journalists present in the courtroom, and represents in a nutshell the surprise that, while so much is known about the International Military Tribunal ('IMT') in Nuremberg, its Asian sister tribunal remained largely unknown in the West until the 1980s. This is surprising, as the Tokyo Tribunal lasted for three and a half years and involved hundreds of staff, including lawyers, government officials, clerks, journalists and translators.

The Tokyo Tribunal was established shortly after the Nuremberg Tribunal (which started in October 1945), and held trials from May 1946 until November 1948 under its official heading, the International Military Tribunal for the Far East.<sup>2</sup> It indicted 28 Japanese defendants, amongst them former prime ministers, cabinet ministers, military leaders and diplomats, and displayed a list of 55 charges. It was also one of the first "in-

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<sup>&</sup>lt;sup>1</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow & Co., New York, 1987.

<sup>&</sup>lt;sup>2</sup> Scholarship on the International Military Tribunal for the Far East ('IMTFE') has increased over the last decades. For an overview, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008; and Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008; and Kerstin von Lingen (ed.), *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-1948*, Brill, Leiden, 2018.

terracial and multilingual criminal trials" in history.<sup>3</sup> The name of the Tribunal, as Boister and Cryer have noted, echoes an 'orientalist approach', and it would therefore be better replaced by 'Tokyo IMT'.<sup>4</sup> Therefore, even though it might be problematic to alter an established and official name, for this chapter 'Tokyo Tribunal' is preferred.

To bring to the fore the voices of those involved in the Tokyo Tribunal is an interesting field of research which this chapter explores. The Tribunal's 11 judges and prosecution teams, as well as the team of Western and Japanese defence attorneys, brought together not only different national backgrounds, languages and ideologies, but also different perceptions of justice, deriving from varying legal traditions, personal training and experiences with courts.<sup>5</sup> Many of the lawyers and judges involved had already been in high positions within their home countries, although most of them had no experience with international law, and none of them had ever been to Japan.<sup>6</sup>

When the Tribunal commenced operations, the Western Allies and all convening parties at the judge's bench held high hopes of achieving a 'second Nuremberg', but these hopes were shattered. The experience of Nuremberg might have triggered expectations of unanimity, but the Tokyo Tribunal was different in many respects, which will be highlighted in this chapter.

As shown by James Burnham Sedgwick's study "The Trial Within",<sup>7</sup> justice was negotiated through several intricate concurrent processes wherein the 'human element', as we might call the actors involved, had

<sup>&</sup>lt;sup>3</sup> Ireland claims that it was the first such trial, see Gordon Ireland, "Uncommon Law in Martial Tokyo", in *The Yearbook of World Affairs*, 1950, vol. 4, p. 66. However, this is not the case: the British trial of Toshio Aoki in Singapore in February 1946 was earlier and was both interracial (one of the judges was Indian) and multilingual. Also, the Shanghai mixed court would qualify (Chinese and British judges, defendants, and accused), although arguably, both trials were not international tribunals. The author thanks Robert Cribb for pointing this out.

<sup>&</sup>lt;sup>4</sup> Boister and Cryer, 2008, p. 3, see above note 2.

<sup>&</sup>lt;sup>5</sup> Many thoughts expressed in this chapter are presented in more depth in Lingen, 2018, above note 2, especially see the introduction (pp. 1-28).

<sup>&</sup>lt;sup>6</sup> Boister and Cryer, 2008, p. 78, see above note 2; Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, no. 465, p. 494.

<sup>&</sup>lt;sup>7</sup> James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946–1948", unpublished Ph.D. thesis, University of British Columbia, 2012.

profound consequences on the trial's proceedings and outcomes. A research group at Heidelberg University,<sup>8</sup> led by the present author, has therefore coined the term 'transcultural justice' to describe the threefold challenges facing such a tribunal: (1) the variety of cultural and professional backgrounds, (2) the divergent expectations of 'justice' and the role of international courts, as well as (3) the human element of forming within and without groups. By restoring agency to all 11 national teams, judges and prosecutors, it is possible to better situate the significance of individual contributions to verdicts, thus re-centring the focus on the national positions of countries which have been side-lined as 'minor' players in the Tokyo Tribunal.

The first two IMTs, at Nuremberg and Tokyo, claimed to be enforcing 'justice', but nevertheless proved to be battlegrounds for intense political and ideological struggles within the new post-war world order. They have contributed to the development of international criminal law, the formation of transcultural norms of legality and legitimacy, as well as transnationally debated (and contested) notions of 'justice'. This holds certainly true for the Nuremberg Tribunal, which is often cited as the legal forerunner to key institutions of international justice, such as the International Criminal Court ('ICC'), active since 2002, or the ex-Yugoslavia and Rwanda Tribunals. However, the legacy of the Tokyo Tribunal had practically fallen into oblivion in the West, until its scholarly awakening with R. John Pritchard's laudable publication of the trial transcripts in 1981, and an online version accessible since 2017 (through the ICC Legal Tools Database).9 Often overlooked due to language constraints is the fact that there was a Japanese edition of selected transcripts and evidence already in 1953, which focused on explaining to the Japanese people why the war was started and how it had been lost.<sup>10</sup> The impact of political motivations

<sup>&</sup>lt;sup>8</sup> The Research Group, "Transcultural Justice: Legal Flows and the Emergence of International Justice within the East Asian War Crimes Trials, 1945-1954" was active between 2013 and 2017 at Heidelberg University, inquiring into Allied approaches to post-war courts in the aftermath of the Pacific War (www.transcultural-justice.uni-hd.de).

<sup>&</sup>lt;sup>9</sup> R. John Pritchard, Sonia Magbanua Zaide, and Donald Cameron Watt, *The Tokyo War Crimes Trial. Transcripts and Index*, Garland, New York, 1981, vol. 22.

<sup>&</sup>lt;sup>10</sup> See Beatrice Trefalt, "Remembering the Tokyo Trial, Then and Now: The Japanese Domestic Context of the International Military Tribunal for the Far East", chap. 15 below.

on the trial's conduct,<sup>11</sup> and even racism on the bench,<sup>12</sup> have also been discussed in previous scholarship.

War crimes trials like the Tokyo Trial are to be studied not only as the scene of battles for justice between the defence and the prosecution, or as arenas for abstract struggles amongst political interests and ideological principles, but as arenas of constant negotiation. This chapter thus takes a closer look at the impact of the different cultural, linguistic, political and legal traditions of the various participants on the Tribunal's planning and operation. In the following sections, I will focus on the moments of judges' selection, colonial endeavours, structural difficulties, the problem of team spirit and fraction building, and general fields of friction.

# 4.2. Selecting Judges

Setting up the Tribunal was more problematic at Tokyo than it had been at Nuremberg. By October 1945, the Supreme Commander of the Allied Powers for Japan, General Douglas MacArthur, was entrusted with setting up a tribunal to bring the Japanese military and political elite to justice. The US State Department subsequently called on each of the nine signatory States of the Japanese surrender to nominate a judge, substitute judge and assistant prosecutor by 5 January 1946.<sup>13</sup> The United Kingdom, China, Australia, the Netherlands, France, Canada, New Zealand and the Soviet Union followed this request. The limitation on the surrender signatories prompted some criticism in the Far Eastern Commission for Japan, where India as well as the Philippines also held a seat. In view of their wartime services rendered (and the ongoing decolonization), they successfully claimed a seat each on the bench. On 26 April 1946, the Charter was amended accordingly.<sup>14</sup> Due to this late decision, however, when the Tokyo Tribunal opened on 3 May 1946, only the initially nominated nine judges had arrived in Japan.

<sup>&</sup>lt;sup>11</sup> M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court", in *Harvard Human Rights Journal*, 1997, vol. 10, p. 33.

<sup>&</sup>lt;sup>12</sup> Terry Hewton, "Webb's Justice. The Role of Sir William Flood Webb in the Tokyo Trial, 1946–1948: An Examination of the Australian Judge in a Political Trial", unpublished Honours thesis, University of Adelaide, 1976, p. 30, quoted in Boister and Cryer, 2008, p. 94, see above note 2.

<sup>&</sup>lt;sup>13</sup> Boister and Cryer, 2008, pp. 27, 80, see above note 2.

<sup>&</sup>lt;sup>14</sup> Foreign Relations of the United States (FRUS), "Far Eastern Commission Policy Decision FEC 007/3", United States Department of State, 3 April 1946, vol. 8, pp. 424-27.

The judges finally travelling to Tokyo were Sir William Webb for Australia as President of the Tribunal, William Patrick for the United Kingdom, Edward Stuart McDougall for Canada, Erima Harvey Northcroft for New Zealand, MEI Ju'ao<sup>15</sup> for China, Ivan Zarvanov on behalf of the Soviet Union, Bernard Röling for the Netherlands, Henri Bernard representing France, Radhabinod Pal as the Indian judge, and Delfin Jaranilla for the Philippines. The United States had first sent J.P. Higgins, who was, however, replaced by Myron C. Cramer after six weeks. None of them spoke Japanese. The fact that 6 of the 11 judges were familiar with Anglo-American common law influenced the Tribunal quite heavily, and was seen as a disadvantage to and by the Soviet, French and Dutch judges especially, who had different legal backgrounds.<sup>16</sup> Importantly, the Tokyo Tribunal also gave the smaller Allied nations a voice in the trial – unlike at Nuremberg, where only four of the victorious powers took seats. Thus, it is fair to state that, considering the manifold legal or judicial cultures represented in the courtroom, Tokyo produced a broader variety of meanings of 'justice' than Nuremberg.<sup>17</sup>

Besides the United States and the United Kingdom, all nine countries<sup>18</sup> were eager to make their national voices heard, and some even used the bench to display their national narrative of the Pacific War. The Commonwealth States of Australia, Canada and New Zealand were especially eager to not only distinguish themselves from the British, but also claim reward for their war services through more political representation. As Yuma Totani has contended, the Australian participants in the Tokyo Tribunal "profoundly shaped the course of the trial and left their deep imprint on its outcome".<sup>19</sup> In the case of New Zealand, this is quite obvious, as Boister underlines: "they perceived international law's granting of interest-laden rights to both the weak and powerful alike as an opportunity to try to control the depredations of the more powerful political outliers that

<sup>&</sup>lt;sup>15</sup> There are different romanizations for MEI's first names, Ju'ao and Ru'ao can both be found.

<sup>&</sup>lt;sup>16</sup> David M. Crowe, *War Crimes, Genocide and Justice*, Palgrave MacMillan, New York, 2014, p. 209; Boister and Cryer, 2008, p. 82, see above note 2.

<sup>&</sup>lt;sup>17</sup> "Introduction", in Lingen, 2018, p. 5, see above note 2.

<sup>&</sup>lt;sup>18</sup> For the Philippines' case, see Hitoshi Nagai, "Burdened by the 'Shadow of War': Justice Jaranilla and the Tokyo Trial", in Lingen, 2018, pp. 202-20, see above note 2.

<sup>&</sup>lt;sup>19</sup> Totani, 2008, p. 42, see above note 2.

threaten them".<sup>20</sup> A model was the foundation of the League of Nations and discussions during the Great War, as Isabel Hull had already argued with view to the community of international lawyers.<sup>21</sup>

In the case of China, representation on the bench was of utmost importance, after the civil war started, to minimize the influence of the Nationalist leader CHIANG Kai-shek within the circle of major Allies. Until 1944, China had been considered one of "the four big Allies".<sup>22</sup> To be represented at Tokyo on the bench first served China's political agenda, and second, helped it to overcome the legal bias created through the colonial rules that had stripped Chinese courts the right to sit in judgment over foreign nationals. This so-called 'extraterritoriality clause' was a constant point of friction between China and the Western Allies, and had been abolished by the United States and finally by the United Kingdom in 1943. The Tokyo Tribunal was a symbol for China's return to full status. China was able to present itself as a legally modern and civilized nation.<sup>23</sup>

Finding suitable candidates was thus a highly sensitive and political task. British Foreign Secretary Ernest Bevin,<sup>24</sup> when asked to nominate candidates for the Tokyo Tribunal, observed:

This trial is of considerable significance to us, because of the important role which we play in the Far East, and also because of the tremendous effect which the Pacific War had on large numbers of British subjects and on important British territories.<sup>25</sup>

<sup>&</sup>lt;sup>20</sup> On the New Zealand team and its political stances to emancipate from a mere British Commonwealth colony, see Neil Boister, "New Zealand's Approach to International Criminal Law from Versailles to Tokyo", in Lingen, 2018, pp. 182-201, see above note 2.

<sup>&</sup>lt;sup>21</sup> Isabel V. Hull, A Scrap of Paper: Breaking and Making International Law during the Great War, Cornell University Press, Ithaca, 2014, p. 320.

<sup>&</sup>lt;sup>22</sup> Rana Mitter, Forgotten Ally: China's World War II, 1937-1945, Houghton Mifflin Harcourt, Boston, 2013.

<sup>&</sup>lt;sup>23</sup> Anja Bihler, "On a 'Sacred Mission': Representing the Republic of China at the International Military Tribunal for the Far East", in Lingen, 2018, pp. 84-102, see above note 2.

<sup>&</sup>lt;sup>24</sup> Kerstin von Lingen, "Managing Justice: Judge William Patrick, Prosecutor Arthur Comyns-Carr and British Approaches to the IMTFE", in *idem*, 2018, pp. 103-23, see above note 2.

<sup>&</sup>lt;sup>25</sup> The National Archives at London ('TNA'), LCO 2/2986 Bevin to Patrick, 7 February 1946.

Participation in the trial was seen as an enhancement of the United Kingdom's prestige in Asia.<sup>26</sup> Whitehall was surely on a mission to strengthen the Nuremberg Charter by indicting 'crimes against peace' (aggression), 'conventional war crimes', and crimes against civilians (summarized under the charge of 'crimes against humanity') set down in the London Charter of August 1945.<sup>27</sup> However, this might be one of the fundamental misconceptions of British and American lawyers. Expecting Tokyo to become 'the other Nuremberg' ignored that the war in Asia was less clear-cut when it came to defining Japan's violation of international law, unlike Nazi atrocities and the genocide.

Moreover, unlike for the IMT at Nuremberg, finding suitable personnel was a problem, although many saw it as a national duty to be represented at Tokyo, as it was perceived as one of the elements of Pacific post-war order resettlement. This was especially the case for the returning European colonial powers. A common feature was that judges or prosecutors who had been nominated frequently declined, and only the third or fourth candidate accepted – this was the case with the United Kingdom, France, the Netherlands and India<sup>28</sup>, for example. Different from Nuremberg, it seems that many who rejected the post had not perceived it to be a clever career move to serve a newly established war crimes court in a faraway country, when national foreign policy seemed to prioritize Europe.

Apart from personal motivations, institutional reservations were also voiced. The experience of the Nuremberg Tribunal had already given a taste of the consequences of longer absences within the home district courts.<sup>29</sup> Thus, in the British case, Lord Chancellor William Jowitt suggested the selection of someone from the Scottish Court of Session (the supreme civil court).<sup>30</sup> After short consultations, Jowitt came up with three candidates and named Judge McIntyre (Lord Sorn), Lord Keith and Lord Patrick, to "play [...] the part which Lawrence is playing at Nuremberg".<sup>31</sup> It was agreed that Patrick was the most suitable amongst the can-

<sup>31</sup> TNA, LCO 2/2986, Letter Jowitt to Shawcross, 14 January 1946.

<sup>&</sup>lt;sup>26</sup> Kirsten Sellars, "William Patrick and 'Crimes Against Peace' at the Tokyo Tribunal, 1946–1948", in *The Edinburgh Law Review*, 2011, vol. 15, no. 2, p. 170.

<sup>&</sup>lt;sup>27</sup> Lingen, 2018, p. 103, see above note 2.

<sup>&</sup>lt;sup>28</sup> On the Indian case, see Milinda Banerjee, "India's 'Subaltern Elites' and the Tokyo Trial", in Lingen, 2018, pp. 262-83, see above note 2; Sellars, 2011, p. 175, see above note 26.

<sup>&</sup>lt;sup>29</sup> Sellars, 2011, p. 170, see above note 26.

<sup>&</sup>lt;sup>30</sup> TNA, LCO 2/2986, Letter Undersecretary Normand to Jowitt, 16 January 1946.

didates as he was not married, and had no dependents, which would facilitate a months-long absence.<sup>32</sup> In the case of Canada,<sup>33</sup> although the desired candidate, Justice John Andrew Hope, had agreed in principle and was himself eager to be part of the national team, the ministry objected to granting him leave for the duration of the trial. Canadian Deputy Minister Varcoe feared that "the administration of justice in Ontario will suffer if [Justice Hope] is absent for three months at this time".<sup>34</sup> Another case in point was the United States' nomination of Judge Higgins, who, as mentioned, was replaced after six weeks, as his home court feared that he would be away from office for too long.<sup>35</sup>

Thus, most of the political actors carelessly undervalued the challenges of an international court, had strong misconceptions about its length, and had no measures to replace the personnel missing at home. Also, unlike at Nuremberg, there was no wise provision to nominate a judge and an alternate, for times of absence. This resulted in the nonrepresentation of a country if its judge was absent, for duty, illness or simply (and rare) leave to see his family.

# 4.3. Colonial Endeavours

The former European colonial powers merit special attention.<sup>36</sup> The Dutch,<sup>37</sup> who had been especially active within the United Nations War Crimes Commission at London in planning war crimes trials post-1945,<sup>38</sup> were utterly disappointed when they were not called to the bench in Nu-

<sup>&</sup>lt;sup>32</sup> Lingen, 2018, p. 105, see above note 2.

<sup>&</sup>lt;sup>33</sup> Yuki Takatori, "'Little Useful Purpose Would be Served by Canada': Ottawa's View of the Tokyo War Crimes Trial", in Lingen, 2018, pp. 148-61, see above note 2.

<sup>&</sup>lt;sup>34</sup> Library and Archives Canada (LAC), RG 25/vol. 3641/File 4060-C-40, Letter from Deputy Minister of Justice, 10 January 1946. Thanks to Yuki Takatori for pointing this source out.

<sup>&</sup>lt;sup>35</sup> Yuki Takatori, "The Forgotten Judge at the Tokyo War Crimes Trial", in *Massachusetts Historical Review*, 2008, vol. 10, pp. 115-41.

<sup>&</sup>lt;sup>36</sup> That said, the British case seems to have functioned a bit outside of the colonial logic, which the Netherlands and France displayed, as will be shown later by documentary evidence.

<sup>&</sup>lt;sup>37</sup> The following paragraph is based on and cites Lisette Schouten, "In the Footsteps of Grotius: The Netherlands and Its Representation at the International Military Tribunal for the Far East, 1945-1948", in Lingen, 2018, pp. 242-61, see above note 2.

<sup>&</sup>lt;sup>38</sup> Kerstin von Lingen, "Legal Flows: Contributions of Exiled Lawyers to the Concept of 'Crimes against Humanity' During the Second World War", in *Modern Intellectual History*, 2020, vol. 17, no. 2.

remberg, but could only 'help' within the French team.<sup>39</sup> When J. Loudon, the Dutch ambassador to Washington, forwarded the request to the Dutch Ministry of Foreign Affairs, satisfaction seemed near. However, the Ministry was preoccupied with internal reforms, shifting international relations and a *de facto* colonial war in the Netherlands East Indies, and was therefore reserved in its reaction. The adjudication of foreign war criminals, especially those in the 'Far East', was by no means a priority. Ministry jurist E. Star Busmann considered Dutch participation in the Tribunal "unrealistic and not in our interest" in light of the more recent political developments in Indonesia, and pointed out that it could well be possible that the Netherlands, when suppressing the Indonesian independence fighters, would use methods that other countries might regard as war crimes.<sup>40</sup> Considering the later developments, his comments mirror the 'double standards' applied by the old colonial powers in Asia with regard to their former colonies.<sup>41</sup> Nonetheless, the Minister of Foreign Affairs, E.N. van Kleffens, decided that the Netherlands should fulfil its Allied 'duty'. Furthermore, participation in an international tribunal fitted well with the long-standing Dutch tradition of the promotion of an international legal system. Another consideration, according to Van Kleffens, was the publicity that would be given to these trials. Thus, although the Netherlands saw little merit in joining an international war crimes tribunal at first, national interests, the chance to regain recognition and a commitment to international law prevailed; it was decided that the Netherlands would participate.42

For France, the prospect of regaining national prestige, which was tainted by the Vichy government's collaboration with Japan that lasted until March 1945, made the selection of a suitable candidate a matter of

<sup>&</sup>lt;sup>39</sup> The Dutch representation at the Nuremberg Trial was limited to Samuël John Baron van Tuyll van Serooskerken, who assisted the (French) prosecution section of the International Military Tribunal. The invitation for the IMTFE extended to the Netherlands therefore entailed, for the first time, that the Netherlands could actually contribute to the adjudication of major war criminals at an international level.

<sup>&</sup>lt;sup>40</sup> NL-HaNA, 2.05.117, 'Ministerie van Buitenlandse Zaken: Code-archief 1945–1954', inv. no. 6671, Nota Star Busmann, October 1945. The author thanks Lisette Schouten for pointing this source out to me.

<sup>&</sup>lt;sup>41</sup> Schouten, 2018, p. 244, see above note 37.

<sup>&</sup>lt;sup>42</sup> L. van Poelgeest, Nederland en het Tribunaal van Tokio : volkenrechtelijke polemiek en internationale politiek rond de berechting en gratiëring van de Japanse oorlogsmisdadigers, Gouda Quint, Arnhem, 1989, pp. 25-26; Schouten, 2018, p. 245, see above note 37.

national honour.<sup>43</sup> Unlike at Nuremberg, the presence of the French was not unquestioned by other Allies in the Pacific. As Beatrice Trefalt has observed,

for the French prosecution, and the French Government representation in Tokyo, the Tokyo Tribunal had a central dimension as a stage upon which the French Government demanded to record its assertions of victimhood, and justified its presence amongst the nations now joined in punishing Japan's wartime leadership.<sup>44</sup>

Paris was therefore not only looking for first-class lawyers, but also diplomats to bolster the new narrative of Free France legitimately sitting in judgment. Judge Henri Bernard was by no means the first choice of the Quai d'Orsay, but as other candidates had already declined due to poor health or other commitments, the 'pool' of lawyers versed in both international law and colonial experience in Asia was very limited. According to Jean Esmain, France's first choice was to designate Jean Escarra, who played a key role in re-designing the Chinese Civil Code of 1929, but he declined.<sup>45</sup> Nonetheless, Paris was determined that it needed somebody who could control the narrative emanating from the Tokyo Trial, which would inevitably also address the French collaboration with Japan. Bernard was chosen, apart from his availability, for his loyalty. He was a colonial magistrate who had sided with the Free French in August 1940, when the French authorities joined de Gaulle's forces in French Equatorial Africa (Congo). A military tribunal convened under the Vichy regime had even sentenced Bernard to death in absentia.<sup>46</sup> He was paired in Tokyo with Ambassador Zinovy Peshkoff and Prosecutor Robert Oneto, who in-

<sup>&</sup>lt;sup>43</sup> The following paragraph is based on and cites Ann-Sophie Schoepfel, "Defending French National Interests? The Quai d'Orsay, Ambassador Zinovy Peshkoff, Justice Henri Bernard and the Tokyo Trial", in Lingen, 2018, pp. 221-41, see above note 2.

<sup>&</sup>lt;sup>44</sup> Beatrice Trefalt, "The French Prosecution at the IMTFE: Robert Oneto, Indochina and the Rehabilitation of French Prestige", in Kerstin von Lingen (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil, Palgrave/Springer, Cham, 2016, p. 52.

<sup>&</sup>lt;sup>45</sup> Jean Esmein, "Le juge Henri Bernard au procès de Tokyô", in *Vingtième siècle, revue d'histoire*, 1998, vol. 59, p. 4.

<sup>&</sup>lt;sup>46</sup> Le Blanc, *Dépôt central d'archives de la justice militaire* (DCJAM), Judgment of Henri Bernard, Minutes of the French Permanent Military Tribunal in Clermont, 12 September 1941. The author thanks Ann-Sophie Schoepfel for pointing this out to her.

fluenced the Tokyo Tribunal quite heavily and were able to establish the desired narrative for Free France.<sup>47</sup>

## 4.4. Structural Difficulties

The prosecution was organized under American leadership, as Joseph Keenan headed the International Prosecution Section, and all national teams sent in their 'associate prosecutors'. Some names even have a lasting legacy today: among them Arthur Strettell Comyns Carr from Britain, with Christmas Humphreys as one of his juniors; Govinda Menon from India, with Krishna Menon as his junior; Sergej Golunsky from the Soviet Union, a jurist and diplomat who had attended the conferences of Dumbarton Oaks, Yalta and Potsdam; the Chinese prosecutor XIANG Zhejun; and the United States' counsel John W. Fihelly and John Darsey.<sup>48</sup> Asia was represented in the International Prosecution Section through the Chinese, Filipino and Indian members. However, the organization of the trial, in particular the drafting of the indictment, was not organized by the American team, but taken on by the British. According to Morris, Webb attributed the length of the trial to a number of factors, including the scope of the indictment, the amount of the evidence presented, and the difficulties of translation.49

It became clear on arrival that this trial would last much longer than estimated. Shortly after arrival, Comyns Carr wrote back in intense frustration to London:

This is a frightful job you have let me in for. I have already been here as long as you said the whole trip would take, and there is no sign of the proceedings even beginning. On arrival I found the Americans with a huge staff engaged in an enormous research with a stack of documents which have never even been listed or translated.<sup>50</sup>

<sup>&</sup>lt;sup>47</sup> Trefalt, 2018, pp. 51-68, see above note 44.

<sup>&</sup>lt;sup>48</sup> Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan*, Macmillan, New York, 1987, p. 115.

<sup>&</sup>lt;sup>49</sup> Narrelle Morris, "Sir William Webb and Beyond: Australia and the International Military Tribunal for the Far East", in Lingen, 2018, p. 57, see above note 2. She quotes an unsigned document clearly written by Webb: National Archives of Australia (NAA), M1418, 10, "Length of the Trial", 23 June 1947.

<sup>&</sup>lt;sup>50</sup> Cited after Harries and Harries, 1987, p. 118, see above note 48.

The result of the British lead in drafting the indictment was that Keenan was especially watchful of the British prosecutor, Comyns Carr, whom he saw as an opponent. He was ready "to restore his dignity, and if necessary, to do so by pushing aside the Commonwealth prosecutors or anyone else who might steal the limelight from him", as Totani underlines.<sup>51</sup> The Commonwealth judges, in turn, tried to remove Keenan from office for being "incompetent" on at least three occasions.<sup>52</sup>

As in Nuremberg, the Tokyo Charter centred on the charge of 'crimes against peace' (aggression), whilst 'crimes against humanity' became bound to crimes against peace and war crimes. Since judges in Nuremberg had already been reluctant to apply the new concept of 'crimes against humanity', it was decided to bind it to one of the other charges – scholars speak of the 'war nexus'.<sup>53</sup> However, the original intention, and the underlying concept of the exile lawyers who coined the term, was to prosecute all crimes committed against any civilian population, even outside an armed conflict.<sup>54</sup>

The Tokyo Tribunal focused on the so-called 'Class A' war criminals, who were charged with crimes against peace,<sup>55</sup> whilst B/C-class war criminals should be brought to justice elsewhere in Asia where their deeds had been committed.<sup>56</sup> Expectedly, the selection of defendants became another source of dispute.

Problems arose also in respect of matters of procedure, as the Soviet example shows.<sup>57</sup> The Soviet delegation at the Tokyo Tribunal was initially headed by Sergey Golunsky.<sup>58</sup> Fluent in English, French and German,

<sup>&</sup>lt;sup>51</sup> Totani, 2008, p. 36, see above note 2.

<sup>&</sup>lt;sup>52</sup> Kirsten Sellars, 'Crimes Against Peace' and International Law, Cambridge University Press, 2013, p. 188.

<sup>&</sup>lt;sup>53</sup> M. Cherif Bassiouni, "Crimes against Humanity: The Need for a Specialized Convention", in *Columbia Journal of Transnational Law*, 1994, vol. 31, no. 3, p. 463.

<sup>&</sup>lt;sup>54</sup> Lingen, 2018, see above note 38.

<sup>&</sup>lt;sup>55</sup> Boister and Cryer, 2008, p. 49, see above note 2.

<sup>&</sup>lt;sup>56</sup> For comprehensive research on the Class B/C trials, see Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War*, Columbia University Press, New York, 2017.

<sup>&</sup>lt;sup>57</sup> The following paragraph is based on Valentyna Polunina, "The Soviets at Tokyo: International Justice at the Dawn of the Cold War", in Lingen, 2018, p. 128, see above note 2.

<sup>&</sup>lt;sup>58</sup> Professor Golunsky was a member of the Board of the Ministry of Foreign Affairs of the USSR, Chief of the Department of Legal affairs of the Ministry, Ambassador Extraordi-

Golunsky had worked as Stalin's consultant and interpreter in the Yalta and Potsdam conferences of the Heads of Government of the Soviet Union, the United States and the United Kingdom. At the Tokyo Tribunal, he was appointed as the Soviet Associate Prosecutor. The peculiarity of the Soviet legal practice of the time that gave State prosecutors a leading role in a trial caused difficulties. In appointing Sergey Golunsky as the head of the delegation, the Soviet government hoped that his previous experience and mastery of foreign languages would help him in his responsible position to establish contacts with other delegations and promote the interests of the Soviet Union at the Tribunal. Nevertheless, the Soviets did not count on the fact that the judges were expected to head delegations, and therefore were quite surprised when they arrived in Tokyo and were faced with a completely different attitude towards the role of judges.<sup>59</sup> A problematic inconvenience for the whole Soviet delegation was the fact that Judge Zaryanov did not speak any foreign languages, and could only communicate with his colleagues through his interpreter.

It has been an often-heard complaint that the trial procedure was not planned as a joint effort of the 11 nations involved, but instead was imposed on many of the participating nations on arrival. This view emphasizes American dominance of the trial and the internal dynamics, where not all States were considered to be in the front row of preparations. Importantly, however, the British and Australian prosecutors immediately took the lead in forming an Executive Commission for drafting the indictment, with Comyns Carr and the Australian prosecutor Alan Mansfield leading the team.<sup>60</sup> The drafting of the indictment was without doubt a major legal achievement of the Commonwealth prosecutors, and is the long-lasting legacy of Comyns Carr, who used the Tokyo Trial to rise from mid-range barrister and King's Counsel at Gray's Inn into a real star, rightly knighted for his services after his return from Tokyo in 1949.<sup>61</sup>

nary and Plenipotentiary, member of the Academy of Sciences of the USSR, and Doctor of Law.

<sup>&</sup>lt;sup>59</sup> Polunina, 2018, p. 131, see above note 57.

<sup>&</sup>lt;sup>60</sup> Boister and Cryer, 2008, p. 52, see above note 2; Totani, 2008, p. 18, see above note 2.

<sup>&</sup>lt;sup>61</sup> Lingen, 2018, p. 108, see above note 2. See his biography at Oxford Dictionary of National Biography.

# 4.5. Team Spirit

In handling the trial, the nations agreed that each team would present several charges of special importance to that State and related to a certain defendant. Commonly addressed as the 'national prosecution phases', these sessions usually lasted about six weeks and gave national teams the possibility to focus on a certain topic (for example, Australia focused on mistreatment of prisoners of war in its phase, which started in December 1946).<sup>62</sup> From these national prosecution phases, we can gain insights into national narratives of the Pacific War, and analyse the different national strategies deployed during the Tokyo Trial. The French legacy, as mentioned above, was highly contested due to the former alliance of Vichy France with Japan until March 1945, and it was one of the achievements of the French Prosecutor Robert Oneto within the 'French phase' of the Prosecution to switch this image into the stance of a rightful partner sitting in judgement.<sup>63</sup>

When addressing the 'human element' of a trial, as previously explained, it is important to focus not only on the judges, but also on the larger team, consisting of the chief prosecutors, the defence counsel, and even translators and other staff.<sup>64</sup> As the French example shows, members within a national *équipe* formed competing bodies and interpreted the national role at Tokyo differently.<sup>65</sup> For example, diplomatic staff who claimed to be merely 'observing' were actually 'supervising' the legal body. The Canadian example shows how E.H. Norman, a Japanologist, became an important member of the team, delivering priceless services because of his linguistic competence and his inside knowledge of Japanese politics.<sup>66</sup> A special case in point for Tokyo is the employment of female attorneys in the prosecution and as legal aides in the defence team. Scholarship has not yet comprehensively addressed the gender dimension of Tokyo, as there were several female attorneys on duty at the Tokyo Tribunal: Virginia Bowman, Lucille Brunner, Eleanor Jackson, Helen Grigware Lambert, Grace Kanode Llewellyn, Bettie Renner, all from the

<sup>&</sup>lt;sup>62</sup> Morris, 2018, see above note 49.

<sup>&</sup>lt;sup>63</sup> Trefalt, 2018, pp. 51-68, see above note 44.

<sup>&</sup>lt;sup>64</sup> On the role of translators at Tokyo, see Kayoko Takeda, "Trial and Error in the Interpreting System and Procedures at the Tokyo Trial", chap. 7 below.

<sup>&</sup>lt;sup>65</sup> Schoepfel, 2018, see above note 43.

<sup>&</sup>lt;sup>66</sup> Takatori, 2018, p. 164, see above note 33.

United States,<sup>67</sup> and the Burma-born Dutch attorney, Coomee Strooker-Dantra.<sup>68</sup> They all worked on various phases of the prosecution's case and appeared before the Tribunal. It is still undetermined whether, and to what extent, the employment of female colleagues was a side effect of the shortage of personnel at Tokyo, or a purposeful experiment based on merit. The fact remains that Tokyo was a pioneer in this regard and thus more modern than, say, the Nuremberg Tribunal, where women were in large part employed as stenographers or secretaries only.

Tokyo also saw a mixed defence team: as Japanese attorneys were acquainted neither with English nor with the legal procedure of Anglo-Saxon law, which was alien to the Japanese court system, an American team was sent to assist the defence.<sup>69</sup> As Zachmann has pointed out in his study entitled *Loser's Justice*, the team of Japanese and American lawyers worked remarkably well and addressed many of the weaknesses of the Tribunal with academic verve (especially the absence of the Emperor as a defendant, but also its failure to address the dropping of the atomic bomb).<sup>70</sup>

The Tokyo Tribunal faced many jurisdictional challenges, ranging from charges and their definitions (thereby challenging the Charter itself),<sup>71</sup> which are however not the focus of this chapter. Among the controversies was the US decision not to indict the Emperor, which was motivated by political considerations on the stability of Japanese society.<sup>72</sup> The dismissal of bacteriological warfare charges was a source of constant frustration for the Soviet Union, as it had hoped for disclosure of data and detail. This disappointment later gave the Soviet Union grounds to hold its own trial on bacteriological warfare in Khabarovsk in 1949.<sup>73</sup> Another absent topic, which seems a failure in retrospect, is the system of sexual

<sup>&</sup>lt;sup>67</sup> See Diane Marie Amann, "Glimpses of Women at the Tokyo Tribunal", chap. 6 below.

<sup>&</sup>lt;sup>68</sup> On Stoker-Dantra, see Schouten, 2018, pp. 253-55, see above note 37.

<sup>&</sup>lt;sup>69</sup> Richard H. Minear, *Victors' Justice: Tokyo War Crimes Trial*, Princeton University Press, 1971, p. 23.

<sup>&</sup>lt;sup>70</sup> Urs Matthias Zachmann, "Loser's Justice: The Tokyo Trial from the Perspective of the Japanese Defence Counsels and the Legal Community", in Lingen, 2018, pp. 284-306, see above note 2.

<sup>&</sup>lt;sup>71</sup> See, for details, Boister and Cryer, 2008, pp. 28-48, see above note 2.

<sup>&</sup>lt;sup>72</sup> Crowe, 2014, pp. 202-05, see above note 16.

<sup>&</sup>lt;sup>73</sup> Valentyna Polunina, "From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefields", in Lingen, 2016, pp. 239-60, see above note 44.

slavery, which was only briefly addressed within the Dutch prosecution phase, which however centred mainly on Dutch female victims. As in Nuremberg, the Tokyo Tribunal was criticized for its representative rather than comprehensive selection of defendants. The defence grappled with limited preparation time, language difficulties, inferior translation facilities and logistical issues (such as the shortage of desks, typewriters, paper and money).<sup>74</sup>

The most serious challenges came, however, from a discord on the bench. Webb was criticized for his inability to manage the growing dissent amongst the judges, and constantly attacked by the British, New Zealand and Canadian judges.<sup>75</sup> Patrick did not hold back in his opinion of Webb, who, allegedly, did nothing to calm the bench and hold the group together, but was instead a "turbulent, quick-tempered bully".<sup>76</sup> Webb was also unhappy about the situation and felt constantly under pressure, according to Morris.<sup>77</sup> However, as James Sedgwick has pointed out, "[t]he overbearing caricature of Webb is so entrenched in the historiography that it is rarely questioned, let alone explained".<sup>78</sup> While Morris argues that Webb did what he could in holding the bench together,<sup>79</sup> Patrick obviously resented being subordinate to somebody whom he perceived as not up to the task. He complained bitterly about Webb's "bullying" and, at the same time, his failure to exert enough pressure to secure unanimity on the bench.

When analysing British official documents, another point comes to the fore, which is the desire to emulate the Nuremberg success story by simply copying it. This undervalued the different reality in the Pacific, but also raises the suspicion of whether the aim of 'justice' in Asia could have been tainted with a shade of colonialism. Obviously, London hoped to

<sup>79</sup> Morris, 2018, pp. 57-58, see above note 49.

<sup>&</sup>lt;sup>74</sup> See, for example, IMTFE transcript, pp. 17215, 21825, 42491 (available on the ICC Legal Tools Database). Also Harries and Harries, 1987, p. 145, see above note 48; Crowe, 2014, p. 209, see above note 16.

<sup>&</sup>lt;sup>75</sup> Crowe, 2014, pp. 235, 241, see above note 16.

<sup>&</sup>lt;sup>76</sup> TNA, LC02/2992: Patrick to Normand, no date, probably January 1947.

<sup>&</sup>lt;sup>77</sup> See Morris, 2018, see above note 49; and Narrelle Morris, "Constructing the Historical Legacy of the International Military Tribunal for the Far East: Reassessing Perceptions of President William Webb", chap. 13 below.

<sup>&</sup>lt;sup>78</sup> James Burnham Sedgwick, "A People's Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946– 1948", in *Diplomacy & Statecraft*, 2011, vol. 22, no. 3, p. 491.

achieve a conviction rather than just 'delivering justice'. Foreign Office Assistant Undersecretary Esler Dening feared that a divided judgment would harm Allied prestige in Asia, which was already damaged by the military debacles in Pearl Harbor and Singapore.<sup>80</sup> He summarized:

Here we have a predominantly Western tribunal sitting in the Far East to try Japanese war criminals. If the tribunal fails to fulfil its task, Western justice will become the laughing-stock not only of Japan but of the Far East in general.<sup>81</sup>

In this regard, the Tokyo Tribunal appeared to be the last opportunity to show the world, especially the former adversaries of the Western States in Asia, the supremacy of Western values and its military and legal strength.

# 4.6. Fields of Friction

Six fields of friction can be observed upon scrutinizing the human elements of the trial. Problems ranged from daily routine to the feeling of otherness, from questions of language protocol (and thus hierarchy) to translation difficulties, from American or British dominance of the court's preparation to Webb's conduct of the trial.

First, judges were affectedly differently by the daily challenges of living away from home. Issues ranged from accommodation to the very unstable postal delivery and thus difficulties to keep contact with family and friends at home. They resented the absence of their wives and the travel ban to visit home, which was a real burden for a majority of judges (exceptions were only granted to Webb and Jaranilla, who lived in Tokyo with their wives, and Pal, who managed frequently to return home for judicial duties).

The longer the trial lasted, the more unbearable daily flaws became: the poor quality of translation of the trial, as well as questions of procedure, in particular absences from the bench. The sheer length of the trial was a problem, and the time required for translation as well as for forming a strategy altogether to handle the material. Another problem resulted from the linguistic discord within the team of 11 judges, of whom at least two (Bernard and Zaryanov) did not speak a word of English, while others were not fluent. All of these factors hindered a smooth exchange of ideas

<sup>&</sup>lt;sup>80</sup> Sellars, 2011, p. 177, see above note 26.

<sup>&</sup>lt;sup>81</sup> TNA, FO 371/66552 Dening to Sargent, 30 April 1947.

and positions.<sup>82</sup> Zaryanov complained to Moscow not only on the poor English training provided to Soviet interpreters, but also that he could not communicate with other judges directly, as he feared this hampered his legal authority.<sup>83</sup> As an exception, Russian and French were permitted to be used in court, but only during the respective national prosecution phases. The language problem was perpetuated going down the ranks within the national teams. Interestingly, however, it was in reverse order, as the lower ranks often proved more fluent in English than the judges and prosecutors; some even spoke Japanese.

Even more concerning was the lack of a deputy judge system, which would help during the absence of the main judge. In Nuremberg, every State could nominate two judges; at Tokyo, only one each. The Tokyo Charter provided that six members were enough to convene the Tribunal, and a majority of all members constituted a quorum.<sup>84</sup> However, a recurring cause for complaint has been the repeated absences of judges from the trial, especially in times when the defence presented the case (Webb as well as Pal returned home for court duties, but seem to be the only ones who were granted such exceptions). Defence attorney Owen Cunningham, in his 1948 critique of the trial,<sup>85</sup> counted that out of 466 days of the Tokyo Tribunal, Webb was absent for 53 days and Pal 109 days.<sup>86</sup> James Sedgwick concludes:

> By skipping court time, judges elevated personal motives over national and judicial responsibilities. Absences also reveal a distinct prejudice against the defence case. [...] In practice, this policy amounted to clear bias when judges missed disproportionately large portions of the defence case. Of the 438 workdays missed by judges, 333 came during the defence phase.<sup>87</sup>

Although we do not know whether personal motives to escape the lengthy and sometimes dull proceedings prevailed, or if judges were con-

<sup>&</sup>lt;sup>82</sup> Crowe, 2014, p. 209, see above note 16.

<sup>&</sup>lt;sup>83</sup> Polunina, 2018, p. 131, see above note 57.

<sup>&</sup>lt;sup>84</sup> Boister and Cryer, 2008, p. 27, see above note 2.

<sup>&</sup>lt;sup>85</sup> Owen Cunningham submitted a paper to the American Bar Association in 1948, entitled "The Major Evils of the Tokyo War Crimes Trial", Seattle, 1948, cited in Boister and Cryer, 2008, p. 60, see above note 2.

<sup>&</sup>lt;sup>86</sup> Harries and Harries, 1987, p. 149, see above note 48.

<sup>&</sup>lt;sup>87</sup> Sedgwick, 2011, p. 491, see above note 78.

cerned about the smooth running of the courts at home, the result was that the trial was not balanced between prosecution and defence, as was also underlined by Minear,<sup>88</sup> Dower<sup>89</sup> and Pritchard.<sup>90</sup>

Second, the drafting of the indictment and judgment became a point of friction between the prosecutors involved, as did procedural questions of the trial, especially the heavy emphasis in the US strategy on the charge of 'crime of aggression' and Japan's alleged violation of international treaties.<sup>91</sup> This also had side-effects. As Boister has noted,<sup>92</sup> the focus on aggression gave the US team the opportunity to pursue other goals, as for example the prohibition of the opium trade in Asia. It has been widely overlooked that the US team launched a fierce campaign during the Tokyo Trial to prove that Japan had waged a war of aggression by drugging the Chinese people and breaking their resistance. The 'Group One' counts of crimes against peace, which charged "wars of aggression" and "wars in violation of international law, treaties, agreements and assurances"<sup>93</sup> contained an Appendix A, expanded on the aggression in China.<sup>94</sup> It made a number of allegations crucial to the prosecution's argument about opium control. Firstly,<sup>95</sup> the Japanese had

pursued a systematic policy of weakening the native inhabitants will to resist [...] by directly and indirectly encouraging increased production and importation of opium and other

- <sup>91</sup> On the US strategy, see David M. Crowe, "MacArthur, Keenan and the American Quest for Justice at the IMTFE", in Lingen, 2018, pp. 65-83, see above note 2.
- <sup>92</sup> The following statements are based on Neil Boister, "Colonialism, Anti-Colonialism and Neo-Colonialism in China: The Opium Question at the Tokyo War Crimes Tribunal", in Lingen, 2016, pp. 25-50, see above note 44.

<sup>93</sup> See, for example, Count One, The Indictment is reproduced in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, 2008, p. 16.

<sup>&</sup>lt;sup>88</sup> Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, University of Michigan, Michigan, 2001.

<sup>&</sup>lt;sup>89</sup> John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, W.W. Norton & Co., New York, 1999.

<sup>&</sup>lt;sup>90</sup> R. John Pritchard, "The Historical Experience of British War Crimes Courts in the Far East, 1946-1948", in *International Relations*, 1978, vol. 6, pp. 311-26.

<sup>&</sup>lt;sup>94</sup> Section 4, see Boister and Cryer, 2008, p. 37, see above note 93.

<sup>&</sup>lt;sup>95</sup> The following is based on Mikkel Jarle Christensen and Neil Boister (eds.), "New Perspectives on the Structure of Transnational Criminal Justice", in *Brill Research Perspectives on Transnational Crime*, 2018, vol. 1, no. 2-3, p. 29.

narcotics and by promoting the sale and consumption of such drugs among such people.

## Secondly,

revenue from the above mentioned traffic in opium and other narcotics was used to finance the preparation for and waging of the wars of aggression [...] and to establish and finance the puppet governments set up by the Japanese Government in the various occupied territories.

## Thirdly, the Japanese Government

was actively participating in the proceedings of the League of Nations Committee on Traffic in Opium and other Dangerous Drugs and profess[ing] [...] to the world to be cooperating fully with other member nations in the enforcement of treaties governing traffic in opium and other narcotics to which she was a party.

By 1943, the United States was viewed as the guardian of order in postwar Asia and its explicit policy was to dismantle the colonial opium monopolies.<sup>96</sup> The picture in Taiwan and Northern China, or Manchukuo, was in reality far more complicated, but contradictory evidence was omitted or rejected by the US prosecution. Boister summarizes:

> [T]hrough a symbolic prosecution of Japan (rather than a legal prosecution of the accused on trial), the Tribunal was used to inscribe the social policy of drug prohibition and isolate the world against other possible ways of dealing with this particular social problem.<sup>97</sup>

A third point of friction at the Tokyo Trial was the clash of legal cultures, not only between Western and 'non-Western' ones, but also within European traditions of law, such as between European civil law and Anglo-Saxon common law traditions. The French judge, Henri Bernard, for example, followed argumentation based on natural law.<sup>98</sup>

There was also friction within the English-speaking bloc, mainly on the strategic aims of the trial. Not only was the question of whether to indict the Emperor highly controversial, as we have seen, but also the American strategy of focusing, as in Nuremberg, on the notion of 'crimes

<sup>&</sup>lt;sup>96</sup> William O. Walker III, Opium and Foreign Policy: The Anglo-American Search for Order in Asia 1912–1954, University of North Carolina Press, Chapel Hill, 1991, pp. 153-56.

<sup>&</sup>lt;sup>97</sup> Christensen and Boister, 2018, p. 49, see above note 95.

<sup>&</sup>lt;sup>98</sup> See Schoepfel, 2018, see above note 43.

against peace' was challenged. It became obvious that legal issues had not been solved; some legal issues continued to excite debate, especially the discussion of conspiracy to commit 'crimes against peace', which dragged on for almost a year.<sup>99</sup>

Another problematic issue was the alleged bias of judges who had personal experiences in the Pacific War (such as Webb, Cramer, Zaryanov and Jaranilla).<sup>100</sup> Jaranilla was a survivor of the 'Bataan Death March' and thus personally inflicted by a Japanese war crime on prisoners of war,<sup>101</sup> whilst Webb had been the Australian rapporteur on war crimes during the war.

Still more problematic was the lack of an overall and joint strategy, which resulted in an unbalanced trial conduct, as well as a distorted space to manoeuvre its outcome, threatening the overall mission to bring about 'justice'.

A fourth point concerns the conduct of the trial. As discussed earlier, Webb was criticized for being unable to moderate the competing interests and legal approaches of the group of 11 judges. Sentencing ended in a fiasco. A majority judgment was drafted under of Patrick, with Cramer, Jaranilla, MEI and Zaryanov joining in. The remaining judges formulated concurring or dissenting opinions (Pal, Röling, Bernard). In December 1948, the sentences were handed down, and all Japanese leaders were found guilty of one or more charges. Seven of the accused were condemned to death, 16 more were given life sentences. Sellars surmises that the secret votes against capital punishments were from Webb, Pal, Bernard and Zaryanov (the Soviet Union having temporarily abolished capital punishment).<sup>102</sup>

Fifth, the trial was further hampered by technical issues and questions related to status. Holding the only microphone on the bench, Webb was the only one of 11 judges who could intervene or pose questions.<sup>103</sup> Judging from the work environment, translation difficulties seem to have been the gravest burden for prosecution and defence alike. A complaint by the Canadian judge McDougall from March 1947 reveals a constant

<sup>&</sup>lt;sup>99</sup> Sellars, 2011, p. 184, see note 26.

<sup>&</sup>lt;sup>100</sup> Boister and Cryer, 2008, pp. 83-84, see above note 2.

<sup>&</sup>lt;sup>101</sup> For details, see Nagai, 2018, see above note 18.

<sup>&</sup>lt;sup>102</sup> Sellars, 2011, p. 192, see above note 26.

<sup>&</sup>lt;sup>103</sup> Morris, 2018, p. 45, see above note 49.

shortage of translators, the slow process of translating documents (which took two days for a short letter), and the lack of overall organization in the translation section.<sup>104</sup> Additionally, the New Zealand judge Northcroft criticized the bad quality of the American counsel and their lack of prosecutorial strategy, summarizing that "[t]he degree of disorganization [...] is disturbing".<sup>105</sup> The result was a lot of time wasted, on both the prosecution's and the defence's sides, on irrelevant material. A special case in point were issues related to status, which were especially prominent with the Chinese judge MEI, who complained about the seating order at the bench as well as on his car number plate, which in his views failed to reflect his high status.<sup>106</sup>

The final field of friction was individual problems, such as loneliness, and the formation of alliances behind the scenes, as Sedgwick underlines.<sup>107</sup> The socializing aspect of the trial, which reveals friendships as well as animosities, is an upcoming field of research. Dutch Judge Röling and Dutch attorney Strooker have provided accounts about dinner parties and touristic trips around Japan, for which people would usually assemble into groups. For example a 'prosecution team trip' to Mount Fuji saw the Dutch, American and Chinese members travelling.<sup>108</sup> As Brackman notes, "[a]lthough the judges isolated themselves from the prosecutors and defense lawyers, in the close foreign community in occupied Tokyo, it was inevitable that they socialized to some extent".<sup>109</sup> Further, visual evidence such as press photographs shows, for example, how the Soviet team seemed particularly integrated in all these endeavours, Zarvanov being a cheerful guest in many dinner parties. This hints at a kind of professional comradeship in Tokyo between the foreign judges and prosecutors beyond emerging Cold War realities.

<sup>&</sup>lt;sup>104</sup> TNA, LCO 2/2992, Memorandum to all members of the tribunal from McDougall, 27 March 1947.

<sup>&</sup>lt;sup>105</sup> TNA, LCO 2/2992, Letter from Northcroft to Chief Justice, 28 March 1947.

<sup>&</sup>lt;sup>106</sup> Bihler, 2018, see above note 23.

<sup>&</sup>lt;sup>107</sup> James Burnham Sedgwick, "Building Blocs: Communities of Dissent, Manufactured Majorities and International Judgement in Tokyo", in Lingen, 2018, pp. 29-43, see above note 2.

<sup>&</sup>lt;sup>108</sup> Schouten, 2018, p. 255, see above note 37.

<sup>&</sup>lt;sup>109</sup> Brackman, 1987, p. 67, see above note 1.

#### 4.7. Conclusion

The political context, formed by old wartime alliances, new frictions and Cold War realities, was highly complex, and resulted in the delay and difficulties which obscures the Tokyo legacy even today. The trial was seen as a failure due to its legal discord and the claim that the judges and legal staff were 'less experienced' than those at Nuremberg. This criticism is unfounded, as we have seen. Many governments struggled hard to find the best candidates possible, as they saw it of high political value to be sitting on the international bench. However, especially within the smaller nations, suitable personnel were either not abundant or suffered poor health due to internment and other war services rendered.

At the same time, the Tokyo Tribunal was remarkable as transcultural encounters at the crossroads of Europe, the United States, the Soviet Union, Australia and East, South-East and South Asia left their mark and developed a certain dynamic during the proceedings. There is a strong feeling of commitment and even 'duty' involved when studying the transcultural history of the Tokyo Tribunal. Whilst some judges underscored their independence by voicing dissenting judgments, others were anxious to keep the bench as united as possible, so as to reinforce the legacy of international tribunals as a whole and of Tokyo in particular. Overall, judges and lawyers in Tokyo were constrained to varying degrees by their respective national policies on the one hand and their legal training and experiences on the other. But they all expressed powerful independent opinions on basic questions of their individual perceptions of legal ethics, as we see, for example, with Bernard's and Pal's emphasis on natural law.

This transcultural learning system enabled many of the staff present at Tokyo to later enrol with the emerging international institutions, especially within the UN system. The Tokyo Tribunal gave them possibilities to enrich their knowledge of the functioning of large international courts, and form something which could be termed 'legal flows', which has left its marks on international criminal courts as we know them today.

# The Tokyo Tribunal's Legal Origins and Contributions to International Jurisprudence as Illustrated by Its Treatment of Sexual Violence

### **Diane Orentlicher**\*

#### 5.1. Introduction

When my generation of international legal scholars came of age, efforts to research the International Military Tribunal for the Far East ('IMTFE') turned up remarkably few resources, at least in the English-language literature. Those we found invariably began by noting how little attention the Tribunal had received compared to the International Military Tribunal ('IMT') in Nuremberg.<sup>1</sup> And when legal scholars *did* acknowledge the Tokyo Tribunal, they typically did so by adding "and Tokyo" to their re-flections on Nuremberg's legal legacy.<sup>2</sup> Thus in the legal academy as in

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<sup>&</sup>lt;sup>1</sup> This oft-noted point is captured in the title of a book by Arnold C. Brackman: *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow & Co., New York, 1987. See also R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances: A General Preface to the Collection", in R. John Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East*, The Edwin Mellen Press, 1998, vol. 2, p. xxi, noting that scholars have studied the Tokyo Trial Proceedings "only rarely and even then, [...] generally superficially" ('Tokyo Trial Records'). While I have cited volume 2 here, Pritchard's "General Preface" appears in each volume of this collection.

<sup>&</sup>lt;sup>2</sup> See, for example, M. Cherif Bassiouni, "Nuremberg Forty Years After: An Introduction", in *Case Western Reserve Journal of International Law*, 1986, vol. 80, no. 2, pp. 61-64.

other disciplines, the Tokyo Tribunal was widely treated as "a sister institution, nothing more".<sup>3</sup>

In consequence, the Tribunal's distinctive contributions to the field of international criminal law were long obscured, with important exceptions to be sure. Writing as recently as 2010, one scholar noted that some experts in this field "completely overlook the IMTFE's existence" or misstated key features of its operation and legacy.<sup>4</sup> This is notable. After all, the Tribunal played a foundational role in international criminal law, a field whose explosive growth in the early 1990s was one of the signal developments in international law in the latter half of the twentieth century.

What, then, accounts for legal scholars' relative neglect of the Tokyo Tribunal? This chapter explores several key reasons, and then considers how the resulting gap in knowledge diminished the generally rich body of scholarship in the field of international criminal law.

#### 5.2. Accounting for Legal Scholars' Relative Neglect

One factor behind this general neglect is that the legal framework of the Tokyo Tribunal was derivative (though by no means a carbon copy) of the law of the IMT, as Section 5.3. elaborates. Accordingly, many saw the To-kyo proceedings as "little more than an echo of the far more famous proceedings held at Nuremberg".<sup>5</sup>

Compounding this perception, the IMTFE concluded its work two years after the IMT issued its historic judgment. Recalling that the Nuremberg Trial "began quite soon after the end of the war, and it did not last very long", a former judge on the IMTFE noted the obvious and important consequence: this timing substantially elevated global awareness of the IMT relative to the Tokyo Tribunal.<sup>6</sup> At least among Western scholars, then, it was natural to focus on Nuremberg when constructing narratives of international law's historic post-war shift to principles of individual responsibility for crimes under international law.

<sup>&</sup>lt;sup>3</sup> Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy*, Routledge, 2008, p. 9.

<sup>&</sup>lt;sup>4</sup> Zachary D. Kaufman, "The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations", in *John Marshall Law Review*, 2010, vol. 43, pp. 753-54.

<sup>&</sup>lt;sup>5</sup> These words come from an unidentified source quoted in Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, University of Texas Press, Austin, 1979, p. 9.

<sup>&</sup>lt;sup>6</sup> B.V.A. Röling, "Introduction", in Chihiro Hosoya et al. (eds.), The Tokyo War Crimes Trial: An International Symposium, Kodansha International, New York, 1986, p. 16.

Another contributory factor was the Tokyo Tribunal's perceived lack of 'international' representation. Despite the participation of judges from 11 countries, the IMTFE has long been perceived to be less 'international' than the IMT, whose judges and chief prosecutors came from four countries. To be sure, this view is hardly uniform. Some argue, for example, that the greater diversity of States participating in the Tokyo Tribunal enhanced its legitimacy.<sup>7</sup> Yet for reasons elaborated in Section 5.3., many have seen the IMTFE as a fundamentally American enterprise.

Crucially as well, concerns about the fairness and independence of the Tokyo Trial have coloured the way legal scholars construct its legacy.<sup>8</sup> This stands in marked contrast to how most international law experts have constructed the legacy of Nuremberg, which has been widely embraced as a "spectacular success"<sup>9</sup> despite concerns that the IMT embodied victors' justice and imposed retroactive punishment.

Recent scholarship has questioned whether the Tokyo Tribunal's acknowledged flaws were of a fundamentally different order than those long associated with Nuremberg, or at any rate were as extreme as has long been supposed.<sup>10</sup> While that inquiry is beyond the scope of this chapter, it is relevant here to note a third factor behind generally harsh assessments of the IMTFE: vocal critics of the Tokyo Tribunal included key participants in its proceedings. This phenomenon was famously exemplified in Judge Radhabinod Pal's blistering dissent,<sup>11</sup> but it was not just Pal who faulted core features of the IMTFE. In his dissenting opinion, Judge Henri Bernard averred: "A verdict reached by a Tribunal after a defective procedure cannot be a valid one".<sup>12</sup> For many years, moreover, a scathing in-

<sup>&</sup>lt;sup>7</sup> See, for example, Pritchard, 1998, vol. 2, p. xxxi, see above note 1.

<sup>&</sup>lt;sup>8</sup> See Futamura, 2008, p. 60, see above note 3; Lachezar D. Yanev, *Theories of Co-Perpetration in International Criminal Law*, Brill/Martinus Nijhoff, 2018, pp. 109-15.

<sup>&</sup>lt;sup>9</sup> Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, Princeton University Press, Princeton, 2000, p. 147.

<sup>&</sup>lt;sup>10</sup> See, for example, Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008.

<sup>&</sup>lt;sup>11</sup> Although Pal's judgment was not read in court, it was reported in the Nippon Times along with other judgments; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, p. 324 n. 183.

<sup>&</sup>lt;sup>12</sup> Dissenting Judgment of the Member from France (Henri Bernard), Tokyo Trial Records, vol. 105, p. 20 (of Bernard's judgment), see above note 1.

dictment of the Tribunal published in 1971 "seemed to define the field".<sup>13</sup> Tellingly, its author acknowledged that his "major concern in writing [his] book" was "to demolish the credibility of the Tokyo trial and its verdict".<sup>14</sup>

For decades, moreover, scholars who may have wished to explore the Tokyo proceedings faced practical challenges. While the Nuremberg judgment and proceedings were quickly published by the British and American governments, the Tokyo judgment and records were never officially published, and were available commercially only decades after the trial ended.<sup>15</sup>

In the section that follows, I elaborate on two points noted above: the relatively scant attention paid by international legal scholars to the IMTFE derives, in significant part, from a longstanding perception that it was (1) derivative of Nuremberg, and yet (2) an essentially American institution rather than a truly international tribunal.

#### 5.3. An Echo of Nuremberg and an American Show

#### 5.3.1. Early Planning for Post-war Prosecutions

Early planning for post-war prosecutions laid the seeds for perceptions of Tokyo as "an echo of [...] Nuremberg".<sup>16</sup> Allied leaders' early statements about wartime depredations warranting punishment focused overwhelmingly on Nazi crimes, though some dealt with Japanese offences.<sup>17</sup> The United Nations War Crimes Commission ('UNWCC'), which was established in October 1943, at first focused solely on Axis war crimes; in May 1944, however, it established a sub-commission to address war crimes in Asia and the Pacific.<sup>18</sup> Only in late August 1945 did the UNWCC publish

- <sup>15</sup> Boister and Cryer, 2008, p. 325, see above note 11.
- <sup>16</sup> Piccigallo, 1979, p. 9, see above note 5.
- <sup>17</sup> See Boister and Cryer, 2008, pp. 17-19, see above note 11; Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, pp. 477-79; Minear, 1971, p. 8, see above note 14.
- <sup>18</sup> See Ustinia Dolgopol, "Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes Against The Comfort Women In The Tokyo Trial", in Tanaka, McCormack, and Simpson, 2011, p. 249, see above note 13.

<sup>&</sup>lt;sup>13</sup> Gerry Simpson, "Writing the Tokyo Trial", in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 29.

<sup>&</sup>lt;sup>14</sup> Richard H. Minear, *Victors' Justice: Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971, p. ix.

a white paper recommending that suspected Japanese war criminals be "surrendered to or apprehended by the United Nations for trial before an international military tribunal".<sup>19</sup>

Similarly, wartime warnings of post-war trials focused at first on Germany. Although a definitive plan to establish the IMT would come later, the United States, the United Kingdom and the Soviet Union laid down a marker in November 1943, when the three countries' leaders issued the Moscow Declaration warning that Germans responsible for atrocities would face post-war punishment.<sup>20</sup> Preparations for post-war prosecutions in Nuremberg were well underway by the time the three major allies in the war with Japan – China, the United Kingdom and the United States – declared their general intentions concerning post-war prosecutions of Japanese. The Potsdam Declaration of 26 July 1945, later endorsed by the Soviet Union, stated that "stern justice shall be meted out to all [Japanese] war criminals, including those who have visited cruelties upon our prisoners".<sup>21</sup>

Inevitably, too, the legal framework for Nuremberg was adopted first, and provided a model for Tokyo – a key factor behind the previously-noted "and Tokyo" thread in legal scholarship. The US government did not begin drafting a Tokyo prosecution policy in earnest until 9 August 1945,<sup>22</sup> the day after the Nuremberg Charter was adopted. As a participant in the Tokyo proceedings recalled, those who drafted "the Tokyo Charter took full advantage of the work of their predecessors in London, and to avoid substantial differences in carrying out related programs, followed as closely as possible the Nuremberg Charter".<sup>23</sup>

<sup>&</sup>lt;sup>19</sup> Hisakazu Fujita, "The Tokyo Trial: Humanity's Justice v Victors' Justice?", in Tanaka, McCormack, and Simpson, 2011, pp. 5-6, see *ibid*. (quoting UNWCC, Draft Summary of Recommendations concerning Japanese War Criminals and Atrocities).

<sup>&</sup>lt;sup>20</sup> Moscow Declaration on Atrocities by President Roosevelt, Mr. Winston Churchill and Marshal Stalin, 1 November 1943 (https://www.legal-tools.org/doc/3c6e23/).

<sup>&</sup>lt;sup>21</sup> Proclamation Calling for the Surrender of Japan, United States-China-United Kingdom, Potsdam, 26 July 1945, para. 10 (https://www.legal-tools.org/doc/f8cae3/).

<sup>&</sup>lt;sup>22</sup> See Totani, 2008, p. 21, see above note 10.

<sup>&</sup>lt;sup>23</sup> Horwitz, 1950, p. 486, see above note 17.

#### 5.3.2. American Leadership in London and Domination in Tokyo

As is well known, the United States was the driving force behind the idea of prosecuting Nazi war criminals once the war ended.<sup>24</sup> Early on, the United Kingdom favoured executing the principal Axis leaders; Stalin proposed shooting thousands.<sup>25</sup> In this setting, the United States had to persuade its allies to accept its vision.

The United States also took the lead in developing one of Nuremberg's central innovations – criminalizing the planning, preparation, initiation and waging of wars of aggression, which the Nuremberg and Tokyo Charters termed "crimes against peace". On this point, too, the United States had to persuade reluctant allies to go along. Doing so was a major focus of US diplomacy, under the leadership of Justice Robert H. Jackson, when the four Allied powers met in London to negotiate the Nuremberg Charter.<sup>26</sup> Only after weeks of difficult negotiations was Jackson able to overcome the strenuous resistance of the French and Soviet delegates.<sup>27</sup> When participants in the London Conference adopted the Nuremberg Charter on 8 August 1945, they included this novel crime in the Tribunal's subject-matter jurisdiction, along with conventional war crimes and another legal innovation, crimes against humanity.<sup>28</sup>

When applied to Nazi atrocities against German citizens, the last crime represented a profound rupture with bedrock principles of international law, which had long deemed outside its regulatory remit the way a government treated its own citizens in its own territory. Partly for this reason, the Nuremberg Charter specified that crimes against humanity could be prosecuted only when committed "in execution of or in connection

<sup>&</sup>lt;sup>24</sup> See Diane Orentlicher, Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia, Oxford University Press, New York, 2018, p. 432, n. 16.

<sup>&</sup>lt;sup>25</sup> See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, pp. 29-32; Bass, 2000, p. 147, see above note 9. Before he was persuaded to pursue post-war prosecutions, President Franklin Roosevelt too was sympathetic to the idea of summarily executing Nazi leaders. See *ibid*.

<sup>&</sup>lt;sup>26</sup> See Totani, 2008, p. 21, see above note 10.

<sup>&</sup>lt;sup>27</sup> See *ibid*.

<sup>&</sup>lt;sup>28</sup> Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, Article 6 ('Nuremberg Charter') (https://www.legal-tools.org/doc/64ffdd/).

with" one of the other crimes set forth in the Charter,<sup>29</sup> which by their nature entailed inter-State armed conflict.

The joint adoption of the Nuremberg Charter at the conclusion of multilateral negotiations and the adherence to that instrument by 19 other States, along with organizational matters that are discussed later, meant that Nuremberg would be widely seen and celebrated as a multilateral project despite its origins in American planning and its debt to American persistence. The process culminating in the promulgation of the Tokyo Charter was markedly different.

The first draft of the Tokyo Charter "was drawn up, in its entirety, by the United States".<sup>30</sup> While this draft was amended to accommodate the views of US allies,<sup>31</sup>

[i]t was made abundantly clear to the Allied Powers that the Supreme Commander [of occupied Japan, U.S. General Douglas MacArthur,] and the United States Government were determined to go ahead with the Tribunal on American terms. This train was going to depart whether or not the other United Nations chose to go along for the ride. The result was that the Allied Powers [...] fell in step with General MacArthur's diktat [...].<sup>32</sup>

The United States did not share its key policy document for prosecutions in Japan with Allied governments until well into October 1945,<sup>33</sup>

<sup>&</sup>lt;sup>29</sup> *Ibid.*, Article 6(c)

<sup>&</sup>lt;sup>30</sup> Horwitz, 1950, p. 483, see above note 17.

<sup>&</sup>lt;sup>31</sup> The original Charter, promulgated on 19 January 1946, provided for the appointment of "not less than five nor more than nine Members". Charter of the International Military Tribunal for the Far East, Article 2, in General Orders No. I, General Headquarters Supreme Commander for the Allied Powers, 19 January 1946. The Charter was amended to allow for up to eleven members so that India and the Philippines, which had not signed the instrument of surrender but had fought against Japan, could nominate judges and prosecutors. See Charter of the International Military Tribunal for the Far East, Article 2, in General Orders No. 20, General Headquarters Supreme Commander for the Allied Powers, 26 April 1946; TIAS No. 1589, 4 Bevans 20 ('Tokyo Charter') (https://www.legal-tools.org/ doc/44f398/).

<sup>&</sup>lt;sup>32</sup> Pritchard, 1998, vol. 2, p. xxvii, see above note 1.

<sup>&</sup>lt;sup>33</sup> Totani, 2008, pp. 21, 26, see above note 10; Boister and Cryer, 2008, p. 23, see above note 11. According to Solis Horwitz, a US member of the prosecution staff, a directive ordering the investigation, apprehension and detention of suspected war criminals, which was issued on 21 September 1945, was "approved by all nations taking part in the occupation of Japan". Horwitz, 1950, p. 480, see above note 17. But Horwitz did not clearly state whether these countries approved of the directive before it was issued.

weeks after Japan surrendered and General MacArthur had arrived in Tokyo to take up his post as Supreme Commander for the Allied Powers in Japan. By that time, the arrests of suspected Japanese war criminals by Americans were well underway.<sup>34</sup> And while the Nuremberg Charter was jointly promulgated by four countries, the Tokyo Charter was issued through the unilateral action of General MacArthur.<sup>35</sup>

#### 5.3.3. Legal Frameworks: Derivation and Difference

Although strongly influenced by the IMT Charter, the text of the Tokyo Charter was by no means an exact replica. While the first point may have obscured Tokyo's legal innovations, key differences detracted from the IMTFE's legal legacy (though these were hardly the most important factors behind critical assessments of Tokyo). Even where the two charters were in sync, the taint of retroactive justice has clung more tenaciously to the Tokyo Tribunal than its counterpart in Nuremberg.

The IMTFE's debt to Nuremberg is particularly evident in Article 5 of the Tokyo Charter, which sets forth the Tribunal's subject-matter jurisdiction. Like the IMT, the Tokyo Tribunal had jurisdiction over crimes against peace, as well as participation in a common plan or conspiracy to commit them; conventional war crimes; and crimes against humanity. The Tokyo Charter's definitions of these crimes largely followed, but were not identical to, those in the Nuremberg Charter. For example, instead of including examples of war crimes, as the Nuremberg Charter had done, the Tokyo Charter more succinctly included the category of "Conventional War Crimes: Namely, violations of the laws or customs of war".<sup>36</sup>

Nuremberg Charter, 8 August 1945, Article 6(b), see above note 28.

<sup>&</sup>lt;sup>34</sup> See Brackman, 1987, p. 10, see above note 1.

<sup>&</sup>lt;sup>35</sup> The Far Eastern Commission ('FEC'), comprising representatives of ten countries that had fought against Japan, was empowered to take decisions that would be transmitted to Mac-Arthur as directives. While its input resulted in amendments to the first version of the Charter promulgated by MacArthur, the FEC largely accepted the US policy on prosecutions in Tokyo. Horwitz, 1950, pp. 481-82, see above note 17.

<sup>&</sup>lt;sup>36</sup> Tokyo Charter, 26 April 1946, Article 5(b), see above note 31. The corresponding provision in the Nuremberg Charter reads:

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or illtreatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]

The Tokyo Charter's definition of crimes against humanity diverges from its precursor more substantially. In the Nuremberg Charter, crimes against humanity were defined as certain inhumane acts "committed against any civilian population" when other conditions are present.<sup>37</sup> Just days before the Tokyo Trial began, the phrase "against any civilian population" was removed from the definition of crimes against humanity set forth in the original Charter proclaimed by General MacArthur. The amendment was suggested by Joseph Keenan, the American Chief Prosecutor in Tokyo, who wanted to establish that any killing – even of combatants – in the prosecution of a war of aggression is unlawful.<sup>38</sup> The altered definition left scant if any international legal legacy. No one was convicted of crimes against humanity in Tokyo,<sup>39</sup> and the definition of this crime in the amended Tokyo Charter has not been followed in the statutes of other international criminal tribunals.

Turning to crimes against peace, the definition in the Tokyo Charter largely tracked its precursor in the Nuremberg Charter, but added the text italicized below:

Crimes against Peace: Namely, the planning, preparation, initiation or waging of a *declared or undeclared* war of ag-

In another departure from the Nuremberg Charter, which defined "Crimes against Humanity" to include "persecutions on political, racial or religious grounds", Nuremberg Charter, 8 August 1945, Article 6(c), see above note 28, the corresponding phrase in the Tokyo Charter omitted the word "religious", recognizing only "persecutions on political or racial grounds". Tokyo Charter, 26 April 1946, Article 5(c), see above note 31. In addition, the Tokyo Charter did not include any provision authorizing the Tokyo Tribunal to declare an organization or group a "criminal organization", as the IMT was authorized to do. Nuremberg Charter, 8 August 1945, Article 9, see above note 28.

<sup>39</sup> The Tokyo indictment grouped war crimes and crimes against humanity together under the heading "Group Three: Conventional War Crimes and Crimes against Humanity". The three counts listed under this heading emphasized violations of the laws of war, as did the further specifications of these violations in Appendix D. The Judgment dealt with atrocity crimes solely under the rubric of violations of the laws of war, presumably because the prosecutors who took the lead on the atrocities charges did not develop clear arguments about crimes against humanity. See Yuma Totani, "The Case against the Accused", in Tanaka, McCormack and Simpson, 2011, p. 154, above note 13.

<sup>&</sup>lt;sup>37</sup> *Ibid.*, Article 6(c), see above note 28.

<sup>&</sup>lt;sup>38</sup> B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond*, Polity, Cambridge, 1993, pp. 56-57. The prosecution did not rely solely on the charge of crimes against humanity to advance this claim. Instead, it linked murder charges to all three crimes falling within the IMTFE's subject-matter jurisdiction. The Majority Judgment side-stepped ruling on this novel claim. For a detailed discussion of the murder counts, see Boister and Cryer, 2008, pp. 154-74, see above note 11.

gression, 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[.]<sup>40</sup>

In a further departure from Nuremberg, the Tokyo Charter allowed for the prosecution of individuals only when they were "charged with offenses which include Crimes against Peace".<sup>41</sup> This limitation reflected the US government's position, set forth in its previously-noted policy paper, that the investigative body in Tokyo "should attach importance" to crimes against peace.<sup>42</sup> In fact, the United States apparently proposed that the IMTFE have jurisdiction *only* over crimes against peace, but agreed to include the other two crimes in the Tribunal's remit at the insistence of the United Kingdom.<sup>43</sup>

Despite this accommodation, at one point in the trial Keenan proposed to shorten or even drop the prosecution's presentation of war crimes evidence, which would leave the Tribunal to rule only on evidence relating to crimes against peace. Keenan's suggestion drew strong objections from other Allied prosecutors, who prevailed.<sup>44</sup> This, Yuma Totani writes, enabled "voluminous" evidence of Japanese atrocities to become part of the Tokyo Trial and historical record.<sup>45</sup>

As to organizational matters, key differences between the Nuremberg and Tokyo Charters underscored American dominance in Tokyo (though, as already suggested, participants from other countries significantly influenced the conduct and legacy of the trial). The Nuremberg

- <sup>43</sup> Boister and Cryer, 2008, p. 25, see above note 11.
- <sup>44</sup> Totani, 2011, p. 153, see above note 39.
- <sup>45</sup> *Ibid*.

<sup>&</sup>lt;sup>40</sup> Tokyo Charter, 26 April 1946, Article 5(a), see above note 31. Totani suggests that the words "declared or undeclared" were introduced to clarify the irrelevance of a formal declaration in light of the fact that Japan had initiated some armed attacks without prior warning or formal declaration: Totani, 2008, p. 81, see above note 10; Boister and Cryer emphasize the inverse: introducing the phrase clarified "that compliance with the formal requirements for the declaration of war in international law did not deprive a war of its criminal nature if it was aggressive": Boister and Cryer, 2008, p. 120, see above note 11. The separate addition of "law" after "international" sought to avoid any ambiguity regarding whether international law criminalized aggressive war: Totani, 2008, p. 81, see above note 10. In Totani's view, this position "had been the view of the planners of the Nuremberg tribunal, but it did not attain its full expression in the Nuremberg Charter". *Ibid*.

<sup>&</sup>lt;sup>41</sup> Tokyo Charter, 26 April 1946, Article 5, see above note 31.

<sup>&</sup>lt;sup>42</sup> Totani, 2011, p. 148, see above note 39.

Charter accorded each of the four signatories the right to appoint one judge and one alternate.<sup>46</sup> In contrast, the Tokyo Charter vested General MacArthur with exclusive authority to appoint the Tribunal's judges—albeit, and by no means incidentally, from those whose names were submitted by the nine signatories to the Instrument of Surrender as well as India and the Philippines.<sup>47</sup> And where the Nuremberg Charter provided for the four judges to select their own President,<sup>48</sup> the Tokyo Charter provided for the Supreme Commander to appoint the President of the IMT-FE.<sup>49</sup>

In reality, MacArthur exercised less authority over the Tokyo Tribunal than he seemed to possess in its Charter. As Totani notes, MacArthur did not really have the option of rejecting participating countries' judicial nominees.<sup>50</sup> That he hardly controlled the Tribunal is, moreover, amply demonstrated by the splintered opinions of its judges, including Judge Pal's comprehensive dissent.<sup>51</sup> Nevertheless, the concentration of authority in MacArthur is fundamental to perceptions of Tokyo as an American tribunal, as well as to concerns about its independence.

Just as the IMT Charter accorded each signatory the right to appoint a judge and an alternate, it also gave each the right to appoint a Chief Prosecutor.<sup>52</sup> In contrast to the equal status of Nuremberg's four Chief Prosecutors, the Tokyo Charter provided for the Supreme Commander to

<sup>&</sup>lt;sup>46</sup> Nuremberg Charter, 8 August 1945, Article 2, see above note 28.

<sup>&</sup>lt;sup>47</sup> Tokyo Charter, 26 April 1946, Article 2, see above note 31.

<sup>&</sup>lt;sup>48</sup> Nuremberg Charter, 8 August 1945, Article 4(b), see above note 28.

<sup>&</sup>lt;sup>49</sup> Tokyo Charter, 26 April 1946, Article 3(a), see above note 31. In addition, while Article 29 of the Nuremberg Charter vested responsibility for carrying out and potentially reducing sentences in the Control Council for Germany, which comprised the same four States that created the Tribunal, Article 17 of the Tokyo Charter vested this authority in the Supreme Commander for the Allied Powers in Japan. As a result of a policy directive adopted by the FEC, however, MacArthur could exercise these powers only after consulting with representatives of the members of the FEC in Japan. See Boister and Cryer, 2008, p. 26, see above note 11; Horwitz, 1950, p. 482, see above note 17.

<sup>&</sup>lt;sup>50</sup> Totani, 2008, p. 30, see above note 10.

<sup>&</sup>lt;sup>51</sup> Two members of the Tribunal, the Australian President and the Filipino judge, submitted separate opinions that registered disagreement with aspects of the majority judgment. The French, Dutch and Indian members filed opinions that dissented from the majority judgment more substantially – in the case of Judge Pal, comprehensively. For a succinct summary of the separate opinions, see Piccigallo, 1979, pp. 28-31, see above note 5.

<sup>&</sup>lt;sup>52</sup> Nuremberg Charter, 8 August 1945, Article 14, see above note 28.

designate a single Chief of Counsel,<sup>53</sup> whom other participating countries could appoint an "Associate Counsel to assist".<sup>54</sup> This, Solis Horwitz wrote, was notable: "For the first time eleven nations had agreed in a matter other than actual military operations to subordinate their sovereignty and to permit a national of one of them to have final direction and control".<sup>55</sup> As already noted, an American, Joseph Berry Keenan, was appointed Chief of Counsel.

In myriad ways that transcend Keenan's formal position, the imprint of American policy on key prosecutorial decisions shaped enduring assessments of the IMTFE. In particular, the Tokyo Tribunal's legacy has long been clouded by American insistence that Emperor Hirohito not be indicted, as well as the United States' role in suppressing evidence of human experimentation involving biological warfare by the Imperial Japanese Army's Manchuria-based Unit 731.<sup>56</sup>

#### 5.4. Reconsidering Tokyo's Legal Legacy

As we have seen, the convergence of myriad factors served to radically diminish the Tokyo Tribunal's presence, and certainly its stature, in scholarly narratives about the origins of international criminal law. Remarkably, it was long common even among leading experts in the field of international criminal law to describe the International Criminal Tribunal for the former Yugoslavia ('ICTY'), which was created by the UN Security Council in May 1993,<sup>57</sup> as the first international criminal tribunal since Nuremberg.<sup>58</sup>

Not surprisingly, then, scholars and advocates have often seemed unaware of the Tokyo Tribunal's substantive contributions to the field of international criminal law.<sup>59</sup> Apparent ignorance of the Tribunal's treatment of crimes of sexual violence is a notable case in point.

<sup>&</sup>lt;sup>53</sup> Tokyo Charter, 26 April 1946, Article 8(a), see above note 31.

<sup>&</sup>lt;sup>54</sup> *Ibid.*, Article 8(b).

<sup>&</sup>lt;sup>55</sup> Horwitz, 1950, pp. 486-87, see above note 17.

<sup>&</sup>lt;sup>56</sup> See Futamura, 2008, p. 63, see above note 3.

<sup>&</sup>lt;sup>57</sup> UN Security Council, resolution 827, International Criminal Tribunal for the former Yugoslavia (ICTY), UN Doc. S/RES/827 (1993), 25 May 1993 (https://www.legal-tools.org/ doc/dc079b/).

<sup>&</sup>lt;sup>58</sup> See Kaufman, 2010, pp. 753-54, see above note 4.

<sup>&</sup>lt;sup>59</sup> Another factor may have contributed to this phenomenon: until the 1990s, literature exploring the Tokyo precedent focused overwhelmingly on crimes against peace, largely ob-

With justification, scholars and advocates have often held that, until the 1990s, sexual violence was widely viewed as an inevitable by-product of war rather than a grave offense, and for that reason was largely invisible in post-war prosecutions.<sup>60</sup> When the UN Security Council created the ICTY, a global movement sought to ensure that rape would at long last be prosecuted as a war crime, as though this had never happened before.<sup>61</sup>

While advocates' general concerns were amply warranted, many seemed unaware that crimes of sexual violence had been successfully prosecuted at Tokyo as war crimes. As previously noted, the prosecution offered "voluminous" evidence of Japanese atrocities, which included the rapes of thousands of women during the occupation of Nanjing in 1937–38. The prosecution presented evidence of sexual violence principally as alleged violations of the laws of war as defined in the Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land.<sup>62</sup>

Notably in light of concerns that post-war prosecutions did not recognize the serious nature of sexual violence, testimony about rapes committed in Nanjing reflected an acute awareness of the gravity of these crimes. For example, a witness who described summary executions in Nanjing responded this way when asked, "What was the conduct of the Japanese soldiers toward the women" there?: "That was one of the roughest and saddest parts of the whole picture".<sup>63</sup> And when a defence lawyer tried to discredit a witness who testified about mass rapes in Nanjing by suggesting that Chinese soldiers also committed rape, the President of the

scuring the Tribunal's treatment of other atrocity crimes. See Totani, 2011, p. 147, see above note 39. This is not surprising, as charges relating to crimes against peace dominated the trial and judgment. See *ibid.*; Boister and Cryer, 2008, p. 175, see above note 11.

<sup>&</sup>lt;sup>60</sup> See, for example, Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law", in *McGill Law Journal*, 2000, vol. 46, p. 220.

<sup>&</sup>lt;sup>61</sup> See Felice D. Gaer, "Rape as a Form of Torture: The Experience of the Committee Against Torture", in *CUNY Law Review*, 2012, vol. 15, no. 2, p. 295. Some, to be sure, recognized the Tokyo precedent. See, for example, Theodor Meron, "Editorial Comment: Rape as a Crime under International Humanitarian Law", in *American Journal of International Law*, 1993, vol. 87, no. 3, p. 426.

<sup>&</sup>lt;sup>62</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 19 October 1907 (https://www. legal-tools.org/doc/fa0161/).

<sup>&</sup>lt;sup>63</sup> Tokyo Trial Records, vol. 7, p. 2633, see above note 1 (testimony of Dr. Miner Searle Bates).

Tokyo Tribunal, Australian Justice William Webb, sternly reminded the lawyer "that rape and the murder of women could never be just reprisals". $^{64}$ 

The judgment did not provide a detailed assessment of evidence of sexual violence and other Japanese atrocities, which the majority deemed "not practicable".<sup>65</sup> Nevertheless, its brief review credited evidence concerning rapes in Nanjing and other locations.<sup>66</sup> Of atrocities in Nanjing, the judgment found:

There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city [...]. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.<sup>67</sup>

Although the judgment did not make determinations about the specific classification of these offences,<sup>68</sup> it left no doubt that they constituted

<sup>&</sup>lt;sup>64</sup> *Ibid.*, p. 2595.

<sup>&</sup>lt;sup>65</sup> International Military Tribunal for the Far East, Judgment, 4 November 1948, in Tokyo Trial Records, vol. 103, p. 49592, see above note 1 ('Judgment').

<sup>&</sup>lt;sup>66</sup> See, for example, *ibid.*, pp. 49613 (Hopeh Province), 49617 (Changsha and Kweilin), 49632 (Blora, Dutch East Indies), and 49638, 49640 (Manila).

<sup>&</sup>lt;sup>67</sup> *Ibid.*, pp. 49605-06.

<sup>&</sup>lt;sup>68</sup> The prosecution brought several different war crimes charges in relation to crimes of sexual violence. See example, Indictment, Annex D, Section One ("female prisoners were raped by members of the Japanese forces" in violation of Article 4 of the Hague Regulations prohibiting "inhumane treatment"); *ibid.*, Section Twelve (inhabitants of occupied territories were raped in violation of Article 46 of the Hague Regulations requiring respect for "[f]amily honour and rights").

war crimes.<sup>69</sup> Certain defendants were, moreover, convicted for failing to take appropriate measures to stop these and other atrocities.<sup>70</sup>

This is not to suggest Tokyo modeled appropriate treatment of crimes of sexual violence. Far from it. In particular, the prosecution and judgment have been faulted, and quite rightly so, for their almost complete neglect of the sexual enslavement of so-called "comfort women".<sup>71</sup> Shamefully, this failure was not for lack of evidence, which was readily available. Indeed, evidence of enforced prostitution was introduced during the Tokyo Trial, and the judgment explicitly recognized that, during the Japanese occupation of Kweilin [Guilin], Japanese forces "recruited women labor on the pretext of establishing factories" yet in reality "forced the women thus recruited into prostitution with Japanese troops".<sup>72</sup> Even so, as Ustinia Dolgopol writes, "these crimes were never made a central focus of the prosecutors' case nor of the Judgment".<sup>73</sup>

Yet this should not obscure the unique contributions of the Tokyo Tribunal. The Tokyo prosecutor's decision to include acts of sexual vio-

(Emphasis added.) See also *ibid.*, p. 49791 (finding defendant guilty of war crimes in relation to "violations of women" and other atrocities in Nanjing).

- <sup>71</sup> See, for example, Nicola Henry, "Silence as Collective Memory: Sexual Violence and the Tokyo Tribunal", in Tanaka, McCormack and Simpson, 2011, p. 263, above note 13.
- <sup>72</sup> Judgment, Tokyo Trial Records, vol. 103, p. 49617, see above note 1.
- <sup>73</sup> Dolgopol, 2011, p. 244, see above note 18.

<sup>&</sup>lt;sup>69</sup> See, for example, Judgment, Tokyo Trial Records, vol. 103, p. 49592, see above note 1, stating:

The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, *rape* and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy.

<sup>&</sup>lt;sup>70</sup> See *ibid.*, pp. 49815-16 (General Iwane Matsui, Commander-in-Chief of the Central China Area Army, knew of the atrocities, including rape, committed in Nanjing, and "had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty"); *ibid.*, p. 49791 (Kōki Hirota, Japan's Foreign Minister, "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence"). While my focus here is on the fact that suspects were convicted of *war crimes including rape*, it should be noted that the standard of superior responsibility imposed by the IMTFE has been controversial.

lence in war crimes charges and the judgment's recognition of rape as a war crime marked a salutary departure from Nuremberg. Despite extensive documentation of Nazi crimes of sexual violence and the introduction of evidence of such crimes during the IMT trial, they were not prosecuted as such in Nuremberg.<sup>74</sup> Viewed in this light, the IMTFE's prosecution of sexual violence as a war crime is historic.

Thus it is striking that, even today, analyses of international jurisprudence on crimes of sexual violence often cite the Tokyo precedent, if at all, for the proposition that its Charter did not explicitly recognize rape as a war crime or crime against humanity.<sup>75</sup>

Fortunately, the first Prosecutor of the ICTY and International Criminal Tribunal for Rwanda, Richard J. Goldstone, never doubted that rape constitutes a war crime provided other elements of war crimes are present. Nevertheless, he and his fledgling staff wanted to marshal the strongest support available for the charges they would bring. During the early years of the *ad hoc* Tribunals' operations, I directed a project, the War Crimes Research Office of the Washington College of Law, that provided legal analyses to the Prosecutor. Among the earliest requests we received was for an analysis of post-war precedents for prosecuting crimes of sexual violence. One of our most extensive memoranda for the Prosecutor explored the Tokyo Tribunal's historic judgment, then the most important precedent in this area.<sup>76</sup>

<sup>&</sup>lt;sup>74</sup> See Kelly D. Askin, "Women and International Humanitarian Law", in Kelly D. Askin and Dorean M. Koenig (eds.), Women and International Human Rights Law, Transnational Publishers, Ardsley, 1999, vol. 1, p. 52; Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation", 2008, p. 7 (available on the UN's web site); Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, p. 301. Nevertheless, gender-related crimes for which evidence was introduced in Nuremberg "can be considered subsumed within the IMT Judgment", *ibid*.

<sup>&</sup>lt;sup>75</sup> See, for example, Grace Harbour, "International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment", in Serge Brammertz and Michelle Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 28.

<sup>&</sup>lt;sup>76</sup> In contrast to many scholars' failure to recognize Tokyo's treatment of sexual violence, the person who served as Goldstone's specialist on gender-based crimes, Patricia Viseur Sellers, has forthrightly recognized the Tokyo Tribunal's singular legacy. Noting criticism of the IMT for its failure to address sexual violence, Sellers continues: "The Tokyo Tribunal prosecutors [...] resolutely indicted the rape of prisoners and female nurses", while its

#### 5.5. Conclusion

For a variety of reasons, including undeniably serious flaws, the Tokyo Tribunal was long neglected or downplayed in legal scholarship, as in other disciplines. As a consequence, its foundational role in and contributions to international criminal law were long obscured. Scholarship in this field was correspondingly diminished, as many scholars and practitioners overlooked opportunities to build upon salutary aspects of the IMTFE's work.

Fortunately, recent years have brought welcome change, as a wealth of impressive scholarship has revisited virtually every aspect of the Tribunal's legacy. Other authors in this volume are among the leading contributors to this rich body of work. Through their work, Tokyo's legacy is being reconstructed in all its rich complexity. And this is invaluable. For a tribunal's record – its failures as well as its successes – can offer vital lessons and resources for contemporary efforts to sanction crimes against the basic code of humanity.

judges, "upon denoting the plethora of extreme sexual misconduct, forthrightly issued convictions": Sellers, 2008, p. 7, see above note 74.

## **Glimpses of Women at the Tokyo Tribunal**

#### **Diane Marie Amann**\*

#### 6.1. Introduction

The introduction to a new study of the International Military Tribunal for the Far East ('IMTFE') reports that "there were several female attorneys on duty at the IMTFE", and adds that "Tokyo was a pioneer in this regard and thus more modern than, for example, the tribunal at Nuremberg".<sup>1</sup> The passage merits scrutiny. Although the one Dutch and six American women named were lawyers, only three of them spoke in court, and the nature of the others' work is unclear. Moreover, depending on how one views the two post-World War II projects, the proportion of women lawyers at Tokyo may not have been greater than at Nuremberg. These disparities point to the innate contingencies of historical research. Shifts in social context – in the understanding of what facts are pertinent, and whose experiences matter – affect both the availability and the assessment of archival and other sources. Research on women's roles, including the important work still under way by authors of the quoted study, presents a particularly daunting challenge, not least because the IMTFE is itself only now emerging from the law's shadows. It is as if the 'Tokyo women' were a tiny matryoshka hidden inside a slightly bigger doll called 'Tokyo Tri-

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<sup>&</sup>lt;sup>1</sup> Kerstin von Lingen, "Introduction", in Kerstin von Lingen (ed.), *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*, Brill, Leiden and Boston, 2018, p. 14; see Lisette Schouten, "In the Footsteps of Grotius: The Netherlands and Its Representation at the International Military Tribunal for the Far East, 1945–1948", in *ibid.*, p. 247 and n. 24 (repeating list); below text accompanying notes 44–56 (quoting passage fully and examining it further).

bunal', itself nested within others named 'Nuremberg', 'international criminal justice', 'law' and so on.

As this chapter demonstrates, the Tokyo litigation teams included women who had earned law degrees at Cambridge, Yale, Gonzaga and elsewhere, and had practiced in federal courts, private law firms, or government ministries. Yet, few were permitted to address the Tribunal, and several worked under job titles like 'analyst' rather than 'attorney'. Some Tokyo women had not finished law school, yet performed attorneys' work, often aided by other women professionals, such as secretaries, court reporters, and interpreters. Women at the Tokyo Trial included unattached twenty-somethings and married forty-somethings. All profiled in this chapter were American or European nationals, unacquainted with Japan. All of them are even less well known than the Tribunal at which they worked.

For much of the 70 years since it convicted 25 Japanese leaders of war crimes, crimes against humanity, and crimes against peace, the Tokyo Tribunal has scarcely been visible in the global legal imagination. For decades, it was difficult even to set eyes on the Tribunal's judgment, and what few academic critiques there were tended to dismiss it as an exercise in victors' justice. This is changing, but Tokyo's new visibility retains a blind spot: as did the old ones, most of the new histories also highlight men. Women participants remain obscure, sometimes seen but seldom heard or discussed. This chapter constitutes an effort to expose what has been hidden; that is, to figure women properly within the Tokyo Tribunal narratives.

The chapter first probes the shadows that surrounded Tokyo relative to its Nuremberg counterpart, and then surveys renewed interest in the proceedings in Japan's capital. It notes women's muted roles in academic discourse and, to varying degrees, in three filmed accounts, each titled *Tokyo Trial.*<sup>2</sup> The chapter next gives voice to the women who worked at Tokyo; in particular, women who served on legal teams as lawyers and analysts, stenographers and translators, as well as secretaries and administrators. Profiled are the seven women identified in the study quoted

<sup>&</sup>lt;sup>2</sup> Pieter Verhoeff and Rob W. King (dirs.), *Tōkyō saiban (Tokyo Trial)*, NHK, Japan, 2016; GAO Qunshu (dir.), *Dongjing shen pan (The Tokyo Trial)*, Beijing Xianming Yinghua Culture & Media, Jiujiang Changjiang Film TV Production, and Shanghai Film Group, China, 2006; Masaki Kobayashi (dir.), *Tōkyō saiban (International Military Tribunal for the Far East*), Kodansha, Japan, 1983.

above – Virginia Bowman, Lucille Brunner, Eleanor Jackson, Helen Grigware Lambert, Grace Kanode Llewellyn, Bettie Renner, and Coomee Strooker-Dantra, along with Elaine B. Fischel, the author of a noteworthy memoir.<sup>3</sup> Finally, the chapter draws comparisons with findings from my own research on the 'Nuremberg women'. The chapter is tentative; as with my 2010 essay, "Portraits of Women at Nuremberg",<sup>4</sup> the discussion offers contingent glimpses of the Tokyo women in the hope of encouraging further research.

#### 6.2. A Tribunal in the Shadows

Allied leaders affirmed plans for post-war international criminal trials during a 1945 conference at Potsdam, Germany. Referring to Europe, they said: "War criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment".<sup>5</sup> As for Japan, they insisted that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners".<sup>6</sup> These declarations were implemented along seemingly parallel tracks; a closer look, however, reveals divergences. Efforts along the Japan track moved more slowly, for example. The war in Europe had ended two months before the July gathering at Potsdam, after all, and the Charter of the International Military Tribunal ('IMT') at Nuremberg would issue soon after – on 8 August, in London, within hours of the US atomic-bombing of Nagasaki and of Rus-

<sup>&</sup>lt;sup>3</sup> See Elaine B. Fischel, *Defending the Enemy: Justice for the WWII Japanese War Criminals*, Bascom Hill Books, Minneapolis, 2009, discussed below in text accompanying notes 57–73. Women also were witnesses: see Arnold C Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow & Co., New York, 1987, pp. 20–21 (recalling testimony of Esther Garcia Moras); Jeanne Guillemin, *Hidden Atrocities: Japanese Germ Warfare and American Obstruction of Justice at the Tokyo Trial*, Columbia University Press, New York, 2017, p. 198 (discussing interrogation of Phyllis Bannan).

<sup>&</sup>lt;sup>4</sup> Diane Marie Amann, "Portraits of Women at Nuremberg", in Elizabeth Andersen and David M. Crane (eds.), *Proceedings of the Third International Humanitarian Law Dialogs*, American Society of International Law, Washington, DC, 2010, pp. 31–54.

<sup>&</sup>lt;sup>5</sup> The Berlin (Potsdam) Conference, July 17–August 2, 1945, (a) Protocol of the Proceedings, August 1, 1945 ('Potsdam Conference'), section II(A)(5) (https://www.legal-tools.org/doc/ f966df/).

<sup>&</sup>lt;sup>6</sup> Ibid., Annex II, para. (b)(10). This portion of the Potsdam protocol is reprinted in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, pp. 1–2 ('Tokyo Documents').

sia's entry into the war against Japan,<sup>7</sup> and nearly a month before the signing of the Japanese surrender.<sup>8</sup> Another nine months would elapse before the man named the Supreme Allied Commander in Tokyo, US General Douglas MacArthur, proclaimed the final Charter of the IMTFE;<sup>9</sup> by then, the year-long Nuremberg Trial of the Major War Criminals was almost halfway through.

Efforts in Japan also seemed to run on a shorter track. In legal and popular discourse, 'Nuremberg' typically refers not only to the trial before the IMT, which concluded in October 1946, but also to 12 subsequent trials that the United States conducted in the same courthouse, with the cooperation of other Allies. These latter trials took place before US judges sitting on three-member panels called the Nuremberg Military Tribunals; they lasted through to May 1949. 'Tokyo', in contrast, conjures the single international trial of Japanese Class A war criminals, which began later (April 1946) and ended earlier (November 1948) than the 13 trials at Nuremberg.<sup>10</sup>

In at least one respect, the Japan track operated on a broader gauge. While only four countries – the United Kingdom, France, the Soviet Union and the United States – could appoint judges and chief prosecutors at

<sup>&</sup>lt;sup>7</sup> New Yorkers read "Soviet Declares War On Japan; Attacks Manchuria, Tokyo Says; Atom Bomb Loosed On Nagasaki"; one story beneath that banner was Charles E. Egan, "4 Powers Call Aggression Crime in Covering War Trials", *New York Times*, 9 August 1945, p. 1 (available on its "TimesMachine").

<sup>&</sup>lt;sup>8</sup> "Japanese Instrument of Surrender", in Tokyo Documents, 2008, pp. 3–4, see above note 6 (https://www.legal-tools.org/doc/4059de/). The advanced planning for Europe is evident in Potsdam Conference, section VI, see above note 5, which refers to negotiations in London and calls for a list of Nazi defendants by 1 September 1945 – the day before the signing of Japan's unconditional surrender.

<sup>&</sup>lt;sup>9</sup> Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 26 April 1946, annexed to this volume ('Tokyo Charter'). This version, also reprinted in Tokyo Documents, 2008, pp. 7–11, see above note 6, replaced MacArthur's 19 January 1946 proclamation reprinted *ibid.*, pp. 5-6.

<sup>&</sup>lt;sup>10</sup> See Michael Bazyler, Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World, Oxford University Press, New York, 2016, pp. 69–103 (providing dates of the 13 trials at Nuremberg); Yuma Totani, The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II, Harvard University Asia Center, Cambridge, Massachusetts, and London, 2008, pp. 7–8 (setting out Tokyo Trial dates). Many other trials occurred in Europe and in Asia, in military tribunals and in national courts; at times, these are conflated with the Nuremberg or Tokyo projects.

Nuremberg,<sup>11</sup> the Tokyo Tribunal added seven to that list.<sup>12</sup> A new judicial seat from Europe went to the Netherlands, which still claimed Indonesia as its colony; one from the Americas, to Canada; and five from Asia, to Australia, China, India, New Zealand, and the Philippines. Nevertheless, unlike at Nuremberg, at Tokyo the top military commander had the final say over the men who would judge. And though other countries sent associate prosecutors to Tokyo, only one man served as Chief of Counsel; appointed by President Harry S. Truman, this top prosecutor was Joseph B. Keenan, a US Department of Justice official and former military lawyer.<sup>13</sup> During and after Tokyo, these departures from the Nuremberg model were frequently deemed unfortunate. First, MacArthur's interventions, on matters such as the non-prosecution of Japan's Emperor, seemed motivated more by political expediency than a quest for accountability. Second, Keenan's absences and courtroom behaviour drew criticism. Finally, the heterogeneity of the Tokyo bench fostered disagreement. Two separate opinions and three dissents accompanied the majority judgment, and unlike at Nuremberg, the dissenters challenged foundational principles of the Tribunal.<sup>14</sup> Such factors helped to push Tokyo, far more than Nuremberg, into the law's shadows.

Divergences in the dissemination of tribunal information underline the point. "The Nuremberg trials received much publicity and relatively widespread newspaper coverage throughout the proceedings", wrote Solis Horwitz, who had served as a deputy chief prosecutor at Tokyo; conversely, he added: "Scant attention was paid by the American press to the To-

<sup>&</sup>lt;sup>11</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 8 August 1945, Articles 2, 14 (https://www.legal-tools.org/doc/844f64/, https://www.legal-tools.org/doc/ 64ffdd/).

<sup>&</sup>lt;sup>12</sup> On the structure at Tokyo, see Tokyo Charter, Articles 2, 3, 8, see above note 9. On the "scepticism" with which the Netherlands greeted its inclusion, see Schouten, 2018, pp. 244–47, see above note 1.

<sup>&</sup>lt;sup>13</sup> Executive Order No. 9660, 10 Fed. Reg. 14591, 30 November 1945. For a roster of associate prosecutors, see Telephone Directory, International Prosecution Section, War Ministry Building, 19 June 1946, C.W.J. Phelps Collection ('Phelps Collection'), Box 2, available at University of Virginia School of Law, International Military Tribunal for the Far East Digital Collection ('UVA IMTFE') (http://imtfe.law.virginia.edu/).

<sup>&</sup>lt;sup>14</sup> For example, Elizabeth S. Kopelman [Borgwardt], "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2, pp. 373–444. See also below text accompanying notes 20–28.

kyo Trial".<sup>15</sup> Writing in a journal of the Carnegie Endowment for International Peace, Horwitz confined his observations to sources in English, as does this chapter with regard to its survey of commentary.<sup>16</sup>

Horwitz's observation about the paucity of attention to Tokyo extended as well to official publications. During 1946, the year of the IMT judgment, the US government issued 11 red tomes containing documents on the prosecution of Nazis for conspiracy to wage an aggressive war.<sup>17</sup> This 'Red Series' was soon joined by a 42-volume 'Blue Series', which covered all aspects of that IMT, plus a 15-volume 'Green Series', which chronicled the 12 subsequent proceedings before the US-led Nuremberg Military Tribunals.<sup>18</sup> By 1949, the Nuremberg project had published nearly 60,000 pages of official documentation, in books deposited in libraries across the United States. A year later, Horwitz observed: "No comparable action has as yet been taken with respect to the Tokyo judgment and records".<sup>19</sup>

Nor would it be. In 1953, a Calcutta press issued in book form the 1,200-page dissent in which India's Justice Radhabinod Pal had urged that all defendants be acquitted.<sup>20</sup> The full judgment did not appear until 1977, in two volumes published in Amsterdam and edited by two Dutch law professors – one of them Justice B.V.A. Röling, author of another Tokyo

<sup>&</sup>lt;sup>15</sup> Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, no. 465, p. 475 (omitting the stray comma after "trials" in the original).

<sup>&</sup>lt;sup>16</sup> This limitation is, in part, on account of space constraints. On representations in Japanese, see, for example, Totani, 2008, above note 10, and in this volume, Beatrice Trefalt, "Remembering the Tokyo Trials, Then and Now: The Japanese Domestic Context of the International Military Tribunal for the Far East", chap. 15 below.

<sup>&</sup>lt;sup>17</sup> Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, vols. I–VIII, plus books subtitled *Supplement A*, *Supplement B*, and *Opinion and Judgment*, US Government Printing Office, Washington, DC, 1946.

<sup>&</sup>lt;sup>18</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Nuremberg, 1947; Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg [Nuremberg], October 1946–April 1949 ('Green Series'). All volumes in the three series may be accessed, in searchable PDF format, on the web site of the Library of Congress, under "Military Legal Resources".

<sup>&</sup>lt;sup>19</sup> Horwitz, 1950, p. 476, see above note 15.

<sup>&</sup>lt;sup>20</sup> Radhabinod Pal, International Military Tribunal for the Far East: Dissentient Judgment of Justice R.B. Pal, Sanyal, Calcutta, 1953.

dissent.<sup>21</sup> The Tokyo transcripts were largely unavailable until 1981, when a New York press issued 22 volumes edited by two historians.<sup>22</sup> Great improvement came with the recent placement of typescript transcripts and other Tokyo Trial documents, in searchable format, on the ICC Legal Tools Database.<sup>23</sup>

Likewise, unofficial discourse was sparse. Research has turned up at least 40 book-length, English-language memoirs by Nuremberg men, far more than those by Tokyo participants. No star-studded Hollywood blockbuster like *Judgment at Nuremberg* arose out of the proceedings in Japan.<sup>24</sup> The serious commentaries with the firmest grasp on the global imagination were not favourable ones like Horwitz's 1950 essay.<sup>25</sup> Jurists instead preferred critical accounts – some produced by the prolific Röling<sup>26</sup> – which disparaged the Tokyo Trial as an example of "victors' justice"<sup>27</sup> that was "fraught with procedural irregularities", "politically motivated", and "dubious, if not erroneous".<sup>28</sup> Even amid the post-Cold

<sup>&</sup>lt;sup>21</sup> B.V.A Röling and C.F. Rüter (eds.), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMFTE)*, vols. I and II, Amsterdam University Press, Amsterdam, 1977. On the publishing history, see, for example, Tokyo Documents, 2008, pp. lxxxiii–lxxxiv, see above note 6.

<sup>&</sup>lt;sup>22</sup> R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes*, Garland, New York, 1981. A search in the WorldCat database (https://www.worldcat.org/) indicated that even today, only a hundred or so libraries worldwide possess these volumes.

<sup>&</sup>lt;sup>23</sup> See ICC Legal Tools Database (https://www.legal-tools.org/).

<sup>&</sup>lt;sup>24</sup> Stanley Kramer (dir.), *Judgment at Nuremberg*, Roxlom Films, USA, 1961.

<sup>&</sup>lt;sup>25</sup> A literature review, nonetheless, indicates a greater willingness to rely on Horwitz, 1950, see above note 15, than on a contemporaneous book by the Chief of Counsel and a Juridical Consultant at Tokyo, Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law*, Public Affairs Press, Washington, DC, 1950.

<sup>&</sup>lt;sup>26</sup> See Jeanie M. Welch, *The Tokyo Trial: A Bibliographic Guide to English-Language Sources*, Greenwood Press, Westport, Connecticut, 2002, pp. 84–86 (providing Röling's bibliography).

<sup>&</sup>lt;sup>27</sup> Though the term calls to mind a later critique – Richard H. Minear, *Victors' Justice: Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971 – 'victors' justice' won currency even before the trial's conclusion in 1948. Fischel, 2009, pp. 300–03, 317, see above note 3.

<sup>&</sup>lt;sup>28</sup> M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", in *Harvard Human Rights Journal*, 1997, vol. 10, pp. 33–35 and nn. 96, 110 (citing, *inter alia*, Minear, 1971, see above note 27, and Bernard V.A. Röling, "The Nuremberg and the Tokyo Trials in Retrospect", in M. Cherif Bassiouni and Ved P. Nanda (eds.), *A Treatise on International Criminal Law*, vol.

War revival of international criminal justice, therefore, the IMTFE remained in the law's shadows, its precedents seldom surfacing in the judgments of successor tribunals.

#### 6.3. Amid New Visibility, Women's Muted Roles

Recently, the English-language landscape regarding Tokyo has changed. The year 2008 saw the appearance of a one-volume compilation of the IMTFE Charter, indictment and judgment; its editors, Neil Boister and Robert Cryer, also published a scholarly reappraisal that year.<sup>29</sup> These books, coupled with Yuma Totani's pathbreaking 2008 monograph,<sup>30</sup> confirmed the renewal of interest in post-war proceedings in Japan. Legal and historical writings ensued.<sup>31</sup> Renewed interest extended to popular culture, as evidenced by filmed accounts like a 2016 Emmy-nominated miniseries, *Tokyo Trial (Tōkyō saiban)*, a joint effort of Japan, Canada and the Netherlands, still streaming on Netflix.<sup>32</sup>

Despite this visibility, a blind spot marks many of the newer histories: discussions of women's roles, though more frequent, remain relatively muted. The newer academic literature has broken the "silence" in the "collective memory", to quote Nicola Henry; however, much of this breakthrough has centred on issues related to the sexual violence and enslavement to which women in Asia were subjected by Japanese troops.<sup>33</sup>

<sup>1,</sup> Charles C. Thomas, Springfield, Illinois, 1973, pp. 600–01, 605–07); see Antonio Cassese, *International Criminal Law*, second edition, Oxford University Press, Oxford, 2008, p. 322 (characterizing both Tokyo and Nuremberg as examples of "victors' justice").

<sup>&</sup>lt;sup>29</sup> See Tokyo Documents, 2008, see above note 6; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, New York, 2008.

<sup>&</sup>lt;sup>30</sup> Totani, 2008, above note 10.

<sup>&</sup>lt;sup>31</sup> Works not cited elsewhere in this chapter include Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, London and New York, 2008; Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, Japanese War Criminals: The Politics of Justice after the Second World War, Columbia University Press, New York, 2017; Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in European Journal of International Law, 2001, vol. 21, no. 4, pp. 1085–1102.

<sup>&</sup>lt;sup>32</sup> Verhoeff and King (dirs.), 2016, see above note 2; Etan Vlessing, "NHK Pacts With Canadian, Dutch Producers on World War II Drama (Exclusive)", *Hollywood Reporter*, 20 May 2014 (available on its web site); "2017 International Emmy Awards Nominees", available on the web site of the International Emmy Awards.

<sup>&</sup>lt;sup>33</sup> See Nicola Henry, "Silence as Collective Memory: Sexual Violence and the Tokyo Trial", in Yuki Tanaka, Timothy L.H. McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden and Boston,

Although profoundly important, these are by no means the only aspects of the Tokyo proceedings pertinent to women.

Also important is the extent to which women participated in that post-war trial. Yet, most biographical accounts put men in the limelight, leaving women on the margins. That is certainly the case with the 2016 mini-series, which revolves around Justice Röling. The series opens with this European jurist, played with pensive understatement in the mould of 1940s film stars like Gary Cooper, writing a letter to the distant wife whom he will not see again for more than two years. Soon, a German concert pianist attracts the attention of violinist Röling, but they break when she manoeuvres to have him meet the wife and daughter of a Tokyo defendant. Occasionally, other women are seen, posing in a bikini or serving drinks in a kimono here, or, clad in a dark suit, typing a document there. The only professional who speaks is identified only as 'Lady'.<sup>34</sup> Though prim in dress and in demeanour, Lady, an interpreter, exercises considerable agency: she is the Russian judge's only means of communicating with his peers, and often chooses to render his harsh remarks in tactful terms.

The hero-narrator of a 2006 feature-length Chinese film, *The Tokyo Trial (Dong Jing shen pan)*, is Justice MEI Ju'ao [Ru'ao], China's representative on the bench.<sup>35</sup> As with the 2016 mini-series, this version intersperses courtroom proceedings and judicial deliberations with depictions

<sup>2011,</sup> pp. 263–82. Related chapters in this volume are: Ustinia Dolgopol, "Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes against the Comfort Women in the Tokyo Trial", pp. 243-61; and Helen Durham and Narrelle Morris, "Women's Bodies and International Criminal Law; From Tokyo to Rabaul", pp. 283–90. See also Christine M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery", in *American Journal of International Law*, 2001, vol. 95, no. 2, pp. 335–41.

<sup>&</sup>lt;sup>34</sup> Verhoeff and King (dirs.), 2016, Episode 1, see above note 2 (depicting a judges' conference in which participants are greeted as "Gentlemen – and Lady"). Credits identify the aide only as "Russian Translator". IMDb, "Tokyo Trial (2016) Full Cast & Crew" (available on its web site).

<sup>&</sup>lt;sup>35</sup> GAO (dir.), 2006, see above note 2. MEI's diary, in Chinese, may have served as source material for this film. For an English-language essay by him which conveys his concern about harms to Chinese people, see MEI Ru'ao [Ju'ao], "The Nanking Massacre and the Tokyo Trial", in CHENG Zhaoqi, SONG Zhiyong, ZHANG Sheng, ZHAI Yi'an, and HE Qinhua (eds.), *The Tokyo Trial: Recollections and Perspectives from China*, Cambridge University Press, Cambridge, 2016, pp. 242–48. Here and elsewhere in this chapter, the surnames of Chinese nationals appear first, as is customary, unless stated otherwise in a source; Japanese names follow the Western convention, as explained in the front-matters.

of Tokyo life. Its perspective is quite different, however; trial scenes dwell on Japan's crimes in China, while MEI and other characters struggle to work out historical and contemporary interrelations between Japanese and Chinese people. Women tend bars and wait tables; one was a "sex tool" for the Japanese Army. The camera often settles on two women in the courtroom gallery, one of whom faints when former Prime Minister Hideki Tōjō testifies that he would resume warfare if acquitted. Next to her is Yoshiko Wada, a reporter who has befriended a Chinese male colleague. Shaken by the testimony about the rape of a Chinese girl, Wada confides in her brother, who protests, "Yoshiko, don't forget you are Japanese".<sup>36</sup> Later, he shoots her and her colleague, who then strangles him to death.

Women play more central roles in the 1983 Japanese documentary International Military Tribunal for the Far East (Tokvo saiban), directed by renowned filmmaker Masaki Kobayashi.<sup>37</sup> Among the women spotlighted is Shizuko Hirota, the wife of another former prime minister on trial, said to have committed suicide to 'ease' the mind of her husband. "When Hirota heard the news, he simply nodded."38 Later, Kobavashi presents actual trial footage of witness "Vivien Bullwinkel, Australian Army Nursing Service Captain".<sup>39</sup> In 1942, Bullwinkel, along with other nurses and about 200 women, children and elderly men, had fled from the Japanese troops advancing on Singapore; in 1946, she testified to the IMTFE that she had endured a shooting, capture and more than three years of detention in a series of overcrowded, food-scarce, disease-ridden Japanese prison camps.<sup>40</sup> No defence counsel stood to cross-examine Bullwinkel, and after the Tribunal's President, Justice William Webb, complimented her as a "model witness" who had testified "faultlessly", she was excused.<sup>41</sup> The video clip reproduced in Kobayashi's documentary shows Bullwinkel wearing a uniform, tie and broad-brimmed hat. Hunched over as she speaks into a microphone, she recalls a Japanese massacre in Indonesia that she alone survived: "They then ordered the

<sup>&</sup>lt;sup>36</sup> *Ibid.* Quoted are English-language subtitles, which do not always parse. The extent to which the subplot is fictional is unclear.

<sup>&</sup>lt;sup>37</sup> Kobayashi (dir.), 1983, see above note 2.

<sup>&</sup>lt;sup>38</sup> *Ibid*.

<sup>&</sup>lt;sup>39</sup> *Ibid*.

<sup>&</sup>lt;sup>40</sup> For this witness' full testimony, see Transcript of proceedings, 20 December 1946, pp. 13454–76 ('Bullwinkel testimony') (https://www.legal-tools.org/doc/ceff3f/).

<sup>&</sup>lt;sup>41</sup> *Ibid.*, p. 13476.

twenty-three of us to march into the sea. We had gone a few yards into the water when they commenced machine guns from behind. I saw the girls falling one after the other, then I was hit".<sup>42</sup> A panoramic shot of the court-room reveals a number of other suit-clad women, including one at the prosecution table; none of these women is ever identified.

Such glimpses tantalize, but do not reveal the Tokyo women or the roles they played. It is to those questions that this chapter now turns, providing some answers about women who worked on legal teams at the Tokyo Tribunal.<sup>43</sup>

#### 6.4. Figuring Women into Tokyo Trial Narratives

The turn toward women's roles begins with consideration of the full 2018 passage from which this chapter first quoted:

A special case in point for Tokyo is the employment of female attorneys in the prosecution and as legal aides in the defence team. Scholarship has not yet comprehensively addressed the gender dimension of Tokyo, as there were several female attorneys on duty at the IMTFE: Virginia Bowman, Lucille Brunner, Eleanor Jackson, Helen Grigware Lambert, Grace Kanode Llewellyn, Bettie Renner (all from the USA), and the Dutch attorney Coomee Strooker-Dantra. They all worked on various phases of the prosecution's case and presented to the court. It is still open to research what degree the employment of female colleagues was a side effect of the shortage of personnel at Tokyo, or a purposeful experiment. The fact remains that Tokyo was a pioneer in this regard and thus more modern than, for example, the tribunal at Nuremberg, where women were in large part employed as stenotypists or secretaries only.44

<sup>&</sup>lt;sup>42</sup> Kobayashi (dir.), 1983, see above note 2; Bullwinkel testimony, p. 13457, see above note 40 (containing transcription of quoted excerpt). For a detailed account of this massacre, see Ian W. Shaw, *On Radji Beach*, Pan Macmillan Australia, Sydney, 2010.

<sup>&</sup>lt;sup>43</sup> Starting points for research on women not mentioned in this chapter include James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948", unpublished Ph.D. thesis, University of British Columbia, 2012 (available on its web site); UVA IMTFE, see above note 13.

<sup>&</sup>lt;sup>44</sup> Von Lingen, 2018, p. 14, see above note 1. See also Schouten, 2018, p. 247 and n. 24, see above note 1; "Three District Women Help in Preparing for Jap War Trials", *Evening Star*, Washington, DC, 20 March 1946, p. A3 (describing Bowman, Brunner, Llewellyn and

The passage identifies what it calls "the gender dimension" as an under-researched aspect of the Tokyo enterprise. Such research is essential, but daunting. Compounding the relative obscurity of the Tokyo Trial is the paucity of documentation on women; in particular, women whose names changed upon marriage or divorce. Until the gaps in knowledge posed by such barriers are filled, other statements in the quoted passage necessarily will remain contingent.

Whether hiring patterns differed is an open question, for instance. A prosecution directory indicates that, as they did at Nuremberg, most of the women at Tokyo held clerical positions.<sup>45</sup> The proportion of women on prosecution and defence teams in Tokyo were not vastly different from that in Nuremberg either. Well before the start of the Tokyo Trial, at least three women lawyers contributed to the Nuremberg prosecution: for the United States, Harriet Zetterberg and Katherine B. Fite, both Yale-trained State Department attorneys,<sup>46</sup> and for France, Dr. Aline Chalufour, a member of the Paris Bar whose Sorbonne dissertation had concerned status of forces agreements.<sup>47</sup> At the 12 Nuremberg Military Tribunal trials between 1947 and 1949, moreover, many women lawyers played significant roles as researchers, writers and in-court advocates.<sup>48</sup> Increase in

Renner as lawyers). This chapter refers to these women by the surnames they used at Tokyo or Nuremberg.

<sup>&</sup>lt;sup>45</sup> See Telephone Directory, 1946, see above note 13. Meanwhile, Tokyo defence lawyers complained of inadequate clerical support. "Secretaries' Short Hours Handicap, Attorneys Say", undated, available at Phelps Collection, Box 2, see above note 13.

<sup>&</sup>lt;sup>46</sup> See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, pp. 127, 215, 217 asterisked note (mentioning Fite and Zetterberg); Diane Marie Amann, "Politics and Prosecutions, from Katherine Fite to Fatou Bensouda", in Elizabeth Andersen and David M. Crane (eds.), Proceedings of the Fifth International Humanitarian Law Dialogs, American Society of International Law, Washington, DC, 2012, pp. 7–46; John Q. Barrett, "Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945", in Elizabeth Andersen and David M. Crane (eds.), Proceedings of the Third International Humanitarian Law Dialogs, American Society of International Law, Washington, DC, 2010, pp. 9–30; Bob Lind, "Valley City Woman was Nuremberg Trial Lawyer", InForum, Fargo, North Dakota, 8 January 2018 (available on its web site).

<sup>&</sup>lt;sup>47</sup> See Amann, 2012, pp. 18–19, see above note 46 (mentioning Chalufour); Aline Chalufour, *Le Statut Juridique des Troupe Alliés pendant la Guerre 1914–18*, Les Presses Modernes, Paris, 1927.

<sup>&</sup>lt;sup>48</sup> See, generally, Diane Marie Amann, "Cecelia Goetz, Woman at Nuremberg", in *International Criminal Law Review*, 2011, vol. 11, no. 3, pp. 607–20; Amann, 2010, see above note 4.

women at both courthouses does seem to correlate with the labour shortages brought about by wartime personnel seeking to resume civilian life; this time-related dynamic militates in favour of expanding analysis so that the Tokyo Trial is compared to all the Nuremberg trials.<sup>49</sup>

That said, there seems to have been little purpose behind who was employed where: those sent to Nuremberg included a Japanese-speaking lawyer who applied for Tokyo, as well as a Honolulu court reporter of Chinese and Hawai'ian ancestry.<sup>50</sup> Several others, including Marjorie Nellie Culverwell and Myrtle B. Mills, worked on trials in both cities.<sup>51</sup> "In those days, you didn't argue", said Culverwell, a Briton. "You were just told you were going and that was that".<sup>52</sup> At least two women performed tribunal-related work out of Washington, DC offices: Eleanor Bontecou, who had earned her law degree from New York University in 1917 and served as Bryn Mawr's acting dean before World War II; and, following a brief stint at Nuremberg, Fite.<sup>53</sup> No Japan-based women seem to have acted as lawyers, however. Women were not admitted to the Japanese bar

<sup>&</sup>lt;sup>49</sup> A related question is how, over time, Cold War politics affected proceedings in either courthouse.

<sup>&</sup>lt;sup>50</sup> Walter Rockler, Interview 11611, 21 March 1996, Tape 2, USC Shoah Foundation Visual History Archive; Application for Federal Employment, Piilani Andrietta Ahuna, 22 January 1946, p. 1 (on file with author). For a profile of Ahuna by the interpreter she married at Nuremberg, see Siegfried Ramler, Nuremberg and Beyond: The Memoirs of Siegfried Ramler: From 20th Century Europe to Hawai'i, Paul Berry (ed.), Ahuna Press, Kailua, Hawai'i: 2008, pp. 78–114.

<sup>&</sup>lt;sup>51</sup> Culverwell was an 'assistant' in the British Division led by Tokyo Associate Prosecutor Arthur Comyns-Carr and an 'administrator' for Airey Neave, a British prosecutor at Nuremberg. "Lady Murray: Official at the Nuremberg and Tokyo war crimes trials and translator of the Wannsee Protocol, which contained the 'final solution'", *Times*, London, 26 February 2010, p. 83; Telephone Directory, 1946, pp. 2, 4, 7, see above note 13. Mills was a "court stenographer" at Nuremberg and at Tokyo, where she reportedly "developed a loose rapport" with defendant Tojō. Bruce Miller and Robin Simonton, *Historic Oakwood Cemetery*, Arcadia, Mount Pleasant, South Carolina, 2017, p. 43.

<sup>&</sup>lt;sup>52</sup> *Times*, 26 February 2010, see above note 51.

<sup>&</sup>lt;sup>53</sup> See "Application for Federal Employment", 22 September 1955, Eleanor Bontecou Papers, Box 14, Harry S. Truman Library; Letter from B.O. Bryan. Executive Assistant, Department of State, The Legal Adviser, to Director of Personnel, Re: Katherine Fite, 26 May 1947 (on file with author).

until 1940, and none was permitted to serve as a judge or prosecutor until after World War II.  $^{\rm 54}$ 

Confirming the extent to which someone was a 'lawyer' also poses difficulty. As detailed later in this section, all seven women named in the quoted passage did come to Tokyo with credentials warranting the title of 'attorney', but as noted by Lisette Schouten, only Lambert, Llewellyn and Strooker were "listed as assistant prosecution counsel and presented to the court".<sup>55</sup> The other women named appear in available Tokyo documents as 'stenographer', 'secretary', 'analyst' or the like. The same was true at Nuremberg, where various sources attached such labels to women lawyers like Fite and Chalufour.<sup>56</sup> Adding to the confusion, some of the Nuremberg and Tokyo women performed tasks that today would earn them the classification of 'law clerk' or 'legal advisor', yet they did not hold law degrees.

#### 6.4.1. Elaine B. Fischel

Among the latter was Elaine B. Fischel, author of a photo-filled memoir remarkable for the way it balances vivid recollections of life in Tokyo with reports on case preparation, the trial process, and judicial decisions. On the day the Japanese attacked Pearl Harbor, Fischel was a twenty-year-old tennis champion and graduate of the University of California, Los Angeles.<sup>57</sup> She mastered stenotyping in order to work Stateside for the Army Air Force, and in her spare time learned to fly and took law classes.<sup>58</sup> A post-war call from a former boss prompted her to seek employment as a court reporter in Tokyo.<sup>59</sup> Fischel arrived in the bomb-flattened

<sup>59</sup> *Ibid.*, p. xiii, 2.

<sup>&</sup>lt;sup>54</sup> Yoko [Yōko] Hayashi, "Women in the Legal Profession in Japan", in U.S.-Japan Women's Journal, English Supplement No. 2, 1992, p. 17. In the United States in 1940, women composed 2.4 per cent of the bar. Amann, 2011, p. 619 n. 68, see above note 48.

<sup>&</sup>lt;sup>55</sup> Schouten, 2018, p. 247 n. 24, see above note 1.

<sup>&</sup>lt;sup>56</sup> See "Pass into Potsdam issued to Katherine Fite, July 25, 1946", Katherine Fite Lincoln Papers, War Crimes File, Harry S. Truman Presidential Museum & Library ('Fite Papers') (available on its web site) ("Secretary"); Taylor, 1992, p. 213, see above note 46 (referring to Chalufour as "administrator" and "interpreter"). A cursory comparison suggests fewer women interpreters at Tokyo than at Nuremberg. See, generally, Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial: A Sociopolitical Analysis*, University of Ottawa Press, Ottawa, 2010.

<sup>&</sup>lt;sup>57</sup> Fischel, 2009, p. xii, see above note 3.

<sup>&</sup>lt;sup>58</sup> *Ibid.*, pp. xii–xiii.

capital on 3 April 1946, having journeyed with two women who would remain her friends, Audrey S. Davis and Daphne Spratt.<sup>60</sup> Deployed not as a court reporter but as a prosecution 'legal stenographer', Fischel was bored and restless, and happy to be reassigned to the defence side.<sup>61</sup> She came to support that side with fervour, not only on the job but also in her daily letters to family members who were aghast that she was working on behalf of the Tokyo defendants.<sup>62</sup> Fischel recalled typing, of course, but also tasks often performed by lawyers, such as analysis of Nuremberg documents and other legal research, conversations with detained clients and their families, and summaries of joint defence counsel meetings.<sup>63</sup>

For most of her two and a half years in Japan, Fischel was the secretary for two civilian defence attorneys. John Brannon of Kansas City represented Japanese naval leaders, whom Fischel admired, while William Logan of New York represented Kōichi Kido, a close advisor to Emperor Hirohito whom Fischel "tried hard to like".<sup>64</sup> Despite the demanding nature of the work, she took time to study the ways of her host country. "The wife bows to the husband", Fischel learned from "Taking One's Proper Station", a chapter in *The Chrysanthemum and the Sword* by American

<sup>&</sup>lt;sup>60</sup> *Ibid.*, pp. 3–5, 9. Like Fischel, Davis was assigned to the steno pool: *ibid.*, p. 11; see also *ibid.*, pp. 71, 75. Spratt worked as a court reporter: *ibid.*, p. 11; see also *ibid.*, pp. 106, 112, 120. Tokyo documents cite her as "Official Court Reporter, IMTFE". See Proceedings in chambers, 31 October 1946, (https://www.legal-tools.org/doc/2da262/) and Proceedings in chambers, 3 April 1947 (https://www.legal-tools.org/doc/17e3fa/). Spratt would marry a fellow North Carolinian; as Daphne Faison, she was quoted in a Tokyo news article reprinted in Fischel, 2009, p. 118, see above note 3. Also mentioned in Fischel's memoir is "my stenotypist friend, Frances Way": *ibid.*, pp. 269–73.

<sup>&</sup>lt;sup>61</sup> Fischel, 2009, pp. 11-12, see above note 3.

<sup>&</sup>lt;sup>62</sup> *Ibid.*, pp. 62–65, 97–99, 118–22, 131–37.

<sup>&</sup>lt;sup>63</sup> Ibid., pp. 18–19, 24–30, 48–49, 77, 99, 141, 162–63, 246. Although Fischel does not mention her, the defence cohort reportedly included at least one woman-attorney, namely Alice Rebecca Burke, a 1926 University of Virginia law graduate, college lecturer, and World War II Navy lieutenant commander: Old Dominion University Library, "Alice R. Burke" (available on its web site).

<sup>&</sup>lt;sup>64</sup> Fischel, 2009, pp. 77, 131–37, 170–71, 194, 220, 240, see above note 3. See also Michelle Glazer, "Americans on the Defense Team in the Tokyo War Crimes Trials, 1946–1948: Understanding the Mentality Behind Defending the "Enemy", in *Ezra's Archives*, 2017, vol. 7, no. 1, pp. 76–91 (recounting views of Fischel, Brannon, and others on defence teams) (available on Cornell's eCommons web site).

anthropologist Ruth Benedict.<sup>65</sup> Popular at the time, this 1946 monograph commissioned by the US Office of War Information later drew criticism.<sup>66</sup> Surely it did not alert its readers that World War II had created fissures in Japan's patriarchal society, and thus altered the lot of Japanese women.<sup>67</sup>

Fischel also threw herself into "The Social Whirl".<sup>68</sup> She travelled throughout Japan and other Asian countries, dined with Hirohito's brother, played tennis and went horseback riding with Justice Röling, learned to ski from a Swiss instructor in the Japanese Alps and to ice skate from the Viennese wife of the so-called Mikimoto Pearl King, Kōkichi Mikimoto.<sup>69</sup> Her many 'beaux' included a head of the Canadian Legation later exposed as a KGB spy and, in an on-again, off-again way, Brannon, with whom she posed, fan in hand, in contrasting kimonos.<sup>70</sup> Her liaison with Brannon ended when they returned home – Fischel to Logan's New York office, where she worked on the Tokyo defendants' unsuccessful bid for US Supreme Court review.<sup>71</sup> After recovering from tuberculosis apparently contracted in Japan, Fischel earned a law degree from the University of Southern California and became a trial attorney in Los Angeles.<sup>72</sup> She retired after nearly six decades of legal practice in 2015, at the age of nine-ty-five.<sup>73</sup>

- <sup>68</sup> Fischel, 2009, p. 105, see above note 3.
- <sup>69</sup> *Ibid.*, pp. 68, 79–81, 106–08, 165, 190, 232, 235, 25762, 278–89.
- <sup>70</sup> *Ibid.*, pp. 68–76, 101–02, 105, 115, 124–30, 142–44, 180–82, 236–39, 251–54, 279, 289–90, 311. For a photo of the couple in kimonos, see *ibid.*, p. 237.
- <sup>71</sup> Ibid., pp. 307–10 (discussing *Hirota v. MacArthur*, 338 U.S. 197, 20 December 1948 (*per curiam* denial of defendants' motion to file *habeas corpus* petition)).
- <sup>72</sup> *Ibid.*, pp. 311–20.
- <sup>73</sup> Martha Neil, "Retired lawyer, 95, worked at 'Tokyo Trials' as legal secretary after WWII, knew Japanese leaders", *ABA Journal*, 5 April 2016 (available on its web site). She is still listed as a member at State Bar of California, "Elaine Betty Fischel #24275" (available on its web site). But in a 14 January 2019 e-mail to this author, Professor Bernard J. Hibbitts reported that it was his understanding that she died in 2017, just before her ninety-sixth birthday, from a pulmonary disease related to the tuberculosis she had contracted in Tokyo. No official death notice could be located.

<sup>&</sup>lt;sup>65</sup> Fischel, 2009, p. 58, see above note 3 (quoting Ruth Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture*, Houghton Mifflin, Boston and New York, 2005, p. 49).

<sup>&</sup>lt;sup>66</sup> See Ian Buruma, "Foreword to the Mariner Books Edition", in Benedict, 1946, pp. vii–xii, see above note 65.

<sup>&</sup>lt;sup>67</sup> See Thomas R.H. Havens, "Women and War in Japan, 1937–45", in American Historical Review, 1975, vol. 80, no. 4, pp. 913–34.

#### 6.4.2. Grace Kanode Llewellyn

The notion that more women held more significant roles at Tokyo than at Nuremberg may be traced to no less a personage than President Webb. On 1 July 1946, a male American prosecutor introduced the Tribunal to "Mrs. Grace Kanode Llewellyn of the District of Columbia and United States Supreme Court Bars", one of the seven lawyers named in the passage quoted above. Webb responded: "We welcome you cordially. You probably are the first woman to appear before an International Military Tribunal".<sup>74</sup> Webb was wrong in his supposition, for two women had entered appearances at Nuremberg in December 1945, the same month that Llewellyn went to Tokyo.<sup>75</sup> Yet the first woman to speak on the record in such a tribunal was likely Llewellyn – a fashion-conscious, twice-divorced forty-four year old, a graduate of what is now George Washington University Law School who had been practicing in Washington, DC law offices for more than a decade.<sup>76</sup>

According to a profile by Shana Tabak, Llewellyn served as a Tokyo prosecutor for eight months, with her court presentations "demonstrating her significant role in introduction and defense of evidence documenting Japanese aggression".<sup>77</sup> Llewellyn said nothing at her first ap-

<sup>&</sup>lt;sup>74</sup> Transcript of proceedings, 1 July 1946, p. 1690 (https://www.legal-tools.org/doc/58ae8f/); see Shana Tabak, "Grace Kanode Llewellyn: Local Portia at the Tokyo War Crimes Tribunal", in *The George Washington University Law School International and Comparative Law Perspectives*, Fall 2013, p. 7 (quoting transcript) (available on *Issuu*). Llewellyn is reported to have sat at the prosecutors' table as early as the first day of trial: Guillemin, 2017, p. 186, see above note 3. Webb's supposition that she was also the first woman to appear before a tribunal persisted. See "Grace Bliss, Prosecutor in War Trials, Dies at 56", *Washington Post*, 29 January 1958, p. B2; Sedgwick, 2012, p. 36, see above note 43.

<sup>&</sup>lt;sup>75</sup> Letters attesting to appearances on 15 December and 20 December may be found in the Fite papers, see above note 56, and the Margolies and Zetterberg Nuremberg papers, "Employment Papers of Harriet Zetterberg, 1945–1948", Item 1, US Holocaust Memorial Museum (available on its web site). Research to date indicates that the first woman to address a court at Nuremberg was US prosecutor Sadie Arbuthnot, who, in the case against Nazi judges, described a document book on 21 April 1947. See Transcript for Nuremberg Military Tribunal ('NMT') Case 3: Justice Trial, Harvard Law School Library, Nuremberg Trials Project, pp. 2432–67 (http://nuremberg.law.harvard.edu/).

<sup>&</sup>lt;sup>76</sup> See Tabak, 2013, see above note 74; Irene Hasbrook, "Brains Get Clients out of Jail, but Clothes Help Sway Juries, Says Woman Lawyer", *Washington Post*, 11 May 1934, p. 13; "Mrs. Grace Llewellyn", *Washington Post*, 17 February 1948; *Evening Star*, 1946, see above note 44.

<sup>&</sup>lt;sup>77</sup> Tabak, 2013, p. 7, see above note 74. For a report on one Llewellyn's appearance, see "Manchuria Phase of Case Resumes at Tribunal Session", *Nippon Times*, Tokyo, 31 July

pearance, but on four subsequent days, she proffered portions of the prosecution's evidence supporting charges of Japanese aggression in Manchuria.<sup>78</sup> There was little drama in these presentations, which did not entail examination of live witnesses. Rather, Llewellyn read multi-page exhibit after multi-page exhibit aloud in open court. However, so did many of the men throughout the document-heavy prosecution, and the sheer number and complexity of the exhibits Llewellyn put forward indicate that she contributed significantly to shaping this phase of the prosecution's case. In the courtroom, moreover, Llewellyn displayed tenacity in fighting back challenges posed by the lawyers for the accused. On one such occasion she coolly told the Tribunal: "The prosecution anticipated this query from the defense", and responded by submitting a prepared certification; the document was promptly admitted into evidence.<sup>79</sup>

Yet women's substantive contributions tended not to draw as much media attention as gender angles. One news article in April 1946 nicknamed several Tokyo women "Portia", after Shakespeare's legalistic heroine.<sup>80</sup> In the same time frame, at Nuremberg, the Associated Press dubbed two women who litigated against each other "Opposing Portias".<sup>81</sup> One cannot help but wonder if such theatrical flourishes were meant to suggest a person playing at, rather than practicing, the law.<sup>82</sup> In any event, those Tokyo "Portias" were Grace K. Llewellyn and two of her colleagues, Virginia Bowman and Bettie E. Renner. All three appeared the same week in

1946, Personal Papers of Frank S. Tavenner, Jr. ('Tavenner Papers'), Box 13, available in UVA IMTFE, see above note 13.

- <sup>81</sup> "Opposing Portias at Nuremberg Trials", Associated Press photo of prosecutor Belle Mayer and defence counsel Dr. Erna Kroen, 10 October 1947 (on file with author).
- <sup>82</sup> Positive uses of the term exist, and one Nuremberg woman, in fact, graduated from what then was called Portia Law School: New England Law, Boston, "Catherine E. Falvey", (available on its web site). Yet, the point bears pondering given other uses, not to mention connotations surrounding the stage Portia's lawyerly nemesis, 'Shylock'.

<sup>&</sup>lt;sup>78</sup> Transcript of proceedings, 10 July 1946, pp. 2270–74 (http://www.legal-tools.org/doc/ 12bb5e/), 30 July 1946, pp. 2707–18 (http://www.legal-tools.org/doc/759b4d/), 31 July 1946, pp. 2802, 2912–2,947 (http://www.legal-tools.org/doc/432ea5/), 1 August 1946, pp. 2949–59 (http://www.legal-tools.org/doc/55ede2/).

<sup>&</sup>lt;sup>79</sup> *Ibid.*, 31 July 1946, pp. 2802, 2924–27.

<sup>&</sup>lt;sup>80</sup> "Another Portia", *Lethbridge Herald*, Alberta, Canada, 18 April 1946, p. 3.

a *Los Angeles Times* photo beside two additional US lawyers, Eleanor Jackson and Lucille C. Brunner.<sup>83</sup>

#### 6.4.3. Virginia Bowman and Lucille Brunner

Bowman and Brunner had earned their law degrees at Southeastern University.<sup>84</sup> Sources call Bowman the "secretary" for the prosecution section's Executive Committee; still, her work at Tokyo included drafting a memorandum on whether to charge Kido, the Hirohito advisor on whose defence Fischel would work.<sup>85</sup>

As for Brunner, documents label her variously as "Stenographer", "reporter", or "Analyst",<sup>86</sup> even though she had worked at the Criminal Division of the US Department of Justice before arriving at Tokyo.<sup>87</sup>

#### 6.4.4. Bettie Renner

Also coming from the Criminal Division was another of the women depicted in the *Times*, Bettie Renner.<sup>88</sup> One source indicated that Renner contributed to a preliminary judgment by President Webb; however, this is uncorroborated, and it seems questionable that someone on the prosecution staff would have been tasked to work with chambers.<sup>89</sup> But there is no question that Renner, a US government attorney and "FBI Girl",<sup>90</sup> played an important role in Chief Prosecutor Keenan's staff. No fewer than 10 prosecution documents credit her as the "analyst" who reviewed,

<sup>90</sup> See "Link Woman's Slaying with Oakes Murder", *Chicago Tribune*, 27 May 1950, p. 1; "Ex-FBI Girl's Body Found in Well", *Pittsburgh Press*, 20 April 1950, p. 1.

<sup>&</sup>lt;sup>83</sup> See "Allies Prepare to Try Jap War Criminals", *Los Angeles Times*, 15 April 1946, p. 3, available in Phelps Collection, Box 2, see above note 13.

<sup>&</sup>lt;sup>84</sup> *Evening Star*, 1946, see above note 44. That DC institution no longer exists.

<sup>&</sup>lt;sup>85</sup> Ibid.; Guillemin, 2017, p. 232, see above note 3; "Minutes of the Seventh Meeting of Executive Committee", 18 March 1946, p. 2, Roy L. Morgan Papers ('Morgan Papers'), Box 1, available in UVA IMTFE, see above note 13.

<sup>&</sup>lt;sup>86</sup> See International Prosecution Section ('IPS'), Doc. No. 3344-A, Excerpts from Interrogation of General Hiroshi OSHIMA [Ōshima], 1 February 1946 (https://www.legal-tools.org/ doc/c0f904/); Transcript of proceedings, 23 September 1946, p. 6061 (http://www.legaltools.org/doc/210ac0/); IPS, Doc. No. 1503, Analysis of Documentary Evidence, 30 April 1946, second page (https://www.legal-tools.org/doc/ae2379/, https://www.legal-tools.org/ doc/bd5768/).

<sup>&</sup>lt;sup>87</sup> Evening Star, 1946, see above note 44.

<sup>&</sup>lt;sup>88</sup> Ibid.

<sup>&</sup>lt;sup>89</sup> On the report that 'Betty E. Renner' worked on this draft judgment with Webb, see Sedgwick, 2012, pp. 35, 316 n. 118, see above note 43.

organized and compiled long lists of government statements, news articles, telegrams and other information to be adduced as evidence, against multiple accused persons, of charges including economic and military aggression in places as varied as China, Indochina, Korea, Manchuria and the Philippines.<sup>91</sup> Renner's name resurfaced in the press not long after the close of proceedings at Tokyo, on account of her violent death in 1950 in the Bahamas.<sup>92</sup>

#### 6.4.5. Eleanor Jackson

The last of those in the *Times* photo, Eleanor Jackson, had been the only woman in the class of 1943 at Berkeley Law (University of California, Berkeley, School of Law); she then served as a federal law clerk, assisting her judge in preparing the landmark dismissal of an indictment against 27 interned Japanese-American draft resisters.<sup>93</sup>

<sup>&</sup>lt;sup>91</sup> See IPS, Doc. No. 1210, Analysis of Documentary Evidence, 9 April 1946 (https://www.legal-tools.org/doc/4b1981/), Doc. No. 1309, Analysis of Documentary Evidence, 12 April 1946 (https://www.legal-tools.org/doc/4b1981/), Doc. No. 1410, Analysis of Documentary Evidence, 18 April 1946 (https://www.legal-tools.org/doc/a1e8d5/), Doc. No. 1415, Analysis of Documentary Evidence, 22 April 1946 (https://www.legal-tools.org/doc/a1e8d5/), Doc. No. 1503, Analysis of Documentary Evidence, 30 April 1946 (https://www.legal-tools.org/doc/a1e8d5/); Doc. No. 1505, Analysis of Documentary Evidence, 1 May 1946 (https://www.legal-tools.org/doc/a1e8d5/); Doc. No. 1505, Analysis of Documentary Evidence, 1 May 1946 (https://www.legal-tools.org/doc/a1e8d5/). See also Doc. No. 1411 – Analysis of Documentary Evidence, 22 April 1946 (https://www.legal-tools.org/doc/a1e8d5/), Doc. No. 1414 – Analysis of Documentary Evidence, 22 April 1946 (https://www.legal-tools.org/doc/a1e8d5/), and Doc. No. 1461 – Analysis of Documentary Evidence, 26 April 1946 (https://www.legal-tools.org/doc/a1e8d5/), in Tavenner Papers, Box 24, see above note 77; "Draft List of Categories of Witnesses, 9 March 1946", in Morgan Papers, Box 2, see above note 85.

<sup>&</sup>lt;sup>92</sup> In addition to articles cited above in note 90, see Cathleen LeGrand, "Another Look at a Bahamian Mystery: The Murder of Sir Harry Oakes: A Critical Literature Review", in *International Journal of Bahamian Studies*, 2010, vol. 16, p. 100; "Bahama Police Hunt 'Guard' in Slaying of Yank Woman", *Stars and Stripes*, 23 April 1950, p. 3.

<sup>&</sup>lt;sup>93</sup> Bonnie Azab Powell, "One Tough Case", *Transcript Magazine*, 3 January 2009 (describing US District Court for the Northern District of California, *United States v. Kuwabara*, 56 F. Supp. 716, 22 July 1944) (available on Berkeley Law's web site). Unless otherwise cited, all information and quotes in this paragraph are from this source. Jackson's role in this case is recounted in Eric L. Muller, *Free to Die for Their Country: The Story of the Japanese American Draft Resisters in World War II*, University of Chicago Press, Chicago, 2011, pp. 131, 135–36.

At first, she was eager to join the IMTFE prosecution. But in a 2009 interview, Jackson recalled her disappointment in the tasks assigned,<sup>94</sup> in MacArthur's decision not to prosecute Hirohito, and in the social scene: "Housed in a drafty YWCA in bombed-out Tokyo, she caught diphtheria and worked mainly as a 'geisha, going to parties and ballroom dancing' with the assembled dignitaries". Her dance partners included "Brigadier General John Profumo, then chief of staff to the British Mission in Japan and as yet unsullied by the 'Profumo Affair'". The quoted self-reference to "geisha" is jarring, given the tendency of Tokyo occidentals to equate the term with 'prostitute'.<sup>95</sup> In any event, Jackson quit to work elsewhere in Tokyo, and by 1948 she had opened a solo law practice in Los Angeles. Her storied career representing Black Panthers, death row inmates, civil rights activists, and a Nobel Prize laureate – sometimes at the US Supreme Court – extended into her nineties.<sup>96</sup> At the time of writing, she is listed as an attorney in New York City.<sup>97</sup>

#### 6.4.6. Coomee Strooker-Dantra

Jackson's experiences at Tokyo differed considerably from those of the woman described in Tokyo documents as "Mrs. C. R. Strooker", and in other sources by some variant of her four names, "Coomee Rustom Strooker Dantra". <sup>98</sup> The "Opening Statement: Aggression against the Netherlands" listed Strooker fourth among the lawyers called "associates" of the Associate Counsel in the Netherlands Division.<sup>99</sup>

<sup>&</sup>lt;sup>94</sup> For an example of Jackson's work as an 'analyst', see IPS, Doc. No. 1418 – Analysis of Documentary Evidence, 23 April 1946, Tavenner Papers, Box 24, see above note 77 (https://www.legal-tools.org/doc/a1e8d5/).

<sup>&</sup>lt;sup>95</sup> See Brackman, 1987, p. 12, see above note 3 (writing "I would not class a geisha as a prostitute unless she was specifically identified as one").

<sup>&</sup>lt;sup>96</sup> Ibid. See Jan Hoffman, "Public Lives; 6 Decades of an Unconventional Life", New York Times, 10 September 1999; Rick E. Mordecon (dir.), Rebel With Cause – The Eleanor Jackson Piel Story, 2012 (video of her, at age ninety, recounting her post-Tokyo career) (available on YouTube).

<sup>&</sup>lt;sup>97</sup> See "Piel, Eleanor Jackson", *FindLaw* (available on its web site under "Lawyer Directory"); see also State Bar of California, "Eleanor Jackson Piel #18168" (available on its web site).

<sup>&</sup>lt;sup>98</sup> See Telephone Directory, pp. 3, 7, see above note 13; Schouten, 2018, pp. 247, see above note 1.

<sup>&</sup>lt;sup>99</sup> See Document No. 6912, Opening Statement: Aggression against the Netherlands, November 1946, cover page (http://www.legal-tools.org/doc/f88733/); Schouten, 2018, p. 247, see above note 1. Other women on non-US prosecution teams included: for Australia, Bet-

Born in Rangoon, Burma, then part of British India – today, Yangon, Myanmar – and educated in law at Cambridge University, she had drawn attention as early as 1929.<sup>100</sup> That year, a London correspondent praised the intervention, on behalf of "Burmese feminists", by "a young Parsee barrister", "Miss Coomee Dantra, for whom some admirers predict an illustrious career in the political sphere".<sup>101</sup> She married a Dutch businessman in the 1930s, gave birth to a son and daughter, and, after the war, practised at the Dutch Ministry of Foreign Affairs – a posting that led her to the Tokyo prosecution staff.<sup>102</sup>

Strooker seems to have had greater responsibility than most other women at Tokyo. A prosecution document dated September 1946, a month after Llewellyn's appearances had concluded, contemplates her as the only woman who is going to present part of the prosecution's case on alleged Japanese crimes in the Dutch East Indies.<sup>103</sup> Perhaps this degree of responsibility was due to the nature of her delegation. There were few Dutch lawyers at Tokyo, and, according to Schouten, "none of them was versed in international criminal law nor, with the exception of Mrs Strooker, familiar with the Anglo-Saxon legal system".<sup>104</sup> Thus Strooker,

ty Burrowes and Lena Garrett; for the United Kingdom (besides Culverwell, discussed above text accompanying notes 51–52), Melville Lawrence, Miriam Prechner, and Constance M. Rolfe; and for New Zealand, Olive Marshall. See *ibid.*, pp. 4–7; Sedgwick, 2012, p. 35, see above note 43.

<sup>&</sup>lt;sup>100</sup> See Schouten, 2018, p. 247, see above note 1; Our Lady Correspondent, "A Maid in Mayfair: Gossip from London Town", *Advertiser*, Adelaide, Australia, 4 April 1929, p. 7 (available on the National Library of Australia's web site).

<sup>&</sup>lt;sup>101</sup> Ibid. (further reporting, in dispatch subtitled "An Eastern High Brow", that "[s]he was thoroughly popular at school, but naturally the flapper wits had to christen her house "Dantra's Inferno"").

<sup>&</sup>lt;sup>102</sup> Rob van der Zalm, "Strooker, Shireen", in *Digitaal Vrouwenlexicon van Nederland* [Digital Women's Lexicon of the Netherlands], undated (profiling the lawyer's daughter, who enjoyed a career in the theatre before her death in 2018) (available on its web site). See Schouten, 2018, p. 247, see above note 1 (writing that Strooker worked as a translator in the Netherlands).

<sup>&</sup>lt;sup>103</sup> See "Assignment of Attorneys to Phases of Case September 22, 1946", Tavenner Papers, Box 3, see above note 77. The other two were Grace Kanode Llewellyn, discussed above at text accompanying notes 74–79, and Helen Grigware Lambert, discussed below at text accompanying notes 109–118.

<sup>&</sup>lt;sup>104</sup> Schouten, 2018, pp. 248, 251, see above note 1.

like Llewellyn, joined her male colleagues in proffering multiple exhibits and then reading them aloud in open court.<sup>105</sup>

Interpersonally, Strooker appears to have remained a bit apart, describing herself in one letter as a "middle-aged women, who gets flustered" and "tries to please everybody", and relating her concern that a colleague "held prejudices against her due to the colour of her skin".<sup>106</sup> Nevertheless, Strooker maintained a social schedule that included dinner parties, travel and other engagements, some with US lawyers like Renner and Bowman.<sup>107</sup> Her presentation of evidence won praise from President Webb, who said on her first day in court that "my colleagues and I who had heard you assure you that we regard you as a distinct acquisition to the Bar of this Tribunal", and on her last day: "It has been a pleasure to listen to you, Mrs. Strooker". Both times she responded: "Thank you, your Honor", as was customary of her profession.<sup>108</sup>

#### 6.4.7. Helen Grigware Lambert

A final milestone in the Tokyo women's participation occurred in the last days of the prosecution's case. As reported in the 24 February 1948 *Stars and Stripes*: "A comely brunette American woman rose among the prosecutors at the Tokyo International War Crimes Trial and for one hour summarized the allied charges against burley Naoki Hoshino, Tojo's actual ruler of the puppet state of Manchukuo".<sup>109</sup> She was Helen Grigware Lambert, the last of the women named in the passage quoted above.

Lambert's feat gained her entry into the tiny club of women who gave opening or closing statements at Tokyo or Nuremberg.<sup>110</sup> Lambert

<sup>&</sup>lt;sup>105</sup> Transcript of proceedings, 3 December 1946, pp. 11669–757 (http://www.legal-tools.org/ doc/039e5e/), 6 December 1946, pp. 12169–244 (http://www.legal-tools.org/doc/2cedf9/).

 <sup>&</sup>lt;sup>106</sup> *Ibid.*, p. 252 n. 46 (quoting Strooker letter of 16 May 1946) (spelling as in original); *ibid.*,
 p. 253 n. 56 (citing letters dated 12 June 1946, 27 April 1946, and 29 October 1946).
 Strooker's daughter would speak of the effect that her own skin colour had on her career.
 Van Zalm, undated, see above note 102.

<sup>&</sup>lt;sup>107</sup> Schouten, 2018, p. 255 and n. 66, see above note 1 (referring to "Virginia Bowen").

<sup>&</sup>lt;sup>108</sup> Transcript of proceedings, 3 December 1946, p. 11757 (https://www.legal-tools.org/doc/ 039e5e/) (quoted in Schouten, 2018, p. 246, see above note 1), 6 December 1946, p. 12244 (https://www.legal-tools.org/doc/df06fd/).

<sup>&</sup>lt;sup>109</sup> Ian [Yönosuke] Mutsu, "Lady Attorney Sums Up Tribunal Hoshino Case", *Stars and Stripes*, Pacific Edition, 24 February 1948, p. 1 (spelling as in original), Tavenner Papers, Box 13, see above note 77.

<sup>&</sup>lt;sup>110</sup> In addition to Lambert, research to date has identified five others, all at Nuremberg. Preceding Lambert were prosecutors Sadie Arbuthnot, who read parts of the closing in the

took over the reading of the Tokyo summation from the British Associate Prosecutor, Arthur Comyns-Carr, and 43 transcript pages later, she handed it off to his Chinese counterpart, Judge HSIANG Che-Chun [XIANG Zhejun].<sup>111</sup>

In her segment, Lambert summarized the charges against defendant Hoshino, referring frequently to testimonial and documentary evidence adduced at trial. As *Stars and Stripes* reported, she endeavoured to show that defendant Hoshino, in his role as head of an entity known as the General Affairs Board, "exercised a powerful, if not a completely dominant, influence in the Manchukuoan administration".<sup>112</sup> Furthermore, Lambert's argument connected that defendant to multiple illegal acts, ranging from active support for Japan's military expansion to maintenance of an opium trade. Repeatedly, she challenged the veracity of evidence in opposition; by way of example, she ridiculed one defence witness who had testified both that "he handled Hoshino's business" and "at the same time that Hoshino had no business".<sup>113</sup>

A week or so after her appearance in court, Lambert provided her superiors with a mordant dismissal of the defence response. "Most facts included are unsupported or distorted", she wrote, "and these infrequent factual sequences are hung together with some startling passages on the law, which, although they seem to be conjured up out of some opiate dream, made this assignment anything but dull".<sup>114</sup>

Justice Trial on 13–14 October 1947, and Cecelia Goetz, who read part of the opening in the *Krupp* trial on 8 December 1947; what is more, Dr. Agnes Nath-Schreiber was the sole lawyer representing the respondent in a three-day contempt trial on 29–31 October 1947. See Amann, 2011, pp. 612–13, see above note 48; Transcript for NMT Case 3: Justice Trial, pp. 6055–206, 9661–77, 9743–60, see above note 75. Succeeding Lambert were prosecutor Mary Metlay Kaufman, who gave part of the closing in *Farben* on 10 June 1948, "Green Series", vol. VIII, pp. 1030–43, see above note 17, and Dr. Elisabeth Gombel, the only woman lead defence counsel at either courthouse, who spoke on behalf of her client in the *Ministries Case*, see Opening Statement (available on the Deutsche Digitale Bibliothek), and Final Argument for Ernst Wilhelm Bohle, 11 January 1948 (available on University of Georgia's digital commons).

<sup>&</sup>lt;sup>111</sup> Transcript of proceedings, 24 February 1948, pp. 40925–68 (http://www.legal-tools.org/ doc/95aaf2/).

<sup>&</sup>lt;sup>112</sup> Ibid., p. 40928.

<sup>&</sup>lt;sup>113</sup> Ibid., p. 40971. See also *ibid.*, pp. 40975–6 (declaring another defence claim "extraordinary and it is suggested difficult to believe").

<sup>&</sup>lt;sup>114</sup> Analysis of Defense Summation on Manchurian Phase, 11 March 1948, Tavenner Papers, Box 6, see above note 77.

Lambert's confident tone, in this memorandum and in the courtroom, reflected a dozen years' experience: after graduating from Spokane's Gonzaga Law School, Lambert had practiced as an attorney at the Federal Land Bank, as a Navy judge advocate, and as a law clerk to a federal appellate judge in San Francisco.<sup>115</sup> She went to Tokyo sometime after V-J (Victory over Japan) Day to join her husband, a journalist based there following his Navy discharge.<sup>116</sup> Reportedly, the couple later "traveled the world as she continued her career as a lawyer and then as a noted painter and art critic".<sup>117</sup>

Yet Lambert's accomplishments did not spare her the gender angle. The 1948 *Stars and Stripes* article mentioned her marital status as well as her physical appearance, and a 1935 item heralded her as her law school's "first Portia product".<sup>118</sup> In her sharing of that Shakespearean nickname as well as her lawyerly accomplishments, Lambert was sister to other women, at Nuremberg and Tokyo alike.

#### 6.5. Conclusion

Immediately after World War II, women played important roles at international tribunals in Nuremberg and Tokyo. Many were lawyers or performed legal work in prosecution and defence teams. This chapter endeavours to depict these women as more than glimpses in the Tokyo Trial frame, by exposing their invisibility in many standard accounts, by filling out their profiles, and by comparing them with counterparts at Nuremberg. The chapter points to the difficulty of tracing women, not only because of changes in surnames after marriage or divorce, but also because their contributions to pleadings and the like frequently went uncredited. At both Tokyo and Nuremberg, job titles like 'analyst' and 'stenographer' tended to obscure women's law-related contributions.

<sup>&</sup>lt;sup>115</sup> "Gonzaga's First Portia Scores", *Spokesman-Review*, Spokane, Washington, 15 August 1935, reprinted in Foley Library, Gonzaga University, "First Class Law School, or None at All: GU Law School Turns 100: 1912–1940" (available on its web site); Earl Martin, "Message from the Dean", *The Lawyer*, Summer 2008, p. 3 (available on *Issuu*); "Helen G. Lambert", *Washington Post*, 6 December 1993 (available on its web site).

<sup>&</sup>lt;sup>116</sup> Martin, 2008, see above note 115 (adding that her husband, Tom Lambert, also was a Gonzaga graduate).

<sup>&</sup>lt;sup>117</sup> *Ibid.*; *Washington Post*, 1993, see above note 115.

<sup>&</sup>lt;sup>118</sup> Spokesman-Review, 1935, see above note 115.

Three Tokyo women were recognized as lawyers and permitted to address the IMTFE, but unlike their male counterparts, none was allowed to conduct examinations of live witnesses. Such limitations ebbed over the timespan of the post-World War II trials project, so that in the subsequent proceedings at Nuremberg, numerous women lawyers took on significant courtroom roles. Still, it must be acknowledged that nearly every datum established in this chapter provokes new questions. By way of example, all three women who addressed the Tokyo Tribunal had been married, while many of the other women on legal teams there were single; whether marital status correlated with responsibility seems a question meriting further investigation.

This chapter's focus on litigation teams, moreover, points to a need to study Tokyo women who filled other professional roles, working in judicial chambers or as court reporters, interpreters, or journalists. Filmmaker Kobayashi's foregrounding of Vivien Bullwinkel and Shizuko Hirota likewise points to the need to study women who bore witness to atrocities and also women associated with the Class A war criminals. Of note, too, are the women among the Class B and C war criminals – women like Iva Toguri d'Aquino, known as 'Tokyo Rose' – who were held in the same prison as the Tokyo Trial defendants.<sup>119</sup> The identities, backgrounds and experiences of all such women await discovery and discussion.

Also awaiting research are questions of intersectionality. Coomee-Strooker's sense of discrimination based on her South Asian ancestry underscores the likelihood that the experiences of persons of colour differed from those of others – a supposition that might be tested by research into Tokyo women like Hannah Kato and Tamiko Ikeda, both members of the prosecution staff.<sup>120</sup> In this vein, one of the Tokyo women profiled in this chapter, Elaine B. Fischel, later wrote: "Although "Jap" was a term commonly used by Americans at the time, I wish I had not used what is now

<sup>&</sup>lt;sup>119</sup> See John L. Ginn, Sugamo Prison, Tokyo: An Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a U.S. Participant, McFarland & Co., Jefferson, North Carolina and London, 1992, pp. 34–36 (mentioning women detainees, with reference to Iva Toguri d'Aquino, an American who was sent home, convicted in 1949 of treason on account of her 'Tokyo Rose' broadcasts, and pardoned in 1977 by President Gerald Ford).

<sup>&</sup>lt;sup>120</sup> See Telephone Directory, 1946, pp. 5–6, see above note 13; see also above text accompanying note 106 (discussing Strooker). Kato was the 'stenographer' of the US interrogation of Japanese Army General Torashirō Kawabe: Transcript of proceedings, 24 November 1947, p. 33794 (http://www.legal-tools.org/doc/ee1b2f/).

considered a degrading term to describe people I considered friends and colleagues".<sup>121</sup> Assumptions about Japanese society also tinged interactions. For instance, even as they accepted assertions of Japanese women's subservience and hired Japanese women to serve them as maids, waitresses and seamstresses, Fischel and other trial participants costumed themselves in traditional Japanese dress.<sup>122</sup> Also thought-provoking is Eleanor Jackson's use of "geisha", not only because some linked the term to 'prostitute', but also because of the many inter-ethnic or extramarital liaisons that formed at Tokyo.<sup>123</sup> Such incidents suggest avenues for research into intersections at Tokyo not only of race and ethnicity, but also of sex, sexuality, gender, culture and class.

<sup>&</sup>lt;sup>121</sup> Fischel, 2009, p. 65, see above note 3. See also Kobayashi (dir.), 1983, above note 2 (construing a Japanese defence lawyer's closing as "a euphemistic expression of the underlying race prejudice that had been evident throughout the entire length of the trial").

<sup>&</sup>lt;sup>122</sup> See Fischel, 2009, pp. 67, 70, 152, 201, see above note 3; see also above text accompanying note 70.

<sup>&</sup>lt;sup>123</sup> See above text accompanying notes 94–95 (quoting Jackson), notes 70–71 (describing Fischel-Brannon liaison). See also Ginn, 1992, p. 196, see above note 119 (recounting relationships between Japanese women and American GIs); Sedgwick, 2012, p. 108, see above note 44 (reporting that two Tokyo lawyers "married Japanese women and settled there").

# Trial and Error in the Interpreting System and Procedures at the Tokyo Trial

#### Kayoko Takeda\*

#### 7.1. Introduction

With former Japanese military and government leaders as the accused and judges, prosecutors and defence lawyers from a dozen nations, the International Military Tribunal for the Far East (hereafter, the 'IMTFE' or the 'Tokyo Trial') was an international forum in which multiple languages were used. Just as the Nuremberg Trial could not have taken place without the provision of interpreting and translation services, the Tokyo Trial could not have functioned without the work of interpreters and translators. There are, however, stark contrasts between the two trials in terms of how the interpreting systems were prepared and managed. Touted as the origin of simultaneous interpreting, the Nuremberg Trial invested time and effort before the start of the proceedings to train highly competent interpreters as well as to ensure through 'rehearsals' that this novel system of simultaneous interpreting would operate smoothly. In comparison, at the Tokyo Trial (and preceding Class B/C war crimes trials), there was a great deal of trial and error as to who would interpret and under what procedures they would work. The aim of this chapter is to examine this *ad hoc* nature of how the interpreting system and procedures were established at the Tokyo Trial.

In accordance with the tribunal charter,<sup>1</sup> interpreting between English and Japanese was provided throughout the proceedings. The tribunal

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<sup>&</sup>lt;sup>1</sup> Under Section III "Fair Trial for Accused", Article 9(b) states, "Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested": Charter of the International Military Tribunal for the Far East, 26 April 1946 ('IMTFE Charter') (https://www.legal-tools.org/doc/44f398/).

also used interpreters of Chinese, French, Dutch, German, Russian and Mongolian as needed. Communication in courtroom proceedings was possible only through interpreters. Further, all documents submitted as evidence had to be presented in both English and Japanese, one of which was invariably translated.

That these interpreters and translators played an indispensable role in enabling this multilingual discourse does not usually constitute a major topic in discussions of the Tokyo Trial by historians and legal scholars. However, an inquiry into the trial-and-error nature of the interpreting system and procedures not only reveals the impact of language issues on the proceedings but also adds to the discussion on the *ad hoc* aspects and power dynamics of the tribunal.

There have been a number of studies on the practice of interpreting and its effect on the proceedings at multilingual tribunals. For instance, Francesca Gaiba presents the most extensive description in English of interpreting arrangements at the Nuremberg Trial to date;<sup>2</sup> among the scholarly works on interpreting and translation at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), Ellen Elias-Bursać provides the most comprehensive examination based on her observation, survey and close readings of transcripts;<sup>3</sup> and Ludmila Stern discusses working conditions of interpreters at the ICTY, the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Court ('ICC') in comparison to national courts.<sup>4</sup>

There is one feature of interpreting at Tokyo, however, that clearly distinguishes itself from other international tribunals. Namely, three ethnically and socially different groups of people engaged in three different functions: (1) Japanese nationals, including government officials, interpreted the court proceedings; (2) '*nisei*' (literally, second-generation; in this context, persons born in the United States to Japanese immigrant parents) served as monitors, checking the accuracy of the interpretation; and

<sup>&</sup>lt;sup>2</sup> Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial*, University of Ottawa Press, Ottawa, 1998.

<sup>&</sup>lt;sup>3</sup> Ellen Elias-Bursać, *Translating Evidence and Interpreting Testimony at a War Crimes Tribunal: Working in a Tug-of-War*, Palgrave Macmillan, London, 2015.

<sup>&</sup>lt;sup>4</sup> Ludmila Stein, "What Can Domestic Courts Learn from International Courts and Tribunals about Good Practice in Interpreting? From the Australian War Crimes Prosecutions to the International Criminal Court", in *T & I Review*, 2012, vol. 2, pp. 7-30.

(3) a Caucasian<sup>5</sup> US military officer worked as the language arbiter to rule over disputed translations and interpretations. The present chapter argues that this unique arrangement was devised on the basis of lessons learned from the trial and error with interpreters at Class B/C trials that took place prior to the Tokyo Trial.

Also, the initial stage of the Tokyo Trial was further characterized by impromptu discourse in finalizing this interpreting system. Since the tribunal did not pay due attention to potential language issues in the preparation stage, it was mired by a number of problems with interpreting and translation once the court proceedings started. Unlike Nuremberg where simultaneous interpreting was used, the consecutive mode was used at Tokyo, which made it possible for court participants to discuss language issues during the proceedings.<sup>6</sup> Consequently, a considerable amount of time was spent addressing procedural rules on interpreting, and those rules were determined almost on an *ad hoc* basis in the course of the proceedings.

This chapter focuses on these trial-and-error aspects of interpreting at the Tokyo Trial. It first discusses the link between the interpreting problems at Class B/C trials and the unique composition of interpreters and error correction mechanism for interpreting and translation at Tokyo. It then examines how procedural issues with interpreting were resolved over the course of the trial. Lastly, it briefly recaps the interpreting arrangements at Tokyo in comparison to Nuremberg and touches on the relevance of interpreting phenomena during the Tokyo Trial to the present-day international criminal justice system.

#### 7.2. Lessons from Class B/C Trials: Three-Tier Interpreting System

# 7.2.1. Use of Local Translators and Interpreters During the Preparation Stage

The Allied occupation of Japan started on 28 August 1945. It was an immediate and vital requirement for the Supreme Commander for the Allied Powers ('SCAP') to secure personnel who could translate and/or interpret

<sup>&</sup>lt;sup>5</sup> Although it may sound peculiar, the term 'Caucasian' is used in this chapter to maintain consistency with its usage in the relevant archival documents.

<sup>&</sup>lt;sup>6</sup> In consecutive interpreting, the interpreter gives a rendition after the speaker pauses, as opposed to simultaneous interpreting, in which the interpreter interprets a few seconds behind the source speech.

between English and Japanese for its operations in occupied Japan. Although the US military dispatched over 5,000 *nisei* linguists (language-related personnel) to Japan, the sheer volume of language-related work and the complexity of some tasks exceeded their capacity. Accordingly, SCAP had to resort to Japanese translators and interpreters procured by the Central Liaison Office (an affiliate of the Japanese foreign ministry)<sup>7</sup> and those directly hired by the US occupation army.<sup>8</sup> Thus, as part of SCAP's operations, Japanese citizens were involved, along with Allied military linguists, in the preparation stage of the Tokyo Trial: translating documents that could be used as evidence for arresting and indicting war crimes suspects, and interrogating and taking affidavits from the suspects and witnesses.

Although local interpreters and translators played an indispensable role in preparing for the trial, it is highly likely that the tribunal initially did not plan to use Japanese nationals as court interpreters. Class B/C war crimes trials held by US military commissions in Manila and Yokohama were underway during the preparation of the Tokyo Trial. These trials clearly indicate the US military's preference for using its own personnel as court interpreters no matter how poorly they performed.

# 7.2.2. Learning from Failures at Class B/C Trials

During the trial of General Tomoyuki Yamashita (29 October – 8 December 1945) in Manila,<sup>9</sup> the US military commission first appointed three Caucasian naval and marine officers as court interpreters, but they refused to take the interpreter's oath, citing their own incompetence in spoken Japanese. In one of the US military correspondences concerning this incident, this problem was referred to as an "outrageous failure".<sup>10</sup> The court

<sup>&</sup>lt;sup>7</sup> The Central Liaison Office was established on 26 August 1945 to undertake negotiations and administrative co-ordination between the occupation forces and the Japanese government. One of its responsibilities was to provide interpreters and translators for SCAP.

<sup>&</sup>lt;sup>8</sup> The Eighth US Army placed help wanted ads in newspapers almost daily to directly recruit Japanese interpreters and translators. See Kayoko Takeda, "Guilt, survival, opportunities, and stigma: Japanese interpreters in the postwar occupation period (1945-1952)", in Kayoko Takeda and Jesús Baigorri-Jalón (eds.), *New Insights in the History of Interpreting*, John Benjamins, Amsterdam, 2016, p. 227.

<sup>&</sup>lt;sup>9</sup> The Yamashita trial is well known as the origin of the doctrine of command responsibility in war crimes trials.

<sup>&</sup>lt;sup>10</sup> CINCAFPAC ADV., a correspondence to CINCAFPAC Manila, 28 October 1945, in Records of the Allied Operational and Occupation Headquarters, World War II (Record Group 331), US National Archives, College Park, MD.

used its next choice – "best Nisei" linguists. However, due to their slow and error-filled performance, the trial did not run smoothly. Thus, the court reluctantly had to rely on Yamashita's personal interpreter, Masa-katsu Hamamoto,<sup>11</sup> who was also a prisoner of war.<sup>12</sup>

In the US military trials in Yokohama, *nisei* linguists were appointed court interpreters. Here again, due to their error-ridden performance, the proceedings were often disrupted. For instance, in the trial of Tatsuo Tsuchiya (18–27 December 1945), a prison guard, the defence lawyers complained about the interpreters' errors, and newspapers also reported on interpreting problems.<sup>13</sup> The poor performance of court-appointed *nisei* interpreters was a source of great concern for the Japanese government as well. An internal document of the Central Liaison Office, dated 11 December 1945, indicates that Japanese officials were troubled by the inaccurate interpretation in the Yokohama court.<sup>14</sup> The Liaison Office even planned to propose to SCAP that the defendant be allowed to choose his own interpreter, with a court-appointed official interpreter (a *nisei* linguist) in place to monitor renditions.<sup>15</sup>

The recruiting and testing of Japanese interpreters for the Tokyo Trial took place in January and February 1946.<sup>16</sup> The above-mentioned correspondences and documents involving SCAP, the US military in Manila and the Liaison Office clearly suggest that the Legal Section of SCAP, which established the procedural guidelines of the IMTFE, was aware of the interpreting issues in Manila and Yokohama. The IMTFE could not afford the same problems, given that it was an international event attract-

<sup>&</sup>lt;sup>11</sup> Masakatsu Hamamoto, a graduate of Harvard University, was a civilian attached to the Imperial Japanese Army. He also worked as an advisor to President Laurel of the Philippines under Japanese occupation.

<sup>&</sup>lt;sup>12</sup> See details in Frank A. Reel, *The Case of General Yamashita*, Octagon Books, New York, 1949/1971, and Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial*, University of Ottawa Press, Ottawa, 2010, pp. 69-71.

<sup>&</sup>lt;sup>13</sup> "Language Barrier Causes Recessing of Tsuchiya Trial: Interpreter Unable to Follow Testimony by Defendant", *The Nippon Times*, 24 December 1945; and "Tsuchiya shōnin dai ni tatsu", *The Asahi Shimbun*, 25 December 1945.

<sup>&</sup>lt;sup>14</sup> Shūsen renraku chūō jimukyoku (Central Liaison Office), "Sensō hanzai saiban ni kansuru ken" [Matters Regarding War Crimes Trials], 11 December 1945, in Hiromi Tanaka (ed.), *BC-kyū senpan kankei shiryōshū: BC-kyū senpan saiban shakuhō kankei shiryō* [Documents Related to Class BC War Crimes Trials and Releases], vol. 4, Ryokuin Shobō, Tokyo, 2012, pp. 5-6.

<sup>&</sup>lt;sup>15</sup> *Ibid.*, p. 6.

<sup>&</sup>lt;sup>16</sup> Takeda, 2010, pp. 30-31, see above note 12.

ing close attention from the world as the Japanese counterpart of the Nuremberg Trial. The tribunal needed competent interpreters, regardless of nationality or background, who could facilitate smooth proceedings, which was the likely motivation for the unconventional decision of using Japanese nationals as court interpreters at the Tokyo Trial.

#### 7.2.3. Japanese Interpreters Working for the Former Enemies

A review of the trial records in Japanese indicates that a total of 27 Japanese–English interpreters worked during the Tokyo Trial, but only a handful of them regularly interpreted throughout the proceedings.<sup>17</sup> About half were associated with the Japanese foreign ministry, and the rest were bilingual Japanese citizens, including two former soldiers of the Imperial Japanese Army. One interpreter's father was a war crime suspect.<sup>18</sup> In effect, these interpreters were hired by the former enemies to work in a trial in which the lives of their former superiors and leaders were at stake. This extraordinary arrangement would be analogous to former Nazis interpreting at Nuremberg.

The fact that Japanese nationals interpreted the court proceedings tends to be overlooked in both popular and academic discourses. It is partly because these individuals rarely discussed their experiences interpreting for the trial. Given the persistent negative view of the Tokyo Trial as victor's justice among some Japanese,<sup>19</sup> having worked for the former enemies to facilitate the convictions of former Japanese leaders could be a stigma in Japanese society. Notably, the only Japanese interpreters known to have agreed to interviews for publication did so after they had retired and/or moved overseas.<sup>20</sup>

<sup>&</sup>lt;sup>17</sup> Tomie Watanabe, *Tökyö saiban no tsūyaku kenkyū: Töjö Hideki shōgen o tsūjite* [A Study of Interpreting at the Tokyo Trial: Through Hideki Töjö's Testimony], Master's thesis, Daitō Bunka University, 1998, pp. 10-11.

<sup>&</sup>lt;sup>18</sup> Hideki Masaki, an official of the Japanese foreign ministry, interpreted for his father, Jinzaburō Masaki, during his pretrial interview. Jinzaburō was a well-known general in the Imperial Japanese Army. During the investigation by the International Prosecution Section, Jinzaburō was arrested as a war crime suspect but never indicted. Hideki Masaki served as an interpreter for Emperor Hirohito from 1959 to 1984.

<sup>&</sup>lt;sup>19</sup> For one example of discussions on various popular views of the Tokyo Trial in Japan, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008, pp. 1-4.

<sup>&</sup>lt;sup>20</sup> Masaomi Kondō and Tomie Watanabe, "Booth no naka no Itami Akira: Tōkyō saiban tsuyakusha, Shimada Masakazu ni niku", in *Daito Forum*, 2000, vol. 13, pp. 16-35; Ta-kashi Oka, interview by the author, 2005. Shimada retired in Brisbane, Australia, and Ta-

There is also a popular misperception that *nisei*, not Japanese nationals, played the role of court interpreters at the Tokyo Trial.<sup>21</sup> It is perhaps attributable to the fact that the *nisei* monitors engaged in interpreting-like task on certain occasions, such as simultaneously reading translations of prepared statements as the speaker read the source texts aloud during the trial. Also, *nisei* did work as court interpreters in a number of Class B/C war crimes trials that were taking place in several locations in the Asia-Pacific – hence the possible confusion about the *nisei* being the court interpreters for the Tokyo Trial.<sup>22</sup>

#### 7.2.4. Checking Mechanism

With Japanese citizens, including those from the Japanese foreign ministry, working as court interpreters, it is presumed that the tribunal was suspicious of their impartiality as well as loath to appear dependent on citizens of the defeated nation. This is considered why the tribunal devised a mechanism to oversee the interpreters and check the accuracy of their renditions.<sup>23</sup> The idea of this checking mechanism can be traced back to the procedural rules and regulations for Class B/C trials held by the US military in Yokohama.

The procedural rules and regulations at Yokohama were established in February 1946, which overlaps with the timing of the IMTFE's recruiting of Japanese interpreters. The fact that the rules and regulations were established two months after the beginning of the trials in Yokohama indicates, again, the *ad hoc* nature of addressing language issues, among other procedural details. The references to interpreting in the rules and regulations were presumably in response to the problems with the court interpreters at Yokohama and to the above-mentioned request from the Liaison

kashi Oka retired in Washington, D.C. For details, see Takeda, 2010, pp. 38-39, 56-62, 72-74, 98, 114, 121-30 and 158, see above note 12.

<sup>&</sup>lt;sup>21</sup> The author received this explanation in 2007 during an official tour of the building used for the Tokyo Trial on the premises of the Japanese Ministry of Defense. Also, see Shirō Akazawa, *Tōkyō saiban*, Iwanami Shoten, Tokyo, 1989.

<sup>&</sup>lt;sup>22</sup> A best-selling novel, *Futatsu no sokoku* [Two Homelands], Toyoko Yamasaki, Shincho Bunko, Tokyo, 1983, and a popular TV drama based on the novel, *Sanga moyu*, NHK, 1984, featured a *nisei* monitor/interpreter at the Tokyo Trial, which may also have popularized this misperception in Japan.

<sup>&</sup>lt;sup>23</sup> Takashi Oka, one of the Japanese interpreters, affirms this assumption in a 2005 interview conducted by the author: Takeda, 2010, p. 74, see above note 12.

Office. They are summarized in a review of the occupation policies by SCAP as follows:

The regulations barred any criticism of an interpreter, direct or implied, in open court, until the chief interpreter had investigated the matter and had advised upon the correctness of the translation. If the chief interpreter could not convince both the prosecution and the defense, the complaining party could request an off-record conference. In addition to the court interpreters, the accused were furnished with interpreters who sat with them throughout the trial.<sup>24</sup>

These regulations reveal that a mechanism was in place to address errors in interpreting at the Yokohama court. The IMTFE appears to have taken a similar approach, leading to the establishment of a system to regulate and check the interpreters' work.

### 7.2.5. Monitors and Language Arbitration Board

In order to ensure accuracy in interpreting and translation, the IMTFE had two stages of checking. To correct errors contemporaneously, *nisei* linguists monitored the performance of Japanese interpreters, which was possible owing to the consecutive mode of interpreting. Disputes over translations and interpretations that could not be resolved through this first checking mechanism were reviewed outside the courtroom by the Language Arbitration Board, with the language arbiter announcing the ruling in court.

Four *nisei* took turns to monitor the accuracy of the Japanese interpreters' renditions and make corrections on the spot, if necessary. They also rendered all the prepared translations, such as the closing arguments and the Judgment, which indicated the tribunal's preference for using personnel from Allied forces rather than Japanese citizens whenever it was possible.

At the top of the hierarchical structure of interpreting, a Caucasian US military officer served as the language arbiter. In the Judgment of the Tokyo Trial, there is a reference to how difficult interpreting and translation between Japanese and English was and to why the Language Arbitra-

<sup>&</sup>lt;sup>24</sup> Supreme Commander for the Allied Powers, General Headquarters, *History of the Nonmilitary Activities of the Occupation of Japan, 1945-1951*, Nihon Tosho Center, Tokyo, 1990, p. 81.

tion Board was established. "Part a, Section I Establishment and Proceedings of the Tribunal" states:

> [T]he need to have every word spoken in Court translated from English into Japanese, or vice versa, has at least doubled the length of the proceedings. Translations cannot be made from the one language into the other with the speed and certainty which can be attained in translating one Western speech into another. Literal translation from Japanese into English or the reverse is often impossible. To a large extent nothing but a paraphrase can be achieved, and experts in both languages will often differ as to the correct paraphrase. In the result the interpreters in Court often had difficulty as to the rendering they should announce, and the Tribunal was compelled to set up a Language Arbitration Board to settle matters of disputed interpretation.<sup>25</sup>

When the defence or the prosecution challenged a translation or interpretation, the tribunal president referred the matter to the language arbiter. The arbiter was not necessarily proficient in Japanese but simply announced the decisions made by the linguists of the board who reviewed the dispute outside the courtroom. In this way, the Language Arbitration Board contributed to minimizing the time spent discussing languagerelated issues in court.

Additionally, as a Caucasian US military officer sitting in the prosecution area, the language arbiter functioned to emphasize that the US military was in charge of the procedure. It is presumed that the language arbiter also kept an eye on the *nisei* monitors. The monitors were all '*kibei*' (*nisei* who had some schooling in Japan and returned to the United States), who had been most readily suspected of disloyalty to the United States. In fact, three of the monitors had been detained in internment camps as enemy aliens after Japan's attack on Pearl Harbor. The tribunal was mindful that the *nisei* monitors could be sympathetic to the Japanese defendants.<sup>26</sup>

In sum, this three-tier interpreting system at the Tokyo Trial was, at least in part, a product of the lessons learned from the experiences with

<sup>&</sup>lt;sup>25</sup> Judgment of the International Military Tribunal for the Far East, November 1948, p. 17 (https://www.legal-tools.org/doc/8bef6f/).

<sup>&</sup>lt;sup>26</sup> Kōzō Kinashi, a friend of David Akira Itami, states that Itami, one of the monitors, was sympathetic to the emperor and Hideki Tōjō; Kōzō Kinashi, "Hakuun raikyo", in *Daito Forum*, vol. 13, 2000, pp. 37-49.

interpreters at preceding Class B/C trials held by the US military in Manila and Yokohama. Unprepared for the challenges of interpreting, these trials struggled with serious language issues and had to come up with solutions on an *ad hoc* basis. In order to secure smooth operation and accurate interpretation, the IMTFE came to employ Japanese citizens as court interpreters and establish a three-tier system to check their performance.

# 7.3. Improvising Procedural Rules on Interpreting

# 7.3.1. Untrained Interpreters and Inexperienced Users of Their Services

With the three-tier interpreting system in place, the Tokyo Trial convened on 29 April 1946. However, there was still a great deal of trial and error in coming up with procedural rules and regulations on interpreting over the first year of the court proceedings. The tribunal had still not dedicated enough thought to the issues it might face in this unprecedented multilingual setting, or it simply did not have the capacity to foresee potential problems with interpreter-mediated communication. The Japanese interpreters had received little interpreter training and the users of their services were equally inexperienced. Above all, there was no one who could effectively lead the preparation of the interpreting arrangements. The chief of the Language Section, a US naval officer, had little knowledge of how interpreting between Japanese and English worked, and the most competent *nisei* monitor, David Akira Itami, was a civilian who was not given a leadership position within the tribunal.

For the first month of the trial, interpreters and monitors worked without proper interpreting equipment or an interpreter booth. They had to work from a table on the floor, using a PA (public address) system in open court to deliver interpretation. During a one-week recess in June 1946, an interpreter booth was set up on the platform and IBM equipment identical to Nuremberg's was installed. As mentioned earlier, however, consecutive interpreting was the principal mode at Tokyo, which made it possible for the court participants to discuss language issues during the proceedings, contributing to the prolonged length of the trial.

# 7.3.2. Court Expectations vs. Interpreter Limitations

From the beginning of the Tokyo Trial, the court records reflect a struggle to negotiate a shared understanding of the interpreting process among the court participants. In particular, the president of the tribunal, Australian judge William Webb, had certain expectations as to how interpreting should be done and tried to impose them on the interpreters. These expectations, however, were mostly ill-informed and proved unrealistic when they were crushed by the cognitive limitations and insufficient skills of the interpreters. The court had to improvise practical procedural rules to resolve the problems to carry on with the proceedings.

On 3 May 1946, the first day of the court session, the chief of the Language Section beseeched Webb to address the issue that the interpreter would not be able to interpret unless the speaker paused when signalled. The court did not take any actions in response. On 6 May, Major Lardner Moore of the US army, who was functioning as the language arbiter at the time, delivered a formal request from the Language Section to the court that the speakers wait until the interpretation was completed, as the interpreters were not being given enough time to deliver full interpretations of all the remarks. Wilfully or unwittingly disregarding the tribunal charter's article on language, Webb suggested that a summary would be sufficient for the proceedings to save time. He had to be reminded by the chief of the Language Section that the charter stipulated the provision of language services to ensure the accused a fair trial.<sup>27</sup> Webb still insisted on a summarized interpretation.

On 14 May, the interpreter was struggling because the speaker was reading a prepared statement without pause and the Japanese translation was not available to the interpreter. In response to the interpreter's request to the speaker to break down his remarks, a frustrated Webb said, "Well, this interpreter has no difficulty in reading passage for passage. I do not see why he cannot string them all together".<sup>28</sup> The interpreter's incomplete and inaccurate renditions caused a disruption of the court proceedings. Moore explained that the differences in sentence structure made interpreting between English and Japanese difficult. Webb responded, "Well, I cannot understand yet why he can interpret paragraph for paragraph [...] and yet not be able to string those paragraphs together".<sup>29</sup> Moore suggested providing the interpreter with the translation beforehand for prepared speeches. Additionally, the chief of the Language Section conveyed a

<sup>&</sup>lt;sup>27</sup> IMTFE Charter, see above note 1.

<sup>&</sup>lt;sup>28</sup> Transcripts of the Proceedings of the International Military Tribunal for the Far East, p. 204, available on the Legal Tools Database ('IMT Transcripts').

<sup>&</sup>lt;sup>29</sup> *Ibid.*, p. 216.

strong request from the defence for "a complete and accurate translation verbatim". Webb's ruling was to continue summarization and provide a full translation to the defence later. Despite the Japanese lawyer's repeated objections, Webb insisted that the speaker read the whole text without "interruptions" by the interpreter, promising a full translation at a later time. All these comments by Webb reveal his ignorance of how cognitively taxing interpreting is and his cavalier attitude toward the language needs of the accused.

On 15 May, in response to the defence's persistent requests over a period of several days, Webb finally granted permission for the Japanese translation of prepared remarks to be provided beforehand to the interpreters and the defence so that they could properly prepare, and for sentence-by-sentence interpreting instead of summarization.

On 23 July, the use of relay interpreting for a third language became an issue when the first Chinese-speaking witness testified. In response to the Japanese lawyer's complaints about incomplete interpretations, Webb argued:

> Well, as I explained before, all this interpretation of every word is not required in the interests of justice. It is required in the interests of propaganda. That is the whole point. This elaborate system of interpreting every word does not obtain in any national court. We try murderers there. We try men who cannot speak the English language, but we do not have all of this interpreting. I would like the Japanese to understand that. The Charter really is mostly concerned with the Japanese people understanding what is happening in this Court. It is not required in the interests of justice.<sup>30</sup>

The transcripts of the proceedings do not indicate a formal objection on the record by any court participant to this egregious remark by Webb. Some discussion, however, must have taken place outside the courtroom. Two days later, Webb communicated to the court Moore's input that unnecessarily lengthy questions would make the interpreter's task difficult, and added that making the translations available to the interpreters could reduce the difficulty of their task. Webb also referred to the difficulty of interpreting questions asked in the negative form, and advised the court participants to use the affirmative form when possible. He then

<sup>&</sup>lt;sup>30</sup> *Ibid.*, pp. 2405-06.

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said, "I again urge counsel to make their questions short and clear, and to give due notice of any passage from a report or other document which they desire to be read to the witness".<sup>31</sup> This was the first sign of Webb's newly acquired understanding of interpreters' requirements and his effort to accommodate them.

On 19 August, when a prosecutor pointed out an interpreting error, Webb asked for clarification from the interpreter. The interpreter being pressed, Moore said "any question of the translation in open court simply puts an added burden on the translators and is irritating to them".<sup>32</sup> On 11 October, based on out-of-court input from Moore, Webb advised the court that: "We should all speak into the microphone, speak slowly, and speak in short sentences if possible".<sup>33</sup> Here, Webb was attentive to how users of interpreting services could support interpreter performance. Later, in response to a prosecutor's complaint about being interrupted by the interpreter, Webb said "our very efficient translators are always doing their best [...] They have a most difficult task and they are doing it admirably. That is the opinion of the Tribunal".<sup>34</sup> Five months after the opening of the trial, this acknowledgment indicates that Webb came to appreciate the challenge the interpreters faced and the indispensable role they played for the court to function.

Almost a year after the tribunal convened, Webb stopped showing any sign of ill-informed expectations for how interpreting should work. The following procedural rules he announced on 29 April 1947 illustrate how understanding and supportive Webb became of the interpreters over the first year of proceedings:

> all documents, including running commentaries of counsel, be presented to the Language Division forty-eight hours in advance in order to insure simultaneous interpretation [simultaneous reading of prepared translation], and that the Language Division be notified in advance of any deviations from the planned order of presentation.<sup>35</sup>

<sup>&</sup>lt;sup>31</sup> *Ibid.*, p. 2478.

<sup>&</sup>lt;sup>32</sup> *Ibid.*, p. 3981.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, p. 8776.

<sup>&</sup>lt;sup>34</sup> *Ibid.*, p. 9178.

<sup>&</sup>lt;sup>35</sup> *Ibid.*, p. 21281.

# 7.3.3. Relay Interpreting

As previously mentioned, in addition to Japanese-English interpreters, the tribunal used interpreters of other languages when necessary. Trial records indicate that the tribunal had not anticipated or prepared for issues involving the use of a third language. During the early stages of the trial, a significant amount of time was spent inside and outside the courtroom discussing whether the use of 'non-official' languages should be allowed in court at all.

When General CHING Tehchun of China, the first Chinesespeaking witness, appeared in court on 22 July 1946, the initial arrangement was to provide relay interpreting with Japanese as the pivot language between Chinese and English. This was because the Language Section could not find a Chinese-English interpreter. The defence became concerned about potential inaccuracies in relay interpreting. Also, the court did not appreciate the Japanese rendition preceding the English rendition for a Chinese remark. In other words, it did not want to wait for two steps of interpreting to listen to the English rendition. President Webb made a ruling on the spot to use a secretary of Judge MEI Ju'ao of China as the Chinese–English interpreter, making English the pivot language in relay interpreting between the three languages so that the court could listen to the English rendition first. The poor performance of this ad hoc interpreter drew complaints from both the defence and the prosecution, and often disrupted the court proceedings. Problems with interpreters continued during the testimony of Puyi (former Emperor of Manchukuo). Webb wrote to General Douglas MacArthur, asking for Chinese-English interpreters.<sup>36</sup> In response, MacArthur sent his own interpreter to the court and promised to bring more interpreters in from Shanghai.

# 7.3.4. Belated Inquiry to Nuremberg

The problems with this relay interpreting are probably what prompted the IMTFE a month later to consult the Nuremberg Tribunal about the handling of multiple languages in court. A telegram from the Secretariat of

<sup>&</sup>lt;sup>36</sup> William F. Webb, Letter from W.F. Webb, President of IMTFE to General Douglas Mac-Arthur, 20 August 1945, MacArthur Memorial, Norfolk, VA.

the IMTFE to its counterpart in Nuremberg, dated 23 August 1946, asked the following basic questions:<sup>37</sup>

- 1. How many languages are spoken in court?
- 2. How many language translations are spoken simultaneously over the translator device?
- 3. What is the total number of interpreters and monitors used at any one time?
- 4. Are the interpreters in open court or behind glass walls?
- 5. What is the distance between witness box and interpreters?
- 6. More than one court reporter for each language needed by the interpreter?
- 7. Where are official court reporters seated, near witness or near interpreters?
- 8. How much space is used by interpretation personnel involving interpreters, monitors and others?
- 9. How are counsel, witness and interpreters' speech activities coordinated?

Almost four months after the start of the trial, this belated inquiry illustrates the tribunal's unpreparedness for the use of a third language in court and the absence of any effort to learn from the interpreting arrangements at Nuremberg during the preparation stage. The response, dated 27 August 1946, <sup>38</sup> indicates that the court in Nuremberg had a wellestablished interpreting system in place. The information shared by Nuremberg, however, was not particularly useful because it was all based on the use of simultaneous interpreting, which was not the predominant mode of interpreting at Tokyo.

#### 7.3.5. Use of a Third Language by Prosecutors

When the French prosecutor, Robert L. Oneto, opened his case in French on 30 September 1946, the defence raised an objection, citing non-

<sup>&</sup>lt;sup>37</sup> CINCAPAC, A telegram to General Secretary, IMT, Nuremberg, Germany, 23 August 1946, Records of the Allied Operational and Occupation Headquarters, World War II (Records Group 331), US National Archives, College Park, MD.

<sup>&</sup>lt;sup>38</sup> International Military Tribunal Nuremberg, A correspondence to CINCAPFPAC, 27 August 1946, Records of the Allied Operational and Occupation Headquarters, World War II (Records Group 331), US National Archives, College Park, MD.

compliance with the charter article on language<sup>39</sup> and the difficulty of checking the accuracy of interpretation. The objection was overruled. When Oneto read aloud documents, however, he did so in English. His accent made it difficult for the interpreters to do their job. There was a long discussion on what language was to be used by Oneto, and an irritated President Webb made a ruling to use English only. Oneto's argument for the use of French, however, continued into the next day when he started speaking French again despite the court's ruling. Webb said it was "almost contempt"<sup>40</sup> and adjourned the court. Outside the courtroom, the French judge's threat to resign led Webb to allow the use of French,<sup>41</sup> ending the debate that had taken up two days of court time. Since English–French and French–Japanese interpreters were available, there was no relay interpreting involved and the source speech was interpreted into two languages concurrently.

The Soviet prosecution also insisted upon the use of Russian. The defence objected again, referring to concerns about the disruption, delay and non-compliance with the charter. It also insinuated there was a politically motivated pre-arrangement between the United States and the Soviet Union regarding the use of Russian. Webb called this allegation offensive, claimed that the charter did not exclude a third language, and handed over a ruling that the tribunal would allow the language of any of the countries represented on the court.<sup>42</sup> This debate over the use of Russian occupied the whole afternoon session on 4 October 1946. During the presentation of the Soviet case for the prosecution, the prosecutor spoke in Russian, which was interpreted into English and Japanese concurrently.

#### 7.3.6. Educating the Users of Interpreting Services

The discussion above illustrates how unfamiliar and unprepared the IMT-FE was with effective use of interpreting services in this novel multilingual setting. During the initial stage of the trial, several procedural issues arose around interpreting. In addressing them, the court participants debated in court over the speakers' right to speak in a language of their choosing and the mandate for accurate and full interpretation to ensure the

<sup>&</sup>lt;sup>39</sup> IMTFE Charter, see above note 1.

<sup>&</sup>lt;sup>40</sup> IMT Transcripts, p. 6746, see above note 28.

<sup>&</sup>lt;sup>41</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial*, William Morrow and Company, New York, 1987, pp. 215-16.

<sup>&</sup>lt;sup>42</sup> IMT Transcripts, pp. 7087-88, see above note 28.

defendants' right to a fair trial. Also, the difficulty of interpreting between English and Japanese was explained and recognized, and so were the interpreters' cognitive limitations such as their inability to interpret a long passage in the consecutive mode and to properly interpret a speech read from a prepared text without access to the text or its translation in advance.

Ultimately, the tribunal arrived at workable procedural solutions through debates and negotiations among the court participants over the first year of the trial:

- 1. Speakers were to break down their remarks into short segments;
- 2. The interpreter was to deliver a full interpretation, not a summarization; and
- 3. The translation was to be provided to the interpreter beforehand when the speaker reads from a document.

Most of these conventions are now taken for granted in modern-day international and national courts, but they had to be learned by the court participants through trial and error and through negotiations between the interpreters and the users of their services at the Tokyo Trial. It was indeed a process of educating the users of interpreting services.

#### 7.4. Tokyo, Nuremberg and Beyond

# 7.4.1. Connection to Nuremberg?

The interpreting at the Nuremberg Trial is a monumental event in the history of interpreting because it was the first time that simultaneous interpreting was continuously used for an extended time. The interpreters' skilful handling of the complex interpreting arrangement between four languages (English, French, German and Russian) using novel equipment was a feat in the evolution of conference interpreting as a profession and led to the expansion of training programs for simultaneous interpreters in higher education in Europe and North America. Nuremberg proved that simultaneous interpreting was feasible and efficient, saving an enormous amount of time in a multilingual event. Because of this success, Colonel Léon Dostert (a French-born US military officer and interpreter), who was responsible for setting up the simultaneous interpreting system and for recruiting and training interpreters at Nuremberg, was asked to introduce simultaneous interpreting to the United Nations ('UN'). Some of the interpreters at Nuremberg also went to New York to join Dostert at the UN. Simultaneous interpreting is now widespread and the predominant mode of interpreting at the UN as well as other international organizations, courts and conferences.

In contrast, consecutive interpreting was used at Tokyo since none of the linguists had been exposed to interpreter training and simultaneous interpreting between Japanese and English was deemed impossible at that time due to the differences in sentence structure. While the interpreters at Nuremberg were celebrated as pioneers of simultaneous interpreting who played a significant role in the historic event,<sup>43</sup> Japanese interpreters at Tokyo were invisible for a very long time.<sup>44</sup> None of the interpreters pursued interpreting careers after the trial. As discussed earlier, they seem to have preferred not to attract attention, presumably because of the social stigma attached to having facilitated a trial that was often criticized as victor's justice and that convicted (and executed in some cases) former Japanese leaders. Incidentally, while the interpreter team at Nuremberg consisted of both men and women, the interpreters, monitors and language arbiter at Tokyo were all men.<sup>45</sup>

As for interpreting procedures, there were no impromptu dealings in the courtroom at Nuremberg. Since simultaneous interpreting between four languages was continuously taking place, the tribunal could not have afforded much time to discuss language issues during the proceedings – it would have been such a disruption to the fine-tuned, complex workings of the interpreting system. Dostert and his team conducted strict screening and exams with candidates from the United States and Europe to select a handful of highly competent interpreters.<sup>46</sup> They participated in one to two months of training for simultaneous interpreting, which included practice in simulated courtroom proceedings. Compared to Tokyo, Nuremberg was far more prepared for the challenge of mediating a high-profile multilingual trial. At Tokyo, there was no Dostert who could effectively lead and

<sup>46</sup> Gaiba, 1998, pp. 40-50, see above note 2.

<sup>&</sup>lt;sup>43</sup> See, for instance, AIIC, Interpreters: A Historical Perspective (a documentary film), 1996; and Jesús Baigorri-Jalón, From Paris to Nuremberg: The Birth of Conference Interpreting, John Benjamins, Amsterdam, 2014.

<sup>&</sup>lt;sup>44</sup> There had been some sporadic references in magazines to Japanese interpreters at the Tokyo Trial, but it was Tomie Watanabe's master's thesis (1998) that first addressed them in an academic forum, see above note 17.

<sup>&</sup>lt;sup>45</sup> There were Japanese female translators behind the scene, but no woman worked as a linguist in the courtroom, except a Russian female interpreter in the Soviet interpreter team. The Soviet had a standalone arrangement for its judge who understood neither English nor Japanese: Takeda, 2010, p. 37, see above note 12.

oversee the interpreting system. The equipment dedicated to interpreting was not ready at the beginning, and the interpreters received no training beyond basic information on how the court worked before they started working in court. There seems to have been no sharing of information on interpreting between Tokyo and Nuremberg except for the abovementioned inquiry from Tokyo in August 1946.

There were monitors who checked interpreters' performance at both Nuremberg and Tokyo. Those at Nuremberg, however, were mostly checking if the technical aspect of the interpreting system was running smoothly. Presumably, there was no concern about the impartiality of interpreters since none of them were associated with the accused or the Nazis. Error corrections and style adjustments were made on the transcripts by the interpreters themselves after a given trial session, using the verbatim records of the source speech and interpretations.<sup>47</sup> In comparison, the monitors at Tokyo jumped in, if necessary, to interject corrections of interpreting errors during the proceedings. In addition to the nisei monitors, the Caucasian US military officer, as the language arbiter, contributed to the appearance of the Allied military being in charge of the tribunal's language section and functioned as a deterrent against possible bad faith on the part of the Japanese interpreters and the nisei monitors. Considering these differences in the circumstances between Tokyo and Nuremberg, it can be concluded that there was virtually nothing Tokyo could learn from Nuremberg for practical application in the interpreting arrangements and procedures.

# 7.4.2. Relevance to Present-Day International Criminal Justice

The interpreting at Nuremberg has exerted a lasting impact on the widespread use of simultaneous interpreting and the development of professional training in simultaneous interpreting. The interpreting at Tokyo, on the other hand, was a one-off event that had no immediate bearing on the profession of interpreting or the court interpreting system in Japan or beyond.

There is one feature of interpreting at Tokyo, however, that could be relevant to present-day international criminal justice: the fact that Japa-

<sup>&</sup>lt;sup>47</sup> *Ibid.*, p. 71, pp. 97-98; Peter Less, "Speaking with a History Maker: Interpreters at the Nuremberg Trials", The ATA Conference in Seattle, November 2005; and Peter Less, Personal communication with the present author at the ATA Conference in New Orleans, November 2006.

nese citizens interpreted the proceedings against their former superiors and leaders. This circumstance raised issues of the neutrality and trustworthiness of interpreters, as well as possible psychological burdens on them. The same type of situation can present itself today when languages of lesser diffusion, as Japanese was at that time, are involved in international criminal justice.

The ICTY is one such example. There, simultaneous interpreting between English, French and BCS (Bosnian, Croatian and Serbian) was provided throughout the court proceedings.<sup>48</sup> Most of the interpreters were from the former Yugoslavia since Bosnian, Croatian and Serbian were not widely taught or spoken outside the former Yugoslavia. However, there was no explicit concern over their impartiality. Most interpreters were professionally trained conference interpreters bound by a code of ethics guaranteeing professional integrity, dignity, impartiality and accuracy.<sup>49</sup> Also, they worked in an environment in which their interpretation was broadcast later on the ICTY website with a 30-minute delay and the transcripts were available to the public, leaving little opportunity for transgressions to go undetected. The practice at the ICTY indicates that enforcing the code of ethics and the transparency of the institutional procedures can be an effective way for the users of interpreting services to be assured of interpreter impartiality.

As for error correction, the real-time transcription display<sup>50</sup> in the interpreters' booth made it possible for the interpreters at the ICTY to identify their own errors and correct them in real time. There was also a mechanism through which the defence could request that the Conference and Language Service Section verify the accuracy of a given translation and interpretation. If some disagreement remained, the judge would make a ruling. It should be noted that there are similarities between this system and the Language Arbitration Board from the Tokyo Trial.

At the institutional level, there was a well-developed, professional interpreting system with highly qualified interpreters in place at the ICTY. Some interpreters, though, faced emotional strain stemming from having

<sup>&</sup>lt;sup>48</sup> In addition, Albanian or Macedonian was used in some cases.

<sup>&</sup>lt;sup>49</sup> United Nations, The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/144, 8 March 1999 (https://www.legal-tools.org/doc/xix9r7/).

<sup>&</sup>lt;sup>50</sup> It applied only for interpretation into English.

to interpret testimonies concerning horrific crimes their former political and military leaders had committed.<sup>51</sup> There were counselling services available for those interpreters and other staff who worked closely with the victims and perpetrators to prevent secondary post-traumatic stress. Interpreters from the former Yugoslavia were also concerned about political backlash from supporters of the defendants. During the trial of a prominent politician, there was a newspaper report on the trial with a photo of the defendant in front of an interpreter in the booth. Fearing that the interpreter's family could be threatened by his supporters, the tribunal decided to protect interpreters by installing a one-way mirror for the booth.<sup>52</sup> Whether or not the interpreters were associated with the defendants in any way, the ICTY developed procedures and measures to protect the welfare and safety of interpreters, which presumably contributed to their ability to fulfil their duties effectively.

#### 7.5. Conclusion

Drawing on archival documents of the US military and the Japanese government, the records of the relevant trials, and publications and interviews of court participants at those trials, the present chapter has revealed the trial-and-error nature of establishing the interpreting system and procedures at the Tokyo Trial. First, it argued that the IMTFE devised the unique three-tier interpreting system with Japanese nationals as court interpreters and the error checking mechanism of monitors and language arbiter based on the lessons from the *ad hoc* handling of interpreting and its negative impact on the proceedings at Class B/C trials in Manila and Yokohama. Second, unfamiliar with the workings of interpreting and inattentive to the language needs of different participants, the IMTFE faced a series of unexpected problems with interpreting and had to resolve them extemporaneously over the course of proceedings. Through disruptions, debates and negotiations, it took almost a year for the court to settle with a set of workable procedural rules for interpreting.

The tribunal's cavalier attitude toward the needs and requirements of a multilingual courtroom and improvisational approach to addressing the interpreting problems at Tokyo contrast starkly with Nuremberg, where careful preparations led to the successful operation of a much more

<sup>&</sup>lt;sup>51</sup> Humphrey Tonkin and Maria Esposito Frank (eds.), *The Translator as Mediator of Cultures*, John Benjamins, Amsterdam, 2010.

<sup>&</sup>lt;sup>52</sup> Interview with ICTY interpreters by the author in August 2012.

complex interpreting system. It should be noted, however, that a fundamental difference between the two trials in this context was the availability of competent interpreters within the Allied nations. Due to the lack of such interpreters in Japanese, the IMTFE had to depend on citizens of the defeated nation. Further, in order to monitor the performance of interpreters, the tribunal had to resort to *nisei* who were once deemed enemy aliens by the US government during the war. Accordingly, attention should also be paid to the power and racial dynamics among the members of the interpreting system at the Tokyo Trial. Thus, inquiry into how the IMTFE devised its interpreting system contributes to comparative studies of Tokyo and Nuremberg, as well as discussions of trial preparations and power dynamics within the tribunal.

Today, procedural rules for interpreting are well in place in the international criminal justice system. However, it does not mean that it is free of language-related challenges. For instance, Ellen Elias-Bursać argues that the ICTY was such a protracted affair that the defence eventually developed strategies to exploit the interpreting and translation system by raising a number of terminological issues.<sup>53</sup> Her analysis illustrates that interpreting and translation is an integral part of international criminal justice, and that translation of politically sensitive terms and legal terms between completely different judicial systems<sup>54</sup> probably will never cease to be a challenge in multilingual courtrooms. Whether on the international or national level, it should be assumed that errors in interpreting and translation can happen, and terminological issues are inherent in multilingual court proceedings. Establishing mechanisms to address such language issues is essential to the smooth operation of proceedings. Multilingual courtrooms of the present would benefit from studying past successes and failures to inform their training of court interpreters and the users of their services.

<sup>&</sup>lt;sup>53</sup> Elias-Bursać, 2015, pp. 197-240, see above note 3.

<sup>&</sup>lt;sup>54</sup> See Gaiba, 1998, pp. 104-09, see above note 2, and Takeda, 2010, pp. 46-49, and 99-111, see above note 12, for terminological issues in translation and interpreting at the Nuremberg Trial and the Tokyo Trial, respectively.

PART III: DYNAMICS AND DIMENSIONS OF THE TRIAL

## Individual Responsibility at the Tokyo Trial

#### Yuma Totani\*

#### 8.1. Introduction

The year 2018 marked the passage of seven decades since the promulgation of the Judgment by the International Military Tribunal for the Far East ('IMTFE'). What sorts of knowledge have been generated thus far concerning the trial of major Japanese war criminals at the IMTFE, or the 'Tokyo Trial' as it is commonly known? How has the ever-expanding body of scholarship on the trial as well as controversies it generates come to inform our understanding of the Tokyo Trial and its legacies?

The two decades following the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') saw a surge in the studies of the Tokyo Trial, which, in turn, energized this field of study.<sup>1</sup> The assessment of the Tokyo Trial in the international legal community underwent a marked change in the same decades. Having been overshadowed

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<sup>1</sup> Representative publications in recent decades include David Cohen, "Beyond Nuremberg: Individual Responsibility for War Crimes", in Carla Hesse and Robert Post (eds.), Human Rights in Political Transitions: Gettysburg to Bosnia, Zone Books, New York, 1999, pp. 53-92; Neil Boister and Robert Cryer, The Tokyo International Military Tribunal: A Reappraisal, Oxford University Press, Oxford, 2008a, and its companion source book, Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments, Oxford University Press, Oxford, 2008b; Yuma Totani, The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II, Harvard University Asia Center, Cambridge, 2008; Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, London and New York, 2008; Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited, Brill, Leiden, 2010; and Kerstin von Lingen (ed.), Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48, Brill, Leiden, 2018. I list here a representative range of recent English-language publications alone, since I lack proficiency in other languages except Japanese. For an overview of Japaneselanguage publications on the Tokyo Trial, see Totani, 2008, pp. 190-262.

by the Nuremberg Trial for much of the post-war period, the Tokyo Trial has come to gain recognition as a foundational event in the history of international criminal justice and accountability. The assessment of the Tokyo Trial has been transformed in recent decades, arguably because of the growing global importance of international criminal justice mechanisms to end impunity for genocide, war crimes and crimes against humanity, or serious human rights violations that may amount to core international crimes. Nuremberg and Tokyo are particularly credited for providing historical precedents for enforcing the principle of individual responsibility for international crimes – precedents upon which, five decades following Nuremberg and Tokyo, the ICTY and the ICTR were established. Which were the precedents on individual responsibility that the Tokyo Trial established?

It is a matter of general knowledge that the accused at the Tokyo Trial were convicted of conspiracy to commit crimes against peace. This knowledge is based on the majority's findings that a common plan or conspiracy to carry out aggressive war, with the goal of achieving Japan's economic, political and military domination in Asia and the Pacific, existed between 1928 and 1945; and that, by the application of criminal conspiracy as a theory of liability, most of the accused were guilty of crimes against peace.<sup>2</sup> What remains under-explored is the equally important fact that the prosecution's case did not solely rely on the doctrine of criminal conspiracy but also applied other recognized criminal law theories of individual responsibility, and that there were charges other than crimes against peace. Furthermore, the majority in the final judgment made findings on those counts where the doctrine of criminal conspiracy did not apply, including counts on war crimes. Notwithstanding a marked increase in research on the Tokyo Trial today, however, there is yet to emerge a shared understanding in the scholarly community as to what theories of individual responsibility were applied at Tokyo, or what the underlying evidence by which the individual accused received convictions or acquittals on various charges was.

The purpose of the present chapter is to provide a brief sketch of the prosecution's case on individual responsibility, evidentiary grounds, and

<sup>&</sup>lt;sup>2</sup> Boister and Cryer, 2008b, chapters 9 and 10 of the Majority Judgment, see above note 1.

the defence responses, so that this chapter can correct the existing scholarship concerning the scope of the prosecutorial effort at the Tokyo Trial.<sup>3</sup>

#### 8.2. The Accused

It is instructive to first revisit the principle of individual responsibility as articulated in the IMTFE Charter (promulgated on 19 January 1946), and to review the profiles of those individuals whom the prosecution chose to put on trial at Tokyo. The IMTFE Charter followed the model provided in the Charter of the International Military Tribunal ('IMT') (as annexed to the London Agreement, 9 August 1945) by identifying three types of offences as falling within the jurisdiction of the Tokyo Tribunal: crimes against peace, war crimes, and crimes against humanity. That said, the IMTFE Charter was deliberately phrased to emphasize the relative importance of crimes against peace among the three.

Article 5. Jurisdiction Over Persons and Offences.

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.*<sup>4</sup>

As for the applicable principle of responsibility, the IMTFE Charter contained one article that combined two articles in the IMT Charter without substantially altering their meaning. The relevant article thus read:

Article 6. Responsibility of Accused.

*Neither the official position*, at any time, of an accused, nor the fact that an accused acted pursuant to 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.<sup>5</sup>

<sup>&</sup>lt;sup>3</sup> The present chapter draws upon David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence,* Cambridge University Press, Cambridge, 2018a; and David Cohen and Yuma Totani, *Tōkyō saiban "shinwa" no kaitai: Paru, Rērinku, Webu san-hanji no sōkoku* [The Deconstruction of the Tokyo Trial 'Myths': Battles among Three Justices, Pal, Röling, and Webb], Chikuma Shobō, Tokyo, 2018b.

<sup>&</sup>lt;sup>4</sup> The IMTFE Charter is reproduced, *inter alia*, in Boister and Cryer, 2008b, p. 8, see above note 1 (emphasis added).

<sup>&</sup>lt;sup>5</sup> *Ibid.* The IMT Charter contained the following articles: "Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments,

By the stipulation above, the IMTFE Charter reaffirmed the principle in the IMT Charter that those charged with responsibility for international offences are not immune from criminal prosecution, *regardless of their official positions*. The same principle is articulated in the constitutive statutes of present-day international criminal tribunals such as, for instance, the Rome Statute of the International Criminal Court.<sup>6</sup>

In light of these stipulations in the IMTFE Charter, the prosecution selected 28 Japanese out of some one hundred persons whom the Allied authorities identified as major war criminals for international prosecution.<sup>7</sup> The number of defendants was subsequently reduced to 25 due to two deaths and one case of mental unfitness. In the initial group of 28, most were formerly high-ranking officials of the Imperial Government of Japan, having held key positions in the Cabinet, the Privy Council, the Ministry of the Imperial Household, the Ministry of Foreign Affairs, the Ministry of the Army, the Ministry of the Navy, the Ministry of Finance, and other government agencies, as well as the Japanese-controlled Government of Manchukuo (1932-45) in northeast China.

The accused included the following individuals:

1. Naoki Hoshino was a career bureaucrat in the Ministry of Finance, who served as Chief of the General Affairs Bureau in the Government of Manchukuo from 1936 to 1939 and Chief Secretary and

<sup>6</sup> The relevant provision in the Rome Statute reads as follows:

Emphasis added (http://www.legal-tools.org/doc/7b9af9/).

<sup>7</sup> For more information on how the prosecution selected defendants at Tokyo, see Kentarō Awaya's *Tōkyō saiban ron* [A Treatise on the Tokyo Trial], Ōtsuki Shoten, Tokyo, 1989, and *Tōkyō saiban e no michi* [The road to the Tokyo Trial], vols. 1-2, Kōdansha, Tokyo, 2006. A comprehensive list of those individuals who were named as major war crimes suspects can be found in Tōkyō Saiban Handobukku Henshū Iinkai (ed.), *Tōkyō saiban handobukku* [The Tokyo Trial Handbook], Aoki Shoten, Tokyo, 1989, pp. 200-03.

shall not be considered as freeing them from responsibility for mitigating punishment"; and "Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". The IMT Charter is reproduced in Leon Friedman (ed.), *The Law of War: A Documentary History*, Random House, New York, 1972, vol. 1, p. 887 (emphasis added).

Article 27. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Minister of State without Portfolio of the Imperial Government of Japan from 1941 to 1944.

- 2. Okinori Kaya was also a high official in the Ministry of Finance, who was appointed as Finance Minister on the eve of the Pearl Harbor attack and continued to serve in the same capacity until mid-1944.
- 3. Kōki Hirota was a career diplomat who served as Foreign Minister intermittently from 1933 to 1938, Prime Minister from 1936 to 1937, and *jūshin* ('senior statesman'; ex-premier) from 1938 to 1945 with responsibility to render advice to Emperor Hirohito.
- 4. Baron Kiichirō Hiranuma was a longstanding member of the Privy Council, serving as its Vice-President from 1930 to 1936 and President from 1936 to 1939. He also served briefly as Prime Minister in 1939, and provided advice to the Emperor in his capacity as *jūshin* thereafter.
- 5. Marquis Kōichi Kido made his career as an official in the Ministry of the Imperial Household in most part, but he also held top positions in the executive branch of the government, such as Education Minister in 1937, Welfare Minister in 1938, and Home Minister in 1939. He became the Lord Keeper of the Privy Seal and acted as a personal confidant of Emperor Hirohito from 1940 to 1945.<sup>8</sup>

The group of defendants at the Tokyo Trial included a fair number of former high-ranking army and navy officers as well. Nevertheless, the positions they held were not limited to those in military command organs, but also those in the government administration. For instance, General Seishirō Itagaki may be remembered to this day as a staff officer of the Japanese garrisoned army in northeast China (also known as the 'Kwantung Army') and a co-plotter of the Manchurian Incident of September 1931. Yet, the charges against him at the Tokyo Trial were not limited to matters relating to the Manchurian Incident, but also included his conduct as Army Minister from 1938 to 1939. Similarly, those who are familiar with the history of the Asia-Pacific War may recognize Lieutenant General Akira Mutō as former Adjutant Chief of Staff of General Iwane Matsui's Central China Area Army at the time of the Nanjing Massacre between 1937 and 1938, and Chief of Staff of General Tomoyuki Yamashi-

<sup>&</sup>lt;sup>8</sup> Key positions held by individual accused are indicated in the indictment. Boister and Cryer, 2008b, pp. 63-69, see above note 1.

ta's 14<sup>th</sup> Area Army in the Philippines between 1944 and 1945. However, the charges against Mutō at the Tokyo Trial were not limited to his military services during the Battle of Nanjing or the Battle of the Philippines. They also included his role in the management of prisoner-of-war affairs while serving in the central government as Chief of the Military Affairs Bureau of the Ministry of the Army from 1938 to 1942. Above all, the charges against General Hideki Tōjō at the Tokyo Trial had less to do with his activities in army forces in the 1930s than his conduct during his tenure as Prime Minister and concurrently Army Minister between 1941 and 1944. From these examples, it appears that the prosecution attached *relative* importance to pursuing accountability of those individuals who held top positions in the wartime Japanese government.

It is worth noting that the prosecution stopped short of charging Emperor Hirohito, even though he was the highest-ranking political and military leader of Japan throughout the war. Hirohito held the position of "the head of the Empire, combining in Himself the rights of sovereignty" since before the start of the Manchurian Incident until well after the end of World War II. He concurrently assumed the "supreme command of the Army and Navy", in accordance with the Constitution of the Empire of Japan ('Meiji Constitution').<sup>9</sup> The prosecution nevertheless excluded him from the group of accused because of an Allied joint policy decision, adopted on 3 April 1946, to disallow the Supreme Commander for the Allied Powers ('SCAP') from taking any action against the Emperor as a war criminal without further authorization. This policy decision remained binding upon the Supreme Commander for the duration of the Allied occupation of Japan (1945–52).<sup>10</sup> The withholding of prosecutorial action against Emperor Hirohito sent contradictory messages to the Japanese public concerning the Allied Powers' priorities on justice and accountabil-

<sup>&</sup>lt;sup>9</sup> The text of the Constitution of the Empire of Japan (1889-1947) is available on the web site of the National Diet Library. The term 'Meiji' refers to the reign title of the first modern emperor of Japan, Mutsuhito, covering the period between 1868 and 1912.

<sup>&</sup>lt;sup>10</sup> Two individuals served as the Supreme Commander for the Allied Powers in occupied Japan in succession: General Douglas MacArthur (1945-51) and General Matthew Ridgway (1951-52).

ity. It remains a matter of controversy as to whether the Allied Powers should have put Emperor Hirohito on trial.<sup>11</sup>

#### 8.3. The System of Japanese Government

The Bill of Indictment at the Tokyo Trial is a closely typed 46-page document that contains a preamble, concise statements of the charges in 55 separate counts against the 28 defendants, and five appendices.<sup>12</sup> An analysis of the indictment shows that, broadly speaking, two different theories of liability were invoked to support the various charges against the Japanese accused. One was the doctrine of criminal conspiracy, which both the IMT and IMTFE Charters recognized as an applicable theory of liability by stipulating in part that "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".<sup>13</sup> The doctrine of criminal conspiracy applied to just nine counts at Tokyo, namely, five counts of crimes against peace (Counts 1 to 5), three on murder (Counts 37, 38 and 43), and one on conventional war crimes and crimes against humanity (Count 53). For the remainder of the counts, the accused were charged not with conspiracy, but with substantive offences of planning, preparation, initiation and/or waging of aggressive war (Counts 6 to 36), commission of murder (Counts 39 to 42, and 44 to 52), and ordering, authorization or criminal omission relative to war crimes and crimes against humanity committed by members of the Japanese armed forces (Counts 54 and 55).

With respect to these latter non-conspiracy counts, the prosecution submitted a "Statement of Individual Responsibility for Crimes Set Out in the Indictment" (in Appendix E), articulating its basic position concerning the application of the principle of individual responsibility. This part of the indictment is important, as it illuminates the prosecution's general strategy of linking each of the accused in their disparate roles to a wide

<sup>&</sup>lt;sup>11</sup> Further details regarding the Allied decision not to prosecute Emperor Hirohito and its repercussions in post-war Japan are provided in Totani, 2008, pp. 43-62, 200-05, 213-17, 246-59, see above note 1; and Cohen and Totani, 2018a, pp. 32-44, see above note 3.

<sup>&</sup>lt;sup>12</sup> The digital copy of the indictment is available on the web site of Harry S. Truman Presidential Library and Museum. A reproduction of the indictment is also included in Boister and Cryer, 2008b, pp. 16-69, see above note 1.

<sup>&</sup>lt;sup>13</sup> This phrase appears in Article 5 of the IMTFE Charter: Boister and Cryer, 2008b, p. 8, see above note 1.

range of crimes alleged in the indictment. The relevant passages in the appendix read as follows:

It is charged against each of the Defendants *that he used the power and prestige of the position which he held and his personal influence* in such a manner that he promoted and carried out the offences set out in each Count of this Indictment in which his name appears.

It is charged against each of the Defendants that during the periods hereinafter set out against his name *he was one of those responsible for all the acts and omissions of the various Governments of which he was member*, and of the various civil, military [army] or naval organizations *in which he held a position of authority*.<sup>14</sup>

Through the statement in the first paragraph above, the prosecution set out the following elements required for proving individual responsibility: (1) that the accused held positions of authority; (2) that the accused used the power and prestige derived from such positions, or personal influence; and (3) that the accused enabled the commission of offences as charged in the indictment, by exercising such power, prestige and/or personal influence. The statement in the second paragraph above, meanwhile, articulates a concept of individual responsibility that, somewhat paradoxically, is grounded on the notion of *collective* responsibility. Specifically, it sets out that an accused in a position of authority is liable for "all" criminal acts committed under the administrative or policy purview of the respective governmental agency or entity of which the accused was a member.

In advancing these theories of responsibility, it became incumbent upon the Tokyo prosecution to explain what these "positions of authority" were. To this end, at the start of the Tokyo Trial, the prosecution offered a concise, two-part account on the structure and workings of the Imperial Government of Japan since the overthrow of the shogunal government by imperial loyalists in 1867 (known as the 'Meiji Restoration') through the end of World War II, with special regard to the evolution of the Japanese government system during the years covered by the indictment. Much of the prosecution's presentation during the initial phase was focused on enumerating government organs, outlining their formal functions, and cross-referencing them with provisions contained in corresponding impe-

<sup>&</sup>lt;sup>14</sup> *Ibid.*, pp. 62-63.

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rial ordinances and laws as well as the Meiji Constitution. Additional evidence was produced during the prosecution's subsequent phases and during the defence's presentation of evidence.

When seen as a whole, the prosecution's case brought to light three essential layers in the organization of Japanese government, namely:

- 1. the formal structure of the government as defined by the Japanese laws, which comprised the institution of the Emperor as the sovereign power, and a wide range of imperial advisory organs such as the Ministry of the Imperial Household, the Imperial Diet, Ministers of State, and the Privy Council;
- 2. informal government institutions, which were not explicitly recognized by the Japanese laws but exercised tremendous influence over the formal structure of the government, such as *genro* ('elder statemen'; imperial advisers for life), *jūshin* (as mentioned), the Board of Marshals and Fleet Admirals, and the Chief Aide-de-Camp to the Emperor; and
- 3. a superstructure of the government, or "liaison bodies" in the parlance of the Tokyo prosecution, which were established the 1930s and the 1940s to co-ordinate the views of administrative and military branches of the government concerning war policies. Liaison bodies are shown to have made policy decisions over and above the formal structure of the government, and functioned as the *de facto* highest-level policymaking organs throughout the war years. They were extra-constitutional bodies nonetheless, since their constitutional functions, authority, or duties remained largely undefined by the laws of Japan.

The prosecution's case further demonstrated that these liaison bodies took various forms during the war, including the following main ones:

- the Four Minister Conference (consisting of the Prime Minister, the Foreign Minister, the Army Minister, and the Navy Minister);
- the Five Minister Conference (consisting of the members of the Four Minister Conference and the Finance Minister);
- the Liaison Conference between the Government and the Imperial Headquarters (consisting of the principal members of the Cabinet, those of the Army and Navy General Staff Offices, and their subordinates);

- the Imperial Conference (consisting of the members of the Liaison Conference and the Emperor);
- the Conference for the Supreme Direction of the War (consisting practically of the same members as those in the Liaison Conference); and
- the Imperial Headquarters Conference (consisting of members of the Army and Navy General Staff Offices and the Prime Minister).

As the composition of each of these liaison bodies indicates, those who participated in the meetings of liaison bodies were themselves the *core members of the formal structure of the Japanese government*, concurrently holding positions in the Cabinet, the Privy Council, and/or the Imperial Headquarters.<sup>15</sup> In this manner, the prosecution showed that the Japanese government evolved over time to form a complex structure and, by extension, a highly complicated system for the distribution of government *power, authority* and *prestige* as well as *personal influence*.

How did the defence respond to the prosecution's case on the system of government in wartime Japan? This question is of vital importance because, should the defence fail to introduce sufficient evidence to cast doubt on the prosecution's case, the judges were in principle entitled to take the facts at issue as proved by the prosecution. Quite remarkably, the transcripts of the court proceedings show that not only did the defence fail to challenge the prosecution's case but they also confirmed its general factual accuracy. The defence agreed on: (1) the inviolability of the principle of imperial sovereignty; (2) the indispensability of the formal structure of the government for the Emperor to exercise his sovereign powers; (3) the indispensability of informal advisory organs to the functioning of the formal structure of government; and (4) the significance of the emergence of liaison bodies during the war years, forming a superstructure for policymaking over the formal structure of the government. It can be said that these points of agreement provided the judges with critical factual grounds for determining the power, authority and prestige of positions

<sup>&</sup>lt;sup>15</sup> A full discussion of the structure and workings of the Japanese Government as presented by the prosecution and the defence can be found in Cohen and Totani, 2018a, chapter 3, see above note 3.

held by individual accused and, by extension, the criteria with which to make findings on their liability.<sup>16</sup>

#### 8.4. Individual Responsibility for War Crimes

As mentioned above, the indictment at the Tokyo Trial contained two counts that charged the individual accused with substantive offences of war crimes (Counts 54 and 55).<sup>17</sup> These counts deserve further scrutiny here, since they provide additional details concerning the prosecution's strategy.

The two counts articulated two contrasting theories of liability. Count 54 charged the accused with the commission of war crimes, alleging that the accused "ordered, authorized and permitted" the various Japanese military organizations, authorities of prisoner-of-war camps and civilian internment camps, military and civilian police forces, and so on, in Japan and occupied territories, to commit war crimes.<sup>18</sup> Count 55 charged the accused with culpable failure to stop the occurrence of war crimes, that they:

being by virtue of their *respective offices* responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War [...] deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.<sup>19</sup>

The prosecution's choice of the phrase "their respective offices" is programmatic, as it set the stage for the prosecution to charge not only Japanese military commanders, but also Japanese government officials with responsibility for war crimes.

With regard to Count 55, the prosecution provided, in Appendix D to the indictment, a list of international-law instruments that it considered relevant to establishing the accountability of government officials for war

<sup>&</sup>lt;sup>16</sup> It falls outside the scope of the present chapter to analyse the judges' handling of the prosecution and defence evidence concerning the system of Japanese government. A detailed study of the matter is provided in *ibid.*, Part II.

<sup>&</sup>lt;sup>17</sup> Counts 54 and 55 are classified in the indictment as "Conventional War Crimes and Crimes against Humanity", but the actual case the prosecution made under these counts was war crimes.

<sup>&</sup>lt;sup>18</sup> Boister and Cryer, 2008b, p. 32, see above note 1.

<sup>&</sup>lt;sup>19</sup> *Ibid.*, p. 33 (emphasis added).

crimes. The list included a provision in the 1907 Hague Convention No. IV Concerning the Laws and Customs of War of 1907, which reads as follows:

Prisoners of War are *in the power of the hostile Government*, but not of the individuals or corps who capture them.<sup>20</sup>

This article identifies a "hostile Government" as being primarily responsible for protecting prisoners of war, while the responsibility of military personnel or units that secure prisoners is shown to be secondary. A provision to the same effect was also contained in the International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (signed in Geneva in 1929; commonly known as the 'Red Cross Convention'), which appears in Appendix D as follows:

Article 26. The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles, as well as for cases not provided for, *in accordance with the instructions of their respective Governments* and in conformity with the general principles of the present Convention.<sup>21</sup>

It goes without saying that a 'government' is the one to sign and ratify international treaties and conventions, and that a 'government' necessarily depends upon individuals in positions of authority to fulfil its various obligations *vis-à-vis* the international community. The prosecution at the Tokyo Trial apparently inferred from provisions in the Hague and Geneva Conventions such as the ones above that members of a government therefore had the duty, *as individuals*, to ensure the government's fulfilment of its obligations concerning the observance of the laws and customs of war.

In addition to international-law instruments above, Appendix D includes a list of "Particulars of Breaches" relating to war crimes. This list, too, deserves close attention here, as it reveals another important facet of the prosecution's strategy for establishing the guilt of those accused of war crimes. The list contains a summary statement – in less than four typescript pages in the Bill of Indictment – of 15 *categories* of war crimes, which the prosecution alleged to have been commonplace occurrence in the Japanese conduct of war and military occupation, and for which the

<sup>&</sup>lt;sup>20</sup> *Ibid.*, p. 57 (Article 4, Section 1, Annex, emphasis added).

<sup>&</sup>lt;sup>21</sup> *Ibid.*, p. 58 (emphasis added).

prosecution sought to hold the accused individuals accountable.<sup>22</sup> What is noteworthy about this list is that it contains no detailed description of any specific *episodes* of war crimes; there is not even basic information such as dates, locations, or numbers of victims. This stands in stark contrast with the 7,900-word statement of offences contained in the IMT indictment, which provides detailed descriptions of individual episodes of war crimes as well as relevant dates, locations, types of offence, numbers of victims, and various other statistical data and tables.<sup>23</sup> Why did the prosecution at the Tokyo Trial prepare the statement of offences in such an abbreviated form instead of following the IMT model?

The answer lies in certain obstacles that the Tokyo prosecution faced while looking for evidence on the war crimes. The prosecution at the Nuremberg Trial could develop charges of atrocities against wartime German government and military leaders relatively easily, by making use of documents that the Allied forces confiscated during the invasive opera-

- 3. Refusal and failure to maintain prisoners of war [...]
- 4. Excessive and illegal punishment of prisoners of war.
- 5. Mistreatment of the sick and wounded, medical personnel and female nurses [...]
- 6. Humiliation of prisoners of war, and especially officers [...]
- 7. Refusal or failure to collect and transmit information regarding prisoners of war, and replies to enquiries on the subject [...]
- 8. Obstructions of the rights of the Protecting Powers, of Red Cross Societies, or prisoners of war and of their representatives [...]
- 9. Employing poison [with a notation that the commission of this offence was confined to "the wars of Japan against the Republic of China"] [...]
- 10. Killing enemies who, having laid down their arms or no longer having means of defence, had surrendered at discretion [...]
- 11. Destruction of Enemy Property [...]
- 12. Failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories, and deportation and enslavement of the inhabitants thereof [...]
- 13. Killing survivors of ships sunk by naval actions and crews of captured ships [...]
- 14. Failure to respect military hospital ships [...]
- 15. Attacks, and especially attacks without due warning, upon neutral ships.

Boister and Cryer, 2008b, pp. 58-62, see above note 1.

<sup>23</sup> For the IMT indictment, see *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946*, Nuremberg, Germany, 1947-49, vol. 1, pp. 27-92 (http://www.legal-tools.org/doc/388b07/).

<sup>&</sup>lt;sup>22</sup> The 15 categories of war crimes as listed in Appendix D are as follows:

<sup>1.</sup> Inhuman treatment [...] prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces [...]

<sup>2.</sup> Illegal employment of prisoners of war labor [...]

tions following D-Day. The prosecution at Tokyo, by contrast, struggled with a dearth of evidentiary materials because of co-ordinated cover-up efforts by the Japanese government and military authorities, which burned documents in their possession en masse during the two-week hiatus between the Japanese Government's acceptance of Potsdam terms on 14 August 1945 and the surrender ceremony on 2 September 1945. The Tokyo prosecution ultimately secured a large amount of evidence on the war crimes, but not soon enough to analyse and incorporate them into the Bill of Indictment.<sup>24</sup> Furthermore, it was predominantly 'crime-base evidence', that is, evidence documenting the various episodes of war crimes but unlike in the IMT – fell short of affirmatively establishing their link to the accused individuals.<sup>25</sup> Given this, the prosecution at the Tokyo Trial apparently decided to focus on documenting the broad geographical distribution and recurrence of various categories of war crimes by using crime-base evidence, so as to enable the judges to make inferences of criminal orders or authorizations by the accused as alleged in Count 54, or culpable failures to stop the commission of war crimes as alleged in Count 55.

Once in open court, the prosecution made the following statement to clarify what it sought to achieve by presenting voluminous crime-base evidence:

> This similarity of treatment [of prisoners of war, civilian internees, and non-interned civilians] throughout the territories occupied by the Japanese forces will, it is submitted, lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders

<sup>&</sup>lt;sup>24</sup> A fuller discussion on the Tokyo prosecution's challenges in collecting evidence on war crimes is provided in Cohen and Totani, 2018a, pp. 61-68, 204-08, see above note 3.

<sup>&</sup>lt;sup>25</sup> The prosecution did obtain a limited amount of 'linkage evidence', which showed affirmatively the connection of certain accused with specific episodes of war crimes. For instance, the prosecution presented in evidence the record of pretrial interrogations, during which former Army Minister, Tōjō admitted that he authorised the use of prisoners of war for the construction of the Burma-Siam Railway. He testified to the same effect during court testimony as well. Moreover, the prosecution presented a large number of Allied Governments' protests and inquiries regarding the Japanese treatment of Allied prisoners of war and civilian internees, which helped document that Tōjō and other high-ranking members of the Japanese Government were repeatedly put on inquiry notice about the crimes committed by the Japanese servicemen.

and soldiers, but of the general policy of the Japanese forces and the Japanese government. $^{26}$ 

In other words, the prosecution sought to demonstrate that the members of Japanese armed forces mistreated protected individuals – prisoners of war, civilian internees, and other civilian populations in occupied territories – in similar manners everywhere, and argued that such "similarity of treatment" must have resulted from Japan's war "policy".

How did the defence respond? The transcripts of the court proceedings reveal that, in seeming contradiction to its general insistence on the primacy of the Act-of-State doctrine, the defence readily agreed to the applicability of the principle of individual responsibility insofar as the charges of conventional war crimes were concerned. However, the defence took issue with the prosecution's contention that international-law instruments such as the Hague and Geneva Conventions provided a legal basis to hold government officials accountable for war crimes. Instead, the defence argued that the duty to ensure the observance of the laws and customs of war rested with military authorities – namely, members of the Ministry of the Army, the Ministry of the Navy, and army and navy forces at theatres of war – and not with members of non-military government agencies in whom the Japanese laws vested no such legal duties.<sup>27</sup>

The defence further objected to the prosecution's contention that the crimes committed were perpetrated in a "similar" manner across all locations so as to allow the inference of an underlying policy. While not denying the broad geographical distribution and recurrence of war crimes perpetrated by Japanese forces, the defence argued that the allegation of similarly-patterned war crimes was "far too vague to be made the foundation of a highly criminal charge", and also pointed out that the prosecution "does not even say that the 'pattern' was uniformly found everywhere". The prosecution "in some cases admitted it was not".<sup>28</sup> To challenge the prosecution's contention that war crimes resulted from Japan's war policy, the defence went on to offer the following alternative explanation:

<sup>&</sup>lt;sup>26</sup> Transcripts of court proceedings at the Tokyo Trial are available in the ICC Legal Tools Database. For the quoted passage, see transcripts of court proceedings, p. 12861 (https:// www.legal-tools.org/doc/db944e/).

<sup>&</sup>lt;sup>27</sup> An in-depth analysis of the defence case is provided in Cohen and Totani, 2018a, chapter 6, see above note 3.

<sup>&</sup>lt;sup>28</sup> Transcripts of court proceedings, p. 42261, see above note 26 (https://www.legal-tools.org/ doc/8642f3/).

Even if the alleged atrocities or other contraventions assume a similar singular pattern of acts it cannot justify such an assumption [of orders by higher authorities]. Such a pattern may have been a sheer reflection of national or racial traits. Crimes no less than masterpieces of art may express certain characteristics reflected the *mores* of a race. Similarities in the geographic, economic, or strategic state of affairs may in part account for the "similar pattern" assumed.<sup>29</sup>

In this explanation, the defence suggested the "national or racial traits" as an alternative explanation for the similarity in Japanese actions. This argument appears to have made no impression on the judges, however, as the majority wrote in the final judgment that

the evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal established that [...] torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy.

The majority further held that, given the scale and similarity of atrocities, "only one conclusion is possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces".<sup>30</sup>

### 8.5. The Case of Shigemitsu

The previous sections have explored the prosecution's theories of government officials' responsibility for international offences and the defence's responses. Let us now take up a case study, so that it can be seen how the contrasting interpretive positions on law and facts between the two parties played out in an actual case, namely the case of war crimes against Mamoru Shigemitsu, formerly a member of the Japanese war cabinet and Foreign Minister.

Shigemitsu was one of three career diplomats to be put on trial at Tokyo, two others being Shigenori Tōgō (Foreign Minister; 1941–42, 1945) and aforementioned Kōki Hirota (Foreign Minister; 1932–36, 1937–38). Shigemitsu had held various ambassadorial positions for much of the 1930s and the early 1940s, after which he served as Foreign Minister in the Tōjō Cabinet, starting in April 1943. He continued to hold the

<sup>&</sup>lt;sup>29</sup> *Ibid.*, p. 42203 (emphasis in the original).

<sup>&</sup>lt;sup>30</sup> Boister and Cryer, 2008b, p. 531, see above note 1.

same position after the replacement of the Tōjō Cabinet with the Koiso Cabinet following the fall of Saipan in July 1944. He left the office in April 1945 when the Koiso Cabinet fell, but he was reappointed to serve as Foreign Minister in the Prince Higashikuni Cabinet (1945–46), which was formed right after the end of the Pacific War.<sup>31</sup>

The prosecution's case on war crimes against Shigemitsu was focused exclusively on the period between 1943 and 1945 when he served as Foreign Minister.<sup>32</sup> The principal allegation was not that Shigemitsu ordered or authorised the commission of war crimes, but rather that he failed to fulfil his legal duty – in his capacity as a member of the Japanese Government – to ensure Japan's observance of the laws and customs of war. In support, the prosecution mainly documented the following facts:

- 1. that, over the course of two years of his service as Foreign Minister, Shigemitsu received notice of numerous protests and inquiries from the Allied Governments via the Protecting Powers regarding the Japanese mistreatment of Allied nationals in Japanese custody;
- 2. that Shigemitsu passed on incoming foreign protests and inquiries to authorities concerned within the Imperial Government of Japan;
- 3. that he prepared replies of his government based on information received from Japanese authorities concerned, and delivered them to the Protecting Powers; and
- 4. that the replies he prepared invariably denied the occurrence of the alleged war crimes.

In short, the prosecution showed that Foreign Minister Shigemitsu was repeatedly put on notice regarding the Japanese mistreatment of Allied nationals in their custody, but he delivered no satisfactory replies to the Allied protests.

In response, the defence did not deny the veracity of these facts, but disputed their sufficiency as a basis on which to convict Shigemitsu. The defence argued that as Foreign Minister, Shigemitsu did not have the power to take charge of military matters in the first place, and that he simply did what he had to do in his official capacity, namely, to pass on

<sup>&</sup>lt;sup>31</sup> Shigemitsu represented the Imperial Government of Japan at the signing of the Instrument of Surrender on the deck of U.S.S. *Missouri* at Tokyo Bay on 2 September 1945.

<sup>&</sup>lt;sup>32</sup> A fuller analysis of the case against Shigemitsu can be found in Cohen and Totani, 2018a, chapter 6, see above note 3.

the information from foreign governments to Japanese authorities concerned, and to return the Japanese Government's formal replies to the Protecting Powers. What is more, according to the defence, not only did Shigemitsu discharge his legal duty as Foreign Minister fully, but he also did so *conscientiously*. To this end, the defence presented an affidavit taken from Shigemitsu's former subordinate official, Tadakatsu Suzuki, during the sur-rebuttal phase in February 1948, and also called him to provide oral evidence in the courtroom.<sup>33</sup>

As he took the witness stand, Suzuki emphasized that prisoner-ofwar affairs fell outside the jurisdiction of the Foreign Ministry, but that Foreign Minister Shigemitsu took personal initiative to ascertain and ameliorate the actual conditions of prisoner-of-war internment. For instance, Shigemitsu was said to have directed Suzuki to apply pressure on Suzuki's counterparts in military ministries while Shigemitsu himself spoke directly and repeatedly to the Army Minister. Furthermore, Shigemitsu was said to have made his own subordinates use the Foreign Ministry's information network to verify facts.

Suzuki went on to point out that, on one occasion, Shigemitsu attempted to establish an "international laws and customs committee" as a new cabinet organization, so that it could raise awareness among the members of the Cabinet on legal issues concerning prisoner-of-war treatment. However, Shigemitsu gave up on this idea because, according to the witness, both Shigemitsu and Suzuki believed that the Foreign Ministry had no authority to deal with prisoner-of-war affairs. That said, Suzuki informed the Tribunal that, in October 1944, Shigemitsu brought up the information of prisoner-of-war mistreatment at a meeting of the Conference for the Supreme Direction of the War (that is, as we have seen, a liaison body that came to function as the *de facto* highest-level policymaking organ of the Japanese Government during the Koiso Cabinet). According to Suzuki, this particular action *vis-à-vis* the liaison body brought about a modest improvement in prisoner-of-war treatment. When cross-examined

<sup>&</sup>lt;sup>33</sup> Suzuki served as chief of the "Bureau in Charge of Japanese Nationals in Enemy Nations", an office established within the Ministry of Foreign Affairs in mid-November 1942 to be chiefly responsible for processing the incoming inquiries and protests on Japanese violations of laws and customs of war. Evidence regarding the functions of this Bureau can be found in transcripts of court proceedings, pp. 38780-83. Suzuki had previously appeared as a prosecution witness, the core part of whose testimony can be found in transcripts of court proceedings, pp. 12830-42, see above note 26.

by the prosecution as to whether Shigemitsu took up the prisoner-of-war affairs with the Cabinet (of which the accused was a member), however, Suzuki testified that "I do not think Foreign Minister SHIGEMITSU himself submitted anything of the kind to the Cabinet meetings".<sup>34</sup>

What should one make of the testimony by Suzuki as above? Given the nature of Shigemitsu's wartime initiatives, should they constitute a sufficient ground to exculpate him? The answer to these questions would depend on the standard of responsibility that the Tribunal would impose. If the Tribunal was to apply the standard that a concerned official was required to do everything within his or her scope of authority to address the issue, Suzuki's testimony may carry considerable weight in favour of the accused. If, on the other hand, the Tribunal should impose a standard that requires the accused to have taken *effective measures to end the mistreat*ment, Suzuki's testimony may not be sufficient to absolve the accused. Shigemitsu's own assessment of the witness testimony was that it was unhelpful. In the diary that he kept during the Tokyo proceedings, Shigemitsu made extensive comments on Suzuki's testimony and especially his statement that Shigemitsu failed to take action vis-à-vis the Cabinet. "Today, I scored a loss for the first time since the start of the court proceedings", 35 Shigemitsu wrote, indicating that this particular piece of evidence likely implicated him.

In the final judgment, a majority of the judges found Shigemitsu guilty of war crimes under Count 55 holding that:

We do no injustice to SHIGEMITSU when we hold that the circumstances, as he knew them, made him suspicious that the treatment of prisoners was not as it should have been. Indeed, *a witness* gave evidence for him to that effect. Thereupon he took no *adequate steps* to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary, to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.<sup>36</sup>

<sup>&</sup>lt;sup>34</sup> Transcripts of court proceedings, p. 38911, see above note 26 (https://www.legal-tools.org/ doc/9dd820/).

<sup>&</sup>lt;sup>35</sup> Mamoru Shigemitsu, Sugamo nikki [Sugamo Diary], vol. 1, Bungeishunjū Shinsha, Tokyo 1953, p. 343.

<sup>&</sup>lt;sup>36</sup> Boister and Cryer, 2008b, p. 618, see above note 1 (emphasis added).

This verdict indicates that the majority attached importance to testimony provided by "a witness" – Suzuki – according to whom the accused suspected that the prisoner-of-war treatment had not improved, but "took *no adequate steps* to have the matter investigated". In short, the standard of responsibility applied by the majority was that of taking *effective measures* to end the mistreatment.

#### 8.6. Conclusion

In the brief sketch of the prosecution's theories of responsibility, underlying evidence, and the defence responses, this chapter sought to shed light on the scope of the prosecution's case at the Tokyo Trial, especially where it concerned war crimes. The prosecution sought to establish the accountability of Japanese government officials for war crimes and to that end, it advanced a unique interpretation of international-law instruments and also adopted a unique method of proof. Or to be exact, the case made at Tokyo was not particularly unique or unusual. There were contemporaneous war crimes trials where high-ranking government officials were convicted for war crimes on similar legal grounds as the one for Shigemitsu, as exemplified in the case of Ernst von Weizsäcker at the *Ministries Case* at Nuremberg.<sup>37</sup>

Moreover, it was commonplace among prosecuting agencies at contemporaneous Allied war crimes trials in the Far East to make extensive use of crime-base evidence to document the broad geographical distribution and recurrence of war crimes, and to enable the judges to make inferences of criminal orders, authorization, or knowledge against the accused.<sup>38</sup> The significance of the Tokyo Trial, in this regard, is not that the prosecutorial effort was novel, but rather that it built on the experiences of contemporaneous Allied war crimes trials, thereby putting to further test the emerging legal theories and strategies for establishing accountability.

The task for researchers of the Tokyo Trial going forward is to continue exploring the jurisprudential legacy of the Tokyo Trial in relation to case-law literature arising from the past and the present, and to determine

<sup>&</sup>lt;sup>37</sup> See Totani, 2008, pp. 149-50, see above note 1.

<sup>&</sup>lt;sup>38</sup> See Yuma Totani, Justice in Asia and the Pacific Region, 1945-1952: Allied War Crimes Prosecutions, Cambridge University Press, New York, 2015. The Tokyo Trial aside, the Allied authorities held more than 2,240 war crimes trials against some 5,700 accused at 51 separate locations across the former theatres of war in Asia and the Pacific.

its relevance to our continuing effort to strengthen the international criminal justice mechanisms in the twenty-first century.

# 'Conventional War Crimes': The International Military Tribunal for the Far East and the Ill-Treatment of Prisoners of War and Civilian Internees

### **Robert Cribb\***

#### 9.1. Introduction

The International Military Tribunal for the Far East ('IMTFE') was a vast and complex legal reckoning with Japan's political and military leaders for crimes committed before and during the Second World War. Although the trial conducted by the IMTFE was a single legal enterprise, some of the important insights emerge from examining specific themes within the trial record. The prosecution of Japanese defendants for crimes against prisoners of war and internees had a relatively subordinate role in the trial process. The issues about prisoners of war raised by this prosecution, however, effectively illustrate the court's legal thinking on responsibility for war crimes. This chapter examines the decision to prosecute Japanese leaders for crimes against prisoners of war, the terms of the indictment, the proceedings in court, the arguments presented by the defence, and the outcomes of the trial.

On 26 July 1945, the leaders of the United Kingdom, (the Republic of) China and the United States, meeting in the German city of Potsdam, issued a formal Proclamation Defining Terms for Japanese Surrender ('Potsdam Declaration'). The Potsdam Declaration demanded Japan's unconditional surrender, threatening "prompt and utter destruction" if the

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Japanese authorities failed to comply. It also outlined programmes which the Allies proposed to implement if Japan did indeed surrender. Amongst other things, the Allies expressed their determination in Article 10 to mete out "stern justice [...] to all [Japanese] war criminals, including those who have visited cruelties upon our prisoners".<sup>1</sup>

In singling out cruelty against prisoners as a focus of the Allies' post-war reckoning with Japan, the Potsdam Declaration reflected the prevalent perception in the West, that Japanese forces had treated Western prisoners of war and internees under their control with extreme harshness and brutality. In the first months of the Second World War in Asia, Japanese forces captured around 140,000 Western military personnel belonging to Western and colonial armies in East Asia, Southeast Asia and the Pacific.<sup>2</sup> Some of these men, and a small number of women captured as nurses, were executed upon capture; the rest were consigned to prisonerof-war camps in Japan, Japanese colonies, and regions under Japanese occupation or hegemony. A similar number of Western civilians were interned, especially in the Dutch East Indies (now Indonesia). Conditions in the prisoner-of-war and internment camps varied dramatically, but the worst cases were marked by deprivation of food, shelter and medical care; by excessive labour demands; and by seemingly gratuitous brutality on the part of camp guards.<sup>3</sup> Poor conditions in some camps fed a general perception in Western media that all prisoners were treated badly and that all Japanese military personnel were immensely brutal. In War Without Mercy, Dower has vividly described how the two sides in the war over

<sup>&</sup>lt;sup>1</sup> Proclamation by the Heads of Governments, United States, China and the United Kingdom, 26 July 1945, US Department of State, *Foreign Relations of the United States: Diplomatic Papers: The Conference of Berlin (the Potsdam Conference), 1945*, vol. 2, US Government Printing Office, Washington, DC, 1945, p. 1476.

<sup>&</sup>lt;sup>2</sup> Japanese forces also captured a large but uncertain number of Asian military personnel in the British Indian, Dutch East Indian and Filipino armed forces in this period. As was their custom with soldiers of the Republic of China captured in China after the outbreak of hostilities there in 1937, Japanese commanders released many of these troops soon after capture. Many others were recruited under varying degrees of duress to serve the Japanese armed forces as labourers or auxiliary soldiers.

<sup>&</sup>lt;sup>3</sup> Bernice Archer, *The Internment of Western Civilians Under the Japanese*, 1941–1945, Routledge Curzon, London, 2004; Gavan Daws, *Prisoners of the Japanese*, Scribe, Melbourne, 1994.

time adopted shrill, racialized views of each other that gave wide currency to such perceptions.<sup>4</sup>

Whereas most of the provisions of the Potsdam Declaration embodied intentions to shape the future of Japan, the statement concerning war criminals was broader because it reflected the Allied intention to influence international law, which would apply to all nations. The Allies' aim in this clause was to reinforce in international law the commitment to bring the perpetrators of violence against prisoners of war to account. In particular, the Allied planners intended that the standards set out in the 1907 Hague Convention on the Laws and Customs of War on Land and the 1929 Geneva Convention governing the treatment of prisoners of war<sup>5</sup> would be enforced systematically both in the International Military Tribunal ('IMT'), which tried German leaders at Nuremberg, and in the IMTFE at Tokyo, creating a precedent that would oblige future generations to behave better during conflicts, or at least to reckon with war crimes. This intention had been manifested in the St. James Declaration, signed in London in January 1942 by several of the Allied powers, which foreshadowed reckoning with war criminals through a "channel of organised justice".<sup>6</sup> Robert H. Jackson, who became Chief Prosecutor at the Nuremberg IMT, stated explicitly: "through these trials we should be able to establish that a process of retribution by law awaits those who in the future similarly attack civilization".<sup>7</sup> In the event, however, it proved significantly more difficult than expected to establish the guilt of the defendants in Tokyo according to reasonable legal standards.

<sup>&</sup>lt;sup>4</sup> John W. Dower, War Without Mercy: Race & Power in the Pacific War, Pantheon Books, New York, 1986.

<sup>&</sup>lt;sup>5</sup> See Andrew Webster, "Hague Conventions (1899, 1907)", *The Encyclopedia of War*, Blackwell, Oxford, 2011 (https://doi.org/10.1002/9781444338232.wbeow271); Arnold Krammer, *Prisoners of War: A Reference Handbook*, Praeger Security International, Westport, CT, 2008, pp. 122–23. For the full texts of these conventions, see Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907 (https://www.legal-tools.org/doc/ fa0161/); and Convention relative to the Treatment of Prisoners of War, 1929 (https://www. legal-tools.org/doc/1d2cfc/).

<sup>&</sup>lt;sup>6</sup> Punishment for War Crimes, HMSO, London, 1942, p. 6.

<sup>&</sup>lt;sup>7</sup> Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, London, 1945, US Department of State, Washington, DC, 1949, p. 49 (https:// www.legal-tools.org/doc/4304bb/).

The Potsdam Declaration, with its emphasis on prisoners of war in Article 10, provided part of the legal basis for the creation of the IMTFE. Behind the scenes, however, the intention to punish those who had mistreated Allied prisoners<sup>8</sup> was overshadowed from the start by the United States government's determination to use the international court to prosecute Japanese leaders for the crime of aggression, often characterized as 'crimes against peace'. In part, this emphasis rested on a division of labour between national tribunals and the international tribunal. During the months between the Potsdam Declaration of July 1945 and the opening of the Tokyo Tribunal on 29 April 1946, the United States, Australia, the United Kingdom, and China had all begun to convene local trials of Japanese military personnel for war crimes, including crimes against prisoners; preparations for trials were also under way in French Indochina and the Dutch East Indies, while the Philippines was expected to initiate a trial process following its independence in July 1946. The U.S. prosecutions, and later those by the French authorities, focused primarily on illtreatment of prisoners of war and internees; other jurisdictions prosecuted a wider range of offences, but crimes against prisoners were prominent in all the schedules of arraignments except in China and the Philippines.<sup>9</sup> There was no risk, therefore, that brutalities against prisoners would escape legal reckoning.

### 9.2. Indictment

When the indictment for the IMTFE was being prepared,<sup>10</sup> charges of crimes against peace against Japan's leaders had committed occupied centre stage. Therefore, in the Charter for the IMTFE, issued on 19 January 1946, the category "(a) crimes against peace" was in first place, followed by "(b) conventional war crimes" and "(c) crimes against humanity". U.S. General Douglas MacArthur, as Supreme Commander for the Allied Powers, went one step further, pressing the other Allied powers not to use their

<sup>&</sup>lt;sup>8</sup> In this chapter, the term 'prisoners' refers to both prisoners of war and internees, as was evidently intended by the Potsdam Declaration, though not by the 1929 Geneva Convention.

<sup>&</sup>lt;sup>9</sup> Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, Japanese War Criminals: The Politics of Justice After the Second World War, Columbia University Press, New York, 2017, pp. 67–103.

<sup>&</sup>lt;sup>10</sup> For the complex process leading to the formation of the IMTFE, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War Two*, Harvard University Asia Center, Cambridge, 2008, pp. 20–28.

local courts to prosecute crimes against peace but instead leave that category of indictment exclusively to the IMTFE. In late 1946, well into the proceedings, the US Prosecutor at the IMTFE, Joseph Keenan, contemplated dropping the conventional war crimes charges altogether. This would have restricted the IMTFE to judging crimes against peace and would have put an end to charges concerning prisoners.<sup>11</sup> Over time, the bullet-point order in which the categories of crime were presented in the IMTFE Charter crystallized into a pronounced hierarchy: upon conviction, the defendants in Tokyo were identified as 'Class A' war criminals, even though some of them had also been convicted for conventional war crimes. By contrast, crimes against humanity (conceived by the Nuremberg IMT as crimes by a regime predominantly against its own citizens) were not prosecuted as such in the IMTFE and were mentioned only once, in passing, in the final judgment.

The IMTFE's emphasis on crimes against peace was also strongly evident in the indictment presented at the opening of proceedings. The indictment comprised 55 counts or specific charges, which were classified into three groups.<sup>12</sup> The first group contained 36 counts of crimes against peace; defendants were separately charged with conspiracy to wage aggressive war and with initiating and waging such war against various powers, collectively and individually. In support of these counts, Appendix A of the indictment included a detailed history of alleged Japanese aggression in East Asia since 1928; Appendix B consisted of a digest of international agreements which could be read as outlawing aggression; Appendix C itemized assurances by Japanese governments that they had no aggressive intention.

The second group of charges, headed "Murder", comprised 15 counts. These counts were predicated on the assumption that, because Japan's war was illegal, the Japanese military was not entitled to so-called 'belligerent rights', that is, the right to kill enemy soldiers in battle or to kill enemy civilians on the grounds of military necessity without being liable for murder charges. Many of these counts labelled the killing of Allied military personnel in the course of Japan's military operations in Mongolia and the Soviet Far East in 1939 and in East Asia, Southeast

<sup>&</sup>lt;sup>11</sup> *Ibid.*, p. 115.

<sup>&</sup>lt;sup>12</sup> "Japanese Indictment", Proceedings of the International Military Tribunal for the Far East (http://www.legal-tools.org/doc/6f22e0/).

Asia, and the Pacific from 1941 to 1942 as murder. Count 44 alleged a conspiracy to kill Allied prisoners of war immediately after capture. Counts 45 to 50 referred to the mass killing of civilians in specified places in China, including the 1937–1938 Nanjing Massacre.

Barring Count 44, the remaining crimes against prisoners were included in the third group of charges, which only included Counts 53 to 55, referred to as "Conventional War Crimes and Crimes against Humanity". These counts accused the defendants of violating the laws and customs of war in relation to Allied prisoners of war and internees.<sup>13</sup> Unlike the counts grouped under 'crimes against peace' and 'murder', these counts did not refer to specific incidents, actions or events, but identified three ways in which Japanese leaders were allegedly guilty of crimes against prisoners. Count 53 alleged that the defendants had been part of a conspiracy to "order, authorize and permit" their subordinates "to commit [...] breaches of the Laws and Customs of War [...] against many thousands of prisoners of war and civilians then in the power of Japan". Count 54 alleged more directly that the defendants had, as individuals, "ordered, authorized and permitted" the offences, while Count 55 alleged that the defendants, as leaders of Japan, had "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of international law.<sup>14</sup> In other words, Count 54 alleged the direct complicity of the senior leaders in crimes against prisoners, whereas Counts 53 and 55 alleged different forms of indirect culpability.

Counts 44 and 53 (conspiracy to kill Allied prisoners of war and to commit conventional war crimes more generally) might have been elastic enough to ensnare the Tokyo defendants; as a criminal charge, conspiracy could encompass both an agreement to commit an illegal act, even if that act was never carried out, and the carrying out of some small act, relatively innocuous in itself, which was part of a larger criminal plan. The Counts, however, were procedurally problematic because the Charter of the IMTFE omitted to identify conspiracy to commit conventional war crimes as a crime within the ambit of the Tribunal in the way that it identified conspiracy to commit crimes against peace and crimes against hu-

<sup>&</sup>lt;sup>13</sup> Whereas Australian, Chinese and Netherlands Indies authorities issued legislation after the war to define the acts considered to be war crimes, the United Kingdom and the United States relied on the formulation "laws and customs of war" to cover any action, anticipated or not, which might be regarded as repugnant to humane practice.

<sup>&</sup>lt;sup>14</sup> "Japanese Indictment", pp. 12–13, see above note 12.

manity.<sup>15</sup> In the end, the court ruled that it had no authority to pronounce on these charges.<sup>16</sup>

The prosecution charged 26 of the original 28 defendants under Count 54. Kenji Dohihara, Shunroku Hata, Naoki Hoshino, Seishirō Itagaki, Okinori Kaya, Kōichi Kido, Heitarō Kimura, Kuniaki Koiso, Akira Mutō, Osami Nagano, Takazumi Oka, Hiroshi Ōshima, Kenryō Satō, Mamoru Shigemitsu, Shigetarō Shimada, Teiichi Suzuki, Shigenori Tōgō, Hideki Tōjō, and Yoshijirō Umezu were all said to have committed offences relating to this count between 7 December 1941 and 2 September 1945. Sadao Araki, Kingorō Hashimoto, Kiichirō Hiranuma, Kōki Hirota, Iwane Matsui, Yōsuke Matsuoka, and Jirō Minami were said to have commenced their offences in China on 18 September 1931, the date of the so-called Mukden Incident, which marked the beginning of Japan's invasion and occupation of Manchuria. Only the propagandist Shūmei Ōkawa, who held no government position, and the diplomat Toshio Shiratori were not charged under Count 54.

Establishing direct culpability, however, was problematic. To remain faithful to the principles affirmed at the Nuremberg IMT – "criminal guilt is personal [...] mass punishment should be avoided"<sup>17</sup> – the IMTFE could not simply attach collective guilt to all Japanese leaders. Instead, it was necessary to show some direct personal engagement with the crimes. The subordinates who had committed crimes, however, were often some distance below the defendants in the Japanese political and military hierarchy and often far-removed geographically.

This issue was particularly problematic in the Japanese case for five reasons. First, immediately after the surrender, the Japanese military authorities had ordered the wholesale destruction of documents containing military secrets, including documents that might implicate military per-

<sup>&</sup>lt;sup>15</sup> For a brief outline of adoption of conspiracy as a charge in the Nuremberg IMT, and thereafter at the IMTFE, see Bradley F. Smith, *The Road to Nuremberg*, Basic Books, New York, 1981, pp. 33–37, 50–53.

<sup>&</sup>lt;sup>16</sup> IMTFE Judgment, reproduced in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgment*, Oxford University Press, Oxford, 2008a, p. 85. The judgment and the transcripts ('Transcript') of the IMTFE are available in the ICC Legal Tools Database.

<sup>&</sup>lt;sup>17</sup> Cited in Allison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, no. 1, p. 85.

sonnel in war crimes.<sup>18</sup> The destruction of documents was by no means comprehensive, but it was extensive enough to obscure the record of decision-making.

Second, even in normal times, Japanese decision-making was sometimes diffuse, with policy decisions gradually taking shape through shifts and modifications, rather than being recorded definitively in the minutes of a meeting or in a decree by a commander. Attributing specific responsibility for a decision was often extremely difficult.

Third, the Japanese military hierarchy was sometimes seriously ambiguous. An officer serving in a prisoner-of-war camp, for instance, might be simultaneously operating within two hierarchies – the hierarchy of the prison camp administration and the hierarchy of his own regular unit. This circumstance sometimes made it difficult for a court to determine which line of command should share responsibility for that officer's misdeeds.

Fourth, behind a veneer of politeness and solidarity, both the Japanese military and the Japanese political class were deeply factionalized. This factionalization contributed strongly to a substantial turnover among high-level office-holders in Japan during the period being examined by the Tribunal. Many cabinet ministers and military commanders held key positions for just a few months before moving on to other posts or having interludes of relative powerlessness because of health or factional considerations.

The fifth, and most important, reason for the difficulty in establishing direct culpability of Japanese national leaders in war crimes was that most of the reported crimes were *prima facie* the consequence of lowerlevel decisions. Summary executions, unwarranted beatings, the sending of sick men to work, failure to attend to problems of sanitation and inadequate accommodation, and the withholding of food and medical supplies were all local decisions most unlikely to have been directly ordered by senior leaders in Tokyo.

The 26 defendants arraigned on Count 54 were also charged under Count 55, which embodied the still ill-defined concept of command responsibility – that is, the principle by which higher-ranked officers might be held legally accountable for the misdeeds of their subordinates when no orders had been issued, or when alleged orders had been lost. Com-

<sup>&</sup>lt;sup>18</sup> Totani, 2008, p. 106, see above note 10.

mand responsibility, sometimes known as the 'separate offence of the superior', makes the commander responsible for failing to take appropriate action to prevent subordinates from committing a war crime, to halt a crime in process, or to punish those who had committed a crime.<sup>19</sup> This form of command responsibility separates commanders from the (presumed) atrocities and makes them responsible instead for a failure of duty to control or punish those under them. In support of this charge, the prosecution referred explicitly to the conviction of General Tomoyuki Yamashita in the first US war crimes trial in the Philippines.<sup>20</sup> In 1945, Yamashita was found guilty of failing to take sufficient action to prevent Japanese troops in Manila from committing acts of murder, rape and pillage during the weeks immediately before the fall of the city to American forces near the end of the war.<sup>21</sup>

The main body of the IMTFE indictment identified only modes of responsibility for crimes against prisoners. For further specification, one was referred to a separate, somewhat ramshackle document labelled "Appendix D". This section did not set out specific incidents, actions or events, either. However, it identified specific categories of offences against prisoners of war. It referred to the 1929 Geneva Convention on Prisoners of War, but did not summarize the document in the way that

<sup>&</sup>lt;sup>19</sup> See Danner and Martinez, 2005, see above note 17; Chantal Meloni, "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?", in *Journal of International Criminal Justice* 2007, vol. 5, pp. 619–23.

Totani, 2008 (p. 105, see above note 10), distinguishes what she calls the "cabinet responsibility" of civilian political leaders from the "command responsibility" of military officers, but I believe this formulation is misleading. The term 'cabinet responsibility' conventionally refers to the obligation of cabinet members to support cabinet decisions, regardless of whether they personally agree with those decisions. It is unhelpful to apply this established term to the very different situation in which criminal responsibility is attributed to cabinet members for failing to halt atrocities. Even in its own terms, moreover, the characterization of this charge as "cabinet responsibility" is misleading. The prosecutors formulating this charge did not limit its scope to cabinet ministers, but instead included cabinet "advisers" (presumably civilian bureaucrats) and "every high officer in the chain of command directly concerned with these matters" (Transcript, 17 February 1948, p. 40111 (https://www.legal-tools.org/doc/1c9dfe/)).

<sup>&</sup>lt;sup>20</sup> Transcript, 30 January 1947, pp. 16787–88 (https://www.legal-tools.org/doc/e764f7/).

<sup>&</sup>lt;sup>21</sup> On the Yamashita trial, see Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility*, Scholarly Resources, Wilmington, Delaware, 1982, and Allan A. Ryan, *Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability*, University Press of Kansas, Lawrence, Kansas, 2012.

Appendix A recapitulated the international agreements on non-aggression. The categories of ill-treatment identified in this Appendix were:

- employment of prisoners as labour on tasks related to the war effort;
- murder, torture, ill-treatment and rape;
- employment of prisoners in dangerous labour;
- inadequate provision of food, clothing and shelter;
- excessive and illegal punishment, including arbitrary, capricious and collective punishment;
- failure to make adequate sanitary provision for prisoners or to provide adequate medical care;
- humiliation of prisoners, including by forcing them to work in public view and requiring Allied officers to salute Japanese other ranks;
- failing to keep proper records and to provide adequate information on prisoners held;
- obstructing the work of the Red Cross and the Protecting Power, including withholding Red Cross parcels;
- killing of prisoners on the point of surrender or when they were no longer able to offer resistance and killing of survivors of ships sunk in naval action.

Under the Hague Convention (Article 6), the State holding prisoners of war was permitted to put them to work "according to their rank and aptitude, officers excepted". The Convention specified, however, that "[t]he tasks shall not be excessive and shall have no connection with the operations of the war". At issue in Tokyo, therefore, was not forced or slave labour – prosecuted in Nuremberg as a crime against humanity – but rather the tasks to which prisoner labour had been set and the conditions in which prisoners worked.

Appendix D did not acknowledge that neither the Hague nor the Geneva Convention specifically provided for the treatment of civilian internees. The indictment as a whole appears to have regarded internees as similarly positioned as prisoners of war and, therefore, covered in the same way. The disorganized character of Appendix D, moreover, was exacerbated by its specification of a range of crimes that were related, not to prisoners but to the inhabitants of occupied territories.<sup>22</sup>

The IMTFE indictment in relation to crimes against prisoners presented one further preliminary legal issue: whether any crime had in fact been committed at international law. The prosecution, as noted above, invoked the 1907 Hague Convention and the 1929 Geneva Convention as evidence of international standards as well as pointed to Japan's ratification of the former and its signature of the latter. Although Japan had never ratified the 1929 Convention, the prosecution asserted that it was applicable to Japan on two grounds. For one, ratification by many other powers had given the Convention's provisions the status of customary international law, binding on all powers, including non-signatories. The prosecution also stressed that, in January 1942, the Japanese government formally indicated it would "apply mutatis mutandis, the provisions of that Convention to American prisoners of war" and had subsequently extended this guarantee to "English, Canadian, Australian and New Zealand prisoners of war in their power".<sup>23</sup> The prosecution maintained that this pronouncement bound Japan to the provisions of the Convention. The defence, by contrast, pointed to Japan's failure to ratify the 1929 Geneva Convention and argued that the expression "mutatis mutandis" gave Japanese authorities absolute freedom to determine the extent to which it complied with the Convention.<sup>24</sup> In the end, the Tribunal chose not to address the significance of non-ratification or the precise meaning of "mutatis mutandis", ruling instead that Japan was bound by an obligation to behave humanely, regardless of whether or not it had signed specific international agreements.<sup>25</sup>

### 9.3. Proceedings

In hearing the charges, the Tribunal organized its proceedings into roughly chronological 'phases'.<sup>26</sup> The earliest phases examined Japan's two inva-

<sup>&</sup>lt;sup>22</sup> "Japanese Indictment", Appendix D, p. v (http://www.legal-tools.org/doc/6f22e0/).

<sup>&</sup>lt;sup>23</sup> *Ibid.*, p. ii.

<sup>&</sup>lt;sup>24</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal*, Oxford University Press, New York, 2008b, pp. 181–85; Totani, 2008, p. 109, see above note 10.

<sup>&</sup>lt;sup>25</sup> Transcript, 12 November 1948, pp. 49719–20 (https://www.legal-tools.org/doc/9ae0f4/).

<sup>&</sup>lt;sup>26</sup> The complex structure of the trial defies brief characterization. For a clear outline of the overall structure, see R. John Pritchard, *The Tokyo Major War Crimes Trial: Transcripts of the Court Proceedings of the International Military Tribunal for the Far East*, vol. 1, Edwin Mellen Press, Lewiston, NY, 1998, pp. lxxi–lxxix.

sions of China, categorized as the Manchurian Incident of 1931 and the China Incident of 1937. In that context, the Tribunal heard its first evidence in relation to the ill-treatment of prisoners on 6 August 1946, when an American journalist, John B. Powell, testified to the brutal and neglect-ful treatment of Western and Chinese civilians detained by the Kenpeitai in Shanghai from December 1941.<sup>27</sup>

Later phases focussed on diplomatic and military events leading to the Pearl Harbor attack, with the case concerning subsequent ill-treatment of prisoners, Phase XIV, relegated to the latter part of the proceedings. In practice, however, the ill-treatment of prisoners had been a sub-theme in the proceedings well before the formal commencement of Phase XIV on 16 December 1946. On several occasions, the Tribunal interrupted proceedings on the prelude to Pearl Harbor to hear from prosecution witnesses whose duties would take them away from Japan before they would otherwise have been called to the stand.<sup>28</sup> A report presented to the court by a Dutch investigator, K.A. de Weerd, to document Japan's attempts to destroy Dutch influence in occupied Indonesia also dealt with Japanese brutality towards prisoners and civilians in the former colony.<sup>29</sup> From 10 to 16 December 1946, the Assistant Prosecutor of the Philippines, Pedro Lopez, tabled 131 affidavits and examined five witnesses who testified about atrocities in the Philippines, both inside and outside the camps.<sup>30</sup>

A significant volume of evidence on Japanese treatment of prisoners had thus been heard by the Tribunal by the time the Australian lead prosecutor, Alan Mansfield, who carried the prosecution case for Counts 53 to 55, delivered his opening statement on 16 December 1946. He began by elaborating the argument, already outlined in the indictment, that Japan was legally bound to adhere to the 1929 Geneva Convention on account of the repeated assurances from the Japanese Foreign Minister, Shigenori Tōgō, that Japan would abide by that Convention *mutatis mutandis*.<sup>31</sup> He

<sup>&</sup>lt;sup>27</sup> Transcript, 6 August 1946, pp. 3270–83 (https://www.legal-tools.org/doc/8031d2/).

<sup>&</sup>lt;sup>28</sup> Ibid., 10–19 September 1946, pp. 5351–921 (https://www.legal-tools.org/doc/91705c/, https://www.legal-tools.org/doc/9ed10b/, https://www.legal-tools.org/doc/eb27b2/, https:// www.legal-tools.org/doc/421ebe/, https://www.legal-tools.org/doc/f6fe26/, https://www. legal-tools.org/doc/753fc8/, https://www.legal-tools.org/doc/4533d8/); *ibid.*, 27 November 1946, pp. 11403–627 (https://www.legal-tools.org/doc/5f7add/).

<sup>&</sup>lt;sup>29</sup> *Ibid.*, 6 December 1946, pp. 12130–342 (https://www.legal-tools.org/doc/2cedf9/).

<sup>&</sup>lt;sup>30</sup> *Ibid.*, 10 December 1946, pp. 12348–850 (https://www.legal-tools.org/doc/754447/).

<sup>&</sup>lt;sup>31</sup> Alan Mansfield, Opening Statement, 16 December 1946, *ibid.*, pp. 12856–60 (https://www.legal-tools.org/doc/99f853/).

then began to present evidence of Japanese atrocities against prisoners of war, internees and local residents in occupied territories (excluding the Philippines, on which evidence had previously been presented).

Earlier in the proceedings, in July 1946, Mansfield obtained permission from the court not only to present a substantial portion of the atrocity evidence in affidavit form, but also to present only selected extracts from those affidavits. The defence had strenuously objected to this procedure, emphasizing the importance of subjecting witnesses to cross-examination and pointing out that many affidavits contained material favourable to both sides. The Tribunal, however, overruled the objection on the basis of Article 13 of the IMTFE Charter, according to which "[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value". This ruling was probably influenced, in part, by practicalities. Court proceedings required around 100 copies of each document that was tabled; the copying of entire affidavits would have increased the volume of paper around six-fold, according to Mansfield. The Tribunal was already Occupied Japan's most important consumer of paper.<sup>32</sup> The only concession to the defence was that the full documents from which any excerpts had been taken were to be made available to the defence within a month of their lodging.33

Mansfield announced a prosecution strategy which made no attempt to draw a line of direct responsibility to the defendants, but instead, as he put it, demonstrated a

similarity of treatment throughout the territories occupied by the Japanese forces [...] [that would] lead to the conclusion that such mistreatment was the result, not of the independent acts of the individual Japanese Commanders and soldiers, but of the general policy of the Japanese forces and of the Japanese Government.<sup>34</sup>

Mansfield promised to present the court with a "chronicle of murder and mistreatment" which would include evidence of massacres, depriva-

<sup>&</sup>lt;sup>32</sup> See R. John Pritchard, "The International Military Tribunal for the Far East and its Contemporary Resonances", in *Military Law Review*, 1995, vol. 149, p. 26.

<sup>&</sup>lt;sup>33</sup> Transcript, 3 July 1946, pp. 1842–57, 1860, 1869–71 (https://www.legaltools.org/doc/ e470ed/); *ibid.*, 15 July 1946, pp. 2287–93 (https://www.legal-tools.org/doc/aa90c8/).

<sup>&</sup>lt;sup>34</sup> Mansfield, 16 December 1946, see above note 31.

tion of food, inadequate medical care, unreasonable labour demands, torture and capricious punishment. The Japanese authorities, he alleged, had also planned "to kill all prisoners of war in the event of there being a landing by Allied troops in Japan or any attempt made to recapture them".<sup>35</sup> The prosecution case under Count 54, thus, relied on the argument that a common pattern of atrocities across the Japanese empire constituted evidence of a centrally-directed policy, even if that policy could not be demonstrated directly from Japanese documents. Addressing the command responsibility charge under Count 55, he went on to outline the Japanese authorities' efforts to prevent information about the condition of the prisoners from reaching the outside world. As he stated, it was

apparent that the Japanese Government, the members of which were charged with the responsibility of seeing that their forces complied with the rules of war, either knew of many of the breaches [of international law] and neglected to take any steps to prevent them, or failed to institute any proper inquiry to ascertain whether the allegations contained in the protests [from Allied governments] were founded on fact.<sup>36</sup>

In support of the prosecution case, Mansfield and his colleagues from Australia, Canada, France, the Netherlands and the United States adopted a strategy of flooding the court with a huge volume of evidence falling into four categories. First, there were additional witnesses, who provided graphic testimony of their experiences and observations in Java, Sumatra, Borneo, the Thailand-Burma Railway, Hong Kong and elsewhere. The witnesses seldom identified individual perpetrators, but instead delivered a broad picture of widespread cruelty and callous neglect of prisoners.

The second category of evidence consisted of hundreds of affidavits and reports collected by national war crimes investigation teams for their own trials. Much of the material makes for grim reading. A great deal of it had already been presented in national courts and some was intended for future trials, though the winding up of the trial process meant that some of the Tokyo evidence was never presented elsewhere. The material varied from sober, detailed reports with a strong air of plausibility to brief, probably exaggerated, claims based on hearsay. Reflecting the prosecution

<sup>&</sup>lt;sup>35</sup> *Ibid*.

<sup>&</sup>lt;sup>36</sup> *Ibid*.

strategy in some of the national trials,<sup>37</sup> however, the prosecution did not intend to establish the culpability of specific individuals for specific criminal acts. For the most part, on-the-spot perpetrators were not identified in court. The intention, rather, was to conjure up a picture of pervasive cruel behaviour on the part of tens of thousands of Japanese military personnel with the aim of establishing the wickedness of the entire Japanese imperial venture and, hence, of its leaders. This category of evidence also included interrogation reports of captured Japanese soldiers.<sup>38</sup> This material received only passing attention in the courtroom.

The third category of prosecution evidence consisted of translations of captured Japanese documents relating to prisoner policy and administration. The existence of these documents indicated that the official Japanese instruction to destroy sensitive material at the end of the war had not been fully effective. On 7 January 1947, for instance, the prosecution tabled an extract from an instruction sent by Japanese Prime Minister Hideki Tōjō, in his capacity as Army Minister, to the commandant of Zentsuji prisoner-of-war camp in Shikoku on 30 May 1942. The instruction conveyed a somewhat contradictory message, telling the commandant that he should uphold humanity while avoiding "a mistaken idea of humanitarianism" and stressing that the prisoners must work because "the present situation of affairs in this country does not permit anyone to lie idle doing nothing but eating freely".<sup>39</sup> The prosecution's point in presenting this material, however, was to demonstrate the engagement of the highest level of the Japanese leadership with prisoner-of-war affairs, so that they could subsequently be held accountable for what happened to the prisoners during the war.

The final element in the prosecution case was the courtroom examination of the defendants themselves. In his testimony, Tōjō began to address the prisoner issue on 30 December 1947 and immediately accepted comprehensive political responsibility for Japanese policies in this area.

<sup>&</sup>lt;sup>37</sup> See, for instance, Robert Cribb, "The life and trial of Cho Un-kuk, Korean war criminal", in *Critical Asian Studies*, 2018, vol. 50, no. 3, pp. 329–52.

<sup>&</sup>lt;sup>38</sup> Transcript, 20 December 1946, pp. 13432–33 (https://www.legal-tools.org/doc/ceff3f/); "War Crimes, Sandakan Area: Statement taken down by and during interrogation by Squadron Leader F.G. Birchall", Sandakan, 26 October 1945, IMTFE Doc 5421 Exh. 1671 (http://www.legal-tools.org/doc/2e4844/).

<sup>&</sup>lt;sup>39</sup> "Instructions delivered to the Commander of the Zentsuji Division", 30 May 1942, IMTFE Doc 1547-A, Exh. 1960 (http://www.legal-tools.org/doc/27ef18/).

He concluded this acceptance, however, defiantly: "I have nothing whatever to say on this point [legal responsibility and criminal liability] other than to state frankly that at no time during my entire career did I ever contemplate the commission of a criminal act".<sup>40</sup> He went on to claim that his instructions had always been to treat prisoners "with humanity" and that the scale of the prisoner administration task had made it impossible to adhere to the Geneva Convention, meaning that policies had fallen reasonably within the *mutatis mutandis* promise. He defended the punishment of prisoners of war for disciplinary breaches and for war crimes (specifically the Allied bombing of civilians). He proposed a narrow interpretation of Article 31 of the Geneva Convention prohibiting prisoners-of-war labour on military projects that would make the Thailand Burma Railway project permissible. While conceding that "on account of the relentless depredations to the sea-borne traffic by enemy sub-marines, it became vitally important to open a land route to that area [Burma]," he maintained that:

> The railway route lay at a great distance behind the front lines and there being no military operations in progress in that area at that time, it was quite apparent the construction work on this railway could not be construed as being confined within the class of military operations prohibited to prisoners of war labor by the Hague and Geneva Treaties.<sup>41</sup>

For the prosecution, establishing the direct responsibility of individual defendants did not mean connecting them to specific incidents, but rather connecting them individually to the Japanese policy on prisoners. Tōjō, who concurrently held the positions of Prime Minister and Army Minister from October 1941 to July 1944, was alleged to have issued instructions on the treatment of prisoners of war – requiring them to work on military projects inconsistent with Japan's undertaking to apply the provisions of the Geneva Convention *mutatis mutandis*. He was held responsible specifically for the decision to employ prisoners in the Thailand-Burma Railway's construction.<sup>42</sup> Kimura, who had been Deputy Army Minister, was shown to have been responsible for laws under which

<sup>&</sup>lt;sup>40</sup> Transcript, 30 December 1947, pp. 36412–14 (https://www.legal-tools.org/doc/7b86b6/).

<sup>&</sup>lt;sup>41</sup> *Ibid.*, p. 36421. Article 31 of the Geneva Convention read, "Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units".

<sup>&</sup>lt;sup>42</sup> Transcript, 16 December 1946, pp. 12871, 12874, 12876 (https://www.legal-tools.org/doc/ 99f853/).

prisoners of war were executed for attempting to escape and under which downed Allied airmen were executed as war criminals for bombing civilians. He was blamed for a policy of exhibiting prisoners publicly to humiliate them and for employing them on war-related work. Kimura had later served as Armed Forces Commander in Burma, and was thus also blamed for the treatment of prisoners there.<sup>43</sup>

Mutō and Satō, similarly, were shown to have headed the Military Affairs Bureau, which co-ordinated prisoner-of-war affairs. Former Foreign Ministers Tōgō and Shigemitsu were held responsible, along with Tōjō (who had briefly served as Foreign Minister), for failing to act on Allied protests about the treatment of prisoners that had been delivered to the Foreign Ministry by Swiss authorities.<sup>44</sup> These protests had gone also to the Navy Ministry, thereby implicating Shimada, Oka and Nagano, who had been Navy chiefs.<sup>45</sup> Shimada and Nagano were also held responsible for the decision to employ prisoners in the Thailand-Burma Railway project.<sup>46</sup>

Umezu had been a commander of the Kwantung Army (that is, the Japanese forces stationed in Manchuria) and was held responsible for using prisoners as military labour,<sup>47</sup> as was Itagaki, who had also had been military commander in Singapore from April 1945 until the end of the war. "Upon him", according to the rather vague words of the prosecutor, "rests some responsibility for the breaches of the laws of war in and about Singapore during the period he was in command".<sup>48</sup> Suzuki was mentioned as a member of the Tōjō cabinet bearing responsibility for war crimes because he would have known of the Allied protests as a cabinet member.<sup>49</sup>

The British prosecutor, Arthur Comyns Carr, began his summary of the cases against the defendants on 30 January 1947. He addressed both the crimes against peace and war crimes. For the latter, he relied on the case set out in the indictment and elaborated by Mansfield – that Japan had bound itself to treat prisoners humanely and had systematically and

<sup>&</sup>lt;sup>43</sup> *Ibid.*, pp. 12871–72, 12875.

<sup>&</sup>lt;sup>44</sup> *Ibid.*, pp. 12873–74.

<sup>&</sup>lt;sup>45</sup> *Ibid.*, p. 12875.

<sup>&</sup>lt;sup>46</sup> *Ibid.*, p. 12876.

<sup>&</sup>lt;sup>47</sup> *Ibid*.

<sup>&</sup>lt;sup>48</sup> Ibid.

<sup>&</sup>lt;sup>49</sup> *Ibid.*, p. 12875.

deliberately failed to do so. Dohihara, Hata, Itagaki, Kimura, Matsui, Minami and Mutō were alleged to be directly responsible for prisoner conditions. Kimura, Mutō and Umezu had also had prisoner-related responsibilities at the centre, along with Oka, Satō, Shimada, Suzuki and Tōjō. Shigemitsu and Tōgō had, it was alleged, failed to use their positions as Foreign Minister to seek to ameliorate the treatment of the prisoners. Kaya and Kido were alleged to have known of atrocities and to have done nothing to prevent them. It appeared, however, that the prosecution had quietly dropped its case against Araki, Hashimoto, Hiranuma, Hirota, Hoshino, Koiso and Ōshima.<sup>50</sup>

### 9.4. Defence

In responding to the flood of documentary and witness evidence of wartime atrocities, the defence, for the most part, did not seek to refute the facts presented by the prosecution, though occasionally it drew attention to the hearsay nature of evidence presented.<sup>51</sup> Instead, their principal strategy was to draw out the context of prisoner suffering so as to present that hardship as a consequence of war, and of local decisions, rather than as a consequence of central policy.<sup>52</sup> A ruling from the Tribunal President, Sir William Webb, on 3 September 1947, blocked the defence from raising examples of good conditions and favourable treatment in camps as a means of refuting the prosecution argument that a universal pattern of atrocities constituted evidence of central policy:

We know that there are tens of thousands of kind-hearted Japanese. We would assume in the army itself, in the navy, in the air force, many Japanese behaved very well but that is not an answer to these charges. Meet the charges made against you and do not try to prove that in other cases where no charges were made no faults could be found.<sup>53</sup>

The defence summation was presented by Kenzō Takayanagi, a prominent conservative lawyer who later chaired a Commission set up to reconsider Japan's post-war constitution. The core of the defence strategy

<sup>&</sup>lt;sup>50</sup> *Ibid.*, 30 January 1947, pp. 16784–86 (https://www.legal-tools.org/doc/e764f7/).

<sup>&</sup>lt;sup>51</sup> For instance, *ibid.*, 17 December 1946, pp. 13041–49 (https://www.legal-tools.org/doc/ e3cb30/).

<sup>&</sup>lt;sup>52</sup> For instance, *ibid.*, 18 December 1946, pp. 13147–61 (https://www.legal-tools.org/doc/ 404336/).

<sup>&</sup>lt;sup>53</sup> *Ibid.*, 3 September 1947, p. 27474 (https://www.legal-tools.org/doc/731538/).

was to accept the reality of war crimes - Takayanagi opened with the observation "War is a brutal affair"<sup>54</sup> – but to deny the culpability of the senior figures on trial in Tokyo. He noted that the American members of the so-called 'Commission of Fifteen' at the Versailles Conference<sup>55</sup> had argued against criminalizing the failure to prevent war crimes; and that in English law, negligence causing death was seen only as manslaughter, a non-capital offence.<sup>56</sup> Despite the similarity of the charges in Nuremberg and Tokyo, he dismissed what he called "the facile assumption that the German and Japanese situations were the same", arguing that German command structures were far more rigid than Japanese ones. By this he suggested that the German High Command bore greater responsibility for atrocities than the Japanese High Command, which was less in control of its subordinates. He rejected as unwarranted speculation the idea that similarities in the pattern of atrocities perpetrated by German and Japanese forces proved there had been a concerted plan to commit war crimes, asserting that any similarity in the offences was likely to have been simply the product of similar wartime conditions. Somewhat contradictorily, he also suggested that the crimes of Japanese soldiers might have arisen from Japanese culture: "Crimes no less than masterpieces of art may express certain characteristics reflecting the *mores* of a race".<sup>57</sup> He did not specify what these characteristics might be.

Takayanagi went on to argue carefully against the principle of individual responsibility for acts of State. There was, he said, no implication in international law that national leaders bore criminal responsibility for actions they had taken by virtue of their office. He argued that the indictment invoked retroactive (*ex post facto*) law which was not in effect at the time of the relevant acts or omissions.<sup>58</sup> The prohibition of

ex post facto penalization is not a technical rule of American jurisprudence. It is a rule based on natural and universal jus-

<sup>&</sup>lt;sup>54</sup> *Ibid.*, 3 March 1948, p. 42201 (https://www.legal-tools.org/doc/62b7d1/).

<sup>&</sup>lt;sup>55</sup> The Commission of Fifteen was set up in January 1919 during the preliminary stage of the peace negotiations to examine the possibility of prosecuting and punishing German war criminals. See "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties", in *American Journal of International Law*, 1920, vol. 14, no. 1/2, pp. 95–154.

<sup>&</sup>lt;sup>56</sup> Transcript, 3 March 1948, p. 42201 (https://www.legal-tools.org/doc/62b7d1/).

<sup>&</sup>lt;sup>57</sup> *Ibid.*, p. 42203.

<sup>&</sup>lt;sup>58</sup> *Ibid.*, pp. 42204–24.

tice. As fire burns and water flows alike in Washington and Tokyo, so a violation of that rule will be felt to be unjust and oppressive in the East as well as in the West.<sup>59</sup>

More specifically, Takayanagi reminded the court that Japan had not ratified the 1929 Geneva Convention and that Japan's *mutatis mutandis* message had no more force in law than a tourist announcing that he intended to go to watch *kabuki* the next day.<sup>60</sup> He scorned the argument that personal liability for government officials had been created by Article 4 of the 1907 Hague Convention which specified that "[p]risoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them". "No one supposes that German prisoners in Great Britain were or are in the personal custody of Mr. At[t]lee and Mr. Morrison and Miss Wilkinson.<sup>61</sup> It is the state, the state alone that is intended".<sup>62</sup>

Takayanagi then tackled again the argument that common patterns of Japanese brutality reflected a common plan, pointing out that the huge mass of evidence actually showed great variation. Compulsory oaths not to escape had been imposed on prisoners of war, for instance, in Singapore, Hong Kong, Borneo, Java, Zentsuji and Formosa, but not in Burma or the Philippines.<sup>63</sup> "If cruel events took place, they were the sporadic acts of local officers of inferior rank."<sup>64</sup> Takayanagi criticized the prosecution for presenting cases of massacre and prisoner-killing without acknowledging their likely context of rebellion and mutiny in occupied territories. He objected to the Tribunal President's instruction that examples of good treatment of prisoners by Japanese authorities could not be adduced to balance cases of bad treatment, given that the prosecution case had rested on demonstrating a consistent pattern of bad treatment.<sup>65</sup>

<sup>65</sup> *Ibid.*, p. 42267.

<sup>&</sup>lt;sup>59</sup> *Ibid.*, p. 42224.

<sup>&</sup>lt;sup>60</sup> *Ibid.*, pp. 42255–59.

<sup>&</sup>lt;sup>61</sup> Clement Attlee was the British Prime Minister at the time; Herbert Morrison was his deputy; and Ellen Wilkinson was British Minister of Education and a prominent Labour party figure.

<sup>&</sup>lt;sup>62</sup> Transcript, 3 March 1948, p. 42259, see above note 56.

<sup>63</sup> Ibid., p. 42261.

<sup>&</sup>lt;sup>64</sup> *Ibid.*, p. 42262.

### 9.5. Judgment

The bench began to deliver its rulings on 4 December 1948. The majority judgment of the IMTFE set out what it claimed to be the obligations of a government in relation to prisoners (including prisoners of war and internees). It also reviewed the indictment, striking out some 45 of the original 55 counts, including all of those in the group headed "Murder", which were ruled to be either invalid or redundant.<sup>66</sup>

By far the largest part of the final judgment of the IMTFE addressed the issue of crimes against peace. The judgment offered a detailed evaluation of the evidence on Japan's policies of military expansion since 1928 and its social and economic policies in the occupied regions of Manchuria and China. "Conventional war crimes" were addressed in Chapter VIII of the judgment. There, the judges set out an executive summary of Japanese war crimes under numerous headings: "murder of captured aviators", "massacres", "death marches" and so on. The judgment made little attempt to connect the defendants directly to the atrocities, dealing with the links in no more than a few scattered lines. There was no summation of the evidence concerning war crimes in the final judgment. Instead, the judgment read:

> After carefully examining and considering all the evidence we find that it is not practicable in a judgment such as this to state fully the mass of oral and documentary evidence presented; for a complete statement of the scale and character of the atrocities reference must be had to the record of the trial.<sup>67</sup>

Unlike at the Nuremberg IMT, there were no absolute acquittals at the IMTFE. The only defendants who escaped a guilty sentence on at least one charge were the two who died before the end of the trial (Matsuoka and Nagano) and the one who was ruled unfit to stand ( $\bar{O}$ kawa). The judges, however, discriminated carefully among the various charges. Except for Kimura, every one of the remaining 25 defendants was acquitted on at least one charge. Of the 24 men charged with direct responsibility for war crimes under Count 54, only five – Dohihara, Itagaki, Kimura, Mutō and Tōjō – were found guilty. These men were all senior military officers against whom the prosecution had been able to present direct,

<sup>&</sup>lt;sup>66</sup> Boister and Cryer, 2008b, p. 73, see above note 24.

<sup>&</sup>lt;sup>67</sup> IMTFE Judgment, reproduced in Boister and Cryer (ed.), 2008a, p. 531, see above note 16.

documentary evidence of formal responsibility for prisoners. Another five – Hata, Hirota, Koiso, Matsui and Shigemitsu – were found guilty of command responsibility under Count 55. Fourteen defendants were found not guilty of both Count 54 and Count 55. The seriousness with which the Tribunal regarded the guilty verdicts, however, is reflected in the fact that the five men convicted under Count 54 (direct responsibility) were all sentenced to death and were subsequently executed. Two of the five defendants (Hirota and Matsui) found guilty under Count 55 were likewise sentenced to death and executed. None of those acquitted of the war crimes charges were executed, though all received prison terms on the basis of their other convictions.

## 9.6. Conclusion

At the end of the Second World War, the Allied authorities placed a high priority on prosecuting Japanese leaders and military personnel for the brutalities inflicted on about 140,000 Western prisoners of war and a similar number of internees who had been in Japanese custody during the war. The Tokyo Tribunal, which tried senior Japanese leaders, gave greater attention to crimes against peace than to the ill-treatment of prisoners, but most of the 28 defendants faced charges for both their direct responsibility for atrocities against prisoners and their failure to take the steps within their power to halt or limit brutalities ordered by others. Although a handful of defendants could be linked to abusive treatment of prisoners using documentary evidence, the core strategy of the prosecution was to attribute collective responsibility for the ill-treatment to the defendants by flooding the court with evidence of a mass of individual but largely anonymous instances of brutality or culpable neglect. The prosecution argued that a common pattern of atrocities in this evidence was proof of a central plan for abuse of prisoners. In response, the defence largely accepted the factuality of the atrocities but sought to portray them as a consequence of the difficult circumstances of the war and of the initiative of lower-ranked military personnel. The Tribunal ruled that the defence could not refute the claim of a general pattern by bringing forward evidence of favourable behaviour that would show a more varied pattern of behaviour.

The Tribunal found only five defendants guilty of crimes against prisoners; in all five cases, the charge rested in part on specific documentary evidence, rather than only on the inference of policy based on a common pattern of atrocities. Another five defendants were found guilty of failing to attempt to stop crimes by others. The severity of the sentences against these defendants -7 of the 10 were condemned to death - has tended to mask the large number of acquittals on war crimes charges. In effect, although it did not say so, the Tokyo Tribunal agreed with the defence argument that responsibility for most war crimes was located lower in the Japanese military hierarchy.

# Nuremberg, Tokyo and the Crime of Aggression: An Intertwined and Still Unfolding Legacy

### **Donald M. Ferencz<sup>\*</sup>**

#### **10.1. Introduction**

At both the International Military Tribunal ('IMT') at Nuremberg and the International Military Tribunal for the Far East ('IMTFE') at Tokyo, waging a war of aggression was the core element of the indictable offence known as crimes against peace.<sup>1</sup> Though never before charged in a court of law, it was famously branded at Nuremberg as "the supreme international crime".<sup>2</sup>

In what may be seen as the culmination of more than seven decades of efforts to meaningfully effectuate the precedent established at Nuremberg, the International Criminal Court ('ICC') has just recently finally managed to activate its own jurisdiction over the crime of aggression.<sup>3</sup> Yet the ICC's long-awaited aggression jurisdiction is still rather limited, and is likely to remain so for quite some time. Thus, insofar as establishing illegal war-making as a universally prosecutable criminal offence goes, the

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<sup>&</sup>lt;sup>1</sup> At Nuremberg, crimes against peace was charged as an offence separate and distinct from crimes against humanity and war crimes; at Tokyo, it was a *sine qua non* for prosecutions of the major war criminals.

<sup>&</sup>lt;sup>2</sup> Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Nuremberg, 1947 ('Nuremberg Trial'), vol. I, p. 186 (https://www.legal-tools.org/doc/f21343/, https://www.legal-tools.org/doc/3c08b1/).

<sup>&</sup>lt;sup>3</sup> The ICC's aggression jurisdiction was activated as of 17 July 2018, by way of the required re-approval of amendments on the crime of aggression which were adopted at the ICC Review Conference held in Kampala in 2010.

legacy of the Tribunals remains very much a work in progress.<sup>4</sup> The following discussion is intended to contextualize that legacy within the framework of the ongoing efforts to ensure that those most responsible for the crime of aggression can be held accountable for their crimes in a court of law.

### **10.2.** Early Perceptions of the Trials

From their inception, the Nuremberg and Tokyo Tribunals were sharply criticized, and understandably so. After all, the trials were imposed on the vanquished by the victorious Allies, who appointed judges strictly from among themselves, raising the spectre of inherent judicial bias.<sup>5</sup> At Nuremberg, the proceedings were authorized by the 23 nations that joined the London Agreement.<sup>6</sup> By contrast, the Tokyo Tribunal was created solely by the United States, acting through the authority of General Douglas MacArthur as the Supreme Commander for the Allied Powers.<sup>7</sup> In an asymmetric departure from the ideal of equality before the law, the indictments of both tribunals covered only crimes alleged to have been committed on behalf of the defeated nations, rather than by those sitting in judgment. The notional standard of equality of arms between the accused

<sup>&</sup>lt;sup>4</sup> See below Section 10.8., especially text to notes 61 *et seq*. For a discussion of the amendments and their implications, see Stefan Barriga and Leena Grover, "A Historic Breakthrough on the Crime of Aggression", in *American Journal of International Law*, 2011, vol. 105, pp. 517-33; Claus Kreß and Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, p. 1179; Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017; Kevin Jon Heller, "The Sadly Neutered Crime of Aggression", *Opinio Juris*, 13 June 2010 (available on its web site).

<sup>&</sup>lt;sup>5</sup> At the IMT, the judges were appointed by four countries: France, the United Kingdom, the United States, and the Soviet Union. The IMTFE judges were drawn from 11 countries: Australia, Canada, the Republic of China, France, British India, the Netherlands, New Zealand, the Philippines, the United Kingdom, the United States, and the Soviet Union.

<sup>&</sup>lt;sup>6</sup> The Nuremberg Charter is annexed to the London Agreement of 8 August 1945 (https:// www.legal-tools.org/doc/64ffdd/, https://www.legal-tools.org/doc/844f64/). The London Agreement was signed by Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, France, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, the Union of Soviet Socialist Republics, the United Kingdom, the United States, Uruguay, Venezuela and Yugoslavia. See Agreement for the Prosecution and Punishment of Major War Criminals of European Axis (https://www.legal-tools. org/doc/5379a0/, https://www.legal-tools.org/doc/76efcc/).

<sup>&</sup>lt;sup>7</sup> See Annex for the IMTFE Charter and the Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946 (https://www.legal-tools.org/doc/ 242328/), amended 26 April 1946 (https://www.legal-tools.org/doc/a3c41c/).

and their accusers was similarly compromised. The Charter of each of the Tribunals expressly provided for fair trial for the defendants. Yet according to the Tokyo Charter, defence counsel could be removed "at any time" at the discretion of the Tribunal,<sup>8</sup> and at Nuremberg, they had been excluded from the prosecution's evidentiary archives.<sup>9</sup> Moreover, in a departure from the procedural standards that are generally applicable in criminal trials, neither tribunal was bound by technical rules of evidence.

But the situation could have been considerably worse for the defendants. A mere 14 months before the IMT began, Winston Churchill, the British Prime Minister, and Franklin Roosevelt, the US President, had tentatively agreed to the summary execution of thousands of suspected war criminals. In the end, it was decided instead to hold trials for what, by comparison, would be a relatively modest number of defendants.<sup>10</sup>

In his opening statement at Nuremberg, Robert Jackson, the American Chief of Counsel, sought to refute claims of victors' justice by emphasizing that prosecuting Nazi leaders in court was fairer than simply having them taken out and shot. Rather than belabour the fact that largescale extrajudicial killing had seriously been considered, Jackson made his point rather obliquely, albeit with considerable eloquence:

[T]hat four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>11</sup>

Jackson was acutely aware that the IMT was under scrutiny not only on account of its own perceived shortcomings but also out of concern that its defects could serve to undermine respect for international law itself.<sup>12</sup> He took pains to dispel such concerns:

<sup>&</sup>lt;sup>8</sup> *Ibid.*, Section III ("Fair Trial for Accused"), Article 9(c).

<sup>&</sup>lt;sup>9</sup> See Telford Taylor, *The Anatomy of the Nuremberg Trials*, Alfred A. Knopf, New York, 1992, p. 627.

<sup>&</sup>lt;sup>10</sup> Though Roosevelt, in October 1944, joined Churchill in initialling the so-called Morgenthau Plan, calling for summary executions, within a month Roosevelt expressed his regret at having done so and reversed course. *Ibid.*, p. 34. See also Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971, p. 9.

<sup>&</sup>lt;sup>11</sup> Nuremberg Trial, vol. II, p. 99, see above note 2.

<sup>&</sup>lt;sup>12</sup> See, for example, Charles E. Wyzanski, "Nuremberg: A Fair Trial? A Dangerous Precedent", *The Atlantic Monthly*, April 1946 (available on its web site). Yet, when the trials were completed, his opinion shifted rather dramatically. See Charles E. Wyzanski, "Nu-

The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.<sup>13</sup>

The official trial transcript indicates that Jackson immediately followed this with what has become one of the most frequently quoted statements of the Nuremberg trials: "To pass these defendants a poisoned chalice is to put it to our own lips as well".<sup>14</sup> Yet, in what may come as a surprise to many, he never actually said it.<sup>15</sup>

By 1 October 1946, the IMT had rendered its verdict. Within days, the judgment was subject to withering rebuke. The *New York Times* carried a front-page article on 6 October 1946 under the headline, "TAFT CONDEMNS HANGING FOR NAZIS AS UNJUST VERDICT".<sup>16</sup> In a less strident but similar vein, on 2 October 1946, the *Chicago Tribune* ran an editorial which asserted: "The truth of the matter is that no one of the victors was free of the guilt which its judges attributed to the van-quished".<sup>17</sup>

The Tokyo Tribunal fared even worse. Almost two months before the IMTFE officially handed down its judgment, one of the defence counsel, Owen Cunningham, launched a scathing condemnation of the Tribu-

- <sup>16</sup> See Walter W. Ruch, "Taft Condemns Hanging for Nazis as Unjust Verdict", *The New York Times*, 6 October 1946, p. 1 (available on its "TimesMachine").
- <sup>17</sup> As reported by Quincy Wright, "The Law of the Nuremberg Trial", in *The American Journal of International Law*, 1947, vol. 41, no. 1, p. 45.

remberg in Retrospect", *The Atlantic Monthly*, December 1946 (also available on its web site).

<sup>&</sup>lt;sup>13</sup> Nuremberg Trial, vol. II, p. 101, above note 2.

<sup>&</sup>lt;sup>14</sup> *Ibid*.

<sup>&</sup>lt;sup>15</sup> See (and listen to) "Robert H. Jackson (1945) Opening Statement", an audio-visual recording of original IMT film footage, published online by the Robert H. Jackson Center, 2015, at 11:19 to 11:28 mins. of the recording (available at YouTube). For further discussion and confirmation of the omission, see also John R. Barrett, "No Poisoned Chalice", *The Jackson List*, 2013 (available on its web site) (crediting the German film-maker, Ullabritt Horn, with having noticed the discrepancy) (with thanks to John Barrett for having confirmed this).

nal.<sup>18</sup> He presented a paper at an American Bar Association meeting held in Seattle on 7 September 1948, entitled "The Major Evils of the Tokyo Trial", in which he publicly announced that Justice Pal had "already completed his dissension judgment, recommending dismissal of all counts and acquittal of all defendants".<sup>19</sup> Moreover, he claimed that the object of the trial was vengeance, vindication and propaganda; that the prosecuting nations failed to show that they themselves were free from having committed some of the same crimes charged against the Japanese; that the accused had not been afforded a fair trial; that evidence had been suppressed; that defence witnesses had been abused; that certain judges had been absent from the Tribunal for months at a time; that aggressive war had never been adequately defined nor made punishable, and that, therefore, the Tokyo Charter was an example of *ex post facto* law.<sup>20</sup> In retaliation for such conduct, Cunningham was summarily barred from the proceedings.<sup>21</sup>

The 11 justices at Tokyo were responsible for writing six separate opinions. Nine of the justices signed on to the majority opinion,<sup>22</sup> which was read aloud in open court beginning on 4 November 1948. It took over a week before the reading was concluded.<sup>23</sup>

Shortly after the IMTFE rendered its verdict, a collective defence appeal was filed. It listed various objections to the judgment, including unfairness of the trial procedure itself, irregularities with respect to the type of evidence which was admitted, and the conclusions which were drawn from such evidence.<sup>24</sup> The petition cautioned General MacArthur that the "verdict looks too much like an act of vengeance to impress the world with our love of justice and fair play".<sup>25</sup>

MacArthur denied the appeal with both grandiloquence and mixed feelings:

<sup>&</sup>lt;sup>18</sup> Arnold C. Brackman, *The Other Nuremberg, The Untold Story of the Tokyo War Crimes Trials*, William Morrow and Co., New York, 1987, p. 369.

<sup>&</sup>lt;sup>19</sup> *Ibid*.

<sup>&</sup>lt;sup>20</sup> *Ibid*.

<sup>&</sup>lt;sup>21</sup> *Ibid.*, p. 370.

<sup>&</sup>lt;sup>22</sup> Minear, 1971, p. 161, above note 10.

<sup>&</sup>lt;sup>23</sup> Brackman, 1987, p. 372, above note 18.

<sup>&</sup>lt;sup>24</sup> Defense Appeal signed by Ben Bruce Blakeney on behalf of all defence counsel, 21 November 1948, reproduced in Minear, 1971, pp. 204-08, above note 10.

<sup>&</sup>lt;sup>25</sup> *Ibid.*, p. 207.

No duty I have ever been called upon to perform in a long, public service replete with many bitter, lonely, and forlorn assignments and responsibilities is so utterly repugnant to me as that of reviewing the sentences of the Japanese war criminal defendants by the International Military Tribunal for the Far East [...]

It is inevitable that many will disagree with the verdict; even the learned justices who composed the tribunal were not in complete unanimity, but no mortal agency in the present imperfect evolution of civilized society seems more entitled to confidence in the integrity of its solemn pronouncements. If we cannot trust such processes and such men, we can trust nothing. I therefore direct the Commanding General of the Eighth Army to execute the sentences as pronounced by the tribunal. In doing so, I pray that an Omnipotent Providence may use this tragic expiation as a symbol to summon all persons of good will to the realization of the utter futility of war – the most malignant scourge and greatest sin of mankind – and eventually to its renunciation by all nations.<sup>26</sup>

# **10.3.** The *Ex Post Facto* Issue: The IMT Makes Its Peace with Crimes Against Peace

Though Nuremberg and Tokyo both included crimes against peace as the centrepiece of the indictments, it was a crime which many argued had not been sufficiently recognized in international law so as to support criminal prosecutions. Consequently, it was strenuously contended that it represented an application of *ex post facto* law, in contravention of the fundamental principle of *nullum crimen sine lege*.

Edward T. Imparato, *General MacArthur Speeches and Reports 1908–1964*, Turner, Nashville, 2000, p. 230 (from a public address at the annual stockholders' meeting of the Sperry Rand Corporation, 30 July 1957, New York).

<sup>&</sup>lt;sup>26</sup> Ibid., p. 167. In the 1950s, MacArthur gave a series of speeches addressing the recklessness of war, including one in New York City, where he railed against what he perceived as his own country's wasteful and dangerous build-up of military assets:

Our swollen budgets constantly have been misrepresented to the public. Our government has kept us in a perpetual stat of fear – kept us in a continuous stampede of patriotic fervor – with the cry of grave national emergency. Always there has been some terrible evil at home or some monstrous foreign power that was going to gobble us up if we did not blindly rally behind it by furnishing the exorbitant funds demanded. Yet, in retrospect, these disasters seem never to have happened, seem never to have been quite real.

Insofar as the IMT judgment preceded that of the IMTFE by two years, it was Nuremberg which did the 'heavy lifting' in terms of addressing and analysing the *ex post facto* question. The Tokyo Tribunal did little more than rubber-stamp Nuremberg's conclusions on the matter. Thus, the Tribunals' rationale for having countenanced charges for crimes against peace cannot be understood without reference to Nuremberg.

When Robert Jackson took to the podium at the IMT on 21 November 1945, he very quickly made a point of offering a justification for the prosecution of crimes against peace:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.<sup>27</sup>

His words, though poignant, seem to belie a sensitivity to the potential shortcomings of relying solely on the Kellogg-Briand Pact (Treaty for the Renunciation of War as an Instrument of National Policy) or other non-binding international conventions for the proposition that waging aggressive war was already recognized as criminal prior to Nuremberg. Why else would he lead the argument for criminalizing aggressive war-making by pointing in the direction of natural law, referring to the "common sense of mankind"? One might be forgiven for suspecting that if Jackson was thoroughly convinced that crimes against peace indisputably existed within positive international law prior to Nuremberg, he might have offered evidence of such positive law right at the outset. Indeed, in his later argument before the Tribunal, Jackson as much as admitted that Nuremberg was, of necessity, charting new territory in the law. After methodically tracing the detailed history of various conventions characterizing aggression as a crime, he concluded his argument with an appeal to the adaptability of law:

> But if it be thought that the Charter, whose declarations concededly bind us all, does contain new law I still do not shrink from demanding its strict application by this Tribunal [...]

> It is true of course, that we have no judicial precedent for the Charter. But international law is more than a scholarly collection of abstract and immutable principles. It is an

<sup>&</sup>lt;sup>27</sup> Nuremberg Trial, vol. II, p. 99, above note 2.

outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law [...] The law, so far as international law can be decreed, had been clearly pronounced when these acts took place. Hence, I am not disturbed by the lack of judicial precedent for the inquiry it is proposed to conduct.<sup>28</sup>

The argument that Jackson himself felt that the IMT was applying law retroactively finds further support in a letter he wrote in early 1949 addressing the jurisprudence of Nuremberg. In it, Jackson confessed "I am not disposed to deny that it was a substantial break with the past and may have been applied somewhat retroactively".<sup>29</sup>

In its judgment, the IMT addressed the *ex post facto* question headon, holding that because the defendants must have known that in attacking neighbouring States they were doing wrong, they deserved to be punished. The IMT pointed to the Kellogg-Briand Pact<sup>30</sup> as being of paramount importance in establishing that aggressive war-making was already a crime in international law prior to World War II:

> 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. War for the solution of international controversies undertaken as an instrument of national policy certainly in-

<sup>&</sup>lt;sup>28</sup> *Ibid.*, p. 147 (emphasis added).

<sup>&</sup>lt;sup>29</sup> See Jackson's letter to his intended biographer, Eugene C. Gerhart, 17 March 1949, available on the Jackson List's web site (with thanks to Professor John Q. Barrett for its on-line publication).

<sup>&</sup>lt;sup>30</sup> The Kellogg-Briand Pact, signed at Paris on 27 August 1928, also referred to as 'The Pact of Paris', provides in Article I: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another" (https://www.legal-tools.org/doc/998ff6/).

cludes a war of aggression, and such a war is therefore outlawed by the pact.<sup>31</sup>

### 10.4. The IMTFE Plays 'Follow the Leader'

The IMTFE was given the unique opportunity to 'push the envelope' with respect to holding illegal war-makers directly responsible for the crime of murder. The linking of illegal war-making with murder rested on the premise that if a war is unlawful, then those who kill in furtherance of it are unlawful belligerents who cannot claim to be shielded by the laws of war, which apply only to lawful combatants.

Though the rationale linking the illegality of war to the crime of murder did not find its way into the indictments at Nuremberg, Tokyo was a different matter. Because of continuing concerns regarding the *ex post facto* criminalization of crimes against peace, when the IMTFE indictments were drawn up, it was felt that the 'chain of crimes' theory (that is, linking illegal war to the crime of murder)<sup>32</sup> might serve as an alternate route to achieving convictions.<sup>33</sup> The Tokyo indictments, therefore, included, from Articles 39 through 52, the charge of unlawful killing and murder of members of naval and military forces, as well as civilians and disarmed soldiers.

The majority opinion of the Tokyo judges, not wishing to deviate from the jurisprudence of Nuremberg, circumvented the issue.<sup>34</sup> With respect to the counts of the indictment which included murder (as a consequence that the war was aggressive, and therefore, illegal), the majority concluded:

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

<sup>&</sup>lt;sup>31</sup> Nuremberg Trial, vol. I, p. 220, see above note 2. In light of the IMT's finding that a war in violation of the Kellogg-Briand Pact amounted to aggressive war, would such a precedent apply to the US-led incursion in Iraq in 2003, given that the US and Iraq were both High Contracting Parties to the Pact? See *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003*, US Department of State, 2003, p. 458.

<sup>&</sup>lt;sup>32</sup> Kirsten Sellars, 'Crimes against Peace' and International Law, Cambridge University Press, Cambridge, 2013, p. 129.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, pp. 197-201.

<sup>&</sup>lt;sup>34</sup> *Ibid.*, p. 250.

the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.  $^{35}$ 

Hence, in absorbing the charges of murder into the charges of waging war, the IMTFE deemed it 'unnecessary' to make an independent determination relating to the charges of murder as such.<sup>36</sup>

The IMTFE made no pretence of independently addressing the *ex post facto* issue. After first stating that the Tribunal was bound, pursuant to the terms of its Charter, to reject such defences, it opined that it was in full agreement with the logic of the Nuremberg judgment in this regard<sup>37</sup> The majority judgment of the IMTFE summarily concluded: "Wars of aggression having been proved, it is unnecessary to consider whether they were also wars otherwise in violation of international law or in violation of treaties, agreements and assurances".<sup>38</sup>

# 10.5. The *Ex Post Facto* Issue: Not All Are Convinced, Nor Should They Be

The assertion that the Kellogg-Briand Pact had established aggressive war-making as a punishable crime in international law was subject to vigorous counter-argument at Nuremberg and Tokyo, not only by defence counsel,<sup>39</sup> but also in the excruciatingly detailed refutation set forth in Justice Pal's dissenting opinion at the IMTFE.<sup>40</sup> With reference to the provisions of the Pact, Justice Pal opined, among other things, that:

<sup>38</sup> *Ibid.*, p. 49772.

<sup>&</sup>lt;sup>35</sup> See International Military Tribunal for the Far East, Judgment of 4 November 1948 ('IMTFE Judgment'), pp. 48452-53 (https://www.legal-tools.org/doc/8bef6f/). The full indictment is available in the ICC Legal Tools Database, and in *Shin's Archive*, 17 December 2016.

<sup>&</sup>lt;sup>36</sup> Sellars, 2013, p. 250, see above note 32; IMTFE Judgment, p. 48453, see *ibid*.

<sup>&</sup>lt;sup>37</sup> *Ibid.*, p. 48439.

<sup>&</sup>lt;sup>39</sup> See, for example, the Motion Adopted by All Defense Counsel of the IMT arguing the *ex post facto* issue, filed with the Nuremberg Tribunal on 19 November 1945 (and rejected by the Tribunal two days later on the grounds that, insofar as it was a plea to the jurisdiction of the Tribunal, it was in conflict with Article 3 of the Charter), Nuremberg Trial, vol. I, pp. 168-70, see above note 2. Similar defence arguments were rejected by the Tokyo Tribunal. See IMTFE Judgment, above note 35, pp. 48436-40.

<sup>&</sup>lt;sup>40</sup> See Justice Pal's nearly 700-page dissent from the IMTFE Judgment, International Military Tribunal for the Far East Dissentient Judgment of Justice Pal, Kokusho-Kankokai, Tokyo, 1999 (calling for the acquittal of all IMTFE defendants) ('Justice Pal's Dissenting Opinion') (https://www.legal-tools.org/doc/38eba7/). For a brief review of Pal's dissenting opinion from the perspective of a Japanese scholar, see Kei Ushimura, "Pal's 'Dissentient

Apart from any other consideration, *the single fact* that war in self-defense in international life is not only not prohibited, but that it is declared that each State retains 'the prerogative of judging for itself what action the right of self-defense covered and when it came into play' is, in my opinion, sufficient to take the Pact out of the category of law.<sup>41</sup>

Though Justice Pal did not live long enough to see it, he would surely have been gratified to know that, almost 50 years later, Telford Taylor, a legal scholar and senior assistant to Robert Jackson at Nuremberg, conceded that he himself had come to the same legal conclusion.<sup>42</sup>

There is a chapter in the legislative history of the Kellogg-Briand Pact which, had it been better known at the time, may well have been of more than mere passing interest to defence counsel. Moreover, it is a chapter which may be instructive even today as to what it says about treaties which lack appropriate enforcement mechanisms.

It is no secret that when the Pact came up for ratification before the United States Senate in January 1929, it was overwhelmingly approved, by a vote of 85 in favour and only one opposed.<sup>43</sup> Yet the details of who voted against it and, more importantly, his reasons for doing so are not particularly well known. It is a story which is of interest not only for the *ex post facto* question, but also because of its implications for efforts which are currently underway with respect to more fully and effectively activating the ICC's jurisdiction over the crime of aggression.

When the US Senate put the ratification of the Kellogg-Briand Pact to a vote on 15 January 1929, the lone dissenter was Senator John James Blaine of Wisconsin.<sup>44</sup> He knew that the treaty had no criminal or other meaningful sanctions in the event of its breach. He also knew that States such as the United Kingdom, France and the United States had qualified

Judgment' Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion", in *Japan Review*, 2007, no. 19, pp. 215-23, published by the International Research Centre for Japanese Studies, Kyoto.

<sup>&</sup>lt;sup>41</sup> Justice Pal's Dissenting Opinion, p. 45, see *ibid*.

<sup>&</sup>lt;sup>42</sup> See Taylor, 1992, p. 629, see above note 9 ("Arguments in support of punishing individuals ex post facto for violation of the crime against peace can be made, but, if conducted on a plane devoid of political and emotional factors, will be won by the defense").

<sup>&</sup>lt;sup>43</sup> Robert H. Ferrell, *Peace in Their Time, The Origins of the Kellogg-Briand Pact*, W.W. Norton & Co., New York, 1952, p. 252.

<sup>&</sup>lt;sup>44</sup> *Ibid*.

their accession with declarations, effectively reserving for themselves the right to use force whenever and wherever, in their sole discretion, they felt that military defence of their sovereign interests was justified. Because of this, Blaine stood on the floor of the US Senate on 9 January 1929 and decried the fact that "the treaty itself, weighted down by the reservations, contains the fertile soil for all the wars of the future".<sup>45</sup> He boldly predicted:

[W]hy, this treaty, sir, is not even a truce. It is the beginning of the most stupendous struggle for world dominion and territorial aggrandizement. The clash may not come in our time, but this treaty portends an early conflict – the first one a commercial war, the second one none but the Infinite Mind can contemplate.<sup>46</sup>

### 10.6. Jackson at the IMT: The Push for Accountability

Jackson's impassioned oratory before the Tribunal emphasized, as a matter of paramount importance, that the mere meting out of punishment to the vanquished was by no means the pre-eminent objective of the trials:

> Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible.

> But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to *make statesmen responsible to law*. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, *including those which sit here now in judgment*.<sup>47</sup>

He viewed the goal of the proceedings as the establishment of a universal precedent that would help hold even victors to account. For Jackson, the real enemy to be vanquished was illegal war-making itself.

<sup>&</sup>lt;sup>45</sup> Congressional Record of the United States Senate, 9 January 1929, p. 1401.

<sup>&</sup>lt;sup>46</sup> *Ibid.*, p. 1406.

<sup>&</sup>lt;sup>47</sup> Nuremberg Trial, vol. II, pp. 153-54, above note 2 (emphasis added).

### 10.7. Post-Nuremberg: Optimism, Expectation and Ambivalence

Within a week of the Nuremberg judgment, Jackson submitted a report on the trials to President Truman. He was keen to point out that, going forward, the *ex post facto* question would no longer be an issue. Writing as though the judgment of the IMT had set a binding precedent in international law, he maintained "[n]o one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law, and law with a sanction".<sup>48</sup> Yet, as the lack of subsequent progress in codifying the crime of aggression has shown, he was evidently 'jumping the gun'. For the next 72 years, the crime of aggression would find itself in legal limbo: a crime without an international court of competent jurisdiction and, hence, a crime without the penal sanction which Jackson had so confidently touted.

In November 1946, Francis Biddle, who had served as the US judge at Nuremberg, also wrote to Truman to weigh in on the trials, recommending further action to assure that the IMT's judgment would be recognized as authoritative:

The conclusions of Nürnberg may be ephemeral or may be significant. That depends on whether we now take the next step. It is not enough to set one great precedent that brands as criminal aggressive wars between nations. Clearer definition is needed [...] In short, I suggest that the time has now come to set about drafting a code of international criminal law.<sup>49</sup>

Truman agreed. Consequently, the United States pushed for affirmation of the Nuremberg principles and their codification by the United Nations ('UN'). The endorsement of the Nuremberg judgment was achieved on 11 December 1946 through the unanimous approval of General Assembly Resolution 95(I). It provided, in this respect, that the General Assembly: "*Affirms* the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal".<sup>50</sup>

<sup>&</sup>lt;sup>48</sup> Letter from Robert Jackson to President Truman, 7 October 1946 (available on the web site of Harry S. Truman Library and Museum).

<sup>&</sup>lt;sup>49</sup> *Ibid*.

<sup>&</sup>lt;sup>50</sup> United Nations ('UN'), General Assembly, Resolution 95(I), 11 December 1946 (https:// www.legal-tools.org/doc/bb7761/); For a discussion of the resolution, see United Nation Audiovisual Library of International Law, "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal", 2008 (https://www.legal-tools.

The following year, the General Assembly formally directed the International Law Commission ('ILC') to formulate the Nuremberg principles and to incorporate them into a draft code of offences against the peace and security of mankind.<sup>51</sup> The formulation of the Nuremberg Principles by the ILC was completed in 1950.<sup>52</sup> Among its seven principles was a listing of the crimes within the Nuremberg Charter.<sup>53</sup> On crimes against peace, the ILC formulation of principles used language that tracked the Nuremberg Charter definition of the crime almost *verbatim*.

The ILC began working on a draft code of offences, but it made little real progress on the definition of the crime of aggression. In 1967, the General Assembly authorized a Special Committee on the Question of Defining Aggression.<sup>54</sup> Seven years later, by way of consensus Resolution 3314 (XXIX), the General Assembly adopted the definition of aggression developed by the Special Committee, but it concerned *acts* of aggression, as distinct from the *crime* itself.<sup>55</sup> The newly-minted definition remained in a legal vacuum, as there was still no international court with jurisdiction over the crime of aggression itself.

When the ILC issued its final Draft Code of Offences in 1996, its provisions on the crime of aggression bore no resemblance to the 1974 General Assembly definition. Instead, Article 16 of the 1996 Draft Code provided merely that "[a]n individual who, as leader or organizer, actively

org/doc/u9iu1e/). In *R. v. Jones* [2006] UKHL 16 (appeal taken from the Court of Appeal (Criminal Division), England and Wales) (https://www.legal-tools.org/doc/27fdf0/), the House of Lords of the United Kingdom confirmed that the crime of aggression has, at least since Nuremberg, formed a part of customary international law, citing, among other things, Resolution 95(I).

<sup>&</sup>lt;sup>51</sup> See UN General Assembly Resolution 177(II), 21 November 1947 (https://www.legaltools.org/doc/57a28a/).

<sup>&</sup>lt;sup>52</sup> See Document A/CN.4/34, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, in Official Records of the General Assembly, fifth session, Supplement No.12, Extract from the Yearbook of the International Law Commission, 1950, vol. II, paras. 95-127 (https://www.legal-tools.org/doc/be570a/).

<sup>&</sup>lt;sup>53</sup> *Ibid*.

<sup>&</sup>lt;sup>54</sup> See UN General Assembly Resolution 2330 (XXII), 18 December 1967 (https://www. legal-tools.org/doc/e9b6d2/); For a review of the General Assembly's involvement from 1950 onward relative to the question of defining aggression, see Summaries of the Work of the International Law Commission, Question of defining aggression, 15 July 2015 (https:// www.legal-tools.org/doc/wtmgof/).

<sup>&</sup>lt;sup>55</sup> UN General Assembly, Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974 (https://www.legal-tools.org/doc/752c30/).

participates in or orders the planning, preparation, initiation, or waging of aggression committed by a State shall be responsible for a crime of aggression". $^{56}$ 

Although Article 16 specified that the crime of aggression is a leadership crime, it fell short of clarifying what "leader or organizer" or "waging of aggression" means. Given the conspicuous lack of definitional detail emerging from its almost half-century drafting effort, some might reasonably infer a certain collective ambivalence, if not reluctance, on the part of the ILC towards effectively codifying the crime of aggression.

## 10.8. The ICC Finally Takes the Baton, a Slippery One

Aggression would not find its way into an operational international criminal code until the adoption of the Rome Statute of the International Criminal Court in 1998, which took effect upon the establishment of the ICC in 2002. Yet even then, the crime was included on only a nominal and as yet completely unenforceable basis. Although it was listed among the core crimes over which the ICC ostensibly had jurisdiction, there was a catch. As a matter of negotiated compromise, it was agreed in Rome that the Court would not be able to exercise its aggression jurisdiction until and unless further provisions would be adopted, defining the crime and setting forth the conditions under which the Court could exercise such jurisdiction.<sup>57</sup> There was, of course, no assurance that such further provisions would ever be adopted.

Despite this indefinite deferral, to their credit, the delegates avoided burdening the Rome Statute with the ambiguous circularity of the rather minimalist definition proposed by the ILC. Nonetheless, the decision to put off activating the Court's aggression jurisdiction was based more on *Realpolitik* than on definitional theory. The permanent members of the Security Council have uniformly believed that they alone can determine if there are acts of aggression,<sup>58</sup> and they remain unenthusiastic about seeing an international court with independent jurisdiction over the crime.

<sup>&</sup>lt;sup>56</sup> Yearbook of the International Law Commission, 1996, vol. II, part 2, pp. 42-43 (https:// www.legal-tools.org/doc/bb5adc/).

<sup>&</sup>lt;sup>57</sup> See Article 5(2) of the Rome Statute of the International Criminal Court ('Rome Statute') prior to being amended in 2010 at the ICC Review Conference (reproduced at p. 3, fn. 1 to Article 5) (https://www.legal-tools.org/doc/e5faa8/).

<sup>&</sup>lt;sup>58</sup> The permanent members of the UN Security Council contend that it is their exclusive prerogative under Article 39 of the UN Charter to determine the existence of acts of aggres-

Whereas Nuremberg and Tokyo laid the foundation for criminalizing wars of aggression, the ICC definition of the crime of aggression, like the General Assembly Resolution 95(I), speaks in terms of acts of aggression. For purposes of the Rome Statute, as a general matter, the crime of aggression is limited to:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>59</sup>

The Rome Statute definition then tracks the litany of aggressive acts enumerated within the General Assembly's 1974 definition.<sup>60</sup> Because the Rome Statute definition covers only acts reaching the level of manifest violations of the UN Charter based on their combined "character, gravity, and scale", it excludes uses of force that, though not authorized under the Charter, may ultimately be adjudged to be justifiable in the circumstances. By limiting the scope of criminal culpability to those "in a position effectively to exercise control over or to direct the political or military action of a State", it comports with the approach of the Tribunals in not bringing mid or low-level operatives within the ambit of the crime.

Still, concerning the criminalization of illegal war-making, the legacy of the Tribunals is far from settled. Unlike the ICC's jurisdiction over war crimes, genocide and crimes against humanity, its aggression jurisdiction comes with unique restrictions, notwithstanding its entry into force in 2018. Unless there is a referral of a situation by the UN Security Council, States which are not party to the Rome Statute are completely excluded from such jurisdiction, and States Parties are only subject to it on a purely voluntary basis.<sup>61</sup>

sion. On the question of whether Article 39 grants the Security Council an exclusive right to make such determinations, see Mark S. Stein, "The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power to Determine Aggression?", in *Indiana International & Comparative Law Review*, 2005, vol. 16, no. 1 (concluding in the negative).

<sup>&</sup>lt;sup>59</sup> Rome Statute, Article 8*bis* (as amended) (https://www.legal-tools.org/doc/a87ede/).

<sup>&</sup>lt;sup>60</sup> Compare *ibid.* with UNGA, Resolution 3314 (XXIX), above note 55.

<sup>&</sup>lt;sup>61</sup> For the definition of the crime of aggression and the jurisdictional conditions surrounding the Court's exercise of jurisdiction over the crime of aggression and of other crimes generally, see Rome Statute, Articles 8*bis*, 12, 15*bis*, and 15*ter* (as amended), above note 59. For a discussion of limitations on such jurisdiction and the activation decision itself, see

If the ideal of "equal justice under law" is to mean anything here, the ICC's aggression jurisdiction must be fortified by further ratifications – especially by those States Parties which sat in judgment at Nuremberg and Tokyo or were party to the 1945 London Agreement. In this respect, the message that Harry Truman, the President of the United States, delivered to the General Assembly in October 1946, just three weeks after the Nuremberg judgment, bears repeating even today:

> I remind you that 23 members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as states shall be tried before the bar of international justice<sup>62</sup>

Of these 23 signatories to the London Agreement, only eight have come forward, as States Parties of the ICC, to ratify the Kampala amendments: Belgium, Croatia, Luxembourg, the Netherlands, Panama, Poland, Uruguay and the Former Yugoslav Republic of Macedonia. Like the other 29 States Parties who have thus far ratified the aggression amendments, they have taken an important step in fortifying the crimes against peace precedent established at Nuremberg.<sup>63</sup>

By contrast, France and the United Kingdom, which both sat in judgment at Nuremberg and Tokyo and sit as permanent members of the

Jennifer Trahan, "From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression", in *International Criminal Law Review*, 2018, vol. 18, no. 2; Claus Kreß, "On the Activation of ICC Jurisdiction over the Crime of Aggression", Editorial Comment, in *Journal of International Criminal Justice*, 2018, vol. 16, no. 1, pp. 1-17; see also Donald M. Ferencz, "Greatest challenges facing the ICC on crimes of aggression are equality before the law, evidence-gathering, and witness protection. Creative solutions which encourage non-ratifiers to ratify may be part of the solution", *Human Rights and International Law ICC Forum*, January 2018 (available on its web site).

<sup>&</sup>lt;sup>62</sup> Harry S. Truman, US President, Address in New York City at the Opening Session of the UN General Assembly, 23 October 1946 (available on the web site of the Truman Library). For further discussion of illegal war-making as a crime against humanity, see the web site of Benjamin Ferencz, the last surviving Nuremberg prosecutor (www.benferencz.org).

<sup>&</sup>lt;sup>63</sup> The other ratifying States include: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Cyprus, Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Malta, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Switzerland, and Trinidad and Tobago. For an updated listing of ratifying States, see the web site of The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression.

UN Security Council, are notably absent from that list.<sup>64</sup> Such failure to ratify the amendments, coupled with the failure of other powerful States to join the Court (including the three other permanent members of the Security Council), does little to enhance the reputation of Nuremberg or To-kyo as harbingers, along with the UN Charter, of an improved world order based on equality under the law. Nor does the recent repudiation by the United States of the ICC system itself,<sup>65</sup> including the unprecedented revocation of the ICC Prosecutor's US travel visa.<sup>66</sup>

The three dozen States Parties that have already ratified the Kampala amendments at the time of writing have thereby confirmed their commitment to the principle that statesmen should be held accountable in law for the "supreme international crime". Robert Jackson warned that the standards that Nuremberg had set in criminalizing aggression "will become the condemnation of any nation that is faithless to them". It is an admonition that some states apparently take more seriously than others.<sup>67</sup>

### **10.9. Final Observations**

Among the lessons to be learned from the Kellogg-Briand Pact and the effort to outlaw illegal war-making is that where law lacks effective, broad-based, and reliable enforcement, it is undercut in its capacity to safeguard those who most depend upon it. Dwight Eisenhower and Douglas MacArthur each saw this clearly. At Tokyo, MacArthur had called for the renunciation of war by all nations. Eisenhower, as US President, had declared, "[I]n a very real sense, the world no longer has a choice between

<sup>&</sup>lt;sup>64</sup> See Owen Bowcott, "ICC crime of aggression comes into effect without key signatories", *The Guardian*, 17 July 2018 (available on its web site) (quoting a Foreign Office spokesperson as having said, "The UK has no plans to ratify the crime of aggression amendments. We believe that the UN Security Council bears the main responsibility for maintaining international peace and security, and should be the primary body to determine when an act of aggression has occurred").

<sup>&</sup>lt;sup>65</sup> See the 15 March 2019 statement of US Secretary of State, Michael R. Pompeo, threatening economic sanctions and denial of visas for ICC staff involved in investigating possible crimes committed by US or allied personnel in Afghanistan (available on the web site of the US State Department). See also the anti-ICC remarks of the former US National Security Advisor, John Bolton, made on 10 September 2018 to the Federalist Society ("We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us").

<sup>&</sup>lt;sup>66</sup> "U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation", *Reuters*, 4 April 2019 (available on its web site).

<sup>&</sup>lt;sup>67</sup> Letter from Robert Jackson to President Truman, 7 October 1946, see above note 48.

force and law. If civilization is to survive, it must choose the rule of law".  $^{68}$ 

In an ironic twist, when Frank Kellogg was awarded the Nobel Peace Prize in 1929, he seemingly downplayed the rule of effective enforcement of international law in favour of the court of public opinion. In his acceptance speech, he observed:

> I know there are those who believe that peace will not be attained until some super-tribunal is established to punish the violaters of such treaties, but I believe that in the end the abolition of war, the maintenance of world peace, the adjustment of international questions by pacific means will come through the force of public opinion, which controls nations and peoples - that public opinion which shapes our destinies and guides the progress of human affairs.<sup>69</sup>

By contrast, former Reichsmarschall Hermann Göring, the lead defendant at Nuremberg, held a rather different view of public opinion. Less than six months before he was sentenced to death by the IMT, Göring was interviewed in his jail cell, from where he candidly explained how easily the masses are manipulated into supporting the war aims of political elites:

Naturally, the common people don't want war; neither in Russia nor in England nor in America, nor for that matter in Germany. That is understood. But, after all, it is the *leaders* of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship or a Parliament, or a Communist dictatorship. [...] voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing

<sup>&</sup>lt;sup>68</sup> Dwight D. Eisenhower, "Statement by the President on the Observance of Law Day", 30 April 1958 (available on the web site of Gerhard Peters and John T. Woolley, *The American Presidency Project*).

<sup>&</sup>lt;sup>69</sup> He added: "I do not envisage the signs of the time as foretelling another war". See Frank B. Kellogg's acceptance speech on the occasion of the award of the Nobel Peace Prize in Oslo, 10 December 1930 (available on the web site of the Nobel Foundation). As to Kellogg's ability to discern the signs of the times, it may be of interest to note that five years later, he was further quoted as having declared that war in Europe was "inconceivable". See "WAR 'INCONCEIVABLE', KELLOGG HOLDS HERE", *The New York Times*, late edition, 25 September 1935, p. 15 (available on its "TimesMachine").

the country to danger. It works the same way in any country.  $^{70}$ 

Göring's assessment goes to the very heart of why so many have laboured so long to assure that political and military leaders are held to account for dragging nations and peoples into conflict in violation of international law.

It is not hyperbolic to suggest that today's ICC system owes its existence to principles of law directly traceable to Nuremberg.<sup>71</sup> It was a tribunal which, in the words of Robert Jackson, was intended to set a legal precedent whereby international law would be put "squarely on the side of peace".

The homage to "Reason" articulated in Jackson's opening statement has come to form an integral and compelling part of the lore and legacy of Nuremberg. His words resonate with all who work to protect the weak from the powerful through the application of law.<sup>72</sup> Yet the fact that the power of the IMT and IMTFE Charters was not brought to bear equally upon victors and the vanquished alike remains among the greatest points of criticism.<sup>73</sup>

It is axiomatic that the selective application of universal principles of law is inevitably followed by charges of hypocrisy. The current failure

<sup>&</sup>lt;sup>70</sup> G.M. Gilbert, *Nuremberg Diary*, A Signet book, New American Library, 1961 [1947], pp. 255-56 (emphasis in the original).

<sup>&</sup>lt;sup>71</sup> For a review of developments from Nuremberg through the planning for the trial of Saddam Hussein, see Robert H. Jackson Center, "The Influence of the Nuremberg Trial on International Criminal Law" (undated) (https://www.legal-tools.org/doc/lub803/).

<sup>&</sup>lt;sup>72</sup> The struggle is by no means a new one. The preamble to the Code of Hammurabi (on display at the Louvre Museum in Paris) references that this ancient set of laws was given "so that the strong shall not harm the weak". See *Ancient History Sourcebook: Code of Hammurabi*, c. 1780 BCE, L.W. King (trans.) (available on the web site of Fordham University).

<sup>&</sup>lt;sup>73</sup> Perhaps nowhere is the irony of this dichotomy seen more clearly than in the juxtaposition of three nearly simultaneous events. The London Agreement was signed on 8 August 1945, authorizing prosecution of Nazi leaders for crimes against peace, war crimes, and crimes against humanity. It also happened to be the day on which Harry S. Truman, as President of the United States, signed the bill by which the US became the first country to ratify the UN Charter, the preamble of which expressed a solemn determination "to save succeeding generations from the scourge of war". Yet, before the sun had set that very day in Washington or London, an American B-29 Superfortress bomber carrying the "Fat Man" plutonium bomb had already lifted off of a runway on the Pacific island of Tinian *en route* to obliterating the city of Nagasaki.

of those nations which sat in judgment at Nuremberg and Tokyo to take the yoke of the law upon themselves may be seen by some as a stain on the Tribunals' legacy, but the stain is more so on the reputation of such States themselves. It presents an ongoing reminder that the rule of law which is preached by powerful States continues to be very different than that which they themselves accept to be bound by.

At the very least, States which are reluctant to expose their national leaders to the aggression jurisdiction of the ICC could incorporate the crime within their own national criminal codes.<sup>74</sup> Such domestication would send a signal that they do not consider themselves to be wholly above the laws proscribing the illegal use of force in global affairs. Moreover, it would provide at least a theoretical basis for ending pervasive double standards which discriminate against soldiers in favour of politicians. If military personnel can be prosecuted for war crimes, why should the politicians who send them out to fight and die remain completely above the law for the far greater crime of illegal war-making itself?

Despite the shortcomings of the Tribunals and the ICC itself, they form part of a continuum of twentieth- and twenty-first-century efforts trending, however imperfectly, in the direction of replacing the law of force with the force of law. Such evolution has already occurred with respect to the establishment of systems of enforceable domestic laws in virtually all well-developed societies, and for good reason: protection of human rights depends on deterrence of human wrongs.

Göring reputedly once wrote: "War is like a football game. Whoever loses gives his opponent his hand, and everything is forgotten".<sup>75</sup> If ever that was true, the judgment at Nuremberg was a critical turning point in the process of relegating such thinking to the trash heap of history. Despite its limitations, the recent activation of the ICC's aggression jurisdiction is a clear affirmation that the promise of Nuremberg has certainly not been forgotten by those who wish to see a more humane world under the rule of law.

<sup>&</sup>lt;sup>74</sup> For a discussion of the subject of State domestication of the crime of aggression, including reference to states which have already done so, see Astrid Reisinger Coracini, "(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law", in Kreß and Barriga (eds.), 2017, pp. 1038-55, see above note 4.

<sup>&</sup>lt;sup>75</sup> Paul Roland, *The Nuremberg Trials, The Nazis and Their Crimes Against Humanity*, Arcturus, London, 2012, p. 37.

Two years after the Nuremberg judgment, and half a world away, Justice Pal raised a stark question in his dissent at Tokyo. It is one which may have been on the minds of many – particularly those who had experienced the unimaginable destruction wrought by nuclear weapons or by the inescapable infernos spawned by the firebombing of civilian populations.<sup>76</sup> "The real question", he asked, is "can mankind grow up quickly enough to win the race between civilization and disaster?".<sup>77</sup>

A full 70 years on, the answer to his question remains precariously illusive.

<sup>&</sup>lt;sup>76</sup> The American General, Curtis LeMay, in defending the use of the atomic bomb, boasted: "We scorched and boiled and baked to death more people in Tokyo on that night of March 9-10 [1945] than went up in vapor at Hiroshima and Nagasaki combined". See Nicholas D. Kristof, "Tokyo Journal; Stoically, Japan Looks Back on the Flames of War", *The New York Times*, 9 March 1995, p. 4 (available on its "TimesMachine").

<sup>&</sup>lt;sup>77</sup> Justice Pal's Dissenting Opinion, above note 40, p. 700.

# Substantive Law Issues in the Tokyo Judgment: From Facts to Law?

### Marina Aksenova\*

#### 11.1. Introduction

Back in 1950, one of the contemporary scholars of the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Tribunal') wrote:

[T]he unwieldy mass of the majority judgment as a whole, to say nothing of the dissenting opinions, is an especial pity under the circumstances, for its sheer bulk precludes reproduction and makes it impossible for the Tribunal's arguments and conclusions of law ever to be textually available to the international legal world [...].<sup>1</sup>

It is clear that the problem of accessibility no longer exists as technology has enabled access to the relevant material. The length of the Tokyo judgment was unprecedented only if compared with its Nuremberg counterpart – the Tokyo judgment exceeds 1,000 pages while the Nuremberg one is less than 200 pages. The volume is, however, not unusual for modern international criminal law: one of the last judgments rendered by the International Criminal Tribunal for the former Yugoslavia ('ICTY') before its closure was in the *Mladić* case. It is 2,526 pages long and consists of five volumes.<sup>2</sup> What makes the Tokyo judgment truly stand out is

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<sup>&</sup>lt;sup>1</sup> Gordon Ireland, "Uncommon Law in Martial Tokyo", in *Year Book of World Affairs*, 1950, vol. 4, p. 63.

<sup>&</sup>lt;sup>2</sup> International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Mladić*, Trial Judgment, 22 November 2017, IT-09-92-T (https://www.legal-tools.org/doc/96f3c1/,

not its length, but its fact-based methodology (also adopted by the International Military Tribunal ('IMT') at Nuremberg), whereby the judges discussed at length the circumstances of Japan's military domination and aggression,<sup>3</sup> but devoted remarkably little space to the individual contribution of each of the accused.<sup>4</sup> The section of the judgment dealing with individual verdicts constitutes less than five per cent of the entire judgment.

What explains such an approach at Tokyo? Admittedly, part of the reason was the desire of the Tokyo judges to collectively attribute guilt to high-ranking defendants.<sup>5</sup> The other explanation, which is not mutually exclusive with the first one, was the lack of legal vocabulary and pertinent legal structures that could serve as a basis for the factual analysis in the judgment. While modern international criminal law developed a highly technical and often confusing language to describe the modes of liability, defences, substantive crimes, and, to a lesser extent, sentencing considerations, the Nuremberg and Tokyo judges operated in a legal vacuum.<sup>6</sup> The Nuremberg and Tokyo Charters were the products of a political compromise between the Allied powers. It was not a given that these trials would even occur in the first place.<sup>7</sup> The judges therefore faced a challenging task of creating new approaches to prosecuting mass atrocities on an unmatched scale. They did not have the option of falling on the formulaic language widely used in modern international criminal law. The question looms as to whether the fact-based approach of Tokyo has any legal precedential value for contemporary jurists.

https://www.legal-tools.org/doc/f8f51c/, https://www.legal-tools.org/doc/e6f43e/, https:// www.legal-tools.org/doc/e8792f/).

<sup>&</sup>lt;sup>3</sup> Ireland, 1950, p. 61, see above note 1.

<sup>&</sup>lt;sup>4</sup> Kai Ambos noted that "the Nuremberg approach can be called pragmatic rather than dogmatic". See Kai Ambos, "Individual Criminal Responsibility in International Criminal Law: A. Jurisprudential Analysis – From Nuremberg to The Hague", in Gabrielle Kerk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of National and International Courts, Volume I Commentary*, Kluwer Law International, The Hague, 2000, p. 8.

<sup>&</sup>lt;sup>5</sup> Marina Aksenova, *Complicity in International Criminal Law*, Hart Publishing, Poland, 2016, pp. 53 ff.

 <sup>&</sup>lt;sup>6</sup> Solis Horwitz, "Document 465: The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, pp. 475–540.

<sup>&</sup>lt;sup>7</sup> See Richard Overy, "The Nuremberg trials: international law in the making", in Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003.

This chapter answers this question in the positive by looking at the Tokyo judgment through the lens of 'constructed temporality', which invites the reader to view international criminal law not as a linear exercise, but rather as a 'puzzle' with various points of reference grounded in different interconnected and mutually enriching moments in time.

The traditional understanding of the evolution of international criminal law is that it emerged in Nuremberg,<sup>8</sup> was subsequently applied in Tokyo, and was then codified to some extent by the International Law Commission, which adopted the Nuremberg Principles in 1950<sup>9</sup> and then started its work on the draft Code of Crimes against the Peace and Security of Mankind ('Draft Code').<sup>10</sup> There was a legal vacuum until the 1980s when the work on the Draft Code was resumed. This was followed by the resurgence of international criminal law in the 1990s with the establishment of the *ad hoc* tribunals. The early 2000s were marked by the first years of the operation of the International Criminal Court ('ICC') - the permanent body tasked with prosecuting mass atrocities. By then, international criminal law had reached a stage of certain maturity, accompanied by a number of legitimacy and enforcement challenges, which can be perceived either as 'growing pains' of the discipline or as a threat to its survival, depending on the point of view of the observer. Such a linear narrative, dominant in the discussions of international criminal law, dovetails the principle of legality in a sense that it tracks down the development of the body of law and its incorporation in the work of the relevant institutions.

While acknowledging this linear narrative, this contribution suggests that alternative narratives are also possible and desirable in order to achieve a better understanding of the field. One may equally argue that the linear progression of international criminal law is nothing more than an illusion or a constructed idea. This is the reason why temporality is

<sup>&</sup>lt;sup>8</sup> Some might argue that the origins of international criminal law go back in time to pre-Nuremberg. See Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law, Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2014 (https://www.legal-tools.org/doc/6a26c8/).

<sup>&</sup>lt;sup>9</sup> Adopted by the International Law Commission at its second session in 1950, *Yearbook of the International Law Commission*, 1950, vol. II (https://www.legal-tools.org/doc/brq89g/, https://www.legal-tools.org/doc/9c9ro7/, https://www.legal-tools.org/doc/kug9u3/).

<sup>&</sup>lt;sup>10</sup> Adopted by the Commission at its sixth session, in 1954, Yearbook of the International Law Commission, 1954, vol. II (https://www.legal-tools.org/doc/114616/).

viewed as a 'constructed' concept in this chapter. It is plausible to suggest that the discipline moves in circles - taking a leap forward and then retracting to the state of affairs that existed before.

Now, it is clear that this conceptualization cannot exist in a vacuum and must be measured against particular facts and events. The view adopted in this chapter is that the establishment of the Nuremberg and Tokyo Tribunals, the creation of the *ad hoc* tribunals and the ICC were all points in time when international consensus was reached as to the need to 'do something about' mass atrocities. It is equally important to know that political and international considerations halted the development of the discipline at many other points in time. For instance, in the 1950s and 1960s, the climate of accountability for the crimes committed during World War II was overshadowed by the desire, which accumulated at an international level, to forge another consensus on the alignment of States' positions along the Cold War divide.<sup>11</sup> It is also possible to see that presently, international law is in a phase of 'backtracking' as it struggles to fend off the mounting criticism of its cost, ineffectiveness and lack of legitimacy.

This chapter therefore argues that one can conceptualize international criminal law as developing in cycles, each adding a layer of complexity and understanding to this constantly evolving discipline. However, the evolution is by no means linear, rather each moment in time when international criminal law takes a leap forward or backwards is defined by the accumulation of political will at the level of States, institutions and individual actors. The lens of 'constructed temporality' thus creates a narrative for this contribution. The purpose is not, however, to explore the political dimension of international criminal law, but rather to argue that the factual approach adopted in Tokyo is not prohibitive to it being the source of further development for international criminal law.

If one looks at the Tokyo judgment from a purely legalistic perspective, it is easy to see how the lack of legal definitions as well as the perceptions of the lack of objectivity can be prohibitive to its relevance in modern international criminal law. It appears, however, that the value of the Tokyo judgment extends beyond the provision of legal definitions as such; rather, the judgment marks a point in time when certain consensus

<sup>&</sup>lt;sup>11</sup> Devin O. Pendas, "Seeking Justice, Finding Law: Nazi Trials in Postwar Europe", in *Journal of Modern History*, 2009, vol. 81, no. 2, pp. 347–68.

was forged as to the prosecutions of the crimes committed in Asia during the Second World War. This position does not mean the judgment was fully accepted by its contemporaries. For instance, Judith Shklar observed that the Tokyo Trial was perceived as a 'bore' by the Japanese. Unlike its Nuremberg counterpart, it did not dramatize anything for the local population because the conquerors were behaving as they were expected to behave.<sup>12</sup> This reaction does not mean, however, that the judgment and its findings will not resonate with diverse audiences in the future. If one adopts the lens of 'constructed temporality', one allows for the 'surprise re-emergence' of the Tokyo ideas and concepts at the moment when the cycle of international criminal law picks up again.

Turning to facts and statistics, it is well established that Article 5 of the Tokyo Charter provided for individual criminal responsibility for the following substantive crimes: crimes against peace, conventional war crimes and crimes against humanity. The same article specified responsibility of leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes. The Tokyo indictment contained 55 counts charging 28 accused with crimes against peace, conventional war crimes, and crimes against humanity during the period from 1 January 1928 till 2 September1945.<sup>13</sup> The Tokyo Tribunal dismissed 45 counts of the indictment, leaving valid only 10, which included the grand conspiracy (count 1); waging the war of aggression against China, the United States, the British Commonwealth, the Netherlands, France, the Soviet Union and Mongolia (counts 27, 29, 31, 32, 33, 35 and 36, respectively); ordering, authorizing and permitting violations of the laws of war (count 54); and deliberately and recklessly disregarding the legal duty to secure the observance of the laws of war (count 55).

This chapter does not purport to comprehensively discuss each category of crimes adjudicated by the Tokyo Tribunal as it has been exhaustively done elsewhere.<sup>14</sup> It rather focuses on four specific notions discussed at Tokyo by examining them through the lens of 'constructed tem-

<sup>&</sup>lt;sup>12</sup> Judith Nisse Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, 1964, p. 181.

<sup>&</sup>lt;sup>13</sup> The Tokyo War Crimes Trial, vol. 22, p. 48420 ('Tokyo Judgment') (https://www.legaltools.org/doc/8bef6f/).

<sup>&</sup>lt;sup>14</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008.

porality'. These notions are, firstly, the conspiracy and the tension between individual responsibility and collective offending. Secondly, the chapter dwells on the definition of aggression and the right to self-defence as understood by the Tokyo Tribunal. The third concept is the definition of specific war crimes, in particular torture. Finally, the fourth notion is superior responsibility and what it means to consciously or recklessly disregard information, which indicates that subordinates are committing crimes.<sup>15</sup> Each section of the chapter draws on the rhetoric of the Tokyo judgment as well as current debates on the same issue. The purpose is to demonstrate the cyclical nature of international (criminal) law and to establish precedential value of the Tokyo judgment, which is not cancelled out by its highly factual language.

## 11.2. Conspiracy

The Tokyo indictment charged all of the accused with conspiracy extending over a period of 18 years with the broadly defined objective of securing "the military, naval, political, and economic domination of East Asia and the Pacific and Indian Oceans, and for all countries and islands therein and bordering thereon".<sup>16</sup> The charge stemmed from Article 5(a) of the Charter, which called for responsibility of those involved in planning, preparation, initiation, waging aggressive war, and participation in a common plan or conspiracy for the accomplishment of any of the crimes mentioned in the same article. The IMTFE interpreted this provision as covering five different substantive crimes, treating conspiracy and other ways of engagement in criminality as substantive offences. This was a legal solution borrowed from Nuremberg. The Nuremberg indictment charged conspiracy for an even more extended period of time - starting with the formation of the Nazi Party in 1919 till the end of the war in 1945. The difference between Nuremberg and Tokyo was that the Nuremberg judges rejected the grand conspiracy charge, while the Tokyo judges convicted all but one accused - Foreign Minister Mamoru Shigemitsu -

<sup>&</sup>lt;sup>15</sup> Rome Statute of the International Criminal Court ('Rome Statute'), 17 July 1998, Article 28 (b)(i) (https://www.legal-tools.org/doc/7b9af9/); and count 55 of the Tokyo Indictment (https://www.legal-tools.org/doc/8bef6f/).

<sup>&</sup>lt;sup>16</sup> Tokyo Judgment, p. 48421.

under count one as "leaders, organizers, instigators, or accomplices" in the grand conspiracy.<sup>17</sup>

Conspiracy was essentially a tool devised to tackle one of the biggest problems of international criminal law of all times: how does one attach individual responsibility for collective offending? In the absence of developed law on the modes of liability, conspiracy allowed fora factbased approach to charging and giving space to the dominant narrative of aggression, which overpowered both the Nuremberg and the Tokyo indictments.<sup>18</sup> Furthermore, the Tokyo judges chose to treat conspiracy as a substantive crime, largely following the domestic law approach prominent in the United States and overlooking the lack of distinction between the forms of participation and the substantive crime at issue. This approach resulted from the lack of the established legal framework coupled with the desire to secure convictions even in the absence of a well-defined link between the accused and the specific crimes.

Such liberal deployment of conspiracy attracted contemporary criticism. For instance, Gordon Ireland – a scholar of the IMTFE judgment at that time – claimed that it was unjust that the Tokyo version of conspiracy did not allow for the possibility of withdrawal at a later stage – something that the American version of conspiracy guaranteed, thereby protecting those who changed their minds and decided to renounce criminal participation.<sup>19</sup> Judge Henri Bernard from France criticized the deployment of conspiracy for he considered the classical notion of complicity to be more accurate in describing the responsibility of those accused at Tokyo. The principal perpetrator, according to Judge Bernard, would have been the Emperor – a figure not even charged in the indictment.<sup>20</sup> Finally, Judge Pal in his strong dissent emphasized the fact that conspiracy is not a crime under international law.<sup>21</sup>

The dissenting voices were thus strong. They also elucidate how international criminal law has struggled with the problem of attribution of

<sup>&</sup>lt;sup>17</sup> *Ibid.*, p. 49773. See Ireland, 1950, p. 80, above note 1; Boister and Cryer, 2008, pp. 217-19, see above note 14.

<sup>&</sup>lt;sup>18</sup> Aksenova, 2016, chap. 1, above note 5.

<sup>&</sup>lt;sup>19</sup> Ireland, 1950, pp. 81-82, see above note 1.

<sup>&</sup>lt;sup>20</sup> Dissenting Opinion of Judge Bernard, p. 22, reproduced in part in Ireland, 1950, p. 64, fn. 2, see above note 1 (https://www.legal-tools.org/doc/f4179a/).

<sup>&</sup>lt;sup>21</sup> Dissenting Opinion of Judge Pal, p. 991, reproduced in part in Ireland, 1950, p. 100, see above note 1 (https://www.legal-tools.org/doc/2a3d21/).

responsibility from the time of its conception. The 1990s and the work of the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') contributed to the development of a more sophisticated body of law dedicated to the modes of liability.<sup>22</sup> Both Tribunals paid sufficient attention to the problem and came up with more legalistic solutions than the Nuremberg and Tokyo Tribunals. The ICTY extensively employed the doctrine of joint criminal enterprise, using it as a form of responsibility through which all of the participants are held accountable as principals provided they shared a common intent and contributed to the common plan. This concept attracted significant criticism from both practitioners and scholars.<sup>23</sup> The ICTR used the doctrine of extended participation to solve the same legal problem – extending principal perpetration to those who may not have been physically involved in the crime but exerted significant influence over its commission.<sup>24</sup>

The Rome Statute of the ICC contains the most detailed provision on modes of liability to date – Article 25(3). It is designed to cover various forms of complicity and primary perpetration, introducing concepts such as indirect perpetration, co-perpetration and contributing to a group committing crimes. Despite all the details stipulated in the legal text, ICC judges still often find it challenging to link individual contributions to specific crimes.<sup>25</sup> Moreover, it appears that the gravitas at the ICC is once again shifting towards appreciating the context of mass offending together with the individual accountability: the current focus on reparations and the appropriate forms of collective and individual reparations can be seen as an attempt to acknowledge and remedy to the extent possible the wide-

<sup>&</sup>lt;sup>22</sup> See, for instance, Aksenova, 2016, pp. 81 ff., see above note 5.

<sup>&</sup>lt;sup>23</sup> Alison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, pp. 75–169; Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library International Criminal Procedure*, Cambridge University Press, Cambridge, 2007, pp. 17-22; Stephen B. Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?", in *Journal of International Criminal Justice*, 2004, vol. 2, p. 606.

<sup>&</sup>lt;sup>24</sup> International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Gacumbitsi*, Appeal Judgment, 7 July 2006, ICTR-2001-64-A, para. 60 (https://www.legal-tools.org/doc/aa51a3/).

<sup>&</sup>lt;sup>25</sup> For more discussion on the use of various modes of liability at the ICC, see Aksenova, 2016, pp. 133 ff., above note 5.

spread nature of suffering afflicted by mass atrocities.<sup>26</sup> Thus, if one looks at the problem of collective wrongdoing versus personal responsibility through the lens of 'constructed temporality', it becomes obvious that the dilemma still looms large in the field and the new ways of accounting for the context are being developed. The nuanced forms of participation developed in the 1990s only dealt with the problem in part – namely, the legality problem. The factual challenges of distilling individual guilt from the collective wrongdoing remains one to be examined in more detail by the scholars and practitioners of international criminal law.<sup>27</sup>

### 11.3. The Crime of Aggression

The crime of aggression could be named, with some caution, the oldest international crime among the three categories of crimes mentioned at Tokyo. The first attempt to invoke it was made in the aftermath of the First World War. Article 227 of the Versailles Treaty of 1919 called for the creation of a special tribunal to try the German Kaiser for "a supreme of-fence against international morality and the sanctity of treaties".<sup>28</sup> The former Emperor took refuge in the Netherlands and the trial never took place. The crime of aggression re-emerged in the work of the United Nations War Crimes Commission, which labelled the aggressive war and its preliminary and contemporaneous acts as war crimes "in a wider sense".<sup>29</sup> The idea was to hold individually responsible those who launched and waged the Second World War.

Consequently, Article 6(a) of the Nuremberg Charter and Article 5(a) of the Tokyo Charter defined crimes against peace as

planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,

<sup>&</sup>lt;sup>26</sup> See, for instance, the reparation order in the *Al Mahdi* case engaging closely with the cultural significance of the destroyed buildings. International Criminal Court ('ICC'), *Prosecutor v. Al Mahdi*, Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", 8 March 2018, ICC-01/12-01/15 A (https://www.legal-tools.org/doc/8b92e9/).

<sup>&</sup>lt;sup>27</sup> This problem is discussed in detail by multiple authors in the forthcoming volume by Marina Aksenova, Elies van Sliedregt and Stephan Parmentier (eds.), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches to International Criminal Law*, Hart, Oxford.

<sup>&</sup>lt;sup>28</sup> The Treaty of Versailles, 28 June 1919 (https://www.legal-tools.org/doc/a64206/).

<sup>&</sup>lt;sup>29</sup> Kirsten Sellars, 'Crimes against Peace' and International Law, Cambridge University Press, Cambridge, 2013, p. 60.

agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The Charters failed to explain in much detail what "waging the war of aggression" means in practice. Despite the lack of clarity, this class of offences played a central role both in Nuremberg and in Tokyo: count one of each respective indictment referred to the broad conspiracy to commit crimes against peace, whereas count two charged defendants with committing specific offences against peace.<sup>30</sup> The IMT judges were not persuaded by the over-expansive conspiracy charge.<sup>31</sup> Continental lawyers rejected the idea of conviction without proof of the specific crimes perpetrated by the defendant.<sup>32</sup>

Despite the failure of the grand conspiracy charge, the IMT called the initiation of a war of aggression not just an international offence, but "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".<sup>33</sup> The dominant role of this charge in the case in Nuremberg is evident from the judges' treatment of the *ex post facto* challenge raised by the defence. The Tribunal found that the maxim *nullum crimen sine lege* was observed for two main reasons: firstly, the defendants must have known that they are acting in violation of international law by engaging in the war of aggression, and, secondly, recourse to war was already expressly renounced by the Kellogg-Briand Pact at Paris in 1928.<sup>34</sup> However, this reasoning of the IMT is flawed because the 1928 Paris Pact had not intended to give rise to individual criminal responsibility.

Later, in proving the validity of the prohibition of the war of aggression, the prosecution in Tokyo relied most heavily on Article 1 of the Kellogg-Briand Pact of 1928:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to

<sup>&</sup>lt;sup>30</sup> International Military Tribunal (Nuremberg) Judgment and Sentences, reprinted in *American Journal of International Law*, 1947, vol. 41, p. 186 ('Nuremberg Judgment'); see also Tokyo Judgment, p. 48421.

<sup>&</sup>lt;sup>31</sup> Nuremberg Judgment, p. 222.

<sup>&</sup>lt;sup>32</sup> Overy, 2003, p. 19, above note 7.

<sup>&</sup>lt;sup>33</sup> Nuremberg Judgment, p. 186.

<sup>&</sup>lt;sup>34</sup> *Ibid.*, pp. 217-218. See also the General Treaty for the Renunciation of War of 27 August 1928 (https://www.legal-tools.org/doc/396040/).

war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

The prosecution submitted that by 1928, most civilized nations had established the illegality of war as a positive rule of international law.<sup>35</sup> The majority declared that it is bound by the law of the Charter and referred to the Nuremberg IMT judgment in addressing the defence's *ex post facto* challenge:

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 neighboring 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.<sup>36</sup>

As it turned out, defining aggression was not easy. The prosecution in Tokyo, towards the end of the trial, backed away from providing such a definition and, in a typical – for that period of the development of international criminal law – manner, adopted a fact-based approach. The prosecution clarified that what matters was the essence of the crime of aggression, which rested in complete domination of a foreign country.<sup>37</sup> The majority followed suit and did not try to come up with a specific definition.<sup>38</sup> The IMTFE, for instance, held:

> The Tribunal is further of opinion that the attacks which Japan launched on 7th December 1941 against Britain, the United States of America and the Netherlands were wars of aggression. They were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the difficulty of stating a comprehensive definition of "a war of aggression," attacks made with the above motive cannot but be characterised as wars of aggression.<sup>39</sup>

<sup>&</sup>lt;sup>35</sup> Boister and Cryer, 2008, p. 124, above note 14, citing Elizabeth S. Kopelman (n. 80).

<sup>&</sup>lt;sup>36</sup> Tokyo Judgment, p. 48438.

<sup>&</sup>lt;sup>37</sup> Boister and Cryer, p. 122, see above note 14.

<sup>&</sup>lt;sup>38</sup> *Ibid*.

<sup>&</sup>lt;sup>39</sup> Tokyo Judgment, p. 49584.

It is noteworthy that the defence in Tokyo raised an important selfdefence challenge, arguing that Japan had the right to invoke self-defence under the terms of the Kellogg-Briand Pact. The majority disagreed, stating that:

Under the most liberal interpretation of the Kellogg-Briand Pact, the right of self-defense does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action. Any other interpretation would nullify the Pact.<sup>40</sup>

Judge Pal in his dissent argued to the contrary – self-defence, in his view, was inherent in sovereignty and could not be "affected by implication".<sup>41</sup> The approach of the IMTFE was therefore case-by-case and focused on different theatres of war. Robert Cryer argues that it is possible that the majority did not define aggression to avoid suggestions that their definition covered acts by the prosecuting nations.<sup>42</sup>

The lack of definition by the IMT and the IMTFE was understandable but left more questions than answers. Gordon Ireland observed at that time that aggressive war had never been acceptably defined internationally, and there were serious doubts as to if it could ever be.<sup>43</sup> He argued that "not all war has been or can here be condemned, for even the prosecuting nations are not universal pacifists, and before one form of war can be singled out for punishment, it ought to be made clear what kinds are included".<sup>44</sup>

State-focused understanding of aggression dominated international law for decades after the conclusion of the Nuremberg and Tokyo Trials. The 1950 Nuremberg Principles,<sup>45</sup> codifying the IMT law, and the 1954 Draft Code briefly mentioned crimes against peace as offences punishable under international law, but fell short of defining them.<sup>46</sup> The International

<sup>&</sup>lt;sup>40</sup> *Ibid.*, p. 48495.

<sup>&</sup>lt;sup>41</sup> Dissenting Opinion of Judge Pal, p. 91, see above note 21.

<sup>&</sup>lt;sup>42</sup> Boister and Cryer, 2008, p. 121, see above note 14.

<sup>&</sup>lt;sup>43</sup> Ireland, 1950, p. 83, see above note 1.

<sup>&</sup>lt;sup>44</sup> *Ibid*.

<sup>&</sup>lt;sup>45</sup> Adopted by the International Law Commission at its second session in 1950, *Yearbook of the International Law Commission*, 1950, vol. II (https://www.legal-tools.org/doc/6465a9/).

<sup>&</sup>lt;sup>46</sup> Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission at its second session, in 1950, *Yearbook of the International Law Commission*,

Law Commission, in charge of formulating both the Draft Code and the Nuremberg Principles, deferred in this matter to the Special Committee established by the General Assembly.<sup>47</sup> Only in 1974 did the General Assembly adopt Resolution 3314 defining aggression.<sup>48</sup> Article 1 of this resolution states that "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". It is clear that this provision is consonant with Article 2(4) of the UN Charter prohibiting the use force against territorial integrity or political independence of another State. Article 5(2) of Resolution 3314 mentions that aggression gives rise to international responsibility but fails to specify the type of this responsibility as well as the consequences of establishing it. It appears that the General Assembly aimed at obliging States to refrain from aggression and did not deal with matters of individual criminal responsibility.

The crime of aggression made its way back into international criminal law only in 1998, when the drafters of the Rome Statute of the ICC included the crime of aggression within the jurisdiction of the Court. The definition of this crime, which proved so difficult to furnish in the 1940s, had still been missing in the Rome Statute until 2010, when the Assembly of States Parties finally reached an agreement on this controversial issue.<sup>49</sup> Article 8*bis* of the Rome Statute relies on Resolution 3314 for the list of acts that qualify as an act of aggression (for example, the invasion or attack by armed forces of a State or the territory of another State). Strong ties between State- and individual criminal responsibility provoked a debate around the political nature of this crime and the feasibility of prosecuting aggression internationally. Indeed, the ICC included a higher threshold for aggression, "by its *character, gravity and scale, constitutes a manifest violation* of the Charter of the United Nations".<sup>50</sup> On 15 De-

<sup>1950,</sup> vol. II (see Principle VI, along with commentaries at https://www.legal-tools.org/ doc/038f9a/).

<sup>&</sup>lt;sup>47</sup> Boister and Cryer, 2008, p. 264, see above note 14.

<sup>&</sup>lt;sup>48</sup> United Nations General Assembly, resolution 3314(XXIX), 14 December 1974 (https:// www.legal-tools.org/doc/752c30/).

<sup>&</sup>lt;sup>49</sup> Resolution RC/Res.6., adopted at the 13th plenary meeting, on 11 June 2010 (https://www.legal-tools.org/doc/0d027b/).

<sup>&</sup>lt;sup>50</sup> Rome Statute, Article 8*bis*(1) (emphasis added) (https://www.legal-tools.org/doc/3cf6dd/).

cember 2017, the Assembly of States Parties activated the jurisdiction of the ICC over the crime of aggression with effect from 17 July 2018.<sup>51</sup> This date was marked by the ICC as a moment of historic significance, despite the ongoing difficulties in defining both the scope of the Court's jurisdiction as well as the exact opt-out procedure available to countries not wishing to be bound by the amendment to the Rome Statute.<sup>52</sup>

If one looks at the evolution of the crime of aggression, three major trends become obvious. Firstly, there is an ongoing reluctance at defining the offence. Even though the Rome Statute has now been amended to include the elaborate definition of that crime, the road to the adoption of the amendments was thorny and the intricate nature of the legal definition can be explained precisely by States' desire to create a feasible opt-out mechanism that would protect them from the jurisdiction of the Court.

Secondly, the discussion that took place in Tokyo as to whether a State can unilaterally invoke the right to self-defence is still a very timely and relevant one. On 17 May 2018, at the meeting of the UN Security Council dedicated to its role in maintaining international peace, the representatives of Brazil warned against expansive interpretation of the right to self-defence in violation of Article 2(4) of the UN Charter. Brazil's representatives noted that despite the year 2018 marking the ninetieth anniversary of the Kellogg-Briand Pact prohibiting the use of force as national policy, States keep unilaterally invoking it for various purposes, including the protection of human rights, thereby putting in question the stability of an international legal order.<sup>53</sup> The restrictive interpretation of the right to self-defence furnished by the majority at the IMTFE is therefore very modern and relevant, as it resonates with the debates currently ongoing in the UN Security Council.

Thirdly, and related to the question of self-defence, is the ongoing contestation of the scope of the prohibition of the use of force. The Tokyo judgment essentially avoided an overall discussion of the issue, but it highlighted the criminality of the motivation to wage an aggressive war

<sup>&</sup>lt;sup>51</sup> ICC, Press Release, "Assembly activates court's jurisdiction over crime of aggression", 15 December 2017 (https://www.legal-tools.org/doc/40be95/).

<sup>&</sup>lt;sup>52</sup> Nikolas Stürchler, "The Activation of the Crime of Aggression in Perspective", *EJIL: Talk!*, 26 January 2018 (available on its web site).

<sup>&</sup>lt;sup>53</sup> Security Council 8262<sup>nd</sup> meeting, "Security Council Must Rectify Failure to Prohibit Use of Force, Maintain International Peace, Speakers Stress in Day-long Debate", SC/13344, 17 May 2018.

with the purpose of dominating another country. As recently noted by Brazil, force still occupies a prominent place in international relations with various justifications underlying its deployment, including humanitarian intervention, or acting to alleviate the extreme humanitarian suffering of the people.<sup>54</sup> For instance, the UK engaged creatively with the concept of humanitarian intervention to justify the Syria strikes of 13 April 2018.<sup>55</sup> The action was met by scepticism in some legal circles as this doctrine fell short of being an established principle of customary international law.<sup>56</sup>

## 11.4. War Crimes

The category of war crimes draws its substantive content from international humanitarian law, which can be roughly presented as a combination of 'the law of the Hague' and 'the law of Geneva'. The former, codified in the 1899 and 1907 Hague Conventions, provides definitions of lawful combatants, regulates means and methods of warfare and the treatment of persons no longer taking part in hostilities (*hors de combat*). The latter comprises four Geneva Conventions of 1949 and two Additional Protocols of 1977 dealing primarily with the treatment of persons who do not, or no longer, take active part in hostilities (civilians, the wounded, the sick and the prisoners of war).<sup>57</sup>

International criminal law and international humanitarian law are closely connected, which explains the relatively solid grounding of war crimes in the sources of law. However, the aims of these two disciplines are different. International criminal law deals with the individual responsibility for violence that erupts in the course of an armed conflict between sovereign States (belligerency) or between armed groups within the State (insurgency).<sup>58</sup> In contrast, international humanitarian law performs more general regulatory functions and speaks to a wider audience. International

<sup>&</sup>lt;sup>54</sup> Syria Action – UK Government Legal Position, 14 April 2018 (available on the web site of the UK Government).

<sup>&</sup>lt;sup>55</sup> *Ibid*.

<sup>&</sup>lt;sup>56</sup> Opinion of Professor Dapo Akande, The Legality of the UK's Air Strikes on the Assad Government in Syria, 16 April 2018 (available on the web site of the UK Government).

<sup>&</sup>lt;sup>57</sup> Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, third edition, Oxford University Press, 2013.

<sup>&</sup>lt;sup>58</sup> ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, IT-94-1, para. 96 ('Tadic Jurisdictional Decision') (https://www.legal-tools.org/doc/ 01079f/).

humanitarian law frequently calls on States, as opposed to individuals, to ensure compliance by their military with the rules applicable in armed conflicts.

The absence of any legal precedent regarding the crimes prosecuted internationally, first by the IMT and then by the IMTFE, inspired the work of the United Nations War Crimes Commission, which was set up in 1943 to assist with finding substantive definitions. The primary task of this body was to investigate facts and formulate legal opinions relating to war crimes and penal liability of the perpetrators.<sup>59</sup> Consequently, war crimes as a category made an early entrance onto the scene of international criminal law and largely dominated it. Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter extended the jurisdiction of these Tribunals over war crimes, together with crimes against peace and crimes against humanity.<sup>60</sup> War crimes re-emerged in the statutes of the ICTY,<sup>61</sup> ICTR,<sup>62</sup> and Special Court for Sierra Leone,<sup>63</sup> as well as the Law on Establishing the Extraordinary Chambers in the Courts of Cambodia.<sup>64</sup> Article 8 of the Rome Statute contains the most sophisticated and detailed account of war crimes in modern international criminal law.

The IMTFE in the 1940s did not dwell on the contextual elements of war crimes and legal distinctions between different forms of warfare, but rather focused on specific instances of offending. The judges dismissed most of the charges describing responsibility of the defendants for various acts of mass atrocity on technical grounds, retaining only two counts covering war crimes and crimes against humanity (counts 54 and

<sup>&</sup>lt;sup>59</sup> History of the United Nations War Crimes Commission and the Development of the Laws of War compiled by the United Nations Commission, His Majesty's Stationary Office, London, 1948, p. 169 ('UN War Crimes Commission') (https://www.legal-tools.org/doc/ cac045/).

<sup>&</sup>lt;sup>60</sup> Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter.

<sup>&</sup>lt;sup>61</sup> Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute') (as amended on 17 May 2002), 25 May 1993, Articles 2 and 3 (https://www.legal-tools.org/doc/b4f63b/).

<sup>&</sup>lt;sup>62</sup> Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute') (as last amended on 13 October 2006), 8 November 1994, Article 4 (https://www.legal-tools.org/doc/ 8732d6/).

<sup>&</sup>lt;sup>63</sup> Statute of the Special Court for Sierra Leone, 16 January 2002, Articles 3 and 4 (https:// www.legal-tools.org/doc/aa0e20/).

<sup>&</sup>lt;sup>64</sup> Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC) Law, Article 6 (https://www. legal-tools.org/doc/88d544/).

55).<sup>65</sup> Count 54 of the indictment charged 19 persons for having ordered, authorized, permitted persons to commit offences violating the laws of war. Count 55 charged some defendants for being, by virtue of their respective offices, responsible for securing observance of the conventions and the laws and customs of war in respect of the armed forces, prisoners of war and civilians of the Allied forces; and for deliberately and recklessly disregarding their duty to take adequate steps to secure the observance and to prevent breaches thereof.<sup>66</sup>As Yuma Totani noted, the focus of the Tokyo Trial on crimes against peace led to the proposal of the lead American Prosecutor Joseph Keenan to drop the war crimes charges and shorten the trial. The proposition was rejected, and charges were heard.<sup>67</sup> The majority thus spent over 1,000 pages discussing evidence relating to aggression but very little space tackling war crimes.<sup>68</sup> The approach of the IMT-FE was thus illustrative rather than comprehensive.

As with the rest of the Tokyo judgment, the discussion of war crimes was highly factual. The legal analysis was interwoven into the general narrative of the Japanese aggression. There are, however, some significant discussions in the judgment that can serve as a legal precedent. For instance, the IMTFE encountered the question of whether the norms of the laws of war contained in the Geneva Prisoner of War Convention of 1928 are applicable to individuals in cases when the State is not legally bound by the respective convention. The IMTFE resolved this question by reference to customary international law, arguing that "under the customary rules of war, acknowledged by all civilized nations, all prisoners of war and civilian internees must be given humane treatment".<sup>69</sup>

In a highly significant part of the judgment, there is a discussion of the rapes and other atrocities which occurred in Nanjing:

> the members of the victorious Japanese Army had set upon the prize to commit unlimited violence. Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning. There was no discipline

<sup>&</sup>lt;sup>65</sup> See Yuma Totani, "The Case against the Accused", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 154.

<sup>&</sup>lt;sup>66</sup> Tokyo Judgment, pp. 48423-48424.

<sup>&</sup>lt;sup>67</sup> See Totani, 2011, p. 153, above note 65.

<sup>&</sup>lt;sup>68</sup> Boister and Cryer, 2008, p. 190, see above note 14.

<sup>&</sup>lt;sup>69</sup> Tokyo Judgment, p. 49719-20.

whatever. Many soldiers were drunk. Soldiers went through the streets indiscriminately killing Chinese men, women and children without apparent provocation or excuse until in places the streets and alleys were littered with the bodies of their victims. According to another witness Chinese were hunted like rabbits, everyone seen to move was shot. At least 12,000 non-combatant Chinese men, women and children met their deaths in these indiscriminate killings during the first two or three days of the Japanese occupation of the city.<sup>70</sup>

This is a rather under-acknowledged and early discussion on sexual crimes in international criminal law.<sup>71</sup> It was not until the 1990s that the ICTY and the ICTR picked up this important topic and prioritized the prosecution of sexual violence in times of war. The UN Commission of Experts, set up to analyse information pertaining to the violations of international humanitarian law on the territory of the former Yugoslavia, whose report served as a catalysis for the creation of the ICTY, singled out sexual violence as one of the main avenues for its work.<sup>72</sup> Annex IX of the Commission's report entitled "Rape and Other Forms of Sexual Assault" was part of the Commission's study pursuing the objective to serve, *inter alia*, as a basis for the eventual prosecution of rape and sexual assault by the ICTY.<sup>73</sup> M. Cherif Bassiouni, who headed the Commission at that time, noted that this rape investigation was the first one of its kind conducted in time of war.<sup>74</sup> The expectation was therefore that the ICTY would give

<sup>&</sup>lt;sup>70</sup> *Ibid.*, p. 49605.

<sup>&</sup>lt;sup>71</sup> See Diane Orentlicher, "The Tokyo Tribunal's Legal Origins and Contributions to International Jurisprudence as Illustrated by its Treatment of Sexual Violence", chap. 5 above.

<sup>&</sup>lt;sup>72</sup> United Nations Security Council, Resolution 780, 6 October 1992 (https://www.legal-tools. org/doc/cdc5ad/).

<sup>&</sup>lt;sup>73</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) dated 27 May 1994 ('Final Report'), UN Doc. S/1994/674, Annex IX, p. 6 (https://www.legal-tools.org/doc/361096/).

<sup>&</sup>lt;sup>74</sup> M. Cherif Bassiouni, "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780", in *American Journal of International Law*, 1994, vol. 88, pp. 794-795, 798.

"this particularly heinous crime its utmost attention",<sup>75</sup> which the Tribunal did.<sup>76</sup>

Another significant discussion on substantive war crimes pertained to that of torture: its definition and particular conduct that constitutes it. The IMTFE noted that the practice of torture of prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan. The IMTFE further listed the types of torture inflicted: "[a]mong these tortures were the water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging".<sup>77</sup>

Some of the issues discussed by the IMTFE have clear resonance with current debates. This is where the lens of 'constructed temporality' is useful in assessing the developments in international criminal law. For instance, it is interesting to dwell on the IMTFE's definition of waterboarding as torture:

> The Japanese Military Police, the Kempeitai, was most active in inflicting these tortures. [...] The Kempeitai were administered by the War Ministry. A Kempeitai training school was maintained and operated by the War Ministry in Japan. It is a reasonable inference that the conduct of the Kempeitai and the camp guards reflected the policy of the War Ministry. The so-called "water treatment" was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.<sup>78</sup>

In a sad and ironic twist, the use of torture as an 'enhanced interrogation technique' designed to fight terrorism, has re-entered public discourse of many States, including the US following the 9/11 attacks. Francesca Laguardia explains how the turn of criminal justice towards preven-

<sup>&</sup>lt;sup>75</sup> *Ibid*, p. 799.

<sup>&</sup>lt;sup>76</sup> For a comprehensive overview of the track record of the ICTY, see Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016.

<sup>&</sup>lt;sup>77</sup> Tokyo Judgment, p. 49663.

<sup>&</sup>lt;sup>78</sup> *Ibid.*, p. 49664.

tion of terror rather than the extraordinary circumstances of the fight against terror in the context of a non-international armed conflict is chiefly to blame for the increasing acceptance of torture by some officials of the Central Intelligence Agency ('CIA').<sup>79</sup> In her powerful article, she questions both the effectiveness of torture and the principles underlying its use, referring, for instance, to the case of the Guantánamo detainee, Khalid Sheikh Mohammed. In response to being waterboarded, he falsely stated that two individuals, subsequently erroneously detained, were linked to Al-Qaeda.<sup>80</sup> Notwithstanding the criticism by academics, the fact that the current CIA director, Gina Haspel, oversaw a secret prison where waterboarding was used, attests to the ongoing contestation related to the content and definition of war crimes as well as the implications of engaging in this conduct.<sup>81</sup>

It is therefore clear that the IMTFE's discussion of substantive war crimes has strong resonance with today's reality as the work on defining commonly accepted standards of behaviour is still ongoing.

## 11.5. Superior Responsibility

The last important contribution of the Tokyo judgment that is factual in nature but has strong legal implications is its interpretation of superior responsibility. The Tokyo Charter did not have a separate provision on modes of liability and only mentioned that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy" are to be held responsible for the substantive crimes mentioned in Article 5 of the Charter. This early stage of the development of international criminal law is characterized by the lack of distinction between the forms of participation and the substantive offences.<sup>82</sup> The IMTFE (and the IMT) judges did not dwell on the way in which individuals became involved in crimes, but rather focused on their actual contribution based on the circumstances of the case. It was only later, that

<sup>&</sup>lt;sup>79</sup> Francesca Laguardia, "Imagining the Unimaginable: Torture and the Criminal Law", in *Columbia Human Rights Law Review*, 2015, vol. 46, p. 48.

<sup>&</sup>lt;sup>80</sup> Ibid., p. 71, citing Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary, 2014, pp. 83, 108, n. 448.

<sup>&</sup>lt;sup>81</sup> David Smith, "Torture allegations dog Gina Haspel as she is poised to be first female CIA head", *The Guardian*, 16 March 2018 (available on its web site).

<sup>&</sup>lt;sup>82</sup> Aksenova, 2016, p. 79, see above note 5.

modes of liability crystalized into a separate issue and occupied an independent article in the Draft Code.<sup>83</sup>

Despite the lack of explicit focus on modes of liability, there is a striking similarity between the formulation of charges 54 and 55 in the Tokyo indictment and Articles 25(3)(b) and Article 28 of the Rome Statute of the ICC. As mentioned in the previous section, count 54 charged the defendants with "ordering, authorizing and permitting violations of the laws of war", while count 55 dealt with recklessly disregarding the legal duty to secure the observance of the laws of war. Article 25(3)(b) of the Rome Statute establishes responsibility for complicity in the form of ordering, soliciting, or inducing the commission of the crime, while Article 28 deals with the responsibility of military commanders and other superiors. Under the latter, military commanders are responsible if they either knew or, owing to the circumstances at the time, should have known – and other superiors are liable if they either knew, or consciously disregarded information which clearly indicated – that the subordinates were committing or about to commit the relevant crimes.

Yuma Totani argues that one of the biggest challenges to the prosecution in Tokyo was securing evidence of criminal orders for count 54 because of the empire-wide document destruction orchestrated by the Japanese Government prior to its surrender.<sup>84</sup> The prosecution procured witness statements and affidavits from victims, perpetrators and bystanders. This evidence did not implicate specific individuals but helped establish patterns of atrocities perpetrated by the Japanese, which, in turn, allowed the prosecution to argue that the atrocities were not random.<sup>85</sup> This was an interesting way of handling evidence and linking it to specific individuals. The analysis of the IMTFE with respect to this count was thus largely inferential – suggesting that the omnipresent patterns attest to individual

<sup>&</sup>lt;sup>83</sup> UN Doc. A/RES/177(II) (https://www.legal-tools.org/doc/57a28a). Doudou Thiam, who was appointed as the ILC's Special Rapporteur charged with preparing the document in the 1980s, identified the gap in international criminal law in attributing responsibility for the crimes committed by a plurality of persons. The Commission, from its thirty-fifth session, in 1983, to its forty-second session, in 1990, received eight reports from the Special Rapporteur. See the Report of the International Law Commission on the Work of its Forty-Third Session, 29 April-19 July 1991, UN Doc. A/46/10, p. 80 (https://www.legal-tools.org/doc/88a770/). See also Aksenova, 2016, p. 74, above note 5.

<sup>&</sup>lt;sup>84</sup> Totani, 2011, see above note 65.

<sup>&</sup>lt;sup>85</sup> *Ibid*.

responsibility for ordering and not the other way around. The defence unsuccessfully contested this approach.<sup>86</sup> The IMTFE concluded.<sup>87</sup>

During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that only one conclusion is possible - the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.

The IMTFE further held that war crimes were a matter of policy:<sup>88</sup>

At the beginning of the Pacific War in December 1941 the Japanese Government did institute a system and an organization for dealing with prisoners of war and civilian internees. Superficially, the system would appear to have been appropriate; however, from beginning to end the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded. Ruthless killing of prisoners by shooting, decapitation, drowning, and other methods; death marches in which prisoners including the sick were forced to march long distances under conditions which not even wellconditioned troops could stand, many of those dropping out being shot or bayonetted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offences.

Inferential analysis of the mental state of the defendant in the cases of ordering has interesting resonance with modern international criminal law. In the *Šljivančanin* case dealing with the movement of prisoners from the Vukovar hospital to Ovčara by the Yugoslav People's Army during the Balkan war, the ICTY Appeals Chamber viewed the failure of the accused to prevent the implementation of the unlawful order as satisfying all the

<sup>&</sup>lt;sup>86</sup> *Ibid.*, p. 158.

<sup>&</sup>lt;sup>87</sup> Tokyo Judgment, p. 49592

<sup>&</sup>lt;sup>88</sup> *Ibid.*, p. 49593.

requirements for a conviction as an accomplice to murder by omission.<sup>89</sup> It was held that although Mr. Šljivančanin no longer exercised *de jure* authority over the military police, his duty to protect the prisoners of war required him to order the police not to withdraw from the hospital where the prisoners were kept. The Appeals Chamber employed largely inferential analysis suggesting that "had he ordered the military police not to withdraw, these troops may well have, in effect, obeyed his order to remain there".<sup>90</sup>

Similarly, the ICC in *Mudacumura* (charged with committing war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus in the Democratic Republic of the Congo) tackled his responsibility for ordering under Article 25(3)(b) by highlighting that Mudacumura was the top military commander for the relevant period and instructed others to conduct a military campaign resulting in the commission of war crimes.<sup>91</sup> His knowledge about the crimes was inferred from the reports he allegedly received by virtue of his position. Thus, it is clear that despite the developed legal framework for different forms of individual criminal responsibility, inferential analysis based on the facts and the position held by the accused is still employed in modern international criminal law.<sup>92</sup>

With respect to count 55, the first challenge was to prove criminal negligence in cases involving civilians in positions of authority – an untested territory at that time.<sup>93</sup> One of the legal tools employed by the IMTFE to activate responsibility of civilians was referencing the Hague Convention IV of 1907, which states that: "Prisoners of War are in the power of hostile Government, but not of the individuals or corps who capture them".<sup>94</sup> The idea was therefore that the primary responsibility for the welfare of prisoners rests with the government. To that effect, the judges ruled on the responsibility of the government as a collective entity:

<sup>&</sup>lt;sup>89</sup> ICTY, Prosecutor v. Mrkšić and Šljivančanin, Appeal Judgment, 5 May 2009, T-95-13/1-A, paras. 101-103.

<sup>&</sup>lt;sup>90</sup> *Ibid.*, para. 93; Aksenova, 2016, p. 105, see above note 5.

<sup>&</sup>lt;sup>91</sup> ICC, *Prosecutor v. Mudacumura*, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, ICC-01/04-01/12, paras. 64-65 (https://www.legal-tools.org/doc/ecfae0/).

<sup>&</sup>lt;sup>92</sup> Aksenova, 2016, p. 258, see above note 5.

<sup>&</sup>lt;sup>93</sup> Totani, 2011, see above note 65.

<sup>&</sup>lt;sup>94</sup> Tokyo Judgment, p. 48498; Totani, 2011, p. 158, see above note 65.

The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. That Government also attempted to conceal the ill-treatment and murder of prisoners and internees by prohibiting the representatives of the Protecting Power from visiting camps, by restricting such visits as were allowed, by refusing to forward to the Protecting Power complete lists of prisoners taken and civilians interned, by censoring news relating to prisoners and internees, and ordering the destruction of all incriminating documents at the time of the surrender of Japan.<sup>95</sup>

The second challenge for the IMTFE was to dissect the responsibility of the government as a collective entity and link it to individual accused persons. This involved assessing the *mens rea* standard for this category of crimes. The judges interpreted the standard of 'reckless disregard' of a duty in a very broad way: "[i]f 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".<sup>96</sup> Furthermore, the IMTFE judges stressed that merely accepting assurances from those more directly involved in criminality is not enough:

[I]t 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.<sup>97</sup>

Interestingly, these findings did not translate into many guilty verdicts. Only three former Cabinet members were convicted on the ground of negligence (Hirota, Shigemitsu and Koiso). Seven others were found guilty of war crimes on various legal and factual grounds.<sup>98</sup>

<sup>&</sup>lt;sup>95</sup> Tokyo Judgment, p. 49750.

<sup>&</sup>lt;sup>96</sup> *Ibid.*, pp. 48445-6.

<sup>&</sup>lt;sup>97</sup> Ibid.

<sup>&</sup>lt;sup>98</sup> Totani, 2011, p. 159, see above note 65.

The recent *Bemba* appeal judgment rendered by the ICC provides for an interesting comparison with the mens rea standard in cases of superior responsibility. Bemba, who was President and Commander-in-Chief of the Movement for the Liberation of the Congo, was convicted for war crimes by the Trial Chamber under Article 28(a) of the Rome Statute, which, as mentioned, establishes responsibility of a military commander who either knew or should have known about the crimes committed by the subordinates. The Trial Chamber in this case acknowledged that Bemba undertook some measures to address the criminality. In particular, he sent a letter to the UN Representative in the region and requested the Prime Minister of the Central African Republic to set up an international commission of inquiry. The trial judges nonetheless held that Bemba's motivations in doing so were not "genuine".<sup>99</sup> On appeal, Bemba argued that, having been told that the investigation would take place, it was reasonable for him to wait for it.<sup>100</sup> The Appeals Chamber agreed with him and overturned his conviction, inter alia, for this reason, highlighting the practical and operational difficulties Bemba faced as a remote commander operating in a foreign country.<sup>101</sup>

The Appeals Chamber therefore adopted a much more conservative view on superior responsibility than that of the IMTFE 70 years earlier. It must be noted that the IMTFE dealt with responsibility of civilians under the 'reckless disregard' standard, while the ICC in the *Bemba* case looked at the responsibility of a military commander pursuant to the 'knew or should have known' test. The latter standard is however even lower than the 'reckless disregard' (or, as Article 28(b) of the Rome Statute calls it, 'conscious disregard') for other superiors. The situation in *Bemba* of a failure of the commander to follow up on his orders for investigation speaks directly to the pronouncement of the Tokyo Tribunal, which ruled that accepting mere assurances from others is *not* sufficient to absolve a superior of responsibility. The ICC Appeals Chamber ruled to the contrary. Moreover, it introduced the idea of a 'remote commander' – someone who cannot fully control the situation on the ground due to operational inabil-

<sup>&</sup>lt;sup>99</sup> ICC, Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08 A, para. 131 (https://www.legal-tools. org/doc/40d35b/).

<sup>&</sup>lt;sup>100</sup> Ibid., para. 159.

<sup>&</sup>lt;sup>101</sup> *Ibid.*, para. 189.

ity and thus cannot be held responsible for any actions outside of his or her control. This conception stands in contrast with the sweeping approach of the IMTFE holding the whole government responsible for the system of ill treatment of prisoners. It is therefore interesting to observe continuous contestation as to the scope of the notion of superior responsibility and the exact duties imposed on those in positions of authority.

### 11.6. Conclusion

This chapter demonstrated that international criminal law is not static. It is developing in a non-linear fashion by adding layers of complexity with every new cycle of its existence by constantly revising the same philosophical and legal problems. The Tokyo judgment is indeed very factual, which is in part due to the lack of the applicable law available at the time of its creation. But its struggles are not too different from those of modern international criminal justice, well equipped with sophisticated legal formulae and case law. There continue to be debates about the best way of attributing individual responsibility for collective offending, assessing the mental state of the accused in the absence of directly implicating evidence, and applying solidified prohibitions of various international crimes, such as torture, consistently across the spectrum of factual scenarios.

The flaws of the Tokyo judgment were arguably outweighed by the fact that the trial took place in a near legal vacuum,<sup>102</sup> having only the Nuremberg process to rely upon for precedent. Judith Shklar grappled with the application of the principle of legality to the Nuremberg trial when no law had existed prior to it.<sup>103</sup> Her solution was to draw attention away from the legalistic propensity of thinking about law in black and white terms as 'being there' or 'not being there'. It is much more plausible when assessing the legacy of the IMTFE (and the IMT) to focus on the quality of its work and the strength of its intention to achieve the best possible form of justice available at that moment in time.

While there were many deficiencies in the way law was administered in Nuremberg and later in Tokyo, it was an achievement in itself that the debates about the destiny of the defendants took place within the parameters set out by a legal trial. Mass execution or a purely political process could have been other alternatives. The fact that the setting of an in-

<sup>&</sup>lt;sup>102</sup> Shklar, 1964, p. 153, see above note 12.

<sup>&</sup>lt;sup>103</sup> *Ibid*.

ternational criminal trial was chosen to deal with the worst atrocities of the twentieth century had profound impact on how we currently think about individual responsibility of those in positions of power.

# The "President's Judgment" and Its Significance for the Tokyo Trial

#### **David Cohen**\*

#### 12.1. Introduction

The concurring opinion of Sir William Webb, the President of the International Military Tribunal for the Far East ('IMTFE'), was promulgated with the judgment of the majority and is widely referred to by scholars. Less well known, however, is another document entitled "The President's Judgment" but never published.<sup>1</sup> Webb completed and revised a draft of this judgment, noting in May 1948 that he hoped it would be adopted as the majority judgment of the Tribunal.<sup>2</sup> Webb circulated it to the other judges in the form of a "First Draft Judgment" and then a revised "Second

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<sup>&</sup>lt;sup>1</sup> The manuscript of Webb's Judgment may be found in the *Papers of Sir William Webb* at the Australian War Memorial in Canberra.

<sup>&</sup>lt;sup>2</sup> In a letter to MacArthur of 13 August 1947, which was apparently never sent, Webb referred to his activity in drafting as follows: "I am quite sure you intend that I should have all the help I need to write the Court's judgment, or, in any case, the leading judgment. This will be one of the most important and the longest in history. The law alone will be dealt with at considerable length" (National Archives of Australia ('NAA'), M1418, 6, p. 21). In a memorandum to all the judges on 20 December 1946, Webb invited their comments "on the first draft which I framed to meet what I thought might be the opinion of the majority" (NAA, M1417, 24, p. 1).

Draft Judgment".<sup>3</sup> When the majority refused to accept it, Webb decided to use the vastly shorter text that he provided to the IMTFE as his concurring opinion.<sup>4</sup>

This chapter considers why Webb refrained from using this massive 670-page typescript as his concurring opinion and what its significance is for the legacy of the Tokyo Trial. It will also consider how Webb's analysis of the evidence compels reconsideration of the 'victor's justice' perspective on the IMTFE, particularly concerning the charges of crimes against peace.

The President's Judgment is a complex and comprehensive document. Intended as the Tribunal's judgment, it is nothing less than a complete alternative account of the trial and the grounds of liability for the 25 defendants. Pal also produced what he termed his own "Judgment". But unlike Pal's, Webb's judgment actually addresses the substance of the trial and focuses, as was required, on the evidence against each of the individual accused. For this reason alone, Webb's virtually unknown draft judgment commands our attention as it provides the rigorous factual and legal analysis of individual responsibility that both the majority judgment and Pal's dissent fail to produce.

While Webb agreed with the majority that all of the defendants should be found guilty, he disagreed with them on almost everything else. Most importantly, Webb differed from the majority, Röling and Pal on the law as well as the legal and factual basis for the guilty verdicts. Unlike his colleagues, Webb provided a coherent, well-argued, reasoned account of the basis for finding *all* of the individual accused guilty on various, but by no means all of the charges against them. In a memorandum to the judges of February 1947, Webb stated that the Tribunal's judgment should be based upon a "full statement of evidence against and for each accused, followed by finding of fact, application of relevant law, and finally the

<sup>&</sup>lt;sup>3</sup> Webb's memorandum of 27 December 1946 is entitled "Second Draft Judgment" which sets out the general strategy for the second draft (NAA, M1417, 25).

<sup>&</sup>lt;sup>4</sup> This chapter draws upon the co-authored publication of David Cohen and Yuma Totani, *Tōkyō saiban "shinwa" no kaitai: Paru, Rērinku, Webu san-hanji no sōkoku* [The Deconstruction of the Tokyo Trial 'Myths': Battles among Three Justices, Pal, Röling and Webb], Chikuma Shobō, Tokyo, November 2018.

verdict in his case".<sup>5</sup> This is precisely what is lacking in the majority judgment and Pal's dissent.<sup>6</sup>

The bulk of the majority judgment is taken up by a narrative of the conspiracy to wage an aggressive war that tends to obscure the role of individual actors in favour of generalizing about the conspiracy. Webb's judgment, on the other hand, focuses on the role of each individual in the complex chain of events that led to the Japanese attacks against China and subsequently other countries. Unlike the majority and Pal, Webb also generally considers the contentions of both the prosecution and the defence. Webb's methodology thus stands in opposition to that of the other judges because he considered the individualized weighing of all the evidence as an essential requirement.

The majority judges, on the other hand, had decided that they would make their factual findings "without reference to the Defence summations".<sup>7</sup> Indeed, the majority judgment astonishingly makes little reference to the defence case. The same is true of Pal's "Judgment". Webb, however, urged the judges to incorporate analysis of the defence case into their judgment in a memorandum of 17 May 1948 where he stated: "we must do that to be fair". In a further admonishment applicable with equal force to Pal and to the majority, he argued that their task as judges is not "to write any phase of history".<sup>8</sup> Their duty, he continued, is to ascertain the guilt of the accused based upon the evidence and by a statement of factual findings as to each of them.

The difference in Webb's approach to that of the other judges is stark in quantitative terms. Pal's dissent fails to address the evidence against individual accused almost entirely. Instead, he treats them as a collectivity, none of whom bear any responsibility for Japanese war crimes which he nonetheless characterizes as not only widespread but "devilish

<sup>&</sup>lt;sup>5</sup> NAA M1417, 25, 21, 21 February 1947, p. 2.

<sup>&</sup>lt;sup>6</sup> Pal presented his separate opinion as "Judgment", that is, as a substitute for the judgment of the Tribunal rather than a separate opinion setting out his disagreement with the majority. In fact, Pal only refers to the majority judgment once, in the first sentence of his opinion. He then proceeds to write a final judgment for the trial which in his opinion should have taken place at Tokyo, a trial in which only the Allies would have been in the defendant's dock. For a full treatment of Pal's Judgment, see David Cohen and Yuma Totani, *The Tokyo War Crimes Trial: Law, History, and Jurisprudence*, Cambridge University Press, Cambridge, 2018, chaps. 12-13.

<sup>&</sup>lt;sup>7</sup> Memorandum of Webb to all judges, 17 May 1948, Australian War Memorial, 3DRL 2481.

<sup>&</sup>lt;sup>8</sup> Ibid.

and fiendish" in nature.<sup>9</sup> The majority judgment, on the other hand, does include individual verdicts with factual findings and legal conclusions for all 25 of the accused, which nonetheless comprise only 5 per cent of the judgment. In Webb's judgment, however, individual verdicts comprise 401 out of 670 pages. Some 60 per cent is devoted to Part VI, "Individual Cases", providing specific factual findings against each of the individual accused persons.

Beginning with Pal, critics of the guilty verdicts at Tokyo have too often concluded that they are based upon victor's justice rather than the evidence against the accused. Most of those critics, however, are unlikely to have analysed the contents of the nearly 50,000 pages of transcript, more than 4,000 supporting exhibits, and the almost 800 depositions and affidavits. Likewise, neither Pal's dissent nor the majority judgment assesses this massive body of evidence concerning each of the individual accused. This is precisely the glaring shortcoming addressed by the President's Judgment. Thus, Webb alone fulfilled the basic duty of a judge in basing his verdicts of guilt or innocence upon a systematic analysis of the evidence supported by a reasoned account justifying his factual and legal conclusions. His judgment, then, provides a far better basis than the majority or dissenting judgments for assessing whether the verdicts against the individuals were in fact supported by the evidence or dictated by prejudice or politics. In what follows, we will consider Webb's treatment of the most controversial charges at Tokyo - the charges related to the planning, initiating and waging of an aggressive war, and participation in a conspiracy to do so.

### 12.2. Webb on Crimes Against Peace and Aggression

In his judgment, Webb prefaces his consideration of the liability of each of the accused for crimes against peace by a series of factual findings in Part IV, "Japan's Recourse to War". That section considers the evidence on how policy decisions were reached involving the war in China and its later expansion to attacks on the Western powers. The roles played by the accused in those policymaking bodies are demonstrated by the evidence presented in the prosecution and the defence cases, a treatment absent in the majority judgment.

<sup>&</sup>lt;sup>9</sup> Pal, p. 1354 in Boister and Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments*, Oxford University Press, 2008 (emphasis in the original text) (https://www.legal-tools.org/doc/38eba7/).

There, Webb appears to reply to Pal's claim that acts of State confer immunity on government policymakers. He also rejects Röling's argument that officials who intend peace should also be immune from prosecution. Webb applies the principle already established at Nuremberg, that "[t]here is no immunity for anyone, soldier or civilian, who takes part in what he knows, or should know, to be an illegal and criminal war".<sup>10</sup> A handwritten note is appended to this passage that again seems to be aimed at Röling's unprecedented argument for immunity for five of the accused whose intentions were peaceful: "There is no principle of law or justice which gives immunity [...] immunity cannot be granted by this Tribunal which has no power to alter the law but can only ascertain and apply it".<sup>11</sup>

One of the challenges Webb had to meet in analysing the responsibility of the individual accused for crimes against peace arose from his clear acknowledgement that the Japanese political and military leadership was wracked by sharp divisions of opinion and competing policies in regard to war in China and beyond from 1931 to 1945. The majority judgment ignores the legal significance of such evidence by resorting to the theory of an overarching conspiracy from 1928 to 1945. Pal's dissent, on the other hand, scarcely considers such evidence before the Tribunal or its significance. How did Webb, then, account for holding individual defendants liable in this context of apparent uncertainty about whether and when to go to war?

Webb's underlying rationale seems to be that, at certain points in time, every one of the accused became aware that Japan was either deciding to engage in wars that could not plausibly be justified on legal grounds or was actually engaged in such a war. He reasons that, *with and in spite of this knowledge*, they nonetheless supported and participated in planning or implementing the aggression. We will examine whether Webb's factual findings were based on sufficient evidence to support his conclusions against each of the accused.

Unlike the majority, Webb deals at length with the technical legal issue concerning the authority of the Tribunal's Charter and with the legal basis for the charges of waging an aggressive war in his judgment. While the majority was content to merely quote at length parts of the Nuremberg

<sup>&</sup>lt;sup>10</sup> The President's Judgment, p. 267, see above note 1.

<sup>&</sup>lt;sup>11</sup> *Ibid.* See below on Röling's argument that an intention to work for peace exculpates the accused.

judgment, Webb felt that it was important to address in some detail the kinds of arguments made by Pal, Röling and the defence counsel on these issues. While Webb's treatment merits serious attention, the question of the status of the Charter and of crimes against peace is beyond the scope of this chapter. One point that deserves mention here, however, is Webb's argument as to the role of the Tribunal in defining aggression, something the majority neglected to do. Webb raises the fundamental question of how, in the absence of definitions in the instruments, a determination is to be made in concrete cases whether the resort to arms constitutes self-defence or an illegal act of aggression. Webb cites Lauterpacht, who maintained that under international law, the State resorting to war purportedly in self-defence cannot hold

the right of ultimate determination [...] of the legality of such action. No such right is conferred by any other international agreement. The legality of recourse to force in selfdefence is in each particular case a proper subject for impartial determination by judicial or other bodies.<sup>12</sup>

For Webb, then, this determination was the task of the Tokyo Tribunal.

Applying this principle, Webb moves beyond abstract discussions of the interpretation of the 1928 Kellogg-Briand Pact (Pact of Paris). Instead, his judgment focuses on the position taken by the Japanese Government itself in negotiations clarifying its understanding of its obligations under the Pact. These negotiations revealed, in his view, that the Japanese Government acknowledged that *the only legal justification for recourse to war was legitimate self-defence*. From this perspective, the claims by the defence (and Pal) that the Tribunal was applying an *ex post facto* norm could be dismissed as without merit, for *the Japanese Government itself had accepted that recourse to war unless in self-defence, violated international law.* 

For Webb, it inevitably follows that only a judicial body - in this case, the IMTFE - can determine whether the resort to violence in a specific case constitutes aggression or self-defence. To apply this standard, a definition of aggression is required. As noted above, the majority failed to define aggressive war, and Pal stated that he would neither define aggression nor offer a conclusion as to whether or not Japan's invasions of Chi-

<sup>&</sup>lt;sup>12</sup> Ibid., p. 16 (quoting Hersch Lauterpacht (ed.), Oppenheim's International Law, sixth edition, vol. II, Longman, Green & Co., London, 1944 [1940], pp. 154–55).

na and other Asia-Pacific nations constituted aggression. By contrast, in his judgment, Webb defines criminal aggression as "recourse to war for the solution of international controversies: as an instrument of national policy".<sup>13</sup> The standard for determining liability for crimes against peace thus becomes whether the State in question has engaged in hostilities to further its national policies or in legitimate self-defence. Webb applies this definition in both his factual findings and individual verdicts. In each case, he inquires whether warlike actions undertaken in China and elsewhere were implemented to advance Japanese policy objectives or were responses to military force directed at Japan.

Whatever one may think of the substantive merits of Webb's definition, what is important here are three factors that distinguish it from the approach of the majority judgment and Pal's and Röling's dissents on this issue:

- 1. He has articulated a definition and adduced evidence to show that it was a definition acknowledged by the Japanese Government and other nations.
- 2. He has based that definition upon an analysis of generally accepted standards derived from contemporary international legal instruments and the leading jurisprudence.
- 3. He has applied this standard to test the evidence in making his factual findings and ultimate determinations of guilt.

These factors together distinguish the President's Judgment as a reasoned opinion in support of its conclusions in contrast to the more haphazard approach of the other judges.

Webb builds upon his definition of aggression by next addressing how that standard is to be applied to individual defendants. He reasons that: "Every state that became a party to the Pact of Paris perceived and acknowledged the illegality and criminality of recourse to war [...] as an instrument of national policy". Japan, of course, was one of those States. Webb continues by arguing that if one of those States engages in aggressive war, then "those individuals through whom it acts, *knowing as they do that their state is a party to the Pact*, are criminally responsible for this delict of state".<sup>14</sup>

<sup>&</sup>lt;sup>13</sup> *Ibid*.

<sup>&</sup>lt;sup>14</sup> *Ibid.*, p. 17 (emphasis supplied).

Webb has thus followed Nuremberg in rejecting the defence's and Pal's contention that individuals cannot be held responsible for 'acts of state'. This is, of course, one of the most fundamental contributions, perhaps the most important contribution, of the IMT judgment to the development of international law. It destroyed, once and for all, the legal fiction that it is States that 'act', rather than the individuals who possess the legal authority and power to determine, control and implement the policies of those States.

Having articulated this standard, Webb then notes that it must be applied to those specific individuals who planned or prepared for that war, *knowing that it was aggressive in nature*. The burden is on the prosecution to prove both the aggressive nature of the war and the knowledge of the accused of its character. In addition to holding those who plan or prepare aggressive war liable, Webb further articulates the sweeping scope of the application of his standard:

> The view that aggressive war is illegal and criminal must be carried to its logical conclusion, e.g., a soldier or civilian who opposed war but after it began decided it should be carried on until a more favorable time for making peace was guilty of waging aggressive war.

> There are no special rules that limit the responsibility for aggressive war, no matter how high or low the rank or status of the person promoting or taking part in it, *provided he knows or should know it is aggressive.*<sup>15</sup>

Webb's standard thus encompasses all those soldiers and civilians who participate in an aggressive war within the circle of liability, *if* they have, or should have had, knowledge of its illegality. The ensuing discussion of the individual verdicts will show how wide Webb was prepared to cast the web of accountability. It is clear, however, that Webb's standard directly contradicts the position advanced by Röling that officials who are aware of the aggression but participate in an aggressive war with a view to peace should be immune from punishment.

<sup>&</sup>lt;sup>15</sup> *Ibid.*, p. 17-a (emphasis supplied).

#### 12.3. Webb's Individual Factual Findings and Verdicts on Crimes Against Peace: Case Studies

We now turn to Webb's findings against specific defendants on crimes against peace. We focus on a few as case studies, including some of the 'peacemakers' whom Röling wanted to excuse from responsibility. We will see how Webb, unlike the majority, Pal or Röling, weighs the evidence relevant to the charges. Since his treatment of each of the accused is quite lengthy, it is not possible here to provide a full account of all of his analysis. We focus instead on examples that make clear the reasoned basis of his conclusions.

### 12.3.1. The Case of Hata

Shunroku Hata was found guilty by the majority because while he was the Army Minister, the war in China was waged "with renewed vigor",<sup>16</sup> and because he was a member of the conspiracy to achieve domination of East Asia and the Pacific. This conclusion by the majority does not explain Hata's connection to the conduct of the war in China or provide an evidence-based account in support. In contrast to the majority's cursory treatment, Webb devotes 14 pages to a detailed analysis of the evidence against Hata.<sup>17</sup>

Webb first considers Hata's role after he "assumed command in Central China" on 14 February 1938. Webb quotes Hata's key admission during his interrogation about the nature of the conflict in China, that: "Although it actually was a war, all they ever considered it was a Chinese Incident!"<sup>18</sup> This admission is significant, of course, because it both undercuts the defence's position on China as well as indicates Hata's complete awareness of the true nature of the conflict and the hollowness of the Japanese interpretation. Webb goes on to detail that while Hata was in command in Central China, the stated policy of the Japanese Government

<sup>&</sup>lt;sup>16</sup> International Military Tribunal for the Far East, Judgment, 4 November 1948, p. 1154 ('Majority judgment') (https://www.legal-tools.org/doc/09f24c/).

<sup>&</sup>lt;sup>17</sup> The President's Judgment, pp. 315-28, see above note 1.

<sup>&</sup>lt;sup>18</sup> *Ibid.*, p. 315 (PX256, T3451). In all references, PX and DX refer to the prosecution and the defence exhibits respectively. T refers to the page of the trial transcript, where the quote cited by Webb appears or, as the case may be, where the exhibit in question is introduced. Further footnotes will provide, in parentheses, only the references to the exhibits and transcript where the quotation can be found. The transcript itself is available in the ICC Legal Tools Database.

was that they would continue military operations until the "National Government was "completely annihilated."".<sup>19</sup>

Turning to Hata's role as the Army Minister from 1939, Webb's discussion again highlights the vagueness of the conclusions of the majority as to the grounds of Hata's liability. Webb cites records of interrogations, quotes Hata's own words in his official capacity, refers to the testimony of witnesses, and provides exact dates of relevant evidence. For example, Webb provides a lengthy quotation from Hata's statement at a committee meeting of the Imperial Diet on 22 March 1940, that because of the "anti-Japanese policy" of the Nationalist Government (that is, refusing to surrender or be defeated on the battlefield), "Japan is now fighting what one may call a "Holy War"" to bring about peace in Asia.<sup>20</sup>

An "anti-Japanese policy" in the absence of a Chinese armed attack against Japan of course cannot serve as a justification for a war in selfdefence. The argument that the aim of aggression is to bring about peace also cannot serve this purpose. In other words, Webb demonstrates Hata's understanding that what the latter termed the Japanese war against China was in pursuit of national policies. As such, per Webb's definition, it constituted aggression. Accordingly, Webb notes that Hata also argued that Japan should ignore the Nine Power Treaty and should focus on overcoming any resistance to "the establishment of the new order in East Asia".<sup>21</sup> Webb refers to Hata's own testimony that, because he had studied international law, he knew that the war in China was a violation of the treaty. This is of course a crucial admission. Hata stated: "There seemed to be no other way out but to resort to armed force when other means failed".<sup>22</sup>

The most striking contrast between Webb's approach and that of the majority is that Webb finds Hata guilty of aggressive war only in respect to his activities regarding China. Although Webb details Hata's key role in the downfall of Mitsumasa Yonai's cabinet in 1940 and in proposing Hideki Tōjō as Prime Minister, he primarily relies on the overwhelming evidence regarding China. The majority, on the other hand, relies on gen-

- <sup>21</sup> *Ibid.* (PX3832, T38021–23).
- <sup>22</sup> *Ibid.*, p. 318 (PX256, T3451).

<sup>&</sup>lt;sup>19</sup> Ibid. (Prime Minister Fumimaro Konoe's public statement, 16 January 1938, PX268, T3564).

<sup>&</sup>lt;sup>20</sup> *Ibid.*, p. 317 (PX3832, T38017–18).

eralities to find Hata responsible for conspiring to dominate the Asia-Pacific region.

#### 12.3.2. The Case of Hiranuma

Although Kiichirō Hiranuma was a major figure in crucial periods of Japan's policymaking with regard to the war in China, the majority devotes a mere 16 lines to justify its finding of guilt on crimes against peace. Webb, on the other hand, spends 15 pages analysing Hiranuma's specific contribution to the Japanese war policies. One of the few specific findings cited by the majority against Hiranuma is merely that he *attended* the 29 November 1941 meeting of *jūshin* ('senior statesmen') that advised the Emperor on going to war. Webb, in contrast, actually analyses Hiranuma's particular roles from 1931 until the end of the war.

Webb first details the role of the Privy Council in the Manchurian 'Incident', when Hiranuma was its Vice-President (becoming the President in 1936, before turning Prime Minister in 1939). Webb refers specifically to Hiranuma's statements during a Privy Council meeting on 13 September 1932 regarding the creation of a puppet 'independent' State in Manchuria, and especially the Council's readiness to approve the Japan-Manchukuo Protocol.<sup>23</sup> Webb does sometimes merely refer to decisions of the Privy Council without specifying what Hiranuma said and did, perhaps imputing these decisions to him by virtue of his leadership role as the (Vice-)President.<sup>24</sup> On the other hand, Webb's treatment of Hiranuma's tenure as Prime Minister is replete with specific references to his statements and deeds relevant to the charges against him. To cite but a few examples, Webb recounts how, in order to retain Itagaki as Army Minister in his cabinet, Hiranuma agreed to seven specific demands of the Army Senior Chiefs that aimed at putting Japan on a war footing and achieving victory in China.25

In regard to Hiranuma's China policy, Webb cites evidence against him that is surprisingly omitted in the majority's verdict despite its obvious inculpatory relevance. Webb recounts that on 2 January 1939, Hiranuma told the Imperial Diet that he intended to pursue the previous China policy at all costs. Webb continues: "There was no alternative, he [Hiran-

<sup>&</sup>lt;sup>23</sup> *Ibid.*, pp. 330–31.

<sup>&</sup>lt;sup>24</sup> *Ibid.*, p. 331.

<sup>&</sup>lt;sup>25</sup> *Ibid.*, pp. 332–33.

uma] concluded, but *to exterminate* those who persisted in opposition to Japan".<sup>26</sup> Webb also quotes at length the "HIRANUMA Declaration of 4th May 1939 addressed to Hitler"<sup>27</sup> which pledged Japan's political, economic and military support to Germany in the event of war, and references the cabinet decision of 5 June 1939 to implement this pledge to participate "in a German war against England and France".<sup>28</sup>

Webb also details the many cabinet decisions, as well as the Liaison Conference and other key meetings, in which he participated. In some cases, Webb only mentions the decision that was reached; in other cases, he states, for example, that "HIRANUMA agreed".<sup>29</sup> On the most important of these meetings, however, Webb does go into considerable detail. The majority referenced Hiranuma's agreement with the conclusion of the 29 November 1941 meeting of the senior statesmen that war with the United States was "inevitable".<sup>30</sup> Unlike this statement of dubious inculpatory weight, Webb details Hiranuma's actual contribution to the discussion.

In response to  $T\bar{o}j\bar{o}$ 's assertion during the 29 November 1941 meeting that war with the Western powers could not be avoided, Hiranuma "remarked that he agreed that Japan was equal to a prolonged war with the United States in spiritual strength but doubted its ability in material power. He urged that adequate measures and efforts be taken to awaken patriotic sentiment".<sup>31</sup> The transcripts of the 29 November meeting were not presented as evidence, but Webb could draw upon a wealth of oral evidence taken from some of those individuals who had attended the meeting, such as  $T\bar{o}j\bar{o}$ , Yonai and Reijir $\bar{o}$  Wakatsuki, as well as an excerpt from *The Kido Diary*, in which K $\bar{o}$ ichi Kido, the imperial confidant, recorded the gist of the meeting and offered additional explanatory remarks about it. Webb also considers Hiranuma's opposition to peace negotiations in 1945. Among other actions of Hiranuma, Webb recounts how, at a meeting held on 5 April 1945, Hiranuma said "he was strongly opposed to

<sup>31</sup> The President's Judgment, p. 342, see above note 1.

<sup>&</sup>lt;sup>26</sup> *Ibid.*, p. 334 (emphasis added) (PX2229-A, T15989–90).

<sup>&</sup>lt;sup>27</sup> Ibid., p. 337 (the full text of the Hiranuma Declaration can be found in Telegram from Ambassador Ott in Tokyo, to State Secretary von Weizsäcker, 4 May 1939, PX503, T6104–06).

<sup>&</sup>lt;sup>28</sup> *Ibid.*, p. 339

<sup>&</sup>lt;sup>29</sup> *Ibid.*, p. 340.

<sup>&</sup>lt;sup>30</sup> Majority judgment, p. 1156, see above note 16.

any advocacy for peace and cessation of hostilities and so there was no way out but to fight to the end". $^{32}$ 

Webb has thus provided specific factual findings and evidence to support his analysis of Hiranuma's role. He concludes that as President of the Privy Council, Hiranuma overrode objections to Japan's aggression in Manchuria and co-operated with the government and army initiatives to "bring Manchuria under Japanese military, political, economic and industrial control for Japan's benefit".<sup>33</sup> These actions, Webb demonstrates, constitute waging aggressive war against China in pursuit of national interests. Webb then concludes on the basis of factual findings that, when he served as Prime Minister, Hiranuma played a major part in further waging war against China.

Webb has also supported his conclusions with Hiranuma's statements at the senior statesmen and Imperial Conference meetings, and his opposition to ending the war in 1945. Unlike the majority, Webb has not only cited but also analysed the statements attributed to Hiranuma at the 29 November 1941 meeting of the senior statesmen to show that, although he "doubted Japan's material strength", he nonetheless *counselled for and supported* the intended war.<sup>34</sup>

## 12.3.3. The Case of Hirota

No conviction at Tokyo has aroused as much controversy as that of Kōki Hirota. Defended by the dissenting opinions of Pal and Röling, Hirota has been portrayed as a martyr to victor's justice. The failure of the majority judgment to analyse all the evidence before the Tribunal on Hirota has made it easier for critics to support the views of Pal and Röling. At the same time, perhaps no other verdict makes clearer how one's perspective on the evidence might change as seen through the lens of Webb's draft judgment.

A review of the findings and conclusion of Webb's draft judgment indicates that a reasoned case could have, and should have, been made by the majority to support their verdict against Hirota. The evidence relied upon in Webb's draft judgment also calls into question the attempt by Röling to explain away Hirota's role at the centre of Japanese policy-

<sup>&</sup>lt;sup>32</sup> *Ibid*.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, p. 343.

<sup>&</sup>lt;sup>34</sup> *Ibid.*, p. 344.

making in the critical period of 1936 to 1938. It must again be emphasized, however, that the aim here is *not* to arrive at a conclusion concerning the guilt or innocence of Hirota or any other of the defendants. Instead, this treatment of Webb's judgment aims to both underscore the shortcomings of the majority judgment and dissenting opinions, as well as show what kind of case Webb could make to support his verdicts, based upon the evidence before the court.

In comparison with the far more superficial treatments by the majority, Röling and Pal, Webb devotes 20 pages of his draft judgment to a close analysis of Hirota's role as Foreign Minister and Prime Minister through the crucial period from 1933 to 1938. This, Webb shows, was the period when Japan's policy towards China hardened and the foundational decisions that led to the Pacific War were taken. By virtue of the offices he held and the policies he pursued, Hirota played a key role in these decisions. Here again, Webb, unlike the majority, takes Hirota's own words and deeds as the evidentiary basis for reaching his legal conclusions.

Webb begins by noting that already as Ambassador to the Soviet Union from 1930 to 1932, Hirota had stated that it should be Japan's policy to be ready for war, and that the "principal purpose of such policies was *not defense against communism, but rather the conquest of East Siberia*".<sup>35</sup> This policy advice clearly indicates an awareness that armed force was to be used, not in self-defence, but to advance national interests. Webb also quotes *The Saionji-Harada Memoirs* and other sources to show Hirota's commitment to abrogating the Washington Naval Treaty, a position on which he stated: "We are taking an unconditional stand".<sup>36</sup> Such evidence provides only the introductory backdrop to the far more detailed account of Hirota's actions and intentions regarding the Japanese expansion in China.

Webb begins by noting that Hirota was a member of the Cabinet on 22 December 1933 when it reached a key decision on the independence of Manchukuo. To show that Hirota personally favoured such a policy, Webb cites Hirota's speech of 23 January 1934 to the Imperial Diet in which "he acclaimed the establishment of Manchukuo as an independent country".<sup>37</sup> With respect to the Army's advance into China, Webb provides detailed

<sup>&</sup>lt;sup>35</sup> *Ibid.*, pp. 345–46 (emphasis supplied) (PX693, T7452).

<sup>&</sup>lt;sup>36</sup> *Ibid.*, p. 346 (PX3777-B, T37669).

<sup>&</sup>lt;sup>37</sup> *Ibid.*, p. 347 (DX3237, T29453–54).

evidence showing that Hirota, as Foreign Minister, had been apprised of its intentions and preparations. He also cites Hirota's statements, diplomatic communications, and policy briefs to show that Hirota was actively engaged in promoting these plans for further Japanese expansion into China.<sup>38</sup>

After Japan initiated hostilities in China on 7 July 1937 (the Lukouchiao, Lugou Bridge or Marco Polo Bridge Incident), Hirota supported cabinet decisions for further military activity against China. In a speech to the Imperial Diet on 27 July 1937, Hirota "blamed China for the incident",<sup>39</sup> and made further statements that were contradicted by the actual decisions already taken by the Cabinet. Webb cites the 7 August 1937 draft terms of settlement with China that was prepared by Foreign Minister Hirota, the Premier, and Navy and Army Ministers. This draft stated that "we should be determined to exercise military power on a large scale and for a long period of time".<sup>40</sup>

To cite only some of the most inculpatory evidence considered by Webb, he notes that when Japan had commenced full-scale military operations in China, Hirota and the Army and Navy Ministers decided on 7 August 1937 that "the principal areas for using military force on land should be Hopei-Chahar and Shanghai".<sup>41</sup> Webb also references a similar speech to the Imperial Diet on 5 August 1937, where Hirota blamed the Chinese for the Japanese attack on Shanghai and gave his approval to increasing Japanese forces and the dispatch of warships there.<sup>42</sup> (The date Webb identified may be incorrect as the Shanghai Incident broke out on 13 August 1937.)

Webb further provides a detailed account of the Japanese negotiations with the Nationalist Government, showing how the Cabinet, with Hirota in a key role, overrode the Army General Staff's desire to reach a settlement, by insisting on terms that he knew the Chinese would not agree to. Webb cites evidence showing that even the Germans understood Japan's policy to be in bad faith and communicated as much to Hirota. This policy culminated in a decision of the Imperial Conference issued on

<sup>&</sup>lt;sup>38</sup> *Ibid.*, p. 349.

<sup>&</sup>lt;sup>39</sup> *Ibid.*, p. 350

<sup>&</sup>lt;sup>40</sup> *Ibid.*, p. 351 (PX3735, T37223).

<sup>&</sup>lt;sup>41</sup> *Ibid.*, p. 352 (PX3735, T37221).

<sup>&</sup>lt;sup>42</sup> *Ibid*.

16 January 1938 that the "Imperial Government will not care for the National Government hereafter", and would replace the government of China at the time with one that "will be a worthy coalition with our Empire".<sup>43</sup>

To demonstrate Hirota's position on these 'epoch-making' policy decisions, Webb cites Hirota's speech of 16 February 1938 to the Imperial Diet, where Hirota admitted that "Japan had never tried to compromise with Chiang Kai-shek [...] and that Japan had pursued a policy of chastising China in order to change her attitude".<sup>44</sup> Webb again cites *The Saionji-Harada Memoirs* on Hirota's attitude, quoting his statement that, because the Chinese were bluffing, "there was nothing to do but launch the alternative plan of long-term warfare".<sup>45</sup> In other words, war was to be used to advance national policy goals.

Although Webb continues to detail Hirota's activities up to the outbreak of the Pacific War, the discussion above should be sufficient to demonstrate that Webb relied upon specific evidence of what Hirota actually said and did in arriving at his factual findings. He also appears to have done so in a balanced way, noting, for example, that in the 29 November 1941 meeting of senior statesmen, Hirota advised that Japan should not rush into war, should postpone the attack, and should seek a diplomatic solution after the initiation of hostilities.<sup>46</sup>

On the evidentiary basis of such factual findings, Webb argues that "[n]o other civilian prime minster, except perhaps HIRANUMA, supported" the militarists with such consistency.<sup>47</sup> To support this conclusion, Webb refers to some of the evidence on which he has made findings, from Hirota's advocacy of the conquest of East Siberia, to his position on Manchukuo and the further aims "to dismember China and bring it under Japan's control [...] This was in reality taking part in the waging war against China".<sup>48</sup> Webb concludes from the disingenuous settlement negotiations with CHIANG Kai-shek and Hirota's articulation of the necessity

- <sup>45</sup> *Ibid.*, p. 357 (PX3789-A, T37723).
- <sup>46</sup> *Ibid.*, pp. 363–64.
- <sup>47</sup> *Ibid.*, pp. 364–65.
- <sup>48</sup> *Ibid.*, p. 365

<sup>&</sup>lt;sup>43</sup> *Ibid.*, p. 358.

<sup>&</sup>lt;sup>44</sup> *Ibid.* (PX3737-A, T37295–96).

for a 'long term' war that "[h]e was determined to wage war to destroy Chiang and get complete control of China".<sup>49</sup>

On the other hand, Webb's balanced weighing of specific evidence considers the sufficiency of the evidence on responsibility for the expansion of the war in 1941, concluding that although Hirota "did as much as any civilian to prepare" for the Pacific War, the fact that he at the critical moment suggested postponement "precludes a finding beyond reasonable doubt that he initiated the Pacific War".<sup>50</sup>

One would scour the majority judgment and Pal's and Röling's dissents in vain to find a similar weighing of the evidence and an explicit expression of the application of the reasonable doubt standard. Webb continues, however, that in relation to waging the Pacific War, when Koiso became Prime Minister in 1944, "HIROTA advocated the prosecution of that illegal and criminal war".<sup>51</sup> Whatever one's personal conclusion as to Hirota's culpability, there is little doubt that Webb's verdict provides a reasoned decision based upon consideration of the evidence which Webb deemed relevant to the charges. This, along with other evidence Webb cites in his general treatment of the developments of these years, presents the case that the dissenting opinions have failed to answer.

## 12.3.4. The Case of Kimura

In a brief treatment, the majority judgment characterizes Heitarō Kimura as a mere accomplice. Webb shows, however, that his roles and responsibilities as an Army general and later as Vice Army Minister were actually far more substantive. Webb has adduced evidence to show that Kimura played an active and important role in a number of contexts.

With regard to Kimura's role in the war in China, Webb notes that apart from his earlier role as a Major-General in Tokyo, on 9 March 1939, he was promoted to Lieutenant-General and received a field command in China. In 1940, Kimura was made Chief of Staff of the Kwantung Army and served on key committees charged with the economic exploitation of Manchukuo.<sup>52</sup> The main thrust of Webb's analysis, however, details Kimura's conduct as Vice Army Minister from 10 April 1941. He notes that

<sup>&</sup>lt;sup>49</sup> *Ibid*.

<sup>&</sup>lt;sup>50</sup> *Ibid.*, p. 366.

<sup>&</sup>lt;sup>51</sup> *Ibid*.

<sup>&</sup>lt;sup>52</sup> *Ibid.*, p. 414.

Kimura's duties in this position included "the control and utilization of Manchurian resources; general mobilization in Korea, Formosa, and the Colonies", and other matters.<sup>53</sup>

With the outbreak of the Pacific War, evidence considered by Webb demonstrates that Kimura was involved in actually issuing orders and engaging in correspondence concerning deployments, finance and logistics. For example, Webb notes that Kimura "countersigned the order issued immediately after the Imperial Conference on 1st November 1941" notifying field commanders that war "would commence on 8th December 1941".<sup>54</sup> It is also Kimura, Webb recounts, who notified the Foreign Office on 23 January 1942 that Japan would follow the Geneva Convention on Prisoners of War. While the voluminous evidence presented by Webb on Kimura's important role in the mistreatment of prisoners of war bears more directly upon the war crimes charges, that evidence also shows Kimura was not a mere accomplice, but an individual directly involved in policy formulation and implementation at the highest levels.

Webb also makes findings concerning Kimura's role when Tōjō was absent or involved in other matters because of his dual role as Army Minister and Prime Minister. As Webb notes: "Before any important matters were formulated by the Bureau Chiefs, they had to receive the approval of the Minister and the Vice-Minister for War and the Bureau could not carry any decision into effect without the approval of the Minister and Vice-Minister".<sup>55</sup> This evidence thus indicates that Kimura had considerable formal authority in the highest levels of the command structure and policy formulation. Webb also cites as evidence of Kimura's policy level role the dispatch of German Ambassador Ott to Berlin in which he claims that "as Vice-Minister of War he was one of the principal advocates of German-Japanese military cooperation".<sup>56</sup>

The conclusion that Webb draws from his consideration of the evidence is that, as a field commander of general rank, Kimura "took an active part in the China war". Further, as Vice War Minister and Command-

<sup>&</sup>lt;sup>53</sup> *Ibid*.

<sup>&</sup>lt;sup>54</sup> *Ibid.*, p. 415.

<sup>&</sup>lt;sup>55</sup> Ibid., pp. 418–19 (this finding draws upon the prosecution's summation at T41150, which, in turn, is built on excerpt from Army Minister General Regulations, DX3348, T31658-62).

<sup>&</sup>lt;sup>56</sup> *Ibid.* (see telegram from the German ambassadors in Tokyo, Major General Eugene Ott and Heinrich Stahmer, 17 May 1942, PX1272, T11355).

er-in-Chief of the Burma Area Army, "he took a prominent part in planning, preparing, initiating, and waging war in the Pacific". Webb also concludes that Kimura knew these wars were not in self-defence, "particularly from his close association with TOJO".<sup>57</sup> Consideration of the available evidence leads Webb to give a reasoned justification for the conclusion about the importance of Kimura's role and his consequent responsibility for the crimes charged.

## 12.3.5. The Case of Shigemitsu

Like the conviction of Hirota, the conviction of Mamoru Shigemitsu, diplomat and ultimately Foreign Minister, has aroused controversy and charges of victor's justice. As in the case of Hirota, the majority judgment might appear not to offer an adequate evidence-based analysis or a reasoned decision on his liability. This has provided ammunition for critics unfamiliar with the evidence before the court. Webb's account, however, provides factual findings based upon evidence that formed the basis for his legal conclusion on Shigemitsu's responsibility under some of the crimes against peace charges.

Webb first details Shigemitsu's role as Ambassador to China and then turns to his actions as Ambassador to the Soviet Union in 1938. In this capacity, he met with the People's Commissar for Foreign Affairs on several occasions and made demands for the withdrawal of Soviet troops from the west bank of Lake Khasan and so on. On one such occasion, he stated that "Japan has the rights and obligations to Manchukuo to use force and make the Soviet troops evacuate".<sup>58</sup>

Shigemitsu's next posting, as Webb recounts, was to London as Ambassador to Great Britain. Webb quotes at length from a series of telegrams that Shigemitsu sent after the outbreak of war in Europe, advising Tokyo on how to take advantage of the German conquest of European colonial powers. The majority judgment, in contrast, has considered none of this evidence. Shigemitsu's telegram of 5 August 1940 conveys the importance of such evidence in assessing his liability:

> in order to establish our position in Greater East Asia, it would be necessary to consider measures for gaining the maximum benefits at the minimum loss by carrying them out

<sup>&</sup>lt;sup>57</sup> *Ibid.*, p. 423.

<sup>&</sup>lt;sup>58</sup> *Ibid.*, p. 558 (PX754, T7763).

at the direct expense of small nations (for instance France and Portugal) (although indirectly it may turn out to be at the expense of Britain and America) and by avoiding conflict with other countries so as not to make many enemies at once but to dispose of them one by one.<sup>59</sup>

Röling, in his treatment of civilian government officials, portrays Shigemitsu as a man who always sought peace, but he fails to consider such contradictory evidence. To reiterate, the purpose here is not to arrive at a conclusion about Shigemitsu's guilt or innocence but to point out the blatant differences between the judgments of Pal, Röling and the majority on the one hand, and the draft judgment of Webb on the other. Only Webb fully meets the core obligation of a judge in an international tribunal to base his or her ultimate decision upon a careful and impartial weighing of the evidence so as to arrive at sound factual findings to which the relevant legal norms may be applied.

Shigemitsu claimed that when he became Foreign Minister in April 1943, he did so in order to work for peace. Webb, however, quotes his 27 September 1943 statement on the Tripartite Pact:

> The Pact of Alliance shines forth as brightly as ever to illumine our road to victory.....It is well for us to renew.....our firm determination to prosecute the common war.....The spirit of Japan who is fighting in East Asia is the spirit of Germany and her allies fighting in Europe.....<sup>60</sup>

In a similar vein, Webb quotes Shigemitsu's statement in an article of 12 December 1944: "on December 11, 1941, the three nations, concluding a new treaty, firmly pledged themselves to fight out the common war until final victory".<sup>61</sup> Webb also quotes a statement by Shigemitsu of 21 January 1945 in which he extoled Hitler as a hero who would save Europe and pledged that Japan would fight "to the last together with our allied countries at any cost".<sup>62</sup>

In arriving at legal conclusions based upon these factual findings, Webb has again adopted a balanced approach, requiring the evidence to prove the charges beyond a reasonable doubt. Thus, he finds Shigemitsu

<sup>62</sup> *Ibid.*, p. 562 (PX829-A, T8068).

<sup>&</sup>lt;sup>59</sup> *Ibid.*, p. 561 (emphasis added) (PX1023, T9713).

<sup>&</sup>lt;sup>60</sup> *Ibid.* (emphasis added, ellipses in the original) (quoting PX773, pp. 1–3, introduced at T7876).

<sup>&</sup>lt;sup>61</sup> *Ibid.* (PX828-A, T8066).

not guilty with regard to the charges concerning China or the Soviet Union because in these cases Shigemitsu did not go beyond the duties required of him as ambassador in his negotiations and actions.

On the other hand, Webb concludes that because of the policy advice he gave the Japanese Government on how to exploit the German victories in Europe, Shigemitsu "exceeded" these duties. Webb calls particular attention to Shigemitsu's suggestion, as quoted above, in which he extolled "to attack and plunder the small nations [...] who never threatened Japan".<sup>63</sup> As to Shigemitsu's role as Foreign Minister, based on the evidence cited, Webb concludes that "[w]hen Japan resorted to war he was as Foreign Minister a strong advocate of its continuance until final victory. He was responsible for waging war". Accordingly, Webb finds him guilty.

## 12.3.6. The Case of Shimada

A final example is the case against Shigetaro Shimada, Navy Minister in the Tōjō Cabinet. In its judgment, the majority finds him guilty of conspiracy to wage an aggressive war but devotes only one sentence to justifying this conclusion: "From the formation of the TOJO Cabinet until [...] 7th December 1941 he took part in all the decisions made by the conspirators in planning and launching that attack".<sup>64</sup> Webb, on the other hand, spends eight pages discussing Shimada's role in policy matters and the conduct of the war in China and the Pacific. While the majority contents itself with noting that Shimada attended meetings, with no reference whatsoever to what he said or did at those meetings, Webb refers to much more specific evidence. For example, Webb states that, "SHIMADA admitted that he [...] on 30th November 1941, joined with NAGANO [...] in advising the Emperor that the Japanese Navy's preparations for war against the United States and Great Britain were adequate and satisfactory".<sup>65</sup> Webb explains that Shimada "also admitted that he, as Minister of the Navy and Minister of State, at the Imperial Conference on 1st December 1941, joined in making the final official decision to wage war against the United States and Great Britain and their allies".<sup>66</sup>

<sup>63</sup> Ibid., p. 567.

<sup>&</sup>lt;sup>64</sup> Majority judgment, p. 1197, see above note 16.

<sup>&</sup>lt;sup>65</sup> The President's Judgment, p. 569, see above note 1 (Affidavit and testimony by Shigetarö Shimada, DX3565, T34696–704).

<sup>&</sup>lt;sup>66</sup> *Ibid.* (DX3565, T34666).

It is not necessary to detail Webb's further discussion as the statements just quoted indicate the nature of the evidence on which Webb relied. On the basis of his findings, Webb concludes that "SHIMADA, as Admiral, played a leading part in the war against China [...] and as Navy Minister he voted for war in the Pacific, knowing that these wars were not in self-defence of Japan".<sup>67</sup>

As we have seen, Webb alone has provided a detailed, balanced exposition of the relevant evidence and applied the legal standards he has clearly articulated to that evidence to justify his conclusions on guilt or innocence. Röling, on the other hand, relies on a general principle which he has invented and which has no support in international law. Röling argues that an official who participated in an aggressive war but desired peace should not be held accountable for his actions in support of the war.<sup>68</sup> Pal, on the other hand, treats all of the accused as a collectivity and falls back upon discredited principles, such as the act of State doctrine in order to argue for their innocence.

# 12.4. Conclusion

The examples discussed briefly above indicate the painstaking manner in which Webb has analysed the evidence bearing upon each defendant's responsibility regarding the aggressive war charges in his draft judgment. It also bears emphasis that, because Webb differed from the majority on the nature of the conspiracy charges, viewing conspiracy as a mode of liability rather than an independent offence, he has adduced evidence to demonstrate the direct connection of the accused to the charged aggressive conduct. The majority, on the other hand, simply relies on a master conspiracy narrative to ground the liability of the accused.

In contradistinction to Webb, the individual verdicts in the text of the majority judgment almost never quote or cite specific evidence on the charges, let alone weigh that evidence to justify its conclusions. This is not to say that the evidence does not exist, but rather that the majority, unlike Webb, typically fails to analyse it in depth. Webb, in clear contrast to the majority and the dissenters, devotes hundreds of pages to the individual verdicts. As we have seen in regard to crimes against peace,

<sup>&</sup>lt;sup>67</sup> *Ibid.*, p. 577.

<sup>&</sup>lt;sup>68</sup> Röling's dissenting opinion, in Boister and Cryer (eds.), 2008, see above note 9, pp. 702– 09 (the original also available on the ICC Legal Tools Database, https://www.legal-tools. org/doc/38eba7/).

Webb's analysis of the evidence is extensive, if not exhaustive, and his conclusions well-grounded on a reasoned weighing of the relevant evidence and arguments. With regard to those charges, Webb could demonstrate the actual involvement of the accused in policy-level decisions on war as well as their awareness that the war was pursued in implementation of national policies rather than in self-defence. The evidence on these issues was plentiful enough that Webb could reach his conclusions based upon the actual statements and deeds of the accused rather than relying only on inferences drawn from circumstantial evidence.

If Webb's draft judgment had been adopted by the majority, we would have been provided with a very different perspective from which to view the verdicts against the accused. In the end, Webb's draft judgment places overwhelming emphasis on the responsibility of each individual accused. The majority's overemphasis on the theory of a conspiracy to wage an aggressive war, which occupies such a large portion of its judgment, tends to efface the role of specific individuals in favour of a sweeping narrative that places an abstract collectivity - 'the conspirators' - in the foreground. Webb's emphasis upon individual roles, authority and responsibility also supports his contention that the ultimate authority in wartime Japan lay with the Emperor. Webb's clear implication of the Emperor was likely one of the most important reasons why the majority refused to accept his draft judgment as that of the Tribunal. Although the judges' internal memoranda do not clearly indicate why the majority refused to accept Webb's draft judgment, it is apparent that they differed sharply with Webb on the legal status and significance of the conspiracy charge. Due to the critical importance of 'conspiracy' in the majority judgment, this is likely another important reason why Webb's efforts were in vain. In the end, it seems likely that he chose not to publish his draft as his concurring opinion because doing so would have implicitly exposed the deep flaws in the majority's approach.<sup>69</sup>

Pal's dissenting opinion in a sense goes a step further than the majority in abstracting away from individual responsibility. He too often appears to ignore that a trial is about individual guilt, not national guilt or innocence. His desire to exculpate the Japanese Government or State as a

<sup>&</sup>lt;sup>69</sup> The internal memoranda indicate neither why Webb refrained from putting forward his draft as a concurring opinion nor why the majority refused to accept it. Further research in the Webb papers and correspondence may cast light on these issues in the future.

collectivity overshadows the fact that the IMTFE was a trial of individual accused persons. For each of the accused, the prosecution had to prove guilt beyond a reasonable doubt and the judges had the responsibility to provide a reasoned analysis of the evidence that grounds their conclusions of guilt or innocence. Pal completely failed in this regard, even with respect to the war crimes charges where he agreed that the act of State doctrine could not be a defence.

Webb, in his draft judgment, fulfils the role of a judge who weighs the evidence against each defendant on each of the charges against him or her, and provides a reasoned decision in each case. He spared the majority the embarrassment his draft judgment would have caused if it had been published as his concurring opinion. Unfortunately, his decision not to adopt it as his concurring opinion has provided posterity with a very incomplete sense of the evidence before the court that, in Webb's view, justified the convictions of the accused. Webb's withdrawal of his comprehensive draft judgment thus enabled Pal, and to a lesser extent Röling, to discredit the trial as a whole in the eyes of many critics.

# Constructing the Historical Legacy of the International Military Tribunal for the Far East: Reassessing Perceptions of President William Webb

## Narrelle Morris\*

#### 13.1. Introduction

The International Military Tribunal for the Far East ('IMTFE') at Tokyo is often regarded in English language scholarship as the lesser known sibling of the International Military Tribunal ('IMT') at Nuremberg. At the time, one participant suggested that this related to the "[s]cant attention" paid to the IMTFE compared to the "much publicity and relatively widespread newspaper coverage" of the IMT.<sup>1</sup> Another participant suggested that while the IMTFE was, in fact, "fully and ably covered by world-wide press and radio services", it was "[o]vershadowed by the earlier and more sensational Nuremberg trial" and met with "a generally apathetic reaction", perhaps because it involved relatively unknown accused Japanese, "took place too far away and was too protracted to evoke much public interest".<sup>2</sup> Since then, commentators have pointed to the fact that the IMTFE transcripts and other documents were voluminous, complex and largely inaccessible in various national archives for decades after the trial, and that even the majority judgment was not easily accessible until it was finally published in 1977. Moreover, encouraging the IMTFE to be deemphasized in comparison with the IMT, Richard Minear's scathing as-

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<sup>&</sup>lt;sup>1</sup> Solis Horwitz, "The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, no. 465, p. 475.

<sup>&</sup>lt;sup>2</sup> George F. Blewett, "Victor's Injustice: The Tokyo War Crimes Trial", in American Perspective, 1950, vol. 4, no. 3, pp. 282-83.

sessment of the IMTFE in 1971 as merely "victors' justice" in the first full-length monograph to be published in English helped to stigmatize the jurisprudential value of the IMTFE for decades.<sup>3</sup> The IMTFE was not, of course, forgotten in Japan, where it has undergone sustained and intensive analysis, although more historical than legal.

As Canadian diplomat and historian E.H. Norman once observed, the "treasure trove of documentation" created for and by the IMTFE was perhaps the "most enduring legacy of the tribunal".<sup>4</sup> With the IMTFE documents now widely available, as well as translations of Japanese secondary sources, in the last two decades scholars in law and history have taken up the task of analysing and reassessing the IMTFE with different modes of analysis. Even so, it remains a difficult process given that other significant documents – such as the invaluable private papers of the judges, the prosecution and defence teams, and other trial participants and observers - are scattered all over the world. Despite their value, these documents introduce other difficulties due to their subjective curation: they are only what their owners chose to create or retain and later make available to the public. However, the historical legacy of the IMTFE now encompasses much more than simply the documentation created at the time and released since; it is a legacy that has been constructed over time by participants and later by scholars.

As a part of the reassessing the historical legacy of the IMTFE, this chapter focuses on perceptions of the IMTFE judges: Sir William F. Webb of Australia, E. Stuart McDougall of Canada, MEI Ju'ao of China, Henri Bernard of France, B.V.A. Röling of the Netherlands, Erima H. Northcroft of New Zealand, I.M. Zaryanov of the USSR, Lord Patrick of the United Kingdom, and John P. Higgins and Myron C. Cramer of the United States of America. Section 13.2. examines the construction of perceptions of the IMTFE judges, identifying that after the IMTFE concluded, some judges more than others took up the opportunity, or had more of an opportunity, to shape those perceptions. Section 13.3. then turns to focus on the Australian judge and President, Sir William Webb. While all of the judges have received criticism from time to time, perhaps none have received

<sup>&</sup>lt;sup>3</sup> Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, 1971.

<sup>&</sup>lt;sup>4</sup> E.H. Norman, *Hābāto Nōman zenshū* [Writings of Herbert Norman], Genji Ōkubo (trans.), Iwanami Shōten, 1977, vol. 2, p. 391, quoted in John Dower, *Embracing Defeat: Japan in the Aftermath of World War II*, Penguin, 1999, p. 450.

such sustained criticism as Webb. Yet, as the section demonstrates, this criticism is distinctly at odds with how Webb has been portrayed as a judge in Australia. Section 13.4. thus calls for the consideration of the often overlooked broader context of Webb as a person and as a judge, and particularly of the extraordinarily difficult role of presiding over that unique tribunal. Sections 13.5. and 13.6. then examine the emergence of private criticism of Webb by the judges and publicly thereafter by scholars, respectively. It is argued that, in the decades since the IMTFE, much of the criticism of Webb has been uncritically repetitive, with little, if any, consideration of the original context in which it was made or what evidence there was for it.

This repetitive criticism of Webb in the literature has thus overshadowed Webb's actual, and potential, contributions to the development of international criminal law in Tokyo. While Webb is well known for his brief separate opinion, and particularly its pointed commentary on the Emperor, he in fact drafted 658 pages of judgment that, at the very end, he regrettably decided not to submit. This draft judgment, along with his individually-collated case notes for each accused, lies in his papers at the Australian War Memorial.<sup>5</sup> The draft judgment provides an intriguing glimpse into how it might have served as a counterpoint to the majority judgment and the other separate concurring and dissenting judgments, had it been submitted. As David Cohen and Yuma Totani have recently observed, Webb's close attention in his draft judgment to examining and weighing the evidence against each accused individual in order to justify his findings amply demonstrates a significant weakness in both the majority judgment and the dissenting opinion of Pal: that their authors did not fulfil this most basic role and duty of a judge.<sup>6</sup> As Cohen suggests in his chapter in this volume, if Webb's draft judgment had been accepted by the judges who formed the majority, we would have had a very different view today of the jurisprudential - and, therefore, historical - legacy of the IMTFE.<sup>7</sup>

<sup>&</sup>lt;sup>5</sup> Papers of Sir William Webb, Australian War Memorial, 3DRL/2481, Series 2: Draft judgement volumes, 1947-1948 and Series 3: Individual cases, 1945.

<sup>&</sup>lt;sup>6</sup> David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal: Law History, and Juris-prudence*, Cambridge University Press, 2018, p. 390.

<sup>&</sup>lt;sup>7</sup> See David Cohen, "The "President's Judgment" and Its Significance for the Tokyo War Crimes Trial", chap. 12 above.

# 13.2. Shaping Perceptions of the IMTFE

Although much remains to be studied at length in relation to the IMTFE, one topic is the impact that statements or writings by the judges, and then by scholars, have had in shaping and perpetuating certain perceptions of the IMTFE, particularly in relation to the judges themselves. John Dower's prize-winning Embracing Defeat, for instance, is regarded as a foremost work on the post-war Allied Occupation of Japan. In relation to the IMTFE, Dower suggested that Röling and Pal, the authors of two dissenting judgments, are "the most incisive and best-remembered justices".8 Dower was making apparently a subjective judgment about the quality of these judges' contributions, and it was that quality that made them the "best-remembered". It must also be recognized, however, that Röling and Pal themselves chose to remain engaged with the historical legacy of the IMTFE and created the opportunities to be best remembered. For some decades after the war, both judges remained prominent figures in relation to the IMTFE, with Pal especially so in Japan. Both gave speeches and interviews and published their thoughts. Röling, in fact, published hundreds of works, many of which mentioned the IMTFE.<sup>9</sup> Webb, by contrast, gave no public speeches and his only publication on the IMTFE is a brief introduction in 1971 to David Bergamini's Japan's Imperial Conspiracy, published the year before Webb died.<sup>10</sup>

In addition to public exposure, the length of time that the judges had to contribute to the IMTFE's historical legacy varied enormously. Röling\ was the youngest of the judges during the trial and the second last to pass away in 1985, as shown in Table 1. Thus, he had significantly more opportunity to shape the IMTFE's historical legacy than, say, Northcroft, who died in 1953, only five years after the trial concluded.

<sup>&</sup>lt;sup>8</sup> Dower, 1999, p. 465, see above note 4.

<sup>&</sup>lt;sup>9</sup> See, for example, Röling's bibliographies in Paul J. Teunissen and J.F.A. Doeleman, "Bibliography", in Robert J. Akkerman, Peter J. van Krieken and Charles O. Pannenborg (eds.), *Declarations on Principles: A Quest for Peace*, A.W. Sijthoff, 1977, pp. 383-403; and Wil D. Verwey, "Bert V.A. Röling (1965–1985)", in *The Moulding of International Law: Ten Dutch Proponents*, T.M.C. Asser Instituut, The Hague, 1995, pp. 65-68.

<sup>&</sup>lt;sup>10</sup> William F. Webb, "Introduction", in David Bergamini, Japan's Imperial Conspiracy: How Emperor Hirohito led Japan into war against the West, William Morrow and Co., New York, 1971, pp. ix-xiv. Webb also corresponded with Robert J.C. Butow, which informed Butow's Tojo and the Coming of the War, Stanford University Press, 1961, pp. 526, 551.

Judge:	Year of Death:
Northcroft	1953
Higgins	1955
McDougall	1957
Cramer	1966
Pal	1967
Patrick	1967
Webb	1972
MEI	1973
Zaryanov	1975
Jaranilla	1980
Röling	1985
Bernard	1986

#### Table 1: Judges' year of death in order after the conclusion of the IMTFE.

In fact, Röling's most revelatory remarks on the IMTFE appeared in posthumous publications in 1986 and 1993, by which time no judge was alive either to be scandalized or to controvert his claims.<sup>11</sup>

While many topics could be assessed through their historiographical development in literature on the IMTFE, an interesting one is the perceptions of the judges: particularly, how certain observations about the judges came to be made, what evidence there is for them, and what the subsequent trajectory of these observations is through the literature. An example of a lingering general observation is that Pal was the only judge with experience in international law. This was perhaps because his biographical sketch – which Pal himself likely provided for public distribution – mentioned that he joined the International Law Association in 1937.<sup>12</sup> Defence

<sup>&</sup>lt;sup>11</sup> B.V.A. Röling, "Introduction", in Chihiro Hosoya, Nisuki Andō, Yasuaki Ōnuma and Richard H. Minear, *The Tokyo War Crimes Trial: An International Symposium*, Kodansha, Tokyo, 1986; and B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity, Cambridge, 1993.

<sup>&</sup>lt;sup>12</sup> General Headquarters, Supreme Commander for the Allied Powers, Civil Information and Education Section, Press Release, 23 October 1946, p. 4, in University of British Columbia Library Rare Books and Special Collections, David W. Conde fonds, RBSC-ARC-1135, File 30-16. This profile of Pal was reprinted in the *Nippon Times*, 21 November 1946.

lawyer George F. Blewett, writing in 1950, described Pal as "the only deep student of international law on the bench".<sup>13</sup> Minear in 1971 questioned how many of the judges had any background in international law and then answered: "[t]he answer is one: Justice Pal".<sup>14</sup> Dower, drawing upon Minear, held up Pal as the only judge with "significant experience" in international law.<sup>15</sup> Many other scholars have repeated this claim. Yet, as Nakazato Nariaki has recently shown, Pal had virtually no experience in international law, had not produced any prior writings on international law, and, in fact, had little judicial experience on the bench.<sup>16</sup> To correctly answer Minear's question, none of the judges had a background in international law. As Webb reported to the Chief Justice of the High Court of Australia in early 1946, it was unfortunate that "not one of us can be called an expert in international law. I was hoping that at least one of the judges would be a professor of international law".<sup>17</sup> In fact, as Yuma Totani has pointed out, Webb was "one of the few jurists of his time who had extensive knowledge, experience, and insight into matters related to war crimes".<sup>18</sup>

## 13.3. Contradictory Views of President William Webb

This chapter does not focus on Röling or Pal, however, but on the construction of the historical legacy and perceptions of Webb. Traditionally, commentators have been ultra-critical of Webb, raising his allegedly poor and biased behaviour in court, inadequate leadership of the bench, souring relations with the other judges, and the low quality of his legal thinking and jurisprudence. Common terms that have been used to describe Webb include "testy and irascible",<sup>19</sup> "childish",<sup>20</sup> "acerbic",<sup>21</sup> "proud and arro-

<sup>&</sup>lt;sup>13</sup> Blewett, 1950, p. 290, above note 2.

<sup>&</sup>lt;sup>14</sup> Minear, 1971, p. 86, above note 3.

<sup>&</sup>lt;sup>15</sup> Dower, 1999, p. 465, above note 4.

<sup>&</sup>lt;sup>16</sup> Nariaki Nakazato, Neonationalist Mythology in Postwar Japan: Pal's Dissenting Judgment at the Tokyo War Crimes Trial, Lexington Books, 2016, pp. 96-97.

<sup>&</sup>lt;sup>17</sup> Letter from Webb to Chief Justice John Latham, 17 April 1946, in National Archives of Australia ('NAA'), M1418, 3.

<sup>&</sup>lt;sup>18</sup> Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Centre, 2008, p. 42.

<sup>&</sup>lt;sup>19</sup> Gordon Ireland, "Uncommon Law in Martial Tokyo", in *The Yearbook of World Affairs*, 1950, vol. 4, p. 66.

<sup>&</sup>lt;sup>20</sup> *Ibid*.

gant",<sup>22</sup> and "domineering".<sup>23</sup> He has also been called "an isolated figure, hesitant, [and] authoritarian".<sup>24</sup> R. John Pritchard at least gave some measured praise to Webb, when he observed that, on the one hand, "Sir William Webb, by all accounts, was coarse, ill-tempered, and highly opinionated", but, on the other, "[h]e was hard-working and endeavoured to be conscientious".<sup>25</sup> As James Sedgwick has pointed out, the "overbearing caricature" of Webb in Japan is "so entrenched in the historiography that it is rarely questioned, let alone explained. His domineering behaviour in court is dismissively chalked up to an innate tetchiness".<sup>26</sup>

Yet, what is also rarely questioned, let alone explained, is the radical difference between this "overbearing caricature" attributed to Webb in Japan and how Webb was, and is, characterized as a judge in Australia, which he was from his appointment to the Supreme Court of Queensland in 1925 until his retirement from the High Court of Australia in 1958. Upon Webb's appointment as Chief Justice in Queensland in 1940, for instance, the eminent *Australian Law Journal* recorded:

His equable and kindly temperament has made his relations with the Bar uniformly agreeable, and should ensure a smooth and harmonious conduct of the work of the Supreme Court in the future.<sup>27</sup>

Upon Webb's death in 1972, Chief Justice Garfield Barwick of the High Court of Australia remarked upon his harmonious work with colleagues and said:

> [i]n his judicial work, as well as in his social contacts, Sir William was equable and friendly, thoughtful and generous in his attitudes. On the Bench he was always attentive, most

<sup>27</sup> "Mr. Justice Webb", in Australian Law Journal, 1941, vol. 14, p. 118.

<sup>&</sup>lt;sup>21</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, Collins, 1989, p. 312.

<sup>&</sup>lt;sup>22</sup> Eīji Takemae, Inside GHQ: The Allied Occupation of Japan and Its Legacy, Continuum, 2002, p. 240.

<sup>&</sup>lt;sup>23</sup> Totani, 2008, p. 42, above note 18.

<sup>&</sup>lt;sup>24</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008, p. 82.

<sup>&</sup>lt;sup>25</sup> R. John Pritchard, "An Overview of the Historical Importance of the Tokyo War Trial", in Hosoya, Andō, Ōnuma and Minear, 1986, p. 91, above note 11.

<sup>&</sup>lt;sup>26</sup> James Burnham Sedgwick, "A People's Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946– 48", in *Diplomacy & Statecraft*, 2011, vol. 22, no. 3, p. 491.

courteous, direct in his questioning and his contribution to argument. He had a lively sense of humour and was always kindly in its employment.<sup>28</sup>

Similarly, in the valediction offered upon Webb's death, Chief Justice Mostyn Hanger of the Supreme Court of Queensland observed of the previous incumbent of his role:

we remember Sir William as a man with a warm heart and a man of unfailing courtesy, always considerate of those around him, and treating the most humble of us, it seemed, as if we were at least his equals. Irritated he must have felt at times, and angry he must have been at times; but in all the years that I knew him – and they extend over more than 40 -I never saw any outwards sign of either.<sup>29</sup>

Other speakers at the Supreme Court valediction ceremony also remarked on Webb's judicial character, mentioning his "humility", "kindness", "consideration", "humanity", "kindly courtesy", "dignity" and "graciousness".<sup>30</sup> While a certain amount of flattering tribute is to be expected upon the appointment or the death of a judge, more disinterested observers since have remarked positively upon Webb's judicial character. The historian of the Bar Association of Queensland described Webb as:

> a model of polite, courteous behaviour; he was patient and understanding; he did not easily ruffle, but would sit coolly, unconcernedly through the heated argument, smiling gently, his brown eyes alert and at the end of the proceedings, give a calm reasoned answer to the problem, an answer freed from the temperamental, emotional involvement of the parties concerned.<sup>31</sup>

Even a critic who described Webb as a "competent but not outstanding lawyer, who made no particularly memorable contribution to the work

<sup>&</sup>lt;sup>28</sup> Chief Justice Garfield Barwick, "The Late Sir William Webb", in *Commonwealth Law Reports*, 1972, vol. 127, pp. v, vii.

<sup>&</sup>lt;sup>29</sup> Chief Justice Mostyn Hanger, Valediction to Sir William Flood Webb, KBE, LLD, Record of Proceedings, Full Court of the Supreme Court of Queensland, Brisbane, 15 August 1972, p. 1, in Justice William Webb biographical kit, Supreme Court of Queensland Library.

<sup>&</sup>lt;sup>30</sup> Mr. Nixon, Mr. Brennan, and Mr. Crouch, Valediction to Sir William Flood Webb, KBE, LLD, Record of Proceedings, Full Court of the Supreme Court of Queensland, Brisbane, 15 August 1972, pp. 2-3, in Justice William Webb biographical kit, *ibid*.

 <sup>&</sup>lt;sup>31</sup> W. Ross Johnston, *History of the Queensland Bar*, Bar Association of Queensland, 1979, p. 82.

of the High Court" of Australia specifically attributed Webb's career successes to a "proven ability to persuade sometimes difficult colleagues to work together in harmony".<sup>32</sup> So, in all, this characterization is completely at odds with the dominant view of Webb's conduct as a judge in Tokyo and particularly Webb's interactions with the other IMTFE judges.

# 13.4. Webb and the Role of the President

When analysing the differences, and explanations, of these contradictory views, one should consider the broader context of Webb's roles and experiences during the war, at the IMTFE, and in Japan, rather than simply dismiss him in isolation as someone who suffered from "innate tetchiness".<sup>33</sup> Both personally and professionally, presiding over that tribunal was not an easy job, which many critics have seemed willing to overlook while deeming Webb to be ill-suited for and, in fact, damaging to the role, if not the IMTFE as a whole. This broader context undoubtedly helped to shape him as a judge and president, but is often disregarded, likely as there have been few studies of Webb as a judge (especially compared to Pal and Röling), and certainly no biography to date.

Prior to his appointment, Webb had worked industriously during the war in multiple judicial and extra-judicial roles for the Australian and the Queensland governments, with frequent interstate and international travel and little vacation time. Then, like the other IMTFE judges, he accepted an overseas judicial posting that he thought would run to a few months, perhaps six, but eventually ran for closer to three years. He had to live in devastated Tokyo under the Allied military occupation, and was mostly dependent on the co-operation of the occupation authorities for housing, transport and other needs. Although he had just been appointed as a judge of the High Court of Australia – the pinnacle of judicial appointments – his professional career at home was effectively on hold for the interim. Moreover, Webb had to live without his wife (at least until Lady Webb was finally permitted entry in April 1947) and family, missing (amongst other events) birthdays, anniversaries, the marriage of a child, the engagement of another child, and the birth of his first grandchild.

<sup>&</sup>lt;sup>32</sup> B.H. McPherson, *The Supreme Court of Queensland 1859-1960: History Jurisdiction Procedure*, Butterworths, 1989, p. 327.

<sup>&</sup>lt;sup>33</sup> Sedgwick, 2011, p. 491, above note 26.

Webb was the longest serving and most experienced judge to be appointed to the IMTFE, having been first appointed a judge in 1925. He was also the only judge accustomed to being the chief justice of a court, which he had been since 1940.<sup>34</sup> Although the jurisdiction was novel, it is likely that Webb brought his experience as a chief justice to bear on the way that he regarded the role of IMTFE president and thus sought to function. As president, Webb seems to have regarded himself as primus inter pares (first amongst equals), seeking to lead, guide and mediate cooperation among the judges. Writing to the judges in mid-1948, when the judgments were being drafted, he observed, for example, "[a]s President I think it is my duty to take the lead in suggesting what we should do with the Accused".<sup>35</sup> Like most chief justices in Australia, his actual powers as president were fairly limited,<sup>36</sup> although the 'soft' power of possessing the sole microphone on the bench cannot be overlooked. Yet, the dominance of his voice in the proceedings has often meant, both at the time and since, that Webb is treated as synonymous with the IMTFE in relation to criticism.

The bench of 11 international judges was, without a doubt, the largest Webb had ever had to work with, let alone preside over. Webb was certainly aware early on of the difficult task he faced in holding together the numerous and diverse judges, who had varying legal, jurisdictional and cultural backgrounds, including some with little judicial experience. Some of the judges did not speak English. They all had, however, their own (often nationally-dependent) views on matters such as jurisdiction, matters of law, trial procedure, judicial protocol, and the course of proceedings. To further complicate matters, the trial itself, as shaped by the indictment, was sweeping in scope. Problems with translation and interpretation be-

<sup>&</sup>lt;sup>34</sup> Apart from the United States Justice Higgins – ordinarily, Chief Justice of the Massachusetts Superior Court – who quickly resigned in June 1946 and was replaced by Justice Cramer.

<sup>&</sup>lt;sup>35</sup> Letter from Webb to 'General', 9 June 1948, in *Papers of Sir William Webb*, Series 1: The International Military Tribunal for the Far East, 1946-48, Wallet 9, above note 5.

<sup>&</sup>lt;sup>36</sup> The Charter of the IMTFE granted only one special power to the president in that Article 4(b) provided that in the case that the votes of the members of the tribunal on decisions and judgments were evenly divided, the "vote of the President shall be decisive": Charter of the International Military Tribunal, issued 26 April 1946, reprinted in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictments and Judgments*, Oxford University Press, 2008, p. 7 (also annexed to this volume).

tween English and Japanese, as well as several other languages, were an almost daily issue. While some of the prosecution and defence counsel were competent and diligent, others were regarded as inferior, and their work detrimental to the proceedings. Given the inevitable highly politicized nature of the IMTFE, Webb also had to deal with early attempted political interference, constant VIP visitors, and manage the press while trying to be publicly impervious to criticism as the trial dragged on.

Webb knew that he was sometimes not in the best frame of mind, telling Lady Webb: "[f]requently I am in a tempestuous emotional condition, which is a bad thing for the president of any court".<sup>37</sup> He wrote:

I have an immense amount of worry [...] I have to keep a team of eleven together and to avoid saying one thing that they disapprove. The other day I said something which caused a titter and one judge immediately wrote me a note of protest. Any attempt to relieve the dullness of the proceedings is met that way. [...] Then, there are all sorts of 'caves', to use the expression of one judge who seems to be a master at making them. If I consult judges on the bench who are English-speaking, I am accused by the foreigners of making an Anglo-American or a British 'bloc'. Yet, I don't think any of them dislike me, but they make my position very difficult.<sup>38</sup>

## 13.5. Private Criticism of Webb by the Judges

Webb's attempts at leadership, guidance and mediation were soon rebuffed by the other judges. If he expected particular support on the basis of shared language, culture, history or legal commonalities from the British Commonwealth judges, he did not receive it. Rather, Patrick and Northcroft formed, in Northcroft's own words, a "United Kingdom-New Zealand bloc of two", which eventually became, with the drawing in of McDougall from Canada, a core bloc of three who dominated.<sup>39</sup>

The reasons for their personal and professional antagonism towards Webb are complex, and remain to be explored at length, but the level of it,

 <sup>&</sup>lt;sup>37</sup> Letter from Webb to Lady Webb, 1 July [no year but likely 1946], in NAA, M1418, 5.
 <sup>38</sup> *Ibid*.

<sup>&</sup>lt;sup>39</sup> Letter from Northcroft to Sir Michael Myers, 19 September 1946, quoted in Ann Trotter, "Justice Northcroft (New Zealand)", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victors' Justice? The Contemporary Relevance of the Tokyo War Crimes Trial*, Martinus Nijhoff, 2011, p. 83.

at face value, appears to be high. The three justices certainly actively maligned Webb to their respective governments, and eventually side-lined him from the development of the majority judgment. In one letter home, Patrick, for example, called Webb a "quick-tempered turbulent bully", who had "antagonised every member of his Tribunal", thereby frustrating its purpose.<sup>40</sup> In similar correspondence home, Northcroft stated that Webb had an "unfortunate manner of expression, generally querulous, invariably argumentative and frequently injudicious". Moreover, Webb was "often either, and sometimes both, hostile and unreceptive of our [the judges'] suggestions or incapable of understanding their purport or purpose".<sup>41</sup>

Webb had become hamstrung as president: caught between a 'bloc' of judges who did not respect him and would not accept anything other than their viewpoints being expressed unanimously by the bench, and the smaller 'bloc' of dissenting judges – principally Röling and Pal – whom he could not, understandably, do much to control. Although antagonism certainly descended on all sides to personal attacks from time to time, much of the discordant squabbling seems to have been about controlling not only how the proceedings progressed, but also the future historical legacy of the IMTFE, that is, the impact that the IMTFE would have – whether positive or negative – on the process of developing international criminal law already begun at Nuremberg.

It may never be known whether the criticisms of Webb voiced by Patrick, Northcroft and McDougall in their letters home were valid and heartfelt, or – given the timing – exaggerated as part of a concerted plan to convince their respective governments to have Australia remove Webb, leaving them to take charge of the proceedings and, possibly in their view, better control of the dissenting judges. It is curious, though, that Northcroft, perhaps the most vehement of the trio apparently opposed to Webb, did not reiterate his criticism of Webb when later given the precise opportunity. In 1949, Northcroft wrote a letter and a memorandum reporting on the IMTFE to the New Zealand Prime Minister. Though specifically asked to address the choice of president, Northcroft did not even mention Webb by name. He responded only that the choice of the president for an inter-

<sup>&</sup>lt;sup>40</sup> Copy of letter from Patrick forwarded to the Lord Chancellor, circa early 1947, pp. 2, 6, in the UK National Archives ('TNA'), LCO 2/2992.

<sup>&</sup>lt;sup>41</sup> Copy of letter from Northcroft to Chief Justice forwarded to the Lord Chancellor, 18 March 1947, p. 2, in TNA, LCO 2/2992.

national tribunal should be made "solely with reference to especial suitability" and that "[c]onsiderations of national prestige, or even of national jealousy, should not become the dominating factor in the choice of a President".<sup>42</sup> The former remark could be interpreted that he had not found Webb to be especially suitable as president. But the latter remark, if directed at Webb, would appear somewhat odd, given that national prestige or national jealousy had nothing to do, as far as we know, with why General Douglas MacArthur selected Webb as the president. They did, however, relate to the alleged reason that MacArthur had passed over Northcroft to be acting president during Webb's absence in late 1947, eventually settling the position instead on Cramer: the "minor status of Northcroft's court" and the "insignificance of New Zealand as a world power".<sup>43</sup>

# 13.6. The Emergence of Public Criticism of Webb

While private correspondence written by the judges containing criticism of Webb did not emerge publicly for some time, some public criticism of Webb appeared during the trial, often from within the IMTFE. Several prosecution and defence counsel had prominently clashed with Webb during the proceedings. American defence counsel Owen Cunningham, for instance, had "bruising encounters" with Webb,<sup>44</sup> with Cunningham later reminiscing that, although they were friendly outside, the two of them had "fought like tigers in the courtroom".<sup>45</sup>

Cunningham particularly provoked the judges with his address to the International Law Section of the American Bar Association in Seattle on 7 September 1948 – before the verdicts were handed down – tellingly entitled "The Major Evils of the Tokyo Trial".<sup>46</sup> Cunningham's address

<sup>&</sup>lt;sup>42</sup> Letter from Northcroft to the Prime Minister, 17 March 1949, p. 2, in Erima Northcroft Collection, MacMillan Brown Library, University of Canterbury, MB1549, 112636.

<sup>&</sup>lt;sup>43</sup> Conversation with MacArthur reported in message from Alvary Gascoigne, United Kingdom Liaison Mission in Japan, to Foreign Office, no. 1500, 11 November 1947, in TNA, FO 371/63820.

<sup>&</sup>lt;sup>44</sup> Brackman, 1989, pp. 375-76, above note 21.

<sup>&</sup>lt;sup>45</sup> Interview with Owen Cunningham, "Trial of Tojo", circa 1975, Part 2, Iowa Oral History Project, Des Moines Public Library (available on the Internet Archive).

<sup>&</sup>lt;sup>46</sup> Owen Cunningham, "The Major Evils of the Tokyo Trials", address delivered to the Section of International and Comparative Law, American Bar Association ('ABA'), Seattle, WA, 7 September 1948, in the US National Archives and Records Administration ('NA-RA'), College Park, MD, Records of the Judge Advocate General (Army), RG153, Gen-

contained numerous criticisms of the IMTFE, including his assertion that the "greatest evil of the Tokyo trials rests in the creation and the composition of the court itself",<sup>47</sup> although he did not elaborate on what he meant by that comment. He also complained that the Tribunal had favoured the prosecution over the defence and defence witnesses were "abused". Cunningham specifically raised in his address one of Webb's controversial public remarks – that a defence witness was "the most stupid witness heard so far"<sup>48</sup> – but without giving any context for it, which will be discussed later.

Despite the personal attack, Cunningham's address did not apparently concern Webb overmuch. Webb told the other judges that, if the American Bar Association thought Cunningham was guilty of contempt of court, he "felt sure they would not have listened to him". He advised them that he intended to "take no action" against Cunningham.<sup>49</sup> Webb wrote privately: "[p]ersonally I have no feeling against him. I would be concerned only if I were guilty of the charges he made against me".<sup>50</sup> Cunningham later revealed that when he met Webb after returning to Japan, Webb said: "Owen, officially I must reprimand you for your speech at Seattle, but personally I thought it was a great speech".<sup>51</sup> However, after Cunningham subsequently made certain admissions in writing to the IMTFE,<sup>52</sup> he was barred on 13 October 1948 from further proceedings before the IMTFE.<sup>53</sup> Still, he continued to protest the action against him even after the verdicts were handed down.<sup>54</sup> Already deeply critical of the

- <sup>50</sup> Letter from Webb to Capt. J. Frank Colbert, 21 September 1948, in NAA, M1418, 3.
- <sup>51</sup> Interview with Owen Cunningham, above note 45.
- <sup>52</sup> Memorandum to All Judges from the President, 12 October 1948, in NAA, M1417, 26.
- <sup>53</sup> As the IMTFE was then recessed awaiting the delivery of the verdicts, the bar was apparently communicated by the IMTFE administration: see, for example, "War Court Bars Lawyer", *Courier-Mail*, Brisbane, 15 October 1948, p. 1.
- <sup>54</sup> See, for example, "Cunningham Protests Against Court Action", *Nippon Times*, 13 November 1948, p. 2.

eral and Administrative Records (Set-Up Files) 1945-1957, 0153-A1-145, International Tribunal and Judges, Box 124. (Cunningham's address was a part of an ABA forum on war crimes trials, which was published in the *Proceedings of the Section of International and Comparative Law*, ABA, 6-7 September 1948, pp. 30-47.)

<sup>&</sup>lt;sup>47</sup> *Ibid.*, p. 3

<sup>&</sup>lt;sup>48</sup> *Ibid.*, p. 2.

<sup>&</sup>lt;sup>49</sup> Memorandum to All Judges from the President, 9 September 1948, in NAA, M1417, 26.

IMTFE, this was not an experience that was likely to change Cunning-ham's mind.

After the trial concluded in late 1948, criticism of Webb's character and performance started emerging in secondary sources in the 1950s, often relying upon the opinions of those like Cunningham, who continued to propagate his views.<sup>55</sup> Illinois trial lawyer John Alan Appleman was perhaps the first in 1954 to publish a substantial piece on the IMTFE that specifically discussed judicial conduct. Appleman had not participated in, nor attended the trial, and admitted that he did "not pretend to be an expert" in international law.<sup>56</sup> In fact, Appleman seems to have had no special interest in the subject, as his list of publications suggests his dominant area of expertise was American insurance law.<sup>57</sup> In addition to an analysis of clearly limited parts of the transcript, Appleman drew on information from several trial participants, including Cunningham.<sup>58</sup> Appleman was highly critical of Webb, but there are several key problems with his analysis and, as a result, these problems have flowed on into subsequent scholarly work, including by Minear and others, who appear to have accepted Appleman's views on judicial conduct uncritically.

Appleman's overall conclusion about Webb, for instance, was that there was "definitely observed a tendency of the presiding justice [Webb] to be autocratic and overbearing in his manner".<sup>59</sup> Appleman opined that:

[t]he attitude of the president of the Tribunal throughout towards defense counsel was one not consistent with the standards commonly observed in courts of the United States. While American attorneys are expected to observe high principles of ethical conduct and courtesy toward the court, the court is considered to have an equal duty toward counsel

<sup>&</sup>lt;sup>55</sup> For instance, Cunningham denounced the IMTFE in a speech in 1951 as an "act of tyranny, a prostitution of the judicial processes, an instrument of force and a political inquisition": "Lawyer Calls U.S. Culprit by War Trial Law", *Chicago Daily Tribune*, 19 September 1951, p. 21.

<sup>&</sup>lt;sup>56</sup> John A. Appleman, *Military Tribunals and International Crimes*, Greenwood Press, 1971 (first published Bobbs-Merrill Co., 1954), p. v.

<sup>&</sup>lt;sup>57</sup> See James R. Elkins, "John Alan Appleman (1912-1982)", *Strangers to Us All: Lawyers and Poetry.* 

<sup>&</sup>lt;sup>58</sup> Appleman also thanked "for the greatest help" Capt. James J. Robinson USN, who served in the International Prosecution Section: see Appleman, 1971 [1954], pp. xi-xii, above note 56.

<sup>&</sup>lt;sup>59</sup> *Ibid.*, p. 239.

practicing before it. Arrogance on the part of the court by reason of its exalted position is considered in this country to be a violation of judicial ethics, and an indication of the weakness of the man presiding. If this is used as a test of the competence of the Tribunal in question, it leaves one with marked distaste for the judicial tactics employed. The insults to defense counsel were frequent.<sup>60</sup>

"In view of the vast number of such instances" of insults, Appleman added: "it is surprising that upon two occasions the president was guilty of courtesy toward counsel".<sup>61</sup>

The key problem with this analysis is that Appleman was, as one reviewer observed, scrutinizing his subject "with the eye of an American practitioner".<sup>62</sup> Appleman was holding up the United States' judicial style and etiquette as the norm, with no recognition that the IMTFE was neither an American court nor presided over by an American judge, and that judicial style and etiquette do differ in other countries.<sup>63</sup> There is no express equal duty of judges towards counsel in the common law, as Appleman suggested was the norm. Certainly, insults from the bench to counsel or witnesses would breach judicial ethics, but there is an enormous difference between unethical judicial behaviour and a judge's privilege and duty to manage and control his court, as it then was, as he thinks appropriate in the circumstances. The latter may not be always liked by the parties, but is a necessary part of being a judge. Justice James Thomas, author of the standard work on judicial ethics in Australia, points out that:

If judges do not run the equivalent of a tight ship, control is easily lost and cases tend to run on at great expense to the parties and the state. Courts are robust institutions and it is undesirable that either judges or counsel should be too thinskinned about an occasional skirmish. [...] The conduct that is condemned [...] is not the ordinary cut and thrust of courtroom debate or even of occasional duelling when passions arise.<sup>64</sup>

<sup>&</sup>lt;sup>60</sup> *Ibid.*, pp. 243-44.

<sup>&</sup>lt;sup>61</sup> *Ibid.*, p. 244, fn. 26.

<sup>&</sup>lt;sup>62</sup> John H.E. Fried, Review of *Military Tribunals and International Crimes*, in *American Journal of International Law*, 1955, vol. 49, no. 1, p. 115.

<sup>&</sup>lt;sup>63</sup> Appleman, 1971 [1954], pp. 240-41, above note 56.

<sup>&</sup>lt;sup>64</sup> James Thomas, *Judicial Ethics in Australia*, third edition, LexisNexis Butterworths, 2009, pp. 25, 27.

Indeed, the Charter of the IMTFE expressly provided the Tribunal with various powers to manage and control the trial, including the "maintenance of order". Article 12 instructed the Tribunal to:

- a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.
- b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.
- c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.<sup>65</sup>

Moreover, Rule 3 of the Rules of Procedure provided that "the Tribunal, *acting through its President*, shall provide for the maintenance of order at the trial" in accordance with the disciplinary powers set out in Article 12.<sup>66</sup>

As Webb wrote at the time to the chief justice of the High Court of Australia: "If I were less firm than I am they [the defence counsel] would take possession" of the trial.<sup>67</sup> Lord Wright of Durley, the chairman of the United Nations War Crimes Commission, consoled Webb:

I should not be too disturbed if some people say you are a little abrupt and peremptory in dealing with objections. You must keep Counsel in order. Someone said it was like driving a four-in-hand: if they took charge, it was impossible to say where it would end, but if you keep them under control things will go well [...] I am quite sure that they could never have any reasonable grievance.<sup>68</sup>

As well as trying to hold the IMTFE to an alleged American standard of judicial style and etiquette that did not apply, Appleman's examples of Webb's supposed arrogant and insulting behaviour to the defence most-

<sup>&</sup>lt;sup>65</sup> Charter of the IMTFE, Article 12(a), (b) and (c) (with (d) omitted), above note 36.

<sup>&</sup>lt;sup>66</sup> Rules of Procedure of the International Military Tribunal for the Far East, issued 25 April 1946, Rule 3, reprinted in Boister and Cryer, 2008, p. 12, above note 36 (emphasis supplied).

<sup>&</sup>lt;sup>67</sup> Letter from Webb to Chief Justice John Latham, 1 July [no year], in NAA, M1418, 3.

<sup>&</sup>lt;sup>68</sup> Letter from Lord Wright of Durley to Webb, 29 July 1946, p. 2, in NAA, M1418, 4.

ly come from the early months of the trial, when Webb would have been shaping expectations about the conduct of the proceedings.

The next key problem is that these examples are, in any event, poorly characterized as arrogant and insulting. For instance, Appleman described an exchange in mid-May 1946 when Capt. George Furness for the defence characterized Dr. Ichirō Kiyose's earlier presentation for the defence as "brilliant". Appleman reported that Webb "abruptly told him to omit the compliments".<sup>69</sup> But what Webb actually said was "I think you can omit the compliments. It is quite unnecessary".<sup>70</sup> The giving of an opinion like this as to the conduct of the trial can hardly be called arrogant or an insult to the defence.

The day before, in fact, Webb had similarly criticized Chief Prosecutor Joseph Keenan for the style of his remarks before the Tribunal. Keenan had uttered a 135-word sentence posed as a rhetorical question.<sup>71</sup> Webb responded: "Mr. Chief Prosecutor, do you think those rhetorical phrases are fitting at this juncture?".<sup>72</sup> Webb was not the only person to regard Keenan's style as problematic: as defence counsel Carrington Williams recorded in his notes from that day, Keenan "fills his remarks with so much that is unnecessary. Useless rhetoric and speechmaking. Prosecution seems bored with him too. Sir William wears constant frown while such goes on".<sup>73</sup>

<sup>&</sup>lt;sup>69</sup> Appleman, 1971 [1954], p. 244, above note 56.

<sup>&</sup>lt;sup>70</sup> International Military Tribunal for the Far East Trial Transcript ('IMTFE Transcript'), 14 May 1946, p. 196 (https://www.legal-tools.org/doc/f04203/; the entire transcript is available in the ICC Legal Tools Database).

<sup>&</sup>lt;sup>71</sup> *Ibid.*, 13 May 1946, p. 137. The 'question' was:

Mr. President, Members of this International Military Tribunal, can it be that eleven nations represented on this Tribunal and in this prosecution, and in themselves representative of orderly governments, of countries containing one-half to two-thirds of the inhabitants of this earth, having suffered through this aggression the loss of a vast amount of their resources and deplorable and incalculable quantities of blood due to the crimes of murder, brigandage and plunder, are not totally impotent to bring to trial and punish those responsible for this world-wide calamity; that these Allied Nations, having brought about, as they were compelled to do so by sheer force, the end of these wars of aggression, must now stand idly by and permit the perpetrators of these offices to remain without the reach of any lawful punishment whatsoever?

<sup>&</sup>lt;sup>72</sup> Ibid.

<sup>&</sup>lt;sup>73</sup> Carrington Williams, "The Tokyo War Crimes Trial before the International Military Tribunal for the Far East", in John Carey, William V. Dunlap and R. John Pritchard (eds.), *International Humanitarian Law: Origins*, Brill, 2003, p. 114.

Apart from the example about unnecessary compliments between counsel already discussed, most of Appleman's examples of Webb's supposed arrogant and insulting behaviour to support his claim of judicial incompetence and misconduct are not described; they are merely listed in a footnote to the relevant transcript pages.<sup>74</sup> But, (re)viewed as a whole, in the context of what was happening in the trial (that is, the immediately preceding events), and from an understanding of the necessity of any judicial bench to manage and control a trial, they simply do not amount to arrogance or insults either by standards then, which were arguably looser, or today. Moreover, demonstrating how Webb is often conflated with the IMTFE, one of Appleman's examples of insults given to counsel is referenced to the majority judgment that Webb read out from the bench, but certainly did not join in writing.<sup>75</sup>That Webb was direct, short, brusque, acerbic, tetchy, spoke with asperity, or was sarcastic on occasion is undoubted. As Totani has stated, some of Webb's judicial colleagues believed that these traits were "neither helpful nor likeable".<sup>76</sup> But these instances do seem to come after some considerable provocation.

Curiously, although Cunningham had mentioned it in his September 1948 address, Appleman did not raise the most infamous comment Webb did make, which shows the selectivity of his research with the transcript. As is well known, Webb directed the remark "[t]he Prime Minister is the most stupid witness I have ever listened to" at defence witness former Prime Minister Mitsumasa Yonai on 22 September 1947.<sup>77</sup> The broader context of this remark, however, is rarely considered by those who raise it to criticize Webb.

Preceding Webb's remark, Yonai was being pressed in crossexamination by the prosecution about a note reportedly sent to him in July 1940, when he was prime minister, from War Minister General Shunroku Hata.<sup>78</sup> Specifically, the prosecution questioned whether the broad contents of the note had been reproduced in a Tokyo newspaper article at the

 <sup>&</sup>lt;sup>74</sup> Appleman, 1971 [1954], p. 244, fn. 26, above note 56, citing IMTFE Transcript, pp. 196, 2155, 2264-67, 2290, 2511-12, 2517, 2535, 2545, 2740, 2746, 3700, 6091, 16271, 18408-09, 21720-23, 38489, and Judgment, vol. 1, p. 17.

<sup>&</sup>lt;sup>75</sup> *Ibid*.

<sup>&</sup>lt;sup>76</sup> Totani, 2008, p. 16, above note 18.

<sup>&</sup>lt;sup>77</sup> See the remark in: IMTFE Transcript, 22 September 1947, p. 28939 (https://www.legaltools.org/doc/5b2402/).

<sup>&</sup>lt;sup>78</sup> *Ibid.*, p. 28931.

time.<sup>79</sup> Since Webb pointed out that the note in question had been referred to in Lord Keeper of the Privy Seal Kōichi Kido's diary (already in evidence),<sup>80</sup> and that a copy of the article was present in the courtroom before the witness,<sup>81</sup> the question ought to have produced a relatively quick confirmation or denial of reproduction. Some six pages of transcript later, however, Yonai had managed to continue evading the prosecution's question, even when Webb repeated the question. Yonai read some of the newspaper article until he suddenly declared he could not read it without a magnifying glass, so one was brought into the court for him.

From the transcript, Webb was clearly getting frustrated by what he saw as Yonai's tactics of deliberate evasion, when he remarked: "If Admiral Yonai could read without a magnifying glass, after that he could well say that he can't".<sup>82</sup> Two more pages later, when Yonai was still evading the question, Webb remarked: "That is still not an answer. The Prime Minister is the most stupid witness I have ever listened to".<sup>83</sup> It was almost a further page later that Yonai read out the relevant section of the article.<sup>84</sup>

Yes, Webb's remark was ill-judged and should not have been made, but one can certainly not say it was an observation randomly made about a witness for no reason and without provocation. The other judges, and certainly the prosecution, were likely equally frustrated with Yonai's evasion by that point.

It seems clear that at least some of Appleman's criticism of Webb's remarks from the bench was overblown by the fact that Appleman's starting point of what is acceptable in a courtroom was misjudged and also overly delicate, considering actual standards of adversarial courtroom repartee. However, Appleman certainly selectively casts blame on Webb as if he were synonymous with the IMTFE. At the beginning of the trial on 29 April 1946, recalled Carrington Williams, "without air conditioning [...] and large klieg lights<sup>85</sup> beating down; the heat was oppressive. Sus-

- <sup>82</sup> *Ibid.*, p. 28937.
- <sup>83</sup> *Ibid.*, p. 28939.
- <sup>84</sup> *Ibid.*, p. 28939-28940.

<sup>&</sup>lt;sup>79</sup> *Ibid.*, p. 28932.

<sup>&</sup>lt;sup>80</sup> *Ibid.*, p. 28933.

<sup>&</sup>lt;sup>81</sup> *Ibid.*, p. 28933.

<sup>&</sup>lt;sup>85</sup> Klieg lights were powerful electric lights used at the time for film-making.

pense (and sweat) built up".<sup>86</sup> Indeed, the summer of 1946 in Tokyo was, journalist Arnold Brackman remembered, one of the hottest and most humid on record. "[A]lmost everyone broiled", he noted, when the lights went on for filming in the courtroom, which had sealed windows and was not air-conditioned. Patrick, he thought, was particularly feeling the heat.<sup>87</sup> By 20 June 1946, Webb observed from the bench that the "conditions of heat in this courtroom are causing great discomfort to one of my colleagues who will decline to sit if this lighting is continued at its present intensity".<sup>88</sup> When Webb temporarily adjourned the trial on 10 July 1946, he clearly did so on behalf of the bench as a whole, stating:

The Judges have had a conference on the question of airconditioning in this court. We are all finding the conditions of heat most oppressive. [...] One of the doctors has reported, and he supports our attitude. However, we know, without any doctor's report, how we feel and how the heat is interfering with the proper discharge of our duties. [...] We are adjourning on the grounds that the conditions of heat are such that we cannot discharge our [d]uties in the way we think we should.<sup>89</sup>

Moreover, when Webb again addressed the temperature of the court on 15 July 1946, he stated that the installation of air-conditioning was "directed by the Supreme Commander, who had the advantage of medical reports".<sup>90</sup> He observed that air-conditioning was

necessary in this building. This court is situated in the well of the building, ventilation is almost completely shut out, the court is usually crowded and for a considerable portion of the time we have a blaze of lights more profuse than any-thing outside Hollywood.<sup>91</sup>

In these circumstances, it appears quite churlish of Appleman to pronounce in 1954 that the "president of the Tribunal seemed much more

<sup>&</sup>lt;sup>86</sup> Williams, 2003, p. 105, above note 73.

<sup>&</sup>lt;sup>87</sup> Brackman, 1989, p. 171, above note 21. In fact, in a photo taken in the courtroom in September 1946, a few small windows can be seen tilted open behind the bench: see NARA, RG238, Box 1, 46-67816.

<sup>&</sup>lt;sup>88</sup> IMTFE Transcript, 20 June 1946, p. 1087, above note 70 (https://www.legal-tools.org/doc/ 6a0e0a/).

<sup>&</sup>lt;sup>89</sup> *Ibid.*, 10 July 1946, pp. 2262, 2267 (https://www.legal-tools.org/doc/12bb5e/).

<sup>&</sup>lt;sup>90</sup> *Ibid.*, 15 July 1946, p. 2294 (https://www.legal-tools.org/doc/aa90c8/).

<sup>&</sup>lt;sup>91</sup> *Ibid.*, pp. 2286-87.

concerned about his personal comfort than the conduct of the case. He complained bitterly of the heat, even adjourning court on that account".<sup>92</sup> As the transcript clearly shows, it was for the reason of properly conducting the case that the trial was adjourned and, if the decision was not unanimous amongst the judges, it was certainly not a decision of pique made by Webb alone for his comfort.

While this might seem an undue attention and focus on this hapless Illinois trial lawyer who possibly had limited access to the transcript and who can no longer defend himself, the longer-term problem with Appleman's work is that it is the basis for a chain of criticism of Webb's conduct without much, if any, critical analysis of any evidence underpinning Appleman's conclusions. For example, in his doctoral thesis partially on the IMTFE in 1957, TSAI Paul Chung-tseng simply repeated Appleman's criticism of Webb. Tsai asserted that Webb's "[i]nsults to defense counsel were frequent" and, in support, copied Appleman's footnoted examples.<sup>93</sup> TSAI also asserted that defence witnesses were "abused", but cited only Webb's "most stupid witness" remark in support, which was to one witness.<sup>94</sup> Appleman's criticism was also uncritically taken up by Minear in 1971. Minear stated that he did "not feel qualified to assess the issue of judicial etiquette",<sup>95</sup> so he advised that he had explicitly relied upon Appleman and TSAI to support his "sharp" criticism of Webb.<sup>96</sup> Webb, Minear wrote, "conducted the trial in a manner prejudicial to justice. For example, abuse of defense counsel was a regular feature of the trial".<sup>97</sup> Since then, other scholars have relied upon Appleman, TSAI and Minear, repeating their claims that Webb abused or insulted defence counsel or defence witnesses.<sup>98</sup> They have often done so without considering what, if any, evidence lay behind the earlier analyses of judicial conduct.

<sup>&</sup>lt;sup>92</sup> Appleman, 1971 [1954], pp. 240-41, above note 56.

<sup>&</sup>lt;sup>93</sup> TSAI Paul Chung-tseng, "Judicial Administration of the Laws of War: Procedures in War Crimes Trials", unpublished Doctor of Law thesis, Yale University, 1957, chap. VI, p. 33 and F.VI/18, fn. 172.

<sup>&</sup>lt;sup>94</sup> *Ibid.*, chap. VI, p. 33 and F.VI/18, fn. 171.

<sup>&</sup>lt;sup>95</sup> Minear, 1971, p. 85, above note 3.

<sup>&</sup>lt;sup>96</sup> *Ibid.*, pp. x, 83-85.

<sup>&</sup>lt;sup>97</sup> *Ibid.*, p. 83.

<sup>&</sup>lt;sup>98</sup> See, for example, Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy, Routledge, 2008, pp. 60-61, fn. 47.

In more recent years, scholars have uncritically adopted the criticism now known to have been made privately of Webb by the other judges at the time or subsequently in print, with little consideration of context or motivation. While the private letters of Patrick, Northcroft and McDougall are frequently cited, to their number have now been added Röling, due to his willingness to speak publicly about the inner workings of the IMTFE and the length of his survivorship after the other judges. Eleven years after Webb's death, Röling was hypercritical of Webb at a public symposium in Japan in 1983, accusing him of a "tendency to seek positions of power by any available means" and "dictatorial behaviour towards his colleagues as well as toward the prosecutors and defense counsel".<sup>99</sup>

Yet, as Justice Christopher Greenwood has pointed out, the 1986 book that reproduced Röling's criticism of Webb at the symposium was "short", "rather superficial", and contained "little in the way of really rigorous analysis of the important questions" that Röling had raised.<sup>100</sup> As mentioned earlier, a further book of Röling's recollections was posthumously published in 1993, albeit based on interviews with Röling in 1977. When asked if there were "good lawyers" among the other judges, Röling responded only by pointing out the age difference between himself and "most" of the judges, suggesting - rather offensively - that they were consequently "perhaps too old" to realize that "an international court is something different from a national court and that international law is different from national law".<sup>101</sup> He labelled Northcroft "a judge" but Webb "a political figure", <sup>102</sup> which has to be a deliberate mischaracterisation given Webb's judicial appointments both before and after the IMTFE. He then described Webb as a "very arrogant and dictatorial man" and a "dictator".<sup>103</sup> Röling's views are now much repeated, with little consideration of their accuracy decades on from the IMTFE or the ethical propriety of Röling revealing some of the matters he did about the intimate workings

<sup>&</sup>lt;sup>99</sup> B.V.A. Röling, "Introduction", in Hosoya, Andō, Ōnuma and Minear, 1986, p. 17, above note 11.

<sup>&</sup>lt;sup>100</sup> Christopher Greenwood, "Review of The Tokyo War Crimes Trial: An International Symposium", in *International & Comparative Law Quarterly*, 1987, vol. 36, no. 3, p. 687.

<sup>&</sup>lt;sup>101</sup> Röling and Cassese, 1993, p. 29, above note 11.

<sup>&</sup>lt;sup>102</sup> *Ibid*.

<sup>&</sup>lt;sup>103</sup> *Ibid.*, pp. 30, 52.

of the IMTFE, as well as his insider knowledge of the verdicts and the sentences.

# 13.7. Conclusion

This chapter has briefly examined perceptions of Webb, highlighting the contradictions that exist between the generally negative ways that he is portrayed at the IMTFE and the positive views of him as a judge in Australia. It suggests that much of the criticism of Webb overlooks the difficulties and stresses placed on him in undertaking the role of president. Moreover, it has demonstrated that criticism of Webb's judicial performance and conduct in the early secondary literature is not actually supported by the evidence put forward. Nevertheless, this criticism has since been repeated from scholar to scholar and work to work.

This chapter thus argues that what is needed in this new era of analysis of the IMTFE is a fresh start to research on the judges, which some thoughtful scholars are already engaged in.<sup>104</sup> In conjunction with this fresh start, we need less blanket acceptance of criticism and more consideration of the broader context in which criticism is made, including any motivations that the judges, counsel or other participants may have had in voicing criticism of the judges or of the IMTFE generally (or praise for that matter). And we certainly need more consideration of whether sufficient evidence can be found to support a conclusion, particularly a negative one, about judicial conduct and performance.

It is regrettable and a disservice to the historical legacy of the IMT-FE that, no matter what his faults, and there were some, Webb is largely remembered in relation to the IMTFE only as a rude, incompetent judge who had a principally deleterious impact on the proceedings. Webb should also be remembered as a judge of considerable judicial experience, who took on perhaps one of the most difficult international judicial roles in history – one that, in hindsight, few would willingly accept. He was a judge whose individually-collated case notes against each of the accused and whose full draft judgment – which he intended to submit as late as 30 September 1948<sup>105</sup> – reveal an impeccably careful approach to his judicial

<sup>&</sup>lt;sup>104</sup> See, for example, the contributors to Kerstin von Lingen (ed.), *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*, Brill, 2018.

<sup>&</sup>lt;sup>105</sup> Cable from Webb to the Chief Justice [John Latham of the High Court] and the Attorney General, carbon-copied to General MacArthur, 30 September 1948, in *Papers of Sir William Webb*, Series 4: Correspondence, 1946-48, Wallet 7, above note 5.

duties of analysing and weighing the evidence, probably unlike most of the other judges.

Finally, Webb, unlike some other members of the bench, did not seek even privately to undermine his judicial colleagues or the legacy of the Tribunal but remained keen to the judicial decorum of portraying positive collegiality upon the bench. After the verdict was handed down, he wrote to the Australian Prime Minister, J.B. Chifley:

> The team work [amongst the judges] has been admirable. After two and one-half years of strenuous labor [sic] and much difference about important matters of opinion we part eleven good friends. That gives me the greatest satisfaction and I am sure you will be delighted to hear it.<sup>106</sup>

It is a cruel irony that Webb's reward for appropriate judicial behaviour – that he did not publicly or privately criticize his colleagues (except to his wife, which might perhaps be forgiven) – has meant that their criticism of him has instead taken centre stage in the historical legacy of the IMTFE.

<sup>&</sup>lt;sup>106</sup> Cable from Webb to Rt. Hon. J.B. Chifley, 16 November 1948, in *Papers of Sir William Webb*, Series 4: Correspondence, 1946-48, Wallet 7, above note 5.

PART IV: RECEPTIONS AND REPERCUSSIONS OF THE TRIAL

# 'Substantial Criminal Character' or 'Lawless Violence': Crimes in the Charter of the Tokyo Tribunal and Their Receptions in Contemporary Japanese Legal Scholarship

# **Philipp Osten**<sup>\*</sup>

#### 14.1. Introduction

The year 2018 marked the seventieth anniversary of the delivery of the judgment of the International Military Tribunal for the Far East ('IMTFE') in Tokyo. Even though this trial is now widely regarded to constitute a historic point of origin for modern international criminal law, this anniversary has, interestingly, remained almost unnoticed among Japanese legal scholars.<sup>1</sup> This chapter deals with the reaction of contemporary Japanese legal scholars to the Tokyo Trial, in particular the legal debate in the immediate wake of the trial. It concentrates on the echo raised by the

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<sup>&</sup>lt;sup>1</sup> As of the time of writing, no Japanese law journal has dedicated a special issue to, or otherwise focused on, this anniversary; a recent special issue of the law journal *Höritsu jihö* on "International Criminal Law Today" ("*Kokusaikeijihō no genzai*") did not include any specific article on the Tokyo Trial (*Höritsu jihō*, 2018, vol. 90, no. 10, pp. 7-65). Furthermore, no new monograph on the trial by a Japanese legal scholar was published in this regard. The most recent issue of the journal *Keihō Zasshi* (published by the Criminal Law Society of Japan) contains an introductory article on the anniversary of the Tokyo judgment and the international conference held in Nuremberg on that occasion: Philipp Osten [Firippu Osuten], "Tökyō saiban hanketsu 70 shū-nen kokusai shimpojiumu" [International Conference "70 Years Later: The International Military Tribunal for the Far East"], in *Keihō Zasshi* (Journal of Criminal Law), 2020, vol. 59, no. 1, pp. 131-135.

crimes stipulated in the Charter of the IMTFE, which formed the legal basis for the prosecution of the major Japanese war criminals and therefore the core legal issue of the trial. Somewhat surprisingly, the initial reaction of Japanese jurists was *not* muted. To the contrary, a perceptive and somewhat lively discussion took place, at least during and immediately after the trial; in fact, those Japanese scholars already anticipated some legal concepts which are now generally recognized in international criminal law. However, this debate not only remained unnoticed outside of Japan (that is, in Western legal research) for the most part, but is also more or less forgotten among Japanese jurists today.

The crimes, in particular the notion of crimes against peace and related legal questions, constituted the centre-piece of the scholarly debate in Japan. To accurately assess the contemporary Japanese reception of the crimes – that is, the reactions to and scholarly perceptions of the definition and legal substance of the crimes as applied at the IMTFE – this chapter, at its outset, will provide a brief overview of the three crimes falling under the scope of jurisdiction of the Tokyo Tribunal as defined in Article 5 of its Charter: crimes against peace, conventional war crimes and crimes against humanity (Section 14.2.). It will try to shed light on some of the most significant modifications in the definitions of these crimes, as compared to the Charter of the International Military Tribunal ('IMT') at Nuremberg. The legal consequences of such particularities in the definitions with regard to the applicability and interpretation of the crimes will also be outlined.

As regards the ensuing scholarly debate in Japan, naturally, not the entire range of opinions voiced in contemporary Japanese legal scholarship can be covered within this brief study.<sup>2</sup> A special focus shall therefore be put on the views of selected, representative scholars (Section 14.3.), essentially some of the most influential Japanese criminal law and public

<sup>&</sup>lt;sup>2</sup> For a comprehensive account of the Japanese scholarly debate on the Tokyo Trial, see Philipp Osten, *Der Tokioter Kriegsverbrecherprozeβ und die japanische Rechtswissenschaft*, Berliner Wissenschafts-Verlag, Berlin, 2003; Philipp Osten [Firippu Osuten], "Tōkyō saiban to sengo Nihon keihō-gaku" [The Tokyo Trial and the Debate among Criminal Law Scholars in Post-War Japan], in Yoshihisa Hagiwara (ed.), *Posuto wō shitizunshippu no kōsōryoku* [Designing Post-War Citizenship], Keio Gijuku Daigaku Shuppan Kai (Keio University Press), Tokyo, 2005, pp. 85-103. A chapter depicting the first trial analysts in Japan is included in Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, Massachusetts, 2008, pp. 190-217.

international law scholars of their time, as their discussions are, for the most part, unknown outside of Japan.<sup>3</sup>

#### 14.2. Crimes in the Tokyo Charter: Definitions, Modifications, Counts and Judgment

Based on an order by the Supreme Commander of the Allied Powers in Japan, General Douglas MacArthur, the Charter of the IMTFE was drafted by the International Prosecution Section; it was publicized as an attachment to a "Special Proclamation" of the Supreme Commander on 19 January 1946 and constituted the formal legal basis for the establishment of the IMTFE.<sup>4</sup> It was modelled on the Nuremberg Charter and stipulated three categories of crimes, that is, crimes against peace, conventional war crimes and crimes against humanity. However, the definitions of the crimes differed from those in the IMT Charter in several respects. These alterations have consequently influenced the way these crimes were applied in Tokyo.

# 14.2.1. Crimes Against Peace

Crimes against peace were the central charge of the Tokyo Trial and constituted the heart-piece not only of the court proceedings, but also of the ensuing scholarly debate. Unlike the Nuremberg Charter (cf. its Article 6), Article 5 of the IMTFE Charter limited the scope of persons to be tried at Tokyo to those who "are charged with offenses that include Crimes against Peace"; thus, no defendant was prosecuted without a charge of committing crimes against peace. In line with the overall prosecutorial strategy, the Charter and thus the Tribunal were construed to try the Japanese leadership primarily for crimes against peace. The ultimate goal of the trial was to punish Japanese aggression. As a result, nearly all (24 of the 25 remaining) defendants were found guilty of charges pertaining to crimes against peace.

<sup>&</sup>lt;sup>3</sup> For an overview of the scholarly debate among German jurists in the wake of the Nuremberg Trial, see Thomas Weigend, "'In general a principle of justice': The Debate on the 'Crime against Peace' in the Wake of the Nuremberg Judgment", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 1, pp. 41 ff.

<sup>&</sup>lt;sup>4</sup> The Charter was amended on 26 April 1946. The Special Proclamation and the (amended) Charter of the IMTFE (both annexed to this volume) are also reproduced in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, pp. 5-6, 7-11.

The definition of crimes against peace in Article 5 (a) of the Tokyo Charter had been constructed on the Nuremberg model,<sup>5</sup> with one significant modification: the addition of the words "declared or undeclared" to the term "war of aggression" in order to underline the understanding that the manner in which a war was commenced (or qualified by one of the belligerent parties) was immaterial to determining its legal character. This alteration clarified that this crime could also be applied to the undeclared wars which Japan had conducted over many years, particularly in and against China.<sup>6</sup>

In retrospect, it is interesting to note that a strikingly similar wording has also been adopted in the Kampala definition of the crime of aggression, which is now incorporated in the Rome Statute of the International Criminal Court ('ICC') ("regardless of a declaration of war").<sup>7</sup> Arguably, this could be regarded as an indication for a unique impact of the Tokyo Charter on the present-day development of this legal concept. In this respect, the Charter and the related jurisprudence of the IMTFE may perhaps receive more attention in the near future, considering the activation of the jurisdiction of the ICC on the crime of aggression from 17 July 2018 onwards.<sup>8</sup>

Furthermore, the term "[international] *law*" was inserted in the definition ("a war in violation of international law, treaties, agreements or assurances [...]"), supposedly to highlight the understanding that the criminality of aggressive war had been established under international law itself.<sup>9</sup>

While the Nuremberg IMT only had four counts for indictment, there were 55 counts in Tokyo, which were separated into three groups. In the first and most important group, the prosecution developed 36 counts pertaining to crimes against peace, reflecting the emphasis placed on this category. Of these 36 counts, five were conspiracy counts and the remain-

<sup>&</sup>lt;sup>5</sup> For a recent analysis of the historical genesis of the concept of crimes against peace, see Kirsten Sellars, 'Crimes against Peace' and International Law, Cambridge University Press, Cambridge, 2013.

<sup>&</sup>lt;sup>6</sup> See Osten, 2003, p. 88, see above note 2.

<sup>&</sup>lt;sup>7</sup> Article 8*bis* of the amended Rome Statute of the International Criminal Court ('ICC'), 11 June 2010, ICC-RC/Res.6, Annex I (https://www.legal-tools.org/doc/7b9af9/).

<sup>&</sup>lt;sup>8</sup> Cf. Resolution ICC-ASP/16/Res. 5, adopted on 14 December 2017 (https://www.legaltools.org/doc/6206b2/).

<sup>&</sup>lt;sup>9</sup> Cf. Totani, 2008, p. 81, see above note 2.

ing 31 were substantive counts. Most of these counts were not examined in court and/or dismissed from the judgment, as the judges considered them repetitious and redundant. Thus, out of the 36 relevant counts, judgment was finally made on only eight counts. The first count was a conspiracy count, epitomizing all charges related to crimes against peace. It charged, in summation, that there had existed a grand plan or conspiracy to secure domination over the Asia-Pacific region by waging a war of aggression from 1928 to 1945, and that all accused had taken part in this plan or conspiracy in some form. This alleged conspiracy against world peace constituted the keystone of the indictment and was the single most important count in the Tokyo Trial. The court (in its majority judgment) held that such a (single) grand conspiracy over 18 years did exist.<sup>10</sup> It also upheld seven substantive counts of crimes against peace, namely the waging of wars of aggression against China, the United States and five other nations. While holding that such aggression was criminal, the majority, however, refrained from providing an express definition of "aggression". This, as will be seen, was conceived by critics of the trial as a decisive legal weakness.

Altogether, the focus on crimes against peace was even higher in the Tokyo Trial than at Nuremberg.<sup>11</sup> With the notion of aggressive war as its nucleus, crimes against peace was a more problematic and much more disputed concept than conventional war crimes (and even crimes against humanity), because it dealt directly with the nature and causes of war, as compared to specific violations of the laws and customs of war or wartime atrocities.

<sup>&</sup>lt;sup>10</sup> The Judgment of the International Military Tribunal for the Far East is reproduced in R. John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-two Volumes*, Garland, New York, 1981, vol. 20, p. 49769 ('IMTFE Judgment') (https://www.legal-tools.org/doc/8bef6f/). The transcripts are also available on the ICC Legal Tools Database.

<sup>&</sup>lt;sup>11</sup> According to Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy, Routledge, London, 2008, p. 65, as a consequence of this heavy focus, the trial was examining "less the way Japan had conducted the war but more the reasons why" Japan had conducted it.

#### 14.2.2. Crimes Against Humanity

In contrast to crimes against peace, the novel concept of crimes against humanity played a minor role in Tokyo and was practically not conceived as an independent category of crimes.

As described above, the 55 counts charged in Tokyo were separated into three groups, with two-thirds of the counts pertaining to crimes against peace (group 1). The remaining counts were indicted as "Murder" (group 2) – which was not provided for in the statute and was eventually dismissed by the court<sup>12</sup> – and as "Conventional War Crimes and Crimes against Humanity" (group 3, with only three counts). Thus, crimes against humanity were not dealt with separately but combined with conventional war crimes. The judgment limited its findings on this last group to only two counts (Counts 54 and 55). In these two counts, no conceptual or substantial differentiation between war crimes and crimes against humanity was made.<sup>13</sup> The prosecution did not submit evidence to establish specific crimes against humanity, to the effect that no defendant was convicted of any (singular) crime against humanity in Tokyo.

Compared to Nuremberg, the most significant modification in the definition of crimes against humanity in the Tokyo Charter was the deletion of the wording "[acts committed] *against any civilian population*". Thus, the object (that is, the target) of acts constituting crimes against humanity under the Tokyo Charter was not limited to civilians, with the effect that this provision could also apply to inhumane conduct against combatants.<sup>14</sup> The decisive difference in the concept of crimes against humanity lies, therefore, in the non-limitation of the scope of persons to be protected by this notion. The concept of crimes against humanity at Nuremberg was originally drafted with a view to the prosecution of (ideologically motivated) Nazi crimes, namely crimes against persons who did not fall in the scope of conventional war crimes, in particular the offend-

<sup>&</sup>lt;sup>12</sup> On the murder counts and their treatment by the court, see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, pp. 154-74.

<sup>&</sup>lt;sup>13</sup> Cf. Yuma Totani, "The Case against the Accused", in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2010, p. 154, who argues that the two counts should be understood, in substance, as war crimes.

<sup>&</sup>lt;sup>14</sup> Cf. Bernard V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1993, p. 13.

ing State's own citizens or nationals of third States.<sup>15</sup> However, by extending the scope to enemy combatants, it became difficult to distinguish crimes against humanity from conventional war crimes.<sup>16</sup> Considering these alterations, it is not altogether surprising to see that the indictment at Tokyo did not charge crimes against humanity committed against Japanese subjects on Japanese territory – which would have been conceivable, at least theoretically, in view of the colonies annexed by Japan (such as the Korean peninsula) and its (at that time Japanese) citizens.

Furthermore, the court in Tokyo adhered to the restrictive jurisprudence of the Nuremberg Tribunal on the connexity of this crime with the other two crimes falling under its jurisdiction: the IMT presupposed a *nexus* between crimes against humanity and war crimes or crimes against peace (that is, a link to an international armed conflict), which further narrowed down the scope of applicability of crimes against humanity.<sup>17</sup> By restricting crimes against humanity to those closely connected with the war, contrary to the wording "[acts committed] *before* or during the war", practically no pre-war crimes against humanity, that is, inhumane acts committed in peace-time, could be tried in Tokyo.

Today, a (systematic) attack against any *civilian population* is regarded as the most significant characteristic and a crucial foundational element of crimes against humanity.<sup>18</sup> Thus, the omission of this element at Tokyo turned out to be a historical flash in the pan. As no substantial

<sup>&</sup>lt;sup>15</sup> See, for instance, Stephan Meseke, Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes, Berliner Wissenschafts-Verlag, Berlin, 2005, pp. 11 ff.; Kerstin von Lingen, "Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in Criminal Law Forum, 2014, vol. 25, pp. 45-76.

<sup>&</sup>lt;sup>16</sup> Cf. Egon Schwelb, "Crimes against Humanity", in *British Yearbook of International Law*, 1946, vol. 23, pp. 178, 215: "In the Japanese trial it is still more true to say that the term crimes against humanity is merely another description of war crimes".

<sup>&</sup>lt;sup>17</sup> Cf. *ibid.*, p. 206: "The Tribunal treats the notion of crimes against humanity as a kind of subsidiary provision [...]. It is, as it were a kind of by-product of war [...]. It denotes a particular type of war crime".

<sup>&</sup>lt;sup>18</sup> All subsequent statutory definitions of crimes against humanity in international law have included this element; see, for example, the definition provided in Article 7, ICC Statute (https://www.legal-tools.org/doc/7b9af9/). See also the (identical) definition in Article 3 of the draft articles on a Convention for Crimes against Humanity provisionally adopted by the International Law Commission: UN Doc. A/CN/.4/704, 23 January 2017, Annex I, p. 152 (https://www.legal-tools.org/doc/f6dac0/).

discussion of the concept of crimes against humanity occurred in Tokyo and the court ultimately made no findings on crimes against humanity, the trial certainly had no precedential effect on the further development of this notion.

#### 14.2.3. Conventional War Crimes

The notion of conventional war crimes, as such, did not give rise to much legal controversy at the Tokyo Trial since it could be based on customary international law. Unlike the IMT Charter, the definition provided in the Tokyo Charter seemed, at first glance, somewhat undetermined, as it did not enumerate specific violations of the laws or customs of war. Nevertheless, the criminality of these acts, as such, was not contested, even in terms of their legal certainty (that is, sufficient clarity); further, the Nuremberg Charter did not provide a concise, but only an exemplary, definition of war crimes.<sup>19</sup>

Some of the most infamous wartime atrocities committed by the Japanese armed forces were adjudicated under this category of crime. In this regard, the most significant legal aspect was, however, the mode of individual criminal responsibility (or mode of imputation) which was adopted at Tokyo for war crimes. The doctrine of command (or superior) responsibility was applied (inferring on the non-uniform jurisprudence of contemporaneous war crimes trials preceding the IMTFE) and further developed at the IMTFE, with a view also to the responsibility of civilian superiors (as, *inter alia*, in the *Hirota* case<sup>20</sup>). It is here that the court was perhaps most creative and influential in terms of presenting substantial legal discourses and perspectives. These cases were repeatedly referred to, as precedents and were extensively discussed in the jurisprudence of the *ad hoc* Tribunals.<sup>21</sup>

<sup>&</sup>lt;sup>19</sup> Cf. IMT Charter, Article 6(b): "Such violations shall include, *but not be limited to*, [...]" (emphasis applied) (https://www.legal-tools.org/doc/64ffdd/).

<sup>&</sup>lt;sup>20</sup> IMTFE Judgment, p. 49791, see above note 10. Köki Hirota was Japan's Foreign Minister at the time of the massacres committed by the Japanese army in Nanjing and was convicted, *inter alia*, for his inaction to stop these atrocities.

<sup>&</sup>lt;sup>21</sup> For instance, the judgment of the IMTFE (*In re Hirota and Others*) was expressly referred to, *inter alia*, in the Čelebići trial judgment of the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Delalić, Mucić, Delić and Landžo (Čelebići*), Trial Chamber, Judgment, 16 November 1998, IT-96-21-T, paras. 357-358) and the *Akayesu* trial judgment of the International Criminal Tribunal for Rwanda (*Prosecutor v. Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T, para. 633).

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Finally, it should also be mentioned that the IMTFE imposed the most severe punishment – the death penalty – on those convicted of war crimes, and not on those found guilty solely of crimes against peace. This sentencing practice is even more noteworthy considering the heavy focus on crimes against peace in the indictment and the court proceedings. Arguably, this indicates some rudimental reasoning regarding the gravity of the different crime categories, which was already apparent in the Nuremberg judgment and also expressed in some separate opinions at Tokyo.<sup>22</sup>

The possibility of a hierarchy of international crimes in terms of gravity (and corresponding sentencing principles) is, however, highly disputed even today, with rather conflicting views reflecting in the jurisprudence of the *ad hoc* Tribunals, and no explicit provisions in the ICC Statute. In any case, it remains rather questionable whether the Tokyo Trial can provide any precedential guidance in this regard.

#### 14.3. The Contemporary Scholarly Debate on the Concept of Crimes

Already at the outset of the trial, the defence challenged all counts which went beyond the notion of conventional war crimes. In particular, the legality of 'crimes against peace' and, thus, the jurisdiction of the Tribunal itself was questioned. The defence attorneys claimed that the criminality of an aggressive war was not recognized under international law; the provisions in the Tokyo Charter stipulating penal sanctions for crimes against peace would be tantamount to *ex post facto* legislation and therefore would violate the *nulla poena* principle. Furthermore, they argued that an individual could not be made criminally liable for a war which was waged by the State (act-of-State doctrine).<sup>23</sup>

Although the court rejected these motions, it did not present any indepth reasoning of its own regarding these fundamentally important legal questions. Instead, the majority judgment, besides stating that it was

<sup>&</sup>lt;sup>22</sup> Cf. Separate Opinion of President Webb, reproduced in Boister and Cryer, 2008, pp. 637-38, see above note 4.

<sup>&</sup>lt;sup>23</sup> Pritchard and Zaide (eds.), 1981, vol. 2 (The Proceedings of the Tribunalin Open Session), pp. 120 ff., see above note 10. See also IMTFE Judgment, pp. 48436-48436a, see above note 10. Both are also available in the ICC Legal Tools Database. The leading Japanese defence lawyer, Ichirō Kiyose, who eventually became an influential politician in post-war Japan, challenged the jurisdiction of the court already on the fourth day of the trial proceedings (13 May 1946). His famous motion is reproduced in his memoirs: Ichirō Kiyose, *Hiroku Tōkyō saiban* [Private Notes on the Tokyo Trial], Yomiuri Shimbun-sha, Tokyo, 1967, reprinted by Chūō Kōrōn-sha, Tokyo, 1986 (cited here), pp. 53 ff.

bound and empowered by the Charter, simply referred to and relied entirely on the legal reasoning presented in the Nuremberg judgment:

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.<sup>24</sup>

The aforementioned reasoning of the defence lawyers formed the argumentative basis for some critics of the Tokyo Trial in the ensuing debate. Interestingly, however, the majority of contemporary legal academics in Japan expressed overall positive views of the concept of crimes applied at the trial, in spite of their awareness of many legal shortcomings, as will be seen.

# 14.3.1. Criminal Law Scholars

### 14.3.1.1. Shigemitsu Dandō

An affirmative assessment was conveyed, first of all, by Shigemitsu Dandō (1913–2012), the leading criminal law scholar of the time.<sup>25</sup> He was an associate professor of criminal law at the (then Imperial) University of Tokyo at the end of the war, was appointed full professor in 1947, and eventually became the most influential criminal law scholar in post-war Japan.<sup>26</sup> Strongly influenced by German legal doctrine, he also developed a keen interest in American criminal procedure.<sup>27</sup> He briefly taught at Keio University in 1974, before being appointed judge at the Supreme Court of Japan (until 1983). While Dandō avoided being drawn into politically sensitive debates during the war, he was the first criminal law

<sup>&</sup>lt;sup>24</sup> IMTFE Judgment, p. 48439, see above note 10.

<sup>&</sup>lt;sup>25</sup> For biographic details, see his autobiography: Shigemitsu Dandō, Waga kokoro no tabiji [The Journeys of My Heart], Yūhikaku, Tokyo, 1986, pp. 393 ff.

<sup>&</sup>lt;sup>26</sup> Cf. Joseph L. Hoffmann, "Justice Dando and the "Conservative" Argument for Abolition", in *Indiana Law Journal*, 1996, vol. 72, no. 1, p. 21, referring to Dandō as being "truly a leader of the post-war generation of Japanese legal scholars and jurists".

<sup>&</sup>lt;sup>27</sup> Dandō stressed the 'educational' function of the Tokyo Trial proceedings in this regard, even in his last years. See Shigemitsu Dandō and Ken Itō, *Hankotsu no kotsu* [The Essence of the Spirit of Defiance], Asahi Shimbun Shuppan, Tokyo, 2007.

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scholar to publish an in-depth analysis of the legal issues raised by the Tokyo Trial.  $^{\rm 28}$ 

He held that the notion of crimes against peace as well as crimes against humanity could be regarded as rooting in general principles of international law, which themselves could be perceived as a manifestation of natural law. As the international community did not have a central legislative body (unlike within States), Dandō pointed out the general international understanding that principles of justice and the humanitarian ideal were the common heritage of the civilized world. In his view, such principles constituted the fundamental, universally accepted norms of international law. The codification of these norms starting in the nineteenth century was an expression of the universal acceptance of these norms.<sup>29</sup> Such manifest natural law – even if, like the categories of crimes against peace and crimes against humanity, not codified prior to the Second World War – was thus applicable as "positive law in the process of making".<sup>30</sup>

Sure enough, these categories of crime were susceptible to doubts in light of the principle of legality,<sup>31</sup> namely the prohibition of retroactive application of law. However, in Dandō's view, the strict application of this principle in international law in the same traditional understanding as in domestic criminal law, even if seemingly desirable in principle, was not feasible considering the present (transitional) state in the development of international law.<sup>32</sup> Central to his argument was the assumption that both the principle relating to the prohibition of *ex-post facto* law and the body of international law as such (particularly the law pertaining to war crimes) shared the same philosophical foundation: they were both aimed at restricting the unjust exercise of State power while respecting individual liberty.<sup>33</sup> Hence, it would contradict the purpose of the principle of legali-

<sup>&</sup>lt;sup>28</sup> Shigemitsu Dandō, "Sensō hanzai no rironteki kaibō" [A Dogmatic Analysis of War Crimes], first published in *Chōryū*, 1946, vol. 1, no. 7; reprinted in *idem, Keihō no kin-daiteki tenkai* [The Modern Development of Criminal Law], Kōbundō, Tokyo, 1948, amended and extended 1952 (cited here), pp. 153 ff.

<sup>&</sup>lt;sup>29</sup> *Ibid.*, pp. 169 ff.

<sup>&</sup>lt;sup>30</sup> *Ibid.*, p. 172 (author's translation, same for below unless otherwise stated).

<sup>&</sup>lt;sup>31</sup> *Ibid.*, p. 166.

<sup>&</sup>lt;sup>32</sup> *Ibid.*, pp. 166-68, 171, 173.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, p. 167.

ty if it would be interpreted and used to protect those who abused such power:

In the sphere of international law, in particular the law concerning war crimes, this law by itself is construed in order to restrict the unjust exercise of State power; in its relationship vis-à-vis the State power, one might even argue that this law is based on the same theoretical grounds as the principle of legality in domestic law.<sup>34</sup>

Therefore, in light of the ultimate purpose of establishing and fostering world peace, some modifications of the principle of legality were necessary in order to enable the judicial recognition of individual criminal responsibility under international law:

To simply apply sanctions against a State as such which has initiated an illegal war would only have a very limited effect. It is absolutely imperative to also punish those individuals who were the driving force behind the initiation of the war.<sup>35</sup>

Dandō eventually – as the first and only legal scholar in Japan (surprisingly, up to the present day) – established three purposes of punishment specific to international criminal law:

- 1. a general deterrent effect of preventing future wars of aggression;
- 2. a special deterrent (and retributive) effect *vis-à-vis* the individual perpetrator (whose apprehension prevents him or her from initiating another war and thus secures society); and
- 3. the ultimate purpose of realizing justice, thereby shaping the public conscience of the international community (and strengthening faith in the international rule of law) and thus indirectly contributing to world peace.<sup>36</sup>

Accordingly, Dandō attributed a crucial role to the Tokyo Trial on the way to constructing an international criminal justice system that would contribute to deterring future acts of aggression and maintaining peace.

<sup>&</sup>lt;sup>34</sup> *Ibid*.

<sup>&</sup>lt;sup>35</sup> *Ibid.*, pp. 173-74.

<sup>&</sup>lt;sup>36</sup> *Ibid.*, pp. 174-75.

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#### 14.3.1.2. Seiichiro Ono

With regard to the notion of crimes applied in Tokyo and the principle of legality, Dandō's views were also echoed by his academic mentor, the distinguished criminal law scholar Seiichiro Ono (1891-1986).<sup>37</sup> He was one of the leading classic and objectivist criminal law scholars<sup>38</sup> whose theories were also inspired by Buddhism.<sup>39</sup> The objectivist theory of crimes was based on the doctrine of the constitutive elements of crime (or the description of criminal offences: the *Tatbestand*) and on the principle of legality.<sup>40</sup>

As to the doctrine of elements of crime, Ono distinguished between cultural and purely legal norms, both of which contributed to the development of criminal offences. He concluded that all criminal offences were to be construed as cultural phenomena.<sup>41</sup> The concept of 'culture', however, remained vague and left substantial leeway for interpretation.<sup>42</sup> In relation to Japan, Ono initially considered 'culture' as rooting in a specifically Japanese understanding of Buddhism. As of 1940, Ono's concept of genuine Japanese culture became the gateway for his ultra-nationalist theory of a "supreme Japanese legal spirit" that, according to him, was to be disseminated.<sup>43</sup> Thus, he provided a doctrinal justification for Japan's war policy.<sup>44</sup>

In view of his ultra-nationalist wartime publications, he was purged from his chair of criminal law at the (then still Imperial) University of To-

<sup>&</sup>lt;sup>37</sup> On the life and work of Ono, see Osten, 2003, pp. 131 ff., see above note 2; Osten [Osuten], 2005, pp. 89-90, 92-94, see above note 2; Minoru Honda, "Über den rechtsphilosophischen Universalismus in der japanischen Strafrechtsgeschichte – eine kritische Betrachtung über den Strafrechtsgedanken Seiichiro Onos in der Zweiten Weltkriegszeit", in *Ritsumeikan Law Review*, 2014, no. 31, pp. 1 ff.

<sup>&</sup>lt;sup>38</sup> Honda, 2014, pp. 1, 5, see above note 37.

<sup>&</sup>lt;sup>39</sup> Cf. also Keiichi Yamanaka, *Geschichte und Gegenwart der japanischen Strafrechtswissenschaft*, Walter De Gruyter, Berlin, 2012, p. 12.

<sup>&</sup>lt;sup>40</sup> Cf. Honda, 2014, p. 5, see above note 37.

<sup>&</sup>lt;sup>41</sup> Cf. also *ibid.*, pp. 1, 5, who argues that Ono considered the idealistic category of 'culture' to be a standard against which to measure actual criminal policy and jurisprudence.

<sup>&</sup>lt;sup>42</sup> Cf. *ibid.*, p. 6.

<sup>&</sup>lt;sup>43</sup> In his main work of that time, presuming that war was (in some respect) a clash of cultures, Ono considers it Japan's task to establish a new, eastern global legal order based on the tradition of Japanese law: Seiichiro Ono, *Nihon hōri no jikakuteki tenkai* [The Independent Development of Japanese Legal Thinking], Yūhikaku, Tokyo, 1942, pp. 10, 11.

<sup>&</sup>lt;sup>44</sup> See Osten, 2003, p. 133, see above note 2.

kyo in 1946. He became an attorney and later resumed teaching at a small private university. He also temporarily acted as an assistant defence counsel at the Tokyo Trial.<sup>45</sup> In this context, he published a short study on the crimes defined by the IMTFE Charter.<sup>46</sup>

The study was confined to an introduction to the distinct characteristics of the crimes as stipulated in the Charter and a comparison of said crimes with conventional offence categories in domestic criminal law. Even though Ono did not engage in a specific discussion of Japanese war crimes and their legal interpretation in the IMTFE, he thoroughly examined some legal issues raised by the verdict of the preceding Nuremberg Trial.

As regards the principle of legality, Ono pointed out that it was a fundamental principle of justice, but not the only principle of justice and, by far, not an absolute principle.<sup>47</sup> Particularly, he noted the vagueness in the definition of constitutive elements of "crimes against peace". Ono attributed this vagueness to the fact that international law in this area was still "in the making" and the Nuremberg Trial was its first application.<sup>48</sup> He also held that the legal grounds for individual criminal liability of leaders of an aggressive State under international law could be compared to the (generally accepted) legal concept of making representatives of juridical persons criminally responsible for certain offences committed by the legal entity as such:

War is generally conceived as an act conducted by States; it is, however, obvious that such a war is planned, prepared, initiated and carried out by individuals, and it is not theoretically impossible to attribute criminal responsibility to such acts of individuals. This resembles the concept of criminal responsibility of individuals for certain actions of a juridical person.<sup>49</sup>

<sup>&</sup>lt;sup>45</sup> For the defendant Takazumi Oka.

<sup>&</sup>lt;sup>46</sup> Seiichiro Ono, "Sensö hanzai no köseiyöken – Kyokutö Kokusai Gunji Saiban no högakuteki kansatsu" [The Constitutive Elements of War Crimes – A Jurisprudential Contemplation of the International Military Tribunal for the Far East], in *Höritsu Shinpö*, 1946, no. 731, pp. 38 ff.

<sup>&</sup>lt;sup>47</sup> Seiichiro Ono, "Nyurunberugu-hanketsu no höritsu kenkai" [The Legal Conclusions of the Nuremberg Judgment], in *Höritsu Shinpö*, 1946, no. 734, p. 37.

<sup>&</sup>lt;sup>48</sup> *Ibid.*, p. 39.

<sup>&</sup>lt;sup>49</sup> *Ibid.*, p. 40.

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Moreover, with regard to the defence of acting upon superior orders, Ono generally agreed with the test indicated by the IMT, namely whether moral alternative conduct was indeed possible.<sup>50</sup> Remarkably, Ono did not render such opinion in reference to the IMTFE. His reluctance in this regard could possibly be attributed to his writings and his role during the war.<sup>51</sup> After Japan regained its independence, Ono was quickly rehabilitated. In fact, he was appointed chairman of the Criminal Law Reform Commission by the Ministry of Justice.<sup>52</sup> As a result, the Japanese criminal law reform after the Second World War was partly influenced by Ono.<sup>53</sup>

#### 14.3.1.3. Chihiro Saeki

While Dandō and Ono – the latter in reference to the IMT – analysed the notion of crimes against peace and other crimes stipulated in the Tokyo Charter mainly from the angle of the principle of legality, the renowned criminal law scholar Chihiro Saeki (1907–2006) chiefly addressed the issue of acting upon superior orders as a criminal defence.<sup>54</sup> Indeed, he was the only criminal law scholar of his time who extensively discussed this doctrinal issue specifically in the context of war crimes.

Initially, Saeki was a criminal law professor at Kyoto (Imperial) University. Before the war, as of 1930, he had been devoted to developing a normative theory of penal guilt. At its core was the doctrine of reasonableness of norm-conforming (standard-compliant) conduct as a requirement for guilt in criminal law. Saeki considered the exceptional unreasonableness of norm-conforming conduct a supra-legal excusatory defence. According to Saeki, the basis for assessing the unreasonableness is the perspective of the ruling State, which was the supreme authority defining the values of the social order that criminal law aimed at protecting.<sup>55</sup> In his main work before the end of the war, "Criminal Law, General Part",<sup>56</sup> he argued that in Japan, not only penal guilt, but also moral and religious

<sup>&</sup>lt;sup>50</sup> *Ibid.*, p. 40.

<sup>&</sup>lt;sup>51</sup> Cf. Osten, 2003, p. 138, see above note 2.

<sup>&</sup>lt;sup>52</sup> *Ibid.*; Honda, 2014, p. 2, see above note 37.

<sup>&</sup>lt;sup>53</sup> Cf. Yamanaka, 2012, p. 41, note 16, see above note 39.

<sup>&</sup>lt;sup>54</sup> On the life and work of Saeki, see Osten, 2003, pp. 133, 138, see above note 2.

<sup>&</sup>lt;sup>55</sup> Chihiro Saeki, "Kitaikanösei no hyöjun" [The Standard for Reasonableness], in *Högaku Ronsö* (Kyoto Law Review), 1941, vol. 45, no. 2, pp. 3 ff.

<sup>&</sup>lt;sup>56</sup> Chihiro Saeki, *Keihō sōron* [Criminal Law, General Part], Kōbundō, Tokyo, 1944.

guilt could be traced back to the State embodied by the Emperor – the Tennō.<sup>57</sup> With regards to the reasonableness of norm-compliant conduct, Saeki concluded that the law should be construed in order to meet the Tennō's expectations towards his subjects.<sup>58</sup> Unsurprisingly, this line of argument invited arbitrary exercise of State power in the field of criminal justice. In a way, Saeki's reasoning can be regarded as constituting a Japanese version of the notion of '*gesundes Volksempfinden*' (sound popular conscience) in Nazi Germany.<sup>59</sup> In the last years of the war, Saeki considered it the function of legal scholarship to establish a genuinely Japanese jurisprudence supporting Japan's combat mission.<sup>60</sup>

Due to these views expressed during the Second World War, Saeki – like Ono – was removed from his chair of criminal law in 1946. His biography displays further similarities with that of Ono insofar as he became an attorney, acted as an assistant defence counsel at the Tokyo Trial,<sup>61</sup> and later resumed teaching at a private university (Ritsumeikan University). As opposed to his wartime views, in the post-war period, Saeki sympathized with the Japanese Communist Party and socialist parties. Furthermore, he now pursued the doctrine that criminal law primarily served as a means to protect human rights.<sup>62</sup> Saeki's publications concerning the theory of guilt continued to influence the scholarly debate. While he kept focusing on the State as a fundamental cornerstone of his line of reasoning, the State was now, in his view, to be understood as part of the democratic international community.

Perhaps due to this change of heart, Saeki also dealt with the Tokyo Trial, albeit marginally. Upon the proclamation of the IMTFE Charter,

<sup>61</sup> For the defendant Akira Mutō.

<sup>&</sup>lt;sup>57</sup> *Ibid.*, p. 201.

<sup>&</sup>lt;sup>58</sup> *Ibid.*, pp. 269, 273.

<sup>&</sup>lt;sup>59</sup> Cf. Osten, 2003, p. 134, see above note 2.

<sup>&</sup>lt;sup>60</sup> Chihiro Saeki, "Keihō ni okeru nihonteki-naru-mono no jikaku I" [The Discovery of the Japanese Element in Criminal Law, Part I], in *Hōgaku Ronsō* (Kyoto Law Review), 1943, vol. 49, no. 1, pp. 1 ff.

<sup>&</sup>lt;sup>62</sup> Compare Chihiro Saeki, *Keiji-saiban to jinken* [Criminal Justice and Human Rights], Höritsu Bunka Sha, Tokyo, 1957. This work from the post-war period is representative of Saeki's new human rights-based style of argumentation. Saeki attributes his change of heart to his new experiences as an attorney, "a lawyer in opposition" (zaiya hösö) which supposedly increased his awareness of the vital role of human rights in criminal justice, *ibid.*, p. 2 (preface).

Saeki explored the superior orders defence stipulated therein.<sup>63</sup> He analysed the differing legal assessments of executing an unlawful order of a military commander in Anglo-American and Japanese laws. In doing so, he identified three distinct approaches:

- 1. The theory of the absolute duty to comply with an order which was, according to Saeki, prevailing in Germany and Japan did not provide for the right of the subordinate to verify the legality of the order. As a consequence, there was no room for deviant conduct of the subordinate. Therefore, following this approach, the soldier complying with the illegal order could not be held criminally liable for the injustices committed by him; he was deemed to act without penal guilt.<sup>64</sup>
- 2. The theory of the "intelligent soldier" (*Interi-hei-setsu*),<sup>65</sup> supposedly predominating in Anglo-American legal thinking, on the other hand, included the right of the subordinate to review the order. In case of the order being illegal, there was no duty to comply. Hence, the soldier complying with the illegal order could be held criminally liable and could not rely on an excusatory defence.
- 3. The mediating theory, which Saeki considered to be prevailing in France, held that the sentence for the subordinate might be mitigated or waived if he complied with a formally legal but materially illegal order. An obligation to refuse to obey existed only if the material illegality of the order was manifest.<sup>66</sup>

Saeki utilized these theories as a starting point for a comparison between Anglo-American and Japanese legal thinking. While the liberaldemocratic Anglo-American thinking supported the idea of freedom of choice of the soldier, the traditionally hierarchical structure of the Japanese society and the corresponding legal opinion called for unconditional obedience in the army.<sup>67</sup> Ultimately, Saeki applied his doctrine of unrea-

- <sup>65</sup> *Ibid*.
- <sup>66</sup> *Ibid*.
- <sup>67</sup> Ibid.

<sup>&</sup>lt;sup>63</sup> Chihiro Saeki, "Sensö hanzainin saibanrei to jökan no ihömeirei – Eibei keihö shisö to waga keihögaku to no hitotsu no taihi" [The Statute of the War Crimes Tribunal and the Unlawful Order of the Superior – A Comparison of Anglo-American Legal Thinking in Criminal Law and Japanese Criminal Law Doctrine], in *Höritsu Bunka*, 1946, vol. 1, nos. 5/6, pp. 10 ff.

<sup>&</sup>lt;sup>64</sup> *Ibid.*, p. 11.

sonableness of norm-compliant conduct to the superior orders defence. He argued that obeying unlawful orders could constitute – depending on the socio-cultural background of the subordinate – a supra-legal excusatory defence due to exceptional unreasonableness of standard-compliant conduct.<sup>68</sup> Beyond this assessment, however, Saeki did not follow up with a comprehensive analysis of this legal concept with regard to its actual application and interpretation in the Tokyo Trial and judgment.

# 14.3.2. Public International Law Scholars

# 14.3.2.1. Kenzō Takayanagi

One of the most famous critics of the Tokyo Trial is the international lawyer Kenzō Takayanagi (1887–1967), Japan's leading scholar of Anglo-American law at the time. He studied law at Harvard as well as in Chicago and London. Since 1921, he had held a chair for both Public International Law and Constitutional Law at the (then Imperial) Tokyo University. At the IMTFE, he had been appointed defence counsel for the defendant Mamoru Shigemitsu. During the pleadings before the Tribunal, however, he took the floor for all defence lawyers and was considered "their leading intellectual light".<sup>69</sup> In November 1948, he published his pleadings in reply to the prosecution's arguments in a two-part book with both the original English pleadings and Takayanagi's own Japanese translation, which saw a number of additions and revisions.<sup>70</sup> The book was published at the time of the delivery of the judgment, which Takayanagi could not address therein.

In his final address to the Tribunal, summing up the defence on points of law, he argued:

Law is a common consciousness of obligation. Criminal Law is a common consciousness of obligation coupled with an obligation to suffer penalties if it is disregarded. Statesmen perform their transcendently important functions under a common consciousness of obligation under International Law. But statesmen have not hitherto performed their functions under any common consciousness of obligation to suf-

<sup>&</sup>lt;sup>68</sup> *Ibid.*, pp. 12, 13.

<sup>&</sup>lt;sup>69</sup> Boister and Cryer, 2008, p. 275, see above note 12.

<sup>&</sup>lt;sup>70</sup> Kenzō Takayanagi, The Tokio Trials and International Law; Answer to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3 & 4 March 1948, Yūhikaku, Tokyo, 1948.

fer the arbitrary penalties of military law in case the obligations of International Law are broken. The absence, *as a patent fact*, of any such common penal consciousness, prevents the existence of such a penal law. [...] In the absence of such a Law, the imposition of such penalties would be nothing but lawless violence.<sup>71</sup>

Thus, from the very start, Takayanagi made clear that there existed no legal basis for the crimes charged at Tokyo in international law; imposing criminal sanctions in such proceedings was nothing but victor's justice. From his fundamentally positivist point of view, the only legal basis for the Tribunal was, in essence, the provision of the Potsdam Declaration, that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners of war".<sup>72</sup> Having narrowed down the legal foundation of the proceedings, Takayanagi proceeded with an interpretation of the terms "war crimes" and "war criminals". He strived to show that their established meaning under international law as well as in the Potsdam Declaration comprised only acts committed in the course of a war and the perpetrators of such acts – that is, conventional war crimes –, whereas acts committed prior to the outbreak of a war were *a priori* ruled out.<sup>73</sup>

For Takayanagi, of all crimes mentioned in the Charter, only war crimes in this narrow sense met the requirements of the *nulla poena* principle, whereas the others had to be regarded as *ex-post facto* law, rendering a punishment by them "sheer lynch law in the guise of justice".<sup>74</sup> In a famous statement, Takayanagi compared the prosecution's view that punishment of aggressive war "follows the needs of civilization and is a clear expression of the public conscience"<sup>75</sup> with the abolishment of the principle of legality in Nazi Germany (through the notion of '*gesundes Volks-empfinden*'):

As a matter of fact, such a vague principle when it actually operates in the administration of criminal justice is just as

<sup>&</sup>lt;sup>71</sup> *Ibid.*, p. 1 (original emphasis).

<sup>&</sup>lt;sup>72</sup> *Ibid.*, pp. 2-3.

<sup>&</sup>lt;sup>73</sup> Cf. *ibid.*, pp. 4-9.

<sup>&</sup>lt;sup>74</sup> *Ibid.*, p. 12.

<sup>&</sup>lt;sup>75</sup> The Proceedings of the Tribunal in Open Session, in Pritchard and Zaide (eds.), 1981, vol. 2 (The Case for the Prosecution), p. 435, see above note 10 (also available in the ICC Legal Tools Database).

cruel and as oppressive as the penal doctrine which characterized the Third Reich.  $^{76}\,$ 

Having denounced the Tribunal as a whole, Takayanagi again turned to the crimes as provided in the Charter, focusing on crimes against peace. He undertook a comprehensive analysis of the applicable treaties, to demonstrate that there was, in fact, no sound differentiation between a war of aggression and a war of self-defence.<sup>77</sup> He argued that the term "aggression" was too vague and ill-defined to derive any legal consequences from it.<sup>78</sup> In sum, Takayanagi concentrated on pointing out the legal weaknesses of the proceedings; he was highly critical of the concept of crimes applied in Tokyo, which in his view could not have a precedential impact on the further development of international law.

#### 14.3.2.2. Kisaburō Yokota

In stark contrast to Takayanagi's position, the leading authority on international law in Japan at that time, Kisaburō Yokota (1896–1993), was favourably disposed towards the Tokyo Trial. Yokota held a chair in public international law at the (then Imperial) Tokyo University, became the first Japanese member of the International Law Commission (in 1956) and served as president of the Supreme Court of Japan (1960–1966). He was also entrusted with the co-ordination and supervision of the translation of the majority judgment of the Tokyo Trial from English to Japanese.

As early as 1933, Yokota had denounced any war as both a violation of international law and even an international crime, unless it was a case of either self-defence or sanctions in accordance with the League of Nation's covenants on the outlawing of war.<sup>79</sup> While the Tokyo Trial was still pending, he published the comprehensive treatise *Sensō hanzai-ron* (A Treatise of War Crimes),<sup>80</sup> which can, even now, be considered as a benchmark in Japanese international criminal law scholarship. It was written under the assumption that there was a "major re-conceptualization" taking place in international law with war itself now being in the focus of international law.<sup>81</sup> In his assessment of the trial, Yokota, in essence, em-

<sup>&</sup>lt;sup>76</sup> Takayanagi, 1948, pp. 11-12, see above note 70.

<sup>&</sup>lt;sup>77</sup> *Ibid.*, pp. 21-37.

<sup>&</sup>lt;sup>78</sup> *Ibid.*, pp. 43-48.

<sup>&</sup>lt;sup>79</sup> Kisaburō Yokota, *Kokusaihō* [International Law], vol. I, Yūhikaku, Tokyo, 1933, pp. 61.

<sup>&</sup>lt;sup>80</sup> Kisaburō Yokota, Sensō hanzai-ron [A Treatise of War Crimes], Yūhikaku, Tokyo, 1947.

<sup>&</sup>lt;sup>81</sup> On Yokota, see also Totani, 2008, p. 196, see above note 2.

phasized the "revolutionary" significance of the trial for the future development of international law in what he regarded as a transitional period in which the traditional notion of 'war crimes' (that is, violations of *ius in bello*) had to be re-adjusted to incorporate the planning and execution of a war of aggression (that is, *ius contra bellum*) to the criminality of waging an aggressive war, he rejected the criticism concerning *ex-post facto* law and argued as follows:

The question is whether the act under consideration possesses a substantial criminal character, and whether there are any legitimate reasons for the act to be punished.<sup>83</sup>

If there are sufficient substantial reasons, such substance should not be ignored on grounds of legal technicalities such as a purely formalistic understanding of the principle of legality (which does not necessarily have the same scope of applicability in international law). Thus, as long as the *crime* itself is manifested sufficiently (that is, in international treaties renouncing war, in particular the Kellogg-Briand Pact of 1928), the *punishment* in its character as a concrete sanction for a specific illegal act does not necessarily have to be stipulated *a priori*.<sup>84</sup>

Altogether, Yokota admitted that the Tribunal had certain shortcomings from a formal and strictly legalistic point of view. However, with a focus rather on substantive questions of justice and recent tendencies in international law reflecting such notions, there were overriding reasons to punish the accused for carrying out a war of aggression.<sup>85</sup> Yokota also endorsed the complete adherence of the majority judgment of the Tokyo Trial to the legal reasoning of the Nuremberg judgment, as this consistency supposedly reinforces the precedential value of both trials for the development of international law.<sup>86</sup> Several years after the Tribunal, he again held that "the character of aggressive war as an international crime has been established beyond doubt".<sup>87</sup>

<sup>&</sup>lt;sup>82</sup> Yokota, 1947, pp. 3, 130, see above note 80.

<sup>&</sup>lt;sup>83</sup> *Ibid.*, p. 5 (preface).

<sup>&</sup>lt;sup>84</sup> *Ibid.*, pp. 131, 136.

<sup>&</sup>lt;sup>85</sup> *Ibid.*, pp. 5 ff., 125-26.

<sup>&</sup>lt;sup>86</sup> Kisaburō Yokota, *Sensō hanzai-ron* [A Treatise of War Crimes], second edition, Yūhikaku, Tokyo, 1949, pp. 305-06.

<sup>&</sup>lt;sup>87</sup> Kisaburō Yokota, "War as an International Crime", in *Grundprobleme des Internationalen Rechts. Festschrift für Jean Spiropoulos*, Schimmelbusch, Bonn, 1957, p. 460.

# 14.4. Outlook: Further Developments in the Japanese Scholarly Debate

Overall, the views and arguments put forward by contemporary Japanese scholars of the Tokyo Trial, in the academic fields of both criminal law and public international law, can be summed up as follows. The general view of the trial was surprisingly positive and optimistic – notwithstanding a clearly perceptible bassline of criticism. The Tribunal was mostly regarded as an important or even necessary step forward in international criminal law. As to the specific crimes stipulated in the Tokyo Charter, unsurprisingly, the novel notion of crimes against peace constituted the centre-piece of the scholarly debate, whereas conventional war crimes, as such, did not give rise to much controversy, and crimes against humanity were, for the most part, not examined in detail (or disregarded, as in the trial itself). In particular, the legal concept of crimes against peace was deemed as justified and also legitimate on legal grounds; the principle of legality was re-conceptualized to advance the higher cause of international justice.

However, this debate took place in the wake of the trial within a rather limited circle of legal scholars; given the manifold legal shortcomings of the trial, a certain general reluctance to deal with the trial in depth (or at all) among many legal academics was also apparent.<sup>88</sup> For decades to follow, the trial did not receive much attention as a subject of *legal* research among law scholars in Japan. The trial and the three categories of crime which were applied in Tokyo completely disappeared from the focus of research of Japanese criminal law scholars (even those who had initially conveyed positive assessments of the trial, such as Dandō), whereas international law scholars became reluctant to conduct research on such a politically mined field of law.

After decades of scholarly neglect, a revival of interest towards the Tokyo Trial has gradually developed among Japanese academics since the 1980s. In this renaissance of studies on the trial, it was, however, historians (but not legal scholars) who played the central part, drawing on newly

<sup>&</sup>lt;sup>88</sup> On this, see Köichi Miyazawa, "Rechtsprobleme der Kriegsverbrecherprozesse", in Bernhard Diestelkamp, Zentarö Kitagawa, Josef Kreiner, Junichi Murakami, Knut Wolfgang Nörr, and Nobuyoshi Toshitani (eds.), Zwischen Kontinuität und Fremdbestimmung – zum Einfluß der Besatzungsmächte auf die deutsche und japanische Rechtsordnung 1945–1950, Mohr Siebeck, Tübingen, 1996, pp. 73 ff.

available trial-related records.<sup>89</sup> The most recent generation of Japanese scholars attempts to reassess the *legal* significance of the Tokyo Trial. This reassessment takes place in light of the rapid progress in the field of international criminal justice that has occurred in the years following the end of the Cold War, leading up to the establishment of the two *ad hoc* Tribunals of the United Nations and ultimately to the ICC. These researchers (again, mostly historians, not legal scholars) attempt a reappraisal of some legal findings of the Tokyo Tribunal (such as that of superior responsibility) and point out to the long-term legal significance of the trial on the way to furthering the international rule of law.<sup>90</sup>

Such kind of reappraisal is correct in its assessment that today's order of international criminal law resembles to some extent the initial aims and ambitions of the Tokyo Trial at its outset, and confirms some legal findings of the judgment. However, such an assessment partly reveals the tendency of resorting to a largely result-oriented method of argumentation, as it is not always able to provide sufficient proof of a causal impact of the Tokyo judgment on the establishment and further development of specific legal concepts of modern international criminal law.

Outside of Japan, after having been overlooked or marginalized in the international debate for decades, the Tokyo Trial has become the subject of increasing attention even for legal scholars.<sup>91</sup> Moreover, recently, regarding some substantive law issues, even a tendency to the opposite extreme, that is, the attempt to aggrandize the precedential value of the trial and its findings excessively, can sometimes be encountered.<sup>92</sup> To this

<sup>&</sup>lt;sup>89</sup> See, for instance, Kentarō Awaya (with NHK reporters), *Tōkyō saiban e no michi* [The Path to the Tokyo Trial] (publication accompanying an NHK documentary series under the same title), Kōdansha, Tokyo, 1994, p. 212; Kentarō Awaya, "The Tokyo Trials and the BC Class Trials", in Klaus Marxen, Kōichi Miyazawa, and Gerhard Werle (eds.), *Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland*, Berliner Wissenschafts-Verlag, Berlin, 2001, pp. 39 ff. For an influential monograph in the area of political sciences, see Yoshinobu Higurashi, *Tōkyō saiban no kokusai-kankei: Kokusai seiji ni okeru kenryoku to kihan* [The International Relations Surrounding the Tokyo Trial: Power and Norms in International Politics], Bokutaku-sha, Tokyo, 2002.

<sup>&</sup>lt;sup>90</sup> See Totani, 2008, pp. 4, 259, see above note 2. See also – for a slightly less affirmative view – Futamura, 2008, pp. 13, 147, see above note 11.

<sup>&</sup>lt;sup>91</sup> See, for instance, the monumental work of Boister and Cryer, 2008, see above note 12.

<sup>&</sup>lt;sup>92</sup> As a recent example, see GAO Xiudong, "The Tokyo Trial and Its Influence on Contemporary International Criminal Justice", in LIU Daqun and ZHANG Binxin (eds.), *Historical War Crimes Trials in Asia*, Torkel Opsahl Academic EPublisher, 2016, pp. 93 ff. (http://www.toaep.org/ps-pdf/27-liu-zhang): "[...] its [the trial's] importance in the pro-

end, one should perhaps be careful not to overestimate the precedential impact of all aspects of the Tokyo judgment. In any case, interestingly, although outside of Japan, the legal contribution of the Tokyo Trial is receiving increasing reappraisal, within Japan, only a very reluctant *legal* reassessment of the trial, if any, can be detected.<sup>93</sup>

Looking back upon the Japanese scholarly debate, the most surprising finding is that some of the most subtle and visionary assessments were publicized by legal scholars during or shortly after the trial. The legal reasoning and perspectives adopted by these contemporary scholars anticipated, to some extent, legal concepts which are now generally recognized in international criminal law (such as specific purposes of punishment underlying this field of law). It should, however, not be overlooked that these affirmative assessments are almost forgotten in Japan today, even among Japanese legal academics; they did not shape the Japanese perception of the trial. Unlike historians, Japan's present-day legal scholars display a certain reluctance to conduct research on the Tokyo Trial; they seemingly prefer sticking to the current flow of international criminal law and for the most part, only take up legal issues related to the ICC or the ad hoc Tribunals. In this regard, perhaps an overly one-sided focus of the post-war debate on the most problematic of the three crimes adjudicated at the Tokyo Trial, crimes against peace, may have blurred the view on other legal findings of the judgment, in particular regarding conventional war crimes and modes of individual imputation, which deserve closer scholarly attention.<sup>94</sup> The scholarly debate in the aftermath of the trial def-

gress of international criminal justice cannot be denied and its great achievements are beyond doubt [...]. By its nature it was a trial of evil fascist forces by international justice" (p. 95); "No matter how we examine it, the Tokyo Trial established a significant legal precedent, providing important guidance to all subsequent international trials" (p. 97).

<sup>&</sup>lt;sup>93</sup> In this context, it also seems noteworthy that the recent reappraisal of the trial, although primarily triggered by a young generation of Japanese researchers (such as the historian Yuma Totani and the political scientist Madoka Futamura), was – due to their affiliation with American and British universities – initially publicized in English (Totani published a Japanese translation of her book shortly after) and thus, took place outside of Japan at first. In a strict sense, it may even be inappropriate to describe this debate as a 'Japanese' debate.

<sup>&</sup>lt;sup>94</sup> Compare Osten, 2003, pp. 82-83, see above note 2; Philipp Osten [Firippu Osuten], "Tökyö saiban ni okeru hanzai-kösei-yöken no saihö – Shoki-kokusai-keihö-shi no ichidanmen no sobyö" [Elements of Crime at the Tokyo Trial: A Study in the Early History of International Criminal Law], in *Högaku Kenkyū* (Keio University Law Review), 2009, vol. 82, no. 1, pp. 315-38.

initely did not give rise to the emergence of an elaborate international criminal law scholarship in Japan.

# Remembering the Tokyo Trial, Then and Now: The Japanese Domestic Context of the International Military Tribunal for the Far East

#### **Beatrice Trefalt**\*

#### 15.1. Introduction

The recent historical drama Tokyo saiban (Tokyo Trial, directed by a Dutch team for Japan's national broadcaster, NHK, in 2016) highlighted for Japanese and international audiences the politicized nature of the Tribunal, the personality clashes amongst justices, and the lead-up to the judgment and its famously dissenting opinions. In this courtroom drama, the depiction of the noble – and tortured – dissenting justices, particularly the central hero, the Dutch justice Röling, and the less central, but nevertheless powerfully present Indian justice Pal, might have reinforced for Japanese audiences a cynical view of the trial as an exercise in blatant politics, with a good dose of revenge and racism thrown in. However, for a drama about the prosecution of Japanese war crimes, Japanese characters are largely absent from the story. The show focuses on the debates within the courtroom: apart from the portrayal of Röling's friendship with literary critic and author Michio Takeyama, Japanese participants appear either in bit parts as unimportant service personnel, or in interweaved original documentary footage as defendants, lawyers and otherwise as diminutive figures in the landscape of burnt-out Tokyo. The same can be said about much of the existing research on the Tokyo Trial: the focus on international judges and their arguments has largely left untouched the questions of whether and how Japanese audiences engaged with the trial,

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and what other elements of the Japanese defeat might have impacted the meanings it came to acquire over the years that followed.

This chapter aims to bring into focus the Japanese audiences of the trial and its aftermath. It first considers, in Section 15.2., how information about the trials became available to Japanese readers (and radio listeners) as part of the broader context of the occupation. Second, in Section 15.3., it highlights the importance of other war crimes trials, in adding a class dimension to the interpretation of the Tokyo Trial and the accused, particularly in the post-Occupation period. Third, in Section 15.4., it reflects on the broader context of war commemoration in commenting on the depiction of those convicted at the Tokyo Trial in the late 1960s and beyond. Such a contextual approach brings additional insights into the symbolic role of the Tokyo Trial in Japan itself, and its place in the development of broader attitudes towards the war and its aftermath. Philipp Osten, Yuma Totani, and Urs Matthias Zachmann have already provided detailed analyses of the recollections and interpretations of Japanese lawyers and historians throughout the post-war period. My aim here is to provide additions from the perspective of the daily press and magazines for general readership.<sup>1</sup>

# 15.2. The Tokyo Trial and the Allied Occupation of Japan

Japanese attitudes to the International Military Tribunal for the Far East and its processes must be considered within the broader context of Occupied Japan. There, unlike Germany, the Allied military occupation retained the existing Japanese government, except those indicted for war crimes and those purged for their close association with the wartime government. The Occupation's mission of demilitarization and democratization relied on two core ideas: first, that the blame for the war belonged to

<sup>&</sup>lt;sup>1</sup> To date, the most comprehensive account of the Japanese scholarly debate on the Tokyo Trial is Philipp Osten, *Der Tokioter Kriegsverbrecherprozeβ und die japanische Rechtswissenschaft*, Berliner Wissenschafts-Verlag, Berlin, 2003; Philipp Osten [Firippu Osuten], "Tökyö saiban to sengo Nihon keihō-gaku" [The Tokyo Trial and the Debate among Criminal Law Scholars in Post-War Japan], in Yoshihisa Hagiwara (ed.), *Posuto wö shitizunshippu no kösöryoku* [Designing Post-War Citizenship], Keio Gijuku Daigaku Shuppan Kai (Keio University Press), Tokyo, 2005, pp. 85-103; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, 2008; and Urs Matthias Zachmann, "Losers' Justice: The Tokyo Trial from the Perspective of the Japanese Defence Counsels and the Legal Community", in Kerstin von Lingen (ed.), *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice*, Brill, Leiden, 2018, pp. 284-306.

a minority of people who had misled the bulk of the population; and second, as a corollary, that one of the crucial roles of the Occupation forces was the re-education of Japanese people.

This re-education aimed to bring the Japanese people at large to understand and condemn Japanese wartime leaders' actions (and moral corruption) in bringing Japan into the war, and to become informed about the despicable actions of Japanese troops in occupied territories and against prisoners of war. Furthermore, as part of this re-education, Japanese people were to understand how a lack of civic participation in government contributed to these outcomes, thus providing a pedagogical underpinning to all Occupation reforms aiming to democratize Japan. I am not suggesting here that the Tribunal was explicitly part of this re-education programme; nor am I arguing that it was fundamentally shaped by its imbrication into the Occupation's wider programme of propaganda and censorship discrediting parts of Japan's past, or sections of its leadership. The point is, rather, that because of this context of occupation, the Tokyo Trial was very much part of the daily life for the Japanese people. Information about it was plentiful and public; its progression was the subject of near daily reports in the newspapers; and its contents was laid out against numerous other reports and information about the war. Even the words 'Akyū senpan' (Class A war criminal) became widely used to refer to a despised and badly treated individual. In that sense, Neil Boister's assessment of the Tokyo Trial as having elements of a 'show trial' rings true.<sup>2</sup> The question was whether this show was convincing. Just as there were a range of attitudes towards the propaganda of the Occupation "selling democracy as though it were an advertising campaign for a new soap",<sup>3</sup> attitudes towards the trial were multi-layered, complex and fluid.

On 15 August 1945, Japanese people gathered around radios to listen to the Emperor announcing Japan's surrender. On the same day, next to the transcript of the Emperor's speech, newspapers carried the full text of the Potsdam Declaration. Arguably, it was at this time that people in the streets got the first inkling of the pursuit of Japanese war crimes through

<sup>&</sup>lt;sup>2</sup> Neil Boister, "The Tokyo Military Tribunal: A Show Trial?", in Morten Bergsmo, CHEAH Wui Ling, and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 3-29 (https://www. legal-tools.org/doc/fa649c/).

<sup>&</sup>lt;sup>3</sup> William J. Coughlin, *Conquered Press: The MacArthur Era in Japanese Journalism*, Pacific Books, Palo Alto, 1952, p. 45.

courts. How exactly these trials were to occur, and which government was to run them, however, remained unclear even at the highest echelons of the Japanese government for several weeks.<sup>4</sup> Nevertheless, it became clear to the Japanese people, explicitly and implicitly, that trials would take place, and that there would be punishment for those responsible for the war and for the actions of the Japanese military overseas. News of the arrest of former Prime Minister Hideki Tojo and of his attempted suicide on 12 September 1945 signalled the preparations for the trial in Tokyo. On 16 September 1945, the General Headquarters of the Supreme Commander for the Allied Powers (commonly known as 'GHQ' and 'SCAP') instructed Japanese newspapers to publish reports on Japanese atrocities in the Philippines. These had a great impact on the Japanese population, either fuelling existing discontent about the behaviour of demobilized troops with evidence of brutal misdeeds overseas, or suggesting to cynical readers that the Occupation's propaganda went as far as fabricating evidence in its efforts to discredit the Japanese armed forces.<sup>5</sup>

In the lead up to the trial, newspapers regularly carried news items about the preparations by the prosecution team and the collection of evidence about wartime events: on 21 October 1945, the *Asahi shinbun* announced in a big headline that a historically unprecedented trial of some 4,000 people would open in Tokyo within two months, with a focus on punishment for the mistreatment of prisoners of war, amongst other crimes.<sup>6</sup> Information about the prosecution of war criminals in Manila, Singapore, Borneo and other places was supplemented by lavishly pro-

<sup>&</sup>lt;sup>4</sup> See, for example, "Potsudamu sengen zenbun" [Full Text of the Potsdam Declaration], *Asahi shinbun*, 15 August 1945, p. 1; and Hitoshi Nagai, "Sensöhanzainin ni kansuru seifu seimei an: Higashikuni naikaku ni yoru kakugi kettei no myakuraku" [The Government's Plans Regarding War Criminals: The Chain of Reasoning in the Decision of The Higashikuni Cabinet], *Nenpō: Nihongendaishi* [Modern Japanese History Yearbook], December 2005, vol. 10, pp. 277-321.

<sup>&</sup>lt;sup>5</sup> "Hitō Nihonhei no bōjō" [Violent Actions of Japanese Troops in the Philippines], Asahi shinbun, 16 September 1945, p. 2. For attitudes to the reports, see Tottori-ken Keisatsu Buchō, "Hitō ni okeru Nihonhei no bōkō jōdō ni taisuru bumin no hankyō ni kansuru ken" [Report on the Reactions of a Section of the Population about the Information Regarding Violent Actions of Japanese Troops in the Philippines], in Kentarō Awaya (ed.), Shiryō Nihon gendaishi 2: Haisen chokugo no seiji to shakai [Modern Japanese History in Sources vol. 2: Politics and Society after the Defeat], Ōtsuki Shoten, Tokyo, 1981, p. 207.

<sup>&</sup>lt;sup>6</sup> "Shijō keu no daisaiban: Sensōhanzainin yonsen mei ni tassen – Nikagetsu inai ni Tōkyō de hiraku" [An Unprecedented Huge Trial: Expected to Reach 4,000 War Criminals – To Open in Tokyo in the Next Two Months], *Asahi shinbun*, 21 October 1945, p. 1.

duced radio shows that retold for the listeners the truth about Japan's history and the crimes of its former leaders.<sup>7</sup> The editorial of the *Asahi* on 14 December 1945 explained to its readers that the trial of war criminals was part and parcel of condemning war, working for a peaceful future and eventually re-joining the community of nations.<sup>8</sup> In that sense, well before it started, the Tokyo Trial was intricately connected with the Occupation's re-education programmes, in ways that were divorced from the Tribunal's own legal underpinnings and concerns.

Once the trial started, it gained an additional dimension as a place where crucial information was uncovered about political and military conditions before and during the war. These conditions had been hidden from the Japanese public at large through the wartime government's own censorship. But now, the trial provided new information about the war from the 'horse's mouth', as it were: whether or not those listening were cynical about interpretations of the recent past in broader Occupation propaganda, courtroom evidence revealed the thinking of Japan's own wartime leadership. When the layout of the courtroom was presented to the readers of the Asahi, with detailed information on the seating arrangements for the accused, the prosecution, the justices and so on, the headline highlighted that 200 seats in the public gallery had been allocated for a Japanese audience.<sup>9</sup> The function of the trial as a source of information about recent history for the Japanese people, again, was not central to the Tribunal in and of itself, but it certainly was one of its important aspects for interested Japanese observers in the context of Occupied Japan. In addition, the insight afforded by the trial into political decision-making before and during the war was important in the development of critical appraisals of wartime leadership. Historian Masao Maruyama made the point in the book Thought and Behaviour in Modern Japanese Politics, published a decade afterwards in 1956, that the Tokyo Trial was a crucial and unprecedented source of information for him and others about Japanese politics from the Manchurian incident onwards. Journalists, lawyers and their aides carefully collected materials, including copies of documen-

<sup>&</sup>lt;sup>7</sup> Mark Gayn, *Japan Diary*, Tuttle, Tokyo, 1981 (first published in 1948), pp. 6-7.

<sup>&</sup>lt;sup>8</sup> "Shasetsu: Sensö hihan no riron" [Editorial: Theoretical Basis for a Critique of the War], *Asahi shinbun*, 14 December 1945, p. 1.

<sup>&</sup>lt;sup>9</sup> "Nihonjin bōchō nihyakumei – A kyū senpan hōtei junbi totonou" [200 Seats for Japanese Audience: Preparations for Class A War Crimes Court], *Asahi shinbun*, 23 March 1946, p. 2.

tary evidence, and smuggled them out of the courtroom, not only to critique the process of the trial (surely an important element), but also to build up an understanding of what had led to Japan's defeat.<sup>10</sup> *Asahi* journalist Yoshimi Mori, who started collecting trial-related materials from 1947 onwards, wrote in the foreword of the resulting 1953 publication that the trial and the documentation it created was crucial in providing for future Japanese readers explanations of "what led our country to start that war, and then bring it to destruction".<sup>11</sup>

In some quarters of the Japanese population, the idea that the surrender had been a sort of cease-fire, rather than an unconditional surrender, persisted for at least three months into the Occupation.<sup>12</sup> However, the Tokyo Trial was part of a set of events, including loudly trumpeted political reforms, that put paid to such misunderstandings. Furthermore, the wealth that was displayed in the preparation of the courtroom also no doubt provided a lesson about defeat for the population of Japan. By the time the Trial was underway, with its bright lights, cameras and airconditioning, the contrast must have been striking between the economic and technological power displayed within the walls of the courtroom, and the poverty of the city around it, where the population remained on the brink of starvation for several months after the defeat.

This contrast is highlighted in a set of dramatic sequences in the mini-series  $T\bar{o}ky\bar{o}$  saiban: the show begins with the arrival of the British justice Lord Patrick and focuses on the slow progress of his expensive car through a devastated city. The sharp disparity in the wealth of the Allies and the poverty of Japan is also a leitmotiv of later depictions of the trial.<sup>13</sup> The inequality in technological capital impacted on the ability of Japa

<sup>&</sup>lt;sup>10</sup> Masao Maruyama, *Thought and Behaviour in Modern Japanese Politics* [Gendai seiji no shisō to kōdō], Miraisha, 1956 (translated to English and published by Oxford University Press, 1963), p. 199, quoted in Takeshi Sumitani, "Tōkyō saiban no kiroku/tosho ni tsuite no oboegaki" [Memorandum on Records/Books on the Tokyo Trial], in *Sankō shoshi kenkyū*, May 1973, no. 7, p. 1.

<sup>&</sup>lt;sup>11</sup> Yoshimi Mori, "Maegaki", in *Kyokutō Kokusai Gunji Saiban kiroku: Mokuroku oyobi sakuin* [Record of the International Military Tribunal for the Far East: Catalogue and Index], Asahi shinbun chōsa kenkyū shitsu, 1953, p. 3, quoted in Sumitani, 1973, p. 5, see above note 10.

<sup>&</sup>lt;sup>12</sup> Awaya (ed.), 1981, p. 123, see above note 5.

<sup>&</sup>lt;sup>13</sup> Saburō Shiroyama, War Criminal: The Life and Death of Hirota Kōki, John Bester (trans.), Kodansha International, Tokyo, 1977 (first published as *Rakujitsu moyu*, Shinchosha, Tokyo, 1974), p. 256.

anese lawyers to be as well prepared as their Allied counterparts, particularly the American ones: Yutaka Sugawara, the defence lawyer for General Sadao Araki, noted with envy the skills of the American court stenographer, who could immediately repeat what had been said by reference to the tape if clarification was required, compared to the Japanese stenographer, who only had experience in the Japanese Diet and was at first unable to do so. More importantly, Sugawara remembered enviously, his American counterparts could have whatever had been said in the morning typed up during lunchtime, and ready for the afternoon session, whereas the Japanese side could wait for up to a month for a typed record, so that "we experienced an unconditional surrender in administrative terms as well".<sup>14</sup>

Many commentators have noted the extent to which the attitudes towards the defendants, and the trial as a whole, changed over time. According to regional police collections on rumours and attitudes, in the first few months of the Occupation, people tended to be pragmatic about the arrest of wartime leaders: it was only to be expected that those who started the war should be tried.<sup>15</sup> Attitudes towards the accused were also affected by the broader context of the defeat: there was widespread resentment of soldiers and the military for several months, created perhaps less directly by Occupation propaganda than by hunger, cold and the sheer exhaustion caused by the war.<sup>16</sup> Resentment of wartime leaders led to little sympathy for the accused: according to rumours collected by the police in 1945, it was a common complaint that the "people hadn't wanted war", and that "they had been led into it by their leaders".<sup>17</sup> The idea that these leaders, now in Sugamo Prison, still had little sympathy for the people (and perhaps deserved what they got), was also rehearsed in an indignant letter to the editor in the Asahi on 8 November 1945 about the news that

<sup>&</sup>lt;sup>14</sup> Yutaka Sugawara, *Tökyö saiban no shōtai* [The True Character of the Tokyo Trial], Jiji, Tokyo, 1961, p. 128, quoted in Sumitani, 1973, p. 3, see above note 10. See also the related problems in translation and interpreting addressed by Kayoko Takeda in this volume, above chap. 7.

<sup>&</sup>lt;sup>15</sup> Kyoto-fu Keisatsu Buchö, "Sensö hanzaisha happyö (hösö) ni taisuru hankyö naisa ni kansuru ken" [Matter Relating to Internal Investigation on the Reactions to the Declaration (Broadcast) Regarding War Criminals], 14 September 1945, in Awaya (ed.), 1981, p. 352, see above note 5.

<sup>&</sup>lt;sup>16</sup> Jules Henry, "Initial Reactions to the Americans", in *Journal of Social Issues*, August 1946, vol. 2, no. 3, pp. 19-25.

<sup>&</sup>lt;sup>17</sup> Awaya (ed.), 1981, p. 127, see above note 5.

former leaders awaiting trial at Sugamo had complained about the quality of the food they got in prison. The writer was incensed: "they should think about the people of Japan, who are a step away from starvation!".<sup>18</sup> From this time onward, the word *A-kyū senpan* became synonym with someone utterly despised and marginalised. For example, in a discussion about Japanese repatriates in the Diet in November 1947, a politician suggested that returnees "were viewed even less sympathetically than Class A war criminals".<sup>19</sup> The family of General Kenji Doihara, indicted and eventually executed for his role in the invasion and occupation of Manchuria, remembered travelling far from their neighbourhood to go to the bathhouse, somewhere where they would not be recognized as "the family of that war criminal".<sup>20</sup> The granddaughter of Tōjō, Toshie Iwanami, also remembers bitterly the discrimination suffered by her family during and in the wake of the trial.<sup>21</sup>

Particularly notable was the transformation of the image of  $T\bar{o}j\bar{o}$ , whose attempted suicide at the time of his arrest on 12 September 1945 was the source of much contempt. The news provoked antipathy for  $T\bar{o}j\bar{o}$  for all kinds of reasons, starting with the manner and the timing of his attempted suicide. People thought that a military man such as him should have used the sword rather than the gun, and that, to be taken seriously, he should have committed suicide on the day of the surrender, not several weeks later. Moreover, with his attempted suicide,  $T\bar{o}j\bar{o}$  betrayed the expectations of those who thought he would stand up and defend the actions of Japan.<sup>22</sup> However, he redeemed himself spectacularly in the eyes of

<sup>&</sup>lt;sup>18</sup> "Koe: Soshoku" [Voice: 'Frugal Food'], Asahi shinbun, 8 November 1945, p. 2.

<sup>&</sup>lt;sup>19</sup> Shūichi Hōjō, Sangiin [Upper House], Honkaigi 58-gō [Plenary Session, no. 58], in *Kokkai kaigiroku* [Minutes of the Diet], 28 November 1947, p. 17. The term continues to be used regularly to denote the most culpable person or institution, in a range of non-war related contexts. See, for a critique of the usage: Ryuji Ishido, "Goyō saretsuzukeru 'a-kyū senpan'" [The Continuously Misused 'Class A War Criminal'], *Yahoo! News* (Japan), 7 March 2014 (available on its web site).

<sup>&</sup>lt;sup>20</sup> "Natsu no shūsen tokushū: A-kyū senpan no izoku no kokuhaku" [Special Issue on the End of the War in Summer: Confessions of the Bereaved Families of Class A War Criminals], in *Shūkan shinchō*, 16-23 August 2007.

<sup>&</sup>lt;sup>21</sup> Hiroshi Akimoto, "Tökyö saiban a-kyu senpan no izoku – 48-nen me no natsu" [The Bereaved Families of the Tokyo Trial's Class A War Criminals: The Forty-Eighth Summer], *Shūkan yomiuri*, 22-29 August 1993, pp. 168-72.

<sup>&</sup>lt;sup>22</sup> "Sensö hanzainin no happyö narabi Töjö motoshushö no jiketsu misui ni taisuru hankyö" [Reactions to the Announcement about War Criminals and to the Suicide Attempt by Former Prime Minister Töjö], in Awaya (ed.), 1981, p. 344, see above note 5.

many Japanese because he finally fulfilled these expectations during his defence. Although  $T\bar{o}j\bar{o}$  had been despised at the beginning of the trial, Japanese newspaper readers had plenty of opportunity to find redeeming features in him at its end. In a news spread about the announcement of the sentences, the *Asahi* contrasted two defendants in photos and short captions: on the one hand,  $T\bar{o}j\bar{o}$ , looking alert, straight and sharp, who discussed elements of the trial every day with his legal advisers and listened carefully to the judges; and on the other, wartime Foreign Affairs minister Mamoru Shigemitsu, portrayed with his head in his hands, who was reportedly more often doodling than paying attention to the proceedings and refused to discuss the trial with anyone, including his family.<sup>23</sup>

Japanese attitudes to the trial and to the fate of their former leaders on the dock were, unsurprisingly, ambivalent, contradictory, fragmented and fluid, and they were also affected by the changing environment in which the trial took place. Between April 1946, when it began, and late 1948, when those condemned to death were executed, the shock of defeat had worn off, day to day survival had become much easier, and there grew an increasingly critical understanding of how broader geopolitical issues were impacting the Allied Occupation, both in the Japanese public and amongst the Allies. French Ambassador Brigadier Zinovi Pechkoff noted in a dispatch to the French government that Tōjō's defence had contributed to, and confirmed, a growing unease with the 'show' conducted in the trial.<sup>24</sup> The judgment, and the execution of those on the death row, then, took place in an atmosphere that was dramatically different to its beginning.

But if there was in some quarters growing sympathy for those, like  $T\bar{o}j\bar{o}$ , who provided a defence for Japan's actions before and during the war, there was also clear opposition to these ideas. As the world awaited the judgment in September 1948, the widely read monthly magazine *Chuō*  $k\bar{o}ron$  contained an analysis of the trial by legal scholar Kisaburō Yokota, who repeatedly emphasized two central points: first, that the trial provided a critical reckoning of the past; and second, that it marked a crucial starting point for the future of Japan and for the world at large.

<sup>&</sup>lt;sup>23</sup> "Kuwawatta 'e' no ji no kuchimoto" [Mouth Shaped like a Letter '**^**], and "Kakaekomu chintsu na hyōjō" [Grimace in Agony, Head in Hands], *Asahi shinbun*, 12 November 1948, p. 2.

<sup>&</sup>lt;sup>24</sup> Archives Diplomatiques, La Courneuve (NUOI), 372QO100, Pechkoff to Foreign Minister, 7 January 1948, p. 2.

As part of his analysis, Yokota provided for his readers a summary of the prosecution's arguments as well as an attempt to make them plausible: he made clear to his readers that while the Manchurian incident was not directly linked to the war in the Pacific, it did create the conditions in which the subsequent invasion of China and the attack on Southeast Asia and Pearl Harbor were made possible, and that therefore, the prosecution's argument was logical.<sup>25</sup> Yokota thus undermined a prevalent criticism of the prosecution in a population which thought of the Manchurian incident and Pearl Harbor as discrete moments.<sup>26</sup>

Yokota also implicitly critiqued Tojo's defence, and any attempt to undermine the trial's basis on the principle of legality, by arguing that the idea of the illegality of war had been well established before the war, even if it had not become a legal principle: what mattered, according to Yokota, was the intent of earlier international agreements. Therefore - his reasoning went - although the judgment had not yet been finalized, the most important outcome of the trial was already visible: its Charter, and the fact that the Tokyo and Nuremberg Trials together allowed for the prosecution of those responsible for the invasion of neighbouring countries in the future. This, insisted Yokota, was a crucial point for the future of the human race that those questioning the legality of the trial were missing.<sup>27</sup> Yokota also argued that the Tokyo Trial's importance lay in the symbolic boundary it drew between the past and the future. The trial, in his view, opened the eyes of the Japanese people to the mistakes of the past, and it was the means by which they could "awaken from a long nightmare", and punish those who led them into it.<sup>28</sup> The trial was ultimately the moment when Japan's future started, and a fundamental role of the trial was to establish the principles on which Japan's future would be built.<sup>29</sup> Implicit in this argument is the precedence of the trial as a symbolic assertion of a break between past and present, over its role as a legal instrument to determine guilt.

<sup>29</sup> *Ibid.*, p. 6.

<sup>&</sup>lt;sup>25</sup> Kisaburō Yokota, "Tōkyō saiban ni yoru kokusaiteki hansei" [International Reflection Due to the Tokyo Trial], in *Chūō kōron*, 9 September 1948, vol. 63, no. 9, p. 5.

<sup>&</sup>lt;sup>26</sup> Saburō Ienaga, *The Pacific War 1931-1945*, Frank Baldwin (trans.), Random House, New York, 1978 (originally published as *Taiheiyō sensō*, Iwanami Shoten, 1968), p. 248.

<sup>&</sup>lt;sup>27</sup> Yokota, 1948, pp. 7-8, see above note 25.

<sup>&</sup>lt;sup>28</sup> *Ibid.*, p. 5.

As well as spirited defences of the trial such as Yokota's, Japanese readers were also confronted with a range of cynical views about the trial, some from overseas. On 14 November 1948, readers of the *Asahi* were provided with translated selections from the editorials of international newspapers: the *New York Times* suggested, but only half-heartedly, that perhaps the Japanese people had now been provided a lesson about their participation in politics, whereas the *Washington Tribune* noted the absence of the Emperor on the dock. Newspapers in the Philippines (the *Evening Chronicle* and the *Manilla Bulletin*) were even more discouraged by the capacity of the trial to produce real self-reflection and atonement in Japan, and questioned the very nature of the Japanese national character.<sup>30</sup>

The judgment, the enunciation of sentences, international reactions to those sentences, and the preparations for the executions of those condemned to death continued to be widely discussed in the press, and increasingly also broadcast on radio. As the preparations for executions were made, readers were told details about the construction of the gallows, the daily routine of the condemned, their conversations with their religious advisers and their families, and eventually the order by which they were likely to be executed. On 23 December 1948, the day of the executions, the editorial of the Asahi reminded its readers that the death of wartime leaders did not mean that the rest of the Japanese population was absolved from guilt: the death of Tojo and others should be an occasion once more to reflect on the past and pray for peace. At the same time, the newspaper also noted that since a few weeks had passed between the announcement of the death penalty and the actual execution, there was less likelihood that those executed would be made into heroes, even if people generally felt sorry for them and their families. Readers were told that the bodies would be cremated, and the ashes buried together with those of other executed war criminals.<sup>31</sup> This, and the announcement a few days later that remaining individuals awaiting trial on Class A charges had been released from Sugamo Prison,<sup>32</sup> appeared to mark the end of a show

<sup>&</sup>lt;sup>30</sup> "Tōkyō saiban: Hanketsu e no hankyō" [Tokyo Trial: Reaction to the Judgment], Asahi shinbun, 14 November 1948, p. 1.

<sup>&</sup>lt;sup>31</sup> "Heiwa no inori" [A Prayer for Peace], editorial, Asahi shinbun, 23 December 1948, p. 1; "Töjö-ra nana senpan köshukei jikkö saru" [Executions Took Place for Töjö and Six Other War Criminals], *ibid*.

<sup>&</sup>lt;sup>32</sup> "A-kyū yōgisha jūkyūmei shakuhō: Tōkyō saiban – a-kyū" [19 Class A Suspects Released: Tokyo Trial – Class A], Asahi shinbun, 25 December 1948, p. 1.

which, as Saburō Ienaga contended in the late 1960s, remained largely unconvincing and unsatisfactory to the Japanese people.<sup>33</sup>

#### 15.3. Tokyo Trial vs. Other War Crimes Trials

Lessons about the war and the transformation of Japan into a different kind of country, as flawed as these lessons were, had thus been crucial symbolic elements of the trial for Japanese audiences during the Occupation. Soon, an additional layer of complexity was added to attitudes about the Tokyo Trial by the shift of focus the so-called 'Class B/C' trials and war criminals.

At the conclusion of the Tokyo Trial, there were still more than 1,200 prisoners in Sugamo either serving sentences or awaiting trial, as well as several hundred suspected or convicted war criminals in prisons overseas. Trials for Japanese war crimes had been taking place throughout the region (including in the Philippines, Singapore, Burma, Malaya, Indochina, China, Hong Kong, Borneo, Indonesia and New Guinea) since the end of the war. Despite the end of the Tokyo Trial and the release of Class A suspects from Sugamo, however, there seemed to be little hope that the pursuit of war criminals in other jurisdictions would come to an end.

In Japan, families and supporters of those convicted overseas organized an increasingly visible lobby for their repatriation. Those who returned to Japan at the end of their sentences painted a bleak picture of the conditions of imprisonment overseas. In August 1950, former Vice-Admiral Shigeru Fukutome wrote about his experience of five prisons and their comparative conditions for the monthly magazine *Bungeishunjū*, arguing that Sugamo was like a first-class hotel in comparison.<sup>34</sup> Popular opinion was galvanised in January 1951, when 14 war criminals were executed in the Philippines: the headline of the *Mainichi shinbun* pleaded with the rest of the world: "please, no more executions".<sup>35</sup> Petitions to the government about the repatriation of war criminals redoubled, and the conditions under which Japanese overseas, including war criminals, lived

<sup>&</sup>lt;sup>33</sup> Ienaga, 1978 [1968], p. 249, see above note 26.

<sup>&</sup>lt;sup>34</sup> Shigeru Fukutome, "Itsutsu no senpankangoku ni meguru" [Around the Five Prisons for War Criminals], in *Bungeishunjū*, August 1950, pp. 176-85.

<sup>&</sup>lt;sup>35</sup> "Kore ijō shokei o yurushite" [No More Executions, Please], *Mainichi shinbun*, 2 February 1951, reproduced in Mainichi shinbun, Hitoshi Nagai, and Aiko Utsumi (eds.), *Shinbun shiryō ni miru Tōkyō saiban/BC kyu saiban* [Tokyo Trial and Class B/C Trials in Newspapers], vol. 2, Gendai Shiryō, 2000, p. 130.

and awaited repatriation became part of an extensive domestic discussion about war crimes trials overseas, the overseas incarceration of convicted war criminals, and the impact of this incarceration on families at home, who not just suffered from the uncertainty about the fate of their loved ones, but also struggled with the loss of income from the main breadwinner.<sup>36</sup>

The shift of focus to those other war criminals incarcerated in Japan and overseas, and the desperate situation of their families, also had an impact on attitudes towards the Tokyo Trial and the Class A war criminals. While some of the wartime leaders remained in prison, the majority of those incarcerated for war crimes were 'average' people rather than the wartime political and military elite. According to a report on Sugamo Prison published in the weekly magazine *Shūkan Asahi* in February 1952,

> here [among the prisoners] is a strong feeling that we have been made to shoulder the responsibility for the defeat. What was called 'the penitence of 100 million people' [*ichiokusōzange*] was at some point transformed into [the narrower concept of] 'war responsibility' [*sensō sekinin*], and the war criminals alone ended up being the victims of this version of national guilt.<sup>37</sup>

In other words, not only were the Class B/C war criminals explaiing the guilt of nation, there were doing so in much greater numbers than Class A war criminals and generally in much more severe conditions. A year later, in April 1953, in the monthly magazine *Kaizō*, an article tellingly entitled "Uragirareta sensō hanzainin" ("War Criminals Betrayed") rehearsed the same idea: writer Kōbō Abe pointed out to his readers that, if anything, the Class B/C trials were even more unfair than the Tokyo Trial: in Abe's view (which was widely shared), in these other trials, individuals had been left to take the blame for superior officers, had been pursued by prosecutors 'obsessed' with their own belief in the accused's guilt, had been falsely identified by perfect strangers, had been punished differently in different jurisdictions for what amounted to the same crime, or had

<sup>&</sup>lt;sup>36</sup> See the deliberations of politicians in special committees of the houses of parliament, for example, Sangiin [Upper House], Hōmu iinkai [Committee on Legal Affairs], Sensō hanzainin ni taisuru hōteki sochi ni kansuru shoiinkai [Select Committee Regarding Legal Measures Applicable to War Criminals], between 21 November 1951 and 14 December 1951.

<sup>&</sup>lt;sup>37</sup> "Sugamo no naigai" [Inside and Outside Sugamo], editorial section, *Shūkan Asahi*, 24 February 1952, p. 9.

been made to shoulder individually the blame for actions of many, particularly when it came to punishment for treatment of prisoners of war. Ultimately, all had been put into untenable situations because of the actions of their own government, but as Abe pointed out, on 25 January 1953, only 12 of the prisoners in Sugamo represented this government as Class A war criminals, whereas a much greater number, 802, were serving out sentences as Class B/C war criminals.<sup>38</sup>

At the same time, then, as many lawyers were publishing their own acerbic critiques of the Tokyo Trial in the post-Occupation period, many Japanese people read in the press and heard on street corners that the fate of Class A criminals was comparatively benign compared to the much greater mass of those convicted in other trials, and that if anything the Tokyo Trial had at least a level of fairness because it clearly targeted some of those who were responsible for the desperate fate of so many others, that is, government leaders who had made decisions that sent millions of citizens to war as soldiers. Furthermore, many of those who had previously been housed in Sugamo either as convicted or as suspected war criminals were now back in government: prominent examples included Nobusuke Kishi, who had been held in Sugamo on suspicion of war crimes, was released in 1948, immediately returned to politics, and was eventually elected to the Diet in 1953, and Mamoru Shigemitsu, who had been sentenced to seven years' imprisonment at the Tokyo Trial, was paroled in 1950, and was elected to the Diet in October 1952. These politicians were keen to help others who were serving out sentences and were putting their names to organizations to help them, such as the Sensō Jukeisha Sewakai [Association of Assistance for War Convicts]. Nevertheless, they were clearly in a different class and had different future prospects than those Class B/C war criminals who were likely to remain unemployed, poor and otherwise discriminated against after their release.<sup>39</sup>

In that sense, the juxtaposition of the experiences of two types of war criminals, those condemned at the Tokyo Trial and those condemned in other courts, highlighted inequities in sheer numbers of those accused, convicted and executed; in the respective conditions of their incarceration;

<sup>&</sup>lt;sup>38</sup> Köbö Abe, "Uragirareta sensö hanzainin" [War Criminals Betrayed], in *Kaizö*, April 1953, vol. 34, no. 4, pp. 179-80.

<sup>&</sup>lt;sup>39</sup> Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, Japanese War Criminals: The Politics of Justice After the Second World War, Columbia University Press, New York, 2017, pp. 191-94.

and in their prospects for rehabilitation after the end of their sentences. The element of class that it introduced to the conception of the Tokyo Trial also meshed neatly with other ways in which the experiences of the war were being discussed in the public sphere. In the case of soldiers in overseas battlefields, especially those in Southeast Asia and the Pacific, a common trope in memoirs during the 1950s and 1960s was the victimization of low-ranking conscripts by their superior officers, officers who were portrayed as brutal, willing to sacrifice many lives for little military gain, and who made momentous life and death decisions for their men from a safe place well behind the battle-lines. Tales of revenge against former officers were part and parcel of the demobilization and repatriation of overseas battalions during the Occupation, but resentment continued to simmer well into the late 1960s if not beyond.<sup>40</sup>

The Tokyo Trial, with its condemnation of predominantly highranking military men, did not contradict such narratives. Indeed, elements of the trial allowed for further exploration of these tropes. Saburō Shiroyama's 1974 book, Rakujitsu moyu (translated by John Bester and published in English as War Criminal), which narrated the life and death of former Prime Minister, Foreign Minister and Diplomat Kōki Hirota, makes a point of contrasting Hirota's honour, selflessness and ultimately also innocence, with the self-serving arrogance of the military men who led Japan to war. Shiroyama details these qualities in Hirota not only in his various political positions before and during the war, but throughout the Tokyo Trial, making clear that Hirota nobly chose silence when he had the opportunity to defend himself, because to speak would have provided evidence against others.<sup>41</sup> Shiroyama portrays Hirota as the one truly innocent victim of the Tokyo Trial, someone who had throughout his career been a pragmatic career diplomat, convinced of the power of negotiation rather than war to resolve international disputes. In that sense, Shiroyama's narrative reflects a context in which there was a clear, if problematic, dichotomy between 'innocent civilians' and 'morally corrupt military'.

<sup>&</sup>lt;sup>40</sup> See, for example, John W. Dower, *Embracing Defeat: Japan in the Aftermath of World War II*, W.W. Norton & Co., 1999, pp. 58-59; Beatrice Trefalt, "The Endless Search for Dead Men: Funasaka Hiroshi and Fallen Soldiers in Post-War Japan", in Christina Twomey and Ernest Koh (eds.), *The Pacific War: Aftermaths, Remembrance and Culture*, Routledge, London, 2015, pp. 270-81.

<sup>&</sup>lt;sup>41</sup> Shiroyama, 1974, pp. 270-74, see above note 13.

## 15.4. Legacies

The Tokyo Trial and convicted war criminals continue to sit uneasily across the chasm of contrasting public images of the war. Although these are complex and contradictory, they are easily caricatured into opposing left-wing and right-wing factions: one fighting for recognition of and apology for Japanese crimes against the populations of neighbouring Asian countries, opposing constitutional revision of Article 9, and deeply suspicious of the activities of those who fight for the recognition of the sacrifice of fallen soldiers; the other reactionary, pro-remilitarization, antiapology, and keen to have textbooks reflect a past of which Japanese students can be proud. The most recent iteration of such right-wing attitudes is found in the loose political coalition of the Nippon Kaigi (the Japan Conference), emerging from the earlier Nihon o Mamoru Kokumin Kaigi (People's Conference to Protect Japan), which had as one of its central missions the revision of Article 9 of the Constitution, but also to "change the post-war national consciousness based on the Tokyo Tribunal's view of history as a fundamental problem".<sup>42</sup> Tojo's granddaughter Iwanami is a prominent member of Nippon Kaigi, and her strident defence especially since 2005 of Tojo, and by extension of Japan's war effort, have been portrayed as a symptom of the resurgence of the right-wing in Japan.<sup>43</sup> Not all family members of the Tojo family agree with Iwanami's views, and the reticence of many of the relatives of Class A war criminals to speak about their experiences has been noted regularly, including after the release of American documents about the selection and prosecution of the accused in 1993<sup>44</sup>

An event that both fed on and further exacerbated the polarization of views about the war was the enshrinement of convicted war criminals in Yasukuni Shrine in Tokyo in the mid-1970s. The spiritual presence of the war criminals convicted at the Tokyo Trial (those executed in 1948, and those who died later) at Yasukuni has fuelled neighbouring countries' protests about the Shrine, about governmental visits to the Shrine, and by extension about Japanese failures to repent sincerely and atone for the war. But just like in every aspect of the Tokyo Trial and its legacy, there are

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<sup>&</sup>lt;sup>42</sup> Christian G. Winkler, *The Quest for Japan's New Constitution: An Analysis of Visions and Constitutional Reform Proposals 1980–2009*, Routledge, London, 2011, p. 75.

<sup>&</sup>lt;sup>43</sup> David McNeill, "Family Ties: the Tojo Legacy", in Japan Focus/Asia-Pacific Journal, November 2005, vol. 3, no. 11.

<sup>&</sup>lt;sup>44</sup> Akimoto, 1993, pp. 168-72, see above note 21.

contradictory and complicating elements to this story. According to documents made available in March 2007 by the National Diet Library, the government and Yasukuni Shrine agreed to list the names of 14 war criminals in 1969, but did not make the decision public until 1978, because of potential political repercussions regarding the constitutional separation of church and State.<sup>45</sup> Since the Meiji period, Yasukuni Shrine had been the place of repose for those who had given their lives as soldiers on the battlefield. But those convicted in the Tokyo Trial did not die on the battlefield, even if they were army men. Furthermore, they died well after the conclusion of the war as a result of a legal process that was accepted by the Japanese government. Therefore, their enshrinement appears to be a blatant rejection of the Tokyo Trial and of its judgments, though clearly this rejection is made by the Shrine as a private entity, rather than by the government.

But it is also important to place this moment in the context of ongoing attempts by the Association of Bereaved Families (Nippon Izokukai) to restore Yasukuni Shrine to the status of a national institution.<sup>46</sup> Many (but not all) families of fallen soldiers consider that the post-war failure of the government to support the Shrine, because of the post-war constitution's separation of church and State, amounts to an abdication of the State's responsibility to commemorate the sacrifice of citizens who died in the line of duty. Therefore, the Association of Bereaved Families has campaigned for decades to allow for government funding of the Shrine, and to allow official State visits to the Shrine to take place. Those lobbying the government on behalf of bereaved families might have felt that their case would be stronger if the Shrine also included the names of wartime elite who, in a famously dynastic political system, were not only the political but also often the personal predecessors of many of Japan's postwar politicians. It is notable in this respect that the agreement between the Shrine and the government in 1969 took place in a meeting with the Ministry of Health and Welfare, the government institution at that time responsible for matters relating to veterans and bereaved families. It is also

<sup>&</sup>lt;sup>45</sup> "Yasukuni, State in '69 OK'd war criminal inclusion", *The Japan Times*, 29 March 2007 (available on its web site).

<sup>&</sup>lt;sup>46</sup> The Association of Bereaved Families (Nippon Izokukai) is a powerful political lobby group of the families of deceased soldiers and veterans. See Franziska Seraphim, *War Memory and Social Politics in Japan, 1945-2005*, Harvard University Press, Cambridge, 2006, pp. 60-85.

notable that a key member of the Association of Bereaved Families since 1957, and one of its top officials from 1972 to 1980, was Tadashi Itagaki, the second son of General Seishirō Itagaki, who was executed as a Class A war criminal in 1948. Tadashi Itagaki was elected to the Japanese Upper House in 1980 and was a strong presence in Nippon Kaigi.

But enshrining Class A war criminals did not help to satisfy the bereaved families' demands that the government should officially support Yasukuni Shrine: if anything, it complicated matters even more because the Emperor stopped visiting the Shrine as soon as the listing of the names of war criminals at the Shrine was made public. The move also brought attention to the Shrine from China and Korea, where the presence of convicted war criminals at the Shrine bolstered emerging criticisms about Japan's callous unrepentance for its actions during the war. Hence, rather than resolving the issue of State recognition of wartime sacrifice, the enshrinement of war criminals created new problems, not least in making the status of Yasukuni even more widely controversial, but also in removing from the list of visitors the Emperor himself, symbol of the sacrifice of soldiers, whose absence at Yasukuni continues to be noted and mourned.<sup>47</sup> Whether war criminals were enshrined as an obvious political gesture of rejection of the Tokyo Trial, or whether they were enshrined to give additional weight to the demands of bereaved families that the State formally recognize Yasukuni Shrine as officially commemorating fallen soldiers, it is clear that war criminals' symbolic presence at Yasukuni has continued to polarize, rather than unify, views about the Tokyo Trial.

#### 15.5. Conclusion

This chapter has examined three periods in the post-war life of the Tokyo Trial in Japan. I began by pointing out that the story of the Tokyo Trial, even in the recent mini-series  $T\bar{o}ky\bar{o}$  saiban, tends to be portrayed as a political game between powerful allies, from which Japanese people are largely absent or in which they are perhaps even largely irrelevant, even as their own wartime leaders stand accused of war crimes. Such an absence is regrettable, because it prevents an understanding of the role of the Tokyo Trial beyond its own internal legal and political logic. As this chapter has shown, the Tokyo Trial also had a range of cultural, social and

<sup>&</sup>lt;sup>47</sup> See, for example, "Yasukuni o kangaeru (1): 'A-kyu senpan' izokura, kunō to kattō" [Considering Yasukuni: Pain and Discord amongst the Bereaved Families of the 'Class A War Criminals'], *Sankei shinbun*, 16 August 2015.

symbolic meanings in Japan, meanings which cannot be abstracted from Japan's domestic and historical context. These meanings evolved in concert with domestic reform as well as cultural and intellectual introspection during the Occupation; with the growth of a domestic movement to repatriate and then release war criminals convicted in smaller trials during the early 1950s; and since then, in the ongoing debates about the meanings of the war, the never-ending 'post-war', and the nature of civil society and the State – debates to which the enshrinement of war criminals at Yasukuni Shrine in the late 1960s added additional rancour.

In all these periods, it is clear that the 'show' of the trial so carefully orchestrated during the occupation period did not tell a credible story. It was not credible at the time, because it was transparently attached to broader propaganda in the early days of the Occupation, and also because its basis and its assumptions were immediately questioned at home and overseas. The highly publicized nature of the event, tied as it was to the re-education efforts of the Occupation itself, meant that such questions were immediately available to the Japanese public to reflect on and engage with in a range of critical ways. In addition, the story that was told in the 'show' that was the Trial, about the impartial punishment of leaders and of those responsible for heinous crimes, did not match the stories of others who were punished for war crimes: convicted so-called 'Class B/C' war criminals, who came home with stories of flawed trials and terrible conditions in overseas prisons, and who felt that they, rather than a few wartime leaders, were being made to bear the brunt of Japan's war guilt.

It is in this wider context, not just in the walls of the courtroom itself, that we can achieve an understanding of the broader meanings of the Tokyo Trial: if, according to Yokota in 1948, the lessons of the trial transcended the importance of precise legality, and if these lessons provided the starting point for a new Japan, then Yokota was presaging, already then, the fraught and endless 'post-war period'.

# **Clemency for War Criminals Convicted in the Tokyo Trials**

#### Sandra Wilson\*

#### 16.1. Introduction

When sentences were passed on the defendants convicted by the International Military Tribunal for the Far East ('IMTFE') in Tokyo in 1948, there was no thought of clemency.<sup>1</sup> As is often the case with high-profile crimes of exceptional gravity, courtroom rhetoric maintained that the crimes were unrivalled in their depravity. Japanese leaders were said to have "declared war upon civilization". They had allegedly developed a "mad scheme for domination and control of eastern Asia" which, as they advanced together with the Nazis, would ultimately encompass the entire world. They did not care, the prosecutor claimed, that their plans would mean "murder and the subjugation and enslavement of millions".<sup>2</sup> The eventual sentences reflected this assessment of the scale and significance of the crimes. None of the 25 defendants against whom a verdict was passed was acquitted of all charges. Seven defendants were sentenced to death, 16 to life imprisonment, one to 20 years, and one to seven years.

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<sup>&</sup>lt;sup>1</sup> The material in this chapter draws substantially on Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War*, Columbia University Press, New York, 2017.

<sup>&</sup>lt;sup>2</sup> Joseph B. Keenan, "Opening Statement of the Prosecution", in US Department of State, *Trial of Japanese War Criminals: 1. Opening Statement by Joseph Keenan 2. Charter of the IMT of the Far East 3. Indictment*, US Government Printing Office, Washington, 1946, pp. 1, 2. These documents are available in the ICC Legal Tools Database: https://www. legal-tools.org/doc/f8060c/, https://www.legal-tools.org/doc/a3c41c/, https://www.legaltools.org/doc/7dfe1e/; full indictment available in various parts.

The verdicts and the sentences constituted a powerful declaration that what Japanese leaders had done in the Second World War was abhorrent.

The Nuremberg and Tokyo Trials took place because of extraordinary events which seemed to call for extraordinary measures against the convicted defendants. The high-flown rhetoric that surrounded the Tribunals appeared to leave no space for early release. Yet, well before the IMTFE verdicts were handed down, the issue of clemency for Japanese war criminals was already on the table for those convicted in the national military tribunals administered by seven Allied governments: those of the United States ('US'), the United Kingdom ('UK'), France, the Netherlands, Republic of China, Australia and the Philippines. The government of the USSR had also prosecuted Japanese soldiers as war criminals, but these trials had taken place outside the system created by the other wartime Allies, and little information was available about them.<sup>3</sup> Discussions about clemency by the seven Allied governments were not an expression of any form of weakness, but rather were the result of a normal bureaucratic impulse, supported by political considerations that were specific to the war crimes trials. Eventually, clemency was extended also to war criminals convicted at the IMTFE. Despite the importance of this postsentencing phase, however, it has attracted much less attention in the scholarly literature than have the prosecutions themselves.<sup>4</sup>

<sup>3</sup> On the national military tribunals, see Wilson, Cribb, Trefalt and Aszkielowicz, 2017, above note 1; Kerstin von Lingen (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil, Palgrave Macmillan, Cham, 2016; Kirsten Sellars (ed.), Trials for International Crimes in Asia, Cambridge University Press, 2016; Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), Historical Origins of International Criminal Law: Volume 2, Torkel Opsahl Academic EPublisher, 2014 (http:// www.toaep.org/ps-pdf/21-bergsmo-cheah-yi). On Soviet trials, see V.A. Gavrilov and E.L. Katasonova (eds.), Iaponskie voennoplennye v SSSR 1945-1956, Demokratiia, Moscow, 2013, pp. 16-17; Sherzod Muminov, "Prejudice, Punishment, and Propaganda: Post-Imperial Japan and the Soviet Versions of History and Justice in East Asia, 1945–1956", in Barak Kushner and Sherzod Muminov (eds.), The Dismantling of Japan's Empire in East Asia: Deimperialization, Postwar Legitimation and Imperial Afterlife, Routledge, London, 2017, pp. 154-58; George Ginsburgs, The Citizenship Law of the USSR, Nijhoff, The Hague, 1983, p. 318; Andrew Barshay, The Gods Left First, University of California Press, Berkeley, 2013, pp. 139-41; Valentyna Polunina, "From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefields", in von Lingen (ed.), 2016, pp. 239-60. The author thanks David Wells for translating the Russian-language source.

<sup>&</sup>lt;sup>4</sup> As exceptions, see Yoshinobu Higurashi, *Tōkyō saiban* [The Tokyo Trial], Kodansha [Kōdansha], Tokyo, 2008, chaps. 7 and 8; R. John Pritchard, "The Gift of Clemency Following British War Crimes Trials in the Far East, 1946-1948", in *Criminal Law Forum*,

In any formal criminal proceeding, the moment of sentencing is crucial. The severity or leniency of a sentence expresses the view held by the court – and by extension the wider society – of the gravity of the offence and the extent of the perpetrator's culpability. At that moment, the sentence is meant to be conclusive and literal: the convicted criminal will suffer the penalty as prescribed, because that is the penalty appropriate to the crime in question in the circumstances that have been elaborated before the court. In practice, however, sentences are subsequently altered – usually reduced – in all or most justice systems. Variations to sentences take different forms and are granted for different reasons. They may be implemented as individual pardons or as general amnesties; through a system of parole, where conditional release is granted after a certain period; or as commutation of a death sentence or outright reduction in the length of prison time to be served. All of these variations can be classed as forms of clemency.<sup>5</sup>

There are four principal grounds for clemency, all of which were used in Allied dealings with Japanese war criminals. One category is granted as mitigation, usually soon after a sentence has been handed down. Mitigation follows some form of reconsideration of the circumstances of the crime or the fairness of sentencing, either by the original court or by another authority. In a second category, sentences are reduced as a reward: for good behaviour as a prisoner, or for offering evidence on behalf of the State in relation to other crimes. A third category of clemency depends upon the benevolence of a ruler, and may be less predictable. Monarchs,

<sup>1996,</sup> vol. 7, no. 1, pp. 15-50; R. John Pritchard, "The Parameters of Justice: the Evolution of British Civil and Military Perspectives on War Crimes Trials and their Legal Context (1942-1956)", in John Carey, William V. Dunlap and R. John Pritchard (eds.), *International Humanitarian Law, Vol. 3: Origins, Challenges and Prospects*, Brill, Leiden, 2006, pp. 277–326; John Mendelsohn, "War Crimes Trials and Clemency in Germany and Japan", in Robert Wolfe (ed.), *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944-1952*, Southern Illinois University Press, Carbondale, 1984, pp. 226–59; Sandra Wilson, "The Sentence is Only Half the Story: From Stern Justice to Clemency for Japanese War Criminals, 1945-1958", in *Journal of International Criminal Justice*, 2015, vol. 13, pp. 745–61; Wilson, Cribb, Trefalt and Aszkielowicz, 2017, see above note 1.

<sup>&</sup>lt;sup>5</sup> In US official thinking, the term 'clemency' in the case of war criminals was used only for reduction of sentence, not for parole: see Wilson, Cribb, Trefalt and Aszkielowicz, 2017, p. 121, see above note 1. In this chapter, 'clemency' refers to all variations of sentence that resulted in earlier release of prisoners, including parole, which, in practice, was simply used as a form of early release of war criminals.

presidents or other authorities can offer amnesties, pardons or early release as acts of generosity that are unrelated to the original crime. Such benevolence may be granted to commemorate anniversaries or auspicious events, out of consideration of the prisoner's state of health, or simply as an expression of the prerogative to grant mercy. In a fourth group, clemency is driven by pragmatic or political circumstances that are unrelated to the legal process, or to the personalities or circumstances of rulers or prisoners. It may be granted as a matter of convenience for the imprisoning power, for instance, to reduce accommodation pressure in an overcrowded prison,<sup>6</sup> or because of specific political goals. Clemency existed in several forms in the home countries of the governments that prosecuted Japanese war criminals, and had therefore become more or less normal for many officials.<sup>7</sup>

In this chapter, I examine the process by which clemency was extended to the surviving men convicted at the IMTFE, and analyse the motives of Allied authorities in granting clemency. I begin with the moves towards early release of lower-ranking war criminals in the period before the San Francisco Peace Treaty took effect in April 1952. I then discuss the implications for all war criminals of the peace treaty, and the subsequent multinational negotiations over the fate of the surviving men convicted in the Tokyo Tribunal.

#### 16.2. Clemency for Japanese War Criminals Before 1952

Once the prison doors closed on the 25 men sentenced at the Tokyo Tribunal, relatively routine and familiar procedures took over, despite the special nature of the prisoners' crimes. Allied governments remained committed to making war criminals accountable for their offences, to upholding the validity of the original trials, and to keeping faith with victims of Japanese war crimes and their families. They were also increasingly convinced, however, that Japan, along with Germany, should be incorporated unequivocally into the Western camp in the worldwide struggle against Communism. They recognized that if the governments of the two

<sup>&</sup>lt;sup>6</sup> For an example from the fourth category, see "Zimbabwe's Mnangagwa Pardons 3,000 Prisoners to Ease Overcrowding", *Reuters*, 21 March 2018 (available on its web site).

<sup>&</sup>lt;sup>7</sup> On discretionary justice in Anglo-American systems, see Carolyn Strange, "Mercy and Parole in Anglo-American Criminal Justice Systems, from the Eighteenth to the Twentyfirst Century", in Paul Knepper and Anja Johansen (eds.), *The Oxford Handbook of the History of Crime and Criminal Justice*, Oxford University Press, 2016, pp. 573–96.

countries were to be persuaded to take on new responsibilities, the wartime Allies could not continue to insist on treating them as former enemies. Concessions would have to be made on war criminals, among other issues.<sup>8</sup>

By the time the IMTFE verdicts were handed down, many Japanese defendants had already been convicted in the national military tribunals. Prosecutions of 5,700 Japanese military personnel were well under way, and convicted prisoners were incarcerated in Tokyo and in numerous other locations in Asia and the Pacific. US authorities had started to discuss the possibility of remission of sentence for good behaviour as early as August 1946, only a few months after the opening of the Tokyo Trial.

When former Prime Minister Hideki Tōjō and six of his compatriots went to the gallows in December 1948, American officials dealing with war criminals were actively considering ways of releasing and rehabilitating the prisoners they held.<sup>9</sup> It was not only the Americans. Leading British officials, too, had decided by then that war criminals convicted in British military tribunals should be eligible for remission of sentence,<sup>10</sup> and Dutch authorities had already granted eight months' remission to all the war criminals they had convicted and whose sentences they had confirmed.<sup>11</sup>

The first moves towards adjustment of war criminals' sentences arose from bureaucratic and legal imperatives: prisoners' terms were reduced for good behaviour, and there was a serious attempt to standardize sentences to ensure that prisoners served similar terms for comparable offences. This early imperative to reduce sentences can thus be related to the first two grounds for granting clemency outlined above. Good conduct brought rewards; and prison terms were also reduced after the authorities had reconsidered the parity of sentencing across different cases. In part,

<sup>&</sup>lt;sup>8</sup> Wilson, 2015, p. 748, see above note 4.

<sup>&</sup>lt;sup>9</sup> Higurashi, 2008, pp. 316–17, see above note 4.

<sup>&</sup>lt;sup>10</sup> "Trial of War Criminals (Army Order 31/1945) Review of Sentences", 6 May 1948, National Archives (UK) ('NA (UK)'), LCO 53/101.

<sup>&</sup>lt;sup>11</sup> President, Hoofdgerechtshof van Indonesië, "Aftrek preventieve hechtenis m.b.t. oorlogismisdadigers", *Arsip Nasional*, Jakarta, 20 September 1949, Alg. Sec. 289; "War Criminal List Sentenced by Dutch Courts: Sugamo Prison", 6 November 1953, *Nationaal Archief*, Netherlands ('NA (NL)') Buitenlandse Zaken/Code-Archief 45–54, 2.05.117, inv.nr. 7703. The author is grateful to Robert Cribb for translating the Dutch-language material cited here.

however, such initiatives also reflected broad political goals, corresponding to the fourth category of clemency as well. Allied governments not only wanted justice to be done; they also wanted it to be seen to be done, in order to demonstrate the positive values of democracy to Japan and Germany.<sup>12</sup> They feared, too, that obvious anomalies in sentencing might undermine the legitimacy of the war crimes trials and the perceived quality of Allied justice. From the beginning, then, the granting of clemency demonstrated the interplay among legal, administrative and political impulses in Allied dealings with Japanese war criminals.

After the IMTFE sentencing, and the executions that quickly followed, the surviving war criminals disappeared rapidly from public sight as they began their new lives in Sugamo Prison in Tokyo. In Sugamo, which was administered during the Allied Occupation of Japan (1945-1952) by the US Eighth Army, they joined their compatriots convicted at the large US military tribunal in Yokohama, and, increasingly, war criminals convicted elsewhere in Asia and the Pacific by other Allied military tribunals.

Moves towards clemency intensified in 1949. British authorities reduced the sentences of one-quarter of the prisoners they had convicted who would still be in jail at the end of September 1949, and, in addition, decreed that all war criminals convicted in British tribunals would be eligible for remission of one-third of their sentences for good behaviour. In practice, release for good behaviour was automatically granted.<sup>13</sup> In July 1949, 55 prisoners were granted remissions by the French president to commemorate Bastille Day.<sup>14</sup> On Christmas Day, US military authorities also announced that war criminals' sentences would be reduced for good behaviour,<sup>15</sup> and in March 1950 they implemented a formal remission and parole system in Sugamo, under which prisoners could be released after

<sup>&</sup>lt;sup>12</sup> Higurashi, 2008, pp. 316–17, above note 4; Frank M. Buscher, *The U.S. War Crimes Trial Program in Germany*, 1946–1955, Greenwood Press, New York, 1989, p. 50.

<sup>&</sup>lt;sup>13</sup> Pritchard, 2006, pp. 310–14, see above note 4; J.A. Pilcher to Esler Dening, 21 August 1953, NA (UK), FO 371/105446; "Draft Staff Study—Remission of Sentence", 25 February 1949, NA (UK), FO 1060/266; "Remission of Sentence for Good Conduct", 21 February 1949, NA (UK), FO 1060/266; Shapcott to No. 1 War Crimes Sentences Review Board, 3 February 1949, NA (UK), WO 311/567; Brown to Shapcott, 22 November 1949, NA (UK), WO 311/567; Minute, L. Phillips, 28 January 1953, NA (UK), FO 371/105432.

<sup>&</sup>lt;sup>14</sup> Note à l'intention de Monsieur le Président de la République, 9 January 1953, Archives nationales, Paris ('AN (F)'), 4 AG663.

<sup>&</sup>lt;sup>15</sup> Higurashi, 2008, pp. 322–24, see above note 4.

serving one-third of their original sentences, for which pre-trial time in custody also counted. One prisoner convicted by the IMTFE benefited from the parole system operating in Sugamo. Former (and future) Foreign Minister Mamoru Shigemitsu had received the shortest sentence at the Tokyo Trial, that is, seven years. He was released under the Sugamo parole system in 1950. By April 1952, when the Occupation ended, US military authorities had paroled 892 war criminals.<sup>16</sup>

Not everyone supported clemency for Japanese war criminals. Some politicians, military men and officials in the former belligerent countries thought the war criminals potentially dangerous if released, or were wary of their own domestic constituencies, which, authorities believed, insisted on continued vengeance for Japanese war crimes.<sup>17</sup> Nevertheless, by the end of the Allied Occupation, clemency for Japanese war criminals, like clemency for German war criminals, had become very much the bureaucratic norm.<sup>18</sup> Of all the governments that had convicted Japanese war criminals in the loosely co-ordinated system of Allied trials, only the Australian and the Filipino governments had failed to institute systems of sentence reduction or parole, despite a handful of pardons by the president of the Philippines.<sup>19</sup>

#### 16.3. War Criminals and the San Francisco Peace Treaty

Thus far, two factors had allowed and facilitated the steady if not rapid release of Japanese war criminals before the expiry of their formal sen-

<sup>&</sup>lt;sup>16</sup> [George T. Hagen] to Chief, Legal Section, Liquidation Agency, "Japanese War Criminals Convicted by United States Military or Naval Commissions and by the IMTFE and Still Serving their Sentences", 17 May 1952, US National Archives and Records Administration, College Park MD ('NARA'), RG59, Box 25, folder: 5 (Parole Board: SCAP Parole System); SCAP Circular No. 5, "Clemency for War Criminals", 7 March 1950, Diplomatic Archives (Gaimushō Gaikō Shiryōkan) ('GSK'), Tokyo, D' 1.3.0.1, 3.

<sup>&</sup>lt;sup>17</sup> See, for example, the initial views of British Deputy Judge Advocate General Brigadier Henry Shapcott, quoted in Pritchard, 2006, p. 306, above note 4.

<sup>&</sup>lt;sup>18</sup> On clemency in Germany, see Buscher, 1989, above note 11; Kerstin von Lingen, *Kesselring's Last Battle*, Alexandra Klemm (trans.), University Press of Kansas, Lawrence, 2009, pp. 173–78; Norbert Frei, *Adenauer's Germany and the Nazi Past*, Joel Golb (trans.), Columbia University Press, New York, 2002; Mendelsohn, 1984, see above note 4.

<sup>&</sup>lt;sup>19</sup> Hitoshi Nagai, *Firipin to taiNichi senpan saiban: 1945–1953 nen* [The Philippines and the Trials of Japanese War Criminals: 1945-1953], Iwanami Shoten, Tokyo, 2010, p. 261; Sharon Williams Chamberlain, "Justice and Reconciliation: Postwar Philippine Trials of Japanese War Criminals in History and Memory", unpublished Ph.D. dissertation, George Washington University, 2010, pp. 102, 113.

tences. First, prisoners convicted in courtrooms spread over about 50 venues across the Asia-Pacific region had been increasingly concentrated in Sugamo Prison in Tokyo. The existing Sugamo cohort was augmented initially by US-convicted prisoners from Shanghai, Kwajalein, Guam and Manila. From 1949 onwards, for a combination of legal, pragmatic, economic and political reasons, other prosecuting powers had also chosen to send the war criminals they had convicted to serve out their sentences in Tokyo, rather than retaining them in other prisons in the region.<sup>20</sup> The second factor was that once transferred to Occupied Japan, all war criminals still serving sentences were governed by US military regulations, including the parole regulations, regardless of which government had convicted them. So, all decisions on war criminals in Sugamo were made by a single authority, that is, the US military, which was therefore free to make unilateral decisions about release or continued incarceration. In 1952, however, the situation of convicted war criminals changed dramatically. The San Francisco Peace Treaty, which came into force in April, restored Japanese sovereignty after six and a half years of Allied occupation. Nevertheless, Article 11 of the treaty stipulated that decisions about the sentences of war criminals convicted in national military tribunals would not rest with the Japanese government, but would henceforth be made by the prosecuting government, on the recommendation of Japan; variations of the sentences of prisoners convicted by the IMTFE would be made by a majority of the governments involved, again after recommendation by Japan.<sup>21</sup> Up to this point, prisoners in Sugamo had been subject only to US regulations, but Article 11 meant that all of the original prosecuting governments now had to face up separately to the questions of whether, how and when to grant clemency to convicted Japanese war criminals. In the case of the prisoners convicted at the IMTFE, the governments which had participated in the Tokyo trial and had subsequently ratified the peace treaty were to review the sentences jointly.

The end of the Occupation of Japan and the application of Article 11 of the peace treaty completely changed the institutional, political and diplomatic framework within which decisions were made about Japanese

<sup>&</sup>lt;sup>20</sup> On the gradual concentration of prisoners in Sugamo, see Wilson, Cribb, Trefalt and Aszkielowicz, 2017, pp. 140–47, above note 1.

<sup>&</sup>lt;sup>21</sup> Article 11, Treaty of Peace with Japan, in John M. Maki (ed.), *Conflict and Tension in the Far East*, University of Washington Press, Seattle, 1961, pp. 136–37 (https://www.legal-tools.org/doc/3mf4ms/).

war criminals. In April 1952, the US military authorities handed over control of Sugamo Prison to Japanese civilian authorities, and with that move, the US military parole system ceased. Article 11 meant that control of the sentences of prisoners in Sugamo reverted to the governments that had originally convicted them. Negotiations over the fate of these prisoners, and of convicted war criminals still held outside Japan by the Philippines and Australia, now had to be conducted bilaterally, between each of the relevant governments and the Japanese authorities, while the collective powers responsible for the IMTFE prisoners had to work out a way of making joint decisions about them.

On all sides, new institutional arrangements were thus required if war criminals were to be granted any form of clemency. In Japan, it was necessary to construct a system to 'recommend' variation of sentences as required by Article 11. A new law, passed on the day the peace treaty took effect, empowered an independent agency of the Ministry of Justice, the Offenders Prevention and Rehabilitation Commission National ('NOPAR'), to recommend clemency to foreign governments.<sup>22</sup> Within the governments of the former wartime Allies, new arrangements were gradually made to review NOPAR's requests for clemency. In September 1952, President Harry S. Truman authorized the establishment of the Clemency and Parole Board for War Criminals in Washington, DC to deal with Japanese war criminals.<sup>23</sup> Within other governments, clemency requests were typically handled by foreign ministry officials. Clemency applications for prisoners convicted at the IMTFE were reviewed at meetings in Washington of representatives of the governments deemed to have the right to participate in such negotiations.<sup>24</sup>

With the end of the Allied Occupation of Japan, the Japanese public took up the cause of war criminals with a zeal that surprised Allied observers. Campaigners applied pressure directly on the foreign governments which had jurisdiction over war criminals, but addressed themselves most forcefully to their home government. The public campaigns supported repatriation of convicted war criminals to their home country,

<sup>&</sup>lt;sup>22</sup> English translations of the text of Law No. 103 appear in various archival sources. See, for example, NA (UK), FO 371/105447.

<sup>&</sup>lt;sup>23</sup> Harry S. Truman, Executive Order 10393, "Establishment of the Clemency and Parole Board for War Criminals", 4 September 1952, NARA, RG220, Box 1, folder: Minutes – Clemency and Parole Board, M-1 through M-30.

<sup>&</sup>lt;sup>24</sup> Wilson, Cribb, Trefalt and Aszkielowicz, p. 227, see above note 1.

reductions in sentence, an end to the death penalty and, ultimately, early release. Activists put the Japanese government, like the German government, under serious pressure, precisely at the time both were being asked to strengthen the Western alliance against the Soviet Union and its allies. The US, the UK and their allies came to believe they needed to soften their stance on war criminals in order to assist conservative Japanese and German governments to maintain their domestic authority, and thus to function effectively as Cold War allies.<sup>25</sup>

## 16.4. Negotiations over the IMTFE Prisoners

In late 1952, only 12 men sentenced by the IMTFE remained in Sugamo Prison, all serving life terms. Of the 25 who had initially received a verdict, seven had been executed, five others had died in prison, and, as we have seen, one had been paroled by US authorities during the Occupation. By comparison, over 1,200 war criminals convicted in national tribunals remained incarcerated.<sup>26</sup> Despite the low number of IMTFE-convicted prisoners, negotiations over clemency for them were, in one crucial respect, far more complicated, and much ink was spilled over the fate of the 12 men.

Under Article 11, the seven national governments (aside from the Soviet Union) which had convicted Japanese suspects were free to make their own independent decisions to vary sentences. Such decisions often proved difficult, and in practice the separate governments did loosely consult with each other, as well as with the Japanese government, but formally at least, they could do as they chose.<sup>27</sup> In the case of the IMTFE prisoners, however, multiple governments had to reach at least a majority agreement before any decision was made. In this circumstance, there was a large scope for clash of perceived national interests among the erstwhile Allies, and by 1956, solidarity among the Allies on the subject of war criminals had been severely tested. Cold War rivalries and other international tensions were sharply revealed in the discussions on the fate of the IMTFE prisoners. Overall, the Allied governments showed an increasing desire to free the IMTFE prisoners, as did the separate national authorities

<sup>&</sup>lt;sup>25</sup> Sandra Wilson, "The Shifting Politics of Guilt: the Campaign for the Release of Japanese War Criminals", in Kushner and Muminov (eds.), 2017, pp. 87–106, see above note 3.

 <sup>&</sup>lt;sup>26</sup> "Release of War Criminals and its Progress", September 1954, GSK, D' 1.3.0.3-1, vol. 2, p.
 9.

<sup>&</sup>lt;sup>27</sup> See Wilson, Cribb, Trefalt and Aszkielowicz, 2017, chaps. 7–9, see above note 1.

responsible for war criminals convicted in military tribunals. They were not willing, however, to take any action that might impugn the validity of the original trial, or that might seem to display weakness in relation to Japanese war crimes. Reconciling the two imperatives proved to be a tricky balancing act.

The discussions over IMTFE sentences reveal two things. First, negotiations over clemency did not take place in a vacuum, and could not be separated from broader, non-legal issues. As the Allied powers jostled for position in the post-war world, arguments about what to do with the IMT-FE prisoners easily became entangled with questions of international politics and international status that, at times, were remote from the crimes committed by the Japanese military or the circumstances of the war criminals. Second, the governments involved showed a growing disinclination to antagonize Japan and a marked attempt to avoid being singled out as particularly vengeful.

Before negotiations could even begin, there were protracted arguments over which governments had the right to join in.<sup>28</sup> The Allied powers decided in 1952–1953 that only those that had participated in the IMTFE and had also ratified the peace treaty would be eligible. This ruling combined the provision of Article 11 – which stated that power to vary the sentences of those convicted in Tokyo "may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan" – with the provisions of Article 25, which limited the benefits of the treaty to those governments that had signed and ratified it.<sup>29</sup> The Republic of China, the Soviet Union, India and the Philippines had participated in the IMTFE but had not ratified the peace treaty and thus were ruled ineligible to review the sentences.<sup>30</sup>

Political and diplomatic questions were raised among the Allies, however, about all these exclusions. The US government had originally advocated the inclusion of all the above-named countries, plus Pakistan. The issue of participation by India and Pakistan, in particular, consumed much time and energy, in highly complex legal, political and diplomatic

<sup>&</sup>lt;sup>28</sup> More detail on deliberations over IMTFE sentences is available in *ibid.*, pp. 224–36, on which subsequent paragraphs here are based.

<sup>&</sup>lt;sup>29</sup> Treaty of Peace with Japan, 1961, pp. 136–37, 144–45, see above note 21. Korea and China were nevertheless entitled to specific, limited benefits under the treaty, as provided in Article 21.

<sup>&</sup>lt;sup>30</sup> Wilson, Cribb, Trefalt and Aszkielowicz, 2017, p. 225, see above note 1.

discussion among the governments involved, including the UK as the former colonial master. Pakistan had not existed during the Second World War, having been established with the partition of India and independence from the UK in 1947. The Allied powers jointly ruled Pakistan eligible to review sentences because, as part of the former British India, it was deemed to be a State formerly at war with Japan; it had participated (as part of British India) in the IMTFE; and, unlike India, it had signed and ratified the peace treaty.<sup>31</sup> The Indian government, though it did not much care about war criminals specifically, was very concerned about its own international position, and about the implications of recognizing Pakistan as a successor State to British India, and thus objected to Pakistan's inclusion. In this way, the fate of the IMTFE prisoners became entangled with the politics of decolonizing India and newly independent Pakistan, which in fact had nothing to do with Japanese war crimes.<sup>32</sup>

Similarly, the inclusion or exclusion of the Soviet Union and Communist China posed difficulties that, in a direct sense, were irrelevant to the fate of the IMTFE prisoners. The US government argued to its allies that the USSR should be included in deliberations on sentence reviews, because it was expected to oppose clemency. Soviet recalcitrance, the US authorities reasoned, would then encourage Japanese hostility to the USSR, which was an important consideration in the context of the Cold War.<sup>33</sup> The British authorities pointed out that it would then be difficult to leave out Communist China, but that evaluating China's claim would emphasize the diplomatic difference between the UK and the US: the former diplomatically recognized Beijing rather than Taipei [Taibei], whereas the latter did the opposite. Ruling out the Soviet Union and China would then require the exclusion of the Philippines as well. The US government eventually gave way to the British view in each case, including that of India.<sup>34</sup> Eight countries became the joint arbiters of IMTFE sentences: Australia, Canada, France, the Netherlands, New Zealand, Pakistan, the UK, the US.

<sup>&</sup>lt;sup>31</sup> Draft reply to Indian government attached to McPetrie to Fitzmaurice, Foreign Office, 19 May 1953, NA (UK), DO 35/5799, p. 2.

<sup>&</sup>lt;sup>32</sup> See, for example, the papers in NA (UK), DO 35/5799.

<sup>&</sup>lt;sup>33</sup> Telegram, British Embassy, Washington to Foreign Office, London, "Japanese Major War Criminals", 16 June 1952, NA (UK), DO 35/5797.

<sup>&</sup>lt;sup>34</sup> Thomas, Commonwealth Relations Office, to Gandee, Ottawa, 23 May 1952, NA (UK), DO 35/5797; Telegram, Foreign Office, London, to British Embassy, Washington, 25 June 1952, NA (UK), DO 35/5797; Telegram, British Embassy, Washington, to Foreign Office, London, 29 April 1953, NA (UK), DO 35/5799.

They were joined in the final stages by the Philippines, which only ratified the San Francisco Peace Treaty in 1956. Representatives of the eight governments, acting on instructions from home authorities, met in Washington, DC between 1953 and 1955 to decide on the fate of the IMTFE prisoners.<sup>35</sup>

In October 1952, the Japanese agency NOPAR asked the Allied powers to grant clemency to all 12 IMTFE prisoners left in Sugamo,<sup>36</sup> but the various governments replied that individual applications would be necessary. By September 1954, NOPAR had recommended clemency for all the IMTFE war criminals.<sup>37</sup> In working for releases, NOPAR came to rely on a strategy that proved successful, in that it allowed the Allied powers to authorize releases without seeming to have given way to Japanese pressure, and without freeing the prisoners unconditionally. NOPAR applications routinely emphasized age and infirmity, and requested humanitarian consideration for the prisoner. In response, the representatives of the governments meeting in Washington were able to authorize releases through the device of "special medical parole", a consideration that fits into the 'ruler's benevolence' category of the granting of clemency. Three of the IMTFE prisoners were aged over seventy in 1952 - Sadao Araki, Shunroku Hata and Jirō Minami - and in April 1953, NOPAR recommended their release on the grounds of their age.<sup>38</sup> In January 1954, the eight governments reviewing sentences agreed unanimously to grant special medical parole to the oldest, Minami, who was nearly 80 and was be-

<sup>&</sup>lt;sup>35</sup> Relevant records can be found in the following files. In NA (UK): FO 371/105450; FO 371/110509; FO 371/110512; FO 371/115294; FO 371/115295; DO 35/5799; DO 35/5800; DO 35/5801. In NARA, see: RG 220, Box 1, folder: Working Papers 4/28/52-5/31/53 (2); RG 220, Box 5, folder: Working Papers re A, B & C war criminals, 6/1/53–5/31/55; RG 220, Box 1, folder: Minutes – Clemency and Parole Board for War Criminals, M-81 through M-113.

 <sup>&</sup>lt;sup>36</sup> [NOPAR], "Decision on Recommendation on Release by Clemency of A Class War Criminals", 20 October 1952, NARA, RG220, Box 1, folder: Working Papers 4/28/52–5/31/53 (2).

<sup>&</sup>lt;sup>37</sup> "Clemency for Class 'A' Japanese War Criminals: Summary of the Present Position", 20 August 1954, NA (UK), DO 35/5801, p. 2.

<sup>&</sup>lt;sup>38</sup> Turner, U.S. Embassy, Tokyo, to Department of State, "Applications for Clemency of Class A War Criminals", 21 April 1953, NARA, RG220, Box 1, folder: Working Papers 4/ 28/52–5/31/53 (3); "Clemency for Class 'A' Japanese War Criminals: Summary of the Present Position", 20 August 1954, NA (UK), DO 35/5801, p. 1.

lieved to be at death's door.<sup>39</sup> The prospect of a death in prison, especially of an elderly or infirm prisoner, was extremely unpalatable to all the governments in question, as it would make the prosecuting power look heartless and vengeful. Minami was quickly freed, though he survived for almost two years after his release.

Pressure on the governments reviewing sentences to authorize releases began to increase markedly – both from Japanese sources and from external events – from about 1954 onwards. In Japan, there was no notable pressure from the vigorous public campaign that was so active on behalf of war criminals. Public activism concentrated heavily on the men convicted in the national tribunals, rather than on the IMTFE prisoners: in mainstream discourse, there was far more sympathy for the 'ordinary soldiers' who were believed to have been caught up in circumstances for which they were not responsible than there was for Japanese leaders who had dragged their people into a disastrous war.<sup>40</sup> But at the elite level, among prominent Japanese figures who had the opportunity for personal meetings with important Allied authorities, there were some who had a close association with war crimes trials, and for whom the release of the IMTFE prisoners was a deeply personal issue.

Mamoru Shigemitsu, the first IMTFE prisoner to be released on parole, was Foreign Minister and Deputy Prime Minister from 1954 to 1956, while Ichirō Kiyose, defence lawyer for Hideki Tōjō at the Tokyo Tribunal, served as Education Minister from December 1955 onwards. Nobusuke Kishi, who had been arrested as a potential IMTFE defendant but was not charged, became Secretary-General of the ruling Democratic Party (Minshutō) in 1955. Masayuki Tani, a former Foreign Minister who had also been arrested as a potential defendant at the Tokyo Tribunal, became a powerful Foreign Ministry adviser and was appointed ambassador to the

<sup>&</sup>lt;sup>39</sup> Telegram, Department of State to U.S. Embassy, Tokyo, 30 December 1953, NARA, RG220, Box 5, folder: Working Papers re A, B & C war criminals, 6/1/53–5/31/55; C.T. Crowe, "Clemency for Japanese Class 'A' War Criminals: Araki, Hata and Minami", 9 February 1954, NA (UK), FO 371/110509, p. 1.

<sup>&</sup>lt;sup>40</sup> Rintarō Fukuhara, quoted in "Zoku. Sugamo no naigai: senpan wa dō naru ka" [Inside and Outside Sugamo: What Will Become of the War Criminals? Part 2], *Shukan Asahi* [Shūkan asahi], 16 August 1953, p. 10; Ichirō Hatakeyama, "Senpan keishisha no izoku nimo onkyū o: dai hankyō o yonda onkyūhō no kaisei" [Extending Pensions to the Descendants and Families of War Criminals: Big Response to Revision of the Pension Law], cover story, *Toki no hōrei*, August 1954, no. 144, p. 9; Higurashi, 2008, p. 360, see above note 4.

United States in 1956. With such people in positions of influence, pressure on other governments for the prompt release of the IMTFE prisoners increased rapidly.<sup>41</sup> Shigemitsu was especially important. A career diplomat and former ambassador to China, the Soviet Union and the UK who had served three times as Foreign Minister by the time he appeared before the IMTFE, Shigemitsu was not at all embarrassed to have been convicted as a war criminal. During his tenure, there was a particular emphasis on diplomatic efforts to secure releases.<sup>42</sup> The Lower House of the Japanese Diet (the parliament) also passed a resolution on 19 July 1955 calling on the relevant foreign governments to release all war criminals in time for the tenth anniversary of the end of the war on 15 August 1955, though it had no discernible effect.<sup>43</sup>

The governments reviewing IMTFE sentences came under further pressure in 1953–1954 when Japanese prisoners began to return from the Soviet Union and the People's Republic of China ('PRC'). Authorities in both countries had retained large numbers of former Japanese soldiers, and had designated some of them as 'war criminals'. In December 1953 and March 1954, a total of 1,231 Japanese 'war criminals' were repatriated from the Soviet Union, in events that were extensively covered by the Japanese and international press, with more returns promised.<sup>44</sup> Then in August 1954, the People's Revolutionary Military Commission of the PRC announced that Beijing would pardon and release 417 Japanese prisoners, again referred to as 'war criminals'. They arrived in Japan on 27

<sup>&</sup>lt;sup>41</sup> Higurashi, 2008, pp. 371–72, see above note 4.

<sup>&</sup>lt;sup>42</sup> "Sensō Jukeisha Sewakai Zenkoku Kyōgikai no jōkyō" [The Situation of the National Society for Assistance to War Criminals], 20 July 1955, National Archives of Japan, Tokyo ('NAJ'), 4A-22–7306, p. 2.

<sup>&</sup>lt;sup>43</sup> Kokkai kaigiroku, Shūgiin, Honkaigi 43-gō, 19 July 1955, p. 1. Diet records are available on the web site of the National Diet Library (http://kokkai.ndl.go.jp). An English translation of the resolution sent to foreign governments is available as "Resolution Requesting an Immediate Release of War Criminals", GSK, D' 1.3.0.3–9-1, p. 359. See also Tadanori Nakayama, Kokkai kaigiroku, Shūgiin, Honkaigi 43-gō, 19 July 1955, p. 1.

<sup>&</sup>lt;sup>44</sup> "The Development on Negotiations on Repatriation in Moscow" (Japanese report), 2 November 1953, NA (UK), FO 371/105448; "Jap. Prisoners Repatriated", *Recorder*, Port Pirie, South Australia, 2 December 1953, p. 1; "Japanese Prisoners Freed by Russia", *Advertiser*, Adelaide, 22 March 1954, p. 16; "Jösen daihyö o tsurekomu" [With Some of the Departing Passengers], *Asahi Shimbun* [Asahi shinbun], 8 July 1953, p. 7; "Köan maru jösensha: yonhyakunijūmei no shimei wakaru: Soren dainiji hikiage" [The Passengers on the *Köan maru*: the Names of the 420 Revealed: the Second Repatriation from the Soviet Union], *Asahi Shimbun* [Asahi shinbun], 19 March 1954, p. 3.

September 1954.<sup>45</sup> Governments in the 'free world' were afraid that the contrast between Communist clemency and Western reluctance to release war criminals would encourage leftism in Japan and turn the Japanese people away from support of the Western camp in the Cold War. Shi-gemitsu, as Foreign Minister, exploited this fear in his meetings with Western leaders.<sup>46</sup> The French representative on the Washington committee reviewing IMTFE sentences, for one, urged the committee to resume its discussions on release on the grounds that the Communist powers were prepared "to get ahead of the western powers in granting clemency".<sup>47</sup>

In cases where the device of special medical parole could not be used, deciding on clemency nevertheless proved problematic. After Minami's release in January 1954, there was a stalemate among the eight governments over the next case, which was Araki's. In the first instance, he was considered for ordinary parole or other form of clemency. The US, the Netherlands, France and Pakistan favoured the immediate release of Araki and then presumably of the remaining prisoners. US officials, in particular, felt themselves to be under serious pressure from Japan, and believed that the US would be blamed if Araki were not released. The US government was committed to improving relations with Japan, and wished to be seen to be accommodating Japanese preferences in relation to war criminals. The governments of the UK, Canada, Australia and New Zealand, however, wanted Araki to serve a set number of years to represent his sentence of life imprisonment. The earliest release date upon which these governments would agree was 1956.<sup>48</sup> With four governments

<sup>&</sup>lt;sup>45</sup> LING Yan, "The 1956 Japanese War Crimes Trials in China", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2, op. cit.*, p. 218; Barak Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice*, Harvard University Press, Cambridge, 2015, pp. 258–59; Adam Cathcart and Patricia Nash, "War Criminals and the Road to Sino-Japanese Normalization: Zhou Enlai and the Shenyang Trials, 1954–1956", in *Twentieth-Century China*, 2009, vol. 34, no. 2, p. 95.

<sup>&</sup>lt;sup>46</sup> "Telegram from the Embassy in Japan to the Department of State", 6 January 1955, in US Department of State, *Foreign Relations of the United States*, 1955–1957, Washington, DC, 1991, vol. 23, part 1, p. 3.

<sup>&</sup>lt;sup>47</sup> Pelletier to Dunning, Department of State, 4 October 1954, NA (UK), FO 371/110512.

<sup>&</sup>lt;sup>48</sup> Submission: "Japanese Major War Criminals: Araki", [undated], NA (UK), DO 35/5800, p. 1; Telegram, CRO to High Commissioners, 9 March 1954, NA (UK), DO 35/5800, p. 2; Joy, British Embassy, Washington, to Marten, Foreign Office, London, 16 February 1954, NA (UK), DO 35/5800; Joy to Marten, 19 March 1954, NA (UK), DO 35/5801; "Sensō Jukeisha Sewakai

on each side of the disagreement, there was a standoff. Anglo-American solidarity began to show signs of strain because of the differing stances on the IMTFE prisoners and, more broadly, different priorities in dealing with Japan. Under these circumstances, the matter was allowed to lapse. In June 1955, however, it appeared that Araki might die in prison, and the eight governments unanimously approved medical parole.<sup>49</sup> Araki in fact lived until 1966.

By the time Araki was freed, the eight reviewing governments had agreed to release three more IMTFE prisoners on medical parole: in October 1954, Shunroku Hata (who died in 1962) and Takazumi Oka (who died in 1973),<sup>50</sup> and in March 1955, former admiral Shigetarō Shimada, who survived until 1976.<sup>51</sup> After Araki was released in June 1955, seven IMTFE prisoners remained in Sugamo. Apart from Shigemitsu, who had been unilaterally paroled by the US military authorities in 1950, no one had yet been freed except for medical reasons, and no agreement had been reached on how to release the IMTFE prisoners except on medical grounds. Events moved rapidly, however, in 1955 and 1956.

During 1954, there had been some discussion among the eight governments of a proposal to release all IMTFE prisoners on parole after 10 years, which would have meant that the last of them was released in 1956. Only the UK and Australia opposed such leniency by this stage, but no progress was made.<sup>52</sup> Then in April 1955, the Australian government, notorious for its hard line on Japanese war criminals, abruptly changed its stance. In accordance with a new policy of fostering good relations with

Zenkoku Kyōgikai no jōkyō" [The Situation of the National Society of Assistance for War Criminals], 20 September 1955, NAJ, 4A-22–7306, p. 2.

<sup>&</sup>lt;sup>49</sup> American Embassy, Tokyo, to Department of State, "War Criminals", 2 October 1952, NARA, RG59, Box 3020; documents in NAJ, 4B-23–5836; Higurashi, 2008, pp. 358–59, see above note 4.

<sup>&</sup>lt;sup>50</sup> [Memorandum to Japanese Government Authorizing Release on Special Medical Parole of Hata and Oka], 26 October 1954, NA (UK), FO 371/110512.

<sup>&</sup>lt;sup>51</sup> Telegram, British Embassy, Washington, to Foreign Office, London, 28 March 1955, NA (UK), FO 371/115294.

<sup>&</sup>lt;sup>52</sup> New Zealand Department of External Affairs, Aide-Memoire, March 1954, NA (UK), DO 35/5801; Dunning, Department of State, to Parsons, British Embassy, Washington, 11 October 1954, NA (UK), DO 35/5801; Memorandum, "Clemency for Japanese War Criminals: Views and Practice of the Various Powers Concerned in the Exercise of Clemency", [late 1954], NA (UK), FO 371/110512; Crowe, "Clemency for Class 'A' Japanese War Criminals", 8 December 1954, NA (UK), FO 371/110512.

Japan, it announced the introduction for the first time of an Australian system of parole for all Japanese prisoners. The guidelines allowed for release after a maximum of 10 years.<sup>53</sup> Although the system was not fully implemented at this stage, the trend was clear to British officials, who realized they were now out of step with even the most recalcitrant of their allies. Wanting to avoid a "dangerous isolation" from its allies, which in any case could overrule the UK, and to forestall criticism from the Japanese for being less lenient than others,<sup>54</sup> the British cabinet, in July 1955, approved the parole of IMTFE prisoners after 10 years in custody.<sup>55</sup>

In Washington on 7 September 1955, the representatives of the relevant governments agreed, on this principle, to the parole of Kingorō Hashimoto, Okinori Kaya, and Teiichi Suzuki.<sup>56</sup> On 6 December 1955, parole was approved as well for Naoki Hoshino, Hiroshi Ōshima and Kōichi Kido, who had also been in prison for 10 years.<sup>57</sup> Kenryō Satō was the last to be freed, on 31 March 1956 (see Table 1).

Name	Former position	Penal term	Disposi- tion	Date of parole	Remarks (as at 31 Mar. 1956) / Later career
Mamoru Shigemitsu (1887-1957)	Diplomat, Foreign Minister, Greater East Asia Minister	7 years	Parole by US military authorities	21 Nov. 1950	Foreign Minister and Deputy Prime Minis- ter, 1954- 1956
Jirō Minami (1874-1955)	Army Minister, Commander of Kwantung Army, Gover- nor-General of Korea, Privy Councillor	Life	Medical parole	3 Jan. 1954	Died on 5 Dec. 1955

<sup>&</sup>lt;sup>53</sup> Casey, Minister for External Affairs, and Cramer, Minister for the Army, Cabinet submission: "Japanese Minor War Criminals", [April–May 1956], National Archives of Australia, 271958, p. 288.

<sup>&</sup>lt;sup>54</sup> Crowe, Foreign Office, London, to Makins, British Ambassador, Washington, DC, 6 July 1955, NA (UK), FO 371/115295.

<sup>&</sup>lt;sup>55</sup> "Cabinet: Conclusions of a Meeting of the Cabinet Held at 10 Downing Street, S.W.1, on Thursday, 28th July, 1955, at 2.30 p.m.", NA (UK), CAB 128/29, p. 6.

<sup>&</sup>lt;sup>56</sup> British Embassy, Washington, to Foreign Office, London, 7 September 1955, NA (UK), FO 371/115295.

<sup>&</sup>lt;sup>57</sup> Minutes, 19 December 1955, NARA, RG220, Box 1, folder: Minutes – Clemency and Parole Board for War Criminals, M-81 through M-113.

Name	Former position	Penal term	Disposi- tion	Date of parole	Remarks (as at 31 Mar. 1956) / Later career
Shunroku Hata (1879-1962)	Commander of China Expe- ditionary Force, Army Min- ister	Life	Medical parole	30 Oct. 1954	Under medi- cal care
Takazumi Oka (1890-1973)	Chief of Navy Affairs Bu- reau, Vice-Minister of Navy	Life	Medical parole	30 Oct. 1954	Under medi- cal care
Shigetarō Shimada (1883-1976)	Navy Minister, Chief of Navy General Staff	Life	Medical parole	4 Apr. 1955	Under medi- cal care
Sadao Araki (1877-1966)	Army Minister, Education Minister	Life	Medical parole	18 June 1955	Under medi- cal care
Kingorō Hashimoto (1890-1957)	Army officer, Director of Imperial Rule Assistance Association, parliamentarian	Life	Parole	17 Sept. 1955	
Okinori Kaya (1889-1977)	Finance Minister	Life	Parole	17 Sept. 1955	Justice Min- ister, 1963- 1964
Teiichi Su- zuki (1888-1989)	Army General, Minister of State, President of Cabinet Planning Board	Life	Parole	17 Sept. 1955	
Naoki Hoshino (1892-1978)	Vice-Minister of Financial Affairs (Manchukuo), Chief Cabinet Secretary	Life	Parole	13 Dec. 1955	Senior posi- tions in Tōkyū Cor- poration
Kōichi Kido (1889-1977)	Education Minister, Health and Welfare Minister, Home Minister, Lord Keeper of Privy Seal	Life	Parole	16 Dec. 1955	
Hiroshi Ōshima (1886-1975)	Army General, Ambassador to Germany	Life	Parole	16 Dec. 1955	
Kenryō Satō (1895-1975)	Army General, Chief of Military Affairs Bureau	Life	Parole	31 Mar. 1956	

Table 1: Dates and Category of Release of IMTFE Prisoners, 31 March 1956.<sup>58</sup>

<sup>&</sup>lt;sup>58</sup> Adapted from NOPAR, table attached to "Statistical Report on War Criminals in Sugamo Prison, Japan (as at 31 March 1956)", NAA 271958, p. 395.

#### 16.5. Conclusion

During the four years of deliberations over the fate of the IMTFE prisoners, the balance of the relationship between Japan and its former enemies had changed significantly. The demands of the Cold War, and the normalization of relations between Japan and other countries more generally, had trumped any remaining Allied desire for vengeance against Japan for the previous war. For their part, Japanese leaders, who came from the same ruling class as the IMTFE prisoners and in some cases were closely connected with them, had shown increasing confidence in making their demands for release, and, implicitly, in rejecting the grounds on which they had been convicted.

The Allied method of dealing with war criminals convicted at the IMTFE was much more cumbersome than the arrangements for dealing with prisoners convicted in national tribunals, whose fate was decided by single governments. The result, however, was the same. As at 31 July 1956, four months after Kenryō Satō's release, there were only 222 prisoners left in Sugamo.<sup>59</sup> The last Japanese war criminals left Sugamo in May 1958, three weeks after the last German war criminals incarcerated in Landsberg Prison in Bavaria had been freed.<sup>60</sup> Despite all the Allied rhetoric about the exceptional nature of Japan's war crimes, relatively normal administrative arrangements had overtaken the justice process. The politics of dealing with war criminals and the workings of bureaucracy had pointed in the same direction, and had reinforced each other. Japan's re-emergence in the international scene in the 1950s, together with the general administrative impulse towards clemency for imprisoned criminals, had brought an end to the long process of Allied reckoning with Japan's leaders and with ordinary military personnel for their part in the disastrous war in the Asia-Pacific region.

<sup>&</sup>lt;sup>59</sup> NOPAR, "Statistical Report on War Criminals in Sugamo Prison, Japan (as of 31 July 1956)", NAA 271958, p. 65.

<sup>&</sup>lt;sup>60</sup> Three senior German war criminals, convicted at the International Military Tribunal in Nuremberg, remained in Spandau Prison in Berlin, in the joint custody of the US, the UK, France and the Soviet Union. The last of them, Rudolf Hess, died in 1987. Fewer than 30 lower-ranking German war criminals were still imprisoned in the Netherlands, France, Belgium and Italy after 1958. See Frei, 2002, pp. 229–30, above note 18.

## **Spaces of Punishment**

#### Franziska Seraphim\*

#### **17.1. Introduction**

When wartime entrepreneur and so-called 'Class A' war crimes suspect Ryōichi Sasakawa was released from Sugamo Prison by Allied authorities in December 1948, the media widely reported his pledge to henceforth dedicate himself to caring for the families of the executed war criminals and making life easier for those still imprisoned. By all accounts, he followed through.<sup>1</sup> A controversial figure on the political far-right whose wildly successful motorboat-racing enterprise helped rebuild Japan's shipbuilding industry in the 1950s and 60s, Sasakawa went out of his way to console the spirits of the Allied-convicted who did not survive imprisonment and help secure employment for some of those who did. Sasakawa went on to undertake international philanthropic work, and many Japanese-Studies programmes in the United States and Europe have greatly benefited from the Sasakawa Peace Foundation financially.

Similarly, the early release of Nazi munitions industry boss and USconvicted war criminal Alfried Krupp von Bohlen und Halbach from

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<sup>&</sup>lt;sup>1</sup> Fascinating details can be found in a collection of letters written to Ryōichi Sasakawa, edited and introduced by Takashi Itō (ed.), "Senpansha" o sukue: Sasakawa Ryōichi to Tōkyō saiban 2 [Saving the War Criminals: Sasakawa Ryōichi and the Tokyo Trial, Volume 2], Chūō Kōron Shinsha, 2008.

Landsberg War Criminal Prison No. 1 in January 1951 caused a media frenzy. A contemporary cartoon quipped that as journalists and cameramen chased Krupp on his way from the prison to a local inn for a grand celebration, Krupp answered their questions as to his future plans with a tart "I intend to continue my ancestors' business".<sup>2</sup> Krupp was able to negotiate with the Allied occupation the return of his entire wartime assets. He used his wealth and his connections to help many of his fellow Landsberg inmates restart their lives.<sup>3</sup> Like Sasakawa, Krupp eventually set up a philanthropic foundation, and his hometown Essen today boasts an Alfried Krupp Memorial Hospital and an Alfried Krupp Gymnasium, among other public works.

Clearly, the rich and famous had an uncanny way of bouncing back from military defeat and criminal indictment, especially after the Görings and the Tojos, the villains of the international military tribunals at Nuremberg and Tokyo, had been executed. Sasakawa and Krupp occupied similar places in the tiered system of the Allied war crimes trials, not among either the top political and military leaders tried by the Nuremberg and Tokyo Tribunals or the great mass of war criminals prosecuted in national military courts all across Europe and Asia, but in a distinct group of mainly civilian elites nominally under Allied jurisdiction. These Nazi elites were prosecuted by an American court in the 12 Subsequent Nuremberg Proceedings (Nürnberger Nachfolgeprozesse) between 1946 and 1949, whereas their Japanese counterparts, about 50 Class A war crimes suspects, were released without charge during that same time.<sup>4</sup> The final group of 17 left Sugamo Prison in late December 1948 after awaiting trial for three years, among them the future prime minister Nobusuke Kishi, the industrialist Yoshisuke Ayukawa, and also Sasakawa.<sup>5</sup> All three became instrumental thereafter in providing the social glue between those

<sup>&</sup>lt;sup>2</sup> Die Tat, 10 February 1951, reproduced in Ulrich Brochhagen, *Nach Nürnberg: Vergangenheitsbewältigung und Westintegration in der Ära Adenauer*, Junius, 1994, p. 67.

<sup>&</sup>lt;sup>3</sup> Nachlass Arthur Dietzsch, Aufzeichnungen und Gesuche betr: Landsberger Haft, 1947–50, Institut f
ür Zeitgeschichte, Munich, ED112/1.

<sup>&</sup>lt;sup>4</sup> The dominant explanation for the discontinuation of trials against the Japanese leadership is that the Cold War changed Allied priorities, but Yuma Totani finds procedural and personnel impediments equally important. Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, 2009, pp. 69–77.

<sup>&</sup>lt;sup>5</sup> Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War*, Columbia University Press, 2017, pp. 117–18.

remaining in prison, their families and support networks, and post-war society emerging from foreign occupation and struggling to regain both internal cohesion and external credibility.

In this chapter, I sketch out in broad strokes the early parameters of a social history that complemented, even qualified, the legal and political history of the war crimes programme in geographically contingent ways. The status 'war criminal' and its demarcation from related categories relevant in the course of apprehension, detention and especially incarceration - most commonly 'prisoner of war' ('POW') - was not clearly defined. Rather, it was a bone of contention among the prosecuting powers and especially with the International Committee of the Red Cross ('ICRC'), when innovations in humanitarian law intersected with those in international criminal law.<sup>6</sup> The contestation over the conditions of punishment pivoted on defining the rights of the accused and the convicted. Above all, this contest draws attention to the ways in which the politics of post-war justice were usable - and later used - to address the social needs of various peoples and publics around the globe. Not only were these communities differently invested in seeing war crimes punished, but their investment took on new meanings as their respective 'priorities' changed over time. This involved a range of legalities outside criminal trials, concerning the broader post-war operational law of militaries, parliamentary legislative proceedings, and penal law. Moreover, it involved the physical, conceptual and discursive legal spaces associated with them.

Recognizing a plurality of legal spaces – apart from the legal pluralism of the various law codes used in the courtrooms – expands the purview of the war crimes programme not only to different geographical scales but also towards greater temporal nuance as their overlap and interplay shifted over time. It is not simply that the Cold War intervened, as if with an invisible hand, to make enemies of the former Allies and allies of former enemies, in the course of which justice became a political commodity. More broadly, a social conception of the war crimes programme as it played out in different legal spaces is akin to Hajimu Masuda's reading of the (early) Cold War as social politics. By this, he means the ways in which perceived (anti-)Communist and (post-)colonialist enmities "'fit'

<sup>&</sup>lt;sup>6</sup> Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, Oxford University Press, 2014, especially chap. 8 ("Revising the Geneva Conventions, 1946–49: Synthesizing the Old and New Justice").

with the social needs of populations around the world", many of whom used them to deal with the social divisions and contradictions stemming from recent wars and foreign occupation.<sup>7</sup> Analogous to this, the war crimes programme offered space and opportunity to shape social relations between victims and perpetrators of wartime atrocities; winners and losers in war; occupiers and the occupied in places struggling to assert national, ethnic, or post-colonial sovereignty; or within national publics legitimating new forms of national, regional or global hegemony. This crucial insight reflects a perspective germane to critical geography, not a moral judgment of what should or should not have happened.

Neither the codification of abstract (international) law by legal elites nor the handful of top military and political leaders who stood trial in Nuremberg and Tokyo give sufficient insight into this broader sociospatial conception of the war crimes programme. It is more instructive to probe how the unprecedented challenge of apprehending, prosecuting and punishing a diverse mass of war criminals played out practically on the level of local communities directly affected by the physical presence of war criminals on trial or in prison, and discursively through the management of public sentiments among (inter)national audiences. The social field of signification that the Allied war crimes programme generated across time and global space reveals a multiplicity of parallel and competing legalities - claims on different kinds of legal obligations - that afforded even those without the power to challenge the sentences a measure of ownership in the programme.<sup>8</sup> Fundamental to this was the contradiction between the legal treatment of war criminals as individual offenders in court and their physical punishment en masse. This contradiction, in turn, required a legal status definition and demarcation from related yet separate categories in military and civilian criminal law that were deeply embedded in multiple spatial and indeed geographical contexts.

The recent literature in the interdisciplinary field of legal geography is particularly relevant here, for it takes as its subject the nexus of the social, the legal, and the spatial, arguing powerfully for the intersectionality

<sup>&</sup>lt;sup>7</sup> Hajimu Masuda, "Epilogue: The Cold War as Social Politics", in *Cold War Crucible: The Korean Conflict and the Postwar World*, Harvard University Press, 2015, pp. 281–88.

<sup>&</sup>lt;sup>8</sup> This overlaps with but goes well beyond the purely apologetic 'past-political obsessions', detailed for Germany in Norbert Frei, Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit, C.H. Beck, Munich, 1996, Deutscher Taschenbuch Verlag ('DTV'), Munich, 1999.

of fields that have heretofore remained separate.<sup>9</sup> Legal geographers trace the making of legal spaces and their relation to social control across geopolitical and geocultural scales.<sup>10</sup> Relatedly, legal historians now call for a global intellectual history that recognizes the "multi-scalar formation of legal ideas",<sup>11</sup> while some legal scholars argue forcefully for a new methodological approach to the socio-legal nexus in global governance via the idea of "transnational legal pluralism".<sup>12</sup> Crucial for a new understanding of the war crimes programme writ global is the sensibility that anthropologists bring to legal pluralism, which draws attention not only to the existence of overlapping and competing legal structures but also to the chronology by which some of those structures took root or were replaced -"fade in and out" in the words of the Benda-Beckmanns.<sup>13</sup> The establishment and negotiation of territorial jurisdiction, whether among competing or co-operating prosecuting powers in the same region, or by one power in different regions as military and political borders were being redrawn, were undeniably important, both to the conduct of trials and to the punishment of the convicted, with profound consequences in the way justice was experienced socially.<sup>14</sup>

<sup>&</sup>lt;sup>9</sup> Benjamin Forest, "Placing the Law in Geography", in *Historical Geography*, 2000, vol. 28, p. 8.

<sup>&</sup>lt;sup>10</sup> Foundational texts are Nicholas K. Blomley, *Law, Space, and the Geographies of Power*, Guilford Press, New York, 1994; Nicholas Blomley, David Delaney, and Richard T. Ford (eds.), *The Legal Geographies Reader: Law, Power and Space*, Wiley-Blackwell, Malden, 2001; and, more recently, Irus Braverman, Nicholas K. Blomley, David Delaney, and Alexandre Kedar (eds.), *The Expanding Spaces of Law: A Timely Legal Geography*, Stanford University Press, 2014.

<sup>&</sup>lt;sup>11</sup> Milinda Banerjee and Kerstin von Lingen, "Forum: Law, Empire, and Global Intellectual History: An Introduction", in *Modern Intellectual History*, July 2018, vol. 17, no. 2, pp. 1–4.

<sup>&</sup>lt;sup>12</sup> Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, & Legal Pluralism", in Günther Handl and Joachim Zekoll (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, Martinus Nijhoff, Leiden, 2012, pp. 53–86.

<sup>&</sup>lt;sup>13</sup> Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "Places that Come and Go: A Legal Anthropological Perspective on the Temporalities of Space in Plural Legal Orders", in Braverman *et al.* (eds.), 2014, pp. 30–52, see above note 10.

<sup>&</sup>lt;sup>14</sup> On (extra)territoriality, see Kal Raustiala, "The Geography of Justice", in *Fordham Law Review*, vol. 73, no. 6, 2005, pp. 2501–60; On overlapping legal spaces or 'hyperterritoriality', see David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations*, Routledge-Cavendish, New York, 2011, p. 138. More generally, see Charles S. Maier, "Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era", in *The American Historical Review*, 2000, vol. 105, no. 3, pp. 807–31.

Such global methodologies must be complemented by a close reading of local experiences of 'place', in this case carceral geographies.<sup>15</sup> Places of incarceration - from the detention camps for war crimes suspects to the prisons where the convicted served out their sentences long after the trials had concluded – arguably constituted the physical spaces that were most deeply endowed with social meanings of justice through punishment. This was viscerally true in terms of both the social relations that developed on account of the penal law governing the space inside the walls or fences, as well as the normative expectations and practical logistics levelled on a place of punishment from outside by local, regional, national or indeed international communities. Carceral geographers analyse a wide spectrum of socio-legal spaces of confinement and mobility, including prison communities as well as networks of prisons, and how they are co-produced. They see themselves in critical dialogue with the classic works of Michel Foucault on the birth of the modern prison and governmentality, David Harvey and Henri Lefebvre on the production of space, Giorgio Agamben on the state of exception, amongst others.<sup>16</sup> In this case, war criminals prisons served as physical markers of the perpetrators among communities of victims (in the areas occupied by Imperial Japan and Nazi Germany), within perpetrator nations and among the perpetrators themselves, and via the media for public audiences of the victors (for example, in the United States). They produced their own meanings – less of the criminal past itself but all the more powerfully of the (changing) post-war present. And yet, it mattered that this was part of something bigger: a 'global' claim to justice, which made discrepancies and inconsistencies on the ground appear all the more problematic.

In the following, I consider three legal spaces – discursive, procedural and physical – where geopolitical concerns and the logistics of managing thousands of war criminals intersected in the early post-war years. They illuminate the persisting ambiguities in the legal and social status of

<sup>&</sup>lt;sup>15</sup> Foundational anthologies are Dominique Moran, *Carceral Geography: Spaces and Practices of Incarceration*, Taylor & Francis, London, 2015, and Dominique Moran and Anna K. Schliehe (eds.), *Carceral Spatiality: Dialogues between Geography and Criminology*, Palgrave Macmillan, London, 2017.

<sup>&</sup>lt;sup>16</sup> Apart from the classic texts themselves, I have found useful Lauren L. Martin and Matthew L. Mitchelson, "Geographies of Detention and Imprisonment: Interrogating Spatial Practices of Confinement, Discipline, Law, and State Power", in *Geography Compass*, 2009, vol. 3, no. 1, pp. 459–77; Mary Gibson, "Global Perspectives on the Birth of the Prison", in *The American Historical Review*, 2011, vol. 116, no. 4, pp. 1040–63.

the category 'war criminal' as well as the unprecedented challenges of mass incarceration, and the opportunities this eventually produced for Japanese and Germans to claim a measure of ownership of the Allied war crimes programme even without touching the sentences themselves. The discursive space addressing specific audiences in different parts of the world was one of competing visions of how to punish war criminals. The procedural space, embedded in local territorialities, regulated legal policies of sorting war criminals from POWs and collaborators. The physical space I highlight here is the prison for convicted war criminals writ large (networks of prisons) and small (the social relations inside a prison and with its community).

## 17.2. How to Punish War Criminals

The year 1943 saw a flurry of preparatory activism around the world for the legal pursuit of war atrocities that were then escalating and whose full scale was still unimaginable. The Australian government commissioned one of the first official inquiries into war atrocities, against Australian POWs in Papua New Guinea and East Timor, before the United National Commission for the Investigation of War Crimes (later called the United Nations War Crimes Commission ('UNWCC')) began its work in the fall.<sup>17</sup> The Chinese Kuomintang [Guomindang] started lists of suspected Japanese war criminals, but was hampered by a corrupt military justice system and a lack of legal infrastructure capable of dealing with war crimes.<sup>18</sup> The Soviet Union bothered less with preparatory work and instead went straight to trial, prosecuting one Ukrainian and three Nazis in Kharkov in December 1943 and executing them in front of 50,000 spectators.<sup>19</sup>

<sup>&</sup>lt;sup>17</sup> Dean Aszkielowicz, *The Australian Pursuit of Japanese War Criminals, 1943-1957: From Foe to Friend*, Hong Kong University Press, 2017, pp. 37–38.

<sup>&</sup>lt;sup>18</sup> Barak Kushner, Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice, Harvard University Press, 2015, p. 43. See also Anja Bihler, "The Legacy of Extraterritoriality and the Trial of Japanese War Criminals in the Republic of China", in Kerstin von Lingen (ed.), War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956: Justice in Time of Turmoil, Palgrave Macmillan, 2016, pp. 93–116.

<sup>&</sup>lt;sup>19</sup> Michael J. Bazyler and Frank M. Tuerkheimer, "The Kharkov Trial of 1943: The First Trial of the Holocaust?", in *Forgotten Trials of the Holocaust*, New York University Press, 2014, pp. 15-43. For a contemporary American commentary, see George Creel, *War Criminals and Punishment*, R.M. McBride & Co., New York, 1944, pp. 151–63.

Meanwhile, European exile governments in London and American lawmakers in Washington gathered jurists from governments and academia into international and national committees and debated the goals, scope and organization of a war crimes programme that was to overcome the failures of the trials after World War I.<sup>20</sup> The London International Assembly, an unofficial body of experts representing the European exile governments, issued their proposal for a future international criminal court, with provisions on the execution of sentences, pardons and revisions. It did not recommend that the envisioned court have command over its own penal institution or make decisions about pardons but relegated the responsibility to enforce penalties to the relevant prosecuting state.<sup>21</sup> The International Commission for Penal Reconstruction and Development, founded in 1941 in London and a forerunner of the UNWCC, deliberated about the rights of those accused of war crimes and the rules that should guide their detention and court appearance. Chaired by Professor Stefan Glaser, the Polish Minister to the Government of Belgium, this committee went out of its way to elaborate on the need for impeccable democratic credentials in the safeguarding of the rights of those accused of war crimes so as to stay the hand of vengeance. The focus lay in particular on minimizing the length and punitive quality of pre-trial detention and guaranteeing the accused full access to legal counsel through both a national and international supervisory authority.<sup>22</sup> The ICRC went even further, seeking revisions to the Geneva Convention that would strengthen its powers to inspect prisons and camps, and improve the treatment of POWs and civilian detainees ahead of criminal prosecutions of those accused of war crimes <sup>23</sup>

<sup>&</sup>lt;sup>20</sup> Kerstin von Lingen, "Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, no. 1, pp. 45–76.

<sup>&</sup>lt;sup>21</sup> London International Assembly, *The Punishment of War Criminals: Recommendations of the LIA*, London, 1944, pp. 27–28.

<sup>&</sup>lt;sup>22</sup> International Commission for Penal Reconstruction and Development, "Committee on the Rights to Be Accorded to Persons Suspected or Accused of Crimes", July 1943, in folder "UNWCC - International Commission for Penal Reconstruction and Development and its Committees and Sub-Committees: Reports and Notes – 15867", Reel 37, United Nations Archive.

<sup>&</sup>lt;sup>23</sup> Lewis, 2014, pp. 234–35, see above note 6.

In the following year, the American and for their part the Australian public responded to the mounting evidence of atrocities with a diverse array of voices on how to punish war criminals, unwilling to leave things to the United Nations. As Dean Aszkielowicz has shown, Japanese war crimes were a deeply sensitive national identity issue for Australians not to be left to others, although this did not preclude close administrative cooperation with the Allies.<sup>24</sup> In the United States Congress, meanwhile, there were hearings before the Committee on Foreign Affairs on a joint resolution requesting the president to appoint a commission to co-operate with the United Nations in March 1945. They gave a strong sense of the urgency with which representatives of the American public demanded both information about and a say in the punishment of war criminals. The unanimous invocation of the "Leipzig travesty", as the well-connected propagandist George Creel called the mistake of having left the punishment of German WWI criminals to Germans in his 1944 treatise War Criminals and Punishment,<sup>25</sup> made physical custody of war criminals that much more imperative. The apprehension of war criminals before they could escape ('plugging the loopholes') and their extradition from neutral countries therefore became a major focus, opening up new legal spaces of territoriality, jurisdiction and international diplomacy that became the bread and butter of war crimes policymakers when the war ended. The majority of those testifying before Congress, however, clearly grasped onto the call for capture and (capital) punishment as a tool that would 'deter World War III<sup>,26</sup> Nevertheless, contrary to the London International Assembly, American public sentiment demanded a punishment regime geared towards making sure that 'no guilty person escaped' rather than that 'no innocent person be unjustly convicted'".<sup>27</sup>

Managing the sentiment of revenge, especially among the soldiers charged with capturing and detaining suspected war criminals, required help from the learned community. The Historical Service Board of the

<sup>&</sup>lt;sup>24</sup> Aszkielowicz, 2017, p. 38, see above note 17.

<sup>&</sup>lt;sup>25</sup> Creel, 1944, chap. 8, see above note 19.

<sup>&</sup>lt;sup>26</sup> The most vocal but by no means the only proponents of this line of argument were representatives of the Society for the Prevention of World War III, founded in 1944, an organization that advocated for eliminating Germany as a military threat as the first order of importance after the war.

<sup>&</sup>lt;sup>27</sup> United States, House of Representatives, Committee on Foreign Affairs, Punishment of War Criminals, 22 and 26 March 1945, Pub. L. No. HRG-1945-FOA-0006 (available on ProQuest Congressional).

American Historical Association, the most prestigious academic organization of historians in the United States, was commissioned to prepare a 50page illustrated *G.I. Roundtable* pamphlet entitled "What Shall Be Done with the War Criminals?".<sup>28</sup> It was intended for use in preparing broadcasts on the Armed Forces Radio. Complete with a study guide, teachers' notes, and a short list of further readings, it introduced the main points of discussion in a highly accessible way, from "Who are the war criminals?" to "How shall the guilty be punished?". The pamphlet also offered short historical precedents from around the world for a few key legal questions, such as whether 'superior order' was to be a legitimate defence.<sup>29</sup> It assumed that the future international criminal court would decide on prison facilities for the convicted although each country involved would doubtlessly determine the type of punishment it saw fit. Acknowledging the victims' strong feelings in favour of summary execution of all perpetrators, the pamphlet ventured that

for political and economic reasons and to avoid creating 'martyrs', it might be wiser to impose sentences of death on certain leaders and then commute them to prison terms at hard labor for life, perhaps on lonely islands in distant seas, whence escape would be impossible.<sup>30</sup>

This, of course, would minimize soldiers' interaction with them, thereby eliminating the need to manage their thirst for revenge.

The most sought-after visionary on how to punish war criminals was undoubtedly the Harvard criminal law professor and criminologist Sheldon Glueck, a Polish-born authority on juvenile delinquency who wrote prolifically in support of the war crimes programme. He may well be the main author of the pamphlet, judging from the fact that it reproduced the main ideas put forth in his 1944 book *War Criminals: Their Prosecution and Punishment*. In time for Germany's surrender in May 1945, the Office of the Judge Advocate General for the US Army commissioned from Glueck a sophisticated and highly forward-looking programme of imprisonment. Though it never became stated policy, it fore-shadowed much of what would later transpire in Sugamo and Landsberg

<sup>&</sup>lt;sup>28</sup> Sheldon Glueck, American Historical Association (ed.), "What Shall Be Done With the War Criminals?", Department of War, August 1944, EM-11, p. 39 (available on the Association's web site).

<sup>&</sup>lt;sup>29</sup> *Ibid.*, chap. 7, "Are 'Superior Orders' a Legitimate Defense?", pp. 27–31.

<sup>&</sup>lt;sup>30</sup> *Ibid.*, p. 39.

Prisons.<sup>31</sup> Entitled "A Penologic Program for Axis War Criminals", it was divided into six chapters and made recommendations on everything from considering penal philosophy to prisons' amenities and how often "warcrime prisoners" (as opposed to prisoners of war) were allowed to write or receive letters. Glueck had the American public foremost in mind as he sketched out the theoretical and practical challenges of an unprecedented situation, namely the mass incarceration of mass murderers and its public reception over time. His treatise was part of a whole genre of writings by American intellectuals on 'what to do with Germany', from the philosopher John Dewey and the psychoanalyst Erich Fromm to the anthropologist Margaret Mead and the theologian Robert Niebuhr.<sup>32</sup> Given the comparative paucity of independent (non-governmental) writings on Japan and the fact that Japan had not yet been defeated at the time of his writing, Glueck's effort to include Japanese war criminals, however tentatively, speaks to the desire not only on his but also on the US government's part to consider the problem of Axis war criminals as a structural one that transcended specific local contexts. Still, Germany stood undeniably front and centre in contemporary thinking, while Japan, in Glueck's opinion, presented a less complicated case.

The treatment of war criminals was essentially a multi-purpose propaganda tool in Glueck's view to "educate and re-educate the American public", to afford the victims a measure of retribution, and to aid in "the mental hygiene and moral rehabilitation of the German people".<sup>33</sup> No matter how ghastly the revelations of Nazi atrocities, Glueck wrote, Americans' ethnic, religious and business ties to the country of the perpetrators as well as to the victims made for a disturbingly diverse range of attitudes towards German war criminals that demanded careful management. The long-term treatment of war criminals was central to this en-

<sup>&</sup>lt;sup>31</sup> Sheldon Glueck, "A Penologic Program for Axis War Criminals", 9 May 1945, RG 153, entry 145, Box 16 "Imprisonment of German and Japanese War Criminals 1946-49", NA-RA II, College Park; also in the *Sheldon Glueck Papers, 1916-1972*, Harvard Law Library. The following discussion is partially based on Franziska Seraphim, "A "Penologic Program" for Japanese and German War Criminals, 1945-1958", in Joanne Cho, Robert Lee and Christian Spang (eds.), *Transnational Encounters and Comparisons between Germany and Japan*, Palgrave Macmillan, 2016, pp. 185–205.

<sup>&</sup>lt;sup>32</sup> For a discussion of American intellectuals on Germany, see Felicitas Hentschke, *Demokratisierung als Ziel der amerikanischen Besatzungspolitik in Deutschland und Japan, 1943 – 1947*, LIT, Münster, 2001, pp. 83–98.

<sup>&</sup>lt;sup>33</sup> *Ibid.*, p. 16.

deavour. Japan, in contrast, invited a baser reaction, Glueck ventured, as "the color element" favoured an "attitude of almost lawless, brutal, indiscriminate and ultra-swift punishment" and lacked the advocacy of an influential Japanese-American constituency (who, he neglected to say, was locked away in internment camps).<sup>34</sup> Glueck had much more to say on penological practices, which I discuss in part elsewhere.<sup>35</sup> Here I merely wish to draw attention to specific audiences of the Allied war crimes programme as discursive legal spaces of consequence for the broader social history of the programme, not least during the post-trial clemency phase, when advocacy groups worked transnationally to effect, or protest, the early release of the convicted.

# 17.3. Sorting Out Suspected War Criminals

While government officials, parliamentarians, lawyers and academics debated their visions of punishment for war criminals in London, in Chongqing (seat of the Far Eastern Commission of the UNWCC), Canberra and Washington – the hubs of war crimes policy – the Allied victorious armies had to deal with people on the ground. Their job was to sort out suspected war criminals from Axis military and civilian leaders, surrendered soldiers, POWs, and civilian or collaborator populations across Europe, across Asia, and in POW camps scattered across the United States, Australia, New Zealand, Northern Africa, and Siberia. The legal reckoning with war crimes was rooted in the geographical rescaling of territoriality through processes of military conquest, liberation, occupation, re-colonization, decolonization and nationalization.<sup>36</sup>

This remapping of territorial sovereignty entailed not just the assumption of military control over a certain area by the victors in war, but more importantly the sorting and reordering of groups of people, whose sense of place and position to each other shifted in the process, voluntarily or involuntarily. The Allies' gargantuan repatriation efforts across the Asia-Pacific region, within Europe, and across the Atlantic was the over-

<sup>&</sup>lt;sup>34</sup> *Ibid.*, p. 12.

<sup>&</sup>lt;sup>35</sup> See Seraphim, 2016, see above note 31.

<sup>&</sup>lt;sup>36</sup> For a map of territorial jurisdictions in Asia, see Wilson *et al.*, 2017, p. 33, see above note 5; an excellent overview of the complex situation in Asia after the collapse of the Japanese empire is Ronald H. Spector, "After Hiroshima: Allied Military Occupations and the Fate of Japan's Empire, 1945–1947", in *The Journal of Military History*, September 2005, vol. 69, no. 4, pp. 1121–36.

whelming humanitarian imperative and logistical challenge with which the apprehension of war crimes suspects was intimately bound up. Victims and perpetrators were not always easy to distinguish simply by national, ethnic or military group affiliation. The uncovering of crimes, moreover, demanded the furnishing of evidence from victims and perpetrators alike. Equally important was the high degree of human mobility that characterized the post-war years as wartime camps were emptied of some and refilled with others, Japanese were repatriated only to be returned to stand trial near the site of their crimes, and surveillance regimes stretched from local to global (in the form of the ICRC, for example).<sup>37</sup> Even though the vectors of territoriality and mobility pointed in different directions after Imperial Japan's and Nazi Germany's defeat compared to before, the spatial dynamics as such persisted.

The situation in Europe was very different from the one in Asia. The vast majority of German soldiers surrendered on German soil to one of the four occupying powers in their respective jurisdictions, who by then had given up on an inter-Allied co-ordinated occupation policy.<sup>38</sup> Instead, mass internment of Germans - both military and civilian, seen principally as potential security risks and only secondarily as war crimes suspects - followed national policies although there was extensive cooperation on extraditions among the four powers in the first years. The Americans had a policy of 'automatic arrest' in place, the most comprehensive of all four, covering anyone in public office and war industries, utilizing decommissioned concentration camps and makeshift mass detention camps (for example, the Rheinwiesenlager). The British and the French arrested far fewer. The Soviets had no policy in place, which resulted in mass deportations of captured soldiers and civilians first to special camps in the Baltics, Silesia and Pomerania and from there to labour camps in the Soviet Union. Finally, in March 1946, a Soviet version of the American policy for capturing suspected war criminals was put in place. The policy focused on people engaged in espionage, anti-Soviet intelligence, resistance to the Red Army, illegal munitions operations, and to a

<sup>&</sup>lt;sup>37</sup> For a graphic that illustrates war criminals' multiple transfers in the Dutch jurisdiction alone, see Wilson *et al.*, 2017, p. 52, see above note 5.

<sup>&</sup>lt;sup>38</sup> Wolfgang Form, "Alliierte Kriegsverbrecherprozesse nach dem zweiten Weltkrieg in Europa", in Kerstin von Lingen (ed.), Kriegserfahrung und nationale Identität in Europa nach 1945: Erinnerung, Säuberungsprozesse und nationales Gedächtnis, Ferdinand Schöningh, Paderborn, 2009, pp. 52–73.

much lesser extent members of the Nazi Party and Nazi 'terror organizations' down to magazine editors. The arrest rate was a little lower than that of the Americans.<sup>39</sup> But the experience of mass internment had been so challenging that the Western Allies opted for a somewhat reverse policy in Asia: repatriate first, ask war crimes questions later.

In August 1945, six and a half million Japanese military and civilian personnel, including many ethnic Koreans and Taiwanese who had been part of the Greater East Asia project as colonial subjects, were stranded across North and Southeast Asia and the Pacific, variably and over time classified as civilian internees, POWs, Surrendered Enemy Personnel ('SEP' – a British-only designation allowing, before 1 March 1947, for their use as forced labour), War Crimes Suspects, War Criminals, and Cleared War Criminals.<sup>40</sup> Whereas highly ranked officers attending surrender ceremonies were marched straight to high-security prisons, and government leaders ordered to report to Tokyo's Sugamo Prison, the overall goal was to ship as many soldiers as possible back to Japan before screening for war criminals and arresting repatriated suspects from among their home communities. Still, lower-ranked war crimes suspects were arrested in the very same notorious camps the Japanese military (and sometimes they personally) had run for Allied POWs and civilian internees during the war, and where an estimated third of the crimes later on trial had been committed.<sup>41</sup> In Thailand, for example, Japanese SEPs were held at one of the most notorious POW camps they themselves had run during the war while they worked to keep the Siam-Burma Railway going. In Singapore and Jakarta, they were seen all over town repairing its infrastructure as "surrendered Japanese personnel".<sup>42</sup> But many former imperi-

<sup>&</sup>lt;sup>39</sup> Lutz Niethammer, "Alliierte Internierungslager in Deutschland Nach 1945: Ein Vergleich und offene Fragen", in Alexander von Plato (ed.), *Sowjetische Speziallager in Deutschland*, 1945 bis 1950, Akademie, 1998, pp. 97–116.

<sup>&</sup>lt;sup>40</sup> Stephen Connor, "Side-Stepping Geneva: Japanese Troops under British Control, 1945–7", in *Journal of Contemporary History*, 2010, vol. 45, no. 2, pp. 389–405.

<sup>&</sup>lt;sup>41</sup> Reports of General MacArthur, vol. 1, chap. 14, p. 465 (available on the US Army's web site). According to Japanese Justice Ministry statistics, the overwhelming majority of crimes prosecuted were murder/ill-treatment of civilians (4,389) closely followed by those against POWs and internees (3,581) out of a total of 9,228 crimes (not defendants or cases). Yoshio Chaen, *BC-kyū senpan: Oranda saiban shiryō, zenkan tsūran* [Class B/C War Criminals: Complete Available Documents on the Dutch Trials], Fuji, 1992, pp. 268–269.

<sup>&</sup>lt;sup>42</sup> Ronald Spector, *In the Ruins of Empire: The Japanese Surrender and the Battle for Postwar Asia*, Random House, New York, 2008, p. 85; ICRC prison reports, RG 7, International Red Cross Archives, Geneva.

al soldiers made themselves invisible by joining new local wars, in Burma, Malaya, Indonesia and especially China. In addition, Japanese civilians were desperately needed to run industry and infrastructure, as in Korea and Taiwan.<sup>43</sup>

Sorting out war criminals from collaborators was a protracted process in all Axis-occupied areas and at all stages of the war crimes programme. This had to do with the nature of wartime occupation but even more so with post-war political objectives – recovering previously intact national sovereignties in Western and Northern European countries was different from establishing new regimes in Eastern Europe, in the course of which collaborators and Nazi war criminals became hopelessly entangled. But nowhere was this as intense as in countries trying to establish national legitimacy as post-colonial sovereign States for the first time, that is, declaring independence from both the Japanese and Western colonial powers, as in Indonesia, French Indochina, Burma, the Philippines, and differently yet again in China and Taiwan.<sup>44</sup>

Here, the question of territorially-based identity became particularly vexed. As the Dutch colonial authorities sought to reclaim their positions of authority in immediate post-war Indonesia, hunting down collaborators with the Japanese among indigenous populations assumed priority over securing Japanese war criminals.<sup>45</sup> In the Philippines, war crimes and traitor trials became complexly entangled once the Americans turned such legal reckoning over to the newly independent authorities.<sup>46</sup> Questions of

<sup>&</sup>lt;sup>43</sup> For an excellent overview of the immense challenges with which the war crimes programme had to wrestle, see Robert Cribb, "How Finished Business Became Unfinished: Legal, Moral and Political Dimensions of the Class 'B' and 'C' War Crimes Trials in Asia and the Pacific", in Christina Twomey and Earnest Koh (eds.), *The Pacific War: Aftermaths, Remembrance, and Culture*, Routledge, 2015, pp. 92-109.

<sup>&</sup>lt;sup>44</sup> The nexus of war crimes trials and the pursuit of collaborators in the context of colonialism and decolonization in Asia is addressed through a number of case studies in Kerstin von Lingen (ed.), *Debating Collaboration and Complicity in War Crimes Trials in Asia*, 1945-1956, Palgrave Macmillan, New York, 2017.

<sup>&</sup>lt;sup>45</sup> Robert Cribb, "Avoiding Clemency: The Trial and Transfer of Japanese War Criminals in Indonesia, 1946-1949", in *Japanese Studies*, September 2011, vol. 31, no. 2, pp. 153–54.

<sup>&</sup>lt;sup>46</sup> Konrad Lawson, "Universal Crime, Particular Punishment: Trying the Atrocities of the Japanese Occupation as Treason in the Philippines, 1947-1953", in *Comparativ: Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung*, 2013, vol. 23, no. 3, pp. 57–77. See also Wolfgang Form, "Colonization and Postcolonial Justice: US and Philippine War Crimes Trials in Manila After the Second World War", in von Lingen (ed.), 2016, pp. 143–66, see above note 18.

ethnic identity loomed especially large in Chinese nationalist war crimes trials on Taiwan involving legally Japanese but ethnically Taiwanese Class B/C war criminals. Whereas the Western Allies convicted Taiwanese and Korean guards as Japanese war criminals, irrespective of their colonial status during the war,<sup>47</sup> the Chinese Nationalists, eager to "assert their authority over all Chinese", did have to sort out the ethno-political identity of the accused to determine legal prosecution and to set them apart from local collaborators.<sup>48</sup> Even though much of the rhetoric was about unmaking the violent order forged in the previous decade, it was not a simple return to a *status quo ante* but one that reflected new hierarchies and power relationships within specific spatial contexts.

From a legal perspective, what mattered most for the treatment of suspected, accused or convicted war criminals was defining their rights in relation to those of courts martials, POWs or common criminals, a discussion that ran parallel to the dominant debates on what constituted a war crime. This concerned the extension of the 1929 Geneva Convention (which provided for the safeguarding of POWs) to enemy war criminals, both military and civilian. There was no clarity. Well before the end of hostilities, the United Nations Commission for the Investigation of War Crimes took up the question: "May the conventional protection of a prisoner of war, respecting imprisonment and punishment, be denied a prisoner of war who is charged by a responsible accuser as a war criminal?".<sup>49</sup>

The problem was that of the 10 articles of the 1929 Geneva Convention that dealt with the safeguarding of POWs while being subjected to judicial criminal proceedings, none considered the punishment of POWs for crimes committed before their capture. In the absence of a clear definition of the treatment of war criminals in international law, the US Theater Judge Advocate of the European Theater of Operations was initially prepared to grant war criminals the protection enjoyed by POWs. In a memorandum of 15 July 1944, however, Army post-war planners laid down their interpretation that:

<sup>&</sup>lt;sup>47</sup> Among the 5,677 indicted of Class B/C war crimes, 173 were Taiwanese and 148 Korean, in which 21 and 23 were executed respectively. Aiko Utsumi, *Kimu wa naze sabakareta no ka* [Why Was Kim Prosecuted?], Asahi Shinbunsha, Osaka, 2008, p. 7.

<sup>&</sup>lt;sup>48</sup> Barak Kushner, "Pawns of Empire: Postwar Taiwan, Japan and the Dilemma of War Crimes", in *Japanese Studies*, 1 May 2010, vol. 30, no. 1, p. 113.

<sup>&</sup>lt;sup>49</sup> For a related discussion of this issue, see Seraphim, 2016, pp. 189, see above note 31.

As a strict matter of law persons so charged with crime are not entitled to the rights of a prisoner of war, but as a matter of policy for those to be tried only at the end of the war it is believed that they should be given practically all the rights available to ordinary prisoners of war except for close surveillance and other measures necessary for assuring their availability for the trial.<sup>50</sup>

American war crimes policy makers wanted to have it both ways. According to this document, they appeared unrelenting in denying accused war criminals the rights of POWs in court but were willing to be generous when it came to the conditions of imprisonment, especially pretrial detention. The controversy focused on Article 63 of the 1929 Geneva Convention,<sup>51</sup> which established that POWs were to be tried in the same courts and by the same rules as applied to courts-martials of the capturing nation.<sup>52</sup> The defence of the Japanese General Tomoyuki Yamashita took this all the way to the Supreme Court in the fall of 1945, which rejected it on the grounds that Article 63 applied only to crimes committed while in custody as POW, not before capture.<sup>53</sup> The ICRC, meanwhile, insisted on the need to guarantee war criminals a minimum of protection under international law, which was anchored in the Articles 47-67 of the Geneva Convention<sup>54</sup> and could thereby be applied to Axis war criminals. As it turned out, this viewpoint eventually won enough common ground among the Western Allies in 1948 (and in opposition to the Soviets) that at the third Geneva Convention in 1949, the granting of POW privileges, was indeed extended to convicted war criminals in Article 85.55

<sup>&</sup>lt;sup>50</sup> Memo by Colonel Archibald King, Chief of War Plans Division, Headquarters Army Service Forces, to The Judge Advocate General, 15 July 1944, NARA, RG 153, Entry 145, Box 16, p. 3 (italics added).

<sup>&</sup>lt;sup>51</sup> Convention relative to the Treatment of Prisoners of War, 1929, Article 63 (https://www.legal-tools.org/doc/1d2cfc/): "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power".

<sup>&</sup>lt;sup>52</sup> For an in-depth study of this issue, see Günter Winands, *Der Status des Kriegsverbrechers nach der Gefangennahme: eine völkerrechtliche Untersuchung*, Bock & Herchen, 1980, especially pp. 20–21.

<sup>&</sup>lt;sup>53</sup> Allan A. Ryan, Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability, University of Kansas Press, 2012, p. 285.

<sup>&</sup>lt;sup>54</sup> See above note 51.

<sup>&</sup>lt;sup>55</sup> Convention (III) relative to the treatment of prisoners of war, 1949, Article 85 (https:// www.legal-tools.org/doc/365095/): "Prisoners of war prosecuted under the laws of the De-

## 17.4. Carceral Systems

As suspects were apprehended in all corners of the former war theatres, they were housed in existing camps and prisons, often the same places of which the accused had been in charge only a short while earlier and where many of the crimes had occurred. Suspected Japanese war criminals, many of whom had already been repatriated, were apprehended in their hometowns, put back on ships and transported to the places where one of the prosecuting powers requested that they stand trial anywhere in Japan's former empire. The trials-related traffic across the seas of the now defunct far-flung empire and especially the Allied military hubs in Tokyo, Manila, Hong Kong, Shanghai and Singapore included not only the accused but also their legal teams, translators and staff. European, American and Australian prosecutors shared human and material resources as well as courtrooms and jails, in particular in Singapore and Hong Kong.<sup>56</sup> The experience of multiple national justice systems and incarcerations made a lasting impression on the prisoners themselves, who began to see themselves as pawns of the shifting power politics of the time. This is corroborated in the prison diaries and memoirs of famous generals such as Saburō Kawamura and Hitoshi Imamura.<sup>57</sup> More alluringly, some visualized their environs in drawings, maps and cartoons. Incarceration engenders a heightened sense of place, simply because space is restricted, but in this case, the carceral geography of the Allied war crimes programme was literally mapped onto the changing territorial geography of Japan's former empire.<sup>58</sup> From the perspective of both the criminals documenting their experiences and the Japanese government mapping out the war crimes programme in document collections after the programme was over, it is evident that the Allies ran a network of prisons and camps for the incarcera-

taining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention". Quoted, with historical background, in Francois Bugnion and International Committee of the Red Cross, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Oxford, 2003, pp. 617-18. Also, see Winands, 1980, pp. 24–25, see above note 52.

<sup>&</sup>lt;sup>56</sup> See Wilson *et al.*, 2017, p. 52, above note 5.

<sup>&</sup>lt;sup>57</sup> Kei Ushimura, Beyond the "Judgment of Civilization": The Intellectual Legacy of the Japanese War Crimes Trials, 1946-1949, International House Japan, 2003, Part III.

<sup>&</sup>lt;sup>58</sup> For a discussion of the visual record, see Franziska Seraphim, "Carceral Geographies of Japan's Vanishing Empire: War Criminals' Prisons in Asia", in Barak Kushner and Sherzod Muminov (eds.), *The Dismantling of Japan's Empire in East Asia: Deimperialization, Postwar Legitimation, and Imperial Afterlife*, Routledge, 2017, pp. 125–45.

tion of convicted Japanese war criminals that can be characterized and analysed as a 'carceral system'.  $^{59}\,$ 

From a global perspective, it is well worth recognizing the patterns held in common and contrast among the Allies in the distributional geography of places of punishment. All main prisons used to incarcerate (convicted) war criminals across Asia were of colonial origin and had been built in the preceding half-century to discipline and contain local ethnic resistance to colonial and imperial rule: the British prisons in Singapore, Hong Kong, and Rangoon (now Yangon); the American prison in Muntinlupa, a suburb of Manila; the Dutch prison in Jakarta (formerly Batavia), but also the Japanese prisons Sugamo in Tokyo and Fushun in Manchuria. Each reflected the colonial history of its specific region. The British colonial government in Singapore operated two prisons, the older Outram Road Prison, built in 1847 by British professionals, and the newer, majestic, state-of-the-art Changi Gaol, opened in 1936 (and demolished in 2000) and considered to be "one of the most modern and best-equipped military bases in the world" in the words of Royal Artillery Squadron Leader H.A. Probert.<sup>60</sup>

A very different carceral network was operating all across the Soviet Union for a majority of Germans, both military and civilian (about 2.5 million), Japanese (640,000), various Eastern Europeans and Italians, as well as Soviet POWs criminalized by having been detained in Nazi camps.<sup>61</sup> The staggering extent of this network, both numerically and geographically, reflects a dual mapping of war criminality onto post-war criminality as anti-Soviet resistance on the one hand (affecting mainly Germans and East Europeans), and of imprisonment for war crimes onto the existing and expanding GULAG labour camp system (affecting Japanese) on the other. Disentangling this is very difficult, which is why the

<sup>&</sup>lt;sup>59</sup> Yoshio Chaen, Nihon BC-kyū senpan shiryö [Documents of the Japanese Class B/C War Criminals], Fuji, Tokyo, 1983; Yoshio Chaen, Zusetsu sensö saiban Sugamo Purizun jiten [An Illustrated Encyclopedia of Sugamo Prison], Nihon Tosho Sentā, Tokyo, 1994. See also Wilson et al., 2017, pp. 106–15, see above note 5.

<sup>&</sup>lt;sup>60</sup> Cited in Robert Havers, "The Changi POW Camp and the Burma-Thailand Railway", in Philip Towle, Margaret Kosuge, and Koichi Kibata (eds.), *Japanese Prisoners of War*, Hambleton and London, 2000, pp. 20–21.

<sup>&</sup>lt;sup>61</sup> Valerij Vartanov, "Kriegsgefangenschaft in der Sowjetunion", in Günter Bischof, Stefan Karner, and Barbara Stelzl-Marx (eds.), *Kriegsgefangene des zweiten Weltkrieges: Gefangennahme, Lagerleben, Rückkehr*, Kriegsfolgen-Forschung Bd. 4, Oldenbourg, 2005, pp. 89–99.

Soviet and Eastern European trials are usually taken out of the 'Allied' war crimes programme, but it is part of the broader spatial politics of imprisonment that played off of each other at the time. In Asia, the Soviets conducted but one formal trial in Khabarovsk, convicting 12, yet dispersed hundreds of thousands of Japanese captives across the GULAG system of Eurasia.<sup>62</sup> Ichirō Takasugi, the author of one of the most important memoirs of Soviet internment,<sup>63</sup> wrote eloquently about the confusing disconnect between what would have been an appropriate place of his personal punishment, namely where he had engaged in aggression in China, and the Siberian camps in which he found himself. This was the "paradox of the Siberian internment" in Andrew Barshay's insightful reading of Takasugi's text.<sup>64</sup> Such lack of institutional connection between wartime criminality and Soviet internment policy was echoed in Germany as well.<sup>65</sup>

No comparable prison network developed in Europe. Following UNWCC advice, penal policy was left to the individual prosecuting States. Aside from the seven Nazi leaders sentenced to prison terms by the IMT in Nuremberg and incarcerated in Spandau Prison, the only prison jointly run by the four occupying powers in Berlin, the war crimes programme quickly nationalized: the French, the Dutch, the Belgians, the Danes, the Norwegians, the Poles, the Czechs, the Greeks, the Yugoslavs and the Italians all used their own national legal systems and civilian prisons usually in or near urban areas. Unlike in Asia, where Japanese convicted outside Japan were eventually repatriated and transferred to Sugamo amidst multiple collapsing imperialisms, Germans convicted outside Germany served out their sentences as part of those countries' national rebuilding.

But most eyes were on occupied Germany, where the Americans, the Brits, the French, and the Soviets in their respective occupation zones took over local courtrooms in just about every larger city of Germany, staffed them with their own military personnel, and designated one prison

<sup>&</sup>lt;sup>62</sup> Valentyna Polunina, "From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefield", in von Lingen (ed.), 2016, pp. 239–60, see above note 18.

<sup>&</sup>lt;sup>63</sup> Ichirō Takasugi, Kyokkō no kage ni: Shiberia furyoki [In the Shadow of the Northern Lights: A Memoir of Imprisonment in Siberia], Meguro Shoten, 1950, Iwanami Bunko, Tokyo, 1991.

<sup>&</sup>lt;sup>64</sup> Andrew E. Barshay, *The Gods Left First: Imperial Collapse and the Repatriation of Japanese in Northeast Asia, 1945–1956*, University of California Press, Berkeley, 2013, p. 94.

<sup>&</sup>lt;sup>65</sup> Niethammer, 1998, p. 9, see above note 39.

in each Western zone to house the war criminals they prosecuted: the Americans, in Landsberg am Lech, a small town in Bavaria; the Brits, in Werl; and the French, in Wittlich, a former women's prison. This carceral system was less marked by transfers of prisoners or staff between these prisons, although they occasionally occurred, than by an implicit, at times even explicit, alignment of carceral policies and practices among the three Western Allies, who watched and conferred with each other regularly. Certainly, after the consolidation of the three Western zones and the founding of the Federal Republic, the Americans, the Brits, and the French were highly aware of public scrutiny of discrepancies between carceral policies, which could be - and were - exploited by Germans pushing back against the war crimes programme. The Soviets set up socalled special camps (Spezlager) that housed, often on a transitory basis, convicted war criminals along with all other categories of criminals. A particular type of punishment in these camps was not hard labour but the opposite: the complete neglect of the prisoners.<sup>66</sup> The larger point is that the distributive geography of imprisonment had a relational quality, cooperatively or in conflict with other powers, and it is precisely the inconsistencies thereby created that could and was politically used, if not exploited, by various sides and for various audiences.

The contemporary public would hardly have appreciated the distributive geography of the war crimes programme on a global scale. Instead, individual prisons commanded public attention at the time and all the more so after the trials, as part of local communities who serviced them, as part of national politics that used them as symbolic and rhetorical touchstones, and as part of a transnational measuring stick of the longerterm effect of the war crimes programme. What went on inside the high walls filtered through in selective and compromised ways, occasionally surfacing in tabloids, in lawyers' affidavits in clemency petitions and political advocacy, and later in published memoirs.

Perhaps unsurprisingly, it was Spandau Prison in divided Berlin that achieved iconic status, mainly as a unique and bizarre space of continued Allied co-operation across Cold War lines long after all other co-operation among them had ceased. Indeed, Spandau continued to exist not as part of, but despite, the war crimes programme, frozen in time by an uncompromising hostility that prevented it from evolving with the programme. Built

<sup>&</sup>lt;sup>66</sup> *Ibid*.

to a capacity of 600, it only ever housed seven Nazi leaders after 1945, convicted by the IMT in Nuremberg, without recourse to a review process or revisions of sentences. Five of them were released in the 1950s, one in the 1960s, and the last war criminal, Rudolf Hess, was in single occupancy until 1987, when he managed to hang himself at age 93, just three years before the Berlin Wall fell. Throughout these decades, the four Allied powers of World War II took monthly turns at running the prison and supplying guards, principally concerned with spying on each other rather than guarding the old Nazis.<sup>67</sup> It is tempting to see in this a metaphor for the entire war crimes programme as a child of the Cold War. However, Spandau was in fact an exception, not the rule: precisely because it was jointly run by the Allies, they prevented each other from adjusting their carceral policies, in great contrast to any of the other prisons.<sup>68</sup>

With the end of most trials in the late 1940s and the United States taking the lead in winding down the war crimes programme through reviews and a clemency programme, the two American-run war criminals' prisons in Landsberg and Sugamo became synonyms for the Allied war crimes programme as a whole in the contemporary media as well as in governmental politics. This was certainly not apparent in the spring of 1946, when these locales were the subject of ongoing debates among the offices of the Provost Marshall, the Judge Advocate General, the Director of Legal Division, and Prison Director in the US occupation zone in Germany and the US Army Forces in the Pacific, respectively, as well as in the War Crimes Office in Washington.<sup>69</sup> More so than the legal process of the trials, which had limited transparency for most of the time, the longterm execution of sentences was grounded in everyday administrative practicalities that made not only the meaning of justice but also that of democratic rebuilding concrete for different participants and audiences, including the German, Japanese and American publics, as well as the many different victims of war atrocities.

<sup>&</sup>lt;sup>67</sup> Norman J.W. Goda, *Tales from Spandau: Nazi Criminals and the Cold War*, Cambridge University Press, 2007, pp. 1–18.

<sup>&</sup>lt;sup>68</sup> Another exception was the 'Breda Four', the only German war criminals ever imprisoned in the Netherlands, in Breda Prison, two of them until 1989, and widely seen as tokens of a Dutch war crimes programme that never materialized. Dick de Mildt and Joggli Meihuizen, "'Unser Land muss tief gesunken sein...': Die Aburteilung deutscher Kriegsverbrecher in den Niederlanden", in Norbert Frei (ed.), 2006, pp. 316–325, see above note 8.

<sup>&</sup>lt;sup>69</sup> RG 153, Entry 145, Box 16, folder "Imprisonment of Japanese and German War Criminals, 1946-49", NARA II, College Park.

In requisitioning the two prisons in Sugamo and Landsberg, the US military not only found facilities with reasonably intact structures, a reasonable capacity (at least to begin with), and at a reasonable distance to their own trial locations. Like the colonial prisons used for Japanese war criminals all around Asia, the two prisons were also intricately bound up with the preceding half-century of history, forged in the crucible of nation-state building, imperialism, democracy, militarism and fascism. Both were built as part of a global wave of modern prison-building at the turn of the twentieth century, updating and extending Foucault's eighteenth-century history into the global imperial age.

Sugamo Prison, originally named Keishichō Kangoku Sugamo Shisho, was built in north-western urban Tokyo in 1895, the beginning of Japan's formal empire. In the 1920s, it was expanded, renamed 'Sugamo Kangoku', and increasingly housed political prisoners, especially communists arrested under the 1925 Peace Preservation Law. The famous German spy for the Soviet Union, Richard Sorge and his Japanese recruit Hotsumi Ozaki, were executed there on 7 November 1944.<sup>70</sup> The prison layout followed the British model of several cell blocks arranged in a row just like Stanley Prison in Hong Kong, suited to its urban setting, on six acres of land. Five long wings had three-story tiers of cells; another wing had a two-story tier; a separate small building, the Blue Prison, housed women; and yet another separate building was used for executions. Its capacity of about 2,000 was never reached under Japanese administration, and those who remained at the end of the war were simply released to make space for the war criminals expected to be arrested in the fall of 1945.71

The Gefangenenanstalt Landsberg am Lech was built under Kaiser Wilhelm between 1904 and 1908 in a semi-rural setting across the river from the town centre between a major road and extensive farmland on an elevated plateau next to the Gut Spötting, where the prisoners worked. It had a state-of-the-art panopticon layout, in which four cell blocks were arranged in a cross shape with a supervisory area in the centre and a string of administrative buildings curving around one side behind high walls, which corresponded to the modern prison code of 1885. Renovations after

<sup>&</sup>lt;sup>70</sup> One of the latest books detailing this history is Owen Matthews, *An Impeccable Spy: Richard Sorge, Stalin's Master Agent*, Bloomsbury, 2019.

<sup>&</sup>lt;sup>71</sup> *Ibid.*, p. 2–3.

World War I were meant to accommodate a different type of incarceration for a few elite (political) prisoners without labour requirements called *Festungshaft* (fortress custody) and *Schutzhaft* (protective custody). The first such prisoner was Anton Graf von Arco auf Valley, who assassinated the Bavarian prime minister Kurt Eisner in 1919. After the failed Beer Hall Putsch in Munich in 1923, Adolf Hitler, his deputy Rudolf Hess, as well as Julius Streicher and Gregor Strasser served sentences there in considerable comfort.<sup>72</sup> After 1933, the prison became a major *Führer* cult propaganda tool especially among the Hitler Youth, and held increasingly more Nazi resisters as political prisoners in ordinary custody. By the final years of the war, it served as the transfer destination of prisoners from all over Germany and Nazi-occupied territory, thereby including several hundred 'spies' and others, especially from Eastern and Southern Europe, bringing the number of inmates to more than three times its originally intended capacity of 500.<sup>73</sup>

There are obvious trans-war parallels in how the two prisons reflected and participated in their respective political environs. Each had a symbolic meaning that escaped no one. Both were also marked by their close geographical proximity to sites of crimes being adjudicated, POW camps in the case of Sugamo, and the Dachau death camp network in the case of Landsberg. The 1,409 Class B/C Japanese war criminals prosecuted by the Eighth Army of the US and awaiting trial or serving sentences in Sugamo were accused of maltreatment of American POWs in one of the many POW camps in Japan.<sup>74</sup> The most notorious of those camps, the Ōmori stockade on an island in Tokyo Bay, served as a place of detention for suspected war criminals before they began to be transferred to Sugamo Prison in November 1945. The new custodians of Ōmori marked the transition by making the prisoners clean up the "filth" the Japanese had left, "scrubbing from top to bottom and thoroughly disinfecting the place".<sup>75</sup>

<sup>&</sup>lt;sup>72</sup> Dagmar Dietrich, *Landsberg Am Lech: Vorstadtbereiche und eingemeindete Dörfer*, vol. 4, Deutscher Kunstverlag, 1999, p. 200.

<sup>&</sup>lt;sup>73</sup> Thomas Raithel, Die Strafanstalt Landsberg am Lech und der Spöttinger Friedhof 1944-1958, Institut für Zeitgeschichte, 2009, pp. 40–44.

<sup>&</sup>lt;sup>74</sup> A succinct summary of the number of Japanese defendants and trials by prosecuting authority is available in Wilson *et al.*, 2017, pp. 77–78, see above note 5.

<sup>&</sup>lt;sup>75</sup> See Margherita Straehler, "Confidential report to the International Red Cross Society", 8 February 1946, on several visits to Ōmori and Sugamo between September 1945 and February 1946. RG 7 on Japanese war criminals, International Red Cross Archives, Geneva.

Most of the 1,672 German war criminals indicted by American military courts were first held at Dachau before and during their trials, before being transferred to Landsberg Prison about an hour west of Dachau to serve their sentences.<sup>76</sup> Adjacent to Landsberg, several Dachau satellite concentration camps, Kaufering I-IV, had served as forced labour camps for the nearby munitions industry, which was put underground in the last years of the war with the help of prisoners transported there from Auschwitz and other camps; for thousands, they became death camps.<sup>77</sup> After its liberation in April 1945 by American troops, Kaufering IV was reconfigured as a regional displaced persons camp for Holocaust survivors and foreign forced labour. In stark contrast to Tokyo, victims and perpetrators of mass atrocities occupied the area around the small town of Landsberg in close proximity to each other. This exploded into violent confrontation when the townspeople staged a large demonstration against the last US execution of war criminals on the Landsberg town square on 7 January 1951, and a group of Jewish displaced persons living in the area staged a counter-demonstration.<sup>78</sup>

The presence of war criminals – whether suspected, on trial, or convicted – introduced a complexity into the social fabric of local communities that the American occupiers knew they had to manage. In a detailed survey of all the conceivable possibilities for holding former Axis war criminals – in Germany and Japan, on a US-administered island in the Pacific or the Atlantic, in the US federal prison system, or in other Allied countries – these prisons were correctly foreseen as a constant source of irritation on both policy and psychological levels, and not only if they were located in Japan and Germany. It was feared, for example, that the safety of Axis war criminals from violence by fellow criminals could not be guaranteed were they imprisoned in the already overcrowded American

<sup>&</sup>lt;sup>76</sup> Statistics in Frei (ed.), 2006, p. 31, see above note 8. On Dachau as an internment camp, see Harold Marcuse, *Legacies of Dachau: The Uses and Abuses of a Concentration Camp, 1933–2001*, Cambridge University Press, 2001, pp. 88–94.

<sup>&</sup>lt;sup>77</sup> Edith Raim, ""Unternehmen Ringeltaube": Dachaus Aussenlagerkomplex Kaufering", in Wolfgang Benz and Barbara Distel (eds.), *Die vergessenen Lager*, Dachauer Hefte, vol. 5, DTV, Munich, 1994.

<sup>&</sup>lt;sup>78</sup> Michael Strasas, "Die Sprache des Herzens sprechen lassen", in Manfred Deiler, Anton Posset, and Michael Strasas (eds.), Von Hitlers Festungshaft zum Kriegsverbrecher-Gefängnis No. 1: Die Landsberger Haftanstalt im Spiegel der Geschichte, Themenhefte Landsberger Zeitgeschichte: Landsberg Im 20. Jahrhundert, Heft 1, Drucklagen Augsburg, 1993, pp. 13–19.

federal prison system.<sup>79</sup> In the end, the most practical solution was to keep American-convicted war criminals in Sugamo and Landsberg, and deal with the 'irritation' this was likely to cause on an *ad hoc* basis.

American penal practices in Landsberg and Sugamo shared many commonalities and in fact recalled to a large extent Sheldon Glueck's vision of a two-phase penologic programme. The prisons were sites in which the evolving relationship between captors and captives, victors and the vanquished, occupiers and the occupied played out with rare intensity. Indeed, John Dower's characterization of the US occupation of Japan as an extraordinarily "electric" cross-cultural moment whose "focused intensity" had no match in Germany is clearly observable in the dynamics that prevailed in Sugamo.<sup>80</sup> There are political, cultural and psychological reasons for this, at the centre of which lay a form of orientalist racism carried over from the war and reproduced in the exclusiveness of the American occupation. One administrative difference of consequence, however, was the decision to keep the American staff of Landsberg to an absolute minimum by hiring Poles as guards, whereas the Supreme Commander for the Allied Powers ran Sugamo almost exclusively with Eighth Army GIs, apart from the help of Japanese cooks and janitors.<sup>81</sup> In Landsberg, the Americans remained distant authority figures, relying almost exclusively on local resources in supplying and servicing the prison and on the German prison chaplains as mediators (or self-appointed advocates) for the prisoners' requests.82

Paying attention to the physical spatiality of the war crimes programme can open up a much wider range of legalities than those pertaining to the criminal law of trials. Such an inquiry captures the social mean-

<sup>&</sup>lt;sup>79</sup> Memorandum by Bertram W. Tremayne, Jr., "Observations on the place of confinement of war criminals sentenced to terms of imprisonment", 17 April 1946, Judge Advocate General's Office, Plans and Policy Section, War Crimes Branch, RG 153, Entry 145, Box 16 "Imprisonment of German and Japanese war criminals, 1946-49", NARA II, College Park.

<sup>&</sup>lt;sup>80</sup> John Dower, *Embracing Defeat: Japan in the Wake of World War II*, W.W. Norton & Co., New York, 1999, p. 23.

<sup>&</sup>lt;sup>81</sup> Raithel, 2009, p. 51, see above note 73.

<sup>&</sup>lt;sup>82</sup> Insofar as the prisons have been studied academically, works have tended to focus on the chaplains. Key studies are Katharina von Kellenbach, *The Mark of Cain: Guilt and Denial in the Post-War Lives of Nazi Perpetrators*, Oxford University Press, 2013, and Hirotada Kobayashi, *Sugamo Purizun: Kyōkaishi Hanayama Shinshō to shikei senpan no kiroku* [Sugamo Prison: A Record of Chaplain Shinshō Hanayama and the War Criminals on Death Row], Chūō Kōron-sha, 1999.

ings contingent on concrete places; it can do so through a serious analysis of both the space inside the prisons themselves as well as their place within local, national and even transnational communities. The historical record here is so rich, so understudied and undertheorized, and the memory so remarkably uneven in post-war Japan and Germany that it deserves a study of its own beyond the limits of this chapter.<sup>83</sup> Official records of the twelve-year US military administration of Landsberg Prison are scattered among different archives and personal holdings, whereas much documentation of Sugamo as a prison for war criminals has been collected and even reprinted in multiple volumes.<sup>84</sup> Published memoirs by Landsberg war criminals themselves appear to add little to German scholarship beyond proof that the worst offenders unequivocally denied their personal guilt. Sugamo prisoners published more prolifically and in diverse genres from inside the prison and after their release, documenting life there in great detail through manga, drawings, maps as well as poems and nonfiction writing.<sup>85</sup> It directs attention to the relational spatialities of imprisonment as they were experienced and remembered both by captives and their captors as part and parcel of the war crimes programme as a whole.

Prison life also functioned as the pivot between the international politics of justice and the domestic politics of rehabilitation as places of punishment became centre points in the clemency and release programme that eventually brought the war crimes programme to an end in 1958 in both Asia and Europe. Such a reading makes clear just how difficult it was to situate punishment for war crimes within familiar legal regimes, and how usable that difficulty was to those who would challenge justice by foreign powers – with implications for current efforts at transitional jus-

<sup>&</sup>lt;sup>83</sup> For a short comparative study, see Seraphim, 2016, see above note 31. For an overview of Landsberg Prison, see Raithel, 2009, pp. 50–65, above note 73; on Sugamo, see John L. Ginn, Sugamo Prison, Tokyo: An Account of the Trial and Sentencing of Japanese War Criminals in 1948 by a U.S. Participant, McFarland & Co., 1992, pp. 1–14; in Japanese, see Aiko Utsumi, Sugamo Purizun: Senpantachi no heiwa undō [Sugamo Prison: The War Criminals' Peace Movement], Yoshikawa Kōbunkan, 2004.

<sup>&</sup>lt;sup>84</sup> Key sources include Yoshio Chaen, *Nihon senryu: Sugamo Purizun shiryō* [Japan's Occupation: Documents of the Sugamo Prison], 1992, vols. 1–3 and Chaen, 1994, see above note 59.

<sup>&</sup>lt;sup>85</sup> For example: Kiyohei Nakayama, Sugamo Purizun 2000 nichi [2000 days in Sugamo Prison], Gendaishi Shuppankai, 1982; Fumio Fujiki, Sugamo densetsu: Manga de tsuzuru Sugamo Purizun to GI [Legends from Sugamo: Sugamo Prison and the GIs as Seen Through Manga], Ribā, 1994; Tokio Tobita, C-kyū senpan ga suketchishita Sugamo Purizun [Sugamo Prison Sketched by a Class C War Criminal], Sōshisha, 2011.

tice. Tellingly, the public media in both countries had all but jettisoned the term 'war criminal' by the early 1950s and either put it in quotes or replaced it with 'war convicted' (*sensō jukeisha* or its German equivalent *Kriegsverurteilte*).<sup>86</sup> Surprisingly, the war criminals themselves had much agency in this. The prisons became platforms for political activism by those inside as well as politicians and supporters outside. Widows of some of the executed, lawyers for those in prison, and released war criminals or suspects became important spokespersons for the release movement mobilizing local networks to influence parliamentary action, as Sandra Wilson details in her contribution to this volume.<sup>87</sup>

In conclusion, taking the dynamics of punishment through incarceration seriously draws attention to different temporalities, legalities and spatialities than what are typically associated with the war crimes trials centred on the courtrooms in Nuremberg and Tokyo. This chapter focused on three legal spaces - discursive, procedural and physical - in which the contradictory dynamics of mass punishment for individual crimes produced legal relationships responsive to different geopolitical concerns. Juridical, legislative and policy-making assemblies, speaking from various positions of outrage over Nazi German and Imperial Japanese aggression, debated what kind of punishment to mete out to enemy war criminals before the war had even ended. The procedural challenges of apprehension and sorting of suspected war criminals on a massive scale reflected the vastly different circumstances in Europe after Nazi Germany's collapse and across Asia after Imperial Japan's surrender. Imprisonment of the perpetrators far outlasted the trials, military occupation, China's civil war, and much of the world's reconstruction along Cold War lines.

The diversity of the transnational carceral systems and the commitment at least on the part of the Americans to make their engagement in Germany and Japan coherent, speaks loudly to the geopolitical possibilities and ambitions that this quest for justice afforded the victors in war. But the complexity of individual prisons like Sugamo and Landsberg as particular physical and social spaces of justice – relationally experienced – and their embeddedness in their respective local communities, in turn, afforded Germans and Japanese possibilities, not only to contest, but

<sup>&</sup>lt;sup>86</sup> Brochhagen, 1994, p. 20, see above note 2.

<sup>&</sup>lt;sup>87</sup> Sandra Wilson, "Clemency for War Criminals Convicted in the Tokyo Trial", chap. 16 above.

more importantly to reframe the intentions of the victors in light of their own immediate needs: regaining sovereign legitimacy, national rehabilitation, and social integration. From this perspective, the post-war comeback of the Sasakawas and the Krupps may prompt a closer look at the social politics of transitional justice, which significantly qualified the innovations of international criminal law.

# The International Criminal Court and the International Military Tribunal for the Far East: Lessons Learnt or Not?

#### Kuniko Ozaki\*

#### **18.1. Introduction**

The purpose of this chapter is to look at the influence of the International Military Tribunal for the Far East ('IMTFE') on the establishment and the jurisprudence of the International Criminal Court ('ICC' or 'Court'), or, more specifically, at the lessons learnt from the IMTFE from the perspective of the ICC, including via the two United Nations ('UN') *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR').

The IMTFE, the International Military Tribunal at Nuremberg ('Nuremberg IMT'; together, the 'IMTs'), the *ad hoc* tribunals, and the ICC all share the same goal of punishing the perpetrators of the most serious crimes of concern to the international community as a whole, focusing on the individual criminal responsibility of political and military leaders. Crimes under their respective jurisdiction are of a large-scale, systematic and complex nature, and have generally been committed by groups or organizations. The aforementioned features have posed unprecedented challenges in international law as well as procedural and substantive criminal law. It is in this regard that the two IMTs have been pioneers in the development of international criminal law. The two UN *ad hoc* tribunals and,

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more recently, the ICC, have built upon their legacy while learning from their failures.

# **18.2.** Origins and Jurisdiction of the International Criminal Tribunals

The starting point for looking at the lessons learnt from the two IMTs is the legal basis for their establishment and jurisdiction. Both IMTs were established by the Allied Powers. In particular, the IMTFE was created by a "Special Proclamation" of the Supreme Commander for the Allied Powers (from 19 January 1946), with the Charter of the IMTFE ('Tokyo Charter') as an attachment. The proclamation refers to "the terms of surrender that stern justice shall be meted out to all war criminals" and to the Japanese acceptance of those terms. Japan also agreed to accept the judgments of the IMTFE and other Allied war crimes courts in Article 11 of the San Francisco Peace Treaty.<sup>1</sup> Both IMTs were multinational in the sense that the Allied Powers had agreed on the relevant applicable laws beforehand, but it cannot be denied that the IMTFE, in particular, also had characteristics of more traditional types of military commissions established by one of the parties to the international conflict.<sup>2</sup> Their jurisdiction was strictly limited to certain crimes committed by German and Japanese nationals, respectively.<sup>3</sup>

In contrast, the two *ad hoc* tribunals were created by the Security Council under Chapter VII of the UN Charter.<sup>4</sup> Therefore, the two tribunals were *de facto* subsidiary organs of a political body in charge of maintenance of peace and security, with a strong enforcement power. Again, the two tribunals' temporal, territorial and material jurisdiction was strictly limited to certain conflicts which the Security Council had a

<sup>&</sup>lt;sup>1</sup> Treaty of Peace with Japan, San Francisco, 8 September 1951 (https://www.legal-tools.org/ doc/3mf4ms/).

<sup>&</sup>lt;sup>2</sup> R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances", in *Military Law Review*, 1995, vol. 149, pp. 27-28; Zachary D. Kaufman, "The Nuremberg v. The Tokyo Tribunal: Designs, Staffs, and Operations", in *John Marshall Law Review*, 2010, vol. 43, p. 757.

<sup>&</sup>lt;sup>3</sup> Charter of the International Military Tribunal for the Far East, 19 January 1946 ('Tokyo Charter'), Article 5 (https://www.legal-tools.org/doc/44f398/); Charter of the International Military Tribunal, 8 August 1945, Article 6 (https://www.legal-tools.org/doc/64ffdd/).

<sup>&</sup>lt;sup>4</sup> UN Security Council Resolution 827, S/RES/827 (1993), 25 May 1993 (https://www.legaltools.org/doc/dc079b/); UN Security Council Resolution 955, S/RES/955 (1994), 8 November 1994 (https://www.legal-tools.org/doc/b38d4d/).

special interest in.<sup>5</sup> There have also been so-called 'mixed' or 'hybrid' tribunals established by specific agreements with countries where serious crimes had been committed. The purpose of those tribunals is to prosecute and punish selected individuals or a group of people for specific crimes committed in those countries by applying a mixture of international and national laws. The typical example in Asia of such a mixed tribunal is the Extraordinary Chambers in the Courts of Cambodia, which was established by an agreement between Cambodia and the UN for the purpose of prosecuting and punishing serious crimes committed during the Khmer Rouge regime (1975-1979).

On the other hand, the ICC is a treaty-based body aiming at being a permanent and universal criminal court. Its founding document, the Rome Statute, was negotiated and adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to which all UN member States were invited.<sup>6</sup> The ICC has thus tried to avoid the criticism brought to its predecessors which have been referred to as 'victors' justice' (the IMTs) or courts imposed by an 'outside body' (the *ad hoc* tribunals).<sup>7</sup> While this contributed to the legitimacy of the ICC as an independent and impartial court, it was also the cause of a number of the ICC's potentially fatal weaknesses. Instead of having powerful countries or an organization such as the UN Security Council backing it, the ICC lacks enforcement power and is therefore completely dependent on the co-operation (and thereby on the political will) of the individual member (or non-member) States at all stages of the proceedings.<sup>8</sup>

<sup>&</sup>lt;sup>5</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 ('ICTY Statute'), Articles 1-6, 8 (https://www.legal-tools.org/doc/b4f63b/); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 ('ICTR Statute'), Articles 1-7 (https://www.legal-tools.org/doc/8732d6/).

<sup>&</sup>lt;sup>6</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, A/ CONF.183/13, vol. II, p. 2 (https://www.legal-tools.org/doc/253396/).

<sup>&</sup>lt;sup>7</sup> Madoka Futamura, War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy, Routledge, 2008, pp. 60-61; Sarah Finnin and Tim McCormack, "Tokyo's Continuing Relevance", in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited, Martinus Nijhoff, Leiden, 2011, p. 355.

<sup>&</sup>lt;sup>8</sup> Rome Statute of the International Criminal Court, 17 July 1998, Articles 86, 87, 93, 103 ('Rome Statute') (https://www.legal-tools.org/doc/7b9af9/).

In this respect, it is noteworthy that a significant number of States, including permanent members of the Security Council, have not yet joined the Rome Statute. Furthermore, the ratification and accession rates are particularly low in Asian and Arab countries. This means that the Court not only lacks jurisdiction over some regions where serious crimes are or may be committed, but also has little prospects of getting meaning-ful co-operation from major global or regional powers. Moreover, the non-participation of countries with rich and distinct legal traditions hampers the legitimacy of the Court, which should represent all major legal traditions of the world.<sup>9</sup>

Against this background, the Court has been heavily criticized for disproportionately targeting the African continent in its investigations and prosecutions.<sup>10</sup> This criticism is closely related with the fact that the Court does not have jurisdiction over many of the other existing conflict situations, in relation to which it also cannot expect to receive co-operation from the Security Council.<sup>11</sup>

Lack of international co-operation from member States during investigation and prosecution also constitutes a significant issue for the ICC, since the Court has no enforcement power in the territories of these States, and also does not have any direct power to redress their non-cooperation.<sup>12</sup> While in a number of instances, chambers of the Court

<sup>&</sup>lt;sup>9</sup> Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, third edition, Cambridge University Press, 2014, pp. 173-76 (fourth edition, by Cryer, Robinson and Sergey Vasiliev, published in 2019).

<sup>&</sup>lt;sup>10</sup> Torque Mude, "Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric", in *Open Journal of Political Science*, 2017, vol. 7, pp. 178-79.

<sup>&</sup>lt;sup>11</sup> See, for example, UN Security Council, press release, "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution", SC/11407, 22 May 2014 (https://www.legal-tools.org/doc/s934zb/).

<sup>&</sup>lt;sup>12</sup> Rome Statute, Articles 86-87, see above note 8. According to Article 87(1), the Court has authority to make requests to States Parties for co-operation. Pursuant to Article 87(7), if a State Party fails to co-operate while such a request has been issued, the Court may refer the matter to the Assembly of States Parties or to the Security Council. According to Article 87(5), the Court can request the assistance of non-States Parties and if the State has entered into an *ad hoc* arrangement or agreement with the Court, and fails to co-operate pursuant to such request for assistance, the Court may inform the Assembly of States Parties and/or the UN Security Council; see International Criminal Court ('ICC'), Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195, p. 17 (https://www.

have referred cases of non-cooperation to either the Security Council or the Assembly of States Parties, no meaningful measures have arguably been taken by either of the two bodies.<sup>13</sup> It is indeed ironical that the efforts aimed at establishing a truly independent and universal court have had adverse consequences which may spoil the legitimacy of the Court, which amply reflects the current reality of rule of law in the international community. Under these circumstances, it remains to be seen how and when the ICC will overcome these difficulties while keeping its unique legitimacy.

# 18.3. Procedural Law

The experience of the different international criminal courts and tribunals has also shown that there are two major issues that require particular attention in order for any international criminal trial to achieve its objective of delivering justice: procedural fairness, and respect for the principles of legality and of individual culpability.<sup>14</sup> In the following, I will look at whether and how the ICC has learned its lessons in relation to these matters from its predecessors, in particular the IMTFE.

The procedural law of the IMTFE and the Nuremberg IMT is based on military law mixed with predominantly common law elements.<sup>15</sup> At first sight, the IMTs shared some features with the procedural systems adopted at the *ad hoc* tribunals and the ICC. The proceedings at these tribunals are in principle adversarial in the sense that it is for the prosecution

legal-tools.org/doc/89d30d/); *idem*, Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, 11 December 2017, ICC-02/05-01/09-309, paras. 44-55 (https://www.legal-tools.org/doc/5bdd7f/).

<sup>&</sup>lt;sup>13</sup> ICC, Office of the Prosecutor, Twenty-seventh report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), 20 June 2018 (https://www.legal-tools.org/doc/1s1710/); ICC, Situation in Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta* ('*Kenyatta*'), Trial Chamber V(b), Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, 3 December 2014, ICC-01/09-02/11-982, para. 90 (https://www.legal-tools. org/doc/d9a9e5/).

<sup>&</sup>lt;sup>14</sup> Finnin and McCormack, 2011, p. 355, see above note 7; Futamura, 2008, p. 60, see above note 7; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008, p. 311; Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012, pp. 9-16.

<sup>&</sup>lt;sup>15</sup> Evan J. Wallach, "The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline for International Legal Procedure?", in *Columbia Journal of Transnational Law*, 1999, vol. 37, pp. 855-66.

to bring charges against the accused, and that the majority of the evidence is submitted by the parties.<sup>16</sup> A more notable feature, however, is the flexibility of evidentiary rules. It is indeed a challenge to strictly adhere to common law evidentiary rules, including those related to the admissibility and reliability of hearsay evidence, in an attempt to try political and military leaders charged with the commission of complex organized crimes efficiently and expeditiously.<sup>17</sup>

Following the precedent of the Nuremberg IMT, and in line with the practice of military commissions, Article 13 of the Tokyo Charter provides in relation to admissibility that: "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value". Under paragraph (c), the Article then adds an extensive list of specific admissible documentary evidence, including affidavits and unsworn statements.<sup>18</sup> It is apparent that the aforementioned provisions are not in line with the basic common law evidentiary rules. While they might not necessarily be inconsistent with some civil legal traditions, which provide for fewer rules on the admissibility of evidence, such inquisitorial systems instead provide for their own safeguards, which were absent in the IMTFE's otherwise basically adversarial system.<sup>19</sup>

More problematically, however, it has been pointed out that the application of those rules of procedure and evidence contained a number of shortcomings concerning the rights of the accused, particularly the right to cross-examination and the equality of arms, both constituting core values of the common law procedure.<sup>20</sup> For example, it has been argued that the admission of prosecution documentary evidence was almost without limi-

<sup>&</sup>lt;sup>16</sup> Boister and Cryer, 2008, pp. 430-31, see above note 14; Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha", in *Columbia Journal of Transnational Law*, 1999, vol. 37, no. 3, p. 727; Kai Ambos, "International criminal procedure: "adversarial", "inquisitorial" or 'mixed?", in *International Criminal Law Review*, 2003, vol. 3, pp. 7-10.

<sup>&</sup>lt;sup>17</sup> Boister and Cryer, 2008, p. 104, see above note 14.

<sup>&</sup>lt;sup>18</sup> Tokyo Charter, Article 13, see above note 3.

<sup>&</sup>lt;sup>19</sup> May and Wierda, 1999, pp. 744-45, see above note 16.

<sup>&</sup>lt;sup>20</sup> Boister and Cryer, 2008, p. 311, see above note 14.

tation, while the same rules did not apply for defence evidence,<sup>21</sup> and that prosecution hearsay evidence was admitted as a rule, while defence hearsay evidence was systematically refused.<sup>22</sup> The resources available to the parties also differed. For instance, the prosecution had over 100 translators at its disposal, while the defence only had three.<sup>23</sup>

The IMTFE's procedural shortcomings, arguably, influenced the drafters of the *ad hoc* tribunals' founding instruments.<sup>24</sup> More decisive, however, was the post-World War II development of international human rights law and the adoption of the International Covenant on Civil and Political Rights. There, Article 14 provides for the right to a fair trial, including, *inter alia*, the right to a fair and public hearing by a competent, independent and impartial tribunal, the presumption of innocence, and the right to examine witnesses against oneself. This right has been reflected in the statutes of the *ad hoc* tribunals,<sup>25</sup> as well as in Article 67 of the Rome Statute. The provisions of the Covenant and its sister regional human right treaties are particularly important in that: (i) they apply to everyone indiscriminately, including aliens appearing before military commissions; and (ii) their application has produced a rich jurisprudence. The European Convention on Human Rights is crucial in the latter aspect since the European Court of Human Rights has developed jurisprudence on various aspects concerning the procedural rights of the accused, which are applicable to both common law and civil law systems.<sup>26</sup>

The two *ad hoc* tribunals have adopted rules of procedure and evidence that are closer to the common law adversarial system, leaving out

<sup>&</sup>lt;sup>21</sup> Futamura, 2008, p. 60, see above note 7; Boister and Cryer, 2008, p. 104, see above note 14; Finnin and McCormack, 2011, p. 355, see above note 7; Van Sliedregt, 2012, pp. 9-16, see above note 14.

<sup>&</sup>lt;sup>22</sup> Boister and Cryer, 2008, p. 104, see above note 14.

<sup>&</sup>lt;sup>23</sup> *Ibid*.

<sup>&</sup>lt;sup>24</sup> Finnin and McCormack, 2011, pp. 355-56, see above note 7.

<sup>&</sup>lt;sup>25</sup> ICTY Statute, Article 20, see above note 5; ICTR Statute, Articles 19-20, see above note 5.

<sup>&</sup>lt;sup>26</sup> See, for example, European Court of Human Rights, *Case of Barberà, Messegué and Jabardo v. Spain*, Application no. 10590/83, Judgment, 6 December 1988, para. 68 (https://www.legal-tools.org/doc/a84e3a/); *Case of Schenk v. Switzerland*, Application no. 10862/84, Judgment, 12 July 1988, para. 46 (https://www.legal-tools.org/doc/eb5a77/); *Case of Delta v. France*, Application no. 11444/85, Judgment, 19 December 1990, paras. 35-36 (https://www.legal-tools.org/doc/61d15d/); *Case of Ruiz-Mateos v. Spain*, Application no. 12952/87, Judgment, 23 June 1993, para. 63 (https://www.legal-tools.org/doc/ lface9/).

the military law influence contained in the procedure of the IMTs.<sup>27</sup> However, as mentioned before, the specific characteristics of the crimes under their jurisdiction have led the way to more flexible procedures with regard to evidence, for example by allowing the admission of more documentary evidence than under traditional common law systems, albeit within strict limits and while respecting the right to cross-examination.<sup>28</sup> Strict requirements in relation to disclosure also constitute a safeguard for the rights of the accused.<sup>29</sup> The ICTY Rules of Procedure and Evidence were amended to allow for the admission of written statements and transcripts in lieu of oral testimony when they "[go] to proof of a matter other than the acts and conduct of the accused as charged in the indictment" and as long as a number of conditions are fulfilled (Rule 92*bis*), when the evidence emanates from unavailable persons (Rule 92*quater*), or from persons who have been subjected to interference (Rule 92*quinquies*), again under strict conditions.

The ICC has been faced with even tougher challenges in order to firmly uphold the most recent human right standards while efficiently and expeditiously conducting its trials. The cases that have been brought before the ICC are not only complex and large-scale, but have also taken place in remote rural areas many years ago.<sup>30</sup> If the Court were to rely only on direct oral evidence, it would take months only to establish that there has been a conflict. On the other hand, reliable documentary evidence has often proved to be rather scarce while testimonial evidence often comes with serious credibility issues. Furthermore, in many cases, the hostilities in the affected countries are still ongoing, requiring a strong witness protection programme to be put in place. This means that proper disclosure will take much longer and be more difficult in comparison with

<sup>&</sup>lt;sup>27</sup> May and Wierda, 1999, pp. 735-37, see above note 16.

<sup>&</sup>lt;sup>28</sup> *Ibid.*, pp. 743-45.

<sup>&</sup>lt;sup>29</sup> *Ibid.*, pp. 756-61.

<sup>&</sup>lt;sup>30</sup> See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ('Katanga'), Pre-Trial Chamber I, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, paras. 1-7 ('Confirmation Decision') (https://www.legal-tools.org/doc/67a9ec/); Situation in Uganda, *The Prosecutor v. Dominic Ongwen* ('Ongwen'), Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422, paras. 3-5 ('Confirmation Decision') (https://www.legal-tools.org/doc/74fc6e/).

usual domestic cases.<sup>31</sup> Under these circumstances, the ICC was quick in introducing flexible rules of evidence in line with the practice of the *ad hoc* tribunals discussed above.<sup>32</sup>

The major difference between the ICC and the *ad hoc* tribunals in responding to these procedural challenges is that the ICC embarked on an ambitious task of establishing a hybrid type of procedure, belonging to neither the common law nor the civil law system.<sup>33</sup> For example, with regard to evidence, Article 64(9)(a) of the Rome Statute stipulates that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.'

The Rules of Procedure and Evidence, however, have little to add in terms of the exact process to be carried out when evaluating relevance or admissibility.<sup>34</sup> This is mainly because, unlike at the *ad hoc* tribunals, not only the Court's statute, but also its Rules of Procedure and Evidence, have been negotiated and adopted by States with different legal traditions,<sup>35</sup> which could not agree on many of the crucial procedural issues such as the rules to be applied in relation to the admission of evidence. Therefore, much was left for the chambers to decide on a case-by-case basis.

The system put in place thus allows each trial chamber to look for the best mix from various legal systems, which enables it to effectively deal with the crimes before it. In addition, while the trial proceedings are

<sup>&</sup>lt;sup>31</sup> See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda* ('*Ntaganda*'), Trial Chamber VI, Public redacted version of "Prosecution application for delayed disclosure", 17 February 2015, ICC-01/04-02/06-461, para. 4 (https://www.legal-tools.org/doc/e67ed4/).

<sup>&</sup>lt;sup>32</sup> David Hunt, "The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges", in *Journal of International Criminal Justice*, 2004, vol. 2, pp. 61-62; Gideon Boas, "Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court", in *Criminal Law Forum*, 2001, vol. 12, pp. 169, 180-82.

<sup>&</sup>lt;sup>33</sup> Claus Kreß, "The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise", in *Journal of International Criminal Justice*, 2003, vol. 1, no. 3, p. 605.

<sup>&</sup>lt;sup>34</sup> ICC, Rules of Procedure and Evidence, ICC-PIDS-LT-02-002/13, Rule 64 (https://www.legal-tools.org/doc/8bcf6f/).

<sup>&</sup>lt;sup>35</sup> See Rome Statute, Article 51, see above note 8.

in essence adversarial, the ICC, like the IMTs and the *ad hoc* tribunals, does not rely on juries.<sup>36</sup> Moreover, the Rome Statute, unlike the statutes of its predecessors, provides for a distinct pre-trial procedure where the pre-trial chamber performs a review of the case before the commencement of the actual trial.<sup>37</sup> This system certainly helps the chambers introduce more flexible elements of civil law procedures in order to meet the abovementioned challenges. Under these circumstances, some trial chambers have adopted a more common law-based approach of ruling on the admission of each item of evidence at the point of its submission, based on a prima facie evaluation of its relevance, probative value, and potential prejudice against the accused.<sup>38</sup> Other trial chambers have preferred a more civil law-based approach, and do not rule on the admissibility of evidence at the point of its submission, deferring the assessment of evidence, including its admissibility, to the final deliberations.<sup>39</sup> Furthermore, some chambers allow for witness preparation by the calling party under strict conditions, while other chambers prohibit the practice in its entirety.<sup>40</sup> Chambers also employ different approaches in relation to the use of

<sup>&</sup>lt;sup>36</sup> *Ibid.*, Articles 57, 74 and 83.

<sup>&</sup>lt;sup>37</sup> *Ibid.*, Articles 60-61.

<sup>&</sup>lt;sup>38</sup> ICC, *Ntaganda*, Trial Chamber VI, Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619 ('Conduct of Proceedings Decision') (https://www.legal-tools.org/ doc/03357c/); *idem*, Decision on Defence Request for admission of documents used during the testimony of Witness P-0933, 27 May 2016, ICC-01/04-02/06-1340, para. 5 (https://www.legal-tools.org/doc/7cf525/). The Trial Chambers in the *Lubanga* (see below) and *Katanga* cases took similar approaches.

<sup>&</sup>lt;sup>39</sup> ICC, Ongwen, Trial Chamber IX, Initial Directions on the Conduct of Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras. 27-28 ('Conduct of Proceedings Directions') (https:// www.legal-tools.org/doc/60d63f/); Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo'), Trial Chamber I, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, para. 19 (https://www.legal-tools.org/doc/7b6dce/).

<sup>&</sup>lt;sup>40</sup> ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo* ('*Bemba*'), Trial Chamber III, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016, para. 10 (https://www.legal-tools.org/doc/291082/); *Gbagbo*, Trial Chamber I, Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355, para. 19 (https://www.legal-tools.org/doc/aa620a/); *Ongwen*, Trial Chamber IX, Decision on Protocols to be Adopted at Trial, 22 July 2016, ICC-02/04-01/15-504, para. 16 (https://www.legal-tools.org/doc/311696/); *Ntaganda*, Trial Chamber VI, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652, paras. 17-18 (https://www.legal-tools.org/doc/ad21ce/); Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on wit

leading questions and the scope of cross-examination.<sup>41</sup> So far, the Appeals Chamber has refrained from making decisive decisions on these procedural issues.

As one can imagine, differences in the applicable procedural rules within the same Court can be rather confusing for the parties. The unpredictability as to the applicable procedure before a case has been assigned to a particular trial chamber is indeed far from ideal, especially for the defence. Recently, the ICC published a "Chambers Practice Manual" approved by the Judges.<sup>42</sup> To a certain extent, this manual consolidated hitherto different existing practices in the different pre-trial chambers, but has not yet achieved much in consolidating the various practices of different trial chambers. This shows how difficult it is to find the most suitable procedural rules to try the perpetrators of the most serious crimes in an international court effectively and expeditiously while adhering to existing human right standards. This endeavour is still ongoing.

It is also to be noted that the ICC is the first international criminal tribunal to establish a system of victim participation and reparations, following criticism that its predecessors did not pay enough attention to the victims of crimes.<sup>43</sup> Under this system, the victims have the right to present their views and concerns where their personal interests are affected.<sup>44</sup> They usually do so through common representatives of victims during the proceedings.<sup>45</sup> Many chambers have also allowed victims to present evi-

ness preparation, 2 January 2013, ICC-01/09-01/11-524, paras. 50-51 (https://www.legal-tools.org/doc/82c717/).

<sup>&</sup>lt;sup>41</sup> ICC, *Bemba*, Trial Chamber III, Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, paras. 7-20 (https://www.legal-tools.org/doc/ ac5449/); *Ntaganda*, Conduct of Proceedings Decision, 2 June 2015, paras. 21-30, see above note 38; *Katanga*, Trial Chamber II, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, ICC-01/04-01/07-1665, paras. 61-91 (https://www.legal-tools.org/doc/ddb123/); *Ongwen*, Conduct of Proceedings Directions, 13 July 2016, paras. 9-31, see above note 39.

<sup>&</sup>lt;sup>42</sup> ICC, Chambers Practice Manual, May 2017 (https://www.legal-tools.org/doc/f0ee26/).

<sup>&</sup>lt;sup>43</sup> Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?", in *International Journal of Transitional Justice*, 28 September 2013, vol. 7, no. 3, p. 519; Rome Statute, Article 68, see above note 8.

<sup>&</sup>lt;sup>44</sup> *Ibid.*, Article 68(3).

<sup>&</sup>lt;sup>45</sup> ICC, *Bemba*, Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, paras. 34-39 (https://www. legal-tools.org/doc/5d0fa1/).

dence.<sup>46</sup> This sometimes involves the need for a delicate balancing between the interests of victims and the right of the accused in order to avoid that the accused faces a *de facto* second prosecution.<sup>47</sup>

The system of victim reparations included in the Rome Statute has been imported from some civil law countries where the same chamber that has convicted an accused person can order him or her to provide appropriate reparations to the victims. The reparations may include restitution, compensation and rehabilitation.<sup>48</sup> While this has been highly appreciated as representing a major step forward in international criminal law, the approach also contains some serious practical challenges. For example, in most cases before the ICC, it is almost impossible to accurately identify the individual victims of the specific crimes committed by the accused. Further, it is even more difficult to assess the exact amount of the damages caused by the crimes concerned, even based on the evidentiary threshold applied when establishing civil liability. Lastly, in many cases it may be even inappropriate to provide reparations to victims of some crimes while there are others in the same community suffering from the consequences of similar crimes in close geographic and temporal vicinity. Some trial chambers have developed a system of collective reparation, but it is not clear to what extent this is truly consistent with what the Rome Statute envisaged.<sup>49</sup>

<sup>&</sup>lt;sup>46</sup> ICC, *Ntaganda*, Trial Chamber VI, Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), 15 February 2017, ICC-01/04-02/06-1780, paras. 22, 25, 31 (https://www.legal-tools.org/doc/ 64f3d3/); *Bemba*, Trial Chamber III, Order regarding applications by victims to present their views and concerns or to present evidence, 21 November 2011, ICC-01/05-01/08-1935, para. 3 (https://www.legal-tools.org/doc/621c40/).

<sup>&</sup>lt;sup>47</sup> Charles P. Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings", in *Michigan Journal of International Law*, 2008, vol. 29, no. 4, pp. 809-11.

<sup>&</sup>lt;sup>48</sup> Rome Statute, Article 75, see above note 8.

<sup>&</sup>lt;sup>49</sup> ICC, Situation in the Republic of Mali, *The Prosecutor v. Ahmad al Faqi al Mahdi*, Trial Chamber VIII, Reparations Order, 17 August 2017, ICC-01/12-01/15-236, para. 45 (https://www.legal-tools.org/doc/02d1bb/); *Katanga*, Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728, paras. 281-82 (https://www.legal-tools.org/doc/63d36d/).

# **18.4.** Substantive Law

In terms of substantive law, the recent activation of the 'crime of aggression' under the jurisdiction of the  $ICC^{50}$  has opened the possibility that the IMTFE's jurisprudence on the matter may have an impact on the Court's jurisprudence. However, since the ICC has not yet had any relevant cases before it, I will refrain from discussing the elements of this crime. I will also refrain from discussing the issue of how the IMTFE has dealt with the 'murder' charge, which touches upon the fundamental principle governing the post-Cold War development of international criminal law, namely the distinction between *jus ad bellum* and *jus in bello*n area where the IMTFE has had no impact on the ICC.

The substantive law aspects where the IMTFE's jurisprudence has already had a certain influence on the ICC's jurisprudence are: (i) the broad interpretation of individual criminal responsibility; and (ii) the doctrine of command responsibility. In this regard, the treaty-based nature of the ICC has also significantly influenced the applicable substantive law. Whereas the IMTs and the *ad hoc* tribunals relied on customary international law when establishing the substantive law applicable before them, the ICC applies the Rome Statute in accordance with the interpretative principles stipulated in the Vienna Convention on the Law of Treaties.<sup>51</sup>

# 18.4.1. Individual Criminal Responsibility

In pursuing the individual criminal responsibility of the accused for the crimes under its jurisdiction, the IMTFE developed a broad interpretation of criminal liability. Following Article 6 of the Nuremberg Charter, the last part of Article 5 of the Tokyo Charter stipulates that, with regard to crimes under its jurisdiction, "[1]eaders, 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". This form of

<sup>&</sup>lt;sup>50</sup> ICC, Assembly of States Parties, Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, ICC-ASP/16/Res.5 (https://www.legal-tools.org/doc/ 6206b2/).

<sup>&</sup>lt;sup>51</sup> See Rome Statute, Article 21, see above note 8. Article 21 hierarchically lists all the sources of law upon which the Court may rely. First, the Court should apply the Statute and the related core documents of the Court. Secondly, it should apply treaties and principles of international law. Then, the Court can rely on general principles of law derived by the Court from national laws and on principles and rules of law as interpreted in its previous decisions.

liability was not very much elaborated upon at the IMTFE in relation to crimes against humanity and war crimes due to the focus on crimes against peace. However, the provision was used extensively in relation to crimes against peace, together with the concept of 'conspiracy' as explained below.

In relation to 'crimes against peace', Article 5(a) of the Tokyo Charter stipulates an additional form of individual responsibility for "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". Based on these provisions, the IMTFE developed a broad concept of liability, including the criminal liability of those who "shape the policy and influence" the aggressive way. This approach is broader than the one adopted by the Nuremberg IMT, which attached liability to those who were in a position to "control and direct" the aggressive war, based on the same provisions.<sup>52</sup> The concept of conspiracy adopted by the IMTFE was far from clear as a legal concept. It is not even clear whether the concept was the same as the one comprised in the traditional common law crime of conspiracy, where conspiracy constitutes an independent inchoate crime.<sup>53</sup> Moreover, the majority insisted that the concept forms part of customary international law.<sup>54</sup> The reasoning behind this finding, however, is dubious. Therefore, 'conspiracy' as applied at the IMTFE was not only problematic in terms of the principle of culpability, but also, arguably, inconsistent with the principle of legality. It is notable, in this regard, that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>55</sup> in its Article 3, criminalizes 'conspiracy' to commit genocide, but this part of the Convention has not been reflected in the Rome Statute.

<sup>&</sup>lt;sup>52</sup> Neil Boister, "The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 446-47.

<sup>&</sup>lt;sup>53</sup> Boister and Cryer, 2008, p. 309, see above note 14.

<sup>&</sup>lt;sup>54</sup> For the nature of the 'conspiracy' as adopted in the IMTFE majority judgment, its difference with the one employed in the Nuremberg judgment and its shortcomings, see Boister, 2010, vol. 8, pp. 431-33, see above note 52.

<sup>&</sup>lt;sup>55</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force on 12 January 1951) (https://www.legal-tools.org/doc/498c38/).

The Rome Statute took a more restrictive approach towards the crime of aggression. Article 8*bis*, adopted in 2010, stipulates at paragraph 1 that:

For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Following this definition of the crime, Article 25 of the Rome Statute provides at paragraph *3bis* that, in respect of the crime of aggression, the provisions of the Article dealing with individual criminal responsibility shall only apply to persons in a position effectively to exercise control over or to direct the political or military action of a State.<sup>56</sup> It is notable that, unlike at the two IMTs, individual liability for the crime of aggression is much more limited than for war crimes and crimes against humanity.

The broad interpretation of liability developed by the IMTFE influenced the development of international criminal law beyond the scope of crimes against peace. All subsequent international criminal tribunals, including the ICC, have faced the same challenges as the IMTFE in relation to how to properly attribute criminal liability to those leaders or commanders who are often remotely situated from the actual scene of the multiple crimes committed by their subordinates, while strictly adhering to the principle of personal culpability or individual liability. Sometimes, the leaders and the actual perpetrators form part of an organization with an internal hierarchy and several layers of authority, including 'intermediate leaders'. Sometimes, no definable organization exists save for a loose and more or less random association of people. Sometimes, the leaders and the perpetrator share a grand common plan. Sometimes, there is nothing more than an instant and haphazard drive for harming people belonging to another community.

The notion of liability contained in the last part of Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter was further elaborated in Control Council Law No. 10 cases. Based on those cases, the *ad hoc* tribunals have adopted and developed the concept of 'joint criminal

<sup>&</sup>lt;sup>56</sup> Rome Statute, Articles 8*bis* and 25(3)*bis*, see above note 8.

enterprise' ('JCE'). The ICTY Appeals Chamber in *Tadić* clarified this concept as "the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group".<sup>57</sup>

While not going further into this mode of liability, four points are noteworthy in this regard. First, unlike the common law concept of 'conspiracy', JCE is not an independent crime, but a mode of liability.<sup>58</sup> Second, JCE has been regarded as a principal, as opposed to an accessorial mode of liability, although the dividing line between the two has been often unclear.<sup>59</sup> Third, similarly to the two IMTs, the ICTY found that the existence of JCE as a mode of liability had been established in customary international law.<sup>60</sup> The ICTY based this finding on the above-mentioned case law, the UN Terrorist Bombing Convention,<sup>61</sup> the Rome Statute, and national laws.<sup>62</sup> Fourth, JCE, especially its third category which involves "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose" is not without criticism of being too broad, from the viewpoint of the principle of culpability.<sup>63</sup>

While both IMTs and the *ad hoc* tribunals adopted a broad interpretation of principal liability based on customary international law (despite the IMTs' lack of conceptual clarity on the nature of 'conspiracy' for the crime of aggression as mentioned above), the ICC took quite a different

<sup>&</sup>lt;sup>57</sup> ICTY, *The Prosecutor v. Duško Tadić*, Appeals Chamber, Judgement, 15 July 1999, IT-94-1-A, para. 195 ('*Tadić*, Appeals Judgment') (https://www.legal-tools.org/doc/8efc3a/).

<sup>&</sup>lt;sup>58</sup> ICTY, *The Prosecutor v. Milan Milutinović et al.*, Trial Chamber, Judgement, 26 February 2009, IT-05-87-T, para. 106 (https://www.legal-tools.org/doc/9eb7c3/, https://www.legal-tools.org/doc/f0666a/, https://www.legal-tools.org/doc/d79e85/, https://www.legal-tools.org/doc/3b31aa/).

<sup>&</sup>lt;sup>59</sup> ICTY, *The Prosecutor v. Mitar Vasiljević*, Appeals Chamber, Judgement, 25 February 2004, IT-98-32-A, para. 102 (https://www.legal-tools.org/doc/dbe7c4/).

<sup>&</sup>lt;sup>60</sup> ICTY, *Tadić*, Appeals Judgment, paras. 194, 226, see above note 57.

<sup>&</sup>lt;sup>61</sup> International Convention for the Suppression of Terrorist Bombing, 15 December 1997 ('ICSTB'), Article 2(3)(c) (https://www.legal-tools.org/doc/dda995/). See further below note 73 and accompanying text.

<sup>&</sup>lt;sup>62</sup> ICTY, *Tadić*, Appeals Judgment, paras. 194-226, see above note 57.

<sup>&</sup>lt;sup>63</sup> Among many others, see Jens David Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 1, pp. 85-88; ICTY, *Tadić*, Appeals Judgment, para. 204, see above note 57.

approach. Article 25(3)(a) of the Rome Statute attaches criminal liability to a person who "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible". Article 25(3)(b) to (d) provide for liability for ordering, soliciting, inducing, aiding or abetting the (attempted) commission of a crime. Article 25(3)(d) provides for the liability of a person who:

> In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.

The Appeals Chamber in *Lubanga* acknowledged that Article 25(3)(a) refers to the liability of a perpetrator as opposed to that of an accessory.<sup>64</sup> It should also be noted that liability under Article 25(3)(d) is similar to liability established pursuant to the JCE doctrine, but does not constitute a principal form of liability.<sup>65</sup>

The Appeals Chamber in *Lubanga* also endorsed the Trial Chamber's interpretation of co-perpetration under Article 25(3)(a), requiring "an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events". It also acknowledged that "the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime", applying the 'con-

<sup>&</sup>lt;sup>64</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo* ('*Lubanga*'), Appeals Chamber, Judgement on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121, para. 462 ('Appeals Judgment') (https://www.legal-tools.org/doc/585c75/).

<sup>&</sup>lt;sup>65</sup> ICC, *Katanga*, Confirmation Decision, 30 September 2008, para. 482, see above note 30; Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465, paras. 288-89 (https://www.legal-tools.org/doc/63028f/); Cryer, Friman, Robinson and Wilmshurst, 2014, p. 362, see above note 9.

trol over the crime' theory.<sup>66</sup> Derived from German scholarly doctrine ('Tatherrschaftslehre'), this doctrine was further developed in light of the *Eichmann* trial (introducing the notion of 'indirect perpetration by means of an organization', or 'Organisationsherrschaft') and was eventually applied by German courts in order to deal with the criminal responsibility of East German leaders for crimes committed during the Cold War.<sup>67</sup> More recently, the doctrine has also been applied by German courts to complex corporate crimes.<sup>68</sup>

The ICC has departed from the practice of its predecessors in at least two ways. Firstly, the ICC does not rely on customary international law in broadening the scope of liability. This is the natural result of the ICC's treaty-based nature, which has at least solved the challenges in finding a proper basis for liability in international law, thereby freeing the Court from criticism that its law of liability is retroactive. The Appeals Chamber in *Lubanga* indeed stressed that it is interpreting and applying Article 25(3)(a) of the Rome Statute rather than proposing to apply a particular legal doctrine or theory as a source of law.<sup>69</sup> The next question therefore is whether the Appeals Chamber has applied this specific provision correctly by adopting the 'control over the crime' theory.<sup>70</sup> Some have already expressed scepticism, arguing that the theory goes beyond the literal interpretation of the Rome Statute in accordance with the Vienna Convention on the Law of Treaties, and that a doctrine specific to a particular country should not be read into an article of the statute.<sup>71</sup>

<sup>&</sup>lt;sup>66</sup> ICC, *Lubanga*, Appeals Judgment, paras. 469-73, see above note 64.

<sup>&</sup>lt;sup>67</sup> Neha Jain, "The Control Theory of Perpetration in International Criminal Law", in *Chicago Journal of International Law*, 2011, vol. 12, no. 1, pp. 163-66.

<sup>&</sup>lt;sup>68</sup> For some of the relevant jurisprudence, see Thomas Weigend, "Problems of Attribution in International Criminal Law: A German Perspective", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 2, pp. 259-60.

<sup>&</sup>lt;sup>69</sup> ICC, *Lubanga*, Appeals Judgment, para. 470, see above note 64.

<sup>&</sup>lt;sup>70</sup> Ibid., para. 473; contrast Lubanga, Trial Chamber, Judgement pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012, ICC-01/04-01/06-2842, paras. 6-12 (https://www.legal-tools.org/doc/677866/); ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4, paras. 52, 57 ('*Chui*, Van den Wyngaert Concurring Opinion') (https://www.legal-tools.org/doc/7d5200/).

<sup>&</sup>lt;sup>71</sup> Ohlin, 2007, pp. 527-30, see above note 63.

The development of international criminal law in this respect has also been influenced by the various methodologies employed to fight against organized crime and terrorism, particularly in some common law countries.<sup>72</sup> Some of these standards have already been accepted in widely ratified UN conventions against organized crime and terrorism,<sup>73</sup> although it could hardly be argued that any of them forms part of customary international law. For example, Article 52(3)(c) of the 1998 International Convention for the Suppression of Terrorist Bombings criminalizes contribution to the commission of the relevant crimes

by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

This provision was cited in the above-mentioned *Tadić* Appeals Judgment in justifying that JCE forms part of customary international law.<sup>74</sup>

Article 5 of the UN Convention against Transnational Organized Crime adopted in 2000 is even more comprehensive in this respect. According to this article, the States Parties to the Convention shall criminalize either (i) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group, or (ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in (a) criminal activities of the organized criminal group, or (b) other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim. According to the United Nations Office on Drugs and Crime, who is the custodian of the convention, option (i) reflects the practice of the mostly common law countries which have conspiracy laws, and option (ii) reflects criminal association laws

<sup>&</sup>lt;sup>72</sup> Jens Meierhenrich, "Conspiracy in International Law", in Annual Review of Law and Social Sciences, 2006, vol. 2, pp. 345-55.

<sup>&</sup>lt;sup>73</sup> See United Nations Convention against Transnational Organized Crimes and the Protocols thereto, 2004 (https://www.legal-tools.org/doc/dbce6b/); ICSTB, see above note 61.

<sup>&</sup>lt;sup>74</sup> ICTY, *Tadić*, Appeals Judgment, para. 221, see above note 57.

adopted in some civil law jurisdictions.<sup>75</sup> In this context, Article 9 of the Nuremberg Charter stipulates that "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization".

So far, the only ICC appeals judgment on the nature and scope of principal liability under Article 25 of the Rome Statute is the *Lubanga* Appeals Judgment. Several pre-trial chamber decisions have also adopted the concept of 'indirect co-perpetration' based on the same provision, but with a strong dissent.<sup>76</sup>

It is also possible that future ICC jurisprudence will be influenced by the development of national and international criminal law in other areas, in particular in the area of organized crime and terrorism (and *vice versa*). While the ICC has come a long way from the IMTFE, it still remains to be seen how the concept of co-perpetration will develop in the future and whether the ICC will be able to find a way for the most proper attribution of criminal responsibility to those who are truly culpable for the crimes committed.

# 18.4.2. Command Responsibility

The IMTFE's jurisprudence has been particularly influential in relation to the mode of liability of command responsibility. While the Tokyo Charter did not contain any specific provision in relation to this mode of liability, the Tribunal basically followed the reasoning set out by a US military

<sup>&</sup>lt;sup>75</sup> United Nations Office on Drugs and Crime, Vienna, "Model Legislative Provisions against Organized Crime", 2012, pp. 29-30 (https://www.legal-tools.org/doc/6bee5f/).

<sup>&</sup>lt;sup>76</sup> ICC, *Katanga*, Confirmation Decision, paras. 492-93, 519, see note above 30; Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/ 11-373, para. 292 (https://www.legal-tools.org/doc/96c3c2/); *Kenyatta*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382, para. 297 (https://www.legal-tools.org/doc/4972c0/); *Ntaganda*, Pre-Trial Chamber III, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, paras. 104, 121 (https://www.legal-tools.org/doc/5686c6/); *Ongwen*, Confirmation Decision, 23 March 2016, paras. 31-38, see above note 30; see also *Chui*, Van den Wyngaert Concurring Opinion, paras. 58-64, see above note 70.

commission in the 1945 *Yamashita* case<sup>77</sup> and found not only military but also civilian political leaders guilty on this basis.

Some of the most extensive discussions of command responsibility as applied in Tokyo can be found in the ICTY *Čelebići* and *Blaškić* judgments.<sup>78</sup> At the ICTR, the issue of command responsibility of civilians, in light of the Tokyo judgment, was considered in the *Akayesu* case and by the Appeals Chamber in *Bagilishema* and *Musema*.<sup>79</sup>

Article 28 of the Rome Statute provides for command responsibility in a slightly different wording from the formulation adopted by the *ad hoc* tribunals by stating that:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

<sup>&</sup>lt;sup>77</sup> United States Military Commission, Manilla, United States v. Tomoyuki Yamashita, Judgement, 7 December 1945 (https://www.legal-tools.org/doc/c6673f/).

<sup>&</sup>lt;sup>78</sup> ICTY, *The Prosecutor v. Čelebići*, Trial Chamber, Judgement, 16 November 1998, IT-96-21-T, paras. 330-400 (https://www.legal-tools.org/doc/6b4a33/); ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgement, 3 March 2000, IT-95-14-T, paras. 315-16 (https:// www.legal-tools.org/doc/e1ae55/); Boister and Cryer, 2008, p. 304, see above note 14.

<sup>&</sup>lt;sup>79</sup> ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgement, 2 September 1998, ICTR-96-4-T, para. 90 (https://www.legal-tools.org/doc/b8d7bd/); ICTR, *The Prosecutor v. Alfred Musema*, Trial Chamber, Judgement and Sentence, 27 January 2000, ICTR-96-13A-T, paras. 269-75 (https://www.legal-tools.org/doc/1fc6ed/); ICTR, *Prosecutor v. Ignace Bagilishema*, Appeals Chamber, Appeals Judgement, 7 June 2001, ICTR-95-1A-A, paras. 33-38 (https://www.legal-tools.org/doc/c1eb9d/); Boister and Cryer, 2008, p. 306, see above note 14.

While it was the two IMTs which broadened the concept of command responsibility to civilians, Article 28 also refers to the responsibility of civilian superiors, but under stricter conditions in comparison with its military counterpart.<sup>80</sup>

The first case at the ICC in which an accused was convicted at trial level on the basis of command responsibility was the *Bemba* case.<sup>81</sup> The Trial Chamber in that case referred to the IMTFE's jurisprudence, albeit only through relying on ICTY judgments that, in turn, referred to it.<sup>82</sup> It is noted that the majority of the Appeals Chamber overturned the Trial Judgment on issues related to, *inter alia*, the scope of the duty to take "all necessary and reasonable measures" and the Trial Chamber's assessment as to whether the accused in the case had taken such measures.<sup>83</sup>

Trial Chamber III had previously found that responsibility under Article 28(a) of the Rome Statute requires six elements:

- 1. crimes within the jurisdiction of the Court must have been committed by force;
- 2. the accused must have been either a military commander or a person effectively acting as a military commander;
- 3. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;
- 4. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;
- 5. the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

<sup>&</sup>lt;sup>80</sup> Rome Statute, Article 28(b), see above note 8.

<sup>&</sup>lt;sup>81</sup> ICC, *Bemba*, Trial Chamber III, Judgement pursuant to article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, paras. 693-742 ('Trial Judgment') (https://www.legal-tools.org/doc/edb0cf/).

<sup>&</sup>lt;sup>82</sup> Ibid., para. 204, referring to, inter alia, ICTY, The Prosecutor v. Pavle Strugar, Trial Chamber, Judgement, 31 January 2005, IT-01-42, para. 374 and fn. 1094, citing IMTFE, United States of America et al. v. Araki Sadao et al., Judgement, 1 November 1948.

<sup>&</sup>lt;sup>83</sup> ICC, *Bemba*, Appeals Chamber, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgement pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636, paras. 189-94 ('Appeals Judgment') (https://www.legaltools.org/doc/40d35b/).

6. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.<sup>84</sup>

This standard is largely in line with the one set out by the *Yamashita* Commission,<sup>85</sup> as well as with the IMTFE's findings,<sup>86</sup> but is formulated in a more elaborate and clear language in order to better comply with the principles of legality and culpability. Furthermore, the evidentiary threshold required by the Trial Chamber in the *Bemba* case for proving each of these elements, such as 'effective control', the 'should have known' standard, and 'measures within his power' was much higher than the one required by the IMTFE or in *Yamashita*.<sup>87</sup>

The jurisprudence in relation to command responsibility at the ICC is far from ripe. Most importantly, the Trial Chamber in *Bemba* interpreted the language contained in the chapeau of Article 28 "as a result of his or her failure to exercise control properly" as requiring causality between the crimes committed and the exercise of control.<sup>88</sup> This requirement is absent from the provisions of the statutes of the *ad hoc* tribunals, but could possibly put even stricter conditions on the applicability of command responsibility. This issue was litigated before the Appeals Chamber, but the majority of the Appeals Chamber overturning the Trial Judgment on other grounds did not answer this issue.<sup>89</sup>

# 18.5. Conclusion

As noted at the outset, the ICC has much in common with the IMTFE in its efforts towards establishing individual criminal responsibility of those who are most responsible for large-scale, complex, organized atrocities committed by multiple perpetrators. This constitutes an inherently diffi-

<sup>&</sup>lt;sup>84</sup> ICC, *Bemba*, Trial Judgment, para. 170, see above note 81.

<sup>&</sup>lt;sup>85</sup> Major William H. Parks, "Command Responsibility for War Crimes", in *Military Law Review*, 1973, vol. 62, pp. 8, 30.

<sup>&</sup>lt;sup>86</sup> R. John Pritchard, *The Tokyo Major War Crimes Trial: The Judgement, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the far East,* Edwin Mellen, 1998, cited in Victor Hansen, "What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own", in *Gonzaga Law Review*, 2006, vol. 42, no. 3, p. 370.

<sup>&</sup>lt;sup>87</sup> See, for example, ICC, *Bemba*, Trial Judgment, paras. 192-93, 203-04, 207-09, 213, see above note 81.

<sup>&</sup>lt;sup>88</sup> *Ibid.*, para. 210.

<sup>&</sup>lt;sup>89</sup> ICC, *Bemba*, Appeals Judgment, paras. 195-200, see above note 83

cult task for any national court and an even more difficult, if not impossible, task for international criminal tribunals, which cannot rely on various legal, investigative or other practical techniques developed in the different national jurisdictions.

The challenges the IMTFE faced in this respect were tremendous even in comparison with the Nuremberg IMT. While the former had to deal with the long history of the political and military structure of the Japanese government as a whole, the latter only dealt with a manifest policy of more or less limited and well-defined organizations. The IMTFE has been criticized for having been far from successful in fulfilling its difficult mandate.<sup>90</sup> Unfortunately, these difficulties have increased rather than decreased for the subsequent international criminal tribunals, the *ad hoc* tribunals and the ICC, which have been and are dealing with more complicated conflict situation involving various non-governmental forces employed in countries where these tribunals lack any control.

More importantly, more than 70 years after the establishment of the IMTFE, it is now firmly established that, for any international criminal court to be truly effective, the following requirements need to be put in place: (i) legitimacy and integrity of the court; (ii) procedural guarantees of fair-trial rights; and (iii) substantive law based on the principles of legality and individual culpability. As explained above, I believe that the IMTFE came short in truly fulfilling these requirements, while however acknowledging that international law, including the requirements of human rights law, in the 1940s was very different from the circumstances in which we are currently operating.

The *ad hoc* tribunals have tried hard to accomplish both tasks at the same time and produced valuable jurisprudence. The ICC has inherited a lot from the *ad hoc* tribunals' experience in this regard, while also learning lessons from the two IMTs. In addition, as noted above, its distinctive character as an independent, universal, treaty-based tribunal has posed a number of additional challenges for the ICC. It can hardly be said that the ICC has already succeeded in solving all the difficulties before it.

The challenges faced by the IMTFE are in this sense quite contemporary. There are so many legal and practical obstacles that still need to be overcome in order to achieve truly effective international criminal pro-

<sup>&</sup>lt;sup>90</sup> Futamura, 2008, pp. 60-61, see above note 7; Boister and Cryer, 2008, p. 312, see above note 14.

ceedings. I tried to sketch out some of them, although it is beyond my capacity to clearly indicate where we should go. Hopefully, we are heading in the right direction. Maybe we are not.

# PART V: CONCLUSION

# Concluding Reflections: Nuremberg and Tokyo – Twin Tribunals, Far Apart?

# Christoph Safferling\*

### **19.1. Introduction**

The German Reich was defeated by Allied forces and surrendered unconditionally on 8 May 1945. Its Führer, Adolf Hitler, had committed suicide a week before and thus cowardly avoided criminal prosecution, which had been decided on in the Moscow Declaration in 1943. The surviving main war criminals like Hermann Göring, Rudolf Heß, Albert Speer, Wilhelm Keitel, and 18 others, however, were taken to court and tried in Nuremberg from 20 November 1945 until 1 October 1946 on the basis of the London Agreement of 8 August 1945. In the Pacific theatre of the Second World War, the Japanese military surrendered on 2 September 1945 to General MacArthur on the USS Missouri. On 19 January 1946, MacArthur issued a special proclamation establishing the International Military Tribunal for the Far East, following mainly the model set by the Nuremberg Charter only months earlier. The reading of the final verdict against 28 defendants - including Kōki Hirota, Kiichirō Hiranuma, and General Hideki Tōjō, but consciously sparing the Japanese Emperor – ended on 12 December 1948. With these tribunals against the aggressors of the Second World War, the Allied nations wanted to set a precedent and criminalize war as a means of politics. Compared to previous wars and even to the

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First World War, this was suddenly a new approach. Previously, the traditional Westphalian system avoided the attribution of individual criminal responsibility for acts of war. Now, criminal law was used against political and military leaders "to save succeeding generations from the scourge of war" and thereby avoid "untold sorrow to mankind" in the future, as stated in the Preamble to the Charter of the United Nations ('UN') of 26 June 1945.

This obvious parallel in the immediate legal reaction to the aggression and the war crimes committed by both Germany and Japan would suggest that the international military tribunals in Europe and in Asia are seen as being on equal footing, real twin tribunals. Surprisingly, this is not the case. Nuremberg has always been treated as the original and in a way the 'genuine' tribunal, to which Tokyo was second and somehow inferior. Even their naming speaks that language: whereas the former was simply named the International Military Tribunal ('IMT'), the latter was suffixed with "Far East". Note that, in 1993 and 1994, when another pair of tribunals, the International Criminal Tribunals were created by the UN in reaction to mass atrocities in the former Yugoslavia and in Rwanda, they were called accordingly, emphasizing their respective equality. Consequently, much more research has been conducted with regard to Nuremberg compared to Tokyo. It could also be that, particularly in the United States, the de-civilization of Nazi Germany and its aggression was understood as some sort of 'betrayal' of formerly shared values<sup>1</sup> and would thus attract more scholarly attention.

The conference held in 2018 in Nuremberg in the very courtroom where the IMT held its hearings, and of which this volume is an important outcome, tried to bridge the recognition gap between the twin tribunals in Nuremberg and Tokyo. The contributions show in plentiful ways that much more individual and comparative research is indeed warranted in order to enhance our knowledge about these trials. After all, the basis of our modern, post-Cold War international criminal law rests on both the Nuremberg and the Tokyo Tribunals.

<sup>&</sup>lt;sup>1</sup> See Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence*, Oxford University Press, Oxford, 2016.

# 19.2. The German-Japanese Criminal Law Dialogue

The German-Japanese criminal law dialogue has a long tradition. Japanese criminal law at the end of the nineteenth century was strongly rooted in French models, but the criminal law reform of 1907 in Japan made it very clear that it was to have its basis mainly in German criminal law.<sup>2</sup> Although the Japanese legal culture developed as an amalgam, with the reception of the new school of Franz von Liszt in Japan, there is a proximate connection between criminal justice sciences in the Germanspeaking countries and in Japan. Dozens of Japanese scientists are on the way to German universities for their doctorates. No Festschrift, no criminal law scholars meeting in Germany is thinkable without Japanese participation. And vice versa, there are more and more German colleagues participating in criminal justice symposia in Japan. There, they engage together on dogmatically subtle disputes over the doctrines of error of law and error of fact, and the various forms of perpetratorship. In the field of criminal law and the doctrinal discourse, one may understand Japan and Germany as one common space of scientific discourse.

Against this background, does it not seem reasonable to suppose that the Nuremberg and the Tokyo Trials are at the forefront of a lively academic exchange between Germany and Japan? Well, this is not the case. International criminal law plays virtually no role in the German-Japanese criminal law discourse. Even in the context of general principles of criminal law, the question of indirect perpetratorship through organizations, heavily disputed in Germany with regard to Nazi crimes, is not received in Japan like, for example, in the Spanish-speaking world.<sup>3</sup>

The conference held in Nuremberg in 2018 did not deal with criminal law doctrine in Germany and Japan, but rather took the seventieth anniversary of the 'Judgment at Tokyo' as an opportunity to reflect on this historic event and its legal implication. Admittedly, the conference took place in Nuremberg in the historic courtroom, but there were few German and Japanese scholars participating: international experts came together.

The Tokyo Trial enjoys far lower recognition and acceptance in Japan than the Nuremberg Trial does in Germany. The mere fact that this

<sup>&</sup>lt;sup>2</sup> See Keiichi Yamanaka, Geschichte und Gegenwart der japanischen Strafrechtswissenschaft, De Gruyter Saur, Berlin, 2012.

<sup>&</sup>lt;sup>3</sup> See Claus Roxin, Strafrecht, Allgemeiner Teil Band II: Besondere Erscheinungsformen der Straftat, Verlag C.H. Beck, Munich, 2003, § 25, mn. 108 et seq.

conference can take place in the Nuremberg Palace of Justice and visitors can be shown an appropriate exhibition of the proceedings in the Memorium Nuremberg Trials in the attic above Courtroom 600, shows that the legacy of Nuremberg is not denied in Germany. Germany today sees itself obligated both to remind the world of the Nazi crimes and to commemorate the Allied trials in order to learn for the future.

Of course, that was not always the case.<sup>4</sup> On the contrary, the Memorium opened its doors only rather recently, in 2010. Also, until 2000, the German accession to the European Convention on Human Rights had been subject to a reservation with regard to its Article 7(2). There, in this so-called 'Nuremberg Clause', a breach of the non-retroactivity principle is allowed for those cases in which State injustice is "against the general principles of law recognised by civilised nations". This reservation was a clear political signal that the Nuremberg Trial was understood as a violation of the prohibition of retroactivity. Only the fall of the wall and the end of the East-West conflict changed the German attitude towards Nuremberg.<sup>5</sup> This was not least due to the fact that the establishment of the two *ad hoc* Tribunals, as well as the plans for the adoption of a permanent International Criminal Court ('ICC') by the international community made clear that the prosecution of the defeated German war criminals after 1945, just as the prosecution of the defeated Japanese war criminals, does not remain the only case of implementation of international criminal law. Rather, as laid down in the Nuremberg Principles of 1946, international criminal law claims to be relevant and applicable at all times and in all situations. Neither Germany nor Japan were thus victims of a singular criminalization of violations of international law by the victors against the defeated. The UN ad hoc Tribunals, as well as the ICC, are proof of the will of the UN to establish the prohibitions of genocide, crimes against humanity, war crimes and the crime of aggression as peremptory norms that must be respected by everybody at all times. Thus, the charge of in-

<sup>&</sup>lt;sup>4</sup> See Ronen Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to The Hague*, Hart, Oxford, 2012; Hans-Peter Kaul, "Der Beitrag Deutschlands zum Völkerstrafrecht", in Christoph Safferling and Stefan Kirsch (eds.), *Völkerstrafrechtspolitik: Praxis des Völkerstrafrechts*, Springer, Heidelberg, 2014, p. 51.

<sup>&</sup>lt;sup>5</sup> Christoph Safferling, "German Participation in the Nuremberg Trials and Its Implications for Today", in Beth A. Griech-Polelle (ed.), *The Nuremberg War Crimes Trial and its Policy Consequences Today*, second edition, Nomos, Baden-Baden, 2020, p. 33.

justice against Germany and Japan that, as David Cohen described it during the conference, was "ridden to death", is finally losing importance.

### 19.3. The German-Japanese Scientific Discourse

Interestingly, however, this common 'shaming experience' through international judicial procedures<sup>6</sup> has not led to any socio-political exchange and solidarity in this sense between Germany and Japan. The culture of remembrance and the politics of the past play today, as far as I can see, no role in the German-Japanese scientific discourse. The Nuremberg conference also showed that there is still a considerable need to catch up with the Tokyo process. From the outset, science has become more oriented towards Nuremberg. Of course, that may also be because the Nuremberg Tribunal was the first and, since it was based on an international treaty, perhaps also the more 'legitimate' one compared to the Tokyo Tribunal established upon General MacArthur's order.

On the other hand, an 11-member bench of judges gave Japan's trial a stronger international character and made it possible to represent affected peoples much more profoundly than in Nuremberg, where Poland, Hungary, Norway and many other European countries which suffered most from the Nazi aggressive war could not take active part in the trial.

For a long time, Tokyo was regarded as a less innovative episode of Nuremberg with a correspondingly lower significance. Another reason may be that, by shielding the Japanese Emperor from prosecution, the credibility of international criminal justice suffered in this context. At the same time, some key crime contexts, such as the sexual assault of Japanese soldiers against so-called 'comfort women', have been largely excluded from the trial.<sup>7</sup>

# 19.4. Post-Second World War Developments

It should not be overlooked that during the entire Cold War, at the latest with the onset of the Cuban missile crisis, international criminal law disappeared from international politics. Not only in Japan, but also in Germany, one tried largely to close the eyes to the past. In several waves, the German society repeatedly had to grapple with the Holocaust as the most

<sup>&</sup>lt;sup>6</sup> See Frédéric Mégret, "What Sort of Global Justice is 'International Criminal Justice?", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, p. 77.

<sup>&</sup>lt;sup>7</sup> Kelly D. Askin, "Comfort Women – Shifting Shame and Stigma from Victims to Victimizers", in *International Criminal Law Review*, 2001, vol. 1, nos. 1-2, p. 5.

hideous crime in human history.<sup>8</sup> This system of industrial destruction of human life was lacking in the Japanese context. On the other hand, their own war wounds caused by the dropping of the first and until now only atomic bombs, in Hiroshima and Nagasaki, were much more dramatic than the brutal aerial bombardments of Allied forces in Germany in the final years of the war. For example, the Auschwitz concentration camp is recognized as a UNESCO World Heritage Site, as is – not without controversy – the peace monument in Hiroshima;<sup>9</sup> the former being a place of German perpetration, the later a place of Japanese suffering. The policy of the past was obviously different under these respective circumstances.

At the same time, Japan and Germany developed in parallel after the Second World War. A rapid economic growth laid the foundation for quick recovery from the war destructions. Both West Germany and Japan were intensively sought after as urgently needed allies in the East-West conflict, the 'Cold War': the former, against Russia; the latter, against China, North Korea, and also Russia. Economic prosperity, strong Western integration as well as clearly anti-communist political systems allowed stable liberal democracies to emerge in both societies of the former aggressors.

It must now be demanded that the lackadaisical interest in the Tokyo Tribunal be reformed into a common research offensive. It is also high time to take a much closer and more intensive look at the individuals involved in the processes: not only the perpetrators, but also the legal professionals involved – judges, prosecutors as well as defence lawyers. The individual procedural strategies, adopted by both the prosecution and the defence, should be critically analysed. Due to the temporal succession of Nuremberg and Tokyo, the question arises what influence the process and the experiences in Nuremberg had on the procedure in Tokyo.

# 19.5. Conclusion

Japan is now a member of the ICC and a Japanese judge is serving in chambers in The Hague. Nonetheless, in Japanese jurisprudence, interna-

<sup>&</sup>lt;sup>8</sup> See Sandra Schulz, "Film und Fernsehen als Medien der gesellschaftlichen Vergegenwärtigung des Holocaust: die deutsche Erstausstrahlung der US-amerikanischen Fernsehserie 'Holocaust' im Jahre 1979", in *Historical Social Research*, 2007, vol. 32, no. 1, p. 189.

<sup>&</sup>lt;sup>9</sup> See the report of the twentieth session of the World Heritage Committee, 2-7 December 1996 in Merida, Yucatan, Mexico, WHC-06/CONF.201/21, 10 March 1997, p. 69 and Annex V (available on UNESCO's web site).

tional criminal law is not yet quite present. It is high time to change this. Not only does this correspond with the long-shared tradition of Japanese and German criminal law jurisprudence as described above, but Japanese criminal law doctrine and Japanese society have a lot of experience in dealing with war crimes when it comes to the future of international criminal justice. Especially in times of contestation of human rights norms, as now, it is important that democratic States which believe in pluralism, multilateralism and the rule of law make concerted efforts to reduce impunity for atrocity-crimes in fulfilment of the promise made in the very first Nuremberg Principle. We should all work together towards this common goal and in the awareness of our own history, which proves both in Germany and Japan that ideological seduction and totalitarianism can lead to war and annihilation, which in the end backfires in a particularly brutal manner against one's own people. The Nuremberg conference and this resulting anthology testify to the richness of such joint efforts. Let us all continue on this path.

# **ANNEX: TOKYO CHARTER**

Special proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946; Charter dated 19 January 1946; amended Charter dated 26 April 1946; Tribunal established 19 January 1946.

### SPECIAL PROCLAMATION

# ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

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

Whereas, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

Whereas, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government, accepted the terms set forth in such Declaration at Potsdam;

Whereas, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

Whereas, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

Whereas; the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender.

Now, therefore, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR General of the Army, United States Army Supreme Commander for the Allied Powers

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#### WAR CRIMINALS (FAR EAST)-JANUARY 19, 1946

#### GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS

APO 500 26 April 1946

General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

#### CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

#### SECTION I

#### CONSTITUTION OF TRIBUNAL

ARTICLE 1. *Tribunal Established*. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

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.

#### ARTICLE 3. Officers and Secretariat.

a. <u>President</u>. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

b. Secretariat.

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

#### ARTICLE 4. Convening and Quorum, Voting, and Absence.

a. Convening and Quorum. When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

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b. Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

c. Absence. If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

#### SECTION II

#### JURISDICTION AND GENERAL PROVISIONS

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.

ARTICLE 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to 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.

ARTICLE 7. Rules of Procedure. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

#### WAR CRIMINALS (FAR EAST)—JANUARY 19, 1946

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ARTICLE 8. Counsel.

a. <u>Chief of Counsel</u>. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

b. Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

#### SECTION III

#### FAIR TRIAL FOR ACCUSED

ARTICLE 9. *Procedure for Fair Trial*. In order to insure fair trial for the accused the following procedure shall be followed:

a. Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

c. <u>Counsel for Accused</u>. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

d. Evidence for Defense. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

e. Production of Evidence for the Defense. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

ARTICLE 10. Applications and Motions before Trial. All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

#### MULTILATERAL AGREEMENTS 1946-1949

#### SECTION IV

#### POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

#### ARTICLE 11. Powers. The Tribunal shall have the power:

a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

b. To interrogate each accused and to permit comment on his refusal to answer any question.

c. To require the production of documents and other evidentiary material.

d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

ARTICLE 12. Conduct of Trial. The Tribunal shall:

a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

d. Determine the mental and physical capacity of any accused to proceed to trial.

ARTICLE 13. Evidence.

a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

b. <u>Relevance</u>. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

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(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.

e. <u>Records</u>, Exhibits, and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

ARTICLE 14. Place of Trial. The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

ARTICLE 15. Course of Trial Proceedings. The proceedings at the Trial will take the following course:

a. The indictment will be read in court unless the reading is waived by all accused.

b. The Tribunal will ask each accused whether he pleads "guilty" or "not guilty".

c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

f. Accused (by counsel only, if represented) may address the Tribunal.

g. The prosecution may address the Tribunal.

h. The Tribunal will deliver judgment and pronounce sentence.

#### SECTION V

#### JUDGMENT AND SENTENCE

ARTICLE 16. *Penalty*. The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

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ARTICLE 17. Judgment and review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

By command of General MACARTHUR:

RICHARD J. MARSHALL Major General, General Staff Corps Chief of Staff

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