

## Introduction

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### Aims and Methods

This book aims to fill a gap in the voluminous literature on the proceedings before the International Military Tribunal for the Far East (IMTFE, “Tokyo Trial,” or “Tokyo Tribunal”). As will be elaborated below, several generations of Japanese scholars have contributed to what can be considered a major field of historical study focused on the Tokyo Trial. This literature, despite the intensity of its research, has focused far more on the political context of the trial, on the individual accused or other personalities, and on historical and ideological controversies concerning the war and what Japanese scholars term “war responsibility [*sensō sekinin*]” than on the substantive legal content of the proceedings. Early attempts by Western scholars to write about the trial, such as those of Richard Minear or Arnold Brackman, were either ideologically colored by contemporary political preoccupations or largely descriptive of the historical background of the creation and operation of the tribunal. Pursuing other agendas, they also did not engage in legal analysis of the substance of the proceedings. Much of the ensuing English-language scholarship followed these two paths or focused upon specific individuals, such as the Indian Justice, Radhabinod Pal. On the whole, it is fair to say, the volume and depth of Japanese scholarship on the Tokyo Tribunal dwarfs that produced by Western scholars and, unfortunately, the bulk of the Western scholarship has largely ignored the research of their Japanese colleagues, which will be reviewed below.

Apart from the characteristics just noted, what is striking about both the Japanese- and English-language scholarly traditions is the relative paucity of legal analysis of the trial process as a whole. By this we mean systematic analysis of all of the major constituents of the proceedings, that is, the way in which the prosecution and defense developed their respective case strategies, supported them through their arguments and the introduction of evidence, and focused them for the judges through their opening and closing statements. The other major constituent, of course, has to do with the way in which the judges managed the trial process, deliberated amongst themselves on legal and procedural issues, and reached factual findings and legal conclusions as reflected

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in their internal memoranda and, ultimately, embodied in the judgment of the tribunal and the five separate opinions appended to it. Our basic argument is that an assessment of the trial before the IMTFE as a *judicial process* demands a comprehensive analysis of *all* of these constituent elements. To date there has been no such comprehensive juristic assessment and this is the gap we aim to fill.<sup>1</sup>

Attempting such an assessment faces several challenges. The first is the sheer volume of the relevant primary sources: 52,000 pages of trial transcript, hundreds of exhibits and affidavits introduced into evidence, voluminous internal memoranda of the judges and records of the prosecution, and, not least, the six opinions of the judges that take up 1355 closely printed pages. Of these, the majority judgment setting out the findings and reasoning of the tribunal alone comprises 558 printed pages, primarily of detailed factual analysis, and the dissenting opinion of Justice Pal is even longer at 616 pages. Apart from the poor organization, density, and obscurity of argument of these two opinions, scholarship has been handicapped because until recently the complete juridical opinions of the IMTFE had never been brought together and published in an authoritative edition. The seminal work of Neil Boister and Robert Cryer (eds.), *The Tokyo International Military Tribunal: Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (2008), has corrected that shortcoming by publishing the official version of the majority judgment and five separate opinions, together with the indictment and other key documents, together in one massive volume.

In assessing the performance of the prosecution, defense, and judges as reflected in the trial record, we address an array of highly controversial questions that have arisen in the scholarship and public discussions on the Tokyo Trial. As we are well aware that our book challenges many of the orthodoxies that have informed these controversies we have adopted a methodology that eschews “anecdotal” commentary and criticism based upon a few selected references to the trial record. Because of the political and ideologically charged context of the Asia-Pacific War (1931–45) in which many discussions of the Tokyo Trial have implicitly or explicitly been located, we have adopted a dual strategy for dealing with the challenges that such a context represents for research that revises received wisdom, whether that of the right or that of the left.

First, we offer no account of the larger political and historical questions of the rights and wrongs of the war, such as whether Japan was in fact waging a war in self-defense because of the threat of communism from China, whether the colonial system of the Western Powers justified Japanese expansion by

<sup>1</sup> By far the most important English language work assessing the judicial aspects of the IMTFE and putting its overall proceedings in the context of applicable legal standards is the major account of Boister and Cryer, *The Tokyo International Military Tribunal*.

military means, whether the Nanjing Massacre actually took place or how many victims were murdered there, whether the United States was justified in its campaign of firebombing of Japanese cities and its use of the atomic bomb at the end of the war, whether Foreign Minister Hirota Kōki was an innocent martyr, etc. While these and many other such questions may all be interesting and important historical issues, offering an opinion on them is not relevant to assessing the work of the judges at Tokyo in arriving at their various legal conclusions. What is relevant instead, is what evidence was brought before the court, how the prosecution and defense dealt with that evidence in making their respective cases, and how the judges, in reference to that evidence, justified the legal conclusions they reached in their various opinions. To state the obvious, the judges did not have the benefit of the last seventy years of historical research and debate on World War II in Asia and the Pacific and they could not take cognizance of evidence that was not before the court. In other words, our task is to assess the substantive legal performance of the judicial process based upon the trial record and no more. While, as will be seen, some of our conclusions are highly critical of some participants in the proceedings, the criticisms are based solely upon what these individuals said and wrote within their respective roles as judges, prosecutors, and defense counsel.

The second part of our strategy for dealing with the controversial context in which the trial has so often been viewed is to base our conclusions upon systematic, in-depth analysis of the major components of the proceedings. Because it is impossible to examine every aspect of a trial process that took up two and a half years and produced a massive corpus of trial records we have instead focused in-depth on essential elements of the trial in the following manner. We trace the evolution of the prosecution case first through detailed examination of how the prosecution initially prepared their case and presented it in the indictment and their opening statement to the court. We then analyze how the prosecution case changed in response to the evidentiary and other challenges that arose during the proceedings, as reflected most clearly in their lengthy closing statement. We consider the evolution of the defense case as the defense responded to the evidence and arguments of the prosecution. Finally, we provide detailed analysis of the legal basis, factual analysis, and arguments that inform the majority opinion, taking up two full chapters with a discussion of the way in which the majority reached their conclusions on crimes against peace and on war crimes. Each of the five separate opinions receives similar detailed consideration of the reasoning and evidentiary findings on which their respective conclusions rest. Only through such a systematic approach, we maintain, can one fairly assess the juristic quality of the work of the judges and prosecution. The analysis that implements this approach, in turn, is based upon a set of criteria for judicial performance against which the conclusions of the judges can fairly be measured.

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Following this approach, our book revises much of the existing understanding of the Tokyo Trial and presents a substantially new basis for understanding the work of the prosecution, defense, and judges. We argue that close consideration of the prosecution strategy prompts reassessment both of the nature of the prosecution's case and the way in which the change in their case strategy strongly impacted the majority judgment. In regard to the assessments of the judgment and separate opinions, our analysis produces a new and firmly grounded critique of the majority judgment as a final written decision of the tribunal as well as a clearer perspective on the nature and shortcomings of the separate opinions, and particularly those of justices Henri Bernard, Pal, and B. V. A. Roeling.

A further and crucially important component of our contribution to newly assessing the trial is provided by two chapters devoted to analysis of the unpublished judgment of the president of the tribunal, Sir William F. Webb. Webb, as will be seen in detail later, wrote a judgment of more than 600 pages of typescript which he proposed as the judgment of the tribunal. When a majority of judges, for reasons discussed in subsequent chapters, refused to accept this draft judgment Webb set it aside and wrote a brief concurring opinion. Webb's draft judgment, we argue, provides an important new perspective for evaluating both the evidentiary record and legal basis on which all of the judges based their opinions as well as providing a vastly better account of the justification for convictions than the poorly argued and poorly written majority judgment was able to do.

As noted above, we are aware of the challenges in producing a more definitive and systematic account of the legal content of the trial than has yet been available. Apart from the sheer volume of the trial record, much of the evidence was introduced not in the form of viva voce testimony but rather affidavits and other written documents in great quantity. The contents of these evidentiary submissions are often not reflected in the trial transcript for reasons that will become apparent in subsequent chapters. Yet, it is essential for analyzing the weight of the prosecution and defense case, as well as the evidentiary basis of the judicial opinions, to take account of the full scope of evidence the parties introduced in various forms. Most of the existing scholarship has failed to do so.

This task is further complicated by the necessity of being able to evaluate Japanese primary sources in their original language as well as taking into account the mountain of Japanese scholarship that is virtually unknown to most Western scholars. Our book integrates these important Japanese contributions along with Western scholarship. On both the Western and Japanese sides much of the scholarship – though with a few notable exceptions – has been produced by historians who have lacked both knowledge of the body of law applied at Tokyo and an understanding of the nature of an international criminal trial and

the criteria by which it should be assessed. This kind of knowledge is particularly essential for analysis of the majority judgment and separate opinions and evaluation of the work of the tribunal. For example, the dissenting opinion of Justice Pal has been lionized as the focal point of right wing revisionism in Japan and elsewhere, largely out of sympathy for its anti-imperialist and anti-colonial stance rather than its juristic quality. While its more than 600 pages are replete with interminable and repetitive quotations from international law treatises and articles, these alone do not establish the soundness of Pal's legal arguments. For this reason it is important to analyze his opinion, as well as the others, systematically *as a legal opinion*. This has never been comprehensively done before, which explains the rather inordinate length of the chapters on Pal.

In short, lack of systematic attention, preoccupation with historical, political, and ideological issues extraneous to the trial, and too often a lack of careful legal analysis, have produced a body of scholarship in which, apart from a few notable exceptions, scant attention has been paid to substantive quality of the body of legal opinions that on the one hand justified the verdicts and on the other hand attacked them.<sup>2</sup> Addressing this gap in the scholarship requires systematic analysis of the judgment, separate opinions, and Webb's draft judgment rather than conclusory, unsystematic, or ill-founded assessments.

Another shortcoming that reflects unsystematic methodologies in both some of the scholarly literature and in some of the separate opinions has to do with the scope of the jurisdiction of the tribunal. It is vital to remember that when Japan attacked Pearl Harbor and other targets in Southeast Asia in December 1941 its forces had already been fighting an ever-growing and, by 1937 massive, war in China since 1931. As we will see, more of the majority judgment focuses on the period 1928–41 than on the Pacific War (1941–5). Yet some accounts neglect to consider the ten years of war in China preceding the outbreak of the Pacific War and the decisive role consideration of that conflict played in the judges' (with the exception of Pal's) understanding of the aggressive war charges and the process by which the Japanese government ultimately decided to broaden the war at the end of 1941. Our account aims to redress this imbalance through a more comprehensive account of the way the prosecution made its case and how the judges responded in their respective opinions.

Finally, most of the scholars writing about the IMTFE from either the Japanese or the Western side have not viewed the Tokyo Trial in the context of other post-World War II war crimes trials. In particular, they have not placed the Tokyo Trial in the context of its Western counterpart, the International Military Tribunal (IMT), or Nuremberg Tribunal, which ended its work in 1946

<sup>2</sup> One of the most notable of those exceptions is Boister and Cryer's landmark *The Tokyo International Military Tribunal*, as well as some of the articles noted in chapters below that have focused on specific legal issues or aspects of particular opinions.

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and thus provided what the judges at Tokyo regarded as an authoritative model for the IMTFE, both courts operating on substantially the same legal basis. Scholars of the Tokyo Trial have also seldom referenced the twelve Nuremberg subsequent proceedings which are of fundamental jurisprudential importance and were taking place at the same time as the Tokyo Trial and drew considerable attention among the international legal community. Features of the Tokyo Trial which have appeared anomalous to scholars of Japanese history were often in fact the standard procedures which informed the trials at Nuremberg and reflected the procedural standards of that epoch. Our study, accordingly, also aims to view the Tokyo Tribunal in the context of the other trials taking place contemporaneously, and in particular those at Nuremberg, to show the impact of those trials on the Tokyo proceedings as well as to highlight some of the important contrasts between them. We maintain that the work of both tribunals must be judged by the same standards.

### The Relevant Legal Framework

How, then, do we evaluate the trial before the Tokyo Tribunal as a judicial process? We might take as a starting point the standard articulated by the judges in the High Command Case in the Nuremberg subsequent proceedings, the leading WWII case on the responsibility of military commanders for war crimes and crimes against humanity. The judges referenced the standard to which they were duty bound and that same standard applies to Tokyo, as it does to any tribunal worthy of the name:

The first [point] is that this Tribunal was created to administer the law. It is not a manifestation of the political power of the victorious belligerents which is quite a different thing. The second is that the fact that the defendants are alien enemies is to be resolutely kept out of mind. The third is that considerations of policy are not to influence a disposition of the questions presented.<sup>3</sup>

These principles enumerated by the judge of the High Command Case embody the most fundamental principles of judicial ethics and fair trials rights: that judges are bound by the law and they apply the law to the case before them with independence and impartiality. They are not agents of the policies of the governments of their national jurisdictions and they must observe the presumption of innocence despite the fact that the accused were enemies until the cessation of hostilities. These are the standards by which the performance of the judges at both Nuremberg and Tokyo must be measured. Further, what follows from these principles is that the judges are bound to take into account all the

<sup>3</sup> High Command Case, 484.

evidence before them without preference to either party. They must base their judgment upon factual findings that reflect a fair weighing of all of the evidence and arguments of both the prosecution and defense. They must apply a clearly articulated legal standard to those factual findings and reach legal conclusions that are based upon the findings and are reached according to the burden of proof upon the prosecution to prove its case beyond a reasonable doubt. These, as amplified in subsequent chapters in greater detail, are the criteria we apply in assessing the majority judgment and the separate opinions. It has perhaps too often been neglected, especially in reference to Justice Pal, that dissenting judges are equally bound by these standards and to the oath of office they have sworn upon accepting their appointment.

In considering the standard of guaranteeing a fair trial through impartial and independent judges we must also consider one of the challenges to impartiality and independence that is implicit in one of the most frequent criticisms of the Tokyo Tribunal, that of so-called “victor’s justice.” A section below will consider in greater detail how that criticism has manifested itself in Japanese and Western scholarship, but here it is appropriate to reflect on that concept from a conceptual standpoint and more specifically how it bears upon the standards for assessing a judicial proceeding.

We may begin by noting that in the post-war decades the criticism of victor’s justice was directed at both Nuremberg and Tokyo, as well as at the Allied various national war crimes programs more generally. The charges of victor’s justice in regard to Nuremberg may be put into perspective by considering that on December 13, 1946 the General Assembly of the United Nations unanimously adopted a resolution affirming the “principles of international law by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”<sup>4</sup> Those “Nuremberg Principles” continue to command respect today as an important reference point in the development of international law and have provided the foundation for the newly established International Nuremberg Principles Academy at the courthouse in Nuremberg where the IMT and subsequent proceedings took place. The IMTFE had barely been established when the General Assembly adopted the Nuremberg principles, but it must be remembered that both tribunals were founded upon these principles and shared the same legal framework as European and Asian counterparts. Given the affirmation of the work of the Nuremberg Tribunal by the General Assembly, what was meant by charging that the IMT had only applied “victor’s justice”?

In fact, charges of victor’s justice plagued the legacy of Nuremberg in the post-war period until a new generation of German politicians, jurists, and scholars decided that the Nuremberg Trials were a point of pride as the foundation of modern international law rather than the blemish that many scholars

<sup>4</sup> Quotation from GA 95 (1) December 13, 1946.



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in previous generations, more closely connected to the past, had considered them to be.<sup>5</sup> As noted earlier, the Nuremberg courtroom building has now been made into a museum and the German government established the Nuremberg Academy to carry forth the foundational legacy of Nuremberg through training and education of judges from around the world.

In Japan and among some Western commentators, on the other hand, victor's justice continues today to be a label that is widely used to condemn and dismiss the Tokyo Trial as a mere sham proceeding. Given that the Nuremberg and Tokyo Trials operated under essentially the same Charter and legal framework, and reached very similar conclusions in regard to the basic issues of jurisprudence and the guilt of the accused, this discrepancy in reception is somewhat puzzling. Despite the fact that the authoritative judgment of the Nuremberg IMT was handed down long before that of the Tokyo Tribunal, and that the Tokyo Tribunal closely followed the legal pathways set out by the IMT, those who reject the legitimacy of the Tokyo Tribunal often do not consider that their criticisms may apply with equal force to Nuremberg, or to the affirmation of the Nuremberg Principles by the UN General Assembly. It is also striking that Japanese scholars who reject the IMTFE on the grounds of victor's justice have been supported by many American scholars of modern Japan whereas that is much less the case in regard to Nuremberg.

Our book repeatedly references the Nuremberg judgment for two reasons; firstly because the IMT was the coequal European counterpart of the IMTFE and the judges of the Tokyo Tribunal drew upon it extensively. Indeed, the majority and Webb considered it authoritative and followed its holdings on the most important jurisdictional issues. Secondly, we argue that the same critical criteria should be applied to both tribunals and call into question whether some critics who reject the Tokyo judgment's findings on aggressive war, for example, would have been prepared to reject Nuremberg's application of the same legal principles to convict Nazi war leaders of aggression.

Another striking feature of many dismissals of the IMTFE as victor's justice is that they are formulated in a blanket and typically un-nuanced manner, and do not clearly define what that term means. It has become a sort of label that is often uncritically applied as if its applicability is self-evident. As noted above, the critics of the Tokyo Trial seldom consider Nuremberg, and reject it on

<sup>5</sup> On the transformation of attitudes in the German legal profession in the 1990s, see Mouralis, "The Rejection of International Criminal Law in Germany after the Second World War." A sense of the shift in the attitudes of leading German scholars of the immediate post-war generation, and the recognition of the foundational importance of Nuremberg, is conveyed by the very title of an article Hans-Heinrich Jescheck, a dominant figure in German criminal law jurisprudence, published 52 years later on the importance of the Nuremberg legacy: "The General Principles of International Law as Set Out in Nuremberg, as mirrored in the ICC Statute." Jescheck, of course, had himself been one of the immediate post-war critics of the trial, as evidenced by his *Habilitationschrift*.



similar grounds. This is indicative of a double standard in that Nuremberg and Tokyo operated under essentially the same Charter and legal framework, were both composed only of victor nations, and both conducted the trials in essentially the same manner and with the same rules of evidence. Moreover, one can argue that the Tokyo Tribunal was far more broadly based and representative than that of Nuremberg because it consisted of eleven nations rather than four, including India, China, and the Philippines. If the charge that there was no crime of aggression prior to WWII is applied to the Japan's initiation of war with her neighbors, the same is true of Germany's aggression. Yet how many of the critics of the IMTFE would be equally ready to dismiss the legitimacy of the Nuremberg Trial of the major German war criminals in the same way they attack Tokyo? In other words, ignoring the judgment and jurisprudence of the IMT, and of the Nuremberg subsequent proceedings, has made it easier for critics to treat Tokyo as *sui generis* and an aberration.

There are at least four main senses in which one may criticize and dismiss a trial as merely “the justice of the victor” as, for example, Pal does.<sup>6</sup> On the one hand one may criticize Nuremberg and Tokyo as a matter of principle because they did not, for example, include or consist entirely of judges from neutral states. This criticism does not imply any defect in the *conduct* of the trial, that is the fairness of the proceedings themselves, but is rather a formal objection to the constitution of a court that was not more broadly representative of the international community.<sup>7</sup> In the case of both “neutral” judges or those who actually sat at Tokyo, one would equally have to inquire as to whether they acted with competence, fairness, and impartiality.

It is obvious that both Nuremberg and Tokyo were constituted by the victorious nations and it was always acknowledged by the Allied Powers that the establishment of both tribunals followed from the Moscow and Potsdam Declarations and from their status as victors to whom Germany and Japan had unconditionally surrendered. In order to render such considerations as substantive rather than formal criticisms, one would have to show that the judges conducted the trial and reached conclusions in a manner that was not independent and impartial. We will apply these criteria to consideration of the majority judgment and separate opinions and will argue that if anything, it is two of the dissenting judges whose independence or impartiality must be called into question.

Apart from the manner in which a tribunal is constituted one may also object that its legal basis has been created or defined by the victors. Thus, one may

<sup>6</sup> See, for instance, Pal Opinion, 1424, where he dismissed the trial as the “interest of the stronger.”

<sup>7</sup> Of course we know today that neither Switzerland nor Sweden were in reality completely neutral, let alone Portugal and Spain who supported the Nazi regime. Many South American countries were also implicated in one way or another with parties to the conflict.

reject the legal basis of the charges against the accused, for example, that the crimes instantiated in the Charter and charged in the indictment were *ex post facto* laws, not having existed at the time the alleged crimes were committed. Here the core notion is that the victors have unfairly applied new legal standards, not recognized at the time of the commission of the crimes, in order to punish the defeated nation's leaders under color of law. This is indeed a serious matter as it is a basic principle of legality, and one clearly recognized by the judges at Nuremberg and Tokyo, that conviction on the basis of acts that were not a crime when they were committed is unjust and illegitimate. We will consider in some detail the way in which the prosecution, defense, and the majority and other judges dealt with this issue.

One may also allege as victor's justice the way in which the trial was conducted, that is, its inherent fairness as a judicial proceeding. For example, one may argue that there was no opportunity to prepare a defense, that the defendants were not provided with competent counsel and did not have an opportunity to challenge the prosecution's witnesses, or that verdicts were not based upon the evidence. We will also examine these issues in some detail, in particular the question of whether the various opinions of the judges were based upon the evidence and applied consistently the standard of proof beyond a reasonable doubt.

Finally, one may claim victor's justice as a delegitimizing ground on the basis that the trial was in reality not a trial but a political stage-managed show. Here the essential claims are that such a "show trial" is in its very essence political rather than legal, that there has been no real consideration of evidence, that the judges and participants were mere puppets of other forces, and that the judges handed down a verdict that had been determined by external political authorities. Examples of such political show trials from the World War II era might be the Soviet trial in Kharkov in 1943, the German trials before the infamous *Volksgesicht* (People's Court) of the July 20 conspirators against Hitler, the American trial of General Yamashita before a military commission in Manila, or the Japanese Army's trials of American flight crew, such as the trial of the "Doolittle Flyers," held in Shanghai in August 1942, where there were no defense counsel, no opportunity for the accused to defend themselves, and where the verdicts and penalties had been pre-determined by Tokyo. We will also consider these issues, but, as will become apparent, the extensive internal memoranda of the judges – debating legal and procedural issues, considering the evidence on various charges, and discussing the appropriate legal standards – indicate that whatever one may think of its shortcomings it was no politically staged show trial and, hence, not victor's justice in that sense. Indeed, the most clearly documented cases of political interference applied to the dissenting judge, Roeling, and to the way in which all the parties, judges, prosecution, and defense, treated the sensitive matter of the exclusion of Emperor Hirohito from the ranks of the accused.