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TOKYO AND NUREMBERG

Ample information is available on the Nuremberg International Military Tribunal (that actually took place in Fürth, Henri Kissinger's town of birth).

This website, hence, focuses on the Tokyo IMT, precisely because Röling was a judge at the Tokyo IMT

Reference should in this context be made to:

a) The September 2010 issue of *Journal of International Criminal Justice* (Vol. 8, No. 4) pp 1071-1174, dedicated to Röling. Schrijver, Kelk, Cryer, van der Wilt and Cassese wrote some informative and thoughtful essays on the life and work of Röling with some emphasis on his legacy for international criminal law.

b) A 2011 Brill/Nijhoff publication edited by Yuki Tanaka, Timothy McCormack and Gerry Simpson: *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*.

c) A new translation into the Japanese of (Röling & Cassese's) *The Tokyo Trial and Beyond* by Nobuko KOSUGE.

War Crimes Tribunal in Tokyo

Following the Cairo Declaration of December 1, 1943, in which the United States, Great Britain, and China announced their determination "to restrain and punish the aggression of Japan" in the Far East theater, the Allies pronounced their policy regarding Japanese war crimes in the Potsdam Declaration on July 26, 1945.

"We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation," read the declaration, "but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."



The eleven justices for the IMTFE. July 29, 1946.

The International Military Tribunal for the Far East (also referred to as the IMTFE, the Tokyo War Crimes Tribunal, or the Tokyo Trial) was held to try the leaders of Japan for crimes against peace, war crimes, and crimes against humanity committed during World War II, including incidents such as the Nanjing Massacre.

It did not cover individual Japanese war crimes. Those were dealt with separately, in other cities through the Asia-Pacific region.

A panel of eleven judges presided over the IMTFE, one each from the United States, Soviet Union, United Kingdom, France, the Netherlands, Republic of China, Australia, New Zealand, Canada, India, and the Philippines.

The tribunal convened on May 3, 1946, and was adjourned on November 12, 1948.

Judgment

There were 28 defendants tried, mostly military and political leaders.

Two defendants (Matsuoka Yosuke and Nagano Osami) died of natural causes during the trial. Okawa Shumei had a nervous breakdown during the trial and was removed.

Seven others were sentenced to death by hanging for war crimes and crimes against humanity. They were executed at Sugamo Prison in Ikebukuro on December 23, 1948:



September 24, 1946. The eleven justices on bench.

General Doihara Kenji, spy (later Air Force commander)
Baron Hirota Koki, foreign minister

General Itagaki Seishiro, war minister
General Kimura Heitaro, commander, Burma Expeditionary Force
General Matsui Iwane, commander, Shanghai Expeditionary Force
General Muto Akira, commander, Philippines Expeditionary Force
General Tojo Hideki, commander, Kwantung Army (later prime minister)

Sixteen more were sentenced to life imprisonment. Three (Koiso, Shiratori, and Umezu) died in prison, while the other thirteen were paroled in 1955:

General Araki Sadao, war minister
Colonel Hashimoto Kingoro, major instigator of the second Sino-Japanese War
Field Marshal Hata Shunroku, war minister
Baron Hiranuma Kiichiro, prime minister
Hoshino Naoki, Chief Cabinet Secretary
Kaya Okinori, opium dealer to the Chinese
Marquis Kido Koichi, Lord Keeper of the Privy Seal
General Koiso Kuniaki, governor of Korea, later prime minister
General Minami Jiro, commander, Kwantung Army
Admiral Oka Takasumi, naval minister
General Oshima Hiroshi, ambassador to Germany
General Sato Kenryo, chief of the Military Affairs Bureau
Admiral Shimada Shigetaro, naval minister
Shiratori Toshio, ambassador to Italy
General Suzuki Teiichi, president of the Cabinet Planning Board
General Umezu Yoshijiro, war minister

Two defendants received finite sentences.

General Togo Shigenori died in prison in 1949, while foreign minister Shigemitsu Mamoru was paroled in 1950 and went on to serve in Prime Minister Hatoyama Ichiro's cabinet.

Separate Opinions of the Justices

One of the most controversial aspects of the Tokyo Trial is the fact that five of the eleven justices (including the President of the Tribunal Sir William Webb) submitted opinions on the Judgment separate from the Majority. Justice Radhabinod Pal, Justice B. V. A. Röling and Justice Henri Bernard each expressed dissenting opinions. Justice Webb logged no formal dissent, but his separate opinion was critical of several portions of the IMTFE. Justice Delfin Jaranilla put forward a concurring opinion with some differing objections. Most specifically, Jaranilla felt that stricter punishments could have been applied to several of the accused.

The Northcroft collection has copies of each of these separate opinions. It also has a unique view of Justice Northcroft's views on the trial. This takes the form of a report to the Prime Minister of New Zealand regarding the IMTFE.

The Separate [or rather: Dissenting] Opinion of the Member from the Netherlands on Judgment includes: Part I: "Introduction"; Part II: "Observations on the Law": Section I: "Jurisdiction", Section II: "Crimes against Peace", and Section III: "Responsibility for Omission"; Part III: "Observations on the Facts"; Part IV: "Appendices"; and Part V: "The Verdicts in the Individual Cases". For details, reference should be made to Cassese's *The Tokyo Trial and Beyond*, pp 11-12.



The IMTFE was held at War Ministry Buildings in Tokyo. Photo taken on July 22, 1946.

MORE ON THE TOKYO IMT

source: http://www.trinstitute.org/ojpcr/2_3smith.htm

The Online Journal of Peace and Conflict Resolution, issue 2.3/August 1999:
The Primacy of Politics: Justice, Power, and War Crimes Trials, by Charles Anthony Smith.

(...) Unlike the Nuremberg Charter, which was the product of lengthy negotiations among the Allied Powers, the Tokyo Charter was an executive decree promulgated by General Douglas MacArthur at the direction of the United States Joint Chiefs of Staff (Horowitz, 480). Although the other Allies were not consulted until the after the Charter was completed, its heavy reliance on the Nuremberg precedent combined with a lesser interest in the punishment of Japan made such unilateral action unobjectionable to the Allies (Minear, 20-21). The Charter, amended slightly by the Allies, provided for the "just and prompt trial and punishment of the major war criminals in the Far East" (Ibid., 21; Brackman, 60).

The Tribunal held jurisdiction over crimes against peace, conventional war crimes, and crimes against humanity (Röling, 55). Unlike Nuremberg, the charge of crimes against peace was a prerequisite to prosecution, that is, only those individuals whose crimes included "crimes against peace" could be prosecuted by the Tribunal (Minear, 21).

A "fair" or "just" trial for the accused was provided for through the same types of fundamental due process present in Nuremberg. Specifically, the defendants were to be advised of the charges against them in their own language, the trial would be contemporaneously translated, the right of freely chosen counsel was explicit, as was the right to a full and fair defense including the right to cross examine and call witnesses (Minear, 21-24; Röling, 50). The appeals process was limited to an appeal to General

While the process structure included the trappings of due process, it fell far short of fairness in three important ways. First, the evidentiary standard was greatly relaxed. The Charter provided that evidence against the accused could include any document "without proof of its issuance or signature" as well as diaries, letters, press reports and sworn or unsworn out of court statements relating to the charges (Brackman, 60). Indeed, Article 13 of the Charter read in part: "The tribunal shall not be bound by technical rules of evidence . . . and shall admit any evidence which it deems to have probative value" (Minear, 118).

To grasp the import of this evidentiary approach, one need only consider some of the evidence admitted. War time press releases of the Allies were admitted as evidence by the prosecution while those sought to be entered by the defense were excluded (Ibid., 120). The recollection of a conversation with a long dead man was admitted (Ibid.). Letters allegedly written by Japanese citizens were admitted with no proof of authenticity and no opportunity for cross examination by the defense (Ibid.). Finally, the Tribunal embraced the "Best Evidence Rule" once the Prosecution had rested (Ibid., 123). The "Best Evidence Rule" dictates that the "best" or most authentic evidence must be produced (e.g., a map instead of a description of the map; an original instead of a copy; and, a witness instead of a description of what the witness may have said). Justice Pal, one of two justices to vote for acquittal on all counts, observed, "in a proceeding where we had to allow the prosecution to bring in any amount of hearsay evidence, it was somewhat misplaced caution to introduce this best evidence rule particularly when it operated practically against the defense only . . ." (Ibid., 122).

The second glaring procedural defect was the overall policy for the judges. The eleven justices were selected only from the victor nations. No challenge to their credentials was allowed. They were not required to attend the proceedings and two of the justices were replaced after the process had begun. A simple majority constituted a sufficient number present to proceed and a simple majority of those present could make any decision (Ibid.). Moreover, since there was no requirement that the justices deliberate before rendering an opinion, the majority opinion was drafted without input from the dissenters. These procedural defects were manifested most clearly in that verdict. Six justices spoke only through the majority opinion, which found all 28 defendants guilty. The other justices prepared dissenting opinions, with no juridical weight, to express their objections to the majority opinion. (Minear, 81-88 and 161).

Perhaps not surprisingly, the American and British justices were not among the dissenters. Justice Pal of India was the only justice with prior international law experience. He argued for not guilty verdicts on all counts for all defendants because the prosecution had failed to prove its case. Justice Bernard of France urged acquittal on all counts based upon a flawed process. In particular, he wrote "oral deliberations outside of all influence . . . among the judges" was a guarantee of "justice" and in its absence, the verdict was invalid. Justice Roling of the Netherlands objected to the imposition of the death penalty for nonmilitary personnel for any charged crime and for anyone for crimes against peace. Justice Webb of Australia observed that, although death was apparently the minimum punishment for the crime of aggressive war, no Nuremberg defendant had been sentenced to death for it. He concluded "unless the Japanese accused are to be treated with less consideration than the German accused, no Japanese should be sentenced to death . . ." He advocated the Napoleonic tradition of exile rather than death and, showing concern for the executioners as well, suggested, "it may prove revolting to hang or shoot such old men" (Minear, 89-93; Brackman 388-400).

The third major procedural defect is a constant in human rights tribunals: jurisdiction. Like at Nuremberg, the defense argued that the Tribunal sought to impose an *ex post facto* law and the court rejected the argument (Brackman, 373). Justice Röling explained the jurisdiction in the following exchange:

(Q): . . . do you think the Tokyo Court applied retroactive law?

(A): Of course it did . . . but retroactively in this case is not so bad as it sounds . . . their claim that it would be unjust for them to have to account for the behavior was ridiculous . . . (Röling, 68-69).

The Court relied on Nuremberg as a "precedent" and adopted the Nuremberg rationale for jurisdiction when it rejected the defense objections to the proceeding. The refusal by the Court to persuasively respond to the jurisdiction issue made the proceedings legally suspect and of little value over time. As Osiel observed with respect to the Court's validity, "It is one thing to acknowledge that prosecutors have a legitimate range of dramaturgical discretion; it is quite another for them to attempt a staging of Hamlet without the prince" (Osiel, 139).

As flawed as the procedure may have been, it shines as a beacon of justice when compared to the substance of the trial. Two glaring defects combine to utterly undermine the argument that Tokyo involved something other than "Victor's Justice." First, the crimes charged were fundamentally different than those at Nuremberg. While waging war had long been held to be illegal from an international law perspective, the notion of holding leaders responsible for the acts of state was new (Hosoya, 45-48). Moreover, holding underlings responsible for the acts of state, jumping the chain of command as it were, was inarguably unprecedented (Ibid.). The massive atrocities and planned exterminations of whole peoples by the Third Reich had no counterpart in Japan. While it is true Japan conducted a traditional war and even exceeded the bounds of traditional warfare, the crimes of Japan simply were not as heinous as those of Germany. No doubt the Korean comfort women or other victims of Japanese wrongdoing would argue the acts of the two nations were equally reprehensible. Still, not one Japanese defendant was charged with ordering the execution of masses of civilians. The crimes of the Japanese all arose out of the waging of war. Indeed, even those prosecuted for the infamous "Rape of Nanking" were simply charged with negligent supervision (Roling, 32). Not even the forced slavery of foreign women, among the most reprehensible of their systemic acts, was part of the trial (Ibid., 47-53). The gravest charges arose out of crimes of omission - the failure by the defendants to prevent others not charged from doing bad acts (e.g., torture of prisoners and killing of survivors in submarine warfare) (Röling, 74-77).

One defendant who was convicted of the "failure to act," was found guilty because he did not resign once he discovered his efforts to prevent crimes against prisoners was ineffective. The verdict against him stated, in part, he should have pressed the matter, if necessary, to the point of resigning, in order to acquit himself of a responsibility which he suspected was not being discharged" (Ibid., 75).

Not only were individuals held responsible for acts of state, but also for acts of others. Ultimately, the defendants themselves were representatives only (Minear, 4; Brackman, 80-82). The 26 defendants were gleaned from a pool of over 80 "Class A" prisoners. To become a Class A prisoner, one need only be an officer of any level with some evidence against you available (Ibid.). The 26 were picked not because their actions were worse than the 54 who avoided prosecution, but because convictions would be easier to obtain (Ibid.).

The rather random method for ascertaining which individuals should be tried leads to the next fatal flaw in substance - the absence of the Emperor. The prosecution betrayed this flaw in its opening comments:

Individuals are being brought to the bar of justice for the first time in history to answer personally for offenses that they have committed while acting in official capacities as chiefs of state . . . (Brackman, 108).

Yet, no chief of state was actually on trial. Emperor Hirohito had been the only chief of state of Japan from 1928 through 1945 and he was not charged or even implicated as a wrongdoer (Ibid.). The absence of the Emperor as a defendant is a substantive defect of such magnitude, the trial as a whole must be called into question. Yasuaki has observed:

The political character of the trial is manifest in the treatment of the emperor who under the Meiji Constitution bore ultimate responsibility for the war. The tribunal not only failed to call the Emperor to account for Japan's war of aggression, but did not even summon him as a witness (Hosoya, 45-46).

The goals of justice, retribution, and deterrence seem to have never been considered by the architects of the tribunal. As for retribution, no victims were compensated or otherwise made whole in any fashion. Only death was meted out as punishment to a representative class of convicts. Most perpetrators of the alleged criminal activity were never charged. Critically, the Emperor, the one man who was ultimately responsible for whatever misdeeds occurred, was shielded from the proceedings in their entirety. As for deterrence, the lesson for posterity is that those ultimately responsible, like the Emperor, have no risk of prosecution and those responsible on any level, like the Class A prisoners, have long odds against prosecution.

In the final analysis, the trial was a function of political power. The purpose of the trial had been reported as "to convince the Japanese that crime doesn't pay" and "to make firm friends of our former Oriental enemies." At least one tribunal judge has suggested the true purpose of the trial was to **avenge the attack on Pearl Harbor (Röling, 78-82)**. Indeed, Justice Röling explains the failure to contemporaneously publish the transcripts of the proceeding by observing, "I suppose that they [the U.S.] were perhaps a bit ashamed of what happened there . . ." (Ibid., 81). When asked if the trial was "victor's justice," that is, the prosecution of the vanquished by the victors as the final element of defeat, Röling replied:

Of course, . . . we were aware of the bombings and the burnings of Tokyo and Yokohama and other big cities. It was horrible that we went there for the purpose of vindicating the laws of war, and yet saw every day how the allies had violated them dreadfully . . . Tojo was right that in this respect Tokyo was victor's justice only. As one of the accused in the Nuremberg trial put it: "If we had won the war, there would have been another trial, in another place, for other crimes." That's quite true (Ibid., 87).
(...)

nb Röling's quotations are from Röling/Cassese, *The Tokyo Trial and Beyond*.