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# Imperfect Justice at Nuremberg and Tokyo

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Guénaél Mettraux (ed). **Perspectives on the Nuremberg Trial**. Oxford: Oxford University Press, 2008. Pp. 832. £36.99. ISBN 978019923234.

Neil Boister and Robert Cryer. **The Tokyo International Military Tribunal: A Reappraisal**. Oxford: Oxford University Press, 2008. Pp. 358. £63.50. ISBN 9780199278527.

Yuma Totani. **The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II**. Cambridge, Mass: Harvard University Press, 2009. Pp. 355. \$22.95. ISBN 9780674033399.

## Abstract

*When the international criminal tribunals were convened in Nuremberg and Tokyo in the mid-1940s, the response from lawyers was mixed. Some believed that the Second World War was an exceptional event requiring special legal remedies, and commended the tribunals for advancing international law. Others condemned them for their legal shortcomings and maintained that some of the charges were retroactive and selectively applied. Since then, successive generations of commentators have interpreted the tribunals in their own ways, shaped by the conflicts and political concerns of their own times. The past two decades have seen the establishment of new international courts, and an accompanying revival of interest in their predecessors at Nuremberg and Tokyo. Recent commentaries have analysed the founding documents, the choice of defendants, the handling of the charges, the conduct of the cases – and also the legal and political legacies of the tribunals. They demonstrate that long-standing disagreements over antecedents, aims and outcomes have still not been settled, and that the problems inherent in some of the original charges have still not been solved, despite the appearance of similar charges within the remit of the International Criminal Court today.*

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No document better conveys the roughness and expediency of the negotiations leading up to the postwar tribunal at Nuremberg than the transcript of the four-power London Conference held from late June to early August 1945.<sup>1</sup> At this gathering, which was book-ended by the signing of the UN Charter and the bombing of Hiroshima, the Allies formally discussed the proposal to set up a court to try the captured German leaders. In the event, the conference very nearly broke down. The American delegate threatened to walk out over the question of the court's location, the French delegate objected to plans to bring charges of crimes against peace, the British fretted over the risk of German countercharges, and the Soviets refused to countenance a definition of aggression. The debates were in turn acrimonious, meandering, portentous, repetitive and disjointed. There were frequent misunderstandings between common and civil law delegates, and all were compelled to advance their respective nation's interests. Until the final day, none of them could be sure that a tribunal would be established at all, let alone that their discussions would provide the conceptual framework for two great assizes, one in Nuremberg, the other in Tokyo. This was history in the making, and its making was a messy and unedifying business.

In the 65 years since the London Conference and the international tribunals that followed in its wake, successive generations of commentators, writing with the benefit of hindsight, have offered their appraisals of this postwar experiment in international criminal justice. It is notable that these interpretations were often shaped in response to the wars of their own time. In the early 1950s, for example, Western conservatives argued that a new war with the Soviets was in the offing, and the time for prosecuting the Germans had passed. In the late 1960s, Bertrand Russell and Jean-Paul Sartre staged their own informal 'tribunal' to condemn American crimes in Vietnam. In the early 1990s, both Margaret Thatcher (in reference to Iraq) and Madeleine Albright (to Bosnia) harked back to the Nuremberg ideal.

Until recently, however, it was widely assumed that the large-scale formally constituted international tribunals of the 1940s were an experiment that was not likely to be repeated: as Geoffrey Best wrote in the closing decade of the Cold War, Nuremberg was 'but a beacon behind us, growing ever fainter'.<sup>2</sup> But with the revival of interest in international criminal law after the fall of the Berlin Wall, the postwar tribunals assumed a new significance to the lawyers and policy-makers involved in the newly constituted *ad hoc* courts and International Criminal Court, who found themselves grappling with many of the same problems. What was the most appropriate method for determining individual responsibility for international crimes? What were the problems associated with the criminalization of aggression or the prosecution of crimes against humanity? How might one organize a case if documentary evidence or witnesses were not readily available? These questions and many others are considered in the three books under

<sup>1</sup> United States Department of State, *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London, 1945*.

<sup>2</sup> G. Best, *Nuremberg and After: The Continuing History of War Crimes and Crimes Against Humanity* (1984), at 26.

review, which provide fascinating insights into the conceptualization of the charges, the conduct of the trials, the findings that they made, and, finally, the respective legacies of Nuremberg and Tokyo. Each book has different approaches and different strengths, and together they provide a very substantial appraisal of the two tribunals.

## 1 The Conception of Nuremberg

The Nuremberg Tribunal, shorn of its least palatable features, has now become the lodestar of international criminal justice. The lawyer Guénaél Mettraux's major 32-article anthology of writings on this tribunal covers law, history, politics and philosophy, and includes important pieces newly translated from the French, German and Russian. It begins, appropriately enough, with contributions by two men who played a pivotal role in the trial's conception: American chief prosecutor Robert Jackson and his intellectual collaborator Hersch Lauterpacht. In late 1940, Jackson (then attorney-general) began to consult Lauterpacht on the problem of how to justify the United States' involvement in the war at a time when the nation was still avowedly neutral. His Havana speech of March 1941 incorporated Lauterpacht's suggestions relating to 'qualified neutrality',<sup>3</sup> the punishment of aggression, and just war theory. And his Indianapolis speech of October, reprinted in the anthology, issued an internationalist challenge to residual isolationism by calling for a strengthening of international law to deal with aggression and maintain peace.<sup>4</sup>

Hersch Lauterpacht once again dispensed advice to Jackson when they met in July 1945 to discuss the charges that were being formulated at the London Conference, and he later helped to write British chief prosecutor Hartley Shawcross's opening and closing speeches at the trial itself. His ideas were compelling, and some of them – such as those on the individual and the state – were later voiced by Shawcross in court, then reproduced in the Judgment. Jackson and Lauterpacht were central figures who obviously should be included in the anthology, but other highly influential individuals who contributed to the construction of the charges have been left out. Notable omissions include the Soviet academic Aron N Trainin, and the American lawyers Murray Bernays and William Chanler, who in the latter half of 1944 began to independently formulate the charges that would later appear in the Nuremberg Charter as 'common plan or conspiracy' and 'crimes against peace'.<sup>5</sup>

<sup>3</sup> Jackson, 'Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941', 35 *AJIL* (1941) 348, at 351.

<sup>4</sup> Jackson, 'The Challenge of International Lawlessness' (1941), in Mettraux, at 11.

<sup>5</sup> A. N. Trainin, A. Y. Vishinski (ed) and A. Rothstein (tr), *Hitlerite Responsibility Under Criminal Law* (1945); Bernays, 'Legal Basis of the Nuremberg Trials', 35 *Survey Graphic* (1946) 4; and Bernays documents in B. F. Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945* (1982); Chanler documents in Bush, "'The Supreme . . . Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War', 102 *Colum L Rev* (2002) 2324.

Despite careful planning by the prosecuting powers, underlying tensions meant that they were unable to follow a consistent line at Nuremberg. They were prepared to countenance the revolutionary idea of holding national leaders to account (so long as it was at an *ad hoc* trial), but they were also aware of the sovereignty-piercing implications of the charges, and thus treated them with circumspection. Responding to these tensions, Robert Jackson adopted different positions at different times: sometimes he was an impeccable naturalist, other times an unabashed realist. Yet despite the innovative features of the trial he had helped to convene, his preoccupation with sovereign rights never wavered, which is why, in his closing speech, he was moved to state that '[t]he intellectual bankruptcy and moral perversion of the Nazi regime might have been *no concern to international law* had it not been utilized to goosestep the Herrenvolk across international frontiers'.<sup>6</sup>

## 2 Critics and Criticisms

In the first half of Mettraux's anthology, which deals with contemporaneous perspectives on the trial, a range of participants discuss the conception of the charges, the presentation of the evidence, and the significance of the judgment. These writings by, among others, Jackson's legal colleagues and political allies – Francis Biddle, Thomas Dodd, Telford Taylor, Herbert Wechsler, Quincy Wright, and in a later section, Henry Stimson – provide rich pickings, but they also highlight the book's one serious flaw. When covering the immediate postwar period, it thoroughly documents the more commendatory approaches to the Tribunal, yet it does not do the same for the arguments against, even though the criticisms were powerful enough to compel the prosecuting powers in 1946–1948 to take remedial action at both the Tokyo Tribunal and the United Nations (where the 'Nürnberg Principles' were broached to this end). Two critical pieces from this decade are included (by Georg Schwarzenberger, and by Hans Kelsen, who advised the prosecution and was hardly representative) but many others are not. This despite the fact that the academic community's international lawyers and political scientists – particularly those based in the United States, such as Edwin Borchard, George Finch, Leo Gross, Erich Hula, Hans Leonhardt, Max Radin and Franz Schick<sup>7</sup> – raised reservations at the time. The resulting balance of the material representing this crucial period makes Mettraux's volume feel very much the 'official' version.

<sup>6</sup> International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (1947–1949) vol. 19, 399 (emphasis added).

<sup>7</sup> Borchard, 'The Impracticality of "Enforcing" Peace' 55 *Yale LJ* (1946) 966; Finch, 'The Nuremberg Trial and International Law', 41 *AJIL* (1947) 20; Gross, 'The Criminality of Aggressive War', 41 *Am Polit Sci Rev* (1947) 205; Hula, 'Punishment for War Crimes', 13 *Soc Res* (1946) 1; Leonhardt, 'The Nuremberg Trial: A Legal Analysis' 11 *Rev Pol* (1949) 449; Radin, 'Justice at Nuremberg', 24 *Foreign Aff* (1946) 369; Schick, 'The Nuremberg Trial and the International Law of the Future', 41 *AJIL* (1947) 770.

This is a shame because those inclined towards scepticism have much to tell us about the trial and the legal thinking that informed it. Their criticisms focused predominantly on jurisdiction, retroactivity and selectivity – the last two now widely accepted as legitimate complaints against Nuremberg. These arguments could be described as forceful but limited in scope. The approach to retroactivity, for example, was narrowly conceived: while many cited the crimes against peace charge as being an *ex post facto* enactment, only a few also mentioned the equally newly minted crimes against humanity charge<sup>8</sup> and almost none the conspiracy count, hitherto virtually unknown in international law.<sup>9</sup> When considering crimes against peace, they often discussed *nullum crimen sine lege* but rarely its accompanying coda, *nulla poena sine lege*. And although they often talked of the retroactive prohibition of aggressive war, they rarely discussed retroactive individual responsibility – the exception being defence lawyer Hermann Jahrreiss, who used this argument in court.<sup>10</sup> (The sceptics' failure to pick up on this latter issue puzzled Robert Jackson, who later surmised that this was either because 'they do not understand its implications, or . . . they approve abandonment of the old concept of absolute sovereignty'.)<sup>11</sup>

Of all the charges, it was crimes against peace that proved the most contentious. British and French officials had in 1944–1945 privately questioned the validity of the charge, and the following year, while the trial was in progress, academics began to publicly raise similar concerns. A lightning rod for this discussion was criminologist Sheldon Glueck's 1946 *Harvard Law Review* essay (reprinted in the anthology) and then book, *The Nuremberg Trial and Aggressive War*, which followed the prosecution's lead in arguing that *inter alia* the 1923 draft Treaty of Mutual Assistance, the 1924 Geneva Protocol, the 1927 Eighth League Assembly resolution and the 1928 Kellogg-Briand Pact could be 'regarded as powerful evidence of the existence of a widely prevalent custom among civilized peoples sufficient to energize a juristic climate favorable to the regarding of a war of aggression as . . . downright criminal'.<sup>12</sup> The reviewers of Glueck's book were not persuaded by this line. Where, they enquired, was the supporting evidence of state practice and *opinio juris*? As George Finch wrote, custom could not be judicially established 'by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, [or] by citing unratified protocols or public and private resolutions of no legal effect'.<sup>13</sup>

Another criticism of the charges, and particularly crimes against peace, related to the Charter's selective focus on 'the major war criminals of the European Axis'.<sup>14</sup>

<sup>8</sup> The French judge, Donnedieu de Vabres, makes this observation, however, in: 'The Nuremberg Trial and the Modern Principles of International Criminal Law' (1947), in Mettraux, at 227.

<sup>9</sup> A later exception was Julius Stone, in: *Legal Controls of International Conduct: A Treatise on the Dynamics of Disputes and War-Law* (1954), at 361.

<sup>10</sup> IMT, *supra* note 6, vol. 17, at 478.

<sup>11</sup> Jackson, 'Some Problems in Developing an International Legal System', 22 *Temple L Q* (1948) 147, at 153.

<sup>12</sup> Glueck, *The Nuremberg Trial and Aggressive War* (1946), at 34 (original emphasis).

<sup>13</sup> Finch, Review of *The Nuremberg Trial and Aggressive War* by Sheldon Glueck, 41 *AJIL* (1947) 334, at 334.

<sup>14</sup> *The Charter of the International Military Tribunal* (1945), in Mettraux (appendices), at 736.

Shortly after the Judgment was handed down, the British alternate judge, Norman Birkett, while noting that the Charter did not apply to the Soviet Union, the United States or Britain, declared that, ‘If it continues to apply only to the enemy, then I think the verdict of history may be against Nuremberg.’<sup>15</sup> While the Germans were being tried, the Charter formalized the Allies’ refusal to relinquish immunity for themselves for similar crimes. This was a sensitive point, and others associated with the bench and the prosecution – Herbert Wechsler, Telford Taylor and Bernard Meltzer – also raised their concerns about the problem of selectivity.<sup>16</sup>

As predicted, this issue did indeed tarnish Nuremberg’s legacy – and to a greater degree than did retroactivity or the specifics of the Allies’ wartime conduct (the prosecution felt extremely vulnerable to countercharges over the Molotov-Ribbentrop Pact of 1939 and Anglo-French plans to breach Norway’s neutrality in 1940). This invites the question: Why then did they decide to embark on a high-risk trial? One can only agree with Richard Falk, who wrote in 1995 that it was hard to understand ‘why sovereign states should have been ever willing to validate such a subversive idea as that of international criminal accountability of leaders for war crimes’, and that this validation only made sense ‘if the imposition of accountability is understood to be a *particularly* advantageous response to a given geopolitical challenge whose wider implications can be avoided’.<sup>17</sup>

### 3 Tensions at Work

Retroactivity and selectivity aside, there is still a great deal more to be said about the problems implicit within the Nuremberg charges – a matter of some import, given the present appearance of similar charges on the roster of the International Criminal Court. The charge of crimes against peace, for example, proved to be problematic not only because of the aforementioned problems, but also because internal contradictions ultimately rendered it unsustainable. One contradiction relates to sovereignty: the charge reflected both the impulse to protect sovereignty (by punishing assaults on the existing world order) *and* the impulse to breach sovereignty, by making individual leaders – as distinct from states – directly accountable to international law.<sup>18</sup> Another tension relates to enforceability: as David Luban argued in his 1987 piece, reprinted in the anthology, the charge of crimes against peace simultaneously criminalized aggression *and* ‘any attempt to enforce itself’ by taking action against threats

<sup>15</sup> Birkett, ‘International Legal Theories Evolved at Nuremberg’ (1947), in Mettraux, at 307.

<sup>16</sup> Wechsler, ‘The Issues of the Nuremberg Trial’ (1947), in Mettraux, at 319; T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1971), at 82; Meltzer, ‘A Note on Some Aspects of the Nuremberg Debate’, 14 *U Chi L Rev* (1947) 455, at 469.

<sup>17</sup> Falk, ‘Telford Taylor and the Legacy of Nuremberg’, 37 *Colum J Transnat’l L* (1999) 693, at 710 (original emphasis).

<sup>18</sup> K. Sellars, ‘Crimes Against Peace’ and International Law (PhD thesis) (2009), at 310.

to the global order. In consequence, the charge 'cuts its own throat as an instrument of international peace'.<sup>19</sup>

One of the volume's strengths is that it includes translations of half a dozen pieces that have hitherto been unavailable in English. The most notable of these is by the French judge Henri Donnedieu de Vabres, who in 1947 took issue with the conspiracy charge because it 'gives to the Hitlerian enterprise the cover of a romantic prestige'.<sup>20</sup> Half a century later the German legal philosopher Reinhard Merkel expertly dissected some of the problems associated with the court's jurisdiction.<sup>21</sup> And in the same decade a Russian writer, referred to in different parts of the anthology as 'A.M. Larin' and 'Larin A.M. Prigovor', addressed the often-overlooked subject of the Tribunal's finding of facts.<sup>22</sup>

A telling aspect of this collection is that it reveals some of the writers' misconceptions and occasional misrepresentations concerning the Allies' respective roles in the establishment of the Tribunal. It is worth observing, for example, that the Soviets were not in favour of shooting the Nazi leaders (as Otto Kranzbühler stated)<sup>23</sup> although Churchill was. Nor was Roosevelt a consistent advocate of a trial (as Robert Jackson claimed);<sup>24</sup> he in fact wavered between legal and political solutions. The trial was not wholly 'a brainchild of the Americans' (as Luban stated)<sup>25</sup> for the Soviets had conceived similar ideas. And the Russians did not join the trial reluctantly (as Jackson well knew)<sup>26</sup> but firmly supported it as a judicial settling of accounts. To underscore this last point, it was no less a figure than Andrei Vishinsky, chief prosecutor at the 1930s Moscow trials, who in 1945 assumed responsibility for the Soviet team at Nuremberg.

As previously noted, interpretations of Nuremberg have changed over the years. In the two decades immediately following the trial, the verdict tended to be negative. If aspects of the trial were not dismissed as misconceived or misdirected, then they were condemned as insufficient – the Eichmann trial, for example, was seen as making up for Nuremberg's shortcomings on the Holocaust. Today the verdict tends to be more positive, and Guénaël Mettraux, like many others, inclines towards a less critical view, as reflected in his selection. No anthology can be complete, and any selection will inevitably be criticized for this or that omission. In the end Mettraux has drawn together a valuable collection of commentaries into a single volume, which thoroughly deserves to become a standard reference work on the trial.

<sup>19</sup> Luban, 'The Legacies of Nuremberg' (1987), in Mettraux, at 658.

<sup>20</sup> Donnedieu de Vabres, *supra* note 8, at 243.

<sup>21</sup> Merkel, 'The Law of the Nuremberg Trial: Valid, Dubious, Outdated' (1996), in Mettraux, at 566.

<sup>22</sup> 'Larin', 'Nuremberg Trial: The Law Against War and Fascism' (1995), in Mettraux, 546–554.

<sup>23</sup> Kranzbühler, 'Nuremberg Eighteen Years Afterwards' (1965), in Mettraux, at 444.

<sup>24</sup> Jackson, 'Introduction' (1954), in Mettraux, at 701.

<sup>25</sup> Luban, *supra* note 19, at 646.

<sup>26</sup> Jackson, *supra* note 24.

## 4 Trying War at Tokyo

While the Nuremberg Tribunal has been the subject of a deluge of literature from all quarters since its inception, its less well-known sibling at Tokyo has not attracted a great deal of scholarly attention outside Japan. Two recent books go some way towards rectifying this situation. The British-based academic lawyers Neil Boister and Robert Cryer tell the ‘law story’,<sup>27</sup> focusing on the charges, conduct and conclusions of the trial, while the American-based historian Yuma Totani concentrates on the court’s establishment and findings, and the response in Japan after the event. Although they reach different conclusions about the standing of the trial, the two books complement (and occasionally compensate for) one another.

The International Military Tribunal for the Far East opened on 3 May 1946 in the highly symbolic location of the auditorium of the former Imperial Army Officers’ School in Tokyo. Here, the prosecutors would face all the problems experienced by their Nuremberg counterparts, and more besides. One of the greatest of these difficulties related to the character of the Second World War itself. From the outset, the Allies had justified the prosecution of the leaders of the Axis powers on the grounds that the conflict had been unique in the annals of warfare because of its totality and barbarity. This argument rested primarily upon a singular event: the Holocaust. Although the judges at Nuremberg declared *crimes against peace* to be the ‘supreme international crime’,<sup>28</sup> it was in fact the existence of the death camps that formed the moral core of the Allies’ case against the Nazi leaders.

The Second World War was therefore regarded as an exceptional event requiring special legal remedies, its singularity deriving from Germany’s actions. Japan’s policies, by contrast, were unexceptional. Its leaders had certainly presided over wholesale assaults and terrible atrocities, but they had not broken the mould of international politics by instituting policies to systematically annihilate entire national, ethnic, racial or religious groups. As Bruno Simma noted in 1999: ‘Auschwitz was singularly German, and none of the offences committed by the Japanese political and military leaders came even close.’<sup>29</sup>

One silent casualty at Tokyo of this mismatch between German and Japanese crimes was the charge of crimes against humanity, which had initially been framed to address German crimes against Axis populations. Although the crime was listed in the Tokyo Charter along with crimes against peace and war crimes, it was mentioned just once in the Indictment, and only in passing in the majority Judgment. None of the books under review probe the reasons for its disappearance, but the decisive factors must have been the Allies’ tacit recognition that nothing committed by Japan could compare to German crimes, combined with their reluctance to continue deploying this sovereignty-piercing instrument. Even though the war crimes and murder

<sup>27</sup> Boister and Cryer, at 328.

<sup>28</sup> IMT, *supra* note 6, vol. 1, at 186.

<sup>29</sup> Simma, ‘The Impact of Nuremberg and Tokyo: Attempts at a Comparison’, in A. Nisuke (ed.) *Japan and International Law: Past, Present and Future* (1999), at 83.



charges partly covered the same ground as crimes against humanity, many victims, such as the 'comfort women' from Japan's colonies of Korea and Formosa, were left to seek justice by different means.

## 5 A Tarnished Reputation

To date, history's verdict on Tokyo has not been favourable. In 1948, a British Foreign Office official declared it to be a 'political failure',<sup>30</sup> and since then, it has often been deemed a legal failure as well: Cherif Bassiouni, for example, described it as a precedent which legal history can only consider 'with a view not to repeat it'.<sup>31</sup> Neil Boister and Robert Cryer, however, set themselves the task of reassessing the legal issues arising from the trial, and they do so to good effect. They did not have a great deal of secondary literature to draw from. The contemporaneous legal coverage of the trial was remarkably thin, with only a score of articles, mostly short laudatory pieces written by prosecutors, appearing in English-language law journals. And since then, although there have been some notable additions to the literature by historians and political scientists, there has not been much from the legal profession (an exception being the works of the Dutch jurists, Cornelus Pompe and Bernard Röling).<sup>32</sup> The authors thus draw a good deal of their illustrative material from the trial transcript and the papers of the Australian and New Zealand judges.

In approaching the Tribunal, Boister and Cryer are scrupulously even-handed, acknowledging the problems associated with mounting an international trial, and giving the Tribunal credit for its clarification of the law on issues such as civilian command responsibility. This, along with their meticulous analysis of the material, makes the criticisms that they do offer all the more devastating. In summary, they conclude that the prosecuting powers at Tokyo violated the principle of legality by creating the new charge of crimes against peace,<sup>33</sup> treated the war crimes charges as almost an afterthought,<sup>34</sup> and breached the undertaking to give the accused a fair trial.<sup>35</sup>

Not surprisingly, they reserve their sharpest criticisms for the conspiracy charges. Tokyo placed far greater stress on conspiracy than did Nuremberg, prompting Cornelus Pompe to note in 1953 that it seemed as though the Tribunal 'did not consider it so much its task to attribute responsibility for acts committed in international life, as to disclose the existence of a criminal design directed towards such acts'.<sup>36</sup> This emphasis

<sup>30</sup> National Archives (UK), FO 371/69834: Scott, 23/12/48.

<sup>31</sup> Boister and Cryer, at 302.

<sup>32</sup> C. A. Pompe, *Aggressive War: An International Crime* (1953); Röling, 'The Nuremberg and the Tokyo Trials in Retrospect', in Mettraux, 455–472; B.V.A. Röling and A. Cassese (ed), *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (1993).

<sup>33</sup> Boister and Cryer, at 136–137.

<sup>34</sup> *Ibid.*, at 175.

<sup>35</sup> *Ibid.*, at 102.

<sup>36</sup> Pompe, *supra* note 32, at 27.

arose because the lack of evidence linking defendants to specific events necessitated an indirect approach: first establishing an individual's connection to the conspiracy, and then using membership of the conspiracy to signal personal responsibility for substantive crimes. Conspiracy was appealing because it provided a conceptual framework for the consideration of discrete policies and a diverse group of defendants, but it worked only if it could be proved that every defendant had played their allotted part in the grand plan. As Boister and Cryer note, certain individuals (such as Hirota Koki in the 1930s) were like 'the poles holding up the tent' – if one pole were to be removed, the tent would fall down.<sup>37</sup>

Despite the obvious problems, the majority of judges were preoccupied with sustaining a conspiracy-led narrative even when considering the substantive crimes. As David Cohen noted in 1999, this drift from the individual to the collective occurred, for example, in a chapter of the majority Judgment on crimes against peace, which began by stating that the most important task was to 'assess the responsibility of individuals for these attacks', and ended with reference to a collective entity: 'the conspirators'.<sup>38</sup> He further observed that it neither set out plain standards of responsibility nor stated the findings on which individual verdicts were based.<sup>39</sup> Although criminal guilt is personal, Boister and Cryer demonstrate that at times the Tribunal displayed a 'cavalier approach to individual liability'.<sup>40</sup>

## 6 Contending Legal Philosophies

With so many contentious issues up for discussion, it was perhaps inevitable that the Tokyo Tribunal would become a catalyst for debate about the future of international law – an issue addressed in Boister and Cryer's chapter on the legal philosophy of the trial. As they note, both naturalists and positivists made their views known, with the American chief prosecutor Joseph Keenan later claiming (with characteristic hyperbole) that the trial 'served as a cockpit for a death struggle between two completely irreconcilable and opposed types of legal thinking'.<sup>41</sup> And as at Nuremberg, crimes against peace generated the most heat. Positivists maintained that because aggressive warfare had not been criminalized before the Second World War, individuals could not be prosecuted for initiating it. Naturalists, on the other hand, argued that the principle of individual responsibility for aggression was generated spontaneously from public conscience, which would harden into law through its application to cases such as those at Tokyo. The authors pick their way through these and other controversies, showing, for example, that the better-known judges Radhabinod Pal and

<sup>37</sup> Boister and Cryer, at 219.

<sup>38</sup> Cohen, 'Beyond Nuremberg: Individual Responsibility for War Crimes', in C. Hesse and R. Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999), at 60–61.

<sup>39</sup> *Ibid.*, at 64.

<sup>40</sup> Boister and Cryer, at 245.

<sup>41</sup> J. B. Keenan and B. F. Brown, *Crimes Against International Law* (1950), at 13.

Bernard Röling were not as immaculately positivist as is often assumed. At the same time they take issue with Judith Shklar's incisive but imperfect essay *Legalism* (1964), which touched on the intellectual traditions that underpinned the Tokyo Tribunal, and correct her assumption that the Japanese did not comprehend the Judeo-Christian or naturalist themes manifested there.<sup>42</sup>

One of the most outspoken protagonists in these debates at the Tribunal was the aforementioned Joseph Keenan, an avowed naturalist with a conception of international law which might be summarized as innovation in the service of orthodoxy. In his view, the law was a dynamic force, ultimately derived from God and directed towards the maintenance of the *status quo*. He believed that pre-war international arrangements had come about because some nations, by virtue of their superior culture, had assumed control of others for the benefit of all. The only way for a country to lawfully alter these arrangements was by slow, evolutionary means, and Japan's sudden and violent intervention had in his view overturned a legitimate and moral world order. Such aggression had to be stopped because: 'If Japan had the right to change its geographical and economic status suddenly by war, then every other nation as badly situated, from the economic standpoint, had the same right.'<sup>43</sup>

Armed with this idea, Keenan set out the case for the prosecution of aggression based upon the concept of unjust wars (that disrupted the *status quo*) and just wars (that restored the *status quo*). 'The nucleus of crimes against peace is the criminally unjust war,' he wrote, which was 'always evil *per se* in the moral sphere and unjust in the judicial, despite the absence of positive legal undertakings to that effect.'<sup>44</sup> In his view, it was necessary to use the trial to advance international law in order to prevent further unjust wars. Indeed, he was quite prepared to assert this transcendent aim over the apparently lesser task of administering justice: not only did he declare that he had 'no particular interest in any individual or his punishment' because the defendants were mere representatives of 'a class and group',<sup>45</sup> but he rebuked defence lawyers for being willing to 'sacrifice the common international good' to secure the defendants' interests.<sup>46</sup>

## 7 Pal's Perspectives

The most forthright opponent of Keenan's approach was the Indian judge, Radhabinod Pal, whose dissent famously absolved all the Japanese defendants of all guilt. His stance, which was articulated just as third-worldist sentiment was beginning to stir, provides a revealing counterpoint to Keenan on the relationship between international law and the *status quo*. Starting out from a strictly positivist position, he

<sup>42</sup> Boister and Cryer, at 294–296.

<sup>43</sup> Keenan and Brown, *supra* note 41, at 63.

<sup>44</sup> *Ibid.*, at 57 and 79.

<sup>45</sup> *Ibid.*, at 463.

<sup>46</sup> *Ibid.*, at 156.

argued that it was perilous to innovate in line with the dictates of conscience because only adherence to the letter of the law, not ‘the “general moral sense” of humanity’,<sup>47</sup> guaranteed predictability. The naturalist alternative, with its premature claims to universalism, emitted (and here he quoted Lon Fuller) the ‘rich, deep odor of the witches’ cauldron’.<sup>48</sup> Yet as Boister and Cryer note, Pal’s legal philosophy was more complex and accommodating than such words suggest.<sup>49</sup> His suspicion concerning subjectivity was linked to his doubts about the motives of the prosecuting powers, yet his attempt to posit an alternative worldview led him back towards a naturalist position.

Addressing crimes against peace, Pal recalled the prosecuting powers’ history of violence in Asia, and warned that they might deploy the charge for their own self-interested reasons, such as maintaining ‘the very *status quo* which might have been organized and hitherto maintained only by force by pure opportunist “Have and Holders”’.<sup>50</sup> He noted, for instance, Robert Jackson’s statement at Nuremberg that ‘whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions’.<sup>51</sup> In other words, Jackson was effectively calling for the freezing of international relations – just or unjust – at the conclusion of the Second World War. Thereafter, the struggle against colonialism and exercise of ‘self-help by force’<sup>52</sup> would be prohibited. For Pal, this restraint was unacceptable, for the colonized ‘cannot be made to submit to eternal domination only in the name of peace’.<sup>53</sup>

When taking issue with Jackson, Pal proposed a radical inversion of global priorities, with anti-colonial justice taking precedence over peace rather than peace taking precedence over justice (the latter being in his opinion the premise for the concept of crimes against peace). He thus departed from his positivist position and moved towards ‘just war’ theory – in the process stepping onto the same naturalist terrain as Keenan. Their immediate disagreement turned on the question: Were Japan’s wars unjust? Not according to Pal, for Japan’s leaders had believed that they were acting in self-defence. This was a substantial concession to the idea embedded within crimes against peace that wars could be categorized as either illegitimate (aggression) or legitimate (self-defence or sanction). Instead of rejecting this polarity, as an orthodox positivist might have done, Pal submitted to it, by attempting to shift Japan’s wars from the ‘aggressive’ to the ‘defensive’ side of the scale. Instead of reframing the debate, he found himself trapped within it.

<sup>47</sup> R. Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice R.B. Pal* (1953), at 112.

<sup>48</sup> Boister and Cryer, at 286.

<sup>49</sup> *Ibid.*, at 286–291.

<sup>50</sup> Pal, *supra* note 47, at 115.

<sup>51</sup> IMT, *supra* note 6, vol. 2, at 149.

<sup>52</sup> Pal, *supra* note 47, at 114.

<sup>53</sup> *Ibid.*, at 115.

## 8 Reinforcing Nuremberg

Boister and Cryer have produced an illuminating account, and if there is any weakness, it relates not to their interpretation of the legal issues arising from the trial but from their failure to fully explain Tokyo's role in relation to Nuremberg. By the time the Tokyo Tribunal opened, the Nuremberg Charter and Indictment had already been subjected to critical scrutiny by jurists and others, and found wanting on legal grounds, especially with respect to crimes against peace. The prosecuting powers were well aware that this charge had broken new ground, and hoped that the Tokyo Judgment would confirm Nuremberg's determinations on aggressive war, thereby settling the debate.<sup>54</sup>

As a consequence, every possible measure was taken to ensure that Tokyo backed Nuremberg over this problematic charge, from the drafting of the Tokyo Indictment, which attempted to reinforce the crimes against peace charge with the conspiracy and murder charges, to the attempts before and during the trial to focus on aggression to the exclusion of the other substantive charges. These efforts were seen as highly important because, as the British Foreign Office's legal advisor Eric Beckett minuted, a failure to win the case on crimes against peace in Japan 'would *inter alia* mean that the Tokyo Tribunal was saying that the Judgment of the Nuremberg Tribunal was based at any rate in part upon bad law'.<sup>55</sup>

The judges in Japan were thus bound by the dual obligation to uphold both the Tokyo Charter *and* the Nuremberg Judgment. The compulsion to defer to Nuremberg was never publicly stated, of course, although as soon as it became clear to the Allies that the Tokyo bench had split over the question of the validity of crimes against peace, officials either privately sounded out the judges over schemes designed to ensure that the judgment echoed the Nuremberg line (as the British did with Lord Patrick)<sup>56</sup> or pressured them to abandon their disagreements with crimes against peace (as the Dutch did with Bernard Röling).<sup>57</sup> The prosecuting powers' determination to prop up Nuremberg therefore undermined the Tokyo judges' autonomy, and inflamed the tensions that already existed on the bench.

As it turned out, the will of the majority in favour of supporting Nuremberg prevailed, and the Tokyo Judgment duly duplicated the previous Judgment's pronouncements on international law. (The only important exception was the Nuremberg ruling that individuals had international duties that transcended obligations to the state, which was dropped at Tokyo on the insistence of the Soviet judge, I.M. Zaryanov.) As the majority explained: 'this Tribunal prefers to express its unqualified adherence

<sup>54</sup> This theme is examined in greater detail in Sellars, 'Lord Patrick and "Crimes Against Peace" at the Tokyo Tribunal, 1946–48', *Edinburgh L Rev* (forthcoming).

<sup>55</sup> National Archives (UK), FO 371/66552: Beckett, 5/5/47.

<sup>56</sup> Sellars, *supra* note 54.

<sup>57</sup> L. van Poelgeest, 'The Netherlands and the Tokyo Tribunal', *Aspects of the Allied Occupation of Japan*, Part II, Suntory-Toyota International Centre for Economics and Related Disciplines, London (1991), at 38–39.

to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language' for this would 'open the door to controversy by way of conflicting interpretations of the two statements of opinions'.<sup>58</sup>

## 9 One Trial, Many Views

What then is the legacy of the Tokyo Tribunal? Just as Nuremberg was interpreted in new ways by successive generations of observers in the West, so Tokyo was interpreted in new ways by successive generations in Japan. The historian Yuma Totani is primarily interested in the court's findings and the subsequent Japanese response to them. In her vividly detailed book, she seeks to reclaim the Tribunal from its many and varied critics by clearing away some of the misapprehensions and prejudices that have taken root over the years. In the process, she arrives at a more favourable assessment of the trial than many others, including Boister and Cryer, have done.

She begins by surveying the Allies' preparation of the trial, the selection of suspects, and the question of the indictment of the Emperor Shōwa. Then she assesses the handling of leadership responsibility for atrocities, and the cases of the Rape of Nanking, the Burma-Siam 'Death Railway' and other mass crimes committed during the Asian-Pacific War. Of particular interest, though, is her comprehensive description of the legacy of the trial in Japan, which has not been widely discussed in the literature about the Tribunal.<sup>59</sup> She identifies three successive approaches taken by commentators over the years: the legal academics who in the late 1940s upheld the Tribunal as a necessary advance in the law; the conservative nationalists who from the early 1950s denounced it as victors' justice; and the radical historians who from the early 1980s criticized it for its expedient narrative of the Asian-Pacific War.

As Totani recounts, the first published analyses of the trial started to appear while the court was still sitting, and they were generally positive. From Tokyo University's law faculty, for example, Dandō Shigemitsu argued in his 1946 article, 'Sensō hanzai no rironteki kaibō' ('The Theoretical Anatomy of War Crimes') that the criminalization of aggression had long been a principle of international law, and the ban on *ex post facto* enactments was anyway designed to protect the victims, not the manipulators, of arbitrary state power.<sup>60</sup> The following year, his colleague Yokota Kisaburō contended in his book, *Sensō hanzai ron (A Treatise on War Crimes)* that international law was in

<sup>58</sup> International Military Tribunal for the Far East [R John Pritchard (ed)], *The Tokyo Major War Crimes Trial* (1998), vol. 101, at 48439.

<sup>59</sup> The issue is raised in some of the more general literature, however, such as Ian Buruma's *The Wages of Guilt: Memories of War in Japan and Germany* (1995).

<sup>60</sup> Totani, at 193.

a period of revolutionary change in which the concept of war crimes had expanded to embrace aggression – a crime which had clearly been committed by Japan because it had ‘ignored treaties, flouted justice’.<sup>61</sup>

It is worth noting that Totani’s chronological distinction between the first favourable generation of analysts and second antipathetic generation is somewhat artificial, for the two outlooks must surely have co-existed from the start – it was just that early critics of the trial were silenced by Douglas MacArthur’s administration’s purges and censorship during the postwar Occupation.<sup>62</sup> Only after April 1952, with the coming into force of the peace treaty and the lifting of the American restrictions, did the conservative lawyers and politicians begin to broadcast their views. They would make up for lost time by dominating the debate over the following decades.

## 10 The Nationalist Riposte

Totani indicates that the first book setting out a nationalist ‘victors’ justice’ critique of the trial, *Tōkyō saiban o sabaku (Judging the Tokyo Trial)*, was published in 1953. Its author, Takigawa Masajirō, formerly Tokyo defendant Shimada Shigetarō’s lawyer, argued that far from being the self-proclaimed exemplar of civilized values, the Tribunal was in reality an instrument for inculcating defeatism in the Japanese people.<sup>63</sup> Moreover, he wrote, the severity of the sentences handed down at Tokyo compared to Nuremberg could be put down to racial prejudice: ‘the Japanese are coloured and the Germans white’.<sup>64</sup> Other books expressing similar sentiments appeared later. The 1961 memoir, *Tōkyō saiban no shōtai (The True Character of the Tokyo Trial)* by Sugawara Yutaka, Araki Sadao’s lawyer, claimed that the Allies handed down seven death sentences to settle scores over seven wartime actions – Pearl Harbor, Singapore, Bataan and so on.<sup>65</sup> And the 1966 memoir, *Hiroku: Tōkyō saiban (The Secret Record About the Tokyo Trial)* by Kiyose Ichirō, Tōjō Hideki’s lawyer, claimed that the war crimes charges brought at the trial were an invalid pretext for the harsh punishments of the accused.<sup>66</sup>

The conservative critics were more interested in justifying Japanese policies than in analysing the nuances of international law, although as Totani explains, they were happy to use Radhabinod Pal’s dissent to vindicate their stance and invest their arguments with legal credibility.<sup>67</sup> Moreover, she shows that Pal himself was complicit in this process, as his sympathy with defence arguments ripened into support for

<sup>61</sup> *Ibid.*, at 196.

<sup>62</sup> Mayo, ‘Civil Censorship and Media Control in Early Occupied Japan: From Minimum to Stringent Surveillance’ in Robert Wolfe (ed.) *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944–1952* (1984), at 297–298, 310, 318–319.

<sup>63</sup> Totani, at 230.

<sup>64</sup> ‘Tokyo War Crimes Trial Farce; Japanese Lawyer’, *Japan News*, 12/9/53.

<sup>65</sup> Totani, at 230–231.

<sup>66</sup> *Ibid.*, at 231.

<sup>67</sup> *Ibid.*, at 224.

the defendants' cause. He visited Japan on three occasions after the trial – in 1952, 1953 and 1966 – addressing rapturous nationalist audiences, sipping tea with the defendants' families, and visiting the inmates of Sugamo Prison. Although Totani is interested only in his relations with the Japanese right, both Elizabeth Kopleman and Boister and Cryer have noted the multi-faceted character of his legal and political philosophy.<sup>68</sup> This is why during the Cold War decades Pal found common ground with Japanese nationalists over pan-Asianism and anti-communism, with the non-aligned movement over anti-colonialism and self-determination, and with Western anti-militarists over American foreign policies – and was lionized by them all.

## 11 New Forms of Victors' Justice

In the early 1980s Pal's dissentient legacy began to fade, and a new wave of progressive Japanese historians sought to move beyond the good trial/bad trial argument. Totani observes that this generation, armed with newly declassified documents and mindful of Japan's growing assertiveness in Southeast Asia, concluded that the problem with the Tokyo trial was not that it went too far, but that it did not go far enough.<sup>69</sup> Led by their doyen Awaya Kentarō, they criticized the prosecuting powers for ignoring their own crimes of Hiroshima and Nagasaki and for selecting Japan's crimes in line with their own concerns – concentrating, for example, on the experience of whites rather than Asians, failing to indict the Emperor Shōwa, and ignoring Unit 731's bacteriological experiments. They argued that the trial had been driven by political expediency in furtherance of a *status quo* imposed by the United States and the colonial powers in East Asia and the Pacific, and therefore it was victors' justice, albeit of a different variety than that identified by the nationalists. As such, it hindered Japan's ability to face up to its own past.

This more radical reading of the trial was guided by modern assumptions about the Allies' prejudices which, as Totani skilfully shows, were sometimes misplaced. She disputes the view that prosecutors, driven by racism and non-legal priorities, paid little heed to Asian victims. She argues that they *did* focus on the Asian experience, and for good reason: the colonial powers wished to re-establish their shaky credibility in recently reclaimed colonies by making common cause with the colonized.<sup>70</sup> Furthermore, she notes that contrary to claims of gender prejudice, the prosecutors *did* pay attention to the sexual violence perpetrated against Asian women, especially in China and the Dutch East Indies, although they failed to convince the judges that such actions were the outcome of the defendants' orders from on high.<sup>71</sup>

Her argument breaks down, however, when she takes issue with the idea that the trial was a manifestation of victors' justice, designed to sustain American and

<sup>68</sup> Kopleman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' 23 *NYU J Int'l Law & Pol* (1991) 373, at 375–376; Boister and Cryer, at 286–291.

<sup>69</sup> Totani, at 250.

<sup>70</sup> *Ibid.*, at 162–163.

<sup>71</sup> *Ibid.*, at 178–179, 185.



colonial interests in Asia. Leaving aside her preoccupation with Japan's perception of itself as a nation either traduced or suborned by the Allies, one must conclude that any trial conducted after a war is *de facto* victors' justice. Indeed, several contributors to Mettraux's anthology make precisely this point. 'In the existing state of international law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor,' wrote Hersch Lauterpacht in 1944.<sup>72</sup> David Luban further argued that, because the crimes against peace charge criminalised efforts to enforce itself, leaders could only be prosecuted once they had embarked on and been beaten in an aggressive war, and that consequently, 'Only victors' justice is possible.'<sup>73</sup>

## 12 Tests of History

In the course of challenging some of the negative misapprehensions about the Tokyo Tribunal, Totani reaches for more positive interpretations than its legacy has thus far allowed. The material she presents, however, tends to undermine her assertions. So she maintains, for example, that the trial 'marked the starting point of Japan's confrontation with its past',<sup>74</sup> but then chronicles the perennial objections relating to the court, the charges, and the prosecution's evidence – all of which prove that the Tribunal failed in its didactic function. She further states that the trial's findings established the chronological and geographical framework of the postwar 'historiography of World War II',<sup>75</sup> and then undercuts this position by describing the persistent focus in Japan on the *absences* in the Tribunal's narrative: the unmentioned Allied crimes, the unaddressed Japanese crimes, the un-indicted Emperor. As the presiding judge William Webb cautioned at the time: 'A Judgment may itself be historic, yet its contents may be incomplete as history'<sup>76</sup> – all *too* incomplete, the critics thought.

Continuing in a positive vein, Totani maintains that despite the mishandling of the conspiracy counts, the Tribunal's findings on the substantive counts have 'stood up to the test of history'.<sup>77</sup> While no serious impartial commentator has contested the findings on war crimes, the same cannot be said of the findings on crimes against peace, which are still the subject of debate. This interrogative process began as early as May 1948, when the French judge Henri Bernard complained that a draft of the Judgment contained tendentious readings of Russo-Japanese relations, offered an opinion on Japan and the Hague Convention that had not been proved, and raised Japan's Open Door policy in China despite discussion of it being barred in court.<sup>78</sup> The passages to which he objected appeared in the majority's Judgment, and concerned matters

<sup>72</sup> Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944), in Mettraux, at 14.

<sup>73</sup> Luban, *supra* note 19, at 658.

<sup>74</sup> Totani, at 2.

<sup>75</sup> *Ibid.*, at 97.

<sup>76</sup> Boister and Cryer, at 312.

<sup>77</sup> Totani, at 97.

<sup>78</sup> Australian War Memorial, Webb papers, 3DRL 2481 Series 4/7/4: Bernard to Tribunal members, 'Remarks Suggested by Draft of Judgment', 10/5/48.

which continue to exercise scholars to this day. Pronouncements on the tests of history are in this instance premature.

It is possible that Totani's interesting and useful attempt to reconsider the trial's reputation will herald a new generation of Japanese commentators. Inspired by developments in international criminal law, aware of Japan's growing military obligations abroad, and keen to recast relations with their Chinese neighbour, they will have many motives for clearing away the political detritus that has accreted around the trial over the past six decades. But it is one thing to challenge misinterpretations, and quite another to attempt the rehabilitation of a deeply flawed enterprise. Tokyo was the very blackest of courtroom dramas, with an abundance of sombre lessons for jurists as well as for politicians and historians. It is to be hoped that future generations will pay heed to them.

### 13 In Conclusion

These three books make a strong contribution to our understanding of the formation, conduct and outcome of the postwar tribunals, and offer important insights into some of the issues that are of practical relevance to the development of international criminal law today. Guénaél Mettraux has brought together many of the essential writings about the Nuremberg Tribunal into a single volume; Yuma Totani has offered thought-provoking new perspectives on the Tokyo Tribunal; and Neil Boister and Robert Cryer have produced a nuanced analysis of the legal issues arising from that trial. Lawyers will find instructive material in them all.