

Gary J. Bass. ***Judgment at Tokyo: World War II on Trial and the Making of Modern Asia***. New York, NY: Alfred A. Knopf, 2023. Pp. xvi + 912. US\$46.00. ISBN: 9781101947104.

The International Military Tribunal for the Far East was criticized from every direction. Japanese conservatives and Asian radicals thought it had no right to sit in judgment over Japan's wartime leaders. Liberals believed it should have tried Hirohito and paid more attention to crimes against women and Japan's colonial subjects. Western policy-makers cavilled (behind closed doors) at the proceedings dragging on for too long, at their having to parlay with the Soviets and at the deployment of law rather than *realpolitik*. The beleaguered trial was even implicitly criticized by its leading sponsor, the USA, whose officials inflicted the final indignity by declining to publish the transcripts and judgments in English – the language in which the proceedings had been conducted – let alone ennobling them with calfskin and gilt-letter bindings.

All the while, in Japan, the tribunal was beset by legal problems. Chief among these were the novelty of the charges set out in the Tokyo Charter,¹ especially crimes against peace; the overblown indictment, including the additional charge of murder; the prosecution's allegation of a grand conspiracy that could not possibly have existed; and the tribunal's reliance upon a low standard of proof, despite considering the most serious international crimes. The result was a split bench, with the majority producing an under-reasoned judgment and the minority (which included two dissenters) taking issue, variously, with the obligation to be bound by the Charter, the failure to indict Hirohito, the Court's procedural failings and the imposition of death sentences.

This contested – and eventually sidelined – experiment in international criminal law has not received anything like the amount of serious attention that has been devoted to its counterpart at Nuremberg. Gary Bass's richly detailed description of the trial is therefore to be welcomed and goes some way towards rectifying the imbalance. Although no work on this subject can be definitive so long as the relevant documents in the national archives of Japan, the Philippines and the Soviet Union remain inaccessible to researchers, the author has drawn upon the open archives of seven of the 11 prosecuting powers involved to present an illuminating account of the proceedings.

The trial, Bass notes, is fascinating because it was so controversial, functioning as 'an act of war-making and peacemaking' (at 14) with a strong undertow of racism (at 686). Comparing the trials of the Japanese and German leaders, he writes:

If Nuremberg stands as a metaphor for ethical purity, then Tokyo represents a dive into murk. It calls into question a triumphalist view of World War II. ... Because it was defined by the limits of Allied power, marked Allied hypocrisy, and the uncertainty of its outcome, the story of Tokyo is a far less heroic subject than Nuremberg – one that perhaps makes a more fitting World War II history for today, a time when American power is waning, its moral influence sharply diminished, and its democracy in crisis (at 12).

¹ R. J. Pritchard (ed.), *The Tokyo Major War Crimes Trial*, vol. 2 (1998): Charter of the International Military Tribunal for the Far East (26 April 1946, amending the Charter of 19 January 1946).

Bass is strong on the details, recounting the devastating evidence presented in court of Japanese war crimes committed in Nanking, Hong Kong, Sumatra, Bataan and Manila. Thus, during the Philippines' case – described by a diplomat as 'a month of horrors' (at 315) – he recounts how the associate prosecutor Pedro Lopez, aiming to establish Mutō Akira's command responsibility, noted with ghastly precision the 131,028 civilians and prisoners of war who had been tortured, bayoneted, burned and starved to death on his watch.

The parts of the prosecution case dealing with crimes against peace may have been less shocking and more ponderous, but as Bass shows, they were nevertheless suffused by the politics of conflicts both past and present. He describes, for example, how the French prosecutors, when presenting their case of Japanese aggression against France in Indochina, tried to gloss over the fact that they meant *Vichy* France. 'This', he notes, 'put the Allied prosecution in the dicey position of upholding the imperial territorial claims of German collaborators' (at 281). The Cold War complicated matters further for the prosecution because the tribunal, as one of the last redoubts of the wartime alliance, was virtually the only place in the late 1940s where a British prosecutor would be obliged to uphold the rights of the Chinese Communist Party and where a Soviet prosecutor would 'speak for the cause of the United States' (at 402, 408).

The 11 prosecution teams were far from united. They had different motives, expectations and legal traditions, and, while they attempted to present a façade of unity, cracks inevitably showed. Bass, who eschews the dry tone of much academic literature, recounts one courtroom exchange between the Soviet associate prosecutor A.N. Vasiliev and the Australian court president William Webb:

When Vasiliev airily referred to 'the Japanese war criminals,' Webb was taken aback at the flash of Stalinist candor. 'You must not refer to the accused as Japanese war criminals,' chided the Australian chief judge. 'They have not yet been convicted.' The Soviet prosecutor huffily shot back, 'As far as I understand they were brought before this Tribunal as Japanese war criminals, major Japanese war criminals' ... Disgusted, Webb retorted, 'That is not so. And as far as we are concerned they are innocent until they are proved guilty' (at 410).

This is not the only time that Bass signals his distaste for the Soviets' participation in the proceedings – sometimes more vehemently even than George 'long telegram' Kennan himself, who makes cameo appearances in the book as a critic of the trial. On this occasion, however, Vasiliev happened to have the Tokyo Charter's Article 1 on his side, which, as he was reminding Webb, had established the Court 'for the just and prompt trial and punishment of the major criminals of the Far East'.² If the Soviets made no presumption of innocence, then neither did the Charter, which had been authored by the Americans and affirmed by their Western allies.

The book brings to life a familiar cast: the 'exasperated' Webb, the 'indoctrinated' Zaryanov, the 'cerebral' Röling, the 'hapless' Keenan, the 'wily' Comyns Carr, the 'muzzled' Takayanagi, the 'energetic' Blakeney, the 'hard-line' Tojo, the 'devious' Kido and so on. But its main contribution to the English-language literature is to draw on the published correspondence and diary of a figure less familiar to readers outside China: the judge Mei Ruao, nominated by Chiang Kai-shek's Guomindang

government. Though previously inclined towards natural law, he was a staunch defender of the Charter and a stalwart member of the majority while serving in Tokyo. He also bemoaned the Nationalists' failure to unearth better evidence of Japan's atrocious war in China beyond Nanjing; went drinking with the other judges (but had no head for rum and Coke); admired Douglas MacArthur, whom he considered to be 'not only a military genius but also a great politician' (at 181); went to the cinema with the Chinese associate prosecutor Xiang Zhejun; and reported back to Foreign Minister Wang Shijie. (Mei was not the only judge to have *ex parte* communications with the prosecuting powers: the Australian, British, Dutch and Indian judges were at it as well.) By 1949, the writing was on the wall for the Nationalists, and he threw in his lot with the Chinese Communist Party, only to be pilloried by it in later decades as 'rightist' and 'reactionary' for, among other things, his former associations with the Guomindang, MacArthur and the tribunal. He died, unrehabilitated, in 1973.

Although Bass often acknowledges the prosecuting powers' disingenuousness and double standards, he nevertheless offers a largely conventional account of the trial and its context, leaving the core Washington-led liberal-internationalist assumptions of the late 1940s largely unquestioned. According to these, the Allies' war against Japan was, for better or worse, necessary (despite its clear colonial and imperial objectives), and the Japanese defendants were, give or take a few, guilty as charged (despite qualms about the fairness of the proceedings). Because Bass does not attempt to get under the skin of these assumptions, but instead leaves it to the reader to 'draw their own conclusions' (at 13), he cannot offer a truly discriminating appraisal of the quality of the justice dispensed by the tribunal.

Along with these central themes, the orthodox American view is also evident in Bass's portrayal of the leading political actors. Harry Truman, for example, is presented much as he described himself: as a naïf who wrestled with the enormity of the challenges facing him after Roosevelt's death. MacArthur, meanwhile, is styled just as he was at the time – as an egotist and one-time military failure who nevertheless managed to conjure a progressive constitution-led democracy out of the wreckage in Japan. (Bass thus claims that 'Japan, along with West Germany, became an extremely rare success of imposed democracy' [at 22].) Even his main criticism of the proceedings – that the Americans shielded the emperor from prosecution despite his endorsement of wartime policies – is in keeping with contemporaneous sentiments expressed by prominent military and congressional figures in Washington, not to mention several judges in Tokyo.

Bass's preoccupation with American policy, coupled with his uncalibrated condemnation of the Soviet Union's, occasionally blinds him to the drivers of the events that produced the tribunal. When considering, for example, what compelled the Japanese to accept the surrender terms, he assumes that it was American military prowess culminating in the bombing of Hiroshima and Nagasaki that forced their hand. He does not give due consideration to the equally if not more compelling alternatives: that towards the end of the war, Japan's leaders feared a home-grown leftist insurrection

² *Ibid.*, at 1.

by a war-weary population if they decided to fight to the bitter end; and that they were more afraid of surrendering to Soviet control than to American occupation, especially after the Red Army rolled into Manchuria on 9 August 1945. The atom bombs, though a significant factor in the decision to surrender, were thus not necessarily the overriding one: indeed, it has been observed elsewhere that the leaders in Tokyo initially regarded the irradiation of Hiroshima as being not so very different from the incineration of the 60-odd Japanese cities that had already taken place.³

One of the book's undoubted strengths is the emphasis that Bass puts on the fact that the trial was a political event, with national politics shaping almost every aspect of the trial, from the choice of defendants, to the selection of evidence, to the perspectives of the judges. At the same time, though, he forgoes the opportunity to dissect, rather than simply describe, the trial as a legal construct. This has several consequences. For a start, it presents an incomplete picture of the dynamics of power. In wartime, of course, overwhelming force is the prerequisite for the establishment of subsequent court proceedings against enemy leaders: it would have been impossible to mount an Allied trial in Tokyo before the US Navy had destroyed the Imperial Navy in the Pacific and the Red Army had trapped the Kwantung Army in North China. But after the Allies had compelled Japan to surrender, and once the Americans had installed themselves as overlords in Tokyo, the coercive power of the military metamorphosed into the coercive power of international criminal law, which delivered the 28 defendants to the courtroom in Ichigaya.

Without considering this transformation from military to legal compulsion, one cannot give proper weight to the prosecution's construction of the case against the Japanese. The Western Allied powers, who were addressing audiences both at home and abroad, wished to avoid the accusation that they were using the trial to wreak further vengeance on the country that had humiliated them at Pearl Harbor, Singapore and Kalijati and had then ejected them from their Asian and Pacific colonies and spheres of influence. How, then, might they present a plausible version of the conflict that would lead to the conviction of the defendants without drawing attention to inconvenient truths about their own motives? Their task was to find the legal mechanism that would convert their side of the conflict from what it was – the attempt to recapture lost prestige and possessions from an Asian interloper – into a more flattering narrative: a just war conducted by the 'great democracies'⁴ and the 'peace-loving peoples'⁵ against those 'who declared war upon civilisation'.⁶

The vital ingredient in the alchemy that they hoped to achieve was the charge of crimes against peace, which was levelled against all the defendants. This charge was deployed for two reasons. First, it provided a conceptual framework for the trial. By asking 'who started the war?', the prosecuting powers could recast a multi-power conflict over territory into an open-and-shut case against Japan. Second, the aggression charge allowed the prosecutors to selectively target a few dozen high-echelon leaders (civilian as well as military) who had possessed the power to orchestrate wartime

³ A. Cockburn, 'Big Six v Little Boy', *London Review of Books* (16 November 2023), available at <https://www.lrb.co.uk/the-paper/v45/n22/andrew-cockburn/big-six-v-little-boy>.

policies, while leaving the lower-rank perpetrators of war crimes and crimes against humanity to be tried at Yokohama and elsewhere. With these two benefits in mind, the prosecution established a hierarchy of wrongdoing, with crimes against peace foremost and crimes devolving from them in a subsidiary position. This order of priorities was reflected in the prosecution's 10-month presentation, with most of it devoted to crimes against peace, only a few months allocated to the leaders' orchestration or failure to prevent war crimes and no time at all given to their part in crimes against humanity – the Americans having decided to offer information-for-immunity deals to the Japanese responsible for the biological warfare programme in China.

A further problem with writing about the trial without fully addressing the sources of legal authority is that it is harder to assess the fairness of the proceedings. Consider, for example, the inequality of arms between the prosecution and defence. Bass rightly draws attention to the relative lack of time, translators, wages and resources accorded to the defence teams. But because he overlooks the Charter, he cannot show how this inequality was hardwired into the proceedings from the outset. The defence chafed under the yoke of Article 12(b), which induced the tribunal to 'rule out irrelevant issues and statements of any kind whatsoever',⁷ which is why it refused to hear references to antecedents to the war and counter-charges against the Allies. The prosecution, by contrast, were gifted Article 13, which began by stating that the tribunal 'shall not be bound by technical rules of evidence',⁸ which thus allowed the Court to admit material that many national courts would have rejected. As Christmas Humphreys, a member of the British prosecution team, observed at the time: 'The hair of the wig of an Old Bailey Judge would rise in horror if told that a photostat of a newspaper report of an alleged official communiqué' could be admitted as evidence, but 'as these were the rules of the game we played them'.⁹

The subtitle of Bass's book promises 'World War II on Trial' and 'the Making of Modern Asia'. He delivers on the first but not so much on the second. 'The trial', he argues, 'was a simulacrum of the tremendous military and political changes that shaped modern Asia' (at 8). This is not the case. Rather, the tribunal was conceived as a guarantor of the American-led international *status quo* circa 1945–1946 and which, thereafter, held out against the run of events in Asia. It retained the old war-time alliance despite the gathering momentum of the Cold War; it upheld the interests of the colonial powers despite the Asia-Pacific colonies' agitation for independence; and it refused to hear defence arguments that the Japanese were trying to contain the spread of communism (another crucial Asian development), lest invidious comparisons be made with Truman's own containment policy, which was being advanced in Europe while the trial was in progress. The tribunal's contribution to the making of

⁴ Pritchard, *supra* note 1, Transcript, at 385.

⁵ *Ibid.*, Indictment, at 1.

⁶ *Ibid.*, Transcript, at 385.

⁷ *Ibid.*, Charter (26 April 1946), at 5.

⁸ *Ibid.*

⁹ C. Humphreys, *Via Tokyo* (1948), at 84.

modern Asia was therefore insignificant, serving chiefly as testimony to the hubris of the colonial powers and the pitfalls of international criminal justice.

That said, the trial did play a significant role in the construction of modern Japan, albeit not so great a role as is generally assumed. Those defendants who had been convicted but not hanged were temporarily removed from the political scene (although not for long: they were all released by the mid-1950s and a few, including Shigemitsu Mamoru, would re-enter politics shortly after). Furthermore, by criminalizing only a small number of individuals, MacArthur's occupation authorities were able to reorganize Japanese society around precisely the people it had declined to indict: Hirohito, recast as an obliging constitutional monarch, and the heads of the *zaibatsu*, who would take Japan to new industrial heights on the back of MacArthur's next war in Korea. As for the tribunal's legacy, Japan's conservatives have long used it as a negative talisman, denouncing the 'Tokyo trial view of history' – of which, in their eyes, Bass's book would be just the latest manifestation.

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The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN).¹ While all UN member states are parties to the Statute of the International Court of Justice, which is annexed to the UN Charter, its jurisdiction is consent based.² The role of the Court, according to the Charter and its Statute, is to settle disputes between states and provide its opinion on legal questions to organs and agencies of the UN when asked.³ The Court's judgments are not precedents, and Article 59 of its Statute limits the bindingness of its judgments to the parties to a given dispute. Despite this humble textual basis, the Court is much more than a dispute settlement body, and this *Cambridge Companion*, edited by Carlos Espósito and Kate Parlett, demonstrates this masterfully.

The *Companion* is dedicated to the memory of James Crawford. During his illustrious career, Crawford wrote extensively about the Court, was a member of the International Law Commission (ILC), appeared as advocate before the Court on numerous occasions and served as an ICJ judge. For a book that focuses on the role and contribution of the ICJ to the development of international law, and features chapters on the role both the ICJ judge and of advocates before the Court, there could not be a more fitting individual.

¹ Charter of the United Nations (UN Charter) 1945, 1 UNTS 15, Art. 92.

² Statute of the International Court of Justice (ICJ Statute) 1945, 33 UNTS 993, Arts 34–36.

³ *Ibid.*, Arts 38.1; UN Charter, *supra* note 1, Art. 96.