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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

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Dedicated to Laetitia Helene Bergsmo

EDITORS' PREFACE

This is the second volume in the trilogy *Historical Origins of International Criminal Law: Volumes 1–3* ('HOICL'). It picks up where the first volume ended and focuses on Second World War trials that have received less attention. These trials are an important subject for further study due to the large numbers conducted, the variety of actors involved and the fact that not so much is known about some of them. What laws were used? Which national and international authorities were involved? Who did these trials include and exclude in the process? What were their political or social objectives?

These Second World War trials were conducted in different countries and in different working languages. As a result, they are not as accessible as trials whose proceedings were conducted or recorded in English. The records of some have also just been released or made widely available. They therefore very much remain unchartered territory. Volume 2 provides an overview of these varied prosecutions and connects researchers working on wide-ranging trials. Such a mapping exercise aspires to facilitate expert collaboration and the asking of more complex research questions about these trials, such as their correlation, their commonalities and their differences.

Together, the first and second volumes of this trilogy examine trials and proceedings up until the post-Second World War period. The third volume explores more contemporary trials, crimes and legal concepts, as well as thematic lines of inquiry.

A project of this ambition and reach would not be possible without the help we have received from many talented and committed individuals. We would like to thank all authors for their excellent contributions and professionalism. We also thank Assistant Professor ZHANG Binxin (PKU-CILRAP Research Fellow) who played a major role in the final stages of the editing process. Our editorial assistants provided vital help at all stages of the editing and production process: Ryan HONG, XING Yun, CHOONG Xun Ning, Aarshi Tirkey, CHOW Jia Ying, Sangeetha Yogendran, Kristin Xueqin WU and Mark Ortega. We thank Alf Butenschøn Skre for his production expertise. Support was also provided by Tessa Bolton and Nathaniel KHNG. All chapters have been formatted

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Morten Bergsmo, CHEAH Wui Ling, YI Ping

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The Tokyo Military Tribunal: A Show Trial?

Neil Boister*

21.1 Introduction

Show trials of one sort or another are common through history – from the trial and immolation of Jan Hus in Prague for a heresy against Catholicism he never admitted to,[1] through the injustices of the Dreyfus affair in France,[2] to the "telephone justice" meted out to the anti-Putin oligarch Mikhail Khordorovsky in 2010 in Russia.[3] Perhaps those considered most emblematic (they have become a rhetorical device) are the Stalinist trials of the Great Purge of the 1930s,[4] conducted by the likes of the infamous Procurator-General of the Soviet Union, Andrey Vyshinsky, which were followed in the 1950s and 1960s by the post-war Eastern Bloc trials.

This censorious label – "show trial" – has also been applied to international criminal trials. At the Tokyo International Military Tribunal for the Far East (1946–1948) ('Tokyo Tribunal' or 'Tokyo Trial'),[5] it

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1 Thomas A. Fudge, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure*, Oxford University Press, New York, 2013.

2 Piers Paul Reid, *The Dreyfus Affair: The Story of the Most Famous Miscarriage of Justice in French History*, Bloomsbury Publishing, London, 2012.

3 "Russia on Trial", in *The Washington Post*, 8 November 2010.

4 Robert Conquest, *The Great Terror: A Reassessment*, Oxford University Press, New York, 1990; Arkady Vaksberg, *The Prosecutor and the Prey: Vyshinsky and the 1930s Moscow Show Trials*, Weidenfield and Nicolson, London, 1990.

5 International Military Tribunal for the Far East ("IMTFE"), *The United States of America et al. v Araki, Sadao et al.*, ("Araki case"), Judgment, 4 November 1948 (http://www.legal-tools.org/en/doc/28ddbd/). See Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008. The transcripts of the trial are available in R. John Pritchard

initially took the form of self-criticism. Justice Radhabinod Pal famously dissented from the majority judgment, implying that the trial of the wartime Japanese leadership for crimes against peace and war crimes by the victorious Allied powers was a show trial.[6] This chapter asks whether the categorisation of the Tokyo Trial as a show trial is accurate. It approaches this question by first, in part one, trying to identify the broad characteristics of a show trial. Then in part two, by seeking to identify the presence of these characteristics at Tokyo, the chapter examines whether, and if so how, the Tokyo Trial was a show trial.

Why bother? The principal reason for engaging in this re-examination is to explore whether and if so how trials such as that at Tokyo – although arguably tainted – can nevertheless function as the building blocks of international criminal law. This question has become increasingly important given the growing criticism of international criminal law. As the initial euphoria which coalesced around the reinvigoration of international criminal law in the 1990s has faded, the contradictions within international criminal law have begun to be exposed.[7] This has fuelled the growth in questioning of the rationale of international criminal law itself.[8] This chapter is part of that re-examination.

(ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authorised Commentary and Comprehensive Guide*, Edwin Mellen Press, Lewiston, NY, 1998–2005, 124 vols. A selection of the main secondary sources available in English include: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008; Madoka Futumaura, *War Crimes Trials and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, London, 2008; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2, pp. 373–444; Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971; B.V.A. Röling and Antonio Cassesse, *The Tokyo Trials and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1993; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center, Cambridge, MA, 2008.

6 Gerry Simpson, *Law, War and Crime*, Polity Press, London, 2007, p. 108.

7 See, for example, Makau Matua, "Never Again: Questioning the Yugoslavia and Rwanda Tribunals", in *Temple International and Comparative Law Journal*, 1997, vol. 11, pp. 167–88.

8 For two bookends of this criticism see Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, pp.

21.2. The Characteristics of a Show Trial

All criminal trials are show trials in the sense that they are public attempts to reach a just pronouncement, but only certain trials can carry the pejorative use of the label "show trial" comfortably. Commentators have groped for defining characteristics of this more limited case. Two broad characteristics contain most of the other identified characteristics.

21.2.1. The Predictability of the Outcome

For Jeremy Peterson, one of the most commonly identified characteristics of a show trial is that they are defined by the increased probability, indeed inevitability, of the accused's conviction resulting from the planning and control of the trial.[9] The Stalinist pre- and post- war show trials were characterised, for example, by the undeviating adherence to a scripted (pre-programmed) outcome: guilt. Or to put it another way, the focus of a show trial is on the programmed reduction of "risk" in the conduct and outcome of the trial.[10] The "set piece" nature of the trial is developed through executive control of the establishment of the tribunal, appointment of its officers, control of its jurisdiction and oversight of its conduct.

Procedural fairness is commonly identified as essential to a valid trial. Manipulation of the independence of the court, the rules of criminal process and evidence may be engaged in in a show trial to achieve the desired certainty of outcome. Gerry Simpson considers the ideological rather than evidence-based selection of the accused as a mark of a show trial.[11] Peterson elaborates a number of further specific procedural failings of a show trial: the denial to the defendant of the right to tell his or her side of the story constituted by denial of the right to be heard and/or

561–95; Tor Krever, "International Criminal Law: An Ideology Critique", in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, pp. 701–23.

9 Jeremy Peterson, "Unpacking Show Trials: Situating the Trial of Saddam Hussein", in *Harvard International law Journal*, 2007, vol. 48, no. 1, pp. 257, 260.

10 In rarer cases innocence might be the goal. The Leipzig Trials, for example, were characterised by low punishments and a failure to indict most of the original 900 names submitted. See Antonio Cassese, "Reflections on International Criminal Justice", in *Modern Law Review*, 1998, vol. 61, pp. 1, 7; and generally, C. Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality*, Witherby, London, 1921.

11 Simpson, 2007, p. 113, see *supra* note 6.

denial of counsel; insufficient evidentiary rights broken down into the denial of the right to obtain exculpatory evidence, denial of the right to challenge the prosecution's evidence, failure to limit the record to relevant evidence[12] or failure to admit relevant evidence; the role of a party in oversight of the trial; insufficient proof requirements; reduced independence or competence of decision-makers; denial of public access; and lack of appropriate appeal rights.[13] A process that exhibits one or more of these failures will tend towards distortion, and if it passes an indeterminate qualitative threshold will become a "wicked" legal process, perhaps, fundamentally, not legal at all.[14] If the trial is unfair the system becomes incredible and ultimately illegitimate. It undermines the community interest in imposing criminal law and punishment through that authority. A show trial publicly expresses not justice but brute power.[15]

It is not, however, simply the moulding of the process to suit which creates a predictable outcome. The crime charged can also either be created or modified to this end. Another of Peterson's common characteristics of a show trial is the unfairness of the crime of which the defendant is accused. More pungently, Judith Shklar characterises a show trial as the commission of an act for which there is no crime.[16] Indeed, as Mark Findlay points out:

> To debate whether the accused should be before the courts in the first place is to misunderstand the reality of show trials. The state controls the labelling process. It can designate offence categories, construe certain behaviour as criminal, identify and apprehend offenders, and ignore surrounding circumstances which might defuse the representation of criminality.[17]

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12 An elementary failing is failure to reject falsified evidence. The 1922 trial of the Social Revolutionary Party designed by Lenin relied heavily, for example, on the evidence of agents provocateurs. See Conquest, 1990, pp. 34–35, *supra* note 4.

13 Peterson, 2007, pp. 270 ff., see *supra* note 9.

14 See David Dyzenhaus, *Hard Cases in Wicked Legal Systems*, Oxford University Press, Oxford, 2010, p. 1.

15 See Mark Findlay, "Show Trials in China: After Tiananmen Square", in *Journal of Law and Society*, 1989, vol. 16, no. 3, pp. 352–53.

16 Judith N. Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge, MA, 1986, p. 152.

17 Findlay, 1989, p. 34, see *supra* note 15.

He notes that the authority wielding power may concentrate on the due process rights of the accused in order to divert attention from the fact that the substantive crime is legally precarious.[18] The manipulation of the legal system becomes necessary because, as Simpson points out, show trials tend to be *ad hoc* responses to specific events.[19] The crime charged is in effect invented to suit the new political circumstances. Achieving the desired outcome may also necessitate manipulation of the general principles of criminal liability. Show trials may be forced to place a heavy reliance on concepts of substantive collective criminal responsibility, such as conspiracy, in order to impose the desired structure on historical complexity and to reinterpret individual action and states of mind to fit that structure. Exploring this reinterpretation of the past, Simpson argues that show trials tend to erase the distinction between political error and criminal liability and to juridically re-enact historical transformations: "The accused are guilty not for what they have done but for where they happen to stand when the political forces are transformed".[20] Though subjectively innocent, they are objectively guilty.[21]

21.2.2. Exhibition for an External Target Audience

For Peterson, the other significant characteristic of a show trial is the design or the management of the trial, with a focus on external observers beyond the courtroom rather than on justice to the individual.[22] How this manifests itself in a particular case will depend in large part on (i) who is the target audience, and (ii) what the lesson is to be. In a totalitarian society this may have an internal element of indoctrination of the subject population, and an external element of propaganda because the authors of the trial are intent on putting on a "show" for an external audience over which they do not have sufficient control.[23] In the Stalinist show trials, for example, the target audience may well have been in part potential internal critics of his rule as well as external critics of the fairness of his regime.

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18 *Ibid.*

19 *Ibid.*

20 Simpson, 2007, p. 114, see *supra* note 6.

21 *Ibid.*, pp. 123–26, citing Maurice Merleau-Ponty, *The Visible and the Invisible*, Northwestern University Press, Evanston, IL, 1969, p. 202.

22 Peterson, 2007, pp. 270 ff., see *supra* note 9.

23 Hannah Arendt, *The Origins of Totalitarianism*, Shocken, New York, 2004, p. 452.

Observations made about the Stalinist show trials suggest two further features of these teleological demonstrations.

First, they required the acceptance of subjective guilt by the accused, an acceptance based entirely on false confessions extracted by terror.[24] But more than just confession, they also required repentance, or as Robert Conquest puts it "the acceptance of the prosecution's view that the acts confessed to were appalling crimes".[25] Under enormous duress, the accused participated in his or her own fantastic self-denunciation.

This was so fantastic it left the audience guessing as to whether they really were guilty.[26] This led to the second requirement, public subscription to the denunciation of the accused as their enemy. This involved public reinterpretation of the defendant's acceptance of his own guilt and his repentance of these acts into an objective and abominable crime. "I am guilty" had to translate into "we agree that you are guilty of this horrible crime". For George Hodos, the trials had "the aim of personalizing an abstract political enemy", to place that enemy in the dock and "with the aid of a perverted system of justice, to transform abstract political ideological differences into easily intelligible common crimes".[27] The authors of the trial made no effort to use the trial to reinforce a common subscription to the criminal law by the target public. No effort was made to use the trial to establish a community of individuals which invests in that criminal law as a set of legal norms to which their behaviour should conform. To put it in simple Hartian terms, the authors of the trial are uninterested in using the trial to develop legal rules with an "internal aspect" among those not directly aware of what is occurring but rather only commands enforced through fear.[28] In societies where the level of control over individual belief is near total, these commands have an authority that extends far beyond the actual coercive capacity of the state, and thus in a crude sense the community does exist and it does believe that the accused are guilty. This may have been true, for example, of the Stalinist trials of once mighty party functionaries

[24] Conquest, 1990, p. 35, see *supra* note 4.

[25] *Ibid.*, p. 110.

[26] *Ibid.*

[27] George H. Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954*, Praeger, New York, 1987, p. xiii.

[28] H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1994, pp. 82 ff.

whose unmasking was accompanied by popular legitimacy.[29] However, even in such societies show trials function not to create a sense of social pressure to conform and to choose against interest to subscribe to that pressure and internalise that sense of obligation, but rather as a crude exhibition of Hobbesian authoritarianism carried out without concern for why those subject to the law choose to obey (legitimacy) – only that they should (legitimation). The show trial reinforces loyalty, fidelity, not autonomous morality.[30] There is no morality involved. The audience is freed of the necessity of making a moral judgment because of their belief in the utility of the trial in the ongoing revolution.[31]

21.2.3. Fantasies of Crime and Punishment

These characteristics of a show trial are obviously linked; a predictable outcome is essential for a good show, a good show is important not to overexpose the predictability of the outcome. It may be that the more totalitarian the system, the more emphasis on the enforced compliance of the accused and the audience in the show, whereas the more liberal and legalistic the system, the greater the emphasis on using procedural and substantive manipulation to achieve the desired show. Simpson argues that an international criminal trial is only distinguished from a show trial in degree – show trials are fantastic in every sense, parody legal procedure, parrot obviously fabricated evidence, invent crimes to suit, suggest the unlikeliest of conspiracies, none of which is the case in international criminal trials.[32] It does seem clear that all criminal trials are on a scale – the more controlled and "showy", the more apt the pejorative label of "show trial" becomes. Simpson's insight is that there is no clear bright line between show trials and international criminal trials. International criminal trials may only be less predictable in their outcomes, less showy in their execution. Whether a trial crosses this qualitative threshold will depend on a judgment about its design and execution.

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29 Conquest, 1990, pp. 71 ff., see *supra* note 4.

30 Hannah Arendt makes the point that in a totalitarian system one of the goals is to "empty fidelity of any concrete content". See Arendt, 2004, p. 429, *supra* note 23.

31 Vasily Grossman, *Life and Fate*, Vintage, London, 2006, p. 512.

32 Simpson, 2007, p. 130, see *supra* note 6.

21.2.4. The Distinction between Victor's Justice and Show Trials

We should be careful, before analysing the Tokyo Trial, however, not to equate the charge of show trial with criticism about victor's justice.[33] While show trials are predictable and showy in design and execution, the charge of victor's justice is grounded in the fact that it is the victors that try the vanquished. Alejandro Chehtman doubts whether on its own the fact the losers are on trial has any relevance to the legitimacy of the trial.[34] He cites Hersch Lauterpacht in support, who considers the assumption of the role of dispensing justice by victors a political inevitability tempered only by legal fairness, which is also a condition of its effectiveness:

> 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. This is so in particular when, as may be the case at the close of the second World War, the victorious side represents the overwhelming majority of states and when there are few neutral states left capable of ensuring the impartial administration of justice. Circumstances such as these constitute an additional reason why the manner in which the punishment of war criminals takes place should be not a manifestation of victorious power but an act of international justice.[35]

Victorious states have long held a customary right to punish captured war criminals for violations of the international laws of war.[36] Lauterpacht is at pains to distinguish the exercise of this right from something more vindictive:

> There is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognizant. There is even no question of procedural retroactivity by subjecting him to

[33] Conquest, 1990, see *supra* note 4.

[34] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2010, p. 159-160.

[35] Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", in *British Yearbook of International Law*, 1944, vol. 21, p. 59.

[36] *Ibid.*, pp. 61–62.

> a foreign jurisdiction in defiance of established law and principles.[37]

The long dominant criticism that the Tokyo Trial was victor's justice made *inter alia* by Richard Minear seems, in contrast to this dry evocation of the right of a victor to sit in judgment on the international crimes of those it captures, to be a criticism that the trial was more than justice imposed by a victor; it was because of the way it was designed for a predictable and exemplary outcome, an unjust trial, a show trial.[38] The defence counsel Owen Cunningham commented about the Tokyo Trial many years afterwards: "Victor's justice spells vengeance, vindication and paradox".[39]

The prosecution of international crimes by the victors in a conflict also raises the question of whether the victorious state is a judge in its own cause. It is suggested by Chehtman that it is a mistake to test the validity of the trial by the impartiality of the states that initiate the trial – the victors – because the interest of the latter does not in his view render the trial partial.[40] In his view impartiality normally depends on the impartiality of individuals participating in the trial as prosecutors, judges and so forth. In this analysis, the yardstick of partiality is whether the participants in the trial express the partiality of the state and their political masters.

Tu quoque arguments that the victorious state had in the past engaged in the now proscribed activity can be validly avoided if the law has in fact changed in the interim. A more difficult to evade 'clean hands' argument is when victorious states do not prosecute an extant crime but one they made up. The argument that they have no authority to do so because they would not be serving the interest of individuals in enforcing an extant criminal law[41] returns us to an already canvassed characteristic of show trials: the absence of substantive legality.

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37 *Ibid.*, p. 67.

38 *Ibid.*

39 Owen Cunningham, Interview: "Trial of Tojo: Part I", The Tokyo War Crimes Trial, Iowa Oral History Project, Des Moines Public Library (no date).

40 Chehtman, 2010, p. 160, see *supra* note 34.

41 *Ibid.*, p. 163.

21.3. Show Time at Tokyo?

21.3.1. Introduction

It is, as we shall see, at least arguable that the Tokyo Trial was designed to result in a predictable outcome – guilt – and thus to show both the Japanese public and the outside world who were responsible for the war in East and Southeast Asia: Japan and its leaders. However, as we shall see, the Tokyo Trial was neither entirely risk free nor was it an entirely successful exhibition of war guilt. The programmatic and showy aspects of the trial can be explored by examining the trial in greater detail, isolating and contrasting those factors that made for a predictable outcome and an effective exhibition from those that undermined it as a set piece.

21.3.2. Executive Interference

The design of the trial tends to support the show trial thesis because the Tokyo Tribunal was an *ad hoc* court unilaterally legislated into existence by an executive body, for which multinational support was sought as an afterthought. As a matter of international law, the Tokyo Tribunal was a creation of the Proclamation Defining Terms for Japanese Surrender ('Potsdam Declaration') [42] and the Instrument of Surrender.[43] The fact that the Charter of the Tribunal ('Charter') was proclaimed by General MacArthur, Supreme Commander Allied Powers ('SCAP'),[44] rather than by multilateral treaty as in the case of the Nuremberg International Military Tribunal, indicates substantial executive control of the architecture of the trial by the United States. US influence was strongly evident, for example, in the appointment of the US Prosecutor Joseph Keenan as Chief of Counsel and the other Allied prosecutors as

[42] Proclamation Defining Terms for Japanese Surrender, Issued at Potsdam, 26 July 1945 (http://www.legal-tools.org/uploads/tx_ltpdb/POTDAM_PROCLAMATION_RE_JAPANESE_SURRENDER.pdf).

[43] Instrument of Surrender, 2 September 1945 (https://www.legal-tools.org/uploads/tx_ltpdb/Instrument_of_Surrender_Japan_1945_02.pdf).

[44] Special Proclamation of the Supreme Commander of the Allied Powers, C.182, 1 March 1946 (http://www.legal-tools.org/uploads/tx_ltpdb/File%203822-3828.pdf).

associates.[45] There is a great deal of evidence of the heavy hand of the US State War Navy Coordinating Committee ('SWNCC') in its design. As matters progressed, however, some distance emerged between the trial and its principal architect. The establishment of the Tokyo Tribunal was, for example, sanctioned by Allied control through the Far Eastern Commission ('FEC').[46] And on review of the judgment, the US Supreme Court held that the SCAP was an agent of the Allied powers and an international tribunal.[47] The net result was the masking of US power through the sanction of its allies, making it possible to argue that it was an Allied rather than a US show. In the Supreme Court, Justice William O. Douglas dissented that the Tokyo Tribunal was neither free nor independent of US control.[48] Perhaps the balance of influence is best illustrated by its official title: "*The US and Others v. Araki, Sadao, and others*". This may not be sufficient to justify the label show trial; but it does show significant evidence of goal-directed behaviour.

One of Peterson's characteristics of a show trial is the role of a party in oversight of the trial. However, while the direct interference by the SCAP in the trial at its outset also tends to expose the Tokyo Tribunal as a show trial, the members of the Tribunal soon asserted their judicial independence[49] and the President of the Tokyo Tribunal, the Australian Sir William Webb, actively resisted the SCAP's attempt to direct the Tribunal.[50] The selection of the accused was perhaps the most obvious example of an executive attempt to control the trial. Washington's control of who was to be selected was firm at the outset.[51] It has been argued that in selecting certain accused and labelling them "militarists", the US, working in the Nuremberg idiom, was intent on creating a set of

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45 Charter of the International Military Tribunal for the Far East, 26 April 1946 (https://www.legal-tools.org/uploads/tx_ltpdb/CHARTER_OF_THE_INTERNATIONAL_MILITARY_TRIBUNAL_FOR_THE_FAR_EAST_02.pdf).

46 FEC 007/3, 29 March 1946, File no. EA 106/3/22/, Part 1, Archives New Zealand.

47 US Supreme Court, *Hirota v. MacArthur*, Judgment, in *United States Reports*, 1948, vol. 338, p. 198.

48 *Ibid.*, p. 215.

49 Araki case, Transcript, 3 May 1946, p. 21 (http://www.legal-tools.org/en/go-to-database/ltfolder/0_28747/#results), see *supra* note 5.

50 Letter from Judge Northcroft to PM Peter Fraser of NZ, 11 March 1946, File no. EA 106/3/22, Part 1, Archives New Zealand.

51 *Ibid.*, para. 7(d).

politically disposable opponents[52] embodying something greater than themselves: Japan's imperial aspirations in East and Southeast Asia. Selection was initially *de facto* a SWNCC prerogative but the FEC attempted to assert some control. However, once established, it was the executive committee of the prosecution under the British Prosecutor, Arthur Comyns-Carr, that took control of the selection process, instituting the principal criterion for selection as the degree of involvement in crimes against peace.[53] This is an example of how the introduction of unknown and uncontrolled players into the trial tended to have a disruptive effect on the script. US post-surrender policies certainly continued to have influence in limiting selections, but the non-selection of members of the *zaibatsu* (commercial conglomerates)[54] and Japan's bacteriological and chemical warfare programme introduced a cacophony of dissent within the prosecution.[55] Notoriously it was the SWNCC interfering to exclude from selection the Japanese Emperor, Hirohito, for political reasons, a policy which the FEC then sanctioned,[56] which caused most adverse comment.[57] The New Zealand prosecutor noted, for example, that if it were not for reasons of policy he should have faced trial,[58] and public denunciations were made of Hirohito's *de facto* immunity by Webb[59] and the French Judge Henri Bernard[60] in their separate judgments. While the process of selection tended to push the Tokyo Tribunal towards the

52 Simpson, 2007, p. 120, see *supra* note 6.

53 Memorandum from Mr. Comyns-Carr to the Executive Committee: Subject: Selection of Accused, 1 April 1946, Box 1, Folder 4, IMTFE (IPS), Morgan, MSS 93-4, Law Library, University of Virginia.

54 See Arnold Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow, New York, 1987, pp. 85–86.

55 See Tsuneishi Kei-ichi, "Reasons for the Failure to Prosecute Unit 731 and its Significance", in Yuki Tanaka, Tim McCormack and Gerry Simpson, *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, p. 177.

56 Noted in FEC 007/04, 4 April 1946, "Excerpt from the Minutes of the Seventh Meeting of the FEC, 3 April 1946", File no. EA 106/3/22, Part 1, Archives New Zealand.

57 See generally Totani, 2008, p. 43, *supra* note 5.

58 Quilliam to Foss Shanahan, Department of External Affairs, Wellington, 31 October 1947, File no. 106/3/22, Part 6, Archives New Zealand.

59 Araki case, Separate Opinion of the President, 1 November 1948, p. 18 (http://www.legal-tools.org/uploads/tx_ltpdb/JU01-11-a.pdf), see *supra* note 5.

60 Araki case, Dissenting Opinion of the Member for France [Henri Bernard], 12 November 1948, pp. 20–22 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-05-a.pdf), see *supra* note 5.

threshold of show trial, ironically the internal rancour this caused drew it back because it tended to indicate a lack of control of the outcome or the lesson to be taught.

The formalist response of the Majority of the Tribunal ('Majority') which wrote the judgment in reply to challenges to the SCAP's legislative power to establish the crimes in the Charter – they held the "law of the Charter is decisive and binding on the Tribunal"[61] – assisted merely to confirm the predictability of the outcome of the trial. But the dissents of the Indian Judge Pal, Dutch Judge B.V.A. Röling and French Judge Bernard in this regard famously undermined that predictability. Despite significant evidence to the contrary, Pal considered that the intention in Article 5 which spelled out the jurisdiction of the Tokyo Tribunal over specific crimes, including crimes against peace, was not to enact crimes but to leave the question of whether they were crimes to the Tribunal to decide by reference to appropriate law;[62] the Tokyo Tribunal was "judicial", "not a manifestation of power".[63] This abrogation of legislative power from the Allied governments shocked the New Zealand prosecutor R.H. Quilliam into responding in a report to his superiors: "It would appear to be scarcely credible that the Governments of the United Nations have agreed, by undertaking the prosecution, to the Tribunal deciding the question of the responsibility of the war".[64] But the New Zealand Judge Erima Northcroft was less outraged, noting that if this had not been so, "the nations constituting [the Tribunal] would have made plausible the popular criticism that such trials are acts of vengeance or retribution visited by victorious nations upon the vanquished".[65] The simple possibility of questioning the validity of the crimes in the Charter served to undermine the predictability of its outcome.

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61 Araki case, Judgment, 12 November 1948, p. 24 (http://www.legal-tools.org/en/go-to-database/record/28ddbd/), see *supra* note 5.

62 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal], (http://www.legal-tools.org/uploads/tx_ltpdb/JU01-13-a-min_02.pdf), see *supra* note 5.

63 *Ibid.*, p. 36.

64 Brigadier R.H. Quilliam, Report on the Proceedings of the International Military Tribunal of the Far East, File no. EA 106/3/22, Part 7, p. 18, Archives New Zealand.

65 Mr. Justice E.H. Northcroft, Memorandum for the Right Honourable Prime Minister upon the Tokyo Trials 1946–1948, File no. EA 106/3/22, Part 9, p. 14, Archives New Zealand.

21.3.3. Procedural Irregularity

In a speech made prior to his appointment to lead the prosecution at Nuremberg, Justice Robert Jackson advocated the necessity of the independence of a judicial process to be used to respond to the depredations of the Second World War, and warned against the use of "farcical judicial trials" to rationalise the political decision to execute alleged war criminals. If a "good faith trial" was to be relied on, guilt would have to be proven.[66] He continued:

> But there is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumor. Men of our tradition cannot regard any proceeding as a trial that does not honestly search for the facts, bring forward the best sources of proof obtainable, critically examine testimony. But, further, you must put no man on trial if you are not willing to hear everything relevant that he has to say in his defense and to make it possible for him to obtain evidence from others. Nothing more certainly discredits an inquiry than to refuse to hear the accused, even if what he has to say borders upon the immaterial or improbable. Observance of this principle is of course bound to make a trial something of a sounding board for the defense.[67]

For Jackson, the validity of an international criminal process depends on procedural fairness.

Procedural fairness at Tokyo was formally pledged in terms of Article 1 of the Charter, which guaranteed the accused a fair trial. In spite of this, the defence immediately attacked the fairness of the trial because the SCAP through the Charter had "so altered and revised the rules of evidence, procedure and trial as heretofore applied by military tribunals and courts of criminal justice by all civilized nations".[68] Denial of the right to counsel is one of Peterson's characteristics of a show trial and such denial was clearly in evidence at Tokyo. The prosecution, for example, used evidence from lengthy interrogations undertaken without

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66 Robert H. Jackson, "The Rule of Law among Nations", in *American Bar Association Journal*, 1945, vol. 31, p. 290.

67 *Ibid*., p. 292.

68 Araki case, Motion to Dismiss on Behalf of All Defendants, 4 July 1946, p. 3, see *supra* note 5.

the presence of counsel.[69] Although Article 9(c) of the Charter guaranteed the right to counsel at trial, and both Japanese and US counsel were provided, counsel were frequently subject to judicial abuse.[70] Article 9(d) of the Charter established the right to conduct a defence, including the right to examine witnesses and thus to challenge the prosecution's evidence. But in practice, this was limited in various ways. The defence was granted various rights including the right under Article 9(e) to apply for the production of witnesses and documents. Most relevantly however, Article 7 gave the Tokyo Tribunal the power to draft rules for day to day procedure and in terms of Rule 9, the Tribunal gave itself the power to change the rules as it saw fit and in specific cases, which is what it did repeatedly, constantly changing the rules to the defence's disadvantage.[71] Another of Peterson's characteristics of a show trial is a lack of appropriate appeal rights, and this was manifest in the Charter which in terms of Article 17 only provided for review by the SCAP of sentence. When it came to carrying out this duty, it appears that the SCAP may not even have read the Majority judgment[72] before deciding that there was no technical ground justifying change to any sentences, despite some Allied support for mercy,[73] the gift of which was his correct role.[74] Perhaps one of the most glaring procedural irregularities at Tokyo, at least from an adversarial perspective, was the insistence that evidence in mitigation be given before conviction,[75] forcing defence counsel to hypothetically accept conviction.

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69 See Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan*, Macmillan, New York, 1987, pp. 111–12.

70 See John A. Appleman, *Military Tribunals and International Crimes*, Bobbs-Merrill, Indianapolis, 1954, p. 244, who cites a large number of examples.

71 See Lawrence W. Wadsworth, *A Short History of the Tokyo War Crimes Trials, with Special Reference to Some Aspects of Procedure*, Ph.D. Thesis, American University, 1955, p. 163.

72 See Röling and Cassese, 1993, p. 82, *supra* note 5.

73 See Report by the British Representative on the Allie Control Council, Sir A Gascoigne to Mr. A. Bevin, 15 December 1948, no 246, F 17785/48/23, File no. 106/3/22, Part 8, Archives New Zealand.

74 GHQ, Far East Command, Public Information Office, Immediate Release, 24 November, File no. 106/3/22, Part 8, Archives New Zealand.

75 Rule 10 – US v Araki, Sadao, et al: Amendment of the Rules of Procedure by the adoption of Rules 10 and 11, Papers of Sir William Flood Webb, Series 4, Wallet 5, 3DRL/2481, Australian War Memorial.

Insufficient proof requirements are another of Peterson's characteristics of a show trial. Article 13(a) of the Charter provided that the Tokyo Tribunal was not bound by the technical rules of evidence. What tends to support the show trial hypothesis is not the non-technical approach – something common in courts martial – but that this non-technical approach to evidence left the responsibility for verifying evidence and weighing its probative value to a bench drawn from the defendant's enemies.[76] What followed was regular variation of the rules used selectively to permit the prosecution's version to go in, no matter how tenuous and even when based on fourth hand hearsay such as the Saionji-Harada memoirs and the Marquis Kido's diary.[77] At the same time, the Tokyo Tribunal denied admission of defence evidence challenging the prosecution's characterisation of historical events, another of Peterson's characteristics of a show trial. In this way for example, and as pointed to by Pal, the Majority rejected *tu quoque* evidence relating to Allied complicity in crimes against peace such as the Soviet invasion of Finland and of Japan itself in violation of a non-aggression pact.[78] The hearsay rule, opinion rule and best evidence rule were all abused to the end of supporting the prosecution's version of events.[79] The Majority failed to utilise the broad rule of admissibility to permit all relevant evidence to go in. Among many examples, the Tokyo Tribunal allowed the second version of an affidavit by the former ambassador to Japan, Joseph Grew, to go in for the prosecution, but denied as opinion evidence a defence attempt to put in the first version.[80] The failure to admit relevant evidence is one of Peterson's marks of a show trial and that failure certainly occurred at Tokyo. Another of Peterson's marks of a show trial is the failure to limit the record to relevant evidence and this abuse was also on display at Tokyo. The Majority, for example, accepted evidence of violations of Japan's international drug control treaty obligations as a means to aggression in China through its deliberate supply of drugs to the Chinese people.[81]

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[76] Wadsworth, 1955, p. 21, see *supra* note 71.

[77] See Boister and Cryer, 2008 (*Reappraisal*), p. 113, *supra* note 5.

[78] Araki case, Transcript, pp. 21081, 22451, see *supra* note 5.

[79] See Boister and Cryer, 2008 (*Reappraisal*), pp. 105-6, *supra* note 5.

[80] Araki case, Transcript, p. 10208, see *supra* note 5.

[81] See Neil Boister, "Punishing Japan's 'Opium War-Making' in China: The Relationship between Transnational Crime and Aggression at the Tokyo Tribunal", in Yuki Tanaka,

Many of these procedural and evidential irregularities were used to control the evidence ultimately accepted by the Tokyo Tribunal and thus serve to support the thesis that the trial was a show. Yet in spite of this constant intervention to control the evidence, reading the trial as a whole, one can only conclude that this control constantly faltered: disruptive information seeped through the cracks, the defence mounted a strong assault on the legality of many of these actions, and the trial was subject as it proceeded to blasts of harsh criticism. Perhaps most telling was defence counsel Owen Cunningham's devastating attack entitled "The Major Evils of the Tokyo War Crimes Trial", presented while the trial was in progress to the 1948 American Bar Association Meeting[82] where he concluded: "No nation has the right to administer a lower standard of justice to the citizens of another nation than it would require for its own".[83] He was held in contempt by the Tribunal, but the story was out. According to Cunningham, Webb told him personally that although he must reprimand him he thought "it was a great speech".[84]

21.3.4. Unrepresentative and Biased Judges

Perhaps the most important of Peterson's features of a show trial is a lack of judicial independence leading to a predetermined outcome. There is a *prima facie* case against the Tokyo Tribunal in this regard as the judges were all drawn from the victor nations, with no neutral or Japanese judges. This is dramatically reinforced through the selection by some states of judges with a clear bias such as Webb, who had acted for Australia in war crimes investigations,[85] Judge Delfin Jaranilla from the Philippines, who had been a Japanese prisoner and had been subject to brutal treatment,[86] and the replacement US Judge General Myron Cramer,

Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, pp. 324, 329.

82 File no. 106/3/22., Part 8, Archives New Zealand.

83 "The Major Evils of the Tokyo Trials", Paper to the ABA, Seattle Washington, 7 September 1948, recommendation 4, File no. 106/3/22, Part 8, Archives New Zealand.

84 Cunningham, n.d., see *supra* note 39.

85 See, for example, Sir William Flood Webb, "A Report on Japanese Atrocities and Breaches of the Rules of Warfare", 15 March 1944, AWM 226, 5, Australian War Memorial.

86 IMTFE, *The United States of America et al. v. Araki, Sadao et al.*, Paper no. 141, Motions Presented to the Court, 4 June 1946, vol. 1, 3 May 1946–14 October 1946, IMTFE, Tokyo, Northcroft Archive, MacMillan Brown Library, University of Canterbury.

whose daughter had been interned by the Japanese in the Philippines.[87] The attempt to unseat the judges for bias failed because the Tokyo Tribunal decided that only the SCAP had the power to do so.[88] Members of the Majority also showed bias during the trial. As Judge Röling pointed out for example, they found that there was no evidence of aggressive intentions on the part of the Soviet Union against Germany or Japan despite denying the accused the right to prove such aggressive intentions.[89]

The constant to-ing and fro-ing of judges at Tokyo, with some absent for significant parts of defence evidence, also suggested a degree of judicial contempt for the process, and perhaps that its outcome was a foregone conclusion. But other judges were livid at this, and the resulting tensions served to increase the rate of disintegration of judicial consensus.[90] The bench had begun to fall apart almost from the outset of the trial when the defence motions challenging the jurisdiction of the court catalysed Pal and then the other dissenters to depart from the hoped-for consensus.[91] But in a significant way it was the Judge President Webb who, through his clumsy attempts to justify the Allied position in natural law in his draft judgments, did much to fuel this disintegration which evolved through the trial to the final judgment written in secrecy by a majority of seven. This disintegration damages the show trial thesis, because it illustrates the faltering Allied control over the execution of the design.

21.3.5. A Trial of Aggression

The design of the Tokyo Trial was built around the crime of aggression. At Tokyo, much greater importance was placed by the Allied powers on the redefinition of the factual behaviour of invasion of another state as a new legal category – a crime – where certain moral or political explanations were no longer tenable. The Allies pursued the cementing of

87 Cunningham, n.d., see *supra* note 39.

88 Araki case, Proceedings in Chamber, Transcript, vol. 22, p. 22, see *supra* note 5.

89 Araki case, Opinion of the Member for the Netherlands [Mr. Justice Röling], p. 86 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-04-a-min.pdf), see *supra* note 5.

90 See Boister and Cryer, 2008 (*Reappraisal*), p. 96, *supra* note 5.

91 See Röling and Cassese, 1993, p. 29, *supra* note 5.

this element of the Nuremberg idiom [92] relentlessly. One of the foundational conditions of the trial was the presumption of the correctness of the Western view of the political and military context in East and Southeast Asia; not to accept Japanese aggression would have been to open Allied conduct to criticism. But opening the question inevitably led to uncomfortable questions about which side caused the war. One of the markers of justice is the possibility the accused may go free if the crime itself is invalid. Much ink has been spilt on the question of whether aggression was a crime at the time the Japanese acted. There is little point to add to it here other than to say that while the Majority might validly rely on treaties such as the Kellogg-Briand Pact to determine that there was a tortious obligation not to use force in international relations, this did not translate into a criminal obligation on individuals. This lack of legal authority was subject to brutal criticism from Judge Pal who commented that only a lost war was a crime.[93] He noted that due process in the service of an invalid criminal offence – the crime against peace – did not cure the trial of its political nature.

> The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations.[94]

Röling's resort to interpreting crimes against peace as a political measure to effectively eliminate dangerous political opponents is rooted

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92 See Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, pp. 1, 17.

93 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/712ef9/), pp. 128, see *supra* note 5.

94 *Ibid.*, p. 37.

in the same scepticism.[95] Webb shared the view that the SCAP could not legislate international law through the Charter,[96] and this led to his attempts to wrestle a natural law solution to it in his draft opinions and to his (finally successful) argument that the death penalty was inappropriate for a conviction of crimes against peace.[97] These judicial responses reflected the disintegrative tendency introduced into the trial by the legislation of crimes against peace for the specific purpose of excusing Allied behaviour and taking control of former enemies.[98] They left it open for critics of the trial, like defence counsel Takayanagi Kenzo, to make the obvious point that the enduring impression on Japanese minds would be one law for the Allies and another for the Japanese.[99]

Paradoxically, the choice of crimes against peace as the trial's centrepiece by the Allies revealed only that Japan behaved like so many imperial states before it, including many of the Allies. But the most potent *tu quoque* argument raised at Tokyo was that the Allies, as imperial powers, could not try these offences not because they themselves continued to engage in imperial invasion, but because they continued to use force against the inhabitants of those territories which they had invaded and colonised. Pal's critique of what he considered to be an Allied attempt to freeze international relations to permit the continuation of these empires but prevent the emergence of new ones,[100] resonates with Simpson's insight that the accused in show trials are subjectively innocent but objectively guilty. This immobilisation of international relations reinforced the notion that the new position, with the imperial powers holding significant imperial possessions by force but disallowing any new use of force to this end, could not validly be used as a yardstick against which to measure the Japanese leaders' conduct that had been carried out under the old reality. It is striking in this regard that many in the

95 Araki case, Opinion of the Member for the Netherlands [Mr. Justice Röling] (http://www.legal-tools.org/doc/fb16ff/), p. 45-45A, see *supra* note 5.

96 Subject: Notes on Certain Points of Law (I), Memo to: All Judges, 12 June 1946, Papers of William Flood Webb Series 4, Wallet 20, 3DRL/2481, Australian War Memorial, 2-3.

97 Araki case, Separate Opinion of the President, pp. 15-17 (http://www.legal-tools.org/en/go-to-database/record/1db870/), see *supra* note 59.

98 See generally Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 101.

99 Araki case, Transcript, pp. 42283–4, see *supra* note 5.

100 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/712ef9/), p. 112, see *supra* note 5.

prosecution (Chief Prosecutor Keenan in particular) and among those judges more concerned about the tenuous roots of crimes against peace in particular were avowedly naturalist in their thinking.[101] They appear at times to have accepted that in positivist terms the accused may be subjectively innocent but maintained in natural law terms that they were objectively guilty. However, as the arch positivism of the defence was laid out the prosecution tended to become more positivist and the bench split leaving a core of formalists at the centre of the majority (principally Northcroft, Lord Patrick, Edward MacDougall), a number of sympathetic naturalists (Webb, Bernard) and the soft (Röling) and hard positivist dissenter (Pal). The Tokyo Trial may have been designed as a show trial around the validity of crimes against peace, but the division of judicial views on this issue serves to undermine the claim that the execution of the trial was much of a show.

The Tokyo Tribunal's historical investigation of the conduct of Japanese aggression tried to answer the question why the war was begun by Japan by investigating in weighty detail how it was begun. The steps that led to war gave a sense of a growing causal pressure which could be traced to the Japanese high command and political military leadership. This suited legal analysis because of its analytical clarity, but has been decried by historians as essentially a distortion of an incredibly complex picture.[102] The use of crimes against peace did guarantee a very long and increasingly unstable trial. Indeed, it is arguable that no single factor had as negative an impact on the didactic purposes of the trial as its incredible length. As the record grew the Tokyo Trial became bogged down in minutiae of the details of Japanese occupation of China and Southeast Asia, to the point where the audience, both media and public, was bored to death and left, the show began to flop, and the complexities of history began slowly to emerge.

21.3.6. Collective versus Individual Responsibility

Conspiracy, both as an inchoate crime and a form of participation in crimes against peace,[103] was employed at Tokyo as a structural culpability

[101] See Boister and Cryer, 2008 (*Reappraisal*), pp. 271 ff., *supra* note 5.

[102] See, for example, Minear, 1971, pp. 178–80, *supra* note 5.

[103] See, for example, Neil Boister, "The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The

rather than individual culpability device.[104] It was an elaboration of the outcome that drove reliance on crimes against peace – the responsibility of the accused for the actions of Japan as a whole. This allowed the accused to be joined in single trial, and then a theory of the evidence implicating each of them in a grand rolling conspiracy to be put to the Tribunal. Defence counsel Takayanagi likened these progressive conspiracies to those used for the expansion of the British, French, Dutch and Russian empires and the expansion of the United States.[105] Yet various judges dissented on the validity of the inchoate crime of conspiracy (termed the "naked conspiracy" in the judgment) in international law, most prominently Webb.[106] Conspiracy was more broadly accepted as a principle of complicity in the principal offence of planning for and waging war, transforming those who acted into the implied agents of those who shared their aggressive purpose. The Tokyo Tribunal did not, however, insist on a clear conspiratorial purpose to which all alleged conspirators subscribed. Pal commented sarcastically that he thought the theory of a Japanese conspiracy "had been pushed a little too far, perhaps", in order to give it a "place in the Hitler series".[107] The danger of placing too much emphasis on the collective responsibility of a small group of individual leaders is, as Martti Koskenniemi has more generally pointed out, that it may "serve as an alibi for the population at large to relieve itself from responsibility".[108] This danger appears to have been borne out in Japan. The Tokyo Tribunal did not involve a Stalinist condemnation by the Japanese of their own. The difficulty of convincing the Japanese public that they were guilty was exposed by challenges made to this thesis during the trial and it unravelled. This occurred in part because the authors of the trial did not have sufficient control over the public to make them believe in the thesis. The focus of the trial on

Measure of the Crime of Aggression?", in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 425–47.

104 Simpson, 2007, pp. 118–19, see *supra* note 6.

105 Kenzo Takayanagi, *The Tokio Trials and International Law: Answers to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3rd and 4th March 1948*, Yuhikaku, Tokyo, 1948, p. 17.

106 Araki case, Separate Opinion of the President (http://www.legal-tools.org/doc/1db870/), pp. 8–9, see *supra* note 5.

107 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/03dc9b/), p. 693, see *supra* note 5.

108 Koskenniemi, 2002, p. 14, see *supra* note 92.

individuals excused the Japanese public collectively and they in turn excused the individuals concerned. A request for release on clemency grounds for all Class A prisoners noted in 1952 that the Japanese public "rather warmly sympathise" with them.[109] It propagated a view of history which is now accepted, at least in Japan, as one of several legitimate competing interpretations of the past. To some, the accused are martyrs and their trial sealed their martyrdom.

21.3.7. Common Criminality

It was one of the intentions of the trial to take key Japanese political actors and depoliticise them in order to make them fit a structure which reduced them to common criminals – conspirators, murderers, drug traffickers. This responded to the need to banish them from Japanese political life because they were politically dangerous to the new configuration of political forces evolving in East Asia. One rather peculiar consequence of this was that instead of trying the accused for crimes against humanity, as set out in the Charter, those charges were dropped and the accused were charged with murder on the heavily naturalist theory that killing in an illegal war is unjustified.[110] By judgment, however, these counts were, probably because of judicial scepticism about them, simply rolled into the judgment about crimes against peace.[111] Once again, the judiciary had both interfered with and accepted the prosecutorial design.

21.3.8. The Tokyo Trial: A "B Movie"?

Identifying the trial's audience and achieving the desired effect on them are critical to the exhibitionary element of a show trial. The intrusion of cameras into the courtroom was originally feared because of the media's power to perturb the outcomes of trials.[112] But the possibility of reaching a far larger audience was too tempting; Nuremberg had already broken

[109] Decision on the Recommendation on Release by Clemency of Class A War Criminals, 20 October 1952, By Shirane, Matsusuke, Chairman of the National Offenders' Prevention and Rehabilitation Commission, File no. EA 106/3/22, Part 11, Archives New Zealand.

[110] Araki case, Counts 39–43, 45–52 of the Indictment (https://www.legal-tools.org/uploads/tx_ltpdb/INDICTMENT_01.pdf).

[111] Araki case, Judgment, 48452-3, see *supra* note 5.

[112] Christian Delage, *Caught on Camera: Film in the Courtroom from the Nuremberg Trials to the Trials of the Khmer Rouge*, University of Pennsylvania Press, Philadelphia, 2014, pp. 177–78.

the ice, and Tokyo was designed for maximum media exposure. The trial took place in the former Army Ministry buildings in a courtroom of over one thousand seats of which 660 were on an overlooking visitor's gallery. To ensure the newsreel cameras had a clear view, huge Klieg lights, arc lamps used for film-making, were installed, giving the courtroom the appearance of a film set and making it unbearably hot.[113] The theatrical atmosphere was not lost on observers; Judge Northcroft described it as "derogatory of the dignity of the court'"[114]

In result, the audience became a participant in the longer-term process. At Nuremberg, lights were installed above the defendants by the acclaimed feature film director John Ford to reveal the defendant's facial expressions, and a similar practice appears to have been pursued at Tokyo. The filming of the trial at Tokyo was done to highlight the role of individuals in the engineering of Japan's wars of aggression and to expose their excuses as spurious. At Tokyo the audience was both the Japanese public, who would recognise in the individuals on trial their own responsibility, and the global public, who would guarantee what was being narrated would never happen again. The ultimate goal was to cultivate global solidarity through the prosecution of the novel crimes against peace. But in reality, it exposed a shoddy prosecution, judicial partiality, and the trial as long and boring.

Newsreel footage of the trial reveals that by its end, the accused appeared to have accepted that they too had a part to play in the show. When called forward one by one to be convicted these often very frail old men, did so with great dignity, and when they received their penalty – for seven, death – they bowed very formally and retired with grace – the show over. Even if this was not in fact the case, the filming of the trial made it appear so. Yet the filming failed to fulfil the desired function of extending the narrative of condemnation of aggression into the future. Instead what ensued in the post-trial period was a "war" of the films, in which the US newsreels were archived and supplanted by films made from very different national perspectives in Japan[115] and in China.[116]

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[113] Brackman, 1987, p. 152, see *supra* note 54.

[114] See Letter from Judge Northcroft to AD McIntosh, Secretary for External Affairs, Wellington, 2 July 1946, File no. EA 106/3/22, Part 3, Archives New Zealand.

[115] See, for example, Masaki Kobayashi's *The Tokyo War Crimes Trial* (1983) (film) and Shunya Ito's *Pride* (1998) (film).

21.4. Allied Players in a Tainted Trial

If the criticism of Tokyo as a show trial bites, why then were so many Allied serviceman content to work in this *ad hoc* judicial institution without qualms about its ultimate *ratio*? It is difficult to accept that they were committed without qualms to the Allied cause or following orders as Vyshinsky-like automatons, ready and willing to do their masters' bidding. The emphasis on procedural rather than substantive legality explains why numerous Allied personnel could feel comfortable with the outcome. They had only to ensure the trial was conducted correctly. The trial was very much a legal undertaking where a great deal of effort was made to establish or deny the material and mental elements of the accused's individual guilt, to develop or unsettle the meanings of fundamental principles of international criminal liability, and to follow or change rules of evidence and procedure, and to justify or prevent conviction and punishment. It was this contest over legality which to some extent loosened the controlling political grip of the Allies, and thus rescued the trial from total legal oblivion. However, while the judges and the prosecutors could labour at being disinterested in the substance of the rules then being applied, the trial itself transformed them into historians who worked every day to reinterpret history. And for many, it appears that as their knowledge of the situation grew, their faith in the project withered: judges like Röling, the more they became acculturated to the "enemy", the less convinced they became of the validity of many of the premises of the trial. When very late in the trial, the obviously almost entirely disenchanted Judge Northcroft, Lord Patrick and Judge MacDougall – the core judges of the Majority – all asked their separate governments if they might resign rather than be party to a disintegrating legal precedent, they were told to do their duty.[117] Judge Pal, by contrast, attempted to "rupture" the trial, to expose the system on which it rested by attacking it. But his was not a Jacques Vergès-style frontal and sustained attack on the foundations of the trial,[118] he ruptured the bench internally

[116] See for example, Gao Qunshu's *Dōngjīng Shěnpàn* (2006) (film).

[117] See Ann Trotter, "Justice Northcroft", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, pp. 81, 88.

[118] Described in depth by Koskenniemi, 2002, p. 26, see *supra* note 92.

during the course of the trial and then the legacy of the trial *ex post facto* through an unread judgment delivered at its end.

21.5. A Bad Trial for Good Ends?

Both Shklar and Mark Osiel argue that show trials for educative purposes are morally defensible if they serve liberal ends and promote the rule of law.[119] The Tokyo Trial might thus be justified as an early step in the global politics of resistance to the use of force by states and thus as a legitimate show trial. But this is hindsight. The noble motive of general suppression of the use of force is an attempt to appropriate the past by modern peace advocates who are still some way from succeeding in doing so.[120] The trial is open to the criticism that it was used for instrumental purposes to vindicate the victor's position not justice, and thus does not possess Hannah Arendt's necessary condition for a trial.[121] Does this mean it has passed the threshold and is a show trial?

A counterview is that the Tokyo Trial was not a success as a show trial. As the monolithic goals of the trial slowly disintegrated under the weight of its own assumptions, some justice and some historical accuracy emerged. The trial was premised on the legality of crimes against peace and this placed irresistible pressure on the judges to manipulate procedural and evidential rules to ensure the trial did not completely disintegrate. Ironically, the very fact that the trial permitted this debate indicates that its authors did not have it under sufficient control and immanent within its design was the danger of moral and legal confusion. The off-message voices from within the trial are those we hear most loudly today. And paradoxically the disintegrative tendencies from a show trial perspective, i.e. those tendencies that tended to undermine the predictability of the trial's conclusion and its role as an exhibition, are integrative tendencies when it comes to the validity of the trial as a legal process.

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[119] Shklar, 1986, p. 145, see *supra* note 16; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, New Jersey, 1997, p. 65.

[120] The author is among them. See Neil Boister, "New Zealand and the 'Supreme International Crime': Vengeance or Hypocrisy?", in *New Zealand Yearbook of International Law 2008*, International Law Group, Christchurch, 2010, pp. 137–54.

[121] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking, New York, 1963, p. 232.

21.6. Fractured Foundations

The Tokyo Trial's ruptures revealed the underlying operations of the prevailing global order. The notion that Japan had broken with civilisation, popular with both prosecution and bench, suggested that civilisation was the prevailing order. The trial's greatest failure was its attempt to disguise the fact that the prevailing order itself had produced the armed conflicts in East and Southeast Asia. But the trial revealed the real nature of international society; not built on clear normative principles of right and wrong, but on power. Unsurprisingly, those tensions still prevail. Tokyo did not put to rest the events of the 15-year war. It is not certain that trials of this kind can ever bring on the sleep of history – but they can serve to expose the violence at the heart of much of international legal order and undermine the legitimacy of that order. That is, perhaps, why international criminal trials – particularly of crimes against peace – are so risky, and a poor subject for a good show.

Whether a trial for the crime of aggression under the International Criminal Court Statute will be able to break from this rather dubious historical foundation is an open question. Koskenniemi suggests implicitly that to do so it would have to be conducted in a way that involves a willingness to actively interact with the past and be open to all truth no matter how uncomfortable, including truths about one's own society and its role and implication in events.[122] What this episode in the history of international criminal law teaches is that the crime of aggression will have to escape the symbolic trap of being used for the attribution of blame by one side on the other if it is to be valid. To begin on the presumption of moral and political rectitude, and to try to show this to the Japanese and the rest of the world, as was done at Tokyo, will lead inevitably to failure and the birth and reinforcement of a countervailing truth which the trial will actually fuel.

[122] Koskenniemi, 2002, p. 34, see *supra* note 92.

22

International Military Tribunals at Tokyo, 1946–1949: Individual Responsibility for War Crimes

Yuma Totani*

22.1. Introduction

About half a year after the establishment of the International Military Tribunal in Nuremberg, the Allied Powers represented by 11 nations set up another one in Tokyo (the 'Tokyo Tribunal' or the 'Tribunal') in order to prosecute Far Eastern major war criminals. The joint trial of 28 wartime leaders of Japan with Tōjō Hideki as chief accused – later reduced to a total of 25 accused – took place between 29 April 1946 and 12 November 1948 (the 'Tokyo Trial'). All but one were found guilty of crimes against peace, and ten, including the one acquitted of crimes against peace, were found guilty of war crimes. Seven of the ten who were convicted of war crimes were sentenced to death by hanging while the rest received life in prison (with two exceptions, who received relatively lenient sentences of seven and twenty years). The seven death sentences were carried out on 23 December 1948.

This particular international criminal proceeding has attracted considerable attention of late, especially among international law scholars with the view to determine its relevance to present-day international criminal trials such as the ones held at The Hague. What has come under far less scrutiny, but by no means less important, is the fact that the Allied authorities established in Tokyo in October 1948 two additional international military tribunals in order to proceed with further cases involving major Japanese war criminals. Each tribunal received evidence of war crimes only, and the accused was limited to one per case: Lieutenant General Tamura Hiroshi (19 October 1948–23 February 1949) and Admiral Toyoda Soemu (19 October 1948–9 September 1949).[1]

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While much smaller in scope than the concurrent international proceedings held at Nuremberg, the Tamura Trial and the Toyoda Trial served as crucial capstone proceedings to bring to completion the trials of major war criminals still in Allied custody. This chapter will shed light on these two trials and compare the prosecutorial efforts with the one at the Tokyo Trial. The goal of the chapter is to assess the cumulative findings of the three tribunals on issues of individual responsibility of highest-ranking Japanese government officials and military commanders for war crimes. For the sake of clarity, the discussion that follows will analyse the three cases separately while highlighting commonalities and differences on points of law as well as fact.

22.2. The Tokyo Trial

The accused in Tokyo jointly faced three counts of war crimes. They were namely participation in a common plan or conspiracy to commit war crimes (count 53); orders, authorisation and permission to the members of the Japanese armed forces, the government, prisoner of war ('POW') camp administration and police organisations "frequently and habitually to commit the breaches of the Laws and Customs of War" (count 54); and deliberate and reckless disregard of one's "legal duty to take adequate steps to secure the observance and prevent breaches" of international conventions, assurances and the laws and customs of war (count 55).[2] Of these three counts, the Tokyo Tribunal threw out the first one on the ground that the Charter of the Tribunal "did not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against

the Pacific Region: Allied War Crimes Prosecutions, 1945-1952 (Cambridge University Press, Cambridge, forthcoming 2015).

[1] For the circumstances that led to the establishment of two additional international military tribunals at Tokyo, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center, Cambridge, MA, 2008, chap. 3.

[2] "Indictment", in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, pp. 32–33. Counts 53–55 subsumed the charges of crimes against humanity, too, but no actual case of crimes against humanity was made at the Tokyo Trial. This was due to the opinion of the International Prosecution Section (the prosecuting agency at the Tokyo Trial) prior to the start of the trial that "actually this Section has no cases falling only under Class C [crimes against humanity]". "Minutes of Fourteenth Meeting of Executive Committee" (April 5, 1946), MSS 78-3, Box 2, Tavenner Papers, Arthur J. Morris Law Library, University of Virginia.

peace".[3] The findings of the Tokyo Tribunal concerning war crimes were therefore limited to counts 54 and 55.

Having thus charged that the Japanese accused ordered, authorised and permitted the commission of war crimes under count 54, and that they deliberately and recklessly disregarded their legal duty to ensure Japan's observance of the laws and customs of war under count 55, the International Prosecution Section appears to have had difficulties securing affirmative evidence to substantiate either allegation. Part of the problem was the policy constraint stemming from the inter-Allied decision at the highest level, made before the start of the trial. The Tokyo Tribunal was designed to serve as a venue to try major war criminals *principally* for crimes against peace, and *secondarily* for charges related to wartime atrocities.[4] In practical terms, the high-level policy decision compelled the International Prosecution Section 1) to prioritise evidence collection relative to crimes against peace but not necessarily war crimes; 2) to grapple with chronic shortage of investigation staff and resources insofar as war crimes were concerned; and 3) to shorten the presentation of evidence concerning war crimes to help expedite the court proceedings. To complicate the matter, the members of the central government of Japan and the Japanese Army and Navy units in theatres of war at the war's end had made concerted efforts to destroy physical and documentary evidence of wartime atrocities, prior to the arrival of Allied war crimes investigators.[5] These obstacles undercut the ability of the prosecuting agency to secure in a timely manner conclusive evidence of individual accused's criminal liability for war crimes. In those circumstances, the prosecuting agency had little choice but to rely mainly on circumstantial evidence to substantiate the charges of war crimes.

The general method of proof that guided the prosecution's work, as agreed during the pre-trial phase, was to focus on presenting "a picture of the widespread area of these actions [acts in violation of laws and customs of war]". Such evidence would make it possible for the Tokyo Tribunal to infer that "they couldn't have come about spontaneously but must have

[3] "Majority Judgment", in Boister and Cryer, 2008, p. 85, see *supra* note 2.

[4] For more information regarding the Allied prosecutorial priority at the Tokyo Trial, see Totani, 2008, chap. 1, *supra* note 1.

[5] The Japanese organised effort in the wake of surrender to conceal evidence of war crimes is discussed in the Tokyo Tribunal's judgment. "Majority Judgment", in Boister and Cryer, 2008, p. 593, see *supra* note 2.

been the result of *some common plan*". Evidence of widespread war crimes aside, the prosecution would also present proof of "protests made [by the Allied Governments and Protecting Powers] directly to the people at the top".[6] These two types of proof together would show not only that the Japanese commission of war crimes was widespread but also that the highly-positioned Japanese in the central government were formally and repeatedly put on notice by the outside Powers about their occurrence, and yet stopped short of taking effective steps to address the problem. The prosecution could argue on the basis of such evidence that instances of atrocity were "not merely a series of independent crimes but *one major war crime*".[7] The lead Australian prosecutor, Alan J. Mansfield, let it be known to the Tokyo Tribunal the prosecution's method of proof while in the courtroom. During the opening statement for the prosecution's phase on war crimes, he made the following remark:

> This similarity of treatment throughout the territories occupied by the Japanese forces will lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders and soldiers, but of the *general policy of the Japanese forces and of the Japanese Government*.[8]

In other words, the prosecution would document recurrence of similarly patterned war crimes in broad areas of Japanese-occupied territories. Such documentation, in turn, would enable the Tokyo Tribunal to infer policy dimensions in the occurrence of war crimes.

Lieutenant Colonel Thomas F. Mornane – the Australian assistant prosecutor who filled in Mansfield's position after the latter's departure in early 1947 – recapitulated during the summation the argument previously

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6 "Minutes of the Associate Prosecutors' Meeting (March 2, 1946)", in Awaya Kentarō, Nagai Hitoshi and Toyoda Masayuki (eds.), *Tōkyō saiban e no michi: kokusai kensatsu kyoku, seisaku kettei kankai bunsho* [The Road to the Tokyo Trial: Records Relative to the International Prosecution Section's Policy Making], Gendai shiryō shuppan, Tokyo, 1999 (emphasis added).

7 *Ibid*. (emphasis added).

8 "Trial Transcripts" (transcripts of court proceedings at the Tokyo Trial), R12861 (emphasis added). The entire transcripts of the court proceedings of the Tokyo Trial including court exhibits are available online. Visit the digital subfolder titled, "Member Governments, Other National Authorities and Military Tribunals", which appears under the "United Nations War Crimes Commission" digital folder, uploaded on the website of ICC Legal Tools (http://www.legal-tools.org/en/go-to-database/).

made by his Australian colleague. By presenting voluminous evidence "showing a uniform pattern of atrocities and breaches of the laws of war", so he informed the Tokyo Tribunal, the prosecution made the case "that this was part of a *system* of illegal employment, ill-treatment and murder of prisoners of war and civilians for which all the accused in office during the relevant periods are responsible".[9] The prosecution's usage of words such as "plan", "policy" and "system" as if they were interchangeable is somewhat disconcerting. But the bottom line of the prosecution's case would be this: there was sufficient circumstantial evidence to allow an inference that the commission of war crimes was not an aberration but rather an integral part of the Japanese conduct of war and military occupation.

With regard specifically to count 55, the International Prosecution Section went at some length to elucidate on what basis the accused could be considered as having such "legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war. The theoretical grounding in support of count 55 was sought in the international conventions that predated the outbreak of the Pacific War. One of them was the Hague Convention No. 4 Concerning the Laws and Customs of War on Land (18 October 1907). Article 4 of the Convention read:

> Prisoners of War are *in the power of the hostile Government*, but not of the individuals or corps who capture them.[10]

The same principle was articulated in Article 2 of the International Convention Relative to the Treatment of Prisoners of War (27 July 1929).[11] A stipulation to similar effect was also contained in the International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929). Article 26 of the Convention read:

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9 *Ibid*., R40113 (emphasis added).

10 "Indictment", in Boister and Cryer, 2008, p. 57, see *supra* note 2 (emphasis added).

11 Article 2 of the Convention reads as follows: "Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited". Leon Friedman (ed.), *The Law of War: A Documentary History – Volume 1*, Random House, New York, 1972, p. 494.

> The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles, as well as for cases not provided for, *in accordance with the instructions of their respective Governments* and in conformity with the general principles of the present Convention.[12]

Based on these stipulations, the International Prosecution Section argued that a hostile government had the legal duty under international law to ensure its own troops' observance of the laws and customs of war and that the accused at Tokyo – most of whom had held high positions in the wartime government of Japan – had a share of responsibility for their government's failure to discharge its legal duty.

The lead Australian prosecutor Mornane articulated the prosecution's position relative to count 55 in some detail during the summation. He argued that it was "in our submission […] clear that it is the Government as a whole which is primarily responsible for the prevention of breaches of these Laws of War". He then continued:

> This casts in the first place a duty upon every member of the cabinet and their advisors, and every high officer in the chain of command directly concerned with these matters to satisfy himself that the Laws are being obeyed. Ordinarily no doubt this duty [to prevent breaches of laws of war] could be discharged by satisfying himself that proper machinery had been established for the purpose. But when information reaches him which raises a doubt as to whether they are being flagrantly disregarded, or shows plainly that they are, then a much higher duty devolves upon him.[13]

In other words, the responsibility to discharge the legal duty of a hostile government regarding the observance of the laws of war fell on those individuals who served the government at high levels, viz. members of the cabinet, their subordinate officials and military commanders. In normal circumstances, each of these individuals could be considered as having fulfilled his or her duty if "proper machinery" had been set in place to ensure the enforcement of the laws and customs of war. However, these individuals would be required to take on a higher duty

[12] "Indictment", in Boister and Cryer, 2008, p. 58 (emphasis added), see *supra* note 2.

[13] "Trial Transcripts", R40111, see *supra* note 8.

when they received information that the laws and customs of war were possibly being disregarded or that they in fact were.

What exactly would be the "higher duty" of those individuals holding various positions in relation to the government? Starting with the members of the cabinet, Mornane explained that there was

> a clear duty upon every official who knew about the commission of any of these war crimes to use such power as he possessed to put the matter right at once, at least to the extent of bringing the outrages to an immediate stop.[14]

The duty of a cabinet member included the duty to resign, too, "unless effective steps [were] taken to prevent their commission".[15] As regards high-ranking officers in the military chain of command, Mornane did not elaborate much but simply stated that those officers "in charge of armies, or holding responsible staff appointments in armies in areas in which war crimes were committed" took on the responsibility "to take proper steps to prevent their commission or continuance in such areas".[16] By so stating, the prosecution seems to invoke some sort of principle of command responsibility although without explaining its theoretical stance in detail. Mornane also offered no more than a curt remark with respect to the higher duty of high-ranking government officials serving the members of the cabinet in advisory capacities. He singled out the second-tier officials in the Army and Navy Ministries alone – or the "bureau chiefs" of the ministries – seemingly because the two ministries functioned as the agencies in charge of military administration in the Army and Navy occupied territories. He stated that the bureau chiefs of the two ministries assumed the duty "to take whatever steps they can to prevent such crimes being committed".[17]

The prosecution's arguments on counts 54 and 55 had a material impact on the Tokyo Tribunal's thinking, as its final decision articulated two sets of criteria of individual responsibility that partly mirrored them. Yet the Tokyo Tribunal brought in its own interpretations, too, to make the two sets of criteria carry new features that had not been suggested in the prosecution's case. Let us analyse the two separately below.

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14 *Ibid.*, R40112.

15 *Ibid.*

16 *Ibid.*, R40112–13.

17 *Ibid.*, R40113.

With regard, first, to the prosecution's contention on the policy dimension of war crimes, the Tokyo Tribunal concluded that evidence was indisputable as to the broad geographical distribution and recurrence of similarly patterned war crimes. The Tokyo Tribunal went on to infer from such evidence that criminal orders must have been "secretly" issued or that the commission of atrocity was otherwise "willfully permitted". The logic here seems to be that the orders must have been secret because the International Prosecution Section *was unable to produce actual proof of criminal orders*, or that the commission of atrocity must have been wilfully permitted *in the case of no such orders, in fact, having been ever issued*. The pertinent part in the Tokyo Tribunal's judgment (the 'Judgment') read in full as follows:

> During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that *only one conclusion is possible* – the atrocities were *either secretly ordered or willfully permitted* by the Japanese Government or individual members thereof and by the leaders of the armed forces.[18]

What to make of the above ruling? Can one agree that the secret orders and wilful permission were the "only one conclusion" to be reached by the Tokyo Tribunal?

In his path-breaking analysis of the jurisprudence of the Tokyo Trial, David Cohen answers this question in the negative.[19] Secret orders could hardly be construed as the only logical conclusion, he argues, given the absence of proof of orders. What is more, "the whole notion of a 'pattern' is inadequately analyzed by the Judgment" to justify the Tribunal's opinion of secret orders. The Tokyo Tribunal had much explaining to do, too, as to the exact meaning of "*willful permission*". Cohen points out that "'[w]illfully permitting' is not an established theory of liability in the criminal law".[20] The Tokyo Tribunal may nevertheless

[18] "Majority Judgment", in Boister and Cryer, 2008, p. 531 (emphasis added), see *supra* note 2.

[19] David Cohen, "The Jurisprudence of the IMTFE and Its Legacy" (unpublished article). A modified version of this article will be included in David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal: Law, History, Jurisprudence* (Cambridge University Press, forthcoming).

[20] *Ibid*.

justify its ruling of *secret orders* and *wilful permission* by falling back on the controversial decision reached by the US military commission relative to the Trial of General Yamashita Tomoyuki (29 October–7 December 1945).[21] In a separate study of the jurisprudence of post-war war crimes trials, Cohen writes:

> This language repeats almost verbatim the military commission's finding against Yamashita that the evidence introduced by the prosecution showed that the crimes were so extensive and widespread 'that they must have been willfully permitted by the accused, or secretly ordered by the accused'.[22]

If so, the Tokyo Tribunal may have drawn upon the Yamashita precedent in place of the prosecution's theory of liability, possibly because the explanation of widespread war crimes in terms of general war policy failed to convince the judges.

With regards to the criteria of responsibility relative to count 55, the Tokyo Tribunal again followed the prosecution's original argument to some degree but made certain departures. Instead of discussing the legal duty of *ensuring the observance of the laws and customs of war*, the Tribunal concluded that a hostile government had the legal duty to provide "for the care of prisoners of war and civilian internees".[23] It is not entirely clear why the Tribunal should have chosen this particular phrasing in defining the duty of a hostile government, nor is it clear why these two categories of people should be singled out as protected individuals while not mentioning the rest, that is, the non-interned civilian populations in occupied territories.[24] The Tokyo Tribunal possibly believed

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[21] Case No. 21, Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 8 October–7 December 1945, Judgments Delivered on 4 February 1946 ("Yamashita Trial") (http://www.legal-tools.org/en/go-to-database/record/c574e3/). The record of the Yamashita Trial is available as microfilm publication at the National Archives and Record Administration, College Park, Maryland, USA. "Records of Trials of Accused Japanese War Criminals Tried at Manila, Philippines, by a Military Commission Convened by the Commanding General of the United States Army in the Western Pacific, 1945–1947", M1727, Rolls 29–33. This microfilm publication includes the transcripts of court proceedings only; court exhibits are not included.

[22] David Cohen, "Beyond Nuremberg: Individual Responsibility for War Crimes", in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transition: Gettysburg to Bosnia*, Zone Books, New York, 1999, p. 76.

[23] "Majority Judgment", in Boister and Cryer, 2008, p. 82, see *supra* note 2.

[24] I am indebted to David Cohen who alerted me to this particular feature in the Judgment.

that a hostile government took on a heightened level of institutional responsibility to care for POWs and civilian internees and that, therefore, there must be a separate ruling on the issues of responsibility regarding their protection. It is still unclear, however, as to why the Tokyo Tribunal should believe so, if it was indeed the judges' thinking.

The Tokyo Tribunal explained further that the foregoing legal duty of a hostile government consisted of the following two concrete duties: 1) maintenance of the care for POWs and civilian internees, and 2) prevention of mistreatment against them.[25] These two duties must be fulfilled in order for a hostile government to be considered as having discharged its legal duty under international law.

The Tokyo Tribunal then turned to the issues of individual responsibility. The judgment read that the duty to care for POWs and civilian internees was "not a meaningless obligation cast upon a political abstraction".[26] Rather, those individuals who constituted a hostile government must take up the burden of discharging the government's legal duty. Mirroring the prosecution's argument but also making some modifications, the Tokyo Tribunal identified the following four categories of individuals as the ones having a share of responsibility:

1) Members of the government;
2) Military or naval officers in command of formations having prisoners in their possession;
3) Officials in these departments which were concerned with the well-being of prisoners;
4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.[27]

According to the Judgment, those individuals under the four categories above had the responsibility to ensure proper treatment of POWs and civilian internees and prevention of mistreatment "by establishing and securing the continuous and efficient working of a system appropriate for these purposes". None of them would be held liable insofar as the system set in place functioned continuously and efficiently. However, the issues of individual responsibility would arise 1) if they acquired knowledge of

[25] "Majority Judgment", in Boister and Cryer, 2008, p. 83, see *supra* note 2

[26] *Ibid*., p. 82.

[27] *Ibid*., p. 83.

crimes and yet failed to take such steps "as were within their power to prevent the commission of such crimes in the future". Alternatively, they could be held accountable 2) if they were "at fault in having failed to acquire such knowledge".[28] On the latter point, the Tokyo Tribunal made the following explanatory remark:

> If such a person had, or should, *but for negligence or supineness*, have had such knowledge he is not excused for inaction *if his office required or permitted him to take any action to prevent such crimes.*[29]

The above explanation indicates that the Tribunal recognised not only proof of knowledge as a valid ground to convict an accused but also that of negligence. Put differently, members of a hostile government were deemed to have the legal duty not simply to act on the knowledge of atrocity lest they be held criminal liable; they must accept responsibility for the occurrence of atrocity for the reason of negligence.

The Tokyo Tribunal went on to discuss the criteria of responsibility that were applicable to each of the first three categories of persons indicated above. The ones to fall under the first category were the members of the cabinet. The Tokyo Tribunal appeared to consider them as having been vested with uniquely broad authority on account of their service at the highest executive branch of the government. The Judgment thus reads:

> A member of a Cabinet which collectively, as one of the principal organs of the government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crime in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in future, he elects to continue as a member of the Cabinet.[30]

The Tokyo Tribunal maintained that the same principle would apply to practically all members of the cabinet no matter whether their respective departments were "directly concerned with the care of prisoners". In other words, those serving as Education Minister, Finance Minister, Foreign Minister, and so on, shared the same legal duty *on account of their*

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*, pp. 83–84.

membership in the cabinet. A member of the cabinet "may resign", so the Judgment reads, to extricate oneself from responsibility, but one "willingly assumes responsibility for any ill treatment in the future" if one chooses to remain in the cabinet while having knowledge of mistreatment and failing to take such steps to prevent its future occurrence.[31]

The Tokyo Tribunal did not seem to require the same stringent standard of responsibility for those who came under the third category ("officials in these departments which were concerned with the well-being of prisoners"), but there are some ambiguities in the Judgment. The pertinent section reads as follows:

> Department officials having knowledge of ill treatment of prisoners *are not responsible by reason of their failure to resign*; *but if their functions included the administration of the system of protection of prisoners* and if they had or should have had knowledge of crimes and did nothing effective, *to the extent of their powers*, to prevent their occurrence in the future then they are responsible for such future crimes.[32]

In the foregoing paragraph, the Tokyo Tribunal recognised two distinctive types of government officials, namely, those whose "functions included the administration of the system to protect war prisoners" and those without such functions but still were *concerned with the well-being of prisoners* in some ways. The negligence standard presumably applied to the former type of government officials, and possibly the requirement to resign although the Judgment is not clear on this point. The same paragraph contains the qualifier "to the extent of their powers" as if to suggest that the Tokyo Tribunal recognised certain limitations of government officials' authority.

With regards to the second category of persons ("military or naval officers in command of formations having prisoners in their possession"), the Tokyo Tribunal similarly deemed them responsible for proper treatment of those POWs and civilian internees under their control if they "had, or should have had knowledge in advance" that mistreatment was likely to occur. In other words, 1) military commanders had the legal duty to care for war prisoners insofar as they came under their control, and 2)

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31 *Ibid*., p. 84.

32 *Ibid*. (emphasis added).

military commanders were subject to the negligence standard. The Tokyo Tribunal included in this category of persons the Army Minister and the Navy Minister, although the Judgment offers no clear explanations as to why. One can only surmise that the Tokyo Tribunal took into account the evidence of two ministers having formal authority to take control of POW administration in Army and Navy occupied territories.

The Tokyo Tribunal, in this manner, set out in the Judgment theories of liability that grew out of the arguments advanced by the prosecution but that also contained varying degrees of modification based on the Tribunal's own take on points of law. Certain questionable interpretive positions – such as the ruling "secret orders and willful permission" – may put to question their adequacy, but it would be fair to say that the Tokyo Tribunal developed some practical conceptual tools with which to resolve the issues of guilt and innocence of individual accused. A close study of verdicts in the Judgment reveals, however, that the Tokyo Tribunal applied its theories of liability to actual cases inconsistently. To compound the matter, the Tokyo Tribunal would make inculpatory factual findings against individual accused at certain segments of the Judgment, only to disregard or dismiss them when reaching the individual verdicts. The Tokyo Tribunal repeated this type of inconsistency frequently enough to undercut the validity of individual verdicts in several instances.[33] Let us examine some examples of questionable verdicts, especially those that have direct relevance to the Tamura Trial and the Toyoda Trial.

One set of examples that is worthy of attention concerns the Tokyo Tribunal's findings relative to former top officials of the Army Ministry. According to the Judgment, the Military Affairs Bureau in the Army Ministry "retained control of the System set up for enforcement of the Laws of War during the Pacific War".[34] The Military Affairs Bureau exercised control over two POW affairs agencies that were established soon after the outbreak of the Pacific War: the Prisoner of War Information Bureau and the Prisoner of War Administration Section. The former agency was charged with investigation of "internments, removals, release on parole, exchanges, escapes, admissions to hospitals and deaths

[33] I am indebted to David Cohen who alerted me to these features of the Tokyo Tribunal's judgment. Cohen, unpublished article, see *supra* note 19.

[34] "Majority Judgment", in Boister and Cryer, 2008, p. 581, see *supra* note 2.

of prisoners of war" and had the duty "of maintaining records for each prisoner of war and managing the communications and correspondence regarding prisoners of war, and of collecting information pertaining to the condition of prisoner of war".[35] The latter agency was "given authority" to handle all matters pertaining to the management of POWs and civilian internees in the theatre of war. According to the Tokyo Tribunal's findings, the successive directors of the two POW affairs agencies came under control of the chief of the Military Affairs Bureau and they "had no power to take action without the approval of the Chief of the Military Affairs Bureau". All bureau chiefs of the Army Ministry, including the chief of the Military Affairs Bureau, attended bi-weekly conferences where "[m]atters relating to prisoners of war and civilian internees were discussed".[36] The chief of the Military Affairs Bureau, in short, held control over affairs of POWs and received information about the conditions of POW and civilian internment on a regular basis. If so, and in light of the foregoing criteria of responsibility (relative to persons falling under category 3 – "officials in these departments which were concerned with the well-being of prisoners"), the chief of the Military Affairs Bureau could be considered as criminally liable for POW mistreatment. This was not so, however, according to the Judgment.

Two accused, Mutō Akira and Satō Kenryō, successively served as chief of the Military Affairs Bureau (October 1939 to April 1942 and April 1942 to December 1944 respectively).[37] Both were acquitted of POW and civilian mistreatment that occurred during their service as chiefs of the Military Affairs Bureau, *notwithstanding* the Tokyo Tribunal's findings that their office had control over the system of POW administration. Regarding Satō, the Tokyo Tribunal agreed that he "knew of the many protests against the behaviour of Japan's troops, for these protests came to his Bureau and they were discussed at the bi-weekly meetings of Bureau Chiefs in the War [Army] Ministry". But the Tokyo Tribunal acquitted him for the following reason:

> TOJO presided at these meetings and it was he who decided that action or inaction should be taken in regard to the

[35] *Ibid*., p. 580.

[36] *Ibid*., p. 581.

[37] See "Indictment" for biographical information of the accused, in Boister and Cryer, 2008, pp. 67–68, see *supra* note 2.

> protests. SATO, *his subordinate, could not initiate preventive action against the decision of his chief*.[38]

The above passage indicates that the Tokyo Tribunal believed Satō's subordinate position in relation to the Army Minister as constituting a defence. If so, this undercuts the Tribunal's theory of liability discussed earlier. It has been seen that department officials in charge of POW administration *shared* with other members of the government, including the Army Minister, the duty to care for POWs and civilian internees, and that they therefore were criminally liable for the occurrence of POW and civilian mistreatment. The verdict for Satō did not reflect this theory. The verdict for Mutō is even less satisfactory. The Tokyo Tribunal failed to mention in the individual verdict the fact that Mutō had ever served as chief of the Military Affairs Bureau. Consequently, no specific finding of guilt or innocence was made against Mutō on this particular issue.[39]

Another set of examples that help illustrate the Tokyo Tribunal's inconsistency concerns the former high-ranking members of the Navy Ministry. It was established at the Tokyo Trial that administration of POWs and civilian internees was generally the responsibility of the Army Ministry.[40] However, it was also shown that the Navy Ministry was responsible for the care of those enemy nationals who fell in Navy custody. According to the Judgment, the Navy "exercised jurisdiction for administration of occupied areas" such as Borneo, the Celebes, the Moluccas, Timor, and other islands east of a line through Bali and Wake Island. "In those areas occupied by the Navy, the prisoners of war and civilian internees were administered by the Navy Minister and the enforcement of the laws of war in those areas became the responsibility of the Navy, under the directions of SHIMADA and OKA".[41] Vice Admiral Oka Takazumi served as chief of the Navy Affairs Bureau of the Navy Ministry between October 1940 and August 1944, and Admiral Shimada Shigetarō held the position of the Navy Minister between October 1941 and July 1944.[42] Given their many years of service as top officials in the Navy Ministry, given their official duties to care for POWs and civilian

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38 "Majority Judgment", in Boister and Cryer, 2008, p. 617 (emphasis added), see *supra* note 2.

39 *Ibid*., p. 614.

40 *Ibid*., pp. 580–82.

41 *Ibid*., p. 583.

42 See "Indictment" for biographical information of the accused, in Boister and Cryer, 2008, pp. 67–68, *supra* note 2.

internees in Navy custody, and given prevalence of naval atrocities in the Navy controlled areas, one would think that the two accused would be convicted. But that was not the conclusion of the Tokyo Tribunal. Both accused were cleared of all charges of war crimes.

The Tokyo Tribunal explained Oka's acquittal as follows:

> There is *some evidence tending to show that OKA knew or ought to have known* that war crimes were being committed by naval personnel against prisoners of war *with whose welfare his department was concerned* but it falls short of the standard of proof which justifies a conviction in criminal case.[43]

In the verdict above, the Tokyo Tribunal readily recognised that there was 1) some proof of knowledge (or "should have known"), and 2) proof of duty to care for POWs. Nevertheless, the Tokyo Tribunal deemed such proof insufficient to convict him, stating "it falls short of the standard of proof which justifies a conviction in criminal case". It is not at all clear which standard of proof, on this occasion, was being referred to.

The verdict for Shimada on war crimes is equally unsatisfactory. The Tokyo Tribunal had already shown that the Navy Minister (as a person falling under category 2 – "military or naval officers in command of formations having prisoners in their possession") had the legal duty to care for POWs and civilian internees in Navy custody and that he was subject to the negligence standard. The Tokyo Tribunal further took note of the fact that the members of the Japanese naval forces committed atrocities and that the ones responsible for the commission of atrocities "ranged in rank from Admirals downwards". Having made these findings, the Tokyo Tribunal acquitted Shimada of all allegations of war crimes. The pertinent part in the Judgment reads as follows:

> The evidence, however, is insufficient to justify a finding that SHIMADA is responsible for these matters, that he ordered, authorized or permitted the commission of war crimes, or that he knew they were being committed and failed to take adequate steps to prevent their commission in the future.

[43] "Majority Judgment", in Boister and Cryer, 2008, p. 615 (emphasis added), see *supra* note 2.

> The Tribunal finds SHIMADA not guilty on Counts 54 and 55.[44]

In the verdict above, the Tokyo Tribunal appeared to require proof of criminal orders, authorisation, or permission, *or* proof of knowledge of the occurrence of naval atrocities in order to convict the accused. If the Tokyo Tribunal did mean so, it would conflict with the theory of liability that it had set out elsewhere in the Judgment. It has been seen that required elements to establish individual guilt are: 1) proof of the accused's legal duty to protect POWs and civilian internees; and 2) proof of disregard of duty, knowingly or by negligence. Shimada's case seemingly met the requirements, but the Tokyo Tribunal ruled against his conviction.

The acquittals of these four individuals arguably was a setback for the International Prosecution Section, since it amounted to failure to establish the guilt of top Army and Navy officials whom it had argued were responsible for taking proper steps to prevent the occurrence of war crimes in areas under their military control. This particular shortcoming was somewhat mitigated in the cases of high-ranking members of the Imperial Japanese Army. The former Army Minister Tōjō, former Vice Army Minister Kimura Heitarō and some other Army men were found guilty of war crimes. Mutō Akira was among the convicted, although his was in connection with the Rape of Manila during which he served as chief of staff of General Yamashita.[45] In the case of the Imperial Japanese Navy, however, not a single officer was found guilty of war crimes at the Tokyo Trial. There were only three Navy men in the group of accused to begin with, and one of them died of illness at an early stage of the court proceedings.[46] The remaining two Navy men were acquitted, as have already been seen.

The Tamura Trial and the Toyoda Trial picked up where the Tokyo Trial left off as if to deal with the unfinished jobs. The Legal Section of the occupation authorities now led the prosecutorial effort. It chose one Army officer (i.e. Tamura) and one Navy officer (i.e. Toyoda) to be

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[44] *Ibid*., pp. 619–20.

[45] *Ibid*., p. 614. The Rape of Manila refers to a series of mass atrocities that were committed by the Japanese ground troops in Manila during the US counter-invasion in February 1945.

[46] Admiral Nagano Osami, formerly chief of the Navy General Staff (April 1941–February 1944), died within the first year of the Tokyo Trial.

brought before the newly established international military tribunals on charges of war crimes. The main victim groups would be POWs and civilian internees, but the prosecution's cases also had broad coverage of war crimes involving non-interned civilian populations in Japanese-occupied territories. The prosecuting agencies at the two trials introduced afresh some of the evidentiary materials already used at the Tokyo Trial as well as new ones, so that they could show that the accused authorised the commission of war crimes or disregarded their duties. Were the prosecuting agencies successful this time? Were they able to convince the judges of the guilt of the accused? Let us turn to the trial records of actual cases.

22.3. The Tamura Trial

Lieutenant General Tamura Hiroshi was the last of three career Army officers who successively served as chief of the Prisoner of War Information Bureau and concurrently chief of the Prisoner of War Administration Section of the Army Ministry. While holding these two positions in the last nine months of the war (1 December 1944 to 2 September 1945), Tamura took on an array of bureaucratic responsibilities pertaining to collection, maintenance and transmission of information concerning POWs, and decision-making powers concerning POW internment, transfer and employment, among other matters.[47] The chief of POW affairs agencies has been shown in the Tokyo Tribunal's judgment as a relatively powerless Army Ministry official in relation to the chief of the Military Affairs Bureau. However, the prosecuting agency at the Tamura Trial brought out a different picture. Voluminous oral and documentary evidence was presented to show that the chief of POW affairs agencies was more than a "yes man" of the chief of the Military Affairs Bureau; he rather had the power to make policy decisions and issued orders in the name of the Army Minister.

[47] The full record of the Tamura Trial ('Tamura Trial') is available as microfilm publication at the National Archives and Records Administration, College Park, Maryland, USA. "Records of the Trial of Accused War Criminal Hiroshi Tamura, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948–1949", M1728, 3 rolls; and "Transcripts from the Case of the United States of America vs. Soemu Toyoda and Hiroshi Tamura, 1946–1948", M1661, 4 rolls. The record of the Tamura Trial will be referred to as the Tamura Trial hereafter.

Tamura faced a single charge of war crimes and 11 specifications. Most of the allegations against him were that of "willful and unlawful disregard and failure to discharge his duties [...] by ordering and permitting" the mistreatment of POWs.[48] This phasing appears to be modelled partly on count 55 of the Tokyo Trial ("deliberately and recklessly *disregarded their legal duty*") but probably more so on the case against Yamashita, where the charge read that the accused "*unlawfully disregarded and failed to discharge his duty* as commander to control the operations of the members of his command, permitting them to commit brutal atrocities".[49] The allegations of disregard of duty aside, Tamura also faced those of the *ordering* of war crimes. The relevant specifications partly read that the accused "did willfully and unlawfully *order, direct, cause, incite, advise, and permit* the mistreatment, abuse, torture and killing of Allied POWs".[50] The inclusion of this type of allegation indicates the readiness of the prosecution to take up the burden of proof not only of Tamura's disregard of duties but also of his authority to issue military orders. The latter could be a difficult task, however, since the two POW affairs agencies on their face fell outside the military chain of command and were not vested with command authority. Regardless, a significant portion of the prosecution's case against the accused focused on substantiating command authority he allegedly assumed and exercised over the course of his service as POW affairs chief.

The main evidence against Tamura was taken orally in the courtroom from his former Army colleagues and subordinate officials. One of the key prosecution witnesses was Sanada Jōichirō.[51] He was a colleague of Tamura between December 1944 and March 1945 during which he served as chief of the Military Affairs Bureau of the Army Ministry. His testimony centred on the theory and practice of the power vested in the chief of POW affairs agencies. To begin with, Sanada accepted as factual that the chief of the Prisoner of War Administration Section was essentially a government functionary who served as "a direct assistant staff officer to the [Army] Minister". In his capacity as "the only advisory staff of the Minister" on matters pertaining to POWs, the chief

48 *Ibid.*, Tamura Trial, Charge Sheet.

49 Yamashita Trial, Indictment (emphasis added), see *supra* note 21.

50 Tamura Trial, Charge Sheet, see *supra* note 47.

51 Tamura Trial, "Testimony of Sanada Joichiro", R87–218, see *supra* note 47.

of the Prisoner of War Administration Section assumed broad authority to manage POW affairs. He pointed out that the section chief took charge of 1) carrying out the inspection of POW camps or having his staff do so; 2) assembling and conveying to persons in charge of POW camps "the intention of the central government" under orders of the Army Minister; and 3) "demand[ing] information from the army commanders" regarding POWs, by virtue of his holding concurrently the position of chief of the Prisoner of War Information Bureau.[52] The chief of the Prisoner of War Administration Section did not have the power to issue orders, Sanada readily confirmed, but then he "frequently gathered the prisoner of war camp commanders for a conference and would transmit the opinions of the War [Army] Minister". Above all, this particular section chief was the only Army Ministry official vested with the power to make decisions on matters of POW management. The power vested in chiefs of other bureaus in the Army Ministry was limited to offering "advices [*sic*] and suggestions" within their respective areas of specialisation.[53]

Sanada testified to the similar effect with regard to Tamura's authority as chief of the Prisoner of War Information Bureau. While agreeing that the bureau chief had no authority to take disciplinary action against an Army unit, say, for failing to provide POW information, Sanada pointed out that the chief of the Prisoner of War Information Bureau concurrently held the office of the chief of the Prisoner of War Administration Section and that *in the latter capacity*, he could "request the War [Army] Minister to take appropriate action". The Army Minister in turn would issue orders on behalf of the bureau chief so as to require the Army unit concerned to provide necessary POW information.[54] In other words, the chief of the Prisoner of War Information Bureau could make his demand binding on Army units by having it conveyed through the Army Minister. Imposing disciplinary action, in this regard, may have fallen within his power so long as it would be carried out through the Army Minister. When cross-examining this witness, the defence countered him by putting the following question: "The truth of the matter is, the POW Information Bureau was charged with the collecting of

[52] Tamura Trial, "Exhibit 56: Statement of Sanada Joichiro", pp. 4-6, R172, see *supra* note 47.

[53] Tamura Trial, "Testimony of Sanada Joichiro", R216, see *supra* note 47.

[54] *Ibid*., R175.

information and had absolutely no authority to do anything else, is that not correct?" This question met flat denial, however, as Sanada replied: "Not as you have stated".[55]

Sugai Toshimaro was formerly adjutant of the Army Ministry between February 1943 and February 1945. He took the witness stand also for the prosecution to offer corroborative oral evidence. He confirmed that the chief of the Prisoner of War Administration Section was uniquely vested with decision-making authority on matters of POW management. The section chief would generally make decisions "after consulting with other bureau chiefs concerned" and issue them in the name of either the Army Minister or the Vice Army Minister.[56] But "[i]f it was within his delegated authority, there were cases where he did not [need to] get the approval of the Minister".[57] What was more, the section chief could "*issue instructions and orders* to the camp commanders after having received the orders from the War [Army] Minister". Upon cross-examination by the defence counsel, Sugai revised his testimony by stating that "the word 'order' is not proper". But he still held that it was a matter of little importance as to whether one should call them as *orders* or *instructions*. "In substance they are the same. Both had to be carried out", he testified.[58]

Lieutenant Colonel Hoda Haruo served as the third-ranking official of the two POW affairs agencies and was a former subordinate of three successive POW affairs chiefs. His court testimony generally fell in line with those offered by witnesses Sanada and Sugai. He recalled that the chief of the Prisoner of War Administration Section had the responsibility to report to the Army Minister and to receive the latter's authorisation on "important matters".[59] But the same did not apply when it came to "minor matters", because in late November 1942 the Army Minister delegated part of his decision-making authority to the chief of the Prisoner of War Administration Section. "Minor matters" included issues such as POW and civilian accommodation, allowances, transfer, employment, punishment, correspondence, relief, and the granting to foreign observers entry into

55 *Ibid*., R204.

56 Tamura Trial, "Exhibit 358: Affidavit of Sugai Toshimaro", p. 1, R953, see *supra* note 47.

57 Tamura Trial, "Testimony of Sugai Toshimaro", R960, see *supra* note 47.

58 *Ibid*., R958 (emphasis added).

59 Tamura Trial, "Testimony of Hoda Haruo", R1075, see *supra* note 47.

internment camps for inspection.[60] The section chief thereafter "made decisions and approval[s] on behalf of the War [Army] Minister". Matters thus decided "were looked upon as the decision and approval and orders of the War [Army] Minister and carrying out of those was required".[61] When the defence suggested that the work of the Prisoner of War Administration Section was "merely a clerical duty", Hoda denied it and reiterated that this office "had to make decisions" after consulting various government and military authorities concerned. Given the actual decision-making power, "you cannot say that it was an unimportant clerical duty".[62]

Hoda had additional information against the accused. Tamura was "very strict on the prisoners of war", which Hoda remembered as standing in contrast with Uemura Mikio and Hamada Hiroshi, two Army generals who served in the same posts successively prior to Tamura's appointment.[63] The two predecessors, in Hoda's opinion, were more attentive than Tamura to the welfare of POWs. For instance, the witness could recall an episode in which Hamada had POW labour withdrawn from the Hidachi Production Company upon receipt of an on-site inspection report – presumably an unfavourable one – submitted by his subordinate official.[64] Hoda did not have any personal knowledge of comparable initiatives having been taken by Tamura. "To my knowledge he never sent a notification forbidding and prohibiting personal punishments as did both UEMURA and HAMADA". What the accused did do, according to this witness, was to promote the meting out of harsh treatment against POWs. Specific instructions given out by Tamura included: that POW confinement cells be made small and allow less sunlight; that complaints and petitions from POWs be rejected; that relief goods be placed under strict control of camp commanders; and that Allied airmen be placed in a special compound at the Ōmori POW camp to prevent them from spreading to other prisoners the latest information about the progress of the war.[65]

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60 Tamura Trial, "Exhibit 16: Notification from the Adjutant to the Chief of the Prisoner of War Control Bureau (November 22, 1942)", R121, see *supra* note 47.

61 Tamura Trial, "Testimony of Hoda Haruo", R1075–76, see *supra* note 47.

62 *Ibid*., R1089.

63 Tamura Trial, "Exhibit 429: Affidavit of Hoda Haruo", p. 6, R1048, see *supra* note 47.

64 *Ibid*., p. 4.

65 *Ibid*., p. 6.

Lieutenant Colonel Emoto Shigeo, former area commandant of the POW camp group in Hokkaidō between May 1944 and April 1945, also took the witness stand for the prosecution. His testimony centred on his personal experience of being directed by the POW affairs agencies in general and by Tamura in person to increase severity in the handling of POWs.[66] Mirroring the oral evidence offered in Hoda's testimony, this witness related in the courtroom a major shift in POW policy since the time Tamura took up the position of chief of the POW affairs agencies. Emoto could recall, for instance, that when Tamura's immediate predecessor, Hamada, visited the Hokkaidō camps in June 1944, Hamada expressed great satisfaction with the exemplary improvement Emoto had brought about to the POW conditions.[67] But once Tamura was in office, Emoto received instructions that his camps should change course. The altered policy was passed to the witness when Hoda visited him in an official capacity. "The Allies are coming closer to Japan and we, the Japanese people, are not going to shake hands with the enemy after the war is over", he is said to have told Emoto. With this understanding in mind, "you must treat prisoners of war much more strictly". When Emoto countered that these instructions conflicted with the policy previously endorsed by Hamada, he was told that "[n]ow the situation had become different".[68]

The new POW affairs chief, Tamura, made a visit to the Hokkaidō camps shortly after Hoda in February 1945. Emoto attested to receiving various orders and instructions personally from Tamura on this occasion. Their gist was that a far more stringent management system must be imposed. Specifics of Tamura's orders included: that the Red Cross supplies be placed under far stricter control; that the guardhouse cells be modified to make them smaller and afford less sunlight; and that all the posted placards indicating the rules and regulations concerning the proper treatment of POWs, in English, Dutch and Japanese, be removed from POW compounds.[69] The placards in question had been prepared and nailed on the walls of POW barracks because of Emoto's decisions in the preceding months, the purpose being to "enable all the prisoners of war,

66 Tamura Trial, "Testimony of Emoto Shigeo", R443–515, see *supra* note 47.

67 Tamura Trial, "Exhibit 134: Interrogation of Emoto Shigeo", p. 4, R444, see *supra* note 47.

68 *Ibid.*, p. 6.

69 *Ibid.*, pp. 8–10.

as well as my subordinates in the various prisoner of war camps, to know how prisoners of war should be treated". Tamura disapproved of the display of these placards, however, and told the witness that they "should be taken down and should not be put up thereafter".[70] When Emoto asked if there had been any policy change, Tamura is said to have replied that he would "require us [the Hokkaidō camp authorities] to treat prisoners of war very much more strictly because Maj. Gen. HAMADA's principles were very much too lenient".[71]

During the extensive cross-examination that ensued, the defence interrogated the witness as to what steps he took to implement the orders that he allegedly received from Tamura. It soon became clear that while the witness did make certain changes as ordered, he did not follow through with all of what Tamura had directed him to do. This revelation led the defence to suggest that notwithstanding the frequent use of the word "order", the witness actually never received any orders because Tamura, after all, was not vested with any command authority. Alternatively, would the witness be prepared to accept that the witness disobeyed them because he took light of the fundamental duty of a soldier, viz. to follow superior orders? Emoto's testimony somewhat faltered when confronted with what amounted to personal attacks, but he ultimately summed up his position as follows:

> So I say not all orders but some orders I couldn't obey. Not because of General TAMURA's order. Some of the orders issued by Northern Army Headquarters [the superior army unit of the Hokkaidō POW camps] I could not obey to the letter because the orders are wrong.[72]

By this reply, Emoto made the case of no fundamental difference between orders coming from Tamura and those from other military superiors. He followed some and disobeyed others on the basis of their merit and not on account of who issued the orders.

How did the defence respond to the prosecution's evidence that pointed to the decision-making authority of the POW affairs chief and, moreover, Tamura's personal initiatives in authorising POW mistreatment? The answer to this question is disappointingly straightforward: the defence

[70] *Ibid*., p. 10.

[71] *Ibid*., p. 12.

[72] Tamura Trial, "Testimony of Emoto Shigeo", R498, see *supra* note 47.

chose to do little. Shortly after the prosecution's case rested and the defence motion for the finding of not guilty was rejected, the defence announced that it would call to the stand the accused Tamura alone. No other witnesses or court exhibits would be presented. This course of action was being taken as "the most expeditious way of proceeding" and, moreover, it "gives the accused the opportunity to testify to the court on the matters on which the court wants clarification and gives the court the opportunity to go into any phase of the case which they may decide to ask the accused about".[73] The defence then called the accused to the stand and asked him some preliminary questions for the limited purpose of establishing the witness's identity. Without further direct examination, neither the prosecution nor the tribunal could bring much out of examining him. The Tamura Trial came to an end in a short while on 23 February 1949. The verdict was that of guilty, although all allegations relative to the ordering of war crimes were dismissed. Tamura was found guilty of disregard of duty only. No written judgment accompanied the verdict to explain the rationale. Tamura was sentenced to eight years' hard labour.[74]

Why did the defence decide to bring the trial to an abrupt end in this manner? While it cannot be independently verified, the Tamura Trial appears to have ended the way it did because of a plea deal of sorts that was reached between the tribunal and the defence. According to a post-trial interview of a Japanese defence lawyer, the law member of the tribunal approached the defence team in late January or early February of 1949, inquiring into the possibility of bringing the trial to an early conclusion.[75] The reason for the request was purely personal: the law member wanted the trial to end soon enough for him to secure an attractive job offer being made by the occupation authorities. The defence agreed to co-operate although on one condition: the penalty to the accused must be as lenient as the one Shigemitsu Mamoru had received at the Tokyo Trial. A former Foreign Minister during part of the Pacific War, Shigemitsu was convicted of war crimes and crimes against peace but received an unusually light sentence of seven years in prison. The tribunal

[73] Tamura Trial, R1269, see *supra* note 47.

[74] *Ibid*., R1382-83.

[75] "Tonai tō kyojū no sensō saiban jukeisha tō ni taisuru mensetsu chōse hōkokusho, No. 48 (Shōwa 37.3.12–8.17), Shōwa 37-nendo" [Report on Interviews and Investigations of Convicted War Criminals etc. with Residence in Tokyo, No. 48 (March 12–August 17, 1962)], Hōmu-Hei-11-4B-23-6575, National Archives of Japan.

of the Tamura Trial appears to have accepted this condition. The plea deal, if there was one indeed, can explain as to why the tribunal dismissed all the evidence pointing to Tamura's assumption and exercising of *de facto* command authority, found him guilty of disregard of duty only, and handed down the light penalty of eight years' hard labour.

The defence decision to decline the opportunity to rebut the prosecution's case in full was an unfortunate one, as it left a certain sense of incompleteness to the Tamura Trial. The tribunal did reach its conclusion on the issues of accused's guilt or innocence, but on ambiguous grounds of individual responsibility. Whatever may have been the tribunal's legal opinion, this case ended without making any marked contribution to advancing our understanding of criminal liability of high-ranking government officials for war crimes.

22.4. The Toyoda Trial

Admiral Toyoda Soemu had served as a highest-ranking officer of the Imperial Japanese Navy in the last phase of the war. He took charge of all Japanese naval operations in the Pacific theatre from before the Battle of Saipan to the Battle of Okinawa as commander-in-chief of the Combined Fleet (3 May 1944–29 May 1945). He concurrently assumed other command posts, albeit briefly, in May 1945,[76] after which he left them to accept new appointment as chief of the Navy General Staff of the Imperial General Headquarters at Tokyo. He continued to direct the Japanese naval operations as Navy chief until the end of hostilities (30 May–2 September 1945). These top positions aside, Toyoda had held for a year the command of the Yokosuka Naval District (May 1943–May 1944), one of four naval districts that provided coastal defence to the Japanese home islands.[77]

[76] Toyoda was appointed to positions of commander-in-chief of the Combined Naval Forces on 25 April 1945, and also commander-in-chief of the Naval Escort Command on 1 May 1945.

[77] The full record of the Toyoda Trial ('Toyoda Trial') is available as a microfilm publication at the National Archives and Records Administration, College Park, Maryland, USA. "Records of the Trial of Accused War Criminal Soemu Toyoda, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948–1949", M1729, 7 rolls; and "Transcripts from the Case of the United States of America vs. Soemu Toyoda and Hiroshi Tamura, 1946–1948", M1661, 4 rolls.

Toyoda was charged with responsibility for an array of atrocities committed by Navy servicemen over the course of his assumption of these multiple top positions in the Navy. The charge sheet read in the main that he "willfully and unlawfully disregard[ed] and fail[ed] to discharge his duty […] by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision", who, in turn, committed atrocities against POWs and civilians in Navy-controlled areas.[78] The prosecution's method of proof was a familiar one: to document broad geographical distribution and recurrence of naval atrocities throughout the theatres of war, so that the tribunal could make an inference about the accused's disregard of duty. Evidence of criminal orders or knowledge of naval atrocities, meanwhile, was conspicuously absent.

The prosecution justified the lack of affirmative evidence of Toyoda's issuance of criminal orders or his knowledge of naval atrocities by arguing that the legal doctrine of command responsibility – which it declared to be the theoretical basis of the case against Toyoda – made no requirement of either proof. "The accused has been charged with neglect of duty", Jesse Deitch, serving as lead prosecutor, explained to the tribunal, and made the following statement to clarify the prosecution's position:

> This is significant for it means that the prosecution need not prove that the accused ordered the commission of any of the incidents which resulted from his neglect of duty, and it means that the prosecution need not specifically prove that the accused knew of the impending commission of any incident before it occurred.[79]

Despite the above understanding about the standard method of proof, the defence "has sought to confuse the tribunal into believing that it is necessary to prove, *either directly or circumstantially*, that the accused had *actual or constructive knowledge* of the commission of an incident". Deitch asserted that all the prosecution needed to show, in fact, was merely the accused "neglected the duty to control his subordinates and the duty to protect prisoners of war".[80] With regard to specifics of the

[78] Toyoda Trial, Charge Sheet, see *supra* note 77.

[79] Toyoda Trial, Prosecution's Summation, R4437, see *supra* note 77.

[80] *Ibid*., R4437 (emphasis added).

accused's duty, the prosecution further held that it was entirely unnecessary to inquire into the matter either. "That the accused had the duty as Commander in Chief and as Chief of the Naval General Staff [Navy General Staff] to control his subordinates [...] *is so elementary that it warrants no discussion*".[81]

While crudely put, the foregoing statements can be understood as reflecting an influential strand of legal thinking about command responsibility in the post-war war crimes trials since the time of the Yamashita Trial.[82] In a nutshell, a military commander could be held liable for war crimes committed by subordinate troops on account of his formal position as a commander. To convict an accused, all the prosecution needed to do would be to show the position held by the accused and to document war crimes committed by the members of subordinate armed forces. Alternatively, the prosecution might have considered applying a different theory of liability, namely, by drawing upon the Tokyo Tribunal's judgment. Required proof in the latter case would be 1) that a military commander had the legal duty to care for prisoners of war and civilian internees under his control, and 2) that he knew or should have known the occurrence of mistreatment. The actual case made against Toyoda does not show, however, that the prosecution put to use the theory of liability arising from the legal opinion of the Tokyo Tribunal.[83]

The prosecution's foregoing argument on required proof came under scathing criticism of the defence, since it appeared as amounting to refusal to prove anything at all. The lead defence lawyer, Ben B. Blakeney, summarised the prosecution's case as follows:

> The prosecution, in their view, need prove nothing. No proof of orders is required, no knowledge of the atrocities […] Not that he neglected his duty by issuing orders contrary to duty, not that he neglected his duty by approving the commission

[81] *Ibid*., R4444 (emphasis added).

[82] I rely on David Cohen, 1999, see *supra* note 22, and the dissenting opinion of Justice Murphy at the US Supreme Court (In *re Yamashita*, 327 U.S. 1 [1946]) for my understanding of the Yamashita precedent.

[83] During its summation, the prosecution did quote pro forma the theories of liability that had been set out in the Tokyo Tribunal's judgment. However, there is no clear indication that the legal opinion of the Tribunal defined the prosecution's case. Toyoda Trial, R4445–47, see *supra* note 77.

> of acts which duty forbids, not that he neglected it by having knowledge of and, knowing, doing nothing to prevent or punish the commission of atrocities.[84]

If so, "What remains?" Blakeney asked. The answer would be this: "Just that he neglected his *duty* by being Commander-in-Chief of the Yokosuka Naval District, Commander-in-Chief of the Combined Fleet, Chief of the Navy General Staff, or occupant of other high office".[85] What sort of *duty* did Toyoda have, then, which he allegedly neglected? The prosecution never gave a satisfactory explanation on this point either. It simply stated that the accused's duty to control subordinate Navy units was "so elementary" as to require no proof. Consequently, the tribunal was left "to guess what power of command Admiral Toyoda possessed".[86]

The defence went on to argue that the precedents on command responsibility to date were "mutually inconsistent and mutually contradictory". If one were to point out a common thread, however, the defence had the following to be said: to convict a person under the doctrine of command responsibility, the prosecution must at minimum take the burden of 1) proof of "orders for or at the least of the possession of knowledge of the atrocities", and 2) proof of "the power of command".[87]

The defence illustrated its position by way of the trials of Yamashita Tomoyuki and of Honma Masaharu, both held before the US Military Commission in Manila in previous years. The pertinent section in the defence summation read as follows:

> General Yamashita was convicted of responsibility for the acts of the troops *under his command* as general officer commanding in the Philippines, [...] acts of which the Tribunal trying him found that he *must have had knowledge*. Lieutenant-General Homma [Honma] was convicted of responsibility for the acts of the troops *under his command* when he occupied the same position, [...] acts of which the report of his trial shows that he *had personal knowledge* and for which he *had given orders*.[88]

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84 Toyoda Trial, Defence Summation, R4639, see *supra* note 77.

85 *Ibid*. (emphasis added).

86 *Ibid*., R4646.

87 *Ibid*., R4640.

88 *Ibid*., R4641 (emphasis added).

In other words, the accused in both cases were convicted on the findings 1) that they *knew or must have known* of atrocities committed by Army servicemen, and 2) that the perpetrators of atrocities fell under the accused's *command*. Blakeney was quick to add that with both trials, "there was sufficient doubt" about knowledge of the accused, so much so that two of the justices at the US Supreme Court produced dissenting opinions when considering *habeas corpus* petitions.[89] But setting aside this particular controversy and limiting the discussion at a moment to purely theoretical issues, the guilty verdicts in both instances required 1) proof of knowledge, and 2) proof of command authority. In the defence's opinion, these were the standards by which the case against Toyoda must be judged.

With the foregoing theoretical considerations in mind, the defence presented during the court proceedings voluminous oral and documentary evidence in rebuttal of the prosecution's case. The defence evidence showed 1) that the accused did not know of the occurrence of documented instances of naval atrocities; 2) that he lacked the means to acquire such knowledge; 3) that the prosecution's evidence in support of the alleged broad geographical distribution and recurrence of naval atrocities was too spotty to warrant the imputing of knowledge to the accused; and 4) that regardless of the prosecution's assertion, this accused was vested with little or no command authority in relation to those Navy servicemen directly responsible for committing atrocities. On the last point, the defence evidence brought to light a unique organisational structure of the Imperial Japanese Navy that limited command authority of Toyoda as operational commander on matters of navy administration.[90]

The defence case was well documented and thoroughly researched, so much so that it had a tremendous impact on the tribunal's thinking. The defence case actually constituted the exact legal and factual grounds on which the tribunal reached its final decision. On 7 September 1949 the tribunal read out in the open court its judgment, pronounced to Toyoda the verdict of not guilty of the charge and of all specifications, and set him free upon the court's adjournment.[91] The last of the three international

[89] *Ibid*. (emphasis added).

[90] For the entirety of the Defence Summation on legal and factual findings, see Toyoda Trial, R4614–4943, *supra* note 77.

[91] Toyoda Trial, R5021, see *supra* note 77.

criminal trials at Tokyo thus came to an end with dramatic victory for the accused. The long-standing effort by the Allied prosecutors to hold a top Japanese Navy man accountable for war crimes, meanwhile, failed once again. No additional Navy high command cases followed thereafter.

The tribunal for the Toyoda Trial itself appeared quite surprised by its own conclusion. "In its initial stages", the judgment read, "this case appeared to be but a simple one involving only direct command responsibility". But the facts revealed by the defence about the unique structure and workings of the Imperial Japanese Navy command taught the tribunal that neither could the accused person's command authority nor his duty to control the subordinate Navy units be taken for granted. The pertinent part in the judgment reads as follows:

> When the enquiry reached into the highest strats [*sic*] of the Japanese Navy, it became all-too-clear that *here was something that had little parallel to the systems of command familiar to Occidentals* and that the applications of such principles of command to the case was impracticable. A study had then to be made of what are, to Western mentalities, amazingly complex and, at times, almost unbelievable principles of technical administration, authority and direction of a war effort. *This Japanese propensity for divided authority and control, for piecemeal responsibility and decision* has added tremendously to the task of this Tribunal in ascertaining the hidden truth.[92]

By the "Japanese propensity for divided authority and control, for piecemeal responsibility and decision", the tribunal was referring to the defence evidence documenting the byzantine structure of the Imperial Japanese Navy's command. It was shown, for instance, that the commander-in-chief of the Combined Fleet did assume "command authority" in relation to subordinate fleet organisations but only insofar as *tactical* aspects of naval operations were concerned. As for matters of naval administration including military discipline, the chief of the Combined Fleet had no authority. The chiefs of constituent fleets that fell under the umbrella of the Combined Fleet *bypassed* the chief of the Combined Fleet and made reports on administrative issues directly to the Navy Minister. The Navy Minister, in turn, exercised command authority

[92] Toyoda Trial, Judgment, R5002, see *supra* note 77.

in relation to individual fleet chiefs, that is, insofar as matters of Navy administration were concerned, including military discipline. The chief of the Combined Fleet, too, was subject to command of the Navy Minister in the area of Navy administration.[93] Some variations of the principle of divided command applied to other posts that Toyoda held during the war. As regards the chief of the Navy General Staff, the defence evidence showed that the Navy chief was strictly the Emperor's advisory organ and that he was vested with no command authority whatsoever. The Navy chief did take charge of planning naval operations and issuing naval orders and directives, but only *in the name of the Emperor* in whom the ultimate power to command rested.[94] All in all, the defence case showed that Toyoda assumed limited kinds of command authority and that he could not be held individually or criminally liable for the documented instances of atrocity.[95]

The tribunal of the Toyoda Trial also followed closely the defence argument when writing out its decision on criteria of responsibility. The tribunal began by briefly referring to the Yamashita Trial and the Honma Trial. It was "not within the province of this Tribunal" to comment on the decisions of the US Supreme Court, so the judgment read, but "[t]heir lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of *their subordinates*, of which actions the commanders *must have had knowledge*".[96] The tribunal thus recapitulated the defence argument, concurring that Yamashita and Honma were convicted essentially on 1) proof of knowledge (or "must have had known") and 2) proof of command authority. The tribunal then segued to setting out its own criteria of responsibility.

Having "carefully studied" the findings made at Yamashita, Honma and other contemporaneous war crimes trials, the tribunal ruled that the required elements to convict a military commander for war crimes would boil down to the following two sets, which are quoted in full. First:

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93 Toyoda Trial, Defence Summation, R4648–52, see *supra* note 77.

94 *Ibid*., R4653–56.

95 Toyoda Trial, For the Tribunal's summary of factual findings, see Judgment, R5010–19, *supra* note 77.

96 *Ibid*., R5005 (emphasis added).

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
2. The ordering of such atrocities.[97]

In the case that proof of orders could not be produced, a military commander may be still held liable for occurrence of war crimes under the second set of criteria of responsibility:

1. As before, that atrocities were actually committed;
2. *Notice of the commission thereof.* This notice may be either:
   a. *Actual*, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter;
   b. *Constructive*. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.
3. *Power of command.* That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.
4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violation[s] of the laws of war.
5. Failure to punish offenders.[98]

There are two notable aspects in the tribunal's foregoing criteria of responsibility. First, the tribunal rejected the prosecution's contention that no proof of knowledge, either actual or constructive, was required to convict an accused under the doctrine of command responsibility. The tribunal instead required proof of knowledge, namely 1) proof that the accused was informed of atrocity or 2) proof that given a great number of offences within his command, "a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of

[97] *Ibid.*

[98] *Ibid.*, R5005–6 (emphasis added).

the existence of an understood and acknowledged routine for their commission". Second, the tribunal similarly rejected the prosecution's contention that the power to command was inherent in any military commander and therefore needed no proof. The tribunal held that, to convict an accused under command responsibility, he must be shown to have had the "power to command" and more specifically, "actual authority over the offenders to issue orders to them not to commit illegal acts, *and* to punish offenders".

The tribunal, in this manner, built on the defence's argument and carefully delineated its positions on command responsibility. In so doing, the tribunal was quite self-conscious about the historical significance of its decision. The Toyoda Trial was "a Trial of Review", the judgment read, where the tribunal analysed the charges, decisions, and evidence of as many as 32 preceding trials. The tribunal expressed satisfaction that its final decision by and large was "not inconsistent with the findings in those cases in so far as they are co-related".[99] This statement points to the tribunal's confidence that its judgment articulated the distillation of legal thinking that grew out of contemporaneous war crimes trials. The validity of this view is open to scholarly scrutiny, but the tribunal for the Toyoda Trial may be credited for articulating clearly its interpretive position concerning the evolving case law literature on command responsibility in the post-Second World War Allied war crimes programme.

22.5. Concluding Remarks

This chapter has explored from a comparative perspective the three international criminal trials that were held in Tokyo in the wake of the Pacific War. The main goal has been to bring to light the two underexplored proceedings and assess how they relate to the Tokyo Trial from the standpoints of both law and fact. In lieu of a conclusion, the findings of this chapter may be summarised into the following three points.

First, it has been shown that while evidentiary materials often overlapped, the three trials brought out contrasting understandings about the distribution of power, authority, and duty in the Japanese government and military organisations. The Tamura Trial, for instance, put to question

[99] *Ibid*., R5004.

the validity of the Judgment of the Tokyo Tribunal about the supposed limited power of the POW affairs chief in relation to the chief of the Military Affairs Bureau in the Army Ministry. The Toyoda Trial, for its part, raised new questions about the culpability of those serving the Navy high command and, more specifically, the adequacy of acquittals at the Tokyo Trial of Oka and Shimada, two top Navy Ministry officials. Second, the three trials generated dissimilar theories of liability about the members of government and military even though they apparently built on shared precedents. The contrast is particularly great between the Tokyo Trial and the Toyoda Trial. The former adopted from the Yamashita Trial the problematic ruling of "secretly ordered or willfully permitted", while the latter referred to the same trial only to come up with its own distinct theory of command responsibility, *which effectively repudiated the validity of the Yamashita decision*. Third and finally, the three trials together may still be considered as landmark cases precisely because of the diversity of the tribunals' decisions. They represent broad-ranging legal thinking that materialised in the minds of the judges at the three historic international trials in this theatre in the wake of the Second World War. Exploring the jurisprudential legacy of these cases – however contradictory they may have been – is key to deepening our understanding of the historical origins of international criminal law and their relevance to international criminal trials of the twenty-first century.

23

Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of his 'Indian' Legal Philosophy

Milinda Banerjee[*]

23.1. Introduction

The objective of this chapter is to explore the perspectives of the Indian (Bengali) judge Radhabinod Pal (1886–1967) on legal philosophy and history and the impact these ideas had on his landmark dissenting Judgment at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') (1946–1948)[1] as well as, more generally, on his later evaluation of this famous war crimes trial and of international criminal law. Earlier historians have noted the markedly anticolonial nature of Pal's Judgment in Tokyo (and some have alleged that the Judgment was too naively pro-Japanese). Indeed, Pal's Judgment is widely noted as a pioneering anticolonial contribution to debates on international criminal law and justice.[2] However, in this context scholars have rarely interrogated

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[1] International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Judgment of The Hon'ble Mr. Justice Pal, Member from India ("Pal Judgment") (https://www.legal-tools.org/en/go-to-database/ltfolder/0_29521/).

[2] For scholarship on Radhabinod Pal and the Tokyo Trial, see, for instance, Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial,* Princeton University Press, Princeton, NJ, 1971; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951,* University of Texas Press, Austin, 1979; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1990/91, vol. 23, pp. 373–444; Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability", in *New Literary History*, 1992, vol. 23, no. 1, pp. 45–67; Ushimura Kei, *Beyond the "Judgment of Civilization": The Intellectual Legacy of the*

Pal's voluminous writings on classical Indian legal philosophy and history (with their extensive inter-textual references to Sanskrit sources)[3] or historically contextualised his perspectives in light of contemporaneous Indian (including significant Bengali-language) debates on sovereignty and associated political theology. I argue that a focus limited to his Tokyo Judgment, to the almost total exclusion of his other juridical writings (both before and after the trial) as well as the broader Indian discursive context, has obscured Pal's remarkably nuanced vision of global justice.

In contrast, by offering a more polyglot reading of Pal, I wish to present some broader arguments about the relationship between anticolonial politics and the emergence of international criminal law, while also presenting arguments demonstrating the contributions that extra-European theoretical perspectives on legal philosophy can make to

Japanese War Crimes Trials, 1946–1949, The International House of Japan, Tokyo, 2003; Ushimura Kei, "Pal's 'Dissentient Judgment' Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion", in *Japan Review*, 2007, vol. 9, pp. 215–24; Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, New York, 2008; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, MA 2009, especially pp. 218–45; Nakajima Takeshi, "Justice Pal (India)", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, pp. 127–46; Ashis Nandy, "Justice Radhabinod Pal and India–Japan Relationship: The Voices of Asian Intellectuals", India-Japan Dialogue, the Japan Foundation Lecture, 2012–13; Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013. I have not been able to consult Japanese-language scholarship on Pal; the review of the scholarly literature throughout this chapter therefore excludes this corpus. There is a significant recent Japanese-language biography on Pal: Nariaki Nakazato, *Paru Hanji: Indo nashonarizumu to Tokyo Saiban*, Iwanami Shoten, Tokyo, 2011; an English translation is due to appear in 2015. I am indebted to Francesco Rosada of Heidelberg University for stimulating discussions on European-Christian understandings of natural law.

[3] In fact, strictly speaking, the term "Sanskrit" cannot be used for many of the ancient Vedic textual passages that Pal cites; this language is often described today as "Vedic Sanskrit". In this chapter Sanskrit is used as shorthand for the language used in the Vedic corpus as well as in later post-Vedic Sanskrit literature. Nandy is the only one who acknowledges the "Indian" legal-philosophical background of Pal, but he analyses Pal in an essentialist and sketchy manner as being the product of a "Hindu" mythic worldview, instead of academically interrogating Pal's writings. Nandy dismisses the latter as "mainly narrations of who said what and when, with a rather pallid attempt to cast the narrative in a social evolutionist frame"; Nandy, 1992, p. 60, see *supra* note 2.

debates on international criminal justice. Taking a cue from Pal's writings, I suggest that concepts of international criminal justice can be refined if dissociated from conceptions of "sovereignty", not only from the sort of sovereignty exercised by states but also from the authority of non-state political communities, of inter-state coalitions or even of fixed legal norms. Since debates on international criminal justice often tend to become polarised between those who uphold the sovereignty claims of states (often non-Western states) and those who champion international "humanitarian" interventions (often under the aegis of Western powers), Pal's critique of both Western and non-Western forms of power structure and sovereignty can help us to transcend this polarisation.

Pal's Tokyo Judgment may be accused of being flawed in many ways. But in his different writings, Pal offered incisive arguments about the relation between caste hierarchy and governance in India, and the analogous manner in which racial and religious-monotheistic oppression have influenced the structuring of Western global governance. I argue that Pal's view on governance thus emanated from a very critical perspective about the dependence of sovereignty on social stratification and hierarchical command. Any conceptualisation of international criminal justice can benefit from such a perspective in attempting to combat Western as well as non-Western forms of exploitation and sovereign violence. Indeed the very dichotomy of "West" and "non-West" gets destabilised when one sees the transnationally connected as well as locally instantiated effects of hierarchical regimes of oppression. Pal's position on global justice emanated from a concern with attacking these connected narratives of power, which he categorised under the overarching term of "sovereignty".

In Pal's view, as the chapter will show, what was needed was not only international criminal justice, but rather a concept of global justice which could transcend the divisions of race and nationality. Impartial justice meted out by an international court of criminal justice was (as he notes in his Tokyo Judgment) a possible option, provided both victor and vanquished nations after a war submitted to this court. Behind Pal's passionate quest for an impartial global justice lay, I argue, a philosophical genealogy rooted in his excavation of ancient Indian concepts and especially that of an overarching cosmic-moral order described in Vedic texts as *rta*. The fundamental tenet of Pal's worldview was this principle of *rta* and its relation to historically flexible laws (Pal

used another Vedic concept, *vrata*, to describe these shifting laws, as argued in the next section).

In contradistinction to some dominant strands in scholarship on Pal's Tokyo Judgment, I suggest that Pal was not a simple positivist who upheld the sovereignty claims of non-European states against the claims of natural law championed in the context of the Tokyo Trial by the US Chief Prosecutor, Joseph B. Keenan (1888–1954), or the Australian President of the IMTFE, William Webb (1887–1972).[4] Pal was not a total opponent of natural law arguments, nor did he altogether discount the possibility of a world in which some form of global justice would supersede the laws of sovereign states. In contrast to earlier scholars who have suggested that Pal was primarily a defender of extra-European sovereignty against colonialism, I suggest that his dissenting Judgment was in the first place an attack on (imperial) sovereignty claims, and only secondarily, a defence of (non-European) sovereignty. It is important to appreciate Pal's ambiguity about sovereignty because it can help us understand better why many Indians who were otherwise very critical of Western-origin concepts of state sovereignty, nevertheless fell back upon the idea of the sovereign postcolonial state as the only possible defence against empire. Anticolonial Indians were often half-hearted champions

[4] For a typical appraisal of Pal as a positivist see, for example, Kopelman, 1990/91, *supra* note 2. Though Kopelman does admit that Pal had broader moral (anticolonial) considerations, she still thinks there was a basic positivistic basis to his legal formulations. Most famously perhaps, Judith N. Shklar has noted that during the Tokyo Trial, Keenan, Webb and (more ambivalently) the French judge Henri Bernard referred to natural law, while Pal attacked the natural law argument. See Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, MA, 1964, pp. 181–90. For more nuanced arguments, see Robert Cryer, "The Doctrinal Foundations of International Criminalization", in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1: *Sources, Subjects and Contents*; Martinus Nijhoff, Leiden, 2008, p. 112; Robert Cryer, "The Philosophy of International Criminal Law", in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham, 2011, pp. 242–43, as well as Boister and Cryer, 2008, pp. 285–91 see *supra* note 2. Cryer admits the presence of a moralistic tone in Pal's Judgment which comes close at times to a naturalistic position; similar arguments can be found in Boister and Cryer, 2008, see *supra* note 2. Sellars, 2013, see *supra* note 2 also emphasises the radical (anti-colonial) ethical content of Pal's arguments. But neither Cryer nor Sellars interrogates Pal's Hindu law writings. In contrast, by examining these writings, I demonstrate Pal's naturalist self-positioning clearly and show how and where he differed from Keenan and Webb. The naturalist stance of these latter two have received scholarly attention in the different books and essays cited in this chapter, and especially in the works of Shklar, Kopelman, Boister and Cryer, and Sellars (see this footnote and *supra* note 2).

of national sovereignty; many of them saw national sovereignty as merely a necessary evil to be embraced in the fight against colonialism because the sovereign state was the only allowed political form in the Western-dominated international system. To suggest that anticolonial activism was only about mimetically replicating the European-origin nation-state model would thus constitute an error in historical understanding even though such a view has often prevailed in scholarship.[5]

Taking a cue from existing scholarship, and through detailed intellectual-historical analyses that go further than earlier research, I will show that one significant Allied position in the Tokyo Trial was to argue that natural law had to be enforced through the sovereignty of the Allied Powers. From this perspective, the enforcement of natural law did not imply a simple abrogation of state sovereignty (through the establishment of superiority of natural law over positive law) but rather the enforcement of one sort of sovereignty (that of the Allied Powers as the mouthpiece of international opinion) against another (that of Japan). Indeed, Keenan wished to gradually convert natural law into positive law in order to provide a basis for international criminal law. Sovereignty was not to be entirely annulled in the process of this conversion, but was to be (partially) displaced to the remit of a supra-state, working on an international political-legal level. In reaction to such a worldview, Pal's championing of the Japanese during the trial was less a simple exculpation of Japanese war crimes and more a strategic championing of the sovereignty of non-European states against the more powerful sovereignty of the victorious Allied Powers legitimating itself in the name of moral order. This chapter therefore also questions whether international criminal law, even when underpinned by natural law arguments, really refutes positive law-oriented sovereignty claims, and whether there is any necessarily clear-cut structural dichotomy between natural law and positive law positions. While existing scholarship on the Tokyo Trial has paid some attention to the legal philosophical debates there, I take conceptual lessons from Pal's Hindu law writings to offer a broader theoretical argument that problematises conventional European-origin binary distinctions between natural and positive law.

[5] For a celebrated account which suggests that non-Europeans by and large wished to replicate Western-origin models of national sovereignty, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, London, 2006 [1983].

As my conclusion, I want to offer some preliminary thoughts about the manner in which the search for international criminal justice should attempt to divorce itself from the naked exercise of sovereign violence and other forms of exploitative power. A study of the Tokyo Trial can sensitise us to the pitfalls of identifying international criminal justice too easily with any particular form of so-called sovereign authority, even if exercised by a league of powers. Justice would thus lie not in the translation and implementation of some fixed norms or laws (natural or positive, and this dichotomy, as I shall show, is to some extent, an artificial one), and even less in the sovereign command of some state or coalition of states. It would have to be envisaged in a more complex manner, through a grappling with myriad everyday power relations, acts of injustice and exclusion, as well as acts of welfare. It has to be conceptualised from below through just acts or judgments that have to be continually negotiated and renegotiated to take into account changing social-historical realities even if a reference to a cosmic juridical order remains on the horizon.

23.2. Is Justice Possible Without Sovereignty? Pal's Conceptualisation of "Hindu Law"

In order to understand Pal's severe denunciation of Allied sovereignty claims at the Tokyo Trial, it is important to underline the manner in which he attempted to conceptualise an alternative model of justice and law that could exist without the violent sanctions of a sovereign state or any sovereign political community. In writings published both before and after the trial, Pal excavated and interpreted "Hindu law" as a model of moral order, justice and legality that could act independently of state sovereignty, even if it did not always function as such in practice. These works also help us trace the remarkable journey of Pal from a poor family background in rural Bengal, where he had acquired Sanskrit education in a traditional school (*tol*) from a Muslim teacher, to the metropolitan world of Calcutta where he gave lectures at the University of Calcutta (colonial India's premier institution of postgraduate education) on the philosophy and history of Hindu law, before ultimately rising to the post of a Judge in the Calcutta High Court in 1941 and the Vice Chancellor of the University

of Calcutta in 1944.[6] Pal's position of "subalternity" as well as his Sanskritic training enabled him ultimately to become a pioneer anticolonial critic of international law and a champion of global justice.

To understand Pal's interventions on Hindu law, one needs to understand the impact of British rule on South Asian legal-political worlds. Modern academic research suggests that in precolonial India there was no homogenous state-backed code of law; what governed legal life were moral norms and local customs, sometimes supplemented by governmental orders. There were enormous heterogeneities in the realm of norms and customs. But most historians today concur that the norms among literate gentry groups tended to be more oriented to hierarchy, including *varna-jati* (loosely and inaccurately translated as "caste") stratification and patriarchal authority.[7] By contrast, among the vast

[6] Radhabinod Pal, *The Hindu Philosophy of Law in the Vedic and Post-Vedic Times Prior to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1927(?); Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times Down to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1929(?), enlarged edition, University of Calcutta, Calcutta, 1958; Nandy, 1992, see *supra* note 2. The dating of the first two books is somewhat approximate; in the case of the first book, there was no publication date on the book itself, but the date of accession was given as 20 October 1927 in the copy that I used (of Kaiser-Wilhelm-Institutfür ausländisches öffentliches Recht und Völkerrecht, Berlin). In the case of the second book (used from the collection of the Heidelberg University Library), the book again does not mention any publication date; the cover page only says "intended for Tagore Law Lectures, 1929". According to the 1958 edition, the lectures were in fact delivered in 1932. 1927 and 1929 may therefore be taken as approximate dates.

[7] For this analysis see, for instance, Nicholas B. Dirks, *The Hollow Crown: Ethnohistory of an Indian Kingdom*, Cambridge University Press, Cambridge, 1987; C.A. Bayly, *Indian Society and the Making of the British Empire*, Cambridge University Press, Cambridge, 1988; KumkumSangari and SudeshVaid (eds.), *Recasting Women: Essays in Indian Colonial History*, Rutgers University Press, New Brunswick, NJ, 1990; Bernard Cohn, "Law and the Colonial State in India", in *Colonialism and its Forms of Knowledge: The British in India*, Princeton University Press, Princeton, NJ, 1996, pp. 57–75; David Washbrook, "From Comparative Sociology to Global History: Britain and India in the Pre-history of Modernity", in *Journal of the Economic and Social History of the Orient*, 1997, vol. 40, no. 4, pp. 410–43; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, Oxford University Press, Oxford, 1998; Dirk H.A. Kolff, *Naukar, Rajput and Sepoy: The Ethnohistory of the Military Labour Market in Hindustan, 1450–1850*, Cambridge University Press, Cambridge, 2002; Susan Bayly, *Caste, Society and Politics in India: From the Eighteenth Century to the Modern Age*, Cambridge University Press, Cambridge, 2005; Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Permanent Black, New Delhi, 2006; Wael B. Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, New York, 2009; Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity*, Oxford University Press, New York, 2010;

majority of South Asia's peasant, forest-dependent, pastoral-nomadic and artisanal groups, local legal customs tended to be less hierarchical and less patriarchal. From the late eighteenth century, colonialism introduced a radical transformation since the British sought to subjugate, demilitarise and tax South Asian peasant, forest-oriented, pastoral and artisanal populations, and simultaneously to select their allies from the literate gentry groups. The norms of the latter were homogenised and hybridised with British norms to produce state-backed codes of Anglo-Hindu and Anglo-Muslim (civil) law, displacing the heterogeneous customs prevalent earlier, and thereby also vastly accentuating many aspects of social hierarchy. Simultaneously, reforms in criminal law also homogenised this domain, albeit in a more Westernising manner; nevertheless, these criminal law reforms also aimed at strengthening the sovereign apparatus of the colonial state.

There was, however, little consensus among the British, and among Europeans in general, about the nature of South Asian legalities. Some administrators and scholars affirmed the historicity of Hindu law, comparing it to European types of law. In the course of the nineteenth and early twentieth century, and with the gradual popularity of "Aryan" race theory among Europeans, some of them affirmed that Brahmanical "Hindu" norms derived in the ultimate instance from ancient Indo-European or "Aryan" norms, even as Aryan-origin "upper caste" Indians ruled over "non-Aryan" "lower castes". Indian *varna-jati* hierarchies were thus inaccurately interpreted by Europeans, and gradually by many Indians too, through the lens of race theory. Others, especially from the late nineteenth century, gave greater emphasis to local customs than to Brahmanical values as the truest sources of legal life in South Asia. Still others suggested that Indians, like other Asiatic peoples, did not know true rule of law, being habituated to slavish obedience to "Oriental despotisms".[8] That such racist views were not moribund even in the mid-1940s can be seen from the way in which the chief American prosecutor at Nuremberg, Robert H. Jackson, in the opening address of the International Military Tribunal ('IMT'), compared the notion of

Timothy Lubin, Donald R. Davis Jr, and Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction*, Cambridge University Press, Cambridge, 2011.

8 Apart from the works cited in note 7, see also Thomas R. Metcalf, *Ideologies of the Raj*, Cambridge University Press, Cambridge, 1995; Thomas R. Trautmann, *Aryans and British India*, University of California Press, Berkeley, 1997.

'*Führerprinzip*' to a "despotism equalled only by the dynasties of the ancient East".[9] Even more proximately, in the context of the Tokyo Trial, Keenan and his associate, Brendan F. Brown, while explaining war crimes and especially those committed by the Japanese, blamed "[p]atriotism, or political motives, or adherence to the tenets of an Oriental theology which exalts the State to the level of divinity and makes the will of the State the ultimate moral measure".[10]

Pal's conceptualisation of "Hindu Law" can be seen as a response to all these above trends. Against the European view that precolonial Indians did not know true law, he offered detailed investigations of ancient Indian legal philosophy and history. He refuted the views of the British civilian J.H. Nelson (articulated in 1877) about the absence of "real" law in traditional India.[11] To establish parity between Indian and European legal philosophy, he cited the German philosopher of law Fritz Berolzheimer (1869–1920) about the common origins of ancient Indian and European legal ideas, though his interpretation of Vedic concepts went far deeper and in more radical directions than outlined in Berolzheimer's very brief analysis.[12] Responding to the question raised by the British politician and former Secretary of State for India, the Marquess of Zetland (1876–1961), about whether rule of law and representative institutions could survive in India after the demise of British rule, Pal took the example of ancient Indian history to argue for the organic roots of legal-democratic traditions in India. Pal quoted (and aligned himself with) Indian historians like K.P. Jayaswal (1881–1937) who legitimated the anticolonial struggle in India by suggesting that India had not been traditionally governed by "Oriental despotism"; rather Indian history had been characterised by different popular and representative institutions and sometimes even by republican polities. Therefore, in the opinions of Pal, Jayaswal and others, India did deserve

9 *United States. The Department of State Bulletin*, 1945, vol. 13, p. 850.

10 Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law*, Public Affairs Press, Washington, DC, 1950, pp. 137, 213, referencing International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Transcript of Proceedings, 4 June 1946, p. 463 ("Tokyo Trial transcripts") (http://www.legal-tools.org/doc/436390/).

11 Pal, 1958, pp. 1–2, see *supra* note 6.

12 Pal, 1927, pp. 1–2, see *supra* note 6; Pal, 1958, pp. iv, 109–10, see *supra* note 6; see also Fritz Berolzheimer, *The World's Legal Philosophies*, The Lawbook Exchange, New Jersey, 2004 [1912], pp. 37–38.

to develop into a free and democratic country.[13] However, I would argue that Pal's most important distinctiveness lay in his conceptualisation of the relation between justice, law and sovereignty. Refuting Nelson's argument, mentioned above, that sovereignty was essential to law, and that Indians lacked real law in the Austinian sense because they had traditionally lacked such sovereignty, Pal suggested that ancient Indian law was in fact better than modern European law precisely because it had lacked such a sovereign centre.

Pal's suspicion towards sovereignty was a suspicion towards state power; but it was also hostility towards any form of organised power. There was a significant domestic Indian context for this. Pal came from a "lower caste" (potter) background. In his writings we seldom find any celebration of Brahmanical *varna-jati* values of the kind that we would detect in many 'upper caste' Indian intellectuals of the late nineteenth and early twentieth century. Pal did wish, from an anticolonial standpoint, to emphasise the organic unity of a Hindu-Indian legal tradition rooted in the Vedic texts,[14] and establish its commonality with ancient European legal philosophy. He was similar in this regard to other nineteenth and early twentieth century Indian reformers and nationalists like Rammohun Roy (1772/4–1833) and Dayanand Saraswati (1824–1883) who saw in the Vedic texts the roots and base of Indian tradition. However, while making

[13] Pal, 1929, pp. 11–12, see *supra* note 6; Pal, 1958, pp. 86–110, see *supra* note 6. The work of K.P. Jayaswal which Pal cites is *Hindu Polity: A Constitutional History of India in Hindu Times* (2 volumes in 1), Butterworth & Co., Calcutta, 1924. K. P. Jayaswal (1881–1937) was an Indian nationalist historian whose research in the late 1910s and early 1920s played a critical role in legitimating Indian nationalist demands for devolution of governmental power to Indians. Jayaswal argued that ancient India had evolved republican and constitutional-monarchic forms of governance. Indian nationalists argued that republicanism and constitutionalism were thus embedded in Indian history and tradition, challenging British colonial arguments that India had always been ruled by despotic monarchies and therefore did not deserve liberal-constitutional forms of government in the present. For a political use of Jayaswal, see the Dissenting Minute of Sir C. Sankaran Nair, the only Indian member in the Viceroy's Council during the discussions centring on the Government of India Act of 1919. See House of Commons, Parliamentary Papers. East India (Constitutional Reforms). Letter from the Government of India, dated 5 March 1919, and enclosures, on the questions raised in the report on Indian constitutional reforms. Minute of Dissent by Sir C. Sankaran Nair, dated March 5, 1919. Sankaran Nair (1857–1934) was a famous lawyer and judge, who became a President of the Indian National Congress in 1897, and became a Member of the Viceroy's Council in 1915.

[14] In doing this, one of the models for Pal was the Roman jurist Gaius's attempt to provide a historical genealogy and foundation for Roman law; see Pal, 1929, p. 1, *supra* note 6.

such an archaeological effort, Pal made flawed arguments about monolithic differences between "Aryan" and "Semitic" theologies.[15]

Though his reading of history was thus inflected by colonial-origin discourses of race theory and race conflict (as between "Aryans" and "non-Aryans" in India; here his views were shaped by European scholarship on Indian history), he was not an Aryan supremacist. He acknowledged that non-Aryan cultures, in India and elsewhere, possessed their own civilisational standards; some of the Dravidian peoples "might have been quite as civilized as the Aryans even if less warlike".[16] He wrote about the degradation caused to "non-Aryan" inhabitants of India by "Aryan" incomers, and of the tragic connections between the victimisation of "non-Aryans" and the victimisation of women.[17] As can be seen from his Tokyo Judgment (discussed below), he found the Nazi leaders to be "war criminals" because of the way in which they waged war in a ruthless and reckless way. In general Pal denied visions of race supremacy:

> It is further to be remembered that the racial explanation of differences in human ability and achievement is a deliberate and cold-blooded piece of deception in which the differentiating effects of upbringing and education are mendaciously ascribed to pre-existing differences of a racial order and this with the calculated object of producing certain effects in the practical field of social and political action.[18]

In a related manner, Pal was critical towards caste hierarchies, particularly as enunciated by Manu, a mytho-historical ancient Indian writer of a text that expressed the most brutal Brahmanical perspective towards lower castes and women. As early as 1929, he saw Manu's religion as "a body of externals", "without any deeper meaning", meant only "to minister to the supremacy of the established government", and "expressive of the manifestation of the devotion of the subjects to the sanctioned power of State".[19] Citing a verse in the Rgveda attributed to Manu, Pal saw in it a dangerous tendency towards proclaiming the unlimited power of gods, which went against the more common Vedic

[15] Pal, 1927, pp. 11–12, see *supra* note 6; Pal, 1958, p. 116, see *supra* note 6.

[16] Pal, 1958, p. 44, see *supra* note 6.

[17] *Ibid.*, p. 344, and *passim*.

[18] *Ibid.*, pp. 271–72.

[19] Pal, 1929, p. 34, see *supra* note 6; also Pal, 1958, p. 247, see *supra* note 6.

idea of the subjection of gods to a higher law.[20] In his view, Manu had ultimately placed "sovereignty above law", going against the earlier Vedic tradition of placing law above sovereignty.[21]

By 1958 Pal saw race, caste, imperialism and state power to be related manifestations of injustice. The German thinker Friedrich Nietzsche (1844–1900) had cited Manu to suggest that Indian caste ideals could provide to modern Europeans the model of how a master people would rule over those lower than him. Pal referred to this to argue that ancient as well as modern concepts of justice, when they became linked to the exercise of organised power, committed brutal injustices against the weak, such as against conquered races, the poor, the lower castes and women. Pal refuted the idea that there could be hereditary transmission of special aptitudes, which was the common justifying rationale for both race and caste hierarchy. Pal's critique of Nietzsche (and of Manu) lay above all in the fact that Nietzsche had not concerned himself with the self-development of the majority of humanity.[22] The reason why Pal romanticised the Rgveda might have been because he found little trace of caste stratification in the text (except in the isolated Purusha Sukta, widely considered as a later interpolation).[23]

Pal's critique of sovereignty can thus be seen as a response to the processes through which the colonial sovereign state in South Asia had heightened the power of Brahmanical groups, as race and caste theories came together to legitimate the exercise of power by British and Indian elites. By contrast, Pal's position was to ask for justice that would simultaneously attack all such formats of organised power. To Pal it seemed that race, class, caste and patriarchy were alike elements in the

[20] Pal, 1927, p. 72, see *supra* note 6.

[21] Pal, 1927, p. 73, see *supra* note 6; Pal, 1958, p. 157, see *supra* note 6.

[22] Pal, 1958, p. 13, 226–69, see *supra* note 6.

[23] *Ibid.*, p. 70: "In the Rigveda, with the single exception of the Purusha Sukta, there is no clear indication of the existence of caste in the proper Brahmanical sense of the word. This caste system was only introduced after the Brahmans had finally established their claims to the highest rank in the body politic; when they sought to perpetuate their social ascendancy by strictly defining the privileges and duties of the several classes, and assigning to them their respective places in the graduated scale of the Brahmanical community". The Rgveda is generally regarded as the earliest part of the Vedic corpus, the hymns in it being composed in the second millennium BC. The core Vedic texts were composed between the second and first millennium BC.

exercise of power, often acting in conjunction with state authority, whether such authority was ancient or modern.

> Indeed till now the story everywhere seems to have been one of ruthless fight for wealth with little regard for the rights or welfare of 'inferior races'. Even today two-thirds of the world's population live in a permanent state of hunger. Even now all but a tiny fraction are condemned to live in degrading poverty and primitive backwardness even on a continent rich with land and wealth, with all human and material resources.[24]
>
> Everywhere we witness lust for power to dominate and exploit; we witness contempt and exploitation of coloured minorities living among white majorities, or of coloured majorities governed by minorities of white imperialists. We witness racial hatred; we witness hatred of the poor.[25]

Hence Pal described the state (by which he meant any form of organised governance), as "immorality organized".[26] To locate the genealogies of sovereign oppression, Pal went back to ancient Indian sources (such as Manu) and also to Hebraic-Christian monotheism; he identified these, and especially the latter, as the source of concepts of divine despotism and therefore as a distant predecessor of modern forms of state sovereignty, where law was conceptualised as the despotic will of the sovereign.[27] Christian doctrines about God's righteous indignation, according to him, influenced Westerners to justify their wars and atrocities.[28]

> The idea of authority again has made its appearance at different times in different forms. The earliest form in which it enters the arena is in that of a belief in a divinely ordained or divinely dictated body of rules; while in its latest form it is a dogma that law is a body of commands of the sovereign power in a politically organized society, resting ultimately on whatever might be the basis of that sovereignty. In either of these forms it puts a single ultimate unchallengeable

[24] *Ibid.*, p. 269.

[25] *Ibid.*, p. 274.

[26] *Ibid.*, p. 269.

[27] Pal, 1927, pp. 7, 11–12, 27, see *supra* note 6.

[28] Pal, 1958, p. 246, see *supra* note 6.

> author behind the legal order, as the source of every legal precept whose declared will is binding simply as such.[29]

This critique of monotheism or divine "despotism" and divine sovereignty as leading to the growth of racially-charged imperialistic drives was in fact a common strand in anticolonial Bengali discourses, and can be found in the writings of many intellectuals and political leaders, including Vivekananda (1863–1902) and Bipin Chandra Pal (1858–1932).[30] I would argue that such a view could be seen as a marked contrast to the arguments of the famous German jurist Carl Schmitt (1888–1985) with his emphasis on the genealogies of monistic state sovereignty in divine monotheism.[31] By rejecting this sort of monotheistic will, Pal and others among his Indian contemporaries were rejecting the choice of untrammelled sovereignty altogether since such sovereignty (they felt) would lead to state violence, racism, and colonialism. To quote Pal (from his Hindu law book of 1958):

> There is little fundamental difference between the law viewed as the will of the dominant deity and the law viewed as the will of the dominant political or economic class. Both agree in viewing law as a manifestation of applied power. As

[29] Pal, 1927, p. 7, see *supra* note 6.

[30] See, for example Vivekananda, "The Soul and God", in *The Complete Works of Swami Vivekananda*, vol. 1, Advaita Ashrama, Calcutta, 1972, pp. 489–502; "Maya and the Evolution of the Conception of God", in *The Complete Works of Swami Vivekananda*, vol. 2, Advaita Ashrama, Calcutta, 1976, pp. 105–117; "The Way to the Realisation of a Universal Religion", in *The Complete Works of Swami Vivekananda*, vol. 2, Calcutta, 1976, p. 364; "First Public Lecture in the East", in *The Complete Works of Swami Vivekananda*, vol. 3, Advaita Ashrama, Calcutta, 1973, pp. 112–13; "The Mission of the Vedanta", in *The Complete Works of Swami Vivekananda*, vol. 3, 1973, pp. 185–86; "India's Message to the World", in *The Complete Works of Swami Vivekananda*, vol. 4, Advaita Ashrama, Calcutta, 1972, p. 310; Bipin Chandra Pal, "Shivaji-Utsava o Bhavanimurti", in *Vangadarshana (Navaparyaya)*, 1313 BS (1906–07), vol. 6, no. 6, pp. 296–305.

[31] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, Cambridge, MA, 2005 [1922], see for example p. 36: "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure". See also Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, Polity Press, Cambridge, 2008 [1970].

> we shall see, the Vedic view of the basis of law was not the divine *will* but the divine *reason*.[32]

While ancient concepts of natural law had also often served as an excuse to carry out acts of oppression, Pal suggested that it was in modern times that oppression had revealed itself in its most naked form, in the format of state sovereignty, and without even any fig leaf of some superordinate moral ideal. Moving away from divine sovereignty, modern Europeans, from Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679) to John Austin (1790–1859), had emphasised state sovereignty; the state was thereby justified to exercise its power in an unrestricted way, subject to no sanction. Even the perspectives of John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778) were tainted with the doctrine of sovereignty, with Rousseau merely replacing the ruler with the nation as the locus of sovereignty. Pal found this obsession with sovereignty to be responsible for the eruption of organised state violence in modern times, in particular for the hypocritical use of a democratic-nationalist idiom by the ruling classes to keep the ruled in thrall, and behind the militancy of European imperialism.[33] Deification of race or nation appeared to him to be a false idolatry.[34]

Again, such a view stemmed from broader anticolonial Bengali/Indian discourses, for example as articulated by Rabindranath Tagore (1861–1941), which saw an ineradicable relation between nation-state sovereignty, racist-nationalist imperialism and political idolatry.[35] There are also similarities between Pal's views and those of Aurobindo Ghose (1872–1950) about the dangers inherent in the translation of monarchic sovereignty to popular-national state sovereignty.[36] Given his critical attitude to ancient, medieval, as well as modern legal traditions, it is difficult to see Pal as a simple nationalist, nostalgic for some legal

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[32] Pal, 1958, p. v, see *supra* note 6.

[33] *Ibid.*, pp. 2–6, 219–21.

[34] *Ibid.*, p. 271.

[35] See, for example, Rabindranath Tagore, *Nationalism*, Book Club of California, San Francisco, 1917, and in general his Bengali and English writings, especially from the 1910s onwards.

[36] See, for example, Aurobindo Ghose, "*The Ideal of Human Unity*" (first published in *Arya* between 1915 and 1918, then published as a book in 1919, then revised in the late 1930s and again in 1949, with the revised edition published in 1950), in *The Complete Works of Sri Aurobindo*, vol. 25, Sri Aurobindo Ashram Publication Department, Pondicherry, 1997, pp. 293–99, 372–82, 443–50.

golden age. Instead, Pal wished to recover certain aspects of ancient Indian (and European) legal philosophy that could be made usable in modern times. For instance, Pal praised the concept of *ahimsa* or non-violence, a concept rooted partly in precolonial Indian traditions. Mahatma Gandhi (1869–1948) gave this concept of *ahimsa* a radical anticolonial political turn. In upholding *ahimsa*, Pal was careful to make clear that he did not share Gandhi's romanticised evaluation of preindustrial civilisation.[37] Like the lower caste ideologue B.R. Ambedkar (1891–1956), Pal also saw Buddhism as a praiseworthy religion because of its supposedly pacifist bent (in contrast to Christian religious wars and inquisition) and because the Buddha had proclaimed "the equality of men at the time when inequality was strongly felt". Indeed, Pal interpreted Manu as attempting to suppress the Buddhist revolution.[38]

When it came to the world of law, it was to the ancient Indian (Vedic) ideal of *rta* or cosmic-moral order that Pal harped back. He found this ideal of "natural and human order" to be cognate to the Roman and Christian concepts of *ratio*, *naturalis ratio*, *pax*, *lex aeterna* and *ratio in Deo existens*, thereby establishing homologies between Vedic concepts and those outlined in Roman, early Christian and Scholastic philosophy (St. Augustine being directly referred to by Pal in this regard, and St. Thomas Aquinas more obliquely).[39] Pal found attractive the idea prevalent among "Greek sages, Roman Philosophers and juris-consults, and mediaeval thinkers of the natural law school" which emphasised "the law as based on reason, as ultimately discoverable by a due application of the rational instinct in man".[40] However, Pal was very selective and interpretative in using European natural law concepts. He rejected many elements of it associated with overt theology and colonialism, keeping only those strands that could be made to conform with (and translate for Western audiences) his understanding of Vedic cosmic-moral justice (especially *rta*).

Citing the seer Aghamarsana in the Rgveda, Pal saw *rta* as that which existed before the universe diversified into parts; in this view, he also found "a naturalistic conception of the universe and the emphasis laid

[37] Pal, 1958, pp. 245–46, 396–97, see *supra* note 6.

[38] *Ibid*., pp. 242, 245–46.

[39] Pal, 1927, pp. 1–2, 52, see *supra* note 6; Pal, 1958, pp. iv, 109–110, 144, see *supra* note 6.

[40] *Ibid*., p. 76; also, Pal, 1958, p. 160, see *supra* note 6.

on the eternal existence of law and order in the same".[41] Quoting the sage Madhucchanda, Pal suggested that in the worldview of the Rgveda, even "the gods, powerful as they were, were subject to this eternal order, *rta*". The purpose of *rta*, this cosmic order, was to work for the benefit of human beings. Therefore the gods who were subject to this law could not function as despots, but had to uphold universal welfare, as was the nature (*svadha*) of the *rta* order: "*svadha* is the order or constitution of nature". The movements of the sun and the moon, of day and night, and of nature as a whole were thus also governed by *rta*.[42] The seer Dirghatamas also subscribed to this view: law, which was above the gods, could alone ensure a society's all-round welfare.[43] To the sage Gritsamad, even the creator god *rtavan*, was "subject to law".[44] According to Pal, Vedic law was related to divine essence and divine reason, the will to do good; law did not emanate from the arbitrariness of divine will. *Ṛta*, as both the governing order of nature and the governing order of justice, aimed at benefit and welfare.[45] Pal found Vedic law to be similar in some ways thus to principles of modern Utilitarianism.[46] And this *rta* was also identical in the Vedas with truth (*satya*).[47] Quoting the Brhadaranyaka Upanishad, Pal suggested that this law was the power over power, the "*kshatrasya kshatram*", and through it "even a weak man rules a stronger with the help of the law, as with the help of a king".[48]

> The author of the Upanisad declares law to be the *kshatra* of *kshatra*, more powerful than the power itself. In his opinion law exists without the sovereign and is above the sovereign [...] This ancient philosopher is thus opposed to the absolutist doctrine of the unlimited power of the state. Nay, he even seems to oppose the doctrine of its self-limitation. The power of the sovereign, the power of the state, is limited not by itself, but by some inherent force of law.[49]

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41 *Ibid.*, pp. 15–17 (quote from pp. 16–17); Pal, 1958, pp. 112–14, see *supra* note 6.

42 *Ibid.*, pp. 17–20 (quotes from pp. 17 and 20); Pal, 1958, pp. 114–16, see *supra* note 6.

43 *Ibid.*, pp. 40-42; Pal, 1958, pp. 135–36, see *supra* note 6.

44 *Ibid.*, p. 73.

45 *Ibid.*, pp. 76–77, 89, 107, 138–39; Pal, 1958, pp. vi–vii, 160, see *supra* note 6.

46 *Ibid.*, p. 80.

47 *Ibid.*, p. 100.

48 *Ibid.*, pp. 112–13, see *supra* note 6; Pal, 1958, pp. vii, 84, 180.

49 *Ibid.*, pp. 113, see *supra* note 6; also Pal, 1958, p. 180.

For Pal, even the Indian doctrines of salvation were, in a sense, juridical. Citing the sage Yajnavalkya, he argued that the main aim of the self was to improve itself, and since this would happen only if the self pursued justice, the perfection of the self and the achievement of justice were twin acts. As Pal writes, "the command of nature, 'perfect thyself', is at once a direction for physical and moral self-development and the fundamental principle of justice".[50] Such a quest for being just need not issue from any divine command; they proceeded from the self's own desire. This ideal stems from the maxim, "do not do to another what you would not have another do to you", which Pal located as being attributed to Yajnavalkya and as also present in the works of German philosophers Christian Thomasius (1655–1728) and Immanuel Kant (1724–1804).[51] While Pal acknowledged that the principle of acting justly had often been used to legitimate social hierarchy (such that everyone was advised to act in the way supposedly ordained by their birth status), nevertheless counter-voices emphasising "equality" could also be found in ancient India, not only in Upanishadic literature but also in Buddhist texts like the Dhammapada.[52]

Ultimately, what Pal insisted upon was that Vedic texts enjoined one to avoid dogmatism, to acknowledge the limitations of one's knowledge and action. The pursuit of justice could not take place if one dogmatically tried to enforce one's own beliefs and egotistic interests on others: "to make one's ego absolute is to dogmatize in action as well as in thought [...] Injustice originates in this practical dogmatism, in this blind absolutism". [53] The perfect structure, in his view, was one "where everyone will only do that which at the same time enures to the benefit of all else".[54] Pal affirmed that human beings had the right to life, liberty and pursuit of happiness on equal terms with all.[55] The notion of "rights of man" had thus to co-exist with duties towards the other. In Pal's interpretation of Vedic discourses, justice would become functional when one curbed one's egotistic will in the face of the other, recognising the

[50] *Ibid.*, pp. 119–25 (quote from p. 121); Pal, 1958, pp. 185–87, see *supra* note 6.

[51] *Ibid.*, pp. 121–22; Pal, 1958, p. 187, see *supra* note 6.

[52] *Ibid.*, pp. 134–35; Pal, 1958, p. 194, see *supra* note 6.

[53] *Ibid.*, pp. 97–99 (quote from p. 99).

[54] Pal, 1958, pp. 170–72 (quote from p. 171), see *supra* note 6.

[55] *Ibid.*, p. 282.

sacredness of the other, and bowed to the demands imposed by justice while acting towards the other:

> Justice is indeed a mutual limitation of wills and consciousness by a single idea equally limitative of all, by the idea of limitation itself which is inherent in knowledge, which is inherent in our consciousness as limited by other consciousnesses. In spite of ourselves we stop short before our fellow man as before an indefinable something which our science cannot fathom, which our analysis cannot measure, and which by the very fact of its being a consciousness is sacred to our own.[56]

Pal detected in Vedic literature a constant tension, as well as attempts at reconciliation, between the immutability of law and the changeability of law, and between fixed conceptions of moral order on one hand, and the evolution of society, and the growth in diversity and heterogeneity on the other. The difference between the Vedic concepts of *rta* and *vrata*, the latter being interpreted by Pal as specific and changeable applications of *rta*, was one way to conceptualise the binary between the immutability of a just legal-moral order and the flexibility of specific and diverse laws which would change as society transformed. Pal here used one particular hymn (Rgveda, 8.25) dedicated to the gods Mitra and Varuna.[57] Such a template which Pal detected in the Vedas can help us understand better also his attitude to international criminal justice and especially his insistence that the abstract moral order had to realise itself through flexible and changing laws that could combat global asymmetries in power. Sovereignty, in fixing justice to a particular power structure (such as one based on monotheism, monarchy, racial nationalism or caste hierarchy), was an obstruction to true justice or *rta*. Therefore, Pal noted that

> the Vedic Rishis generally place law even above the divine Sovereign. The law according to them exists without the Sovereign, and above the Sovereign; and if an Austin or a Seydel tell them that 'there is no law without a sovereign, above the sovereign, or besides the sovereign, law exists only through the sovereign', they would not believe him. Nay, they would assert that there is a rule of law above the

[56] *Ibid.*, p. 172.

[57] Pal, 1927, pp. 6–10, 55–60, see *supra* note 6; Pal, 1958, pp. 146–48, see *supra* note 6.

> individual and the state, above the ruler and the ruled; a rule which is compulsory on the one and on the other; and if there is such a thing as sovereignty, divine or otherwise, it is limited by this rule of law.[58]

23.3. An Ambivalent Signifier of Non-European Sovereignty: Japan in Indian Nationalist Discourses

In spite of maintaining a fairly consistent anti-sovereignty attitude in his 'Indian' legal philosophical vision throughout his career, in the Tokyo Trial, Pal performed in some ways a volte-face. As mentioned earlier, from a critic of sovereignty, he appeared to become a champion of Japanese sovereignty and a champion of legal positivism. To understand this complex alleged turn, I want to focus now on Indian nationalist ambivalences about the possibility of anticolonial sovereignty and the role of Japan in this construction. My argument here is that Indian nationalist discourses through the late nineteenth and early-mid twentieth century demonstrated a constant ambivalence about the issue of state sovereignty. On one hand, many Indian nationalists wanted a strong nation state as a bulwark against colonial economic exploitation and racism and, on the other hand, many of them were simultaneously suspicious that all forms of state sovereignty, including nation-state ideals, were tainted by an innate aggressive drive that resulted in imperialism. No consensus ever developed in Indian nationalist circles about whether Western forms of state sovereignty were indeed unalloyed good; the anticolonial struggle in India remained much more complex than a simple quest for sovereignty. I would argue that nowhere was this ambivalence more clear than in discussions on Japan. Japan served as a horizon of hope as well as of alarm about the possibilities and dangers of a non-European society emulating a Western model of nationalist state sovereignty.

Indian (and especially Bengali) nationalist circles had been in close contact with Japan since the 1900s. For many Bengali nationalists, including Rabindranath Tagore, Aurobindo Ghose, Bipin Chandra Pal and Pulin Bihari Das (1877–1949), Japan had managed to integrate its Eastern traditions with the best elements of Western economic strength, and the Japanese nation state was thus an ideal exemplar of non-European sovereignty. Sometimes, politicians outside Bengal, such as Gopal

[58] *Ibid.*, pp. 72–73.

Krishna Gokhale (1866–1915), also offered similar perspectives. The Japanese political theology of legitimating the nation through a sacralised emperor cult proved particularly attractive to many prominent Bengalis in conceptualising a future national executive in India. This, however, was not (unlike what Keenan imagined) a traditional assertion of "Oriental despotism"; it was a very modern construction of national sovereignty through the legitimation of the national leadership in theological terms.[59]

The first decade of the twentieth century coincided with Japanese victory in the Russo-Japanese War (1904–1905) as well as with growing anticolonial nationalist agitation in India, with Bengal being the epicentre of rebellion. Naturally, this provided a favourable climate for Bengali Japanophilia. There were also personal contacts forged between Bengalis and Japanese, with the visit to India of the pan-Asianist Okakura Kakuzō (1862–1913) being especially important in this regard.[60] Pal's favourable attitude to Japanese sovereignty (as demonstrated by his dissenting Judgment) was undoubtedly related to his pan-Asianist feelings.[61] In his

[59] For some representative primary sources see, for example: Rabindranath Tagore, "Svadeshi Samaj", in *Ravindrarachanavali*, vol. 13, Government of West Bengal, 1990, pp. 49–50, 52–53, 55; Bipin Chandra Pal, 1906–07, pp. 296–305, see *supra* note 30; Aurobindo Ghose, *The Complete Works of Sri Aurobindo*, vols. 6 and 7, Sri Aurobindo Ashram Publication Department, Pondicherry, 2002, pp. 86, 223–39, 265–67, 308–9, 455, 722, 1093–106; H.A. Salkeld, "Report on the Anushilan Samiti, Dacca", 10 December 1908, para. 5, in *Home Political Proceedings of the Government of India*, April 1909, n. 2, part I, National Archives of India, cited in Sumit Sarkar, *Swadeshi Movement in Bengal, 1903–8*, People's Publishing House, New Delhi, 1973, p. 401; Gopal Krishna Gokhale, *Speeches of Gopal Krishna Gokhale*, G.A. Natesan and Co., Madras, 1916, pp. 821, 1069.

[60] Steven Marks, "Bravo, Brave Tiger of the East! The War and the Rise of Nationalism in British Egypt and India", in John W. Steinberg, Bruce W. Menning, David Schimmelpenninck van der Oye, David Wolff and Shinji Yokote (eds.). *The Russo-Japanese War in Global Perspective: World War Zero*, Brill, Leiden, 2005, pp. 609–28; Rustom Bharucha, *Another Asia: Rabindranath Tagore and Okakura Tenshin*, Oxford University Press, New Delhi, 2009; Carolien Stolte and Harald Fischer-Tine, "Imagining Asia in India: Nationalism and Internationalism (ca. 1905–1940", in *Comparative Studies in Society and History*, 2012, vol. 54, no. 1, pp. 65–92; Satadru Sen, "Benoy Kumar Sarkar and Japan", in *Economic and Political Weekly*, 2013, vol. 48, no. 45, pp. 61–70.

[61] As Ashis Nandy has noted, Pal's message at the dedication of the Pal-Shimonaka Memorial Hall, engraved there in Bengali and English says, "For the peace of those departed souls who took upon themselves the solemn vow (*mantradiksita*) at the salvation ceremony (*muktiyajna*) of oppressed Asia". The message then goes on to quote from a classical Sanskrit text: "*Tvayarsikesardisthitenayathaniyukto'smitathakaromi*" [O Lord, Thou being in my heart, I do as appointed by you]. See Nandy, 1992, p. 54, see *supra* note 2.

Judgment, as we shall see later, he laid the responsibility for much of Japanese imperialism on the prior colonial aggression and racist policies of Western powers. I would argue that his decision to absolve the top Japanese leadership of direct culpability in war atrocities (in contrast to his accusation against the Nazi top brass of being direct war criminals) also needs to be understood in the context of this decades-long Bengali admiration for the Japanese political leadership which produced a powerful and sacralised sovereignty for an independent Japan.

Even more proximately, in the early 1940s, the Bengali-origin nationalist leader Subhas Chandra Bose (1897–1945) had allied with Japan to form an Indian National Army ('INA'), recruited primarily from former British Indian troops and from Indian expatriates in Southeast Asia, which attacked the colonial state of India from the northeastern frontier. Defeated by the British, the INA gained lasting fame through the INA trials held between November 1945 and February 1946. Although Congress politicians were initially ambivalent about their stance towards Bose, the INA and the issue of Japanese collaboration, they nevertheless wished to tap into popular anticolonial resentment during the prelude to the central and provincial elections of late 1945 and early 1946. Prominent Indians, including the future Prime Minister, Jawaharlal Nehru (1889–1964), defended the INA accused. Sympathy for the INA was widespread among Indian publics, cutting across religious lines.[62] This too provided an immediate context for Pal's Tokyo Judgment.

On the other hand, and this has not been sufficiently underscored in existing scholarship, there was also a running thread of concern among Indian nationalists that Japan, by replicating the Western model of the sovereign state, would reproduce colonial forms of violence. Tagore, initially a Japan enthusiast, made a remarkable turnaround as early as the 1910s, criticising the aggressive nationalism and state-worship that he saw in Japan as well as the insensitive reproduction of industrial technocracy.[63] Even Bose criticised Japan (in 1937) for its colonial

[62] M.J. Alpes, "The Congress and the INA Trials, 1945–50: A Contest over the Perception of 'Nationalist' Politics", in *Studies in History*, 2007, vol. 23, no. 1, pp. 135–58; Sugata Bose, *A Hundred Horizons: The Indian Ocean in the Age of Global Empire*, Harvard University Press, Cambridge, MA, 2006, chapter 4.

[63] Rabindranath Tagore, "Japan-yatri" (1919), in *Ravindrarachanavali*, vol. 12, Government of West Bengal, 1989, pp. 189–90; Rabindranath Tagore, "India and Japan", in *The Modern Review*, August 1916, pp. 216–17; for Tagore's 1916 visit to Japan and the

aggression on China, warning India not to emulate this path of nationalist self-aggrandisement and imperialism,[64] though he later strategically allied with Japan in order to free India from British rule. Gandhi regarded Japanese imperialism, German Nazism and British (more broadly, Western) imperialism to be three manifestations of the same militaristic aggressive drive that needed to be condemned. Gandhi had sympathised with Japanese political-cultural regeneration in his younger years, and was even inspired by Japanese victories against Russia; his contacts with Japanese Buddhist monks also influenced his positive attitude to the country. In line with this, Gandhi also condemned racist anti-Japanese attitudes and immigration policies in the US and in Australia. However, on the critical question of Japanese aggression on China, Gandhi turned against this colonialism; he refused to exculpate it merely because Japan was an Asian power. He refused to support Bose's alliance with Japan.[65]

Gandhi's unequivocal condemnation of Japanese imperialism was undoubtedly more radical and forthright than Pal's. However, there are fundamental similarities in the way in which both Pal and Gandhi saw the Second World War not as a Manichean struggle between "good" Allied Powers and "evil" Axis Powers (which underpins, for example, Keenan's vision), but as a tragic contest in which Allied and Axis Powers shared alike a common grammar of militaristic imperial aggression. This similarity also shows why, like Pal, Gandhi also offered a straightforward denunciation of the American bombing of Hiroshima and Nagasaki.[66]

A similar ambivalence towards Japan can be seen in Nehru. Nehru recollected in his writings that he had sympathised with Japan in his youth, but became increasingly critical as Japan invaded China; his sympathy lay with China rather than with Japanese imperialism. Congress organised demonstrations in support of China, a medical mission was sent from India to China in 1938 and Nehru visited the country in 1939. All

controversies caused there by his criticism of nationalism, see Prasanta Kumar Paul, *Ravijivani*, vol. 7, Ananda Publishers, Calcutta, 1997, pp. 176–99, 244–46.

64 Subhas Chandra Bose, "Japan's Role in the Far East (19 September 1937)", in *The Essential Writings of Netaji Subhas Chandra Bose*, Oxford University Press, New Delhi, 1997.

65 This reading is based on discussions on Japan, scattered throughout *The Collected Works of Mahatma Gandhi*, vols. 1–100, Government of India (Publications Division), New Delhi, 1999.

66 *Ibid.*, vol. 84, 1981, pp. 393–94; vol. 85, 1982, p. 371; vol. 90, 1984, p. 522.

these represented a growing Indian political solidarity with China against Japanese aggression, and a partial reversal of earlier Indian Japanophilia. In spite of his vast ideological differences with Gandhi, Nehru also saw British imperialism in India, the Japanese invasion of China, Nazism and Italian imperialism in Ethiopia to be multiple facets of the same trajectory.[67] As such, he refused to condone Japanese imperialism since he felt that "[i]mperialism shows its claws wherever it may be, in the West or in the East".[68] In fact, as Prime Minister, Nehru displayed a marked ambivalence towards the Pal Judgment. In a cable sent in November 1948 to the Governor of West Bengal, Kailash Nath Katju (1887–1968), Nehru wrote:

> Have consulted colleagues. We are unanimously of opinion that you should not send any telegram to General Macarthur. He is mere mouthpiece of other Governments and has no discretion. Apart from this any such move on our part would associate us with Justice Pal's dissenting judgment in Tokyo trials. In this judgment wild and sweeping statements have been made with many of which we do not agree at all. In view of suspicion that Government of India had inspired Pal's judgment, we have had to inform Governments concerned informally that we are in no way responsible for it. Any statement sent by you might well create great difficulties for us without doing much good to anyone else.[69]

This cable assumes special significance given that Katju had been (along with Nehru) on the defence committee in the INA trials. While Nehru and Katju could come to a common platform in defending the accused Indians

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67 Jawaharlal Nehru, *Towards Freedom: The Autobiography of Jawaharlal Nehru*, The John Day Company, New York, 1941, pp. 29–30, 358–359, 367, 397, 411, 433; also Jawaharlal Nehru, *China, Spain and the War: Essays and Writings*, Kitabistan, Allahabad, 1940, (the relevant points are scattered throughout the work, so I have not given specific page numbers); Jawaharlal Nehru, *The Discovery of India*, Jawaharlal Nehru Memorial Fund, New Delhi, 1992 [1946], pp. 421-422, 449-450, 467, 469; Jawaharlal Nehru, *Glimpses of World History*, Jawaharlal Nehru Memorial Fund, New Delhi, 1988 [1934–35), pp. 401, 440–41, 464, 498, 961–62.

68 Nehru, 1941, p. 411, see *supra* note 67.

69 S. Gopal (ed.), *Selected Works of Jawaharlal Nehru*, vol. 8, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1989, p. 415. Nehru's views on the Pal judgment have been discussed by A.G. Noorani, "The Yasukuni 'Hero'", in *Frontline*, 2007, 24, p. 21. However my interpretation differs from Noorani's negative appraisal of Pal's Judgment which Noorani describes as "a disgracefully perverse document".

who had attempted to free India with Japanese help, the cable nevertheless shows underlying differences between these two leaders about the manner of communicating the Indian official governmental position on Japan. In a letter sent to the Premiers (Chief Ministers) of the provincial governments of India on 6 December 1948 Nehru further clarified:

> In Japan the sentence of death passed on Japanese war leaders has met with a great deal of adverse criticism in India. The Indian judge on that Commission, Justice Pal, wrote a strong dissentient judgment. That judgment gave expression to many opinions and theories with which the Government of India could not associate itself. Justice Pal was of course not functioning in the Commission as a representative of the Government of India but as an eminent judge in his individual capacity. Nevertheless most of us have felt that it is unfortunate that death sentences should be passed at this stage on war leaders. We have felt however that an official protest would not do any good either to the persons concerned or to the cause we have at heart, and therefore we have not intervened officially.[70]

Nehru's letters to the Chief Ministers can be considered as semi-official statements, since although

> addressed to the Chief Ministers, these letters had a much wider circulation and were read by Nehru's colleagues at Delhi, by senior officials throughout the country, and by all India's ambassadors and high commissioners [...] and are invaluable today for the insight they provide into the evolution both of Nehru's thought and of official policy.[71]

It is noteworthy that in this semi-official statement on Pal, Nehru did not associate himself with the Judgment, but at the same time articulated Indian criticism of death sentences passed on Japanese leaders. Perhaps surprisingly, even at this late hour, Nehru continued to express some qualified admiration for Japanese policies of economic growth and national regeneration. [72] He thought it morally wrong as well as

[70] G. Parthasarathi (ed.), *Jawaharlal Nehru: Letters to Chief Ministers (1947–1964)*, vol. 1 *(1947–1949)*, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1985, pp. 234–35.

[71] Editorial note in *ibid.*

[72] *Ibid*., pp. 436, 444–45.

impractical to suppress the Japanese completely; they had to be helped to rebuild their economy, albeit on a more democratic and non-militaristic basis.[73] It is on this same note of latent empathy that Nehru publicly objected in 1951 to the Anglo-American draft treaty with Japan because, in his opinion, the treaty ignored the concerns of the Soviet Union and the People's Republic of China: "The proposal to continue foreign bases and foreign troops in Japan not only means a diminution of Japanese sovereignty but is bound to be considered as a direct threat to China".[74] What Nehru desired was that "Japan should function as a free and independent country",[75] and simultaneously, the region should not fall under Western hegemony. This caused some tension between the governments of India and the US, though Nehru suggested that the Indian decision was welcomed by the Japanese people as well as the Japanese government. Above all it would be proof of India's attempt to steer clear of both the Western and the Soviet blocs.[76] Instead of attending the San Francisco Peace Treaty Conference in 1951, Nehru ultimately proceeded with negotiating a separate bilateral treaty between India and Japan, which was signed in 1952 and was notably favourable to Japan, for example because it waived all reparations claims against the country.[77]

23.4. An Attack on Sovereignty? Reading Pal's Tokyo Judgment Against the Grain

Most conventional discussions on Pal's dissenting Tokyo Judgment see his position as a positivist attack on the naturalist position of the prosecution; indeed as a defence of Japanese sovereignty against the

[73] Interview in *The New York Times*, 15 August 1948, in S. Gopal (ed.), Jawaharlal Nehru, *Selected Works of Jawaharlal Nehru*, vol. 7, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1988, p. 674; Minutes of the Third Meeting of the Commonwealth Prime Ministers, London, 12 October 1948, in Gopal, 1989, p. 277, see *supra* note 69.

[74] G. Parthasarathi (ed.), *Selected Works of Jawaharlal Nehru: Letters to Chief Ministers (1947–1964)*, vol. 2 *(1950–1952)*, Jawaharlal Nehru Memorial Fund, Teen Murti House, New Delhi, 1986, pp. 465–66; see also pp. 483–84, 486–88, 494–95.

[75] *Ibid*., p. 465.

[76] *Ibid*., pp. 486–88, 494–95; see also Robert J. McMahon, *The Cold War on the Periphery: The United States, India, and Pakistan*, Columbia University Press, New York, 1994, pp. 106–8, on US–India tensions over the peace treaty with Japan.

[77] Treaty of Peace between Japan and India, 9 June 1952; see also P. Narasimha Murthy, "India and Japan", in *International Studies*, 1987, vol. 17, pp. 613–15.

Allied attempt to find Japanese leaders guilty and impose on them punishments deriving their sanction from international criminal law, with significant underpinnings of the latter in naturalist and humanitarian visions of justice.[78] While such a reading is persuasive enough, it is not complete, and the aim of this section is to read Pal's dissenting Judgment against the grain, to argue that it can be read as much as a significant attack on the idea of sovereignty as a defence of it. To the extent that the delivery of international criminal justice is predicated on the championing of justice against sovereignty claims, Pal, I suggest, need not be seen as a hostile critic of such attempts but as a complex interlocutor, if not outright ally, albeit from his own independent premises.

Pal's ambiguous position on sovereignty was also structural: he came from a country which was not quite sovereign when he arrived in Japan. As a country that had taken a substantial military part in the Second World War and had also suffered a large number of military casualties, India wished to be represented at Tokyo.[79] Given this difficult

[78] Apart from the views of Shklar and Kopelman already cited above, as well as the more nuanced views of Cryer and Boister (see *supra* note 6), one can also mention the appraisal of Pal by Totani, 2009, see *supra* note 2, and by Sellars, 2013, see *supra* note 2, who provides a recent critical reading of the naturalist arguments offered by the prosecution (Keenan and Brown) and by Webb and their connections with global-imperial power asymmetries.

[79] In fact, India, though still under British rule, had gradually been made part of the Allied policy structure at least since 1945, when it gained entry to the Far Eastern Advisory Commission (later, Far Eastern Commission), with the agreement of the US and Britain. India was represented in the Commission by Sir Girja Shankar Bajpai, Indian Resident General in Washington. Bajpai exerted pressure (against initial US objection) that an Indian should be made one of the judges in the planned Tribunal for trying the Japanese accused. The British government also agreed in 1945 that the Government of India should be represented, communicating this in December 1945 to the US. The US too realised that Indians would not look favourably on a practically all-white panel. Subsequently, the Charter of the IMTFE specifically mentioned that India would send a judge to the Tribunal; it was this that led to the entry of Pal to Tokyo. Pal was probably viewed as a harmless Indian option, someone with impeccable qualifications but who was not known for any controversial or dissenting opinions during his career as a judge. See: *United States. The Department of State Bulletin*, 1945, vol. 13, pp. 545, 728, see *supra* note 9; Kopelman, 1990/91, pp. 383–834, see *supra* note 2; IMTFE Charter; Totani, 2009, pp. 28, 223, 269, 294, see *supra* note 2; United States Department of State, *Foreign Relations of the United States: Diplomatic Papers*, 1945, vol. 6, p. 983; Yuki Takatori, "America's War Crimes Trial? Commonwealth Leadership at the International Military Tribunal for the Far East", in *Journal of Imperial and Commonwealth History*, 2007, vol. 35, no. 4, pp. 549–68.

position, Pal's initiative at Tokyo to pioneer an anticolonial juristic subjectivity needs to be appreciated in all its complexity. It might seem extremely counter-intuitive to suggest that he was (like Keenan or Webb) making a statement against sovereignty in Tokyo, but in fact such a position becomes clear when we examine some of the introductory sections of his Judgment. Pal's commencing argument was that there was nothing in the surrender of Japan

> to vest any absolute sovereignty in respect of Japan or of the Japanese people either in the victor nations or in the supreme commander. Further there is nothing in them which either expressly or by necessary implication would authorize the victor nations or the Supreme Commander to legislate for Japan and for the Japanese or in respect of war crimes.[80]

The Allied Powers, neither as separate nations nor as a multi-state alliance, had gained sovereignty over Japan. As Pal stated in his Judgment, "I believe, even in relation to the defeated nationals or to the occupied territory, a victor nation is not a sovereign authority".[81] Victor states (in this case the Allied Powers) had no right to claim themselves as sovereign entities representing the sovereignty of the international community.

> A victor state, as sovereign legislative power of its own state, might have right to try prisoners of war within its custody for war crimes as defined and determined by the international law. But neither the international law nor the civilized world recognizes any right in it to legislate defining the law in this respect to be administered by any court set up by it for the purpose of such trial. I am further inclined to the view that this right which such a state may have over its prisoners of war is not a right derivative of its sovereignty but is a right conferred on it as a member of the international society by the international law. A victor nation promulgating such a Charter is only exercising an authority conferred on it by international law. Certainly such a nation is not yet a sovereign of the international community. It is not the sovereign of that much desired super-state.[82]

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80 See Pal Judgment, p. 29 (underlining in the original) (http://www.legal-tools.org/en/go-to-database/record/712ef9/), *supra* note 1.

81 *Ibid*., p. 57.

82 *Ibid*., p. 55 (underlining in the original).

Pal's fear of the sovereignty of an international tribunal obviously derived from his colonial origins. After all, in India, the British had established their claim to sovereignty precisely on the basis of conquest. Pal undoubtedly feared that Western-dominated tribunals were multi-state mechanisms for establishing sovereignty over defeated non-Western nations.

> It is obvious that mere conquest, defeat and surrender, conditional or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a military occupant. A military occupant is not a sovereign of the occupied territory.[83] […]
>
> I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in "transmuting military violence into commercial profit". The inequity, of course, was of their fathers who had had recourse to the sword for this purpose. But perhaps it is right to say that "the man of violence cannot both genuinely repent of his violence and permanently profit by it".[84]

In fact, Pal's dissenting opinion in Tokyo can be read in two different ways: as a championing of the sovereignty of the decolonising nations (and also of Japan) against a Western-dominated international order, or as the radical denunciation of the possibility of international sovereignty embedded in a multi-state tribunal. In either case, this was an "unhappy" view of sovereignty; sovereignty as a concept resulting in state (including multi-state) violence which needed to be resisted, but simultaneously sovereignty as a form of protection against imperialism, a kind of necessary evil.

> The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international

[83] *Ibid.*, pp. 60–61.

[84] *Ibid.*, p. 279.

> community, if it can be called a community at all, is and will continue to be the national sovereignty.[85]
>
> I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the post-war organizations after this Second World War national sovereignty still figures very largely.[86]

"I, myself, am not in love with this national sovereignty": this is a crucial sentence in the Tokyo Judgment whose import, I think, has not yet received recognition. If Pal was not suffering from schizophrenia, then his championing of *rta* over *kshatra* was also functional in Tokyo: he wished to champion an anticolonial interpretation of cosmic juridical-moral order over Allied sovereignty claims staked on military success. In doing this, if defending Japanese sovereignty was the only way out, then he would do it, but this defensive reaction was only of secondary importance. Pal, like many other anticolonial Indians (including Tagore and Gandhi), saw the nation state only as a penultimate stage and a necessary evil. In an imperial world which recognised no authority except sovereignty, the claims of anticolonial political communities had to be masked and packaged through the claim of sovereignty. Pal was a believer in cosmic-natural law (*rta*) forced into the position of a positivist; an anti-sovereignty advocate forced to speak the language of sovereignty.

Pal did (in hindsight, irresponsibly, and perhaps unforgivably) express doubt about the extent of Japanese war crimes; thus he suggested that reports of the Rape of Nanking (Nanjing) might have been exaggerated. Pal's suspicion stemmed from his belief that the Allied Powers, like British colonialism, might use these atrocities to support their authority.[87] However, this colonial background cannot justify the manner in which he papered over Japanese atrocities. To his credit, however, while talking of exaggerations and distortions, Pal did not exculpate the Japanese of atrocities of "devilish and fiendish character".[88]

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85 *Ibid*., p. 125.

86 *Ibid*., p. 186 (underlining in the original).

87 *Ibid*., pp. 1062–64. Pal refers in his Judgment to British use of false rumors to mobilise anti-German feelings among Indians and Egyptians in the context of the First World War. He may have also had at the back of his mind the way in which the British regularly invoked anti-British "atrocities" allegedly committed by Indians (such as during the Black Hole incident of 1756 and during the Indian Rebellion of 1857) to legitimate their own rule.

88 *Ibid*., pp. 1070, 1089.

He did not deny that many war crimes had taken place; in spite of the inadequate nature of the evidence in a wartime scenario, "it cannot be denied that many of these fiendish things were perpetrated".[89] Particularly since most of these atrocities were committed against Asian populations, including against Indians (especially during the Japanese conquest of the Andaman and Nicobar Islands, but also in other parts of Southeast Asia such as Borneo),[90] Pal did not wish to entirely minimise the horror of these crimes, though he blamed the immediate military perpetrators rather than the high-level Japanese leaders accused in the Tokyo Trial itself. He thus distinguished the Tokyo Trial from the Nuremberg Trial where the high-level leaders, he felt, had given direct command for perpetrating war atrocities. The crimes committed by Nazi leaders, according to Pal, were thus similar to the way in which the Kaiser Wilhelm II had been directly responsible for atrocities during the First World War, and the way in which the Allied leadership was responsible for the dropping of the atomic bombs on Hiroshima and Nagasaki. But in the case of the Japanese top leadership, they were only performing governmental functions and were part of the broader governmental machinery, but they were not directly responsible for the commission of the actual war crimes.[91] This shifting of blame from the Japanese national leadership to the lower rungs of the hierarchy can also be explained as a measure to protect Japan from Allied sovereignty claims; it did not imply a defence of the war crimes themselves.

Pal did not see the Second World War in Asia as a mere episode in inter-state rivalry, as a series of episodes of violence normal in international relations. He saw it, much like Keenan, as an outburst of evil. But unlike Keenan, he did not see this evil as stemming only from Axis efforts; rather, to Pal it was part of the evolution of modernity. Like Gandhi, Pal had, in some ways, a melancholic understanding of modernity. To him it seemed, as to Gandhi or Tagore, that modernity accentuated human propensity to violence, that state power and industrialisation created the global conditions for unremitting war. Pal subscribed to a tragic vision which embedded the violence of warfare in the violence of modernity itself. As he noted in his Judgment: "The

89 *Ibid*., p. 1089.

90 For murder of Indians in the Andaman and Nicobar Islands, and atrocities against Indians in Borneo, *ibid.*, pp. 1077–78.

91 *Ibid*., pp. 9, 137–38, 1089–90.

totalitarian character of war thus is not the result of any design by any particular individual or group of individuals. It is the modern character of war itself. This is the enormity in which the evil of warfare has been fatally transformed by the combined impact of democracy and industrialism".[92] His dissenting Judgment at Tokyo can be read as a foundational critique of "modernity", understood by him and many others as a political-ontological category inseparable from organised sovereign violence.

Pal's critique of violence also translated into a critique of "just war" theory. The doctrine of the "just war", with its specifically Christian grounding, had been invoked by Jackson in the opening address of the IMT, when he declared that there was a difference between just and unjust wars. Jackson rooted this definition, especially of unjust wars, in the teachings of "early Christian and international-law scholars such as Grotius".[93] As Elizabeth Kopelman has argued, this position on "just war" also set the context for the trial at Tokyo.[94] In contrast, Pal felt that seeing the Second World War in Asia as a just war was problematic, especially as "any interest which the Western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period and none of these wars perhaps would stand the test of being 'just war'".[95] This position against Western (and specifically American) Christian-influenced "just war" rhetoric had an indigenous Bengali context as well. For example, Vivekananda had earlier taken a similar position to criticise the way in which Christian preachers had mobilised American public opinion for war against the Philippines (1899–1902).[96] Given that the war against the Philippines was one of the first major and overt manifestations of American colonialism (in Asia) rooted in Christian legitimation,[97] Vivekananda's critique may be taken as a

92 *Ibid*., p. 736.

93 *United States. The Department of State Bulletin*, 1945, vol. 13, p. 855, see *supra* note 9.

94 Kopelman, 1990/91, p. 396–401, see *supra* note 2.

95 See Pal Judgment, p. 70, *supra* note 1.

96 Vivekananda, "The Way to the Realisation of a Universal Religion", 1976, p. 364, see *supra* note 30.

97 For a recent evaluation of this landmark importance of the war from the perspective of American political theology in prefiguring later Cold War tropes, see William Inboden, *Religion and American Foreign Policy, 1945–1960: The Soul of Containment*, Cambridge University Press, New York, 2008, pp. 7–8.

predecessor of Pal's. In his Judgment, Pal in fact cited the British historian Arnold Toynbee (1889–1975) to suggest that European powers, and especially the English-speaking Protestants, had invoked the Bible to present their colonial conquests as God-ordained righteous wars comparable to the ones waged by ancient Israelites against the Canaanites to "recover" the Promised Land; hence non-European peoples would either be subjugated or exterminated. The conquest of India by the British was also, according to Toynbee (as cited by Pal in his Judgment), motivated by such religiously-legitimated racial feelings;[98] Pal's critique of "just war" theory thus stemmed from his broader indictment of colonial theology.

In Pal's eyes, Japanese nationalism was also, in a large measure, a defensive reaction to Western racist policies. If non-Western nations like Japan cultivated racial-national feelings it was because "the western racial behaviour necessitates this feeling as a measure of self-protection".[99] Pal did not wish to justify racism; as he noted:

> "Race-feeling" has indeed been a dangerous weapon in the hands of the designing people from the earliest days of human history. Right-thinking men have always condemned this feeling and have announced that the so-called racial explanation of differences in human performance and achievement is either an ineptitude or a fraud; but their counsel has never been accepted by the world.[100]

Pal's explanation of Japanese racial nationalism was not an exculpation of it, but an attempt to argue that non-Western societies were often forced to accentuate such feelings to defend themselves against Western racism. More concretely, Pal suggested that Japanese politics was in part a reaction against Euro-American domination in the world as well as the threat of Soviet hegemony in the region, especially due to the growth of Communism in China. Specific anti-Japanese measures cited by Pal included also measures taken by the US (Immigration Acts of 1917 and 1924), Australia, and others to exclude non-white immigrants and to deny them equality with whites. The way in which Japanese efforts to introduce a racial equality provision in the convention being drafted for the League

98 See Pal Judgment, pp. 570–71, *supra* note 1.

99 *Ibid.*, p. 570.

100 *Ibid.*, p. 572.

of Nations was shot down by the British in their colonial interest, also convinced Pal that the League and other international organisations were not serious in ending racial discrimination. This too, in his eyes, had provoked Japan in its militaristic efforts.[101]

The question nevertheless remains that if Pal was indeed something of a naturalist, in the sense of being a believer in a natural-cosmic legal-moral order as more legitimate than sovereignty, why then did he refuse to subscribe to the Western–Christian naturalist interpretation that we find in Keenan and Webb? Of course, Pal's position in his Judgment was self-consciously constructed in opposition to Keenan's opening statement at the trial where Keenan described the law on which the indictment was based as rooted in what was variously known as "common law", "general law", "natural law" or "international law".[102] In his Judgment, Pal recognised the importance of natural law, but refused to accept that the Allied Powers could claim to be the true interpreters of natural-moral law.[103]

> I should only add that the international community has not as yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good". International life is not yet organized into a community under the rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested. It is only when such group living is agreed upon, the conditions required for successful group life may supply some external criteria that would furnish some standard against which the rightness or otherwise of any particular decision can be measured.[104]

Furthermore, Western powers had legitimated their claim over newly discovered territories "as a right derived from natural law and justified by the fiction of the territorium nullius, territory inhabited by natives whose

[101] *Ibid*., pp. 136, 485–87, 558, 573–78, 761–68.

[102] *Ibid*., pp. 24–25. (For the statement of Keenan which Pal counteracts here, see the Tokyo Trial transcripts, pp. 405–6, *supra* note 10.)

[103] *Ibid*., pp. 147–51.

[104] *Ibid*., p. 151.

community is not to be considered as a state".[105] The denial of statehood and sovereignty to non-White parts of the world thus went in tandem with the use of natural law to establish Western sovereignty over the non-West. Hence Pal was critical towards any Western imperialistic use of natural law to abrogate the sovereignty claims of non-Western societies/states. Indeed, I would argue that Pal's major critique of sovereignty as political theology (as articulated in his writings on Hindu law) comes alive also in his Judgment when he castigates Allied attempts to project their own political will, indeed their own political sovereignty, as a neutral international criminal justice. To Pal this amounted to the propagation of "substitute religions in legal wrappings".[106] The Allied Powers, by claiming that their way of giving laws would establish a peaceful and democratic world, were subscribing to a false juristic and legislative theology: in Pal's view, they were constructing themselves as a supreme and Godlike lawgiver.

> I am not sure if it is possible to create "peace" once for all, and if there can be status quo which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly, dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of self-help by force can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful. Before the introduction of criminal responsibility for such efforts the international law must succeed in establishing rules for effective peaceful changes. Thus then there can hardly be any justification for any direct and indirect attempt at maintaining, in the name of humanity and justice, the very status quo which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders" and, which, we know, we cannot undertake to

[105] *Ibid.*, p. 342 (underlining in the original).
[106] *Ibid.*, p. 104.

> vindicate. That part of the humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political status quo. But every part of the humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the actual plague of imperialism. They have not as yet been in a position to entertain a simple belief in a valiant god struggling to establish a real democratic order in the Universe.[107]

This does not mean that Pal did not share a view in an idea of justice that could transcend the barriers of state sovereignty and be global in scope; as we have already seen, such a notion of supra-sovereign law was fundamental to his viewpoint. However, where he differed from Keenan or Webb was in refusing to identify this supra-state legal-moral order with the power of the Western nations, or with a Western-dominated tribunal composed of states. I would suggest that such a tribunal seemed to him to merely transfer the problem of sovereignty and state violence from the level of individual states to the level of a particular multi-state coalition. International criminal law would not have transcended sovereignty but merely replicated it at the level of a multi-state alliance. That is what his experience with the IMTFE, dominated by the Western powers, convinced him of.

At a more concrete level, Pal equivocated about the legitimacy of the IMTFE. He endowed the tribunal with some amount of legitimacy given that the judges were there in their personal capacities even if they came from the different victor nations. However, while citing the jurist Hans Kelsen (1881–1973), Pal suggested that an impartial court to whose judgments both victor and vanquished nations would be made subject would have been a better option.[108] Pal was sympathetic towards the idea of an international criminal law court:

> Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the

[107] *Ibid*., pp. 238–39 (underlining in the original).

[108] *Ibid*., pp. 10–15.

> statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states.[109]

Pal's principled support for an impartial international court of criminal justice went hand in hand with denunciation of the IMTFE's operation; the conclusion of his dissenting Judgment clearly accuses the majority Judgment of victors' bias.[110] Pal was against Allied sovereignty masquerading as impartial justice; he was not against the idea of international criminal justice itself. And the supreme goal of this justice would be to protect and uphold the rights of individuals. Aligning himself with the jurist Hersch Lauterpacht (1897–1960), Pal declared:

> I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end [...] <u>This certainly is to be done by a method very different from that of trial of war criminals amongst the vanquished nations</u>.[111]

Pal's philosophy, even in his Tokyo Judgment, was thus indeed hospitable to principles of international humanitarian law and international criminal law. Such a conception of justice, Pal suggests in his Tokyo Judgment, would not merely be "international" justice but something more, since the concept of "nation" would have been subsumed under a standard more global in nature. "I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place".[112] Though Pal fulminated against the Allied use of natural law arguments, ranging "from Aristotle to Lord Wright", also via the US Declaration of Independence and the Hague Convention of 1907,[113] he did not wish to abandon the idea of natural law itself; he did not want to throw the baby out with the bathwater. As he noted in his Judgment:

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[109] *Ibid*., p. 11.

[110] *Ibid*., pp. 1231–35.

[111] *Ibid*., p. 145 (underlining in the original).

[112] *Ibid*., p. 146.

[113] *Ibid*., pp. 147–48.

> The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past... It would certainly be unjust and irrational, if, under the pretext of correcting errors and omissions, this hostility is carried to the destruction of the very object of these systems.[114]

23.5. Natural Law and Positive Law: An Inadequate Dichotomy?

Any discussion on the legal philosophical positions in Tokyo ultimately tends to fall back upon one primeval dichotomy: that between natural law and positive law. But I would suggest that this dichotomy is, in a sense, an inadequate one. Discussions that emphasise the polarity between them obfuscate their structural complementarity in philosophical, political, as well as social terms. Natural law, in some ways, is only positive law which has not yet found a human sovereign; if such a sovereign is located, then natural law need not be a challenge to the existing social-political order (as advocates of natural law often emphasise) but only a champion of it. Realising this secret complicity between natural law and sovereignty will help us appreciate the complexities of Pal's dissenting Judgment. As he noted here:

> We must not however forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of juridicity. Perhaps its claim that the realization of its doctrines should constitute the aim of legislation is perfectly legitimate. But I doubt if its claim that its doctrines should be accepted as positive law is at all sustainable. At any rate in international law of the present time such ideal would not carry us far.[115]

Pal was critiquing here the attempt to convert natural law into positive law; or to phrase this more clearly, he was arguing against the attempt to declare some particular legal ideas (claimed to be "natural law" ideas and hence of universal validity) as also having the force of positive law. Pal was not against the idea of natural law *per se*. What he was against, I would argue, is the attempt to label certain legal provisions as (firstly)

[114] *Ibid*., p. 149.

[115] *Ibid*., p. 72 (underlining in the original).

being founded on natural law and hence of unquestionable and global validity, and (secondly) attempting to translate these so-called natural law provisions into positive law in the course of the Tokyo Trial. I would argue that this in turn was related to an even more fundamental difference between Pal on one hand, and Keenan or Webb on the other, a difference which has not been noticed in existing scholarship. Whereas Pal, embedded in his excavated Vedic texts, saw moral-juridical order (*rta,* loosely translated by Pal for Western audiences as *ratio naturalis, lex aeterna, ratio in Deo existens,* etc.) as the fundamental foundation of justice, he made a difference between this transcendental order and the immanent world of laws which had to be flexible and ever-changing in relation to shifting historical realities (*vrata* was one way he conceptualised this more flexible legality). In contrast, Keenan and Webb tended to collapse the overarching concept of natural law or justice with specific legalities; for them all that needed to be done was to translate justice, inscribed in unchanging and eternal natural law ideas, into specific positive laws. The opening statement of the prosecution,[116] Keenan's jointly authored book with Brown,[117] and Webb's draft judgments[118] as well as final Judgment[119] bear witness to their passionate attempt to delineate a tradition of natural law which stretched from the Graeco-Roman world through the medieval Christians to the early modern and modern world, while arguing at the same time that these natural laws had also been accepted as something like positive law in the early-mid twentieth century in international law.

The agent for translating natural law into positive law would be Allied sovereignty: thus Keenan noted that the Tokyo Charter "was promulgated by an executive order, ultimately in the name of international sovereignty".[120] "General MacArthur, the Supreme Commander for the

[116] See Tokyo Trial transcripts, *supra* note 10.

[117] See generally, Keenan and Brown, 1950, *supra* note 10.

[118] Papers of Sir William Webb, 3DRL/2481, Box 3, Australian War Memorial, "The Natural Law and International Law", "International Law Based on Customs and Agreements", box 8, "The Jurisdiction, Powers and Authorities of the International Military Tribunal for the Far East: Reasons for Judgment of the President and Member from Australia". I am indebted to Kirsten Sellars for bringing these drafts to my attention.

[119] IMTFE, *United States of America et al. v. Araki Sadao et al.,* Separate Opinion of the President, 1 November 1948, ("President's Separate Opinion") (http://www.legal-tools.org/en/go-to-database/record/1db870/).

[120] Keenan and Brown, 1950, p. 55, see *supra* note 10.

Allied Powers in the Pacific, acted in behalf of world society in accepting the delegation of authority to implement the Instrument of Japanese Surrender, and in exercising the power he received".[121] The close nexus between a naturalist view and imperial sovereignty claims is also visible in Webb's Judgment, where the judge quoted the argument of Caleb Cushing (1800–1879) as the Attorney General of the US: "By the law of nations *occupatio bellica* in a just war transfers the sovereign powers of the enemy's country to the conqueror".[122]

I would argue that the natural law that was upheld by Keenan and Webb was not so different from positive law: to them, natural law was only positive law waiting to be functionalised. This was especially true in international relations, as Keenan argued in the Tokyo Trial by citing Lord Wright, Chairman of the United Nations War Crimes Commission.[123] Later, in their book, operating through the conceptual binary of *jus* and *lex*, Keenan and Brown essentially suggested that the conversion of natural law into positive law in international relations had to proceed in the manner of the translation of *jus* into *lex*, as had historically happened in Europe as tribal societies gradually developed into more formal societies. Thus the legal codification that had taken place in European municipal law would now take place in international law.

> The Prosecution maintained that in the meantime, while the international community is making the transition from a relatively primitive and tribal state to the acme of formalistic development, the administration of international penal law must rely upon *jus*, as well as upon *lex*. In discovering *jus*, predetermined by norms of moral, juridical and legal justice, which constitute the plan for living with respect to man in international society, judges must be trusted to use their discretion wisely. During the infancy of national civilization, before the dawn of statutory law, faith in judges proved to be warranted. Centuries from today, it is hoped that men will turn their gaze backward to the twentieth century and conclude that the confidence which was imposed in judges of international tribunals and others to whom was entrusted

[121] *Ibid*., p. vi.

[122] See the President's Separate Opinion, *supra* note 119, p. 12.

[123] Tokyo Trial transcripts, pp. 407–8, see *supra* note 10.

> the quasi-judicial process by world society was completely justified.[124]

Their perspective shows that natural law need not be thought of as a sharp contrast to positive law; the difference between them can be overdrawn. Despite Keenan's repeated claims (for example in his book *Crimes against International Law*) that natural law would defeat the violence carried out by sovereign states by challenging the principle of sovereignty, I would argue that his understanding of natural law was secretly complicit with sovereignty. Natural law, from this perspective, was only positive law in waiting, anticipating a sovereign. And (as noted by scholars on the Tokyo Trial, especially Kirsten Sellars), at the hands of the Allied Powers as conceived by Keenan and Brown, natural law would function as a guarantee of international inequality. To quote Keenan and Brown from their book:

> But self-defense does not consist in protecting one's self against the inequality which evolution and historical accident have created in the natural and physical resources of the various nations. It is plain that some nations live in more healthy and salubrious parts of the earth than others. Some have more extensive physical areas, richer lands, more beautiful scenery, more agreeable climate, and greater mineral wealth than others. This has been determined in large measure by an almost unlimited chain of factors, which include the temperament and success of ancestors, as well as their ethnical, biological, environmental and cultural conditions. But this does not afford any justification for a nation which now has an unfavorable position to have recourse to war, as an instrument of national policy, just to obtain a more favored position [...] The world's geographical status quo in relation to peoples and the lands they occupy has become more and more defined and settled in consequence of the appropriation of specific parts of the earth's surface by peoples who have made permanent and lasting contributions, in virtue of their developed and matured cultures and civilizations [...] Modification of present land titles among the nations is now reasonably possible only on slow, evolutionary basis. If an attempt is made to alter those titles suddenly by the instrument of war,

[124] Keenan and Brown, 1950, p. 56, see *supra* note 10.

> jungle rule, based on physical power, will ensue. Civilization, as it now exists after the efforts of many centuries, will disappear, and world anarchy will prevail.[125]

Keenan's manifesto was to conceive of (the Christian) God as a sovereign whose representative on earth were the Western powers. By 1950, as the Cold War began to be felt, especially through the Korean War, the ideal sovereign was not the Allied Powers, but only the Western bloc led by the US.

> In the light of the decisions reached at the Tokyo and Nuernberg war crimes trials there can be no question but that the Communist Koreans are waging a criminally unjust war [...] Today the chief threat to the spiritual and material prosperity, the happiness, the well being and the future security of the human family lies in the division of international society into communistic and democratic nations.[126]

The lesson offered was that Communism was "incompatible with the Christian-Judaic absolutes of good and evil which were the foundation of the Tokyo and Nuernberg Trials".[127] Citing Cicero, Gratian, St Augustine and St Thomas Aquinas, Keenan and Brown noted: "Wagers of unjust wars acted contrary to the Divine Will, as well as the reason of man".[128] The political theology which had been articulated by the prosecution at the Tokyo Trial, and which was also consonant with the philosophical vision of the President of the Tribunal, found its culmination in this Cold War manifesto against Communism and other forms of non-Western or non-Christian threat to Western hegemony. Both Keenan and Pal, in their very efforts to challenge sovereignty, had ended up supporting two contrasting visions of sovereignty: one championing Western (more specifically, American) sovereignty, and the other the sovereignty of the postcolonial nation state. Sovereignty had proved too cunning for both naturalists.

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[125] *Ibid*., p. 62. See Sellars, 2013, pp. 206–9, *supra* note 2 for an incisive analysis of the asymmetrical-imperial underpinnings of Keenan and Brown's naturalist position and the way in which it ideologically legitimated a conservative status quo.

[126] *Ibid*., p. v.

[127] *Ibid*., p. vii.

[128] *Ibid*., p. 67.

23.6. After Tokyo: Decolonisation and Cold War

While Pal always gets his share of limelight in discussions on Tokyo, his later career largely remains unmentioned. As I showed before, his final writing on Hindu law was published in 1958. Indeed my argument would be that his interpretation and excavation of ancient Indian texts continued to animate his vision of justice even in these late years. Pal remained an active legal participant in the 1950s and 1960s. He abstained from voting on a draft code of international criminal law (Draft Code of Offences against the Peace and Security of Mankind) in 1954 that was debated at the 6th session of the United Nations International Law Commission, held in Paris. His argument, as outlined in that session, was that given the nature of international relations at that period, a mere code of international criminal law could not bring about real justice. It might indeed have the opposite effect of giving to dominant powers, victorious in wars, an excuse to commit injustices. A more comprehensive transformation in international relations was needed which had to be worked out through history; otherwise a mere code could not help humanity to "escape from the guilt of history". Pal's advice was that "in the name of building for justice we must not unwittingly build a suffocating structure for injustice".[129] Such a critical attitude, however, did not prevent Pal from becoming Chairman of the International Law Commission in 1958 and in 1962. In 1962 he was nominated to the International Court of Justice. He was also National Professor of Jurisprudence in India from 1959 to 1967.[130] If we are to understand Pal's position at the Tokyo Trial as well as in the International Law Commission and later, in the late 1940s, 1950s and 1960s, the changing political scenario in Southeast and East Asia needs also to be understood. Important insights about this can be gained from his book, *Crimes in International Relations*, published by the University of Calcutta in 1955.[131]

In Tokyo (as indeed in Nuremberg) the Soviet jurist Aron Trainin's (1883–1957) perspective on the need for international criminal law had had a powerful resonance. This perspective was in turn grounded in a

[129] Radhabinod Pal, *Crimes in International Relations*, University of Calcutta, Calcutta, 1955, pp. iii–ix (quotes from pp. viii and ix).

[130] Gopal, 1989, p. 415, see *supra* note 69.

[131] Pal, 1955, see *supra* note 129

kind of Soviet-Communist internationalism. But Communist incursions in China and, later, Soviet and American partition of Korea, made Pal very sceptical towards this Communist vision of legality. Speaking of the Partition of Korea, Pal sarcastically commented in his book that this was the type of "liberation" that came to the Koreans as a result of the benevolent Moscow Declaration of Trainin.[132] American participation in the Korean War, and use of napalm bombs and other weapons, was also severely criticised by Pal. To him, Soviet as well as American rhetoric of "liberation" appeared hollow when seen in the concrete context of Korean politics and the mass suffering caused to Korean populations, in terms of civilian casualties, as well as long-term economic damage and political-military subjugation.[133]

Simultaneously, in the Dutch East Indies and in French Indochina, the European colonial powers were aiming to re-establish and legitimate their power by invoking their supposed moral superiority in the Second World War. Against them, local nationalists had started waging violent anticolonial campaigns, sometimes with the earlier complicity of the Japanese. Pal feared that a Western-dominated imposition of international criminal law would criminalise these anticolonial movements. American and Soviet passivity towards the re-occupation by the Dutch and the French, and sometimes even active military-political complicity in the re-establishment of colonialism, made Pal sceptical of the universalistic promises of the new order. The new order's message of emancipation seemed like a re-structuring of the old colonial civilising mission.[134] Pal's suspicion towards the indictment of Japan and the imposition of international criminal law was therefore concretely grounded in his anxieties about the re-imposition of colonialism in Southeast Asia as well. Again there was a broader Bengali/Indian context for this. Not only had Bengali intellectuals been engaging closely with Southeast Asian cultural-political life since the interwar years, but the alliance between Nehru and Sukarno (1901–1970), the first Indonesian President, had also became a primary building block of the Non-Aligned Movement. In the next decades, Ho Chi Minh (1890–1969) and the Vietnamese liberation

[132] *Ibid*., p. 46, see *supra* note 129.

[133] *Ibid*., pp. 44–47.

[134] *Ibid*., pp. 49–52.

movement would also become mascots of left radicalism in India, especially in Bengal.

Two of Pal's last writings, in the 1960s, go back to the issues of global justice, which I have argued, haunted him throughout his career. The first is a United Nations Law Commission Report from 1962, which Pal authored in his role as Observer for the Commission at the 5th Session of the Asian-African Legal Consultative Committee held in Rangoon, Burma. I would argue that this report should be interpreted as one of Pal's final meditations on how global justice could be achieved. It would happen, he felt, through the meeting of people from different parts of the world who were driven by a sense of injustice and who shared, in spite of the differences between them, a common longing for justice. It would emerge through tension and conversation between normative-transcendental ideals and ground-level struggles against oppression, linking the universalism of justice with the concreteness of ever-changing historical realities.[135]

Very similar ideas animate a lecture written for a meeting of the United World Federalists in Japan in 1966. In this lecture, Pal affirmed his "firm faith" in the role of global law in bringing about global peace.

> I have a firm faith in the mission of law in the matter of world peace. If we are sincerely cherishing a desire for creating a peaceful world-order, we must look to law. Such a world-order will be possible only if we succeed in bringing the world society under the reign of law, – under the might of that most reasonable force which alone can check the fatal unhinging of our social faculties. Law alone is entitled to claim recognition as the most reasonable of the forces which can help shaping the human society in the right form.[136]

But simultaneously Pal cautioned against all "pretension to finality"; rules of international law had evolved over time, and they needed to be continuously changed according to changing realities.[137] Furthermore, if a world community had to emerge, then community power in the

[135] Report on the Fifth Session of the Asian–African Legal Consultative Committee (Rangoon, January 1962) by Mr. Radhabinod Pal, Observer for the Commission, pp. 153–54.

[136] Radhabinod Pal, *World Peace Through World Law*, United World Federalists of Japan, 1967, p. 1.

[137] *Ibid.,* p. 1.

international field would have to ensure that authority was "exercised with the active concurrence of the governed"; that is, people would come together, overcoming their differences, to create "a democratically controlled planned community life for the world".[138] But this in turn could only happen if they did not imagine their own beliefs and interests to be the final one. The individual, as well as history as a whole, had to continuously strive to change and not sanctimoniously uphold their own ideas as the final word.[139]

23.7. Conclusion: The Search for Justice without Sovereignty?

I have argued in this chapter that Radhabinod Pal's attitude to international criminal law and justice has been inadequately understood till now. Scholars have concentrated mainly on his Tokyo Judgment; in contrast, Pal's voluminous writings on Hindu law or his other writings on global justice have rarely been studied. Neither has Pal been contextualised within broader Indian (and more specifically, Bengali) public discussions about sovereignty and related political theology. His English writings have not been related to his extensive Sanskrit citations or the Bengali-language discussions among his predecessors and contemporaries.

In contrast, I have attempted to capture the multiple Anglophone, Sanskritic and Bengali worlds of legal-political debate that Pal operated through, and have suggested that Pal was not a simple champion of extra-European sovereignty against Western power. In fact, "sovereignty" for him was an overarching negative category for designating all attempts at imposing the power of ruling groups over the ruled, whether through techniques of racial, religious, class, caste or gender oppression. His Tokyo Judgment too did not amount to a simple exculpation of Japanese war guilt. He acknowledged the brutality of Japanese war crimes, but held that these had occurred at the instigation of lower-level functionaries and not due to any instructions given by the top leaders. Here he differentiated the Japanese case from three distinct cases as described earlier: the German Nazis, where he felt that the Nazi leaders were themselves personally responsible for the crimes, the earlier case of Kaiser Wilhelm II, and the case of American bombing of Hiroshima and Nagasaki, where

[138] *Ibid.*, p. 19.

[139] *Ibid.*, pp. 19–20.

too the leadership was personally responsible. However flawed and problematic this Judgment was, I have argued that Pal's primary concern was not to champion Japanese militant nationalism but to prevent the establishment of Allied sovereignty in Asia. Pal feared, justifiably, that the Allied Powers would use the post-Second World War trials to legitimate the re-assertion of their control in Asia, whether in the form of US or Soviet hegemony, or through attempts to re-establish old style colonialism, as in British India, Dutch Indonesia or French Indochina. That Pal, like many other Indians, had to fall back upon the defence of non-European sovereignty as a necessary evil, as the only measure of protection against colonial or neocolonial sovereignty allowed by the international order, was a trick of history which explains why many of these anticolonial activists, though acutely aware of the violence inherent in sovereignty and statehood, nevertheless felt compelled to legitimate the rise of non-European nation states. That decolonisation did not result in a removal of state sovereignty but only in its replication in Asia or Africa was the ironic consequence.

Pal's errors (especially in exculpating Japanese leaders of direct war crimes) mean that we should treat him and his writings with caution. While he condemned many of the Japanese atrocities in his Judgment in strong language, his sometimes ambiguous juristic-historical phraseology (in suggesting that Japanese imperialism was ultimately provoked and over-determined by Western colonialism) has left him open for appropriation by right-wing Japanese politicians.[140] There are also debates among Japanese historians about whether Pal continued to subscribe to problematic pan-Asianist Japanophile ideologies even after Tokyo, or whether he advised the Japanese to renounce militarism.[141] In spite of his many excesses and flaws as outlined above, I have used Pal to draw some conceptual resources which might be useful for imagining international criminal justice beyond the concrete example of the Tokyo Trial. Pal believed in the necessity of an impartial international court of criminal justice to which victor and vanquished states alike would submit after a war. He felt that such a court, by trying to transcend racial and national limits, would actually make a kind of global (and not merely inter-

[140] This last point is most cogently made by Takeshi, 2011, see s*upra* note 2.

[141] Much of this debate rests on reportage of Pal's speeches and activities in Japan and the problems inherent in these source materials; for two opposing interpretations, see generally Totani, 2009, and Takeshi, 2011, *supra* note 2.

national) justice functional, a world community under the sign of law. Till his death Pal never lost faith in the possibility of some form of global justice. However, he felt that the operation of justice had to be deepened democratically, by operating through the consent of the governed, and especially of those disenfranchised populations which had been under colonial servitude for a long time. Mere judicial acts would not suffice in this regard even though they would also have a vital role to play. Pal stressed that justice ultimately had to be dissociated from sovereign dominance. A just juridical body would thus have to function without being tied to the interests and authority of a state, a religion, a community hierarchy, or even a coalition of states claiming (as Keenan did about the Allied Powers) to act as the mouthpiece of international sovereignty.

Despite the problematic nature of his dissenting Judgment at Tokyo, this chapter argues that one can make use of Pal's broader imaginary about cosmic-moral justice to denounce the atrocities and oppression carried out by non-European governments (in the name of national sovereignty or "traditional" values) as much as the oppression carried out by dominant Western powers. Since debates on international criminal justice often tend to get polarised between those who defend the sovereignty of nation states and those who support international intervention, it is good to think with Pal about the common origins of all oppression and atrocity. Pal's "Third World" perspective should not be used to defend non-Western oppressive power structures (his critique of caste-oriented governance as a form of "bad" sovereignty is instructive here). But he can probably also sensitise us against too easy a correlation between Western power and the interests of humanity as such. His criticism of Allied sovereignty thus functions as a critique of colonial or neo-colonial exploitative structures masquerading as benevolent "civilising" order.

Furthermore, this chapter has underlined the connected nature of localised as well as transnational forms of oppressive governance and the bearing this has on conceptualising war crimes and international criminal justice. The manner in which British colonialism accentuated and universalised many aspects of social hierarchy in India, or the way in which European racial nationalism provoked and intensified aggressive Japanese militarism, or the manner in which modern forms of transnational capital operate by engaging with and intensifying local forms of class and gender oppression, demonstrate these myriad

connections. When atrocities resulting from these connections need to be tackled, attempts at enforcing global justice have to negotiate the multiple nodes of sovereign violence; isolating a particular society or state as aggressor and exculpating other societies or states is generally not adequate in ensuring justice and the empowerment of the disenfranchised victims. One has to locate the regionalised as well as globalised forms of oppression that need to be combated through complex and multi-nodal forms of global justice, including criminal justice.

In any trial, the historical-epistemological perspectives of the judges and other legal actors involved are of crucial importance in determining the judicial outcome. My reading of Pal offers a kind of juristic epistemology, one predicated on a search for what I would refer to as "bare justice". This justice does not lie in any positive law, nor even in any fixed formulation of natural law, understood in the way that Keenan or Webb did. These latter, resorting to Christian-European vocabularies, thought that there existed some form of fixed body of rules, natural laws, which could be just translated into positive law (in the world of international relations), a *jus* which could be translated into *lex*. Taking a cue from Pal's writings and from the Tokyo Trial debates (including the long scholarly aftermath of trying to grapple with Tokyo's legacy), I have questioned whether there is necessarily any structural opposition between natural law and positive law positions, given that natural law arguments also often fall back for support on a sovereign: a 'divine lawgiver' to legitimate their claims as universal, and a human one to enforce them. The formal structure of natural law appeared to Keenan, Brown, and Webb to be similar to that of positive law: only natural law, inscribed in cosmic-divine rules, had not yet become completely functional in the realm of human law. For Keenan and Brown, human authority (the Allied Powers) could act as the agent for translating natural law to positive law in the field of international (criminal) law, supported by the cumulative growth of international treaties and jurisprudence.

This study has argued that an epistemology of translation of natural law into positive law ignores the ever-changing nature of social relations. The debate between Pal and Keenan, however, suggests that justice cannot be conceptualised as the mere implementation of already-known laws (positive or natural), even less as the sovereign fiat of some political community claiming to represent the universal interest or the common good. Justice is more adequately imagined as a horizon, as a universalistic

standard to which one can aspire, but which can never be completely clear to us, and therefore never completely translatable into a fixed corpus of rules and governmental apparatus. Justice, in this view, cannot be imagined as inscribed in some pre-given natural law order. One can however attempt to understand justice by attempting to understand better social-historical realities and by trying to remove biases effected by self-interests masquerading as final truths; this element of self-reform is repeatedly emphasised by Pal. It is the ground-level, ever-transforming, contingent nature of fighting oppression through shifting legal norms and judgments which need to be connected to the horizon of justice. To cite Pal, such a striving for justice also needs to be based on recognising the "sacred" nature of the Other.[142] Being inherently sacred, the Other demands from us nothing less than justice; the just act is therefore one which attempts to will the universal good, even if such an act necessarily remains circumscribed by the actor's limitations.

Juristic epistemology was also related in Pal's mind to a juristic cosmology and a juristic soteriology. Citing a famous hymn of the Rgveda (10.129, popularly known as the Nasadiya Sukta), Pal noted how the seer Prajapati Parameshthin had discerned the evolutionary and transforming nature of the world from a single unity (*eka*), and how the hymn highlighted the importance of relativising existing knowledge given the horizon of the unknowable (*na veda*). What Pal says about the seer can equally be taken as a comment on his own worldview: "The sage seems at times to be given to Scepticism, and yet we find him already conscious of the need of faith and as such tending to Mysticism". Given the hymn's complex narrative of the creation of the world from a unity, it also gave Pal an account of the world created not by "a whimsical wilful being" but by the unity underlying the world and its "nature" (*svadha*) to evolve.[143] It was ultimately cosmological unknowability, the expanse of the "inconceivable", which "supplied the metaphysical basis of duty and ultimate guarantee of right".[144] Pal's citation of Yajnavalkya (discussed above) enabled him to relate this pre-theological cosmology to a soteriology; the attempt to acknowledge one's limits and simultaneously to strive for greater justice was also a process of achieving perfection.

[142] Pal, 1958, p. 172, see *supra* note 6.

[143] Pal, 1927, pp. 24–27 (quotations from p. 27), see *supra* note 6; also, Pal, 1958, pp. 119–22, see *supra* note 6.

[144] Pal, 1958, p. 122, see *supra* note 6.

Pal's search for justice was ultimately neither a quest for positivism nor one for divinely-dictated theologically-oriented natural laws, even if his deceptive juridical language lulls us into thinking in turns that he is a positivist or a naturalist.

In conclusion, I would argue that dissociated from alliance with sovereignty and power, the quest for international criminal justice can strive to be (even if it is never completely successful) a public process in which judges and other legal-political actors functioning through an impartial court attempt to find out and enforce what is just. At the same time, the search for justice still remains a personal act through which one attempts to be just, relying not on fixed norms or power structures, but on conscientious readings of changing "historical" realities even as one strives to peel away one's own ingrained prejudices. From this perspective, every decision, every act of judgment, is an act for bettering oneself, an ethical act. Since there are no pre-given norms, scriptures, ideologies or sovereign laws that are *a priori* just, every attempt to enact a just act, to judge justly, is also a substitute cosmological act (to take a hint from Pal), an act of crafting the world in the absence of "a valiant god",[145] in the epistemological gap left by the missing 'divine lawgiver'. The debates in Tokyo stemmed in part from dissonances in thinking about political-legal theology in relation to international criminal justice. From the viewpoint of this study, justice cannot be conceptualised as a sacred Nomos standing above and beyond profane history. Rather, the unknown horizon of justice (or *rta*) invites us to wade through (what Pal referred to in 1955 as) "the guilt of history".[146] The present historical essay has aimed at drawing attention to this uncomfortable historicity of justice.

[145] See Pal Judgment, pp. 238–39, *supra* note 1.

[146] See Pal, 1955, *supra* note 129.

24

The War Court as a Form of State Building: The French Prosecution of Japanese War Crimes at the Saigon and Tokyo Trials

Ann-Sophie Schoepfel-Aboukrat*

24.1. Introduction

In the aftermath of the Second World War, a new Asia emerged from the ashes of war. The end of the war saw a new movement, stressing the creation of a new Asia where all vestiges of colonialism and imperialism would be eliminated. In this context, the Allied prosecution of Japanese war criminals (1945–1951) constituted a resource for overcoming the war and preparing the future world order. Following the guiding principles of the European prosecution of German war criminals, international lawyers had to consider the new political landscape in Southeast Asia that reflected calls for decolonisation. Their reflections contributed to the historical and intellectual foundations of international law.

After the announcement of the Japanese capitulation on 15 August 1945, and before the arrivals of the Allies, revolutionary groups filled the power vacuums in Southeast Asia. The Viet Minh (League for the Independence of Vietnam), the nationalist communist party founded by Ho Chi Minh in 1941 in Vietnam, declared independence on 2 September 1945. French legitimacy as a victorious nation was discussed first in Indochina by independence movements,[1] second by China and the United

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1 David G. Marr, *Vietnam 1945: The Quest for Power*, University of California Press, Berkeley, 1995, pp. 347–540.

States ('US'),[2] and finally by the Japanese occupation. France was accepted as an ally to judge Japanese war criminals at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') and at the French Permanent Military Tribunal in Saigon ('FPMTS' or 'Saigon Trials') in Indochina. Its political and legal approach differed from that which it adopted in Europe, as France was faced with the task of managing a profound political change in Indochina and the transformation of the federation's legal framework, and struggled with its own legacy as a colonial power.

The application of substantive principles of criminal justice had an important political connotation, as the disintegration of French Indochina – the federation of colonies comprising three Vietnamese regions, Cambodia and Laos – was bringing to light French imperialism. To restore its sovereignty over Indochina, France indicted Japan at the IMTFE in Tokyo for its Indochinese occupation from 1940 to 1945, and in Saigon for war crimes committed after 9 March 1945. On 9 March 1946 the FPMTS was re-established in Saigon, exactly one year after the Japanese coup d'état in Indochina, which resulted in the complete dismantlement of the French colonial structures.[3] The Japanese occupation of Indochina contributed significantly to the development of decolonisation in the French colonial empire. While France's position in Asia was seriously weakened after the war, the new French state builders had to dim the memory of this period.

According to the most recent research, only 230 Japanese war criminals were tried in Indochina.[4] This is far less significant when

[2] During the Second World War, China and the US were determined to prevent the resumption of French rule in Indochina. See, Gary H. Hess, "Franklin Roosevelt and Indochina", in *The Journal of American History*, 1972, vol. 59, no. 2, pp. 353–68. At the Potsdam Conference in July 1945, the Allied Chiefs of Staff decided to temporarily partition Vietnam at the 17th parallel until the arrival of the French troops in Indochina; British forces would take the surrender of Japanese forces in Saigon for the southern half of Indochina, Chinese troops in the northern half. However, some Americans and Chinese remained against the French presence in Southeast Asia. See Marr, 1995, pp. 241–96, *supra* note 1.

[3] Ralph B. Smith, "The Japanese Period in Indochina and the Coup of 9 March 1945", in *Journal of Southeast Asian Studies*, vol. 9, no. 2, pp. 268–301.

[4] It is essential to exercise caution regarding this information up to this day since such research had not been done on the statistics of judgments against German and Japanese war criminals based on the French military archives. See Chizuru Namba, "第二次世界大戦後におけるフランスのインドシナ復帰：戦時期の清算と対日本人戦犯裁判" [Dainiji

compared to the number of German war criminals prosecuted in France, which totalled 2,345.[5] While these numbers seem to indicate that France had little interest in the prosecution of Japanese defendants, and did not have the machinery in Indochina to prosecute them, this chapter argues that the opposite is true. For France, the trials at Tokyo and Saigon served as an important tool in re-establishing its position as a world power and a victorious nation among the Allies. At the IMTFE, France sent a judge, Henri Bernard, and a prosecutor, Robert L. Oneto, to prosecute major war criminals.[6] The investigation and trials helped strengthen the French rule of law. And it sent a strong signal that such crimes would not be tolerated in the new post-war society.

There is no comprehensive study of the French position at the IMTFE. And the Saigon Trials have received little interest,[7] due to the lack of official, publicly available archival access in France. The research into newly declassified archival material tries to close that gap and addresses the question of French war crimes trials policy in Saigon. The Saigon and Tokyo Trials performed an invaluable social as well as a state-building function for France. They provide us with a better understanding of the different types of post-Second World War prosecutions, which took place in an important period in international criminal law development. The chapter discloses how France related state policies to criminal justice and foreign affairs and how it applied principles of criminal justice. The answers to these questions lie in the trial papers, French national laws, records of the United Nations War Crimes Commission ('UNWCC') and

Sekai taisengo ni okeru Furansu no Indoshina fukki : senjiki no seisan to tai Nihonjin senpan saiban, in 三田学会雑誌 [*Keio Journal of Economics*], 2011, vol. 14, no. 2, p. 181.

5 Henry Rousso, "L'épuration: die politische Säuberung in Frankreich", in Klaus-Dietmar Henke and Hans Woller (eds.), *Politische Säuberung in Europa: die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, Deutscher Taschenbuch Verlag, Munich, 1991, pp. 214–26.

6 See Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminals Tribunals and Commission (1945–2005)*, Martinus Nijoff, Leiden, 2005; Jean Esmein, "Le juge Henri Bernard au procès de Tokyô", in *Vingtième siècle, revue d'histoire*, 1998, no. 59, pp. 3–14.

7 Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979, pp. 201–8; Namba, 2011, pp. 179–206, see *supra* note 4; Beatrice Trefalt, "Japanese War Crimes in Indochina and the French Pursuit of Justice: Local and International Constraints", in *Journal of Contemporary History*, forthcoming.

the private papers of the French Judge appointed to the IMTFE, Henri Bernard.

The chapter highlights the French historical and intellectual foundations of the enforcement of criminal law at the Saigon Trials and at the IMTFE in the wake of decolonisation. The argument presented is two-fold. On the one hand, France wanted to show with its legal engagement that it resided with the victorious nations. On the other hand, it aimed at sending a message to the world that it had emerged from the war as a new republican power, which was suited to protecting Indochina, thereby trying to erase its colonial past. The chapter is organised in four parts. First, it presents the guiding principles of French criminal law after the Second World War. Second, it demonstrates the French strategy in the struggle for decolonisation in Indochina to investigating war crimes, and third, the criminal proceedings at Saigon. Finally, it analyses the legal interpretation of the French delegation in Tokyo.

24.2. New Doctrinal Elements of International Criminal Law: The Guiding Principles of the War Crimes Ordinance

During the Second World War, the German occupation of France had shaken French republican foundations. The exiled government of General Charles de Gaulle wanted to bring back democracy. The national future of the country was bound to the prosecution of its enemies. War crimes trials thus became an element of state building for the French.

The US started to take an active interest in the future of French legal foundations after the French liberation, as they hoped to rely on France as a republican ally in world affairs. In July 1944 the Office of Strategic Services ('OSS') published an information guide about the French administration of justice, which "shares with English common law the distinction of being one of the two legal systems in wide use among modern industrialized nations".[8] The information guide highlighted the legal issues that France would have to face after the war.

After the French defeat in June 1940, the French President Albert Lebrun appointed Marshal Philippe Pétain as Prime Minister. Pétain first made peace with Germany and reorganised the French Third Republic

[8] The Administration of Justice in France, Civil Affairs Guide, "Administration of Justice", Office of Strategic Services, 29 226/54, 7 July 1944 ("Administration of Justice"), p. 2., National Archives and Records Administration, Maryland, USA ('NARA').

into an authoritarian regime. The Vichy regime had defeated the spirit of republican law with the enforcement of totalitarian political control and racial discrimination.[9] In French Indochina, Jean Decoux, who was named the Governor-General, swore allegiance to Pétain's regime and emphasised the totalitarian aspect of the state.[10] According to the Office of Strategic Services,[11] France would have to reform its legal system after, its liberation, in order to appear legitimate:

> The abolition of fascist vestiges must be the immediate goal of any reform of justice. Until the Vichy machinery has been destroyed in fact and removed in form, it will be impossible for the French to believe that freedom has returned to the courts of his land.[12]

The French state builders were aware of the importance of restoring the French republican legal tradition. On 28 August 1944, one month after the publication of the information guide by the OSS, the Provisional Government of the French Republic – the interim government that ruled France from 1944 to 1946 – issued an Ordinance, Concerning the Suppression of War Crimes ('War Crimes Ordinance') in Algiers.[13] This War Crimes Ordinance was the fruit of a long reflection among the jurists who fought against the Pétain regime, and who associated themselves with the Allied war crimes policy. These jurists presented themselves as inheritors of the French republican tradition.

Two vital factors have to be taken into account for the setting up of the War Crimes Ordinance. First, the democratic branch of the Resistance movement issued it, thus inculcating it with Christian values. The communist branch of the Resistance was in no way involved. Second, the interim government refused to hold the prosecution of war crimes before

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9 See Lêmor Yagil, *"L'homme nouveau" et la révolution nationale de Vichy (1940–1944)*, Presses Universitaires Septentrion, Paris, 1997, p. 56.

10 Eric T. Jennings, *Vichy in the Tropics: Petain's National Revolution in Madagascar, Guadeloupe and Indochina*, Stanford University Press, Stanford, CA, 2004, pp. 162–98.

11 Administration of Justice, p. 19, see *supra* note 8.

12 *Ibid.*

13 Ordonnance du 28 août 1944 relative à la répression des crimes de guerre [Ordinance of 28 August 1944 concerning the Suppression of War Crimes], *Journal Officiel* (Algiers), 30 August 1944, p. 780 ("War Crimes Ordinance"); see also United Nations War Crimes Commission, "French Law Concerning Trials of War Criminals by Military Tribunals and by Military Government Courts in the French Zone of Germany", 1948 (http://www.legal-tools.org/doc/198950/), ("French Law Trials of War Crimes").

civil courts and opted for the military courts instead. A few months after the publication of the French War Crimes Ordinance, the British War Cabinet also decided that "war crimes committed against British subjects or in British territory should be dealt with by military courts set up to try them in Germany".[14]

The atrocities of the Second World War compelled the need for international prosecution after the Allied victory. On 13 January 1942 delegates of the Free French National Committee signed the Inter-Allied Declaration on Punishment for War Crimes in London, better known as the St James's Declaration, establishing the UNWCC. Under the aegis of the Allied powers, the UNWCC was to investigate and obtain evidence of war crimes. Free French representatives took part in the Allied investigation into the perpetration of war crimes in Europe in October 1943, and at the UNWCC's Chungking Sub-Commission ('Sub-Commission') in May 1944. However, the investigative body was subordinated to political considerations. Representatives from the French government in exile possessed only limited powers.[15]

In May 1944 René Cassin, a French jurist, law professor and judge, issued a memorandum for his government in exile in London about the prosecution of war crimes in France.[16] He had significant experience in the area of criminal law. As a French delegate to the League of Nations from 1924 to 1938, Cassin pressed for progress on disarmament and in developing institutions to aid the resolution of international conflicts. In London, he had published the 1940 declaration to demonstrate the unconstitutionality of the Pétain's regime.[17] He also supported the creation of the UNWCC where he was designated as a French representative. According to Cassin, the primary reference for the prosecution of war crimes in France should be the French criminal procedure, namely the Penal Code and the Code of Military Justice.[18]

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[14] War Cabinet 131, CAB65/44, National Archives, United Kingdom ('TNA').

[15] Cherif Bassiouni, *Introduction to International Criminal Law*, Martinus Nijhoff, Leiden, 2012, p. 549.

[16] Rapport du Professor Cassin, 9 May 1944 ("Cassin Report"), BB-30/1785, Archives nationales de France, Paris ('AN').

[17] Michèle Cointet and Jean-Paul Cointet, *La France à Londres: renaissance d'un Etat (1940–1943)*, Editions Complexe, Brussels, 1990, p. 52.

[18] These legal codes were established in the *longue durée*. The guiding principles of the Penal Code and the Code of Military Justice referred to the legal codification of criminal

Cassin also focused on two new innovative legal principles: the offence of belonging to a criminal association ("*association de malfaiteurs*") and the question of superior orders. Superior orders should under no circumstances be interpreted as a lawful excuse.[19]

As an answer to Cassin, François de Menthon, a French politician and law professor, issued a memorandum in May 1944.[20] The personal experience of Menthon is important for the understanding of this memorandum. Indeed, Menthon studied law in Dijon, where he joined the Association catholique de la Jeunesse française. His Catholic background influenced his legal conception on the prosecution of war crimes.[21] The war experience also influenced Menthon. During the Second World War, he was an active member of the French Resistance in France: he was the founder of the first cell of the Liberté Resistance movement in Annecy in November 1940 and a second one in Lyon shortly afterwards, and the editor of the underground newspaper, *Liberté*. He was captured, interrogated in Marseille and then released. In July 1943 he joined de Gaulle in London and followed him to Algiers. Menthon became Commissioner of Justice in the Comité français de Libération nationale (French Committee of National Liberation) from September 1943 to September 1944. In his memorandum, Menthon suggested that war criminals should be punished in military tribunals composed mostly of Resistance members to replace the military elite in France who had collaborated with the Axis Powers during the Second World War.[22]

Both Menthon and Cassin's ideas for the prosecution of war criminals were considered in the War Crimes Ordinance of 28 August 1944, issued by de Gaulle's government. On the one hand, Menthon suggested war crimes should be prosecuted in Permanent Military

acts and punishment after the French Revolution and under Napoleon at the beginning of the nineteenth century, and their evolution under the positivist school in the 1880s and after the First World War. See Frédéric Debove, François Falleti and Emmanuel Dupic, *Précis de droit pénal et de procédure pénale*, Presses Universitaires de France, Paris, 2013, pp. 23–30.

19 Cassin Report, see *supra* note 16.

20 Note sur la répression des crimes de guerres [Note on the Suppression of War Crimes], 22 May 1944, BB-30/1785, ("Note on Suppression of War Crimes"), AN.

21 Claudia Moisel, *Frankreich und die deutschen Kriegsverbrecher: Politik und Praxis der Strafverfolgung nach dem Zweiten Weltkrieg*, Wallstein Verlag, Göttingen, 2004, p. 66.

22 Note on Suppression of War Crimes, see *supra* note 20.

Tribunals consisting of five military judges, the majority of whom were to be selected "among officers, non-commissioned officers and other ranks belonging to the French Forces of the Interior or a Resistance Group" according to Article 5 of the War Crimes Ordinance. Article 14 of the Code of Military Justice stated that the President of the Tribunal should be a civil magistrate. On the other hand, as Cassin had recommended, the French criminal procedure was to be the main reference for the prosecution of war crimes. Article 1 of the War Crimes Ordinance stated that persons liable to prosecution were:

> Enemy nationals or agents of other than French nationality who are serving the enemy administration […] and who are guilty of crimes or delicts committed since the beginning of hostilities; either in France or in territories under the authority of France, or against a French national, or a person under the French protection […] or against the property of any natural persons enumerated above, and against any French corporate bodies.

The terms "war crimes" and "war criminals" were left undefined, although in Article 2 punishable offences are mentioned:

> (1) The illegal recruitment of armed forces, […]
> (2) Criminal association […] organisations or agencies engaged in systematic terrorism; […]
> (3) Poisoning […]
> (4) Premeditated murder […] shall include killing as a form of reprisal; […]
> (5) Illegal restraint […] shall include forced labour of civilians
> (6) Illegal restraint […] include the employment on war work of prisoners of war or conscripted civilians;
> (7) Illegal restraint […] shall include the employment of prisoners of war or civilians in order to protect the enemy;
> (8) Pillage […]

The guidelines of the French criminal law to prosecute war criminals were conditioned by French division during the war between the supporters of the Pétain regime and the French Resistance. The French people had to face a difficult transition between the Vichy authoritarian regime and the new democracy of de Gaulle and the Allied troops. French

supporters of de Gaulle demonstrated the wish for France to return to its democratic and republican tradition by setting up a fair procedure through the War Crimes Ordinance and French criminal law. These jurists contributed to the creation of a legal and judicial precedent in the post-Second World War prosecutions that were decisive for the later creation of other *ad hoc* criminal tribunals.

24.3. The French National Strategy to Investigating War Crimes in Indochina

French participation in the German war crimes prosecution had to face structural, judicial and administrative difficulties. These difficulties were even greater for the prosecution of Japanese war criminals and were compounded by political considerations. In Indochina, France still tried to re-establish its sovereignty and to weaken the Indochinese people's fight for independence. The French state builders had to develop in Indochina a national strategy to restore confidence between the French and the Indochinese. The investigation of war crimes was part of a comprehensive recovery strategy for the French colonial empire.

In order to do so, the state builders introduced the guiding principles of the War Crimes Ordinance. The Ordinance was applicable not only to Metropolitan France but also Algeria and other colonies, by virtue of Article 6. The Code of Military Law required the establishment of "at least one Permanent Military Tribunal in each military region […] in time of war" (Article 10). As to the place of this court, the Code further directed, it "shall, in principle, be the capital of the military region". Thus, Saigon became the site of the French war crimes tribunals in Indochina and followed the same procedure as in the Permanent Military Tribunals in France to prosecute German war criminals. But the Saigon Trials could only operate effectively in 1946, when British occupation of Saigon had come to an end.[23]

The final outcome of the French prosecution of Japanese war crimes in Southeast Asia was far less significant than the French prosecution of German war crimes in Europe. At the Sub-Commission in Chungking, the regular changes of the French staff could not provide the same meaningful participation as at the UNWCC's London headquarters.

[23] Joseph Buttinger, *Vietnam: A Dragon Embattled*, Praeger, New York, 1967, p. 244.

At the Sub-Commission, France was represented by six different jurists from 29 November 1944 to 4 April 1947: Achille Clarac, Jean Daridan, M. de Montousse, Jean Brethes, Eric Pelin and Michel Bertin.[24] These representatives held at the same time various functions in the French colonial administration; for example, Clarac was the diplomatic adviser to the French High Commissioner in Indochina.[25] The French prosecutor at the IMTFE, Oneto, met difficulties in filing the French Indictment.[26]

According to Beatrice Trefalt, there were three interrelated reasons explaining the complications the French encountered. First, the perceived collaboration of the French Indochinese government with Japan until March 1945, which complicated the definition of war crimes and the limits of the French prosecution; second, the pursuit of war criminals in Indochina, which was complicated by French military weakness at the time of the Japanese defeat, and the resulting occupation of Indochina on behalf of the Allies by Nationalist Chinese troops above the 16th parallel, and by British troops below the 16th parallel; and third, the Vietnamese declaration of independence and limited international support for (or outright interference in) France's post-war colonial ambitions in the Far East also interfered with the French pursuit of Japanese war criminals.[27]

The Declaration of Independence of the Democratic Republic of Vietnam ('Declaration') on 2 September 1945 played a valuable role in the struggle for independence. It revealed to the French state builders the Vietnamese indignation and their historical interpretation of the French and Japanese collaboration during the Second World War. It states:

> During and throughout the last eighty years, the French imperialists, abusing the principles of "freedom, equality and fraternity", have violated the integrity of our ancestral land and oppressed our countrymen. Their deeds run counter to the ideals of humanity and justice […]
>
> In the autumn of 1940, when the Japanese fascists, in order to fight the Allies, invaded Indochina and set up new

[24] United Nations War Crimes Commission, Far Eastern and Pacific Sub-Commission, Minutes Nos. 1–38, S-1804-0005-15835 (https://www.legal-tools.org/en/go-to-database/ltfolder/0_28557/#results).

[25] Ministère des Affaires Etrangères et Européennes, *Documents diplomatiques français, 1. Juillet–31 Décembre 1947*, P.I.E. Peter Lang, Paris, 2009, p. 1018.

[26] Esmein, 1998, pp. 5–6, see *supra* note 6.

[27] Trefalt, forthcoming, see *supra* note 7.

> bases of war, the French imperialists surrendered on bended knees and handed over our country to the invaders.
>
> Subsequently, under the joint French and Japanese yoke, our people were literally bled white. The consequences were dire in the extreme. From Quảng-Trị up to the North, two millions of our countrymen died from starvation during the first months of this year.
>
> On March 9th, 1945, the Japanese disarmed the French troops. Again the French either fled or surrendered unconditionally. Thus, in no way have they proved capable of protecting us; on the contrary, within five years they have twice sold our country to the Japanese.[28]

This Declaration was widely debated in France and paved the way for very serious preparations for the war crimes trials in Saigon, through which the French wanted to reinstate their authority and show their commitment to the Vietnamese people. Faced with the prospect of decolonisation, France had to reaffirm its sovereignty over Indochina. The French war crimes trials policy in Indochina consequently reflected a new position that France adopted regarding Indochina. France took three decisive steps to deal with this matter.

First, on 27 October 1946 the Constitution of the Fourth Republic created the French Union to replace the old French colonial system and to abolish the "indigenous" status. In 1946 France accepted to give more independence to Vietnam, Laos and Cambodia through a new statute. Vietnam, Laos and Cambodia became associated states in the French Union. However, in December 1946 France resorted to war against the Viet Minh in order to restore colonial rule to Vietnam. But as soon as hostilities began, France concluded an agreement with Bao Dai, the last Emperor of Vietnam. On 5 June 1948 France recognised "the independence of Vietnam, whose responsibility it will be to realise freely its unity". Vietnam, through Bao Dai, proclaimed "its adherence to the French Union as a state associated with France".[29]

Second, France prosecuted collaborators within the context of the legal purge. For example, Decoux, French Governor of Indochina, was arrested and prosecuted after the war.[30] The FPMTS also tried Vietnamese

[28] Vietnamese Declaration of Independence, 1945.

[29] The Ha Long Bay Agreements recognising the independence of Vietnam, 5 June 1948.

[30] Procès en Haute Cour de justice de Decoux, 3-W 150-162, AN.

and French collaborators. On 13 August 1946 Ho Van Minh was sentenced to lifetime forced labour for "participating in an attempt to demoralise the Army or the Nation", with the object of weakening national defence.[31] During the war Ho Van Minh had denounced some French citizens for supporting the Allies. In 1946 the first French citizen to be sentenced was Emile Eychenne, an entrepreneur born in Indochina. Eychenne was charged with "attacks on the state security – friendly and inconvenient agreements with Japanese", because he had supported the Japanese after March 1945.[32]

Third, the French provided a specific definition of war crimes in Indochina with regards to the period covered. Difficulties were present at the onset of the French–Japanese war. There were diverging interpretations as to the exact beginning of the war. When the administration of French Indochina was bequeathed to the Vichy government, it ceded the control of Hanoi and Saigon in 1940 to Japan. A year later Japan extended its control over the whole of French Indochina and both countries ruled Indochina together.[33] In March 1945 the Japanese imprisoned the Vichy French and took direct control of Vietnam until they were defeated by the Allies in August 1945. According to the Federal Counsellor at the Office of Legal Affairs, Albert Torel, the Japanese had engaged in military operations against French troops since March 1945. His suggestion was finally accepted. War crimes to be tried in Saigon were restricted to the period between 9 March 1945 and 15 August 1945.[34]

In spite of the struggle for decolonisation, France adopted a pragmatic approach to the prosecution of war crimes in Indochina. It created a new legal framework with the legal purge, the creation of the French Union, the War Crimes Ordinance of 28 August 1944 and its adaptation to the local context. The French state builders wanted to demonstrate to the Indochinese that the values that the "new" France defended were right, fair and equitable.

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[31] French Permanent Military Tribunal in Saigon, *The Case of Ho Van Minh*, Judgment, 13 August 1946.

[32] French Permanent Military Tribunal in Saigon, *The Case of Emile Eychenne*, Judgment, 18 September 1946.

[33] See Chizuru Namba, *Français et Japonais en Indochine (1940–1945): Colonisation, propagande et rivalité culturelle*, Karthala, Paris, 2012.

[34] Note d'Albert Torel, INDO HCI, ConsPol 153, Archives nationales d'Outre-Mer ('ANOM').

24.4. A Model of Court Proceedings? The Criminal Proceedings at the War Court in Saigon

France supported the creation of the Nuremberg and Tokyo Tribunals as the first international courts set up to judge individuals at the highest levels of government for grave violations of international criminal law. However, Judge Bernard disapproved the way that investigations were conducted in Tokyo. He considered the French court proceedings as a model. But in reality how did the criminal proceedings take place in Indochina in the context of decolonisation?

According to the specific French legal approach to war crimes, between October 1946 and March 1950 the Saigon Trials heard about 39 cases of accusations of war crimes committed by members of the Imperial Japanese Army. The Japanese were tried on a wide variety of offences. French prosecutors accused Japanese of "mass murder" of French prisoners of war ('POW') by "outright decapitation" or "prolonged torture"; "ill-treatment of POWs and having forced them to do certain work in violation of international conventions"; "mass slaughter" or "assassination" of French POWs, civilians and men and women of the Indochinese Resistance Group.[35] It must be noted, however, that as an archival analysis suggests, no Japanese who stood before a Saigon court was charged with "crimes against peace" or "crimes against humanity", the new charges established at Nuremberg and Tokyo.[36] Japanese suspects who could not be tried accordingly by the French military were subsequently released and returned to Japan. [37]

According to Chizuru Namba, of the overall total of Japanese war criminals judged at the FPMTS, 112 received prison sentences, 63 were executed, 23 received life imprisonment and 31 were acquitted.[38] Before June 1946 France identified more than 933 Japanese suspected of war crimes.[39] It is important to note that most of the victims were French or Indochinese people who usually had a particular status in Indochina; they were "protected" by France. This characteristic of the FPMTS differed

35 Piccigallo, 1979, p. 207, see *supra* note 7.

36 *Ibid.*, p. 204.

37 *Ibid.*, p. 207, see *supra* note 7.

38 Namba, 2011, p. 187, see *supra* note 4.

39 Lettre du Commissaire général à la justice au Garde des Sceaux, Saigon, 13 June 1946, BB-30/1791, AN.

from the other Class B and C war criminal trials conducted in Southeast Asia where violence against native people was indicted. According to Hayashi Hirofumi, the majority of Japanese war criminals brought before British courts in Singapore, Malaya, North Borneo, Burma and Hong Kong faced charges of crimes against Asian civilians, amounting to about 60 per cent of the total case.[40] Namba explains that the Japanese committed crimes against the Viet Minh members who refused to recognise the French legal authority in Saigon to prosecute Japanese war criminals.

The complex and very long French criminal proceedings have been criticised for having insufficient evidence to validate the Judgments. But analysis of documents reveals that this is not the case. To understand the criminal procedure in Saigon from its preparatory stage to the Judgment, we will examine in detail the prosecution of Kyota Katsunami, commander of the Japanese Secret Police ('Kempetai') detachment at Phan Thiet in southeastern Vietnam in 1946.[41] In June 1946 a French priest named Brugidou lodged a complaint against the Kempetai in Phan Thiet for abuse and mistreatment following the Japanese coup on 9 March 1945.[42] During the course of one month, the French and English authorities conducted an investigation. They collected together evidence from intelligence reports and interrogations. The British Army carried out most of the interrogations, assisted by an interpreter. After the investigation, the French authority sent a file document to the UNWCC.[43]

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[40] Hirofumi Hayashi, "British War Crimes Trials of Japanese", in *Nature-People-Society: Science and the Humanities*, no. 31, 2001.

[41] French Permanent Military Tribunal in Saigon, *The Case of Sergent Katsunami*, Judgment 36, 21 October 1946, ("Katsunami Judgment"), Dépôt central d'archives de la justice militaire ('DCAJM').

[42] *Ibid.*, Lettre du Commissaire de la République pour le Sud Annam à Phan Thiet au Délégué des Crimes de Guerre pour le Sud Annam, 6 June 1946, see *supra* note 41.

[43] *Ibid.*, UNWCC file. It states:

> Name of the accused: Kyota Katsunami
>
> Date and place of commission of alleged crimes: March-April 1945 – Phan Thiet Gendarmerie
>
> Number and description of crime in war crime list: Crime No 3 and Crime No 13 / Robbery, ill-treatment of detainees, abuse and torture.
>
> Reference to relevant provisions of national law: Penal Code Art. 302, 303 and 344, Art 400.

The investigation files with intelligence reports, interrogations and the UNWCC documents were forwarded to Saigon to start proceedings on 3 July 1946. From 18 July 1946 to 10 October 1946, an investigating Judge, Jean Pétri, processed the complaint. Pétri questioned witnesses, interrogated suspects and ordered further investigations. His role was not to prosecute the accused, but rather to gather facts, and as such his duty was to look for any evidence available (*à charge et à décharge*), incriminating or exculpatory. On 18 August 1946 Pétri held a cross-examination between the witnesses and the defendant. On this occasion, Katsunami declared:

> Having a very bad memory, I previously declared not to have beaten the R.P. Brugidou. But, during the confrontation tonight, I recognized him. I recognize, indeed, to have beaten him, but I did not kick him.[44]

The scope of the inquiry was limited by the mandate given by the prosecutor's office: the examining judge could not open a criminal investigation *sua sponte*. Hence, Pétri, as the examining Judge, decided there was a valid case against Katsunami. The examining judge asked Katsunami to choose his own attorney. Upon his refusal to do so, Pétri appointed a defence counsel for him. On 17 October 1946 the prosecution notified Katsunami "crimes alleged, the text of the law applicable, and the names of witnesses". Four days later, on 21 October 1946, Katsunami was judged in public proceedings. After all the testimonies had been heard, the accused and his counsel were offered the occasion for final words. Katsunami declared:

> I have been ordered to conduct violent investigations and I have been forced to engage in violence because I wanted the Japanese victory. I have only carried out my duty and without racial hate against the Whites.[45]

> Particulars of evidence in support: MORIYAMA Yasumasa and NISHIDA Masami
>
> Notes: KYOTA is greatly responsible for all that business - his accomplices, sergent GUNTZI and military police AKAMA who have to bear heavy charges would both be dead, this is? without certainty. Those three men are accused of severe ill-treatment towards French civilians arrested and put in the PHANTHIET military police prison.

44 *Ibid.*, Procès verbal interrogatoire et confrontation, 12 August 1945.

45 *Ibid.*, Audience, 21 October 1946.

Kyota was found guilty and sentenced to forced labour.

Upon a conviction, French Military Tribunals awarded a wide range of punishments under the Penal Code: death; penal servitude for life; deportation; penal servitude for a term; detention and confinement (Penal Code, Article 7). The pronouncement of Judgment took place in open court. Military Tribunals reached all decisions by majority vote. Before awarding sentence, Tribunals considered any possible extenuating circumstances. Under the Code of Military Justice, a convicted accused could register an appeal within 24 hours of the time of Judgment. Review of such petitions by a Military Appeal Tribunal followed. Many Japanese war criminals tried to take advantage of this possibility, as with the example that follows.

The Judgment of the Japanese Colonel Shizume and three Japanese Captains[46] in January 1950 was very well known. They were tried for massacring 300 French prisoners at Lang Son between 9 and 11 March 1945. The evidence showed that Shizume ordered the prisoners to be taken in groups of 20 into a small courtyard where they were shot and bayoneted. Captain Kayakawa was accused of having ordered Japanese soldiers to kill General Emile-Renè Lemonnier, after his refusal to surrender. Their lawyer, Fujio Sugimatsu, pleaded for clemency and he wrote to the French Judges on 24 January 1950:

> I was in charge of the defence during the judgment pronounced at the English Army Court of Singapore on the WATARI case […] The judgment pronounced in opposition to these 9 accused was as follows: 4 acquitted and 5 sentenced to prison. I can't help being moved to tears by hearing this fair judgment overcoming all feelings of hostility, race or retaliation. Such a trial opens a new era of history and culture and creates also a new indicator on the path of human life.[47]

However, the four Japanese officers were sentenced to death. The Japanese Captain Yoshio Fukuda registered an appeal. To support his pardoning, the mayor and the inhabitants of his Japanese home town, Asada Mura, sent a petition to Douglas MacArthur, the Supreme Allied Commander for the Allied Powers:

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[46] French Permanent Military Tribunal in Saigon, *The Case of the Langson Massacre*, Judgment, 25 January 1950 ("Langson Massacre case") (DCAJM).

[47] *Ibid.*, Plaidoirie générale, 20 January 1950.

> We all come from the same village, the one of Mr Yoshio FUKUDA. Mr Yoshio FUKUDA was a man whose moral sense was strict; he was born in a family renowned for its thoughtfulness; during his childhood he was nicknamed "the son of God", for he was so fully sensible, sincere and gifted with a strong spirit of justice […] Now Japan is suggesting to move itself towards democracy and in the sight of our country's restoration, only such men are able to achieve this masterpiece.[48]

The court concentrated exclusively on determining whether the decision pronounced thereby constituted a correct application of the law. His application for pardon was rejected and he was executed on 19 March 1951.

War criminals condemned to prison terms were incarcerated in Indochina. In May 1950 they came under US jurisdiction at Sugamo Prison in Tokyo. After the Japanese return to sovereignty on 28 April 1952, the government of Japan administered them. But war criminals' sentences could only be modified with the approval of the French government.[49]

France was faced with rebuilding the country and removing criminals and collaborators from office. In this context, the French Saigon Courts tried Japanese war criminals and collaborators. In the face of the Indochinese struggle for decolonisation, the French pursuit of law and the criminal proceedings tried to prove that they could govern through the rule of law.

This approach was very much in line with other colonial resettling strategies. For example, the British authorities in Singapore saw war crimes trials as a platform to earn credit in the eyes of the decolonisation movement. Just before the end of the war, M.E. Dening, the chief political adviser to Lord Louis Mountbatten, the Supreme Allied Commander South East Asia Command, stated in a letter to the British Foreign Office that it was important "in a manner most calculated to impress the inhabitants with the security we are capable of providing".[50] War crimes trials were thought to present a good opportunity to impress upon the

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48 *Ibid.*, Demande de recours en grâce, 31 March 1950.

49 Trefalt, forthcoming, see *supra* note 7.

50 Peter Dennis, *Troubled Days of Peace: Mountbatten and Southeast Asia Command, 1945-1946*, Manchester University Press, Manchester, 1987, pp. 11–12.

local population that Britain had enough power to protect and govern its empire.[51]

The enforcement of domestic criminal law at the FPMTS was a national strategy to preserve and ensure the continuity of the French legal tradition to prosecute criminals in Southeast Asia. The criminal proceedings demonstrated the consistency of the French legal approach and its continuing values for Indochina in the context of demands for decolonisation.

24.5. The French Delegation at the IMFTE

> Considering the global impact of these trials, the Allied Nations will choose, to represent them, the best and brightest minds with unchallengeable authority.[52]

This statement highlights the importance that France attributed to be represented by qualified jurists at the IMTFE. The IMTFE was convened from 1946 to 1948 to try the leaders of Japan. Following the surrender on 2 September 1945 and the occupation of Japan, MacArthur ordered the arrest of major war crimes suspects. He proclaimed the creation of the IMTFE on 19 January 1946 for crimes against peace and humanity. However, in January 1946 France still did not have designated jurists because it encountered difficulties in appointing qualified staff. Indeed, in France many jurists, who had not collaborated either with Germany or with Japan during the war, were employed to draft the new constitution and to take part in constructing the foundations of the new French Republic. Britain met the same difficulties in appointing legal staff, which dogged the Class B and C war criminals trials to the end.[53]

France wanted first to appoint as judge, Jean Escarra,[54] a French legal scholar, known for having worked as a legal consultant of the Chinese government between 1921 and 1929. Escarra provided advice in reforming the Chinese legal system and was a key participant in designing the Chinese Civil Code of 1929. With his extensive knowledge of Asia and his network of contacts, he would have been a very good choice for the IMTFE. But Escarra refused the French proposal to work at the Tokyo

[51] Hirofumi, 2001, see *supra* note 40.

[52] Trefalt, forthcoming, see *supra* note 7.

[53] Hirofumi, 2001, see *supra* note 40.

[54] Esmein, 1998, p. 4, see *supra* note 6.

Trials. Both the newly designated Judge, Henri Heimburger, and the designated Prosecutor, Jean Lambert, withdrew. Finally, the French government appointed Bernard as Judge and Oneto as Prosecutor.

Jean Esmein explains that the French overseas officials lobbied for the appointment of a colonial judge who could control the flow of information relating to the French colonial project in Asia, as they were worried about investigations into a "cleansing" policy in Indochina.[55] Bernard was a colonial magistrate who sided with the Free French in August 1940 when the French authorities joined de Gaulle's forces in French Equatorial Africa (Congo). A Military Tribunal convened under the Vichy regime sentenced Bernard to death *in abstentia*.[56] Nevertheless, he became a judicial representative for de Gaulle's government in Beirut in 1944.[57] As Bernard was unable to understand the official languages used – English and Japanese – during the IMTFE, the French Ministry of National Education sent Jacques Gouëdou to assist him.[58] Bernard embodied French republican and colonial values, a fact which was important. His presence at the Tokyo Trial sent a strong message to the world: France had the judicial means to re-establish republican law over its colonies.

On 4 April 1946 the French delegation arrived in Japan. One of its main objectives was first to remove French Indochina from the list of Japanese wartime allies, and to have it listed instead as one of the victims of Japanese aggression. The French Prosecutor considered that such thoughts constituted a disgrace. He wanted to prove that France had been a victim of Japanese aggression "despite the absence of a comprehensive documentation".[59] Oneto, a former member of the Resistance, was determined first to create a clear distinction between the Vichy regime and the new French democratic power, and to demonstrate the French commitment to other Allied Powers at the Tokyo Trial.

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55 *Ibid*., p. 6.

56 French Permanent Military Tribunal in Clermont Ferrand, Judgment of Henri Bernard, 12 September 1941 (DCAJM).

57 Fonds du Juge Henri Bernard: Le procès de Tokyo, 1946–1949 ("Bernard"), Bibliothèque de documentation internationale contemporaraine ('BDIC').

58 Michaël Ho Foui Sang, "Justice Henri Bernard", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 96.

59 *Ibid.*

Zinovi Pechkoff, the Chief of the French Mission to the occupation government in Japan, supported Oneto. Pechkoff had acquired comprehensive knowledge about the prosecution of Japanese war crimes since he served France as ambassador in Chungking during the Second World War where he took part in the investigation of war crimes of the UNWCC's Sub-Commission.[60] In mid-May 1946 Pechkoff met with MacArthur to strengthen the French position at the Tokyo Trials. He said that he was offended by the suspicions about France at the IMTFE and its collaboration with Japan in Indochina during the war. At the meeting, MacArthur had a sympathetic attitude and showed his support towards the French.[61] Moreover, Oneto managed to change the Indictment with the introduction of offence 33: "Waging aggressive war against French Indochina after 22 September 1940".

Oneto and his assistant, Roger Depo, introduced their evidence about the relations between Japan and France from 30 September to 7 October 1946 and about war crimes committed in Indochina in January 1947. They proved that the state of war between Japan and France started on 22 September 1940 when Japan launched an attack in Lang Son to prevent the Republic of China from importing arms and fuel from the port of Haiphong through French Indochina along the Sino–Vietnamese railway. Oneto avoided speaking about the Japanese support for the independence movement in Indochina and the American anticolonial position:

> If I stress this point, that is unquestionably contrary to the Hague Convention, I would give the defence and a certain part of public opinion in the Far East a pretext for extensive debates, which seem to be right now inappropriate.[62]

The presentation of the French prosecution was much shorter than the presentation of the Philippine prosecution, the US prosecution and the British Commonwealth's prosecution.[63] Pechkoff was relieved that the French prosecution's case had been entirely convincing to the other

[60] United Nations War Crimes Commission, Far Eastern and Pacific Sub-Commission, Minutes No. 15 (http://www.legal-tools.org/doc/bd5bac/).

[61] Memorandum from Pechkoff to President Gouin, 21 May 1946 ("Pechkoff Memorandum"), HCI 124/382 (ANOM).

[62] *Ibid*.

[63] Yuma Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II*, Harvard East Asian Monographs, Cambridge, MA, 2009, p. 111.

members of the Tribunal: "Oneto promoted a favourable impression […] The French position has been here reinforced by the debates 'over the last couple of days'".[64]

This was very important to the French government, which saw the Tokyo Trial as a legitimisation of the new French historical foundations. This comment shows the French approach to post-war prosecutions as exemplified in the Saigon Trials and at Tokyo. The French saw these trials as legitimising the new French government and differentiating it from the Vichy regime. This was especially true of the insistence on fair procedure that demonstrated their commitment to other Allied powers in Tokyo their position as a valuable partner and ally.

The defence mainly argued the stationing of the Japanese troops in Indochina was not a crime against peace. It estimated that this stationing was legitimate as Japan and Vichy-controlled Indochina signed an accord that granted Japan the rights to station troops in Indochina on 22 September 1940. However, the final Judgment rejected the defence's argument by showing, as Oneto did, that Japan applied military pressure by crossing the Chinese border.

Bernard wanted to inform the President of the Tokyo Trial of his strong disagreement with the proceedings before the final position of the Tribunal was decided.[65] When the final Judgment was published, he decided to make his disapproval known in his Dissenting Opinion on 12 November 1948 where he argued that the Tribunal's action was flawed due to Emperor Hirohito's absence and the lack of sufficient deliberation by the Judges. Bernard regretted that the prosecution was conducted in person and not in rem as the failure to indict Emperor Hirohito served as a clear illustration of the selective approach of the Tribunal.[66] Bernard also disapproved of the use of new international law concepts at the Tokyo Trial, such as conspiracy and crimes against peace.[67] In his dissenting Opinion, he stated: "A verdict reached by a Tribunal after a defective procedure cannot be a valid one".[68] Meanwhile, Pechkoff advised, firstly,

64 Lettre de Pechkoff, ambassadeur de France, chef de la mission française au Japon, au Ministre des Affaires étrangères, 9 October 1946, INF 1364, Centre des archives d'Outre-Mer ('CAOM').

65 Sang, 2011, p. 99, see *supra* note 58.

66 Bernard, 1948, see *supra* note 57.

67 *Ibid.*

68 *Ibid.*

"a compassionate approach – both for the sake of the protagonists and for the sake of mankind";[69] and secondly, like Bernard, he argued against the application of the crimes against peace at the Tokyo Trials. In December 1948 Pechkoff sent a note to MacArthur: "Like Justice Bernard, I cannot subscribe to the verdict of the majority of the judges and to the sentences that have been pronounced".[70]

Unlike the Nuremberg Trial, all the defendants at Tokyo were found guilty. Two of the 28 defendants died during the trial, while one had a mental breakdown on the first day of trial. Seven were sentenced to death, 16 to life imprisonment and two to less severe terms.

At the Tokyo Trial, the French commitment to the rule of law was influenced by the French colonial project in Indochina. While the French Judge cared deeply about the principles of impartiality and fair trial, the French Prosecutor focused on proving that the French had been the victims of the Japanese since 1940. The Tokyo Trial played an important role in French state building: France was recognised as an ally while it faced the difficulty of restoring the rule of law in a climate of violence, political and social strife.

24.6. Conclusion

The French war crimes trials policy in Asia highlights the historical function of post-Second World War prosecutions. Indeed, the French pursuit of justice in Asia against Japanese war criminals belonged to its own nation-building process. The French representatives at the Saigon and Tokyo Trials participated in the French effort to save its honour and regain a place in the leading international institutions. During the war Vichy France had collaborated with Germany and Japan from 1940 to 1945. Therefore the "new" France had to create new legislation to prosecute war crimes and collaborators in Permanent Military Tribunals. Cassin and Menthon drafted the War Crimes Ordinance to prosecute war crimes. Influenced by democratic and Christians values, its aim were to prosecute war criminals and avoid vengeance. The new guiding principles of the War Crimes Ordinance demonstrated to the world that France had returned to its republican legal tradition.

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69 Kirsten Sellars, *'Crimes Against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 255.

70 Note of Pechkoff, November 1948, 331/ 337138 (NARA).

The Tokyo Trial represented a stepping stone to the recognition of France as a valued ally. It played a symbolic role, as it affirmed France's legal ability to emerge from the war as an ally on the side of the Free World. The French war crimes trial policy was determined first by Oneto, who wanted to prove that France was not a wartime ally of the Japanese but a victim, and secondly, by Bernard, caring deeply about the principles of impartiality and a fair trial, which made him issue a Dissenting Opinion at Tokyo. Bernard and Pechkoff both regarded the principles of impartiality and a fair trial very highly, and questioned the legal foundations of the Tokyo Trial.

In Indochina, French trials took place in the context of the struggle for decolonisation. France had therefore to adapt the War Crimes Ordinance to the circumstances. The impact of decolonisation in the making of law was very strong. Before the FPMTS, 230 Japanese defendants were tried according to the new legislation created in 1944 to prosecute war criminals. Japanese defendants were judged only for war crimes committed against the French population, while war crimes committed against the Indochinese population were ignored. This suggests that the French war crimes trials policy in Southeast Asia had two aims. First, the French wanted to locate itself on the side of the victims of Japan in the Second World War. Second, the "new" France emerging from the war sent the message to the world that it embodied a new republican power that could protect Indochina. However, the onset of the first Vietnam War would show that these French goals ultimately failed with Vietnamese independence in 1954.

25

In Search of Justice for China: The Contributions of Judge Hsiang Che-chun to the Prosecution of Japanese War Criminals at the Tokyo Trial

XIANG Longwan* **and Marquise Lee HOULE****

25.1. An End to the Second World War: The Importance of the Tokyo Trial for China

On 15 August 1945 the Japanese Emperor Hirohito announced Japan's surrender to the Allied Powers. The war with Japan was finally over, and the Allied Powers began to draw together prosecutors and judges from around the world to discuss, find evidence and pass judgment over the war crimes and crimes against peace that had been committed by the Japanese. The ensuing International Military Tribunal for the Far East ('Tokyo Trial') lasted over 900 days (3 May 1946 to 12 November 1948) and comprised more than 800 court sessions.[1] In comparison to the International Military Tribunal at Nuremburg, which lasted a mere 248 days, the Tokyo trial had 48,412 pages of records to the latter's 17,000.[2]

The International Prosecution Section set up by the Supreme Commander for the Allied Powers ('SCAP', also referred to as General

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1 Zhaoqi Cheng, Zhiwei Gong, and Yuhui Zhao, *Handbook of the Tokyo Trial Studies*, Shanghai Jiao Tong University Press, Shanghai, 2013, pp. 211–48.

2 Étienne Jaudel, *Le procès de Tokyo un Nuremberg oublié*, Odile Jacob, 2010, pp. 10–12

Headquarters), General Douglas MacArthur, agreed on one thing: that Japanese war crimes had ended on that historic day in August 1945. But opinions were divided on the true starting date of Japanese aggression. It was the Chinese delegation to the Tokyo Trial that demanded the earliest starting date, more than 10 years before the official beginning of the Second World War. Justice MEI Ju-ao (梅汝璈), China's representative to the Panel of Judges for the Tokyo Trial, wrote that some had considered the International Military Tribunal a means of trying the Japanese for crimes they had committed during the Second World War, and that the very public attack on Pearl Harbor on 7 December 1941 leading to the series of battles in the Pacific Ocean was the starting date of the aggression.[3] This narrow view or restrictive structuring of the purpose for the Tokyo Trial was perhaps due to a general lack of knowledge of what had truly been occurring in China for more than 10 years before this date. Using the attack on Pearl Harbor as the starting point of Japanese aggression would have ignored a great deal of wrongdoing committed in Asia. Additionally, it takes a view of history that places a dangerous importance on acknowledging true aggression as deriving from unprovoked acts against Western powers. It was Chinese prosecutors that fought vigorously for 1928 as the starting date of Japanese aggression and war crimes, despite the defence arguing that there had not been a state of war between the two countries so early on.[4]

For the Chinese, these trials were not representative of victory in the Second World War, but a demand for justice against a greater evil, Japanese expansion into their territory and the brutal murders and conspiracies associated with this hunger for greater power over Asia. This is what the Chinese Prosecutor HSIANG Che-chun (向哲濬)[5] demanded of the trial. Since the outbreak of the First Opium War in 1839 until 1945, Hsiang felt that the Chinese had not had a single moment to be proud of. They had been invaded by Western powers and then beaten down by the Japanese. The Tokyo Trial and the corresponding victory over Japanese aggression were, for him, a long-awaited break in the cycle of victimisation. In 1983, four years before his death, Hsiang said: "Since

[3] Xiao'ao Mei and Xiaokan Mei, *Mei Ju-ao's Transcript of the Tokyo Trial*, Shanghai Jiao Tong University Press, Shanghai, 2013, p. 277.

[4] *Ibid.*

[5] This chapter uses English spelling based on the Romanisation of Cantonese pronunciation. True Mandarin pinyin of Hsiang Che-chun is Xiang Zhejun.

the Opium War […] after countless wars and invasions by the western powers, the only victory China had was the anti-Japanese war; the Chinese people only had the Tokyo Trial to make them proud!" [6] Motivated by a private sense of revenge, justice and love for his country, Hsiang represented China as its lead Prosecutor with the goal of proving that, since 1928, the many separate acts of aggression committed over the years by the Japanese had all been part of a larger conspiracy.

But what *ex post facto* justice could there be after all that had occurred? For a start, the goal was condemnation of those who had been instrumental to the conspiracy. But of equal importance was the telling of the tale, the acknowledgement that the events had occurred, that they were perpetrated with a malevolent intent and that, to put it simply, those acts had been wrong. Hsiang did not blame the Japanese people as a whole, and his sense of revenge was not against ordinary citizens, but rather the ringleaders of Japanese militarism, and then later in life the deniers or sympathisers of Japanese aggression. He believed that no Japanese person should ever again forget or deny the injustices and atrocities that had been committed in his homeland. He spoke clearly to this issue in his first speech to the Tokyo Court on 14 May 1946:

> I think the Chinese people had all along most friendly feelings toward the Japanese people. But we submit to the Court that their leaders misled them, fooled them, and destroyed them – ruined them, and those leaders ought to be held responsible as a matter of justice, not only to the oppressed among the Chinese people, not only in the interest of world peace, but also in the interests of the Japanese people.[7]

This chapter discusses the contributions of the Chinese prosecution team headed by Hsiang, as well as the difficulties they faced in their endeavours.

25.2. Flashback: The Education and Formation of Hsiang Che-chun

Hsiang was born in 1892 in Ningxiang County, Hunan province to a rather poor family of farmers. His childhood and youth were dominated

[6] Longwan Xiang, *The Tokyo Trial: Chinese Prosecutor Hsiang Che-chun*, Shanghai Jiao Tong University Press, Shanghai, 2010, pp. 331–33.

[7] *Ibid.*, p. 8.

by dark periods of imperialist aggression and national humiliation.[8] The Sino-Japanese War and the resulting Treaty of Shimonoseki (1895), the Boxer Rebellion and the eventual Peace Agreement between China and the Eight-Nation Alliance (1901) all had deep impressions on him, and from an early age he decided that he wished to serve and strengthen his country.

Because Hsiang excelled in his studies as a child, his extended family decided to pull together to support his continued education at better schools. During his Middle School education in Changsha, he was exposed to and adopted the revolutionary ideas of toppling the corrupt Qing Dynasty government.[9] Hsiang was particularly influenced by his algebra teacher Xu Teli (徐特立), who dramatically cut his finger and wrote protest slogans in his own blood. As a student he was deeply moved and swept up in the drama of the times. Hsiang himself used his blood to emblazon his jacket with the famous Han Dynasty slogan, "匈奴未灭，何以家为".[10] This saying expresses a resolution to serve the motherland. Throughout his life he never lost this passion for justice he had gained at so young an age, and the desire to work for a better China.

Hsiang continued his education at the predecessor of Tsinghua University from 1910 to 1917 in a preparatory programme for study in the United States. In his time in the US, he obtained a B.A. in American and English Literature from Yale University in 1920. Hsiang was very active outside of the classroom as well while at Yale. He was President of the Yale Chinese Students' Club, President of the Yale Cosmopolitan Club and Secretary of the Joint Committee of Eight Chinese People's Organisations during the Washington Conference, and Associate Editor of the Chinese Students' Monthly. During his studies, he also worked at the Library of Congress. He later transferred to George Washington University with the recommendation of the Dean at Yale Law School, where he would be able to study on a scholarship from the Library of

[8] Longwan Xiang, "My Father's Participation in the Tokyo War Crime Trial", in *Wen Hui Daily Newspaper*, 18 September 2005.

[9] Fang Zhou, "My Life Long Teacher and Companion", in Xiang, 2010, pp. 218–20, see *supra* note 6.

[10] Literally, "I will not marry before the Huns have been destroyed". Figuratively, a declaration of devotion to one's country and a determination to work for the attaining of a national goal.

Congress. He graduated from George Washington University Law School with an LL.B. in 1925.[11]

In 1925, newly graduated from law school, Hsiang returned to China and taught at Peking University, Peking Chiao Tung University and the Peking College of Law and Politics. With the purpose of abolishing the unequal treaties China had entered into with post-World War One Allied powers, which guaranteed foreign powers extraterritoriality or the right of trials by consuls, Hsiang joined the preparatory Committee for the Return of Legal Powers. He started as secretary to WANG Ch'ung-hui (王宠惠), a prominent Chinese legal authority. When, in 1927, Wang was named Chief of the Administrative Judicial Department of the National Government, Hsiang was given the opportunity to go with him to Nanking to serve as Secretary of the Department. His first assignment was the realisation of his dream to abolish trials by foreign consulates. In 1932 Hsiang became head of the Soochow (Suzhou) town courts. In 1933 he became Chief Prosecutor in the Shanghai Special District No. 1 Courts.

In July 1937, three months after the birth of his daughter, the Marco Polo Bridge incident occurred. This event sent ripples throughout China. One day Hsiang arrived home and announced that the authorities had reason to believe Japan might soon attack Shanghai. With the intention of fighting back should the Japanese choose to attack, the tension in Shanghai began to rise and dangers became more palpable. Japanese aggression and infiltration into China became more serious, and despite not being a soldier the situation began to interfere not just with Hsiang's career but his personal life as well. His family was often sent away for their protection, with the separation lasting close to two years in one instance. After three months of fighting Shanghai fell to the Japanese in November 1937. The Chinese courts in the Shanghai International Settlement continued to report to the National Government,[11] but the Japanese and the puppet government proceeded to infiltrate them. At that time, the judges were separated from their families and housed in the courthouses for their protection. These precautions were deemed necessary as court officials feared for their safety.

[11] In the early twentieth century, there was an area called the International Settlement in Shanghai, which actually was a joint British and American concession. A Shanghai Court was located in the International Settlement. Before the attack on Pearl Harbor the Japanese Army was not able to interfere with the Court. Susan L. Karamanian, personal letter, in Xiang, 2010, pp. 222–23, see *supra* note 6.

Uncertainty and danger hung in the air, as conspiracies and violence became more prevalent and Japanese agents attempted to chip away at the Chinese government and their legal system. One Sunday night in May 1945 a Japanese agent finally came for Hsiang. The spy broke into his home in an attempt to abduct him. Fortunately, he was working late at the courthouse and thus escaped all harm. His wife CHOW Fang (Zhou Fang, 周芳) was in the first-floor apartment with their three-month-old baby and two other children as the Japanese agent searched for her husband upstairs, misinformed that they lived on a higher storey. In her memoirs, Hsiang's wife recounts her thankfulness that baby Longwan had not cried that night as they hid from the agent, because in that case they would have surely been found out.[12]

On 8 December 1941, concurrent with the attack on Pearl Harbor, the Japanese military flooded into the Shanghai International Settlement, and British and American residents were confined. Shanghai fell into chaos. Two of Hsiang's colleagues, Presiding Judge CHIEN (钱庭长) and Presiding Judge YU (郁庭长) were assassinated, and one colleague, Presiding Judge HSU (徐庭长) was abducted. Under these perilous conditions, Hsiang and his colleagues KUO Yunkuan (郭云观) and Dr. NYI Judson (倪征曀) disguised themselves as paper merchants and mingled among travelling tradesmen. With the help of friends they escaped from a now Japanese-controlled Shanghai.[13] Hsiang reached Chunking, the wartime capital of China. Upon arrival, he was appointed as a secretary of the Highest Defence Committee. Hsiang's wife, and their children escaped separately from Shanghai to the mountains of southern Hunan.

In the spring of 1943 Hsiang was appointed as Chief Prosecutor in the newly established Hunan-Guangtong Branch of the Supreme Court, located where Chow Fang and the family were staying at the time. However, before long, in February 1945, Japanese invaders also reached the suburbs of his refuge and he was once again forced into hiding. He travelled quickly up the mountains of the surrounding area, his two children in the baskets of a carrying-pole wielded by his wife's student who helped them escape to safety.

12 Xiang, 2010, pp. 240–41, see *supra* note 6.

13 *Ibid*., pp. 245–48.

25.3. Selection for the Tokyo Trial

On 15 August 1945 the unconditional surrender of Japan was announced. Hsiang received a telegram from the Judicial Executive Department, naming him the Chief Prosecutor of the Shanghai Supreme Court and requiring him to assume his duties immediately. He quickly left Hunan alone and returned to Shanghai where he was commissioned to organise the Chinese team and prepare evidence for the trial of class A Japanese war criminals.[14]

According to the organisational structure of the court for the Tokyo Trial, each of the 11 Allied nations was to send one Judge and one lead Prosecutor. Hsiang was given the chance to choose either to be a Judge or Prosecutor before the official appointment was made. Chow Fong tells the story in *Memoirs of My Husband Hsiang Che-chun*:

> Mingsi (明思, Hsiang Che-chun's other given name) was recommended to Chiang Kai-shek by Wang Ch'ung-hui (王宠惠). At that time, he was asked if he would be willing to act as Judge or Prosecutor. The majority of people may think that a Judge ranks higher than a Prosecutor, but Mingsi did not think so. He maintained that the monstrous crimes of the Japanese militarists had to be disclosed to the whole world and that to accomplish this mission the prosecutor would carry a greater responsibility. He therefore made the choice to act as China's Prosecutor instead of Judge.[15]

With his choice made, he recommended Mei Ju-ao, a younger graduate from his alma mater Tsinghua University to act as Judge. Mei had received a J.D. from the University of Chicago and was a proficient jurist at the time. He was also a university professor and had been appointed as a legislator of the Legislative Yuan in 1934.[16]

On 8 December 1945 CHIANG Kai-shek officially announced that Hsiang and Mei had been approved to be the formal representatives of China to the Tokyo Trial. And so the struggle to gather evidence and prepare for trial began. Hsiang arrived in Tokyo with his secretary, Henry Chiu, on 7 February 1946. Two days later he sent a telegram back home:

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[14] Longwan Xiang and Yi Sun, *Hsiang Che-chun*'s letters, telegrams and statements at the *Tokyo Trial*, Shanghai Jiao Tong University Press, Shanghai, December, 2014.

[15] Xiang, 2010, pp. 254–55, see *supra* note 6.

[16] *Ibid.*

"Minister Wang, Foreign Office, Chunking. Arrived Tokyo with Secretary Henry Chiu 7th. Saw Chief Prosecutor Keenan 8th. Hsiang Che-chun".[17]

25.4. Trial Facts

The Chinese prosecution team comprised 13 members, including four advisers, three secretaries and five interpreters. Each country submitted a list of suspected war criminals to the SCAP (General Headquarters) and then ordered the arrest of suspected war criminals after the primary selection. The Chief Prosecutor Joseph B. Keenan consulted with the prosecutors from each country, and then chose 28 suspected Class A war criminals to stand trial.

The 12 suspected war criminals submitted by China, according to Chiang Kai-shek's order written by his own hand, included: 1. Doihara Kenji (also rendered as Dohihara); 2. Honjō Shigeru; 3. Tani Hisao; 4. Hashimoto Kingoro; 5. Itagaki Seishirō; 6. Isogai Rensuke; 7. Tōjō Hideki; 8. Wachi Takaji; 9. Sadaaki Kagesa; 10. Sakai Takashi; 11. Kita Seiichi; 12. Hata Shunroku. Of these, Honjō Shigeru committed suicide before the trials began and Tani Hisao was reclassified as a Class B war criminal and taken to the Nanking War Crimes Tribunal to stand trial, where he was subsequently executed.[17] Among the other 10 suspected war criminals named by the Chinese, five were labelled as Class A war criminals: Doihara Kenji, Itagaki Seishirō, Hata Shunroku, Tōjō Hideki and Hashimoto Kingoro.[18] It should be especially noted that Doihara was in Japan when the war ended and, because of insufficient evidence, he was not originally included in the 28 accused criminals. As noted in Awaya Kentarō's *Views on the Tokyo Tribunal*, "Chinese prosecutor Hsiang pointed out that Doihara Kenji was a central person as well as instigator of the aggression against China. The evidence against Doihara Kenji would be obtained in China. Doihara Kenji was finally identified as a defendant".[19] Through Hsiang's efforts, the intelligence chief who had committed innumerable crimes in China was brought to justice.

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17 Xiang and Sun, 2014, see *supra* note 14.

18 Cheng, Gong and Zhao, 2013, pp. 127–45, see *supra* note 1.

19 Awaya Kentarō, *Tokyo Saiban ron* [Views on the Tokyo Tribunal], 6th ed., Otsuki Shoten, Tokyo, 2002, pp. 100–1.

The Indictment against the war criminals listed 55 counts, 44 of them related to China. Seven of the indicted received the death penalty. The accusations were of crimes against peace, conventional war crimes and crimes against humanity.[20] While some counts were specific, such as waging an unprovoked war against China, the US or the Netherlands, others were concerned with conspiracy to commit unlawful actions under international law or with specific actions taken or not taken against soldiers or civilians.[21] The following three counts are examples of this. Count one was for "conspiring as leaders, organizers, instigators or accomplices […] to wage wars of aggression against any country or countries which might oppose her purpose of securing the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans and their adjoining countries and neighboring islands". Count 54 dealt with the inhumane treatment of prisoners of war and others. And Count 55 was concerned with the deliberate and reckless disregard in respect of their legal duty to take adequate steps to prevent atrocities.[22] There were 419 witnesses in court and 779 witnesses by correspondence, in comparison to the 200 witnesses and 143 witnesses by correspondence for the Nuremburg trials. The number of court sessions was also more than double those at Nuremburg.[23]

Throughout the phases of drafting the Indictment and making preparations for trial, evidence gathering was key. It was necessary for Hsiang to request information from China to help in building the prosecution's case. However, the quickest method for information transmission was through use of the telegram and a major communication complication was that there was no telegram machine for the Chinese language during the early stages of the Tokyo Trial. This forced the Chinese prosecution team to make their detailed requests for evidence to the Chinese offices and government in English with the help of the SCAP.[24]

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20 Xiang, 2010, pp. 332, see *supra* note 6.

21 Commission of Documentation of the Tokyo Trial, *Transcripts of the Proceedings of the International Military Tribunal for the Far East*, Shanghai Jiao Tong University Press, Shanghai, 2013 ("Transcripts of the Proceedings of the IMTFE"), vol. 1, pp. 122–23.

22 *Ibid.*,

23 Jaudel, 2010, see *supra* note 2.

24 Xiang and Sun, 2014, see *supra* note 14.

On 11 February 1945, only four days after Hsiang's arrival in Tokyo, he sent a telegram to the Chinese Foreign Minister:

> Minister Wang,
>
> Foreign Office, Chunking.
>
> Assumed work as Associate Prosecutor of International Military Tribunal for Far East, need urgently the facts and evidences concerning
>
> 1) Japanese intrigues and perpetration of Manchuria Incident, 1931; Marco Polo Bridge Incident, 1937 and Sino-Japanese War, 1937; specifying violations of treaties and/or agreements wherever possible.
> 2) Atrocities and/or other violations of international law committed by Japanese troops under command of General Matsui and Hata during war.
> 3) Japanese officials and or private narcotic activities in China as part of scheme to enrich their revenue and weaken Chinese people.
>
> Give details about poppy plantations and traffic in drugs, inform also approximate Chinese losses sustained by all acts of aggression in regard to combat and civilian lives and properties.
>
> Above information required urgently by International Prosecution Section headed by Joseph B. Keenan. Please send materials piecemeal as soon as available.
>
> Hsiang Che-chun.[25]

25.5. Difficulties Faced by the Chinese Prosecution Team

The major difficulties faced by the Chinese prosecution team were three-fold: a) the ongoing Cold War and Chinese civil war; b) dealing with common law principles and procedures; and c) gathering evidence and obtaining witnesses.

[25] Academia Historica, Documents of the Tokyo Trial, East Asian Section, Ministry of Foreign Affairs, Taipei Archives, No. 320, 172-1-0899, Epson 0095, pp. 11–13 ("Documents of the Tokyo Trial").

25.5.1. Shadow of the Cold War and Chaos of the Chinese Civil War

One of the difficulties for the Chinese delegation in particular and justice in general were the political complexities of the times. The Second World War and conflicts with the Japanese had not ended in a vacuum. There were other major conflicts for Allied leaders to contend with. The trials took place in the shadow of the Cold War, which had implications for whom the Americans were willing to indict. It also took place at the same time as the chaotic civil war in China.

The Cold War prompted the US and Britain to adopt a less severe attitude towards Japan. After the secret meeting between MacArthur and Emperor Hirohito on 27 September 1945, the position of the Emperor was maintained for the future of Japan and Hirohito was spared prosecution. In his concurring opinion, the Australian Justice William Webb took issue with the protection the Americans extended to Emperor Hirohito. He wrote: "The suggestion that the Emperor was bound to act on advice is contrary to the evidence. If he acted on advice it was because he was fit to do so. That did not limit his responsibility".[26] He did not believe that the Emperor was as innocent as many conspired to make him seem.

At the end of the Second World War, celebrated British author and journalist George Orwell used the phrase "permanent state of 'cold war'" as a general term in his essay "You and the Atomic Bomb".[27] The first use of the term to describe the post-war geopolitical tensions between the Soviet Union and the US is attributed to Bernard Baruch, an American financier and presidential adviser. On 16 April 1947 he delivered a speech in South Carolina, and stated: "Let us not be deceived: we are today in the midst of a cold war".[28] Just over a month earlier, the British Prime Minister Churchill spoke in the US in these terms: "From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the continent".[29] Despite the detestation the US and British governments had toward the crimes of the Japan militarists, the need to fight the Cold War

[26] David M. Crowe, *War Crimes, Genocide, and Justice: A Global History*, Palgrave Macmillan, New York, 2014, p. 204.

[27] George Orwell, "You and the Atomic Bomb", in *The Tribune*, 19 October 1945.

[28] Bernard Baruch, Speech to the South Carolina Legislature, Columbia, South Carolina, 16 April 1947.

[29] Winston S. Churchill, "The Sinews of Peace", Speech at Westminster College, Fulton, Missouri, 5 March 1946.

resulted in their policy of pulling back on punishments for these war criminals.

The interference due to the onset of the Cold War resulted in a rather cursory bringing to account of the Japanese war criminals: Emperor Hirohito was untouched, many Class A war criminals got lesser punishments than deserved, and some even escaped judgment altogether, for example, the Unit 731 germ warfare group. Hsiang was perplexed as to the tribunals' unwillingness to prosecute these individuals. He later learned that the Americans purposefully shielded them and secretly granted them immunity, so that they, and no other Allied nation, could get their hands on the scientific research and discoveries of Unit 731.[30] In this particular case, the trade made by the US was not merely an obstacle for the Chinese prosecution team to overcome but resulted in the complete inability for them to obtain justice for victims of Japanese experiments and cruelty, the majority of whom had been Chinese. In 2006 Toyo Ishii, a woman who had worked as a nurse during the Second World War, admitted to having helped bury dead bodies and body parts on the grounds of a medical school in Tokyo belonging to Unit 731, shortly after Japan's surrender in 1945.[31]

While the Americans were making backroom deals, China was overcome by civil war. Both before and after the Tokyo Trial, Chiang Kai-shek's main preoccupation was the war at home. Soon after the trials began, some 300,000 Kuomintang troops attacked the central China liberated regions on 26 June 1946, followed by attacks to the liberated regions of eastern China, the Shanxi-Suiyuan area, the Shanxi-Chahar-Hepei area and Manchuria. The Chinese leadership's focus was clearly not on the trial of a conflict that had already ended. China sent the smallest number of members to the international military tribunal, a mere 17 people during the whole of the trial.[32] The funds budgeted by the Nationalist government for the Tokyo Trial were very small as well, quite incompatible with China's position, not to mention the degree of damage done by the Japanese. The expenses budget, for example, could not even

30 Xiang, 2005, see *supra* note 8.

31 Associated Press, "Work Starts at Shinjuku Unit 731 Site", in *Japan Times*, 22 February 2011, p. 1.

32 Longwan Xiang, "The Significance and Revelations of the Tokyo Trials", in *SORSA Annals*, 2005, vol. 22, pp. 12–14.

cover the occasional meals that each Prosecutor was expected to host for their colleagues. When it was Hsiang's turn to do so, he was forced to use his personal salary to help cover the costs of China playing the host.[33]

Of course, the deep regrets that Hsiang had for the trial was not the money spent but rather the lack of willingness by his government to make a stronger demand for justice and revenge. While Chiang Kai-shek was busy trying to keep hold of his country, he adopted the policy of "repaying evil with kindness" toward the Japanese, abandoning the perfectly reasonable demand for war indemnities, and permitting Emperor Hirohito to be exempt from prosecution.

25.5.2. Dealing with the Common Law

The second difficulty was the common law court procedures used in the Tokyo Trial, which caused considerable difficulties in providing evidence. There is a major distinction between the Anglo-American and the continental legal systems. The common law emphasises the rights of the accused in a way that lends itself to excessive procedures that many participants in the Tokyo Trial, even the Judges, found quite difficult to adapt to.

Each Class A criminal had a legal team that always included both Japanese and American attorneys. In fact, there were more than 100 lawyers between all the defendants.[34] Also, because each accusation had to be supported by witnesses or material evidence, it was a challenge to satisfy this burden when, during the war, there had been no means or motivation to collect such evidence from the Japanese war criminals. The Japanese military had also ordered the destruction of evidence just before their surrender. This is not to mention the relatively small size of the Chinese prosecution team. The Chinese team had been thrown together rather quickly. There had been only two months from Hsiang's nomination by Chiang Kai-shek on 8 December 1945 to his arrival in Tokyo on 7 February 1946, and then only two and a half months from his arrival until the time of proposing the Indictment on 29 April. More importantly, the team was quite unfamiliar and inexperienced with the common law system.[35] Even Hsiang, who had an advantage over his team

[33] Fang Zhou, "My Life Long Teacher and Companion", in Xiang, 2010, p. 262, see *supra* note 6.

[34] Mei and Mei, 2013, pp. 213–15, see *supra* note 3.

[35] Xiang, 2005, p. 13, see *supra* note 32.

in having studied common law while abroad, was lacking in practical legal experience within the legal system, having returned to work in China after graduation. Despite this element that added to the difficulties faced, the Chinese team was determined to successfully prove the guilt of the accused.

25.5.3. Gathering Evidence and Finding Witnesses

When the International Military Tribunal for the Far East was established, China had just recovered from the war. Poor transportation conditions exacerbated the difficulties of investigation.[36] Although China had been the greatest victim of Japanese aggression and expansion, it was faced with a disappointing lack of evidence and limited time. The Indictment was due before 29 April 1946 and Mei Ju-ao wrote in his diary on 8 April: "Mingsi said he has been upset these last few days because the evidence China can provide is so little. Abstractly speaking, the Japanese army's aggression against China has lasted 15 years, so we should be the country that can provide the most evidence".[37]

At the time of the initial preparation for trial, Hsiang had only one secretary, Henry Chiu. It soon became imperative to expand the team in order to meet the heavy demands of the task. Upon his request, the Ministry of Foreign Affairs selected James T.C. Liu, who had graduated from the Department of Political Science at Yenching University (one of the predecessors of Peking University) and the Foreign Minister made a request that he be allowed to join the team.

Since English and Japanese were the working languages of the Tokyo Trial, a great amount of evidence and testimony had to quickly be translated from Chinese to English. After receiving approval of the SCAP, Hsiang worked to recruit translators in Shanghai while he was also there collecting evidence in April 1946. KAO Wen-bin recalled the situation when he was interviewed by Hsiang:

> One day in April 1946, I went to Huamao Hotel to take the exam. Mr. Hsiang was the chief examiner. He looked like a scholar without any bureaucratic airs. He let me sit down and asked me to translate a paragraph of a local newspaper from Chinese to English, and then asked about my family

[36] Xiang and Sun, 2014, see *supra* note 14.

[37] Mei and Mei, 2013, p. 65, see *supra* note 3.

> and educational background. He even gave me a cup of coffee in the meantime. I received a telephone call from Mr. Hsiang a few days later informing me that I was recruited. There were five interpreters altogether. Besides me, they were Mr. Chow Hsi-ching (Zhou Xiqing), BA of Railway Management, Shanghai Chiao-tung University (now SJTU), and MBA of Waton School, University of Philadelphia; Mr. Chang Pei-ji (Zhang Peiji), BA of St. John's University; Mr. Liu Chi-sheng (Liu Jisheng), LLB from Soochow (Chungking); and my classmate, Mr. Cheng Lu-ta (Zheng Luda), LLM from Soochow University (Shanghai U).[38]

Besides these, Hsiang also engaged four advisers: Judge Nyi Judson (Ni Zhengyu, LL.B. from Soochow University and LL.D. from Stanford University); Daniel S. Ao (E Sen, LL.B. from Lincoln University and an LL.D. from Stanford University); KWEI Yu (Gui Yu, LL.B. from Soochow University); WU Hsueh-yi (Wu Xueyi, LL.M. from Empire University, Kyoto).[39]

Crippled by war, China had recorded very little concerning the Japanese atrocities, but investigators nonetheless returned to find some witnesses to testify in Court. Because of the lack of evidence found in China at the time, it became clear that much better evidence would be found in the archives of Japan itself. These investigations provided an important foundation for the suit and the trial. Since Japan had blocked the passage of information during the war and had destroyed evidence before their surrender, Chinese prosecutors made great efforts to collect and analyse the reports of the Japanese media from the wartime period. They looked up documents in the Japanese Army headquarters. The chief adviser Nyi Judson recalled:

> After much consideration, the Chinese prosecution team asked the China Military Mission in Tokyo to request permission from the General Headquarters to access the archives of the former Army Ministry of Japan, so that Chinese prosecutors could look for evidence of Doihara Kenji and Itagaki Seishirō's crimes in Japan's aggression against China. The request was processed quickly, but there were numerous documents in the archive; it was by no means easy to find which were "strong" and "specific"

[38] Xiang, 2010, pp. 1–2, see *supra* note 6.

[39] Nyi Judson, *Composure and Peace in The Hague*, Law Press, 1999, pp. 104–7.

> evidence. Fortunately there are some similarities between the Chinese language and the Japanese language. It was therefore not difficult to distinguish the categories and headlines of the documents. Besides, Chinese prosecutors James T.C. Liu and Wu Hsueh-yi were proficient in Japanese, they were competent to the task. After working days and nights, quite a lot of useful materials were found.[40]

One very good example of damning evidence contained within Japanese sources was a news article Kao found:

> Once I saw news on Nichi-Nichi Shimbun [the predecessor of Mainichi Shimbun], which reported a "murderous competition" committed by two Japanese officials, Mukai Toshiaki and Noda Tsuyoshi with their swords. They killed 105 and 106 persons respectively. It [the article] also published a photo showing the two brutes holding theirs swords in their hands. I was outraged at it.[41]

On finding this evidence, Kao sent it swiftly to the relevant court, which was the Nanking War Crimes Tribunal for Class B criminals. The information he found while searching for evidence for the Tokyo Trial allowed the Tribunal in Nanking and the SCAP to become aware of these two particular individuals. They were subsequently found, arrested and sent to Nanking by an aircraft of the Chinese Military Mission in Tokyo, where they were tried and finally executed for their crimes.[42]

Hsiang made further investigative trips to China, sometimes with the welcome help of additional investigators such as Keenan and other American lawyers from the inspection team of the SCAP. While it was quite difficult to investigate in China at the time, after months of effort, many materials of the Japanese Army's atrocities were collected and brought to Japan. More than 700 pieces of relevant documents were found. After strict scrutiny in accordance with the rules of the Tribunal, the appropriate ones were chosen to be used by the prosecution.[43]

Looking for appropriate witnesses to appear in Court was also a difficult task for the Chinese prosecution team. On 10 June 1946 Hsiang

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40 *Ibid.*, p. 114.

41 Xiang, 2010, pp. 3–4, see *supra* note 6.

42 *Ibid.*

43 Xiang and Sun, 2014, see *supra* note 14.

sent an urgent telegram to the Ministry of Foreign Affairs requesting help. He stated:

> It is common for high-ranking officials to serve as witnesses at court in Rule of Law countries. It is also allowed to directly call a witness in international court. But considering that Chinese high officials are busy at present that they should go to a foreign land to make statements and may have to endure cross-examination repeatedly, may cause trouble. Therefore, I suggest that they should make the decision themselves in advance if they are willing to be a witness.[44]

This was Hsiang's earnest warning in advance. Most Chinese witnesses including high officials like General CHING Teh-chun made full preparations before going to Court and thus did a good job on the stand. Ching was the Vice Minister of the Chinese Ministry of Defence, and had been the Mayor of Peking (Beijing) during the Marco Polo Bridge Incident. He convincingly demonstrated evidence of the Japanese army's conspiracy to provoke the incidents of violence in 1937. He wrote a testimony of 15 pages, which included a description of the political and economic situation in China before the Marco Polo Bridge Incident, the stages of the Japanese invasion and details of the incident. Hsiang sent a telegraph to Foreign Minister Wang to praise Ching's performance in Court on 27 July 1946: "Vice-minister Ching Teh-chun was a complete success after four days bearing witness in Court".[45]

25.6. Important Accomplishments

Despite the number of difficulties that the Chinese prosecution team had, they were able to make some important contributions to the Tokyo Trial. One of the most important of these was in relation to the starting date of Japanese aggression. In connection with this, they also successfully argued that war crimes law should apply despite Japan never officially "declaring" war on China. Second, they publically exposed the true nature of the Nanking Massacre, an event still often ignored by Japanese documentaries and museums to this day, not to mention played down or denied by some citizens. Third, they exposed the use of opium and drug

[44] Documents of the Tokyo Trial, No. 0009011, 172-1-0899, Epson 0096, pp. 17–18, see *supra* note 25.

[45] *Ibid.* No.0009025, p. 56.

trafficking as a means of financing the Manchuria campaign. The final major accomplishment was convincing Pu Yi, the last Emperor of China, to come to Tokyo to testify against the Japanese and discuss his coerced role as a puppet leader for their government.

25.6.1. Historic Starting Date of Japanese Aggression

One of the greatest contributions by the Chinese was the delegation's determination in convincing the Court that Japanese aggression had begun much earlier than foreign lawyers and politicians believed. Opinions being divided on the starting date of aggression, it was necessary for different parties to argue their view of history. Mei Ju-ao wrote concerning the varying viewpoints:

> Some people think that the International Military Tribunal of the Far East is the trial for Japanese crimes during WWII. It is through Japan's attack on Pearl Harbor that Japan's foreign aggression evolved into a world war involving [many] countries, the date of Japan's attack on Pearl Harbor, i.e. Dec. 7, 1941, should therefore be perceived as the beginning of Japanese crimes. Whereas, some people hold that Japan's attack on Pearl Harbor and the consequent series of wars in Pacific nations was aimed to settle the war against China, and they are just the extension of war against China, therefore Japanese crimes started from July 7, 1937, the day when Japan launched the "Lugou Bridge Incident". Thirdly, other people maintain that the "Lugou Bridge Incident" of 1937 was an extension of the Mukden Incident on Sept. 18, 1931, when Japan invaded Mukden and planned to occupy Manchuria [four provinces in northeast China]. Actually, China had been at war with Japan since then, so the Mukden Incident should be regarded as the beginning of Japanese crimes. Some people even insist that the Mukden Incident resulted from the murder of Chang Tso-lin during the "Huanggutun Incident" of April 1928. Japan's ambition to occupy the whole of China was thoroughly exposed at the time of this event, and the confrontation between China and Japan actually came into being from then. It is therefore clear to those that hold the final point of view that the crimes of Japanese war criminals started from 1928.[46]

[46] Mei and Mei, 2013, p. 277, see *supra* note 3.

The Chinese prosecution team remained firmly focused on their belief in the last of Mei's explanations of their conflict with Japan. They asked the Court to recognise 1 January 1928 as marking the beginning of Japanese aggression against China.

On the morning of 14 May 1946, George Yamaoka, a Japanese-American lawyer at the trial, disputed this starting date:

> If the acts alleged as war crimes in the Indictment occurred during times of peace between Japan and the Countries involved, since no war existed, there could be no war crimes in the legal sense […] it must be admitted that even this government did not declare war on Japan until December 9, 1941. This is also a matter of public record of which this Tribunal must take judicial notice. The counts of the Indictment, therefore, that allege as war crimes acts of commission or omission perpetrated during the period of January 1, 1928 until December 9, 1941, are not, in fact or in law under any construction, war crimes, since they occurred during times of peace.[47]

On that very afternoon, in his first speech before the Court, Hsiang refuted Yamaoka's argument:

> I would like to ask the permission of the Court to spend a few minutes on a few observations in answer to the motion brought about this morning with reference particularly to China, my country. The learned counsel for the defense say there was no war existing between China and Japan because Japan never declare[d] war against China. Of course, [this] is a question as to what is the correct definition of war. But, since September 18, 1931, Japan took warlike actions in China, killing thousands and thousands of people, soldiers, as well as civilians. That was fourteen years ago. On July 7, 1937, Japan started a war at Marco Polo Bridge, killing hundreds in one night. Later, Japan sent her soldiers all over China, killing millions and millions of soldiers as well as children, women, and helpless civilians – non-combatants. I think those are facts known all over the world. If that [was] not war – what is a war, I wonder? […] Since 1931 Japan sent her soldiers all over China, all over the provinces, without any provocations on the part of China. I submit that

[47] Transcripts of the Proceedings of the IMTFE, pp. 220–22, see *supra* note 21.

> there was a war, whether Japan declared war against China or not, although China did not declare war against Japan until December 9, 1941. But there was a war; that was my submission. I think the Court would take judicial notice to that effect.[48]

Though strongly opposed by defence lawyers, the date of 1 January 1928 was finally recognised by the International Prosecution Section.[49] In response to the allegation that the laws of war did not apply to Japan's conduct in China, the Court commented:

> From the outbreak of the Mukden Incident till the end of the war the successive Japanese Governments refused to acknowledge that the hostilities in China constituted a war. They persistently called it an "Incident". With this as an excuse the military authorities persistently asserted that the rules of war did not apply in the conduct of the hostilities. This war was envisaged by Japan's military leaders as a punitive war, which was being fought to punish the people of China for their refusal to acknowledge the superiority and leadership of the Japanese race and to cooperate with Japan. These military leaders intended to make the war so brutal and savage in all its consequences as to break the will of the Chinese people to resist.[50]

Due to the nature of the Japanese aggression, it was clear to the Court that even though they had not formally declared war on 1 January 1928 or for years afterwards, the laws of war should apply to their actions.

25.6.2. The Nanking Massacre Exposed

The second major contribution of the Chinese prosecution team was exposure of the true nature of the Nanking Massacre. The history of the Japanese army's occupation of Nanking from 13 December 1937 to February 1938 is horrific. Mei wrote: "The Nanking Massacre is undoubtedly the most prominent crime of the Japanese army during

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48 Awaya, 2002, p. 273, see *supra* note 19; see also Xiang, 2010, pp. 5–6, *supra* note 6.

49 Xiang and Sun, 2014, see *supra* note 14.

50 International Military Tribunal for the Far East, Judgment, 4 November 1948, in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crime Trial*, vol. 22, Garland, New York, 1981 ("IMTFE Judgment"), pp. 49, 594–49, 595.

WWII, perhaps second only to the acts of Holocaust perpetrated in the Auschwitz concentration camp".[51]

At least 12,000 non-combatant Chinese citizens died in the first three days of Japanese occupation. These include women and children. "There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city".[52] Many cases involved particularly "sadistic behaviour" such as mutilations or bayoneting pregnant women. The secretary to the prosecuting attorney, GAO Wenbin, provided a photograph from a Japanese newspaper, showing two Japanese soldiers in a "beheading race", which shocked the entire tribunal.[53]

Because Japan had blocked the passage of information and destroyed much evidence of the crimes, the public knew little about the vastness and violence of the Nanking Massacre though there were scattered reports at that time. It was key to providing adequate evidence and witnesses to the Tokyo Trial. The Chinese government attached great importance to what had happened in Nanking. In June 1946, the Investigation Committee for the Nanking Massacre was established. On 23 June the Committee held its first meeting. On 12 September they sent a telegram to the Ministry of Foreign Affairs which stated:

> Instructed by Chairman Chiang Kai-Shek of the Nationalist government, the investigation of the Nanking Massacre should be submitted to the Committee to discuss. It has been decided that we establish an Investigation Committee for the Nanking Massacre, which includes all members of the Nanking Temporary Council and invites representatives of relevant organs or groups as committee members. Investigation groups are to be set up in each zone and investigation will be carried out through specific case study as well as general research. Up to now, 1,484 cases with conclusive evidence and witnesses are qualified to testify as to the criminals' crimes. Among the witnesses were Bo Hong'en and Yin Youyu who were gravely wounded and

[51] Centre for the Tokyo Trial Studies, *Collected Works of the Tokyo Trial*, Shanghai Jiao Tong University Press, Shanghai, 2013, p. 25.

[52] IMTFE Judgment, 1948, pp. 49, 605, see *supra* note 50.

[53] Xiang, 2010, pp. 3–4, see *supra* note 6.

> made a narrow escape from the massacre of the Japanese army. Lu Lixiuying, also, a woman who struggled against the rape of a few enemies, was near death from over 33 stab wounds. Thanks to doctors of Drum Tower Hospital, she was able to survive. The three cases above are extremely severe irrefutable evidence. Considering that the criminals of the Nanking Massacre are on trial in the International Military Tribunal for the Far East, it has been decided to send the investigation reports and relevant photos to Mr. Yao Geng, China Military Mission's source in Shanghai, who will transmit the materials to Chinese prosecutor Hsiang Che-Chun so as to submit it to the Tribunal as evidence. Many cases as such are under investigation and to be sorted out. After which, they will be submitted. Ministry of Foreign Affairs, Chen Yuguang, Chairman of Nanking Temporary Council.[54]

The Chinese prosecuting team also made numerous trips to China for additional evidence, and provided the Court with the sworn testimonies of 13 Chinese witnesses: CHING Teh-chun (秦德纯) for the "Lugou Bridge Incident and Preceding Situation"; Pu Yi (溥仪) for the "Constructing of Manchukuo"; WANG Lengzhai (王冷斋) for the "Lugou Bridge Incident and Results that Followed"; LIU Yaohua (刘耀华), ZHAI Shurong (翟树堂) and XU Jiejun (徐杰俊) for the "Atrocities of Japanese Army in China"; CHEN Dashou (陈大受) and TONG Shoumin (童受民) for "Economic Aggression against China"; and XU Chuanyin (许传音), SHANG Deyi (尚德义), WU Changde (伍长德) and CHEN Fubao (陈福宝) and LIANG Tingfang (梁廷方) for "Conventional War crimes Committed in China and Import of Opium".[55] After two years of labour, the materials were ready. Large numbers of photographs of people being killed and women being raped, as well as the testimonies of the personal experiences of foreign witnesses, gave the world a deeper understanding of the barbaric nature of the Japanese.

From mid-July to mid-August 1946 the criminals of the Nanking Massacre were on trial. The prosecution called eight witnesses: Dr.

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[54] Documents of the Tokyo Trial, 172-1-0899, Epson 0088, No. 1209, pp. 17–18, see *supra* note 25.

[55] Centre for Tokyo Trial Studies, *Index of the International Military Tribunal for the Far East*, Shanghai Jiao Tong University Press, Shanghai, 2013.

Robert Wilson, an American medical doctor at the University of Nanking Hospital; Dr. XU Chuanyin, the person in charge of the Housing Commission of the International Committee for the Safety Zone in Nanking; Shang Deyi, Wu Changde and Chen Fubao, Nanking residents; Dr. Miner Searle Bates, an American history professor at the University of Nanking and founder of the International Committee for the Safety Zone in Nanking; John G. Magee, an American priest of the Nanking Episcopal Church; and Liang Tingfang, a Chinese Captain. [56] The witnesses who testified in Court had either survived or been witness to the crimes of the Japanese Army. Particularly important was the testimony of Magee, who risked his life to shoot a 105-minute film with a 16 mm cinecamera, recording the true scene of the Japanese Army's burning, killing, raping and looting.[57] In a letter to his wife he wrote about his experience:

> The horror of the last week is beyond anything I have ever experienced. I never dreamed that the Japanese soldiers were such savages […] They not only killed every prisoner they could find but also a vast number of ordinary citizens of all ages. Many of them were shot down like the hunting of rabbits in the streets. There are dead bodies all over the city from the south city to Hsiakwan. Just the day before yesterday we saw a poor wretch killed very near the house where we are living. So many of the Chinese are timid and when challenged foolishly start to run. This is what happened to that man […] These two Jap. soldiers were no more concerned than if they had been killing a rat and never stopped smoking their cigarettes and talking and laughing […] But the most horrible thing now is the raping of the women which has been going on in the most shameless way that I have ever known. The streets are full of men searching for women […] The house where we keep our things is loaded with women and some even sleep in our dining room. They sit in the house all day in dreadful fear. Several days ago a Buddhist priest from a little temple across the street came in and said he had heard that Japanese had carried off two Buddhist nuns and begged me to take some

[56] Xianwen Zhang, *Collection of Nanking Massacre Historical Data*, vol. 7, Jiangsu People's Publishing House, Nanjing, 2010, pp. 41–133.

[57] *Ibid.*

> nuns in, which I have done. The house is really packed like sardines […] It is a regular nightmare to deal with these reverted groups of men.[58]

Through the trial, the reality of the Nanking Massacre made its way into the public record. In Chapter 8 of the Judgment of the Court, the section "The Rape of Nanking" reads:

> There was no discipline whatever. Many soldiers were drunk. Soldiers went through the streets indiscriminately killing Chinese men, women and children without apparent provocation or excuse until in places the streets and alleys were littered with the bodies of their victims.[59]

Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.

Large numbers of the population of Nanking fled to the countryside to escape the brutality of the city. They set up fugitive camps but many of these groups were also captured. "Of the civilians who had fled Nanking over 57,000 were overtaken and interned. These were starved and tortured in captivity until a large number died".[60] Soldiers who laid down their weapons were executed without even the pretence of a trial.[61] Burial societies and other organisations counted more than 155,000 bodies that they buried. "They also reported that most of those were bound with their hands tied behind their backs".[62] These numbers do not take into account those whose bodies were burned in fires or thrown into the Yangtze River.

During the trial, the focus of the blame for the massacre was Matsui Iwane, who the Tribunal ruled knew what was happening and "did nothing, or nothing effective to abate these horrors". His defence attorneys tried to argue that he had been ill at the time. However, the Court determined that his illness "was not sufficient to prevent his conducting the military operations of his command nor to prevent his visiting the City for days while these atrocities were occurring".[63] He was

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58 Kaiyuan Zhang (ed.), *Eyewitnesses to Massacre: American Missionaries Bear Witness to Japanese Atrocities in Nanjing*, M.E. Sharpe, New York, 2000, pp. 171–74.

59 IMTFE Judgment, 1948, pp. 49, 606, see *supra* note 50.

60 *Ibid.*, pp. 49, 608.

61 *Ibid.*, pp. 49, 609.

62 *Ibid.*

63 International Military Tribunal for the Far East, Judgment, Chapter X, Verdicts.

the commander of the Army committing the atrocities, and he was aware of their occurrence; he could therefore not successfully plead innocent to the charges against him. While it is true that Matsui did not enter the city right away with his soldiers, the situation did not improve for at least four weeks after his arrival.[64] "The barbarous behaviour of the Japanese Army cannot be excused as the acts of a soldiery which had temporarily gotten out of hand" when the pillaging, raping, murder and arson continued for six weeks after the fall of the city.[65] The court wrote: "He had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty".[66] Matsui was sentenced to death by hanging.

The true success of the trial where the Nanking massacre was concerned was not the condemning of Matsui but the more important goals of 1) finding evidence and recounting what had occurred in an official manner, 2) obtaining recognition of the illegality of the Japanese Army's actions, and 3) the condemnation of these actions by the international community.

Although not disagreeing with the decision of the court to condemn Matsui, the Japanese historian and expert in modern Chinese history, Tokushi Kasahara, argues that "Matsui alone was made into a scapegoat at the Tokyo War Crimes Trials" when, in reality, many other individuals, including Prince Yasuhiko Asaka, were equally to blame.[67] Matsui's part in the massacre is indubitable. However, it is true that many other perpetrators of crimes escaped justice. One thing that remains to this day is the disappointment the Chinese people feel regarding the lack of accountability of the Japanese royal family. Prince Asaka, who is known for his part in the Nanking Massacre, was never charged and lived out the remainder of his life leisurely playing golf.

The immunity of the Japanese royal family was sadly out of the hands of the Chinese prosecution team and even the Chinese government, as the entire institution of the Tribunal was overshadowed by the politics

64 IMTFE Judgment, 1948, pp. 49, 611 and pp. 49, 613, see *supra* note 50.

65 *Ibid.* pp. 49, 613.

66 *Ibid.*

67 "永久保存版 - 三派合同 大アンケート" [Complete Survey of the Three Schools: The Illusion School, the Middle-of-the-Road School and the Great Massacre School), Shokun, February 2001, p. 198.

of the time, and MacArthur negotiated with the US government in order to save the royal family from humiliation and blame.

25.6.3. Revealing the Japanese Use of Opium in China

The French scholar Étienne Jaudel, in *Le procès de Tokyo: un Nuremberg oublié*, highlighted the prominent role Hsiang had in the proceedings. In the chapter on "Crimes of Peace" Jaudel writes: "Chinese prosecutor Hsiang Che-chun disclosed how the Japanese had encouraged farmers to plant opium for them and the interest earned from it was used for funding the Asian Development Bureau".[68] Hsiang's goal was to prove that opium was used to advance aggression and that "Japanese agents, military and civilian, engaged in wide–spread illegal traffic in opium and narcotics, not only in Japanese concessions but in all parts of China".[69] Although Japan had signed and ratified the International Opium Convention of 1912, as well as two other conventions in 1925 and 1931, for the "suppression of the abuse of opium, morphine, and cocaine, as well as drugs prepared or derived from these substances",[70] in order to finance their operations in Manchuria and "in order to weaken the power of resistance of the Chinese, Japan sanctioned and developed the traffic in opium and narcotics".[71] As early as 1929 the Chinese government had been making efforts to fulfil its obligations under the International Opium Conventions of 1912 and 1925. Their plan, beginning with making it illegal to smoke opium, was to gradually suppress both production and consumption.

The court wrote in its Judgment: "Japan as a signatory to the above opium conventions was obligated to assist the Chinese Government in the eradication of the drug habit by limiting the manufacture and sale of the drugs within her territory and by preventing smuggling of the drugs into China".[72] However, the main source of opium and other narcotics in the 1930s was from a Japanese government-operated factory in Seoul. The Japanese also produced hundreds of kilos of cocaine per month for a number of years. It was sold to raise money for the war budget.[73] Not only

[68] Jaudel, 2010, p. 83, see *supra* note 2.

[69] Hsiang, 15 August 1946, Cheng *et al.*, 2013, pp. 3885–92, see *supra* note 1.

[70] IMTFE Judgment, 1948, pp. 48, 486, see *supra* note 50.

[71] *Ibid.*, pp. 49, 160.

[72] *Ibid.*, pp. 49, 161.

[73] *Ibid.*

did the Japanese Army allow the sale of drugs, they also sometimes sent the vendors into towns ahead of them before the attack. In this regard, the Court stated: "Doihara was one of the foremost officers of this organization; and his connection with the drug traffic has been fully shown".[74] Japan, having ratified the International Opium Conventions, was bound by them. "In all areas occupied by the Japanese the use of opium and narcotics increased steadily from the time of such occupation until the surrender".[75]

It was discovered through trial that the Japanese had not just engaged in drug trafficking in China, but that in taking advantage of Manchukuo's sham independence, they were able to "carry on a world-wide drug traffic" while trying to cast guilt onto the puppet state.

> A large part of the opium produced in Korea was sent to Manchuria. There, opium grown in Manchuria and imported from Korea and elsewhere was manufactured and distributed throughout the world. In 1937, it was pointed out in the League of Nations that ninety percent of all illicit white drugs in the world were of Japanese origin, manufactured in the Japanese concession in Tientsin, Dairen and other cities of Manchuria, Jehol and China, always by Japanese or under Japanese supervision.[76]

One case example that was recounted during the submission of evidence at the Tokyo Trial was in reference to Nanking. Opium consumption had almost been "wiped out before 1937". After the occupation, the trade in narcotics "became public and was even advertised in newspapers". By autumn 1939 the monthly revenue from the sale of opium in Nanking alone was estimated at US$3 million. Not only were the Japanese making a great deal of money to support military aggression, but the drugs being consumed by Chinese people were also affecting their health, not to mention society as a whole.

25.6.4. Pu Yi's Testimony

The fourth accomplishment of the Chinese prosecution team was in convincing Pu Yi, the last Emperor of China, to appear as a witness in

[74] *Ibid.*, pp. 49, 162.
[75] *Ibid.*, pp. 49, 163.
[76] *Ibid.*, pp. 49, 165.

Court to give evidence of the conspiracy and organisation by the Japanese to establish a puppet government in Manchuria. On 19 August 1945 Pu Yi was captured by the Soviet Army and sent to Chita in Siberia city. On 10 August 1946 he was sent to Tokyo. He was terrified of the trial. Hsiang and his assistant Chiu talked to him numerous times, and convinced him that he should atone for his previous crimes by exposing the crimes of the Japanese invaders. Pu Yi was finally convinced.

Between 16 August and 27 August 1946 he testified as to the Japanese Kwantung Army's manufacturing of the Manchurian Incident on 18 September 1931, which resulted in the loss of three provinces of Manchuria.[77] On 13 January 1932 Doihara tricked Pu Yi into going to Manchuria and on 1 March 1932, the puppet state of Manchukuo was formed, while the Japanese forced him to sign a secret treaty yielding the rights of the state to Japan.[78] Japanese forces planned to make it appear as though Pu Yi had returned to his throne because of the demand of his people and not in relation to Japanese plots to take control of the east.[79] Due to his rigid refusal to consent to the plots, a riot was instigated on 8 November 1931 to get him out of the city of Tientsin.[80] "An attempt was made to cause it to appear that Pu Yi had fled for his life as a result of threats and the riots in Tientsin". Pu Yi testified that he and the other Chinese officials "were all under the supervision of the Japanese Military Officers". In response to the Chinese government's request the Council of the League of Nations had sent a Commission of Inquiry to Manchuria, headed by Lord Lytton. Pu Yi said in Court: "wherever Lord Lytton went, he was under the supervision of Japanese Gendarmes. When I interviewed Lord Lytton, many of the Kwantung military officers were beside me supervising, if I had told him the truth, I would have been murdered right after the mission left Manchuria".[81]

Despite his initial fear of testifying in open court concerning his part in the Japanese takeover, Pu Yi ultimately caved under the pressure and persuasion of the Chinese delegation to do the right thing and to help prosecute the Japanese war criminals.

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77 Xiang, 2005, see *supra* note 32.

78 Cheng *et al.*, pp. 48, 220–48, 226, see *supra* note 2.

79 IMTFE Judgment, 1948, pp. 49, 167, see *supra* note 50.

80 *Ibid.*, pp. 49, 170.

81 *Ibid.*, pp. 49, 113.

25.6.5. The Matter Is Settled: The Tokyo Trial Comes to an End

The Judgment of the Court at the Tokyo Trial was rendered between 4 and 12 November 1948. During a period of several months, the Tribunal had heard evidence through witness testimony and by affidavit. The evidence presented to the court was such that the court claimed only "one conclusion [was] possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces".[82]

Despite the conclusion of the Trial, there had been a rather absurd episode soon after the verdict. Refusing to accept the judgment, Hirota Kōki, the former Prime Minister, and Doihara appealed to the US Supreme Court which agreed to hear their appeal. At that time, Hsiang was going to return to China. Hearing this news, he expressed his opposing views immediately to the newspapers. *Shun Pao* reported as follows:

> Tokyo, Dec. 1 (Central News Agency) – Chinese prosecutor Hsiang Che-chun who attended International Military Tribunal for the Far East on behalf of China said today that the U.S. Supreme Court had no right to accept the appeal of HIROTA and DOHIHARA. He pointed out that the U.S. Supreme Court had no right to examine the verdict announced by the International Military Tribunal for the Far East because the trial of the 25 Japanese Class A war criminals was an international matter. MacArthur reserves the right of final examination, which he is entitled to according to the Far East Commission.[83]

Under the pressure of the Allies and public opinion, the Supreme Court rejected the appeal. Seven Class A war criminals, including Tōjō, the former Prime Minster, were sentenced to death.[84] General Shang Zheng, head of the Chinese Military Delegation, was present to witness the execution in Sugamo Prison in the early morning of 23 December 1948.[85]

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82 *Ibid.*, pp. 49, 592.

83 Commission of Documentation, 2013, pp. 209–10, see *supra* note 47.

84 *Ibid.*, p. 210.

85 Xiang, 2005, see *supra* note 8.

25.7. A Final Regret: The Lost Legacy and Historical Repercussions

As the end of the Tokyo Trial drew near in late 1948, Chiang Kai-shek's forces were in a phase of continual defeat. At the three major battles of Liaoning-Shenyang (12 September), Huai-Hai (6 November) and Beijing-Tianjin (November 29) Chiang suffered fatal losses and was left with no opportunity to worry about the Tokyo Trial. When the trial ended and Hsiang returned to Nanking with two large trunks of materials, including hundreds of documents of the trial records, there was nobody to care about them. Kao also took back a lot of the trial proceedings. In the chaos of the time, these valuable historical documents regrettably disappeared.[86]

With the fall of the National government, Hsiang chose to stay in Mainland China rather than escape, as he could have, to Taiwan or the US. Hsiang loved China and there was not a doubt that he would choose to stay, although many did not understand his decision in those difficult times. But he stayed, and he worked in China until his retirement in 1965. Happy and relaxed upon retirement, still with an abundance of energy, he was ready to sit down and write his memoirs of the Tokyo Trial. This, unfortunately, never occurred, as his retirement coincided with yet another national disaster, the Cultural Revolution. When the Cultural Revolution was finally over, the important players of the Tokyo Trial were quite advanced in age and those who had survived no longer had the materials they had carried back with them to China from Japan. Without these materials, and with the key players gradually passing away, so much historical knowledge not just about the trial but about the events that were put on trial, was lost.

In the early 1980s, even at the age of 90 years, Hsiang was still very much concerned with China's domestic and international situation. At the time, Japanese right-wing forces were attempting to revive militarism. It was not uncommon for the Japanese to deny their past crimes of aggression. Classroom textbooks were altered by the Japanese Ministry of Education to remove the word "aggression" from the war context. There also began a whitewashing of what had occurred in the cities that Japan had taken over regarding so-called "comfort women", some going so far as to claim the brutality had never occurred or that it had been a normal practice of the era. Whereas some Japanese government officials deny the

[86] *Ibid*.

labelling of their war as an act of aggression, in an attempt to blur history, Hsiang stated that this caused him "great indignation". In 1983 Hsiang spoke about his concern that we will forget history: "Although I am 91-years-old, as a Prosecutor for China at the IMTFE, I once took part in the trial of the Japanese war criminals. I have the responsibility to reiterate the black and white historical conclusions that were made more than 30 years ago".[87] He then continued recounting the history of the trial itself, retelling the process and the final Judgment. He remained firm in taking a stand against those who wanted to forget what had happened and the Japanese who denied what they had done. Not only did he deliver the facts of the trial in his speech but also reminders of some of the crimes committed: of bodies in ditches, of rape, murder and arson, of chaos and misery. And why? Hsiang Che-chun was a reasonable man, not filled with hatred for the ordinary Japanese citizens of today that had no part in past crimes, but filled with outrage at those who denied the crimes of their fathers, and filled with a sense of justice and responsibility towards his country, to be a living reminder while he still could. His speech continued:

> Recently I have read a speech from Attorney Shi Meiyu, my former student from a judge training class in Nanking. Based on the facts of the massacre full of blood and tears, he sharply denounces the Japanese government for their distorting of history. This speech shows how Chinese compatriots on both sides of the Taiwan Strait are of one opinion. I agree wholeheartedly with what Meiyu has said: "I may not live for a long time any more, but I must be a witness of history!"[88]

He believed that all the remaining Tokyo Trial experts and participants should stand as witnesses. He concluded his speech: "If the ghost of Japanese militarism tries to come back, it must be brought to the historical gallows again!"[89]

The historical lessons of the Tokyo Trial are profound. But because of the Anglo-American leniency toward the war criminals, Japanese militarism remains alive to this day. "Weak nations have no diplomacy",

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87 Zhejun Xiang, Speech at a Forum held by Shanghai Society of Law and Shanghai International Relationship Association (1983); Xiang, 2010, pp. 331–33, see *supra* note 6.

88, *Ibid.*

89 *Ibid.*

it is often said. The Nationalist government was so feeble that the Chinese delegation was subjected to many hardships. Moreover, there lacked accurate long-term critiques of the events of the Tokyo Trial. Adequate respect was not given to legal scholars and their resources were not properly used.[90]

While it is true that we cannot blame the current generation for the crimes of the previous ones, they can be blamed for denying the past, as it serves only to do more hurt and acts as building blocks for future crimes. There has been much criticism of the blanket exoneration of Emperor Hirohito and all members of the imperial family, including Prince Asaka, Prince Fushimi Hiroyasu, Prince Naruhiko Higashikuni and Prince Tsuneyoshi Takeda. The French Judge, Henri Bernard, strongly stated in his dissenting opinion that "the failure to try Hirohito 'nullified' the trial and made the accused mere 'accomplices'".[91] The US "went through great lengths to recast the Emperor's image throughout the trial, a move that contrasted sharply with that of Hitler during the Nuremberg trial".[92] The historian Herbert Bix argues that "MacArthur's truly extraordinary measures to save Hirohito from trial as a war criminal had a lasting and profoundly distorting impact on Japanese understanding of the lost war".[93] It is this denial of responsibility or claim of self-defence which distorts history that is truly the most dangerous. It is also the reason why the Chinese and other victims in Asia have reason to still be angry after so many years. Since the Jewish Holocaust, the West and Europe have moved on but they have never forgotten. The same cannot be said for the events that occurred in the East.

After the Tokyo Trial, Hsiang refused the nomination of Grand Justice and became a professor at several universities in Shanghai. He, along with other scholars and contributors to the Tokyo Trial, witnessed additional hardships during the Cultural Revolution. But Hsiang never lost his dedication to making his country a better place and to defend his nation. In 1985, when the Chinese government finally commissioned the establishment of the Nanjing Massacre Memorial Hall, Hsiang conducted

90 Xiang, 2005, see *supra* note 32.

91 Crowe, 2013, p. 204, see *supra* note 26.

92 *Ibid.*

93 Herbert P. Bix, *Hirohito and the Making of Modern Japan*, HarperCollins, New York, 2001, p. 545.

documentary interviews to be kept at the Memorial Hall. This was his last public contribution to his country. On 31 August 1987, after witnessing decades of struggle, war, civil war and multiple changes in government, Hsiang Che-chun passed away in a now peaceful Shanghai.

It is important to fill the gaps left in history and in scholarly writings about the Tokyo Trial, not for the purpose of continuing hatred, but rather of remembering and understanding history; and through that remembrance, working hard not to fall back into the mistakes of the past. Those who forget are doomed to repeat the past. Sadly, it seems, if we are not careful in holding nations and governments accountable, they are sometimes all too happy to conveniently forget. This is why we must make accounts of what has happened. This is why we must understand our history. And this is why we must remind those who deny or try to forget. As Iris Chang says: "Denial is an integral part of atrocity, and it's a natural part after a society has committed genocide. First you kill, and then the memory of killing is killed".

26

From Tokyo to the United Nations: B.V.A. Röling, International Criminal Jurisdiction and the Debate on Establishing an International Criminal Court, 1949–1957

Lisette Schouten*

26.1. Introduction

Soon after the delivery of judgment against Nazi perpetrators in Nuremberg, and with trial proceedings at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') in full swing, the General Assembly of the newly established United Nations ('UN') made its first efforts to push the development of international law and institutionalisation of human rights even further. Genocide was declared a crime against international law in a UN Resolution that was approved in December 1946, while the Convention for the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') was adopted by the General Assembly in December 1948. The Universal Declaration of Human Rights, establishing the general rights for individuals, was adopted in the same month.[1] In the Charter of the UN, the General Assembly was also given the responsibility to initiate studies and make recommendations for "promoting international co-operation in the field and encouraging the progressive development of international law and its codification".[2] The Dutch professor B.V.A. Röling (1906–1985), a former

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1 William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2004, p. 7.

2 United Nations Charter, Chapter IV, Article 13.1.a. The International Law Commission ('ILC') was subsequently created to execute the mandate. The Statute of the International Law Commission (1947), Article 15 defined "progressive development" as the "preparation of draft conventions on subjects that have not yet been regulated by

judge in Japan and a member of the Dutch delegation to the UN, was engaged in these efforts for many years.

While stationed in Tokyo, Röling had been one of the 11 judges involved in the IMTFE who – through their interactions with each other, with their domestic contexts and with the new cultures they encountered – developed new ideas about norms and institutions of international law and justice. After the trial proceedings ended, Röling (who was one of the few Dutch jurists with first-hand experience in delivering international criminal justice) was appointed a member of the Dutch delegation to the UN on the Sixth Committee of the General Assembly and served as the Dutch representative to two special committees of the General Assembly on international criminal jurisdiction. In addition, he became vice-chairman of the 1953 Special Committee on Defining Aggression ('Committee on Defining Aggression'), and Rapporteur of the 1956 session of this Committee.[3] By taking a closer look at Röling's career, this chapter will consider the reach and legal implications of the Tokyo Trial, the broader contributions of its judges to the emergence of modern international criminal jurisdiction and, through examination of Röling's ideas on international criminal law, further illuminate the early discussions on an international criminal court.

26.2. The Establishment of the International Military Tribunals

While ideas on the development of international criminal jurisdiction stem from the nineteenth century, it was only after the First World War

international law, or in regard to which the law has not yet been sufficiently developed in the practice of states". It defined "codification" as "the more precise formulation and systemisation of rules of international law in fields where there already have been extensive state practice, precedent, and doctrines". See Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, Cambridge, 2008, p. 26.

[3] Röling was appointed Rapporteur in the "New York Committee" after he declined an invitation of the United States and Britain to become President of that Committee. Verslag uitgebracht door Prof. Mr. B.V.A. Röling als Nederlands gedelegeerde in het "Committee on International Criminal Jurisdiction", August 1953, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, National Archives of the Netherlands ('NAN'). See also Nico Schrijver, "B.V.A. Röling – A Pioneer in the Pursuit of Justice and Peace in an Expanded World", in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1071–91.

that popular support grew.[4] The Leipzig trials, held after the war ended to judge German war atrocities, were the first attempt at international criminal justice. However, as only 16 cases were eventually brought to trial resulting in a meagre 13 convictions, the trials were generally considered a failure.[5] Yet the outcome of the trials stimulated a renewed interest in the matter of an international juridical institution. It triggered the foundation of the Permanent Court of International Justice (1922–1946) in The Hague, which contributed to the clarification and development of international law.[6] In addition to this, from the 1930s onwards the possibility of an international criminal court was discussed in the League of Nations, culminating in an (unratified) treaty in 1937.[7]

Notwithstanding these efforts to establish international law and supranational legal norms on human rights, the unprecedented and gruesome events of the Second World War fuelled the efforts to lay down guidelines for an international body for the condemnation of war crimes. With the war still raging, representatives of the Allied governments met in international commissions and at international law conferences to decide how "justice should be done on the evildoers" after the war. From 1941 onwards eminent statesmen, lawyers, professors and judges from a wide range of Allied nations gathered in international bodies such as the London International Assembly and the International Commission for Penal Reconstruction and Development, where they discussed the use of legal means to confront war crimes and addressed a number of questions: What are war crimes? Which courts will try these crimes? How best to deal with the plea of superior orders? How to organise the extradition of war criminals?[8] On 13 January 1942 representatives of nine countries

4 Schabas, 2004, p. 2, see *supra* note 1; see also Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court", in *International Review of the Red Cross*, 1998, vol. 38, no. 322, pp. 57–74.

5 J. Holmes Armstead Jr., "The International Criminal Court: History, Development and Status", in *Santa Clara Law Rev*iew, 1998, vol. 38, no. 3, pp. 745–835.

6 Manley O. Hudson, "The Permanent Court of International Justice", in *Harvard Law Review*, 1922, vol. 35, no. 3, pp. 245–75; the Permanent Court was unable to meet during the wartime years (1940–1945). See also Manley O. Hudson, "The Twenty-Third Year of the Permanent Court of International Justice and Its Future", in *The American Journal of International Law*, 1945, vol. 39, no. 1, pp. 1–12.

7 Schabas, 2004, pp. 3–5, see *supra* note 1.

8 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* ("History of the UNWCC"), His Majesty's Stationery Office, London, 1948, pp. 94–104; see also Kerstin von Lingen,

occupied by Nazi forces met in London and signed their first joint resolution.[9] In this so-called St James's Declaration, the countries declared their intention to demand justice from Germany for the war crimes committed in their countries and to bring those responsible before a court of law after the war, meaning everyone who ordered, perpetrated or participated in such crimes.[10]

After the Moscow Declaration of 1 November 1943, the United Nations War Crimes Commission ('UNWCC'), initially called the United Nations Commission for the Investigation of War Crimes, was established by 17 Allied nations during a meeting on 20 October 1943 at the British Foreign Office in London.[11] Its original objectives were limited to the investigation and recording of the evidence of war crimes and the identification of those individuals responsible, as well as reporting to the concerned governments cases "in which it appeared that adequate evidence might be expected to be forthcoming". Later its functions were extended. It received advisory capacity and recommendations could now be given to its members on questions of law and procedure. The UNWCC was chaired by Sir Cecil Hurst and drafted "a convention for the establishment of a United Nations War Crimes Court". [12] The text of this draft Convention was based on the unratified League of Nations treaty and inspired by memoranda issued by the London International Assembly.[13]

However, it was not until the summer of 1945, through the London Agreement of 8 August 1945, that effective means to apply jurisdiction in the international sphere were established. In London it was agreed between the Allies to establish an *ad hoc* International Military Tribunal ('IMT') in Nuremberg to address the grave breaches of international

"Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, no. 1, pp. 45–76.

9 Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 19.

10 History of the UNWCC, p. 1, see *supra* note 8.

11 Representatives of the following 17 Allied nations and dominions were present: Australia, Belgium, Britain, Canada, China, Czechoslovakia, the French Committee of National Liberation, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, the Union of South Africa, the United States of America and Yugoslavia; *ibid*., pp. 112–13.

12 *Ibid*., pp. 2–3.

13 Schiff, 2008, p. 24, see *supra* note 2.

law.[14] The most significant feature of the Nuremberg Tribunal was the inclusion in its Charter of two crimes that had not previously been articulated in international law: *crimes against peace* and *crimes against humanity*, making possible the conviction of German high officials who otherwise might have escaped justice.

Two weeks before the conclusion of the London Conference, the major Allies proclaimed their intention to prosecute the Japanese in the same way as the German perpetrators. Some months after the opening of the Nuremberg Trial, on 19 January 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers, announced the establishment of the IMTFE in Tokyo.[15] The Nuremberg Charter served as the model for the Tokyo Charter, although the Americans solely drafted the final IMTFE Charter.

The principal charge against the 28 Japanese leaders to be tried at Tokyo was their participation in the planning and execution of aggressive war in the Asia-Pacific region, the Class A crimes against peace. In addition, they were also held accountable for conventional war crimes committed by the Japanese armed forces against prisoners of war ('POWs') and civilians. Conventional war crimes and crimes against humanity were labelled crimes of category B and C respectively.[16] The Articles about jurisdiction in the Tokyo Charter closely followed those of

[14] The official seat of the IMT was established in Berlin and the Tribunal's first official session on 18 October 1945 was held in that city. The court then adjourned to Nuremberg.

[15] Represented on the bench of the Tokyo Tribunal were 11 of the respective Allied nations: Australia, Britain, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the USA.

[16] Charter of the International Military Tribunal for the Far East ("IMTFE Charter"), Article 5, enacted at Tokyo, Japan on 19 January 1946, and amended on 26 April 1946 (http://www.legal-tools.org/doc/a3c41c/) defined the three categories as follows: "A. Crimes against Peace: The planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; B. Conventional War Crimes: Namely, violations of the laws or customs of war; C. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan".

Nuremberg. However, there was one difference with the definition of crimes against humanity embodied in the Nuremberg Charter.[17] While the latter text specified the crime as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The words "or religious grounds" were omitted in Article 5(c) of the IMTFE Charter.[18] Further, no provisions were made in Tokyo for the trial of allegedly criminal organisations, unlike in Nuremberg where both individuals and criminal groups such as the Schutzstaffel ('SS'), the Sturmabteilung ('SA') and the Gestapo were brought to trial.

While the Netherlands did not play a role in the IMT at Nuremberg, they represented their colony of the Netherlands East Indies at the IMTFE.[19] On the invitation of the Americans, a Dutch Judge was called to

[17] According to Antonio Cassese and Röling, the words "against any civilian population" were also deleted from the IMTFE Charter, Article 5(c) in April 1946. They argue that by broadening this class of crimes, punishment for large-scale killing of military personnel in an unlawful war was made possible; see B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1994, p. 3; and Memorandum of B.V.A. Röling to President Sir William Webb on "Murder Charges", ("Röling Memorandum"), 13 March 1947, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 11, p. 16 (NAN); see also History of the UNWCC, p. 205, *supra* note 8.

[18] The persecution of Jews in Nazi Germany motived the reference to persecution on religious grounds in the Nuremberg Charter. In their explanation of the fact that there is no mention of "persecutions on religious grounds" in the IMTFE Charter, the UNWCC stated that this was most likely because no such violations had been committed by the Japanese major war criminals. Also, Article 5(c) covered the more important "persecutions on political and racial grounds". Hence, "in case any persecutions on religious grounds should be established and brought forward in the course of the proceedings, they could easily be included within the notion of prosecution on political grounds"; History of the UNWCC, p. 205, see *supra* note 8.

[19] Apart from the major war criminals that were put on trial in Nuremberg and Tokyo, numerous German and Japanese perpetrators were sentenced in Allied trials. Soon after the surrender of German troops in May 1945, the first Allied post-war trials against Nazi perpetrators were held in the European theatre. At the same time, Allied courts assembled all over the Asia-Pacific region to judge those Japanese accused of Class B and/or Class C war crimes. While national war crimes courts held the trials, they were part of an

take a seat on the IMTFE bench, while a Dutch assistant prosecutor was added to the International Prosecution Section. The search for capable judicial staff was long and difficult, as many jurists were already occupied with post-war justice in the Netherlands and Netherlands East Indies and were therefore unable to leave for Tokyo.[20] Suitable candidates were desired to be immediately available, fluent in English and without any wartime connections to the former enemy.[21] After a selection process that took several months, W.G.F. Borgerhoff Mulder accepted the position of the assistant prosecutor while the young jurist Röling was appointed as

impressive and often extremely complex Allied operation that spanned vast areas and required extensive co-operation. Although the reliability of the following figures is disputable (research has shown that some individuals were counted twice, thrice or even four times, while others were tried by more than one country and the number does not include the results of Soviet trials or later trials by the People's Republic of China) the numbers mentioned by Piccigallo are impressive: 5,700 Japanese individuals were indicted for Class B and Class C war crimes and 920 of them sentenced to death. In the Netherlands East Indies, the Netherlands held 448 war crimes trials against 1,038 Japanese suspects; 969 Japanese suspects were condemned (93.4 per cent), while 236 (24.4 per cent) received the death sentence. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1980.

[20] Post-war justice was arranged differently in the two geographical areas. Rules were enacted by the respective governments, and a comparison between the Dutch metropolitan and the Dutch East Indies legislation makes clear that both countries took a different legal approach towards the questions of guilt and the punishment of war criminals. In the homeland, German war criminals and Dutch traitors were sentenced by five Special Courts of Law (*Bijzondere Gerechtshoven*) in the first instance and one Special Court of Cassation (*Bijzondere Raad van Cassatie*). The mixed civilian–military character of Dutch post-war law was reflected in the composition of the courts, as the bench consisted of three civilian jurists and two military members. In addition, 19 tribunals were established where lay justice was exerted under the presidency of a legal expert over those Dutch citizens who had assisted or supported the enemy, had been members of a national socialist organisation or who had somehow benefited from the German occupation. In the Dutch East Indies, Japanese war criminals were sentenced by 12 temporary courts martial ('TCM'). These TCMs were made competent for war crime trials in the first instance. The courts consisted of a president and two members assisted by a legal secretary. All were serving officers or civilians who were, as a result of the "state of siege", given a military rank. The local prosecutors or their substitutes served as judge advocates, they were not militarised. Several of the TCMs tried Japanese defendants as well as (European, Eurasian and Indonesian) collaborators.

[21] Lambertus van Poelgeest, *Nederland en het Tribunaal van Tokio: volkenrechtelijke polemiek en internationale politiek rond de berechting en gratiëring van de Japanse oorlogsmisdadigers*, Gouda Quint, Arnhem, 1989, p. 27.

the Dutch Judge.[22] Röling, a professor of criminal law and criminal procedural law of the Netherlands East Indies who held an endowed chair at Utrecht University was selected, notwithstanding the fact that he did not possess any "Asian" experience nor had expressed any interest in judging Japanese wartime leaders.[23]

26.3. Introducing Röling

Shortly after his appointment by the Dutch government, Röling departed for war-torn Tokyo where he arrived at the beginning of February 1946. With trial proceedings only set to start in May 1946, Röling took the opportunity to tour and discover the city and its surroundings.[24] Overcoming his self-professed hatred of the Japanese, his initial reservations against the ceremonial nature of Japan's culture and his dislike of Japan's traditional music, which he more than once compared to caterwauling, Röling's opinion about Japan quickly changed for the positive.[25] He climbed Mount Fuji, went on excursions to Kyoto and Hiroshima and, more importantly, became acquainted with several well-known Japanese musicians and scholars such as Takeyama Michio and Suzuki Daisetsu Teitaro.[26] During his meetings with these people and evening talks with Japanese students, Röling sought their opinion on specific defendants, discussed legal issues

[22] W.G.F. Borgerhoff Mulder served as the Dutch assistant prosecutor to the International Prosecution Section. Being several years older, Borgerhoff Mulder had expected to be appointed as Judge with Röling serving as his prosecutor. He made this suggestion to the Ministry of Foreign Affairs which, however, stood by its earlier decision. As a result the relationship between Röling and Borgerhoff Mulder during the proceedings in Tokyo was strained. Van Poelgeest, 1989, pp. 28–29, see *supra* note 21.

[23] Some of his wife's family members spent their wartime years in internment camps in the Dutch East Indies and perished under the Japanese occupation.

[24] Van Poelgeest, 1989, p. 60, see *supra* note 21.

[25] Röling: "I am afraid to go home", he said. "I came here with the Dutch hatred of the Japanese […] but after nearly two years I have come to like the Japanese people. They are idealists, and sensitive, and they have something to offer to us Westerners, with our emphasis on material things". See Elizabeth Gray Vining, *Windows for the Crown Prince*, J.B. Lippincott Company, Philadelphia, 1952, p. 169.

[26] Röling would keep in touch and meet Takeyama and Suzuki even after returning from Tokyo. Kei Ushimura, *Beyond the "Judgment of Civilization": The Intellectual Legacy of the Japanese War Crimes Trials 1946–1949*, The International House of Japan, Tokyo, 2003, pp. 125–63; and Röling and Cassese, 1994, p. 35, see *supra* note 17.

related to the trial and tried to explain his views on Japan's war guilt.[27] Röling enjoyed these gatherings and his new lifestyle immensely and even began to question America's "lack of understanding for Japanese subtlety".[28] In short, during his stay in Japan, Röling became acquainted with and tried to understand the country, its culture and the Japanese way of thinking.

Before his departure for Tokyo, Röling had not received any instructions or directions from the Dutch government, nor was he made familiar with the Charter of the IMTFE. Even more telling, until his position at the IMTFE, Röling had not shown any particular interest in international law, declaring it an "uninteresting and dull" specialism.[29] However, upon his arrival in Japan, Röling engaged himself in the content of the Charter, a study of Japanese history and the principles of international law he previously had found so uninteresting. It did not take very long before Röling developed serious reservations about the ambiguous rules of international law that had found their way into the Tokyo Trial's Statute.[30] He became less and less convinced of the legality of the main charge in the Charter, namely that Japan would be held accountable and put on trial for the "ultimate crime", the planning and execution of aggressive war in the Asia-Pacific region.

In January 1947, when the prosecution finished the presentation of its case, a majority of the seven judges – excluding Röling, the French Judge Henri Bernard and the Indian Judge Radhabinod Pal – started to write a preliminary Judgment.[31] Meanwhile, Röling presented a memorandum to Sir William Webb, the Tribunal's President, in which he explained his reservations.[32] He argued that the Charter was a limitation on the jurisdiction of the IMTFE and believed it should be left to the Judges to decide whether the provisions of the Charter were in conformity with the laws of nations:[33]

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27 Hugo Röling, *De Rechter die geen ontzag had. Bert Röling en het Tokiotribunaal*, Wereldbibliotheek, Amsterdam, 2014, p. 85.

28 *Ibid*., p. 138.

29 Röling and Cassese, 1994, p. 8, see *supra* note 17.

30 Letter of B.V.A. Röling to President Sir William Webb ("Röling Letter"), 23 January 1947, Collection 544 B.V.A. Röling, 1915-1985, access no. 2.21.273, inventory no. 11 (NAN).

31 The majority of seven: the United States, Britain, China, the Soviet Union, the Philippines, Canada and New Zealand.

32 Röling Letter, see *supra* note 30.

33 Röling and Cassese, 1994, p. 61, see *supra* note 17.

> In this connection, the essential question is whether the Charter so defines crimes against peace (this is the assumption in the preamble to the indictment) that the tribunal would be bound by its definition of substantive penal law, or whether it was only intended to enumerate those facts in the Charter with regard to which the Tribunal has jurisdiction, thereby leaving it to the Tribunal's judgment whether or not the facts enumerated are to be considered crimes according to international law.[34]

In other words, Röling wanted to verify the Charter's consistency with existing international law, something most of the other Judges refused and fiercely critised him for. According to Röling, this was nonetheless a crucial point, as it opened the discussion about "the extent to which aggressive war was a fully fledged crime at that time".[35]

Unconvinced by the reasoning of the other judges, who referred to treaties such as the Kellogg-Briand Pact of 1928 – which had outlawed war as an instrument of national policy – as evidence of the existence of the crimes against peace and humanity prior to the Second World War, Röling was reluctant to accept the Tribunal's claim that it was entitled to prosecute the Japanese for the crime against peace.[36]

> The Allied Nations undoubtedly have legislative power in Japan by virtue of the surrender as formulated in the Instrument of Surrender. These powers, however, are restricted to legislation for Japan and cannot be stretched to enable the Allied Nations to lay down rules of universal international law by virtue of their victory over Japan. Now there is nothing in the Charter to show that it was intended to state that "Japanese aggression is a crime" […] If it had been the intention thereby to define crimes against peace and to formulate a role of substantive penal law, then it should be assumed that those who drafted the Charter have either obviously exceeded their powers (supposing that existing international law did not, as yet recognize that rule), or

[34] Röling Letter, p. 1, see *supra* note 30.

[35] Röling and Cassese, 1994, p. 61, see *supra* note 17.

[36] "If aggression was not punished as a specific crime under international law at the beginning of the Second World War, how could this fact be reconciled with the rule on trying and punishing 'crimes against peace' contained in the Statute of the Tokyo Tribunal?"; *ibid.*, p. 10.

> supplied an unnecessary rule (supposing that existing international law did already contain that rule).[37]

These non-conformist views left Röling alienated both from his government back home and from his other colleagues on the bench.[38] And while the presence of fellow dissident Judge Pal must have brought some sense of relief to Röling, Pal's intention of providing a dissenting opinion – which went against the Chamber's earlier agreement to secrecy – put Röling in a very difficult position.[39] Those Judges not in agreement with the majority were now compelled to express themselves, to prevent being considered in agreement with the others.[40] Röling thus had to make a crucial decision: Should he resign from his position altogether? Should he accept the Charter and the majority Judgment unconditionally, as his government would have liked and pressured him to do? Or should he follow his "judicial heart" and publish a dissenting opinion? After careful deliberation, Röling decided to accept the Tribunal's Statute but, repudiating any political involvement, to eventually provide a dissenting opinion.

Röling's earlier reservations eventually reappeared in this final dissenting opinion, where he found a middle way between the majority Judgment of his colleagues who, in the words of Antonio Cassese, applied "Western criteria to the actions of the Japanese and saw their crimes through the eyes of the victors" and the views of Judge Pal, who held a

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37 Röling Letter, p. 2, see *supra* note 30. Later Röling would declare: "You may set up an international tribunal; you can make a statute for it and that statute will set out the limits of the jurisdiction of the tribunal, beyond which it can never go. But that doesn't mean that whatever is considered a crime in the Charter should be eventually accepted as a crime by the Court. The victor in a war, even in a world war, is not entitled to brand as an international crime everything he dislikes and wants to prosecute for". Röling and Cassese, 1994, p. 65, see *supra* note 17.

38 Röling and Cassese, 1994, p. 61, see *supra* note 17.

39 Nevertheless, it did not take long before Pal and Röling, who were seated next to each other on the bench, developed a strong friendship. Pal, who argued that Japan had fought the war in order to liberate Asia from Western colonialism, proved to be very influential on Röling's ideas on colonialism, Europe's role in Asia and the rationale behind Japan's behaviour during the war. Ushimura, 2003, p. 166, see *supra* note 26; Röling, 2014, pp. 154–58, see *supra* note 27.

40 For a long time, Röling would favour a majority Judgment not to belittle the value of the Court. He was well aware of the fact that the Tokyo Trial was not so much about the fate of the accused, but more about the development of international law. Röling Letter, see *supra* note 30.

solely Asian point of view when judging the actions of the Japanese.[41] After extensive study of the historical background of the conflict – in order to comprehend the reasoning behind Japan's war against the Allies – and further examination of the principles of international law, Röling dissented with both the majority of the judges and Judge Pal on the reasoning and results.[42]

First, Röling disagreed with the presentation of the facts in the majority Judgment. He criticised the reinterpretation of historical events for, according to him, they led to a superficial and political interpretation of the historical truth. Founding his opinion on both defence and prosecution evidence, Röling believed that there had indeed been a Japanese conspiracy to commit aggression. However, unlike the majority, who closely followed the prosecution and argued that there had existed one large conspiracy to commit aggression which had already begun in 1928, Röling claimed that it only dated from 1940 when the Japanese military got the upper hand and "the use of armed force was accepted as government policy".[43]

Second, as already noted, Röling expressed serious reservations against the ambiguous rules of international law that had found their way into the Statute.[44] He believed that the Tribunal was not so much about the fate of the accused as about the development of international law. It was therefore "the Tribunal's job to create authority in the field of international law, and to independently evaluate the lawfulness of the Charter provisions".[45] According to Röling, it was "open to question whether the Charter embodies the substantive law to be applied by the Tribunal, or whether the Charter only lays down what acts are subject to

41 Röling and Cassese, 1994, p. 10, see *supra* note 17.

42 Röling only gave his dissension where it might have direct bearing on the question of criminal liability in the sense of the Charter. Opinion of Mr. Justice Röling, Member for the Netherlands ("Röling Opinion"), 12 November 1948, pp. 1–2, 63 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-04-a-min.pdf).

43 *Ibid*., pp. 63–64, 83–84. See also Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, New York, 2005, p. 45.

44 Röling Letter, see *supra* note 30.

45 Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, p. lxxvii.

its jurisdiction, and how this jurisdiction is to be executed".[46] Unlike the majority of the Judges, Röling believed that the provisions of the Charter had to be verified with general international law; he found them to be jurisdictional instead of law creating.[47]

In turn, this had implications for his opinion on the lawfulness of Japan's war against the Allies. Röling believed that Japan could not be held responsible for transgressing the "ban on wars of aggression" as it had not been an international crime during the war.[48] Röling did not go as far as Pal, who argued that the Western powers had been "equally guilty of self-aggrandizement as Japan", there essentially being no difference between them in terms of moral culpability. But Röling did later declare:

> You may set up an international tribunal; you can make a statute for it and that statute will set out the limits of the jurisdiction of the tribunal, beyond which it can never go. But that doesn't mean that whatever is considered a crime in the Charter should be eventually accepted as a crime by the Court. The victor in a war, even in a world war, is not entitled to brand as an international crime everything he dislikes and wants to prosecute for.[49]

In addition, Röling explained that he was convinced that Japan's political goals in the pre-war years, to acquire a dominant position in Asia and disabling the European powers in the region, could not be considered an offence in itself.

In order to reconcile his belief that wars of aggression prior to 1939 should not be considered an international *crime*, with the rule on "crimes against peace" contained in the Charter of the Tribunal – the Charter that he had accepted – Röling argued:

> In international law the word "crime" is applied to concepts with different meanings. It can indicate acts comparable to political crimes in domestic law where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment ref1ects a necessary political measure rather

[46] B.V.A. Röling, Interpretation of the Charter, Annex to Röling Letter, 23 January 1947, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 11 (NAN).

[47] Boister and Cryer, 2008, see *supra* note 45.

[48] Röling and Cassese, 1994, p. 10, see *supra* note 17.

[49] *Ibid.*, p. 65.

> than an expression of retribution. If the "crime against peace" is understood in this sense, it is in accordance with international law, and the Charters did not deviate from the present law of nations.[50]

So according to Röling, one should distinguish between those who had committed acts of a "truly criminal nature" (e.g. conventional war crimes) and those who had committed crimes that could be compared to the "political crimes" of domestic law. Because the victorious powers had been on the side of "reason and law" during the war and were now responsible for the maintenance of peace, they "had the right to act against individuals who might prove dangerous for the new order".[51] Following this novel distinction he had created between the two categories of crimes, Röling argued that a person solely guilty of the crime against peace should not be sentenced to death but only receive a term of imprisonment.[52]

Third, Röling's opinion threw light on the law relating to war crimes, in particular on the question of responsibility for omission (command responsibility).[53] Röling disagreed in part with the majority and came to a "rather more sophisticated and nuanced view than the majority, one which has commended itself to history more favourably than others".[54] Although both the majority and Röling agreed that command responsibility existed in international law, Röling argued that several conditions had to be proven before liability for omission could be established. "Firstly, that the accused knew or should have known of the facts, secondly that he had the power to prevent the acts and thirdly that he had the duty to prevent those acts".[55]

While referring to earlier trial cases,[56] Röling consequently argued that the scope of responsibility could differ from case to case.[57] He

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50 *Ibid*., p. 66. Röling Opinion, p. 48, see *supra* note 42.

51 Röling and Cassese, 1994, pp. 10–11, p. 66, see *supra* note 17.

52 *Ibid*., p. 11.

53 *Ibid*., p. 10. See also Röling Opinion, p. 54, see *supra* note 42.

54 Robert Cryer, "Röling in Tokyo: A Dignified Dissenter", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 4, p. 1120.

55 Röling Opinion, pp. 59–60, see *supra* note 42. See also Cryer, 2010, p. 1120, see *supra* note 54.

56 Röling Opinion, p. 58, see *supra* note 42.

57 *Ibid*., p. 60.

believed that in this particular case the majority Judgment had taken this responsibility too far in the verdict of several of the defendants, whilst it had been too lenient for others.[58] According to Röling, the military officers Oka Takazumi, Satō Kenryō and Shimada Shigeterō were guilty of committing conventional war crimes and should have been punished with the supreme penalty, while Field Marshal Shunroku Hata and civilians Kōki Hirota, Kōichi Kido, Mamoru Shigemitsu and Teiichi Togo should have been acquitted.[59]

To briefly summarise, then, in his dissenting opinion Röling showed "rigorous respect for the law" but expressed realism and "a balanced political judgment" at the same time.[60] His awareness of the influence of personal and political ideas on the majority Judgment in combination with his understanding of Japan's history and culture made him walk a "careful middle path" between the outspoken positions of his fellow Judges.[61]

It is thus fair to say that his first experience with international criminal law in Tokyo left Röling very critical of criminal justice but also endowed him with a realistic and less "Western" view on international law.[62] Röling had experienced the contradictions derived from the export of Western legal practice to another cultural context. This experience, combined with his openness to the ideas of Judge Pal and his friendships with Japanese scholars, led Röling to be more sensitive towards global

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58 B.V.A. Röling, "The Nuremberg and Tokyo Trials in Retrospect", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, p. 472; and Röling Opinion, p. 60, see *supra* note 42.

59 Röling Opinion, p. 178, see *supra* note 42.

60 Antonio Cassese on Röling's dissenting opinion in: Röling and Cassese, 1994, p. 10, see *supra* note 17; see also Antonio Cassese, "B.V.A. Roling – A Personal Recollection and Appraisal", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 4, pp. 1141–52.

61 Cryer, 2010, p. 1122, see *supra* note 54. Röling on the interpretation of international law: "The position of a country determines the outlook of its lawyers and its judges, their evaluation of values and interests, their opinion about the meaning of treaty-texts and their appreciation of a specific custom". See B.V.A. Röling, "The Law of War and the National Jurisdiction since 1945", in *Academie de droit international de La Haye, Recueil Des Cours*, 1961, vol. 100, Martinus Nijhoff, Leiden, p. 332.

62 "The victor in a major war usually is in a position to transform his own violation of the law into widely or generally accepted rules of warfare or neutrality. The vanquished, however, in so far as a special military position led him to deviate on other points from accepted custom, is punished for his violations of the laws of war", in Röling, 1968, p. 392, see *supra* note 61.

values and morality in confronting legal issues. We may therefore argue that the importance of Röling's experience in Asia lay not so much in his contribution to the Tokyo Tribunal but in the creation of new perspectives on international law, in particular on crimes against peace.

26.4. Going Beyond Nuremberg and Tokyo: Röling and the UN

Upon his return to the Netherlands in 1948, Röling continued his judicial and academic functions. In 1948 he was appointed professor of criminal law and criminal procedure at Groningen University, an appointment he took up in 1949.[63] In that same year, he was appointed to the Special Court of Cassation, the supreme Dutch authority in the matter of war crimes in Europe. When the Court completed its work in 1951, he served as the chairman of the Advisory Committee on Pardon to Political Delinquents from 1951 to 1954. Yet his interest in the study of legal relations in the international community remained. When he was offered a diplomatic position as a Dutch delegate to the UN, where he would participate in the work of the General Assembly – which was about to discuss the implementation of the principles of Nuremberg and Tokyo – Röling eagerly accepted.[64] In this capacity, Röling held an egalitarian and global outlook and defended a progressive approach to international criminal jurisdiction.

As mentioned earlier, in the Charter of the UN, the General Assembly had been given the responsibility "to initiate studies and make recommendations for promoting international co-operation in the field and encouraging the progressive development of international law and its codification".[65] In 1947 the International Law Commission ('ILC') was created by the General Assembly (Resolution 174(II) of 21 November) to implement this obligation. The General Assembly was given responsibility for the election of the ILC's members, controlled its finances and proposed the topics to be considered. It also approved topics submitted by member states and international organisations and reviewed adopted draft articles. Relations between the ILC and the General

63 Later Röling also accepted a chair in international law, combining the positions. When a successor was found to his criminal law chair, he continued only with international law. Röling and Cassese, 1994, p. 118, see *supra* note 17.

64 *Ibid*.

65 Schiff, 2008, p. 26, see *supra* note 2.

Assembly were channelled through the Sixth (Legal) Committee of the Assembly. The Sixth Committee had completed the draft of the ILC's Statute and gave detailed consideration to the ILC's annual report. The Sixth Committee was also invited to introduce the report in the General Assembly and to aid the ILC's deliberations on its contents.[66]

The first elections for the ILC took place on 3 November 1948, while its first annual sessions opened on 12 April 1949.[67] The members of the ILC were chosen from candidates nominated by UN member states of the General Assembly "as persons of recognized competence in international law", from the "main forms of civilization" and "the principal legal systems of the world".[68] The ILC met annually for several weeks in the summer, usually in Geneva. In 1950 the ILC formulated the Nuremberg Principles, codifying the legal principles of the IMT. In addition, it was given the mandate to draft a Statute of a new international criminal court (deriving from Article VI of the Genocide Convention) and to prepare a Code of Crimes Against the Peace and Security of Mankind ('Code of Crimes').[69] This Code of Crimes was to "serve as the legal

[66] Jeffrey S. Morton, *The International Law Commission of the United Nations*, University of South Carolina Press, Columbia, 2000, p. 3.

[67] For a more detailed history of the ILC, see Ian Sinclair, *The International Law Commission*, Grotius, Cambridge, 1987.

[68] Schiff, 2008, p. 25, see *supra* note 2.

[69] During the drafting of the Genocide Convention, it had been the Iranian and Dutch representatives that called for the inclusion of an invitation to the ILC to study the question of an international criminal jurisdiction. The Netherlands draft resolution read as follows:

> The General Assembly, Considering that the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal. Considering that in the course of development of the international community the need for trial of crimes by an international judicial organ will be more and more felt. Requests the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals whether private persons or officials, charged with crimes over which jurisdiction will be conferred upon that organ by international conventions. Requests the International Law Commission in the accomplishment of that task to pay particular attention to the possibility of establishing a criminal chamber of the International Court of Justice.

framework for a proposed international criminal court, the issue of jurisdiction was therefore critically important".[70]

Notwithstanding the palpable connection between these matters of international criminal jurisdiction, scholars have often pointed to the compartmentalised way in which these projects developed, arguing that there was little interaction between them. William A. Schabas states: "Indeed, much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, almost as if the two tasks were hardly related"; and Benjamin N. Schiff notes: "the ILC's projects to develop a criminal jurisdiction – to design a court and its procedures – and to develop a code of offenses – to define the laws that the court would enforce – flowed intermittently and in parallel, but with little interconnection, thereafter".[71]

The task of formulating a draft statute for the establishment of an international criminal court was given to Special Rapporteurs Ricardo Alfaro (Panama) and Emil Sandström (Sweden),[72] who held very different views on the establishment of an international criminal court.[73] While Alfaro supported the Statute for an international criminal court and a substantive international criminal code, Sandström argued that the world was not yet ready for such a court.[74] The ILC decided to follow the recommendations of Alfaro and agreed that the establishment of an international criminal court was desirable and possible. The debate on an international criminal court thus continued.

Historical Survey of the Question of International Criminal Jurisdiction: Memorandum submitted by the Secretary-General. Topic: Question of International Criminal Jurisdiction, UN Doc. A/CN.4/7/Rev.1.

70 Morton, 2000, p. 37, see *supra* note 66.

71 Schiff, 2008, p. 27, see *supra* note 2; Schabas, 2004, p. 8, see *supra* note 1.

72 Sandström later became chairman of the ILC while Alfaro became Panama's representative to the ILC.

73 M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, Dordrecht, 1987, p. 4.

74 During the examinations of the Rapporteurs' findings in the ILC, the representative of the Netherlands in the ILC, J.P.A. Francois (1949–1961) supported the establishment of an ICC. Praeadvies betreffende International Criminal Jurisdiction (I.C.J.) en het in het leven roepen van een International Criminal Court (I.C.C.) door Prof. Mr. B.V.A. Röling ("Pre-Advice on ICJ"), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

In 1951 the Sixth Committee recommended to the General Assembly the adoption of a resolution that established a Special Committee for the purpose of drafting a convention for the establishment of an international criminal court.[75] This committee, better known as the Geneva Committee, was followed in 1953 by a second committee, labelled the New York Committee.[76]

Meanwhile, the first draft Code of Crimes was submitted in 1950 by the Rapporteur Jean Spiropoulos[77] to the General Assembly, which then referred it back to the ILC for revision.[78] A second revised and more specific draft on the presumption that an international criminal court should be established by multilateral convention was then submitted to the ILC in 1951. However, the most important of the crimes included in the codification, the crime of aggression, was left undefined.[79] As the definition of aggression was inexorably linked with the draft Code of Crimes, it was clear that without a definition, the codification could not be

[75] Some ILC delegates felt the Commission had discussed the ICC *in abstracto* and they wished that the matter should be discussed anew on the basis of concrete proposals. It agreed that a committee of government representatives should consider the problem in all its aspects and, if it came to the conclusions that an international criminal court would be desirable and practical draw up the statute of such a court; *ibid.*, p. 10; See also B.V.A. Röling, "On Aggression, on International Criminal Law, on International Criminal Jurisdiction – II", in *Netherlands International Law Review*, 1955, vol. 2, no. 3, pp. 279–89.

[76] The Dutch government was supportive of this proposal:

> The Netherlands government was prepared to support the joint draft resolutions proposed by Cuba, France and Iran as amended by the UK. It agreed that a committee of government representatives should consider the problem in all its aspects and, if it came to the conclusions that an international criminal court would be desirable and practical, draw up the statute of such a court. That task would be of great importance as it would affect the willingness of states voluntarily to submit to the court's jurisdiction. The rules of such a statute should contain provision for the prevention of abuse by use of the court, as a weapon in national politics or in a cold war […] The task was a big one, but the Netherlands government was confident that the work of the proposed committee, which would be commented on later by the governments, would contribute to the ultimate establishment of an international criminal court".

Pre-Advice on ICJ, p. 10, see *supra* note 74.

[77] Jean Spiropoulos was the Greek representative to the ILC.

[78] Schiff, 2008, p. 25, see *supra* note 2.

[79] Bassiouni, 1987, pp. 5–6, see *supra* note 73.

established. A third track was thus developed. Another separate Committee on Defining Aggression was set up to study the question of defining aggression in 1953.[80]

Röling was heavily involved in all three of these projects.[81] Not only was he the Dutch representative on the Sixth Committee of the General Assembly (1949–1957), he was also the Dutch representative to the two special committees.[82] He was also appointed to the Geneva Committee (1951) and New York Committee (1953) on international criminal jurisdiction that were established for the purpose of drafting a convention for the establishment of an international criminal court. From 1953 he served as vice-chairman of the 1953 Committee on Defining Aggression[83] and as Rapporteur of the 1956 session of the same Committee.[84] At the same time, Röling was an adviser to the Dutch Ministry of Foreign Affairs through his membership of the Adviescommissie inzake Volkenrechtelijke vraagstukken (Advisory Commission on International Law Issues). This Advisory Commission

[80] *Ibid*., p. 6. See also Official Records of the General Assembly, Ninth Session, Supplement No. 11, Report of the Special Committee on the Question of Defining Aggression, 24 August to 21 September 1953, UN Doc. A/2638, pp. 1–15.

[81] Röling was not the only representative who was active in several committees. Representatives of the US (George Morris, John Maktos), Syria (Tarazi), Israel (Jacob Robinson), Yugoslavia (Djuro Ninčić, Aleksandar Božović), Peru (Manuel Maurtua) and Britain (Francis Vallat) were, for example, appointed to the Special Committee on Defining Aggression (1953 and 1956) as well as in the special committees on International Criminal Jurisdiction (1951 and 1953).

[82] His colleague in Tokyo, Radhabinod Pal was later (upon the recommendation of Röling) appointed a member of the ILC.

[83] Whereas his viewpoints on the definition of aggression have been scrutinised in other publications, this chapter places emphasis upon Röling's less well-known ideas on international criminal justice and an international criminal court. See for example B.V.A. Röling, "On Aggression, on International Criminal Law, on International Criminal Jurisdiction – I", in *Netherlands International Law Review*, 1955, vol. 2 no. 2, pp. 167–96; Röling and Cassese, 1994, see *supra* note 17; B.V.A. Röling, "The Question of Defining Aggression", in *Symbolae verzijl: presentees au professeur J.H.W. Verzijl a l'occasion de son LXX-Ieme anniversaire*, Martinus Nijhoff, The Hague, 1958; B.V.A. Röling, "The 1974 definition of Aggression", in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Martinus Nijhoff, Dordrecht,1986, pp. 413–22.

[84] During his time at the UN, one of Röling's main interests was how to decide "which individuals could be held responsible for the crime of aggression, especially in view to the position of subordinates". His former experience at the IMTFE proved to be very influential on his ideas on the "Definition of Aggression". Röling, 1955, see *supra* note 83.

was an independent council for the Dutch government and parliament and gave recommendations on questions of international law.[85]

Although the delegates to the ILC and Special Committees considered themselves legal experts instead of government representatives, the lines between "representative" and "expert" were often blurred.[86] For example, before he took up his position on the Geneva Committee (officially as a government representative), Röling received a one-page instruction from the Dutch government.[87] It was, however, Röling himself who had earlier drafted the pre-advice upon which these instructions were based.[88]

26.5. Röling, the Committee on International Criminal Jurisdiction and the International Criminal Court

> To have or to have not an International Criminal Court, in view of all the preparatory work done is less a question of the brains, than a question of the heart.[89]

It is important to keep in mind that the deliberations on the development of international law took place during the early years of the Cold War, with political tensions heavily influencing the outcome of the discussions. While Sandström and Alfaro had already expressed different opinions on the possibility of establishing an international criminal court, consensus amongst the world's major powers could also not be reached. The Soviet

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85 Although the members of the Advisory Commission had different opinions about the creation of an international criminal court, they remained unanimous in support of one. The Advisory Commission argued that there was a proven need for an international criminal tribunal and believed that the development of international criminal law would greatly benefit from a standing impartial judicial body. Concept rapport inzake de oprichting van een internationaal strafgerechtshof, 1 September 1954, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

86 "We considered ourselves rather a Committee of experts than a Committee of Government representatives; in view of all the technical problems we had to face, it hardly could be done otherwise". Röling, 1955, p. 282, see *supra* note 75.

87 Instructie voor de Nederlandse vertegenwoordiger in het "Committee on International Criminal Jurisdiction" hetwelk te Genève zal bijeenkomen op 1 Augustus 1953 ("Instruction for Dutch Representative"), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

88 Pre-Advice on ICJ, see *supra* note 74.

89 Statement by Röling in the Sixth Committee 23 November 1954 ("Röling Statement", 23 November) p. 4, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61 (NAN).

Union was opposed to the concept of sovereignty and refused to take its seat in the ILC, the US declared that the formulation of an international criminal court statute was neither possible nor opportune at the present time, and Britain declared that they "were not yet ready for such an important and ultimately highly desirable development in world affairs".[90] The Netherlands' government, however, was and remained supportive of the immediate establishment of an international criminal court, even declaring it unnecessary to wait until the draft Code on Crimes had been adopted.[91]

Before Röling was appointed as a member of the Special Committee, he had expressed his thoughts on an international criminal court in the UN's Sixth Committee in 1950.[92] Even though he felt that international crimes as such were recognised, he was not sure if the creation of an international criminal court automatically followed the concept of international crimes. He believed that even without an international criminal court the recognition of those crimes was the main achievement, as international law could still be a significant support for law-abiding governments in national courts. The adoption of the Code of Offences Against the Peace and Security of Mankind before the establishment of an international criminal court was therefore not necessary in his eyes.[93]

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90 M. Cherif Bassiouni, *Introduction to International Criminal Law*, Koninklijke Brill, Leiden, 2013, pp. 580–81 and Rapport I van het werk van Genève Commissie ("Report I"), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, pp. 2–3 (NAN).

91 Instruction for Dutch Representative, see *supra* note 87.

92 During these early deliberations it becomes clear that Röling's experience as a judge in Tokyo influenced his thinking on an international criminal court. When addressing the question should the international criminal court be established as a UN body, some ILC members had proposed to establish an international criminal court as a new chamber of the International Court of Justice. The Dutch representative to the ILC had opposed this proposal arguing that magistrates of the International Court of Justice lacked the necessary experience in criminal law. According to Röling, this argument did not hold; in Nuremberg and Tokyo both the prosecutor and judges lacked international law experience. As a result national legal principles were simply transplanted on international law, diminishing the authority of the Tribunals. In his view, it would be better if international law experts were assisted by criminal law experts than the other way around. Pre-Advice on ICJ, p. 12, see *supra* note 74.

93 *Ibid.*, p. 11.

Yet the value of an international criminal court without a legal framework would be incomplete, as the greatest significance of international criminal law "lay in its applicability to the members of the very governments which had violated it, since they could not be prosecuted under national law". According to Röling, the important question was "whether the institution of an international criminal court would lead to practical results", keeping in mind that it would have to operate under two different situations: in times of peace and in times of war. The role of an international criminal court in times of war would be easy: "the vanquished would be available for trial and a permanent international criminal court could guarantee objectivity and fairness, could avoid the pitfalls with which any ad hoc tribunal would be faced and could establish customs and traditions".[94]

Hence, Röling argued that "the questions of an international criminal court should be considered in the first place with regard to times of peace as an instrument to prevent war and with regard to crimes committed during small-scale hostilities". He felt that it was more difficult to decide upon the functions of an international criminal court in times of peace as peacetime crimes, such as genocide or the planning and preparation of a war of aggression, were rarely committed by individuals or groups of individuals without the consent or approval or complicity of their government.

> The crucial point was whether in such a case the sovereign states concerned would be prepared to submit their national or international policy to the judgment of an international body which would apply to those policies the rules of international law which were so often valued.[95]

Such obvious political aspects had earlier not been taken into consideration by the ILC, but Röling argued that these aspects belonged to reality and jurists had to face them when formulating rules of law. He stated:

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[94] *Ibid*. As a former judge in an international court Röling might have had a better understanding of the inherent shortcomings of international *ad hoc* courts. Statement by Prof. BVA Röling in the Sixth Committee on 25 November 1954 ("Röling Statement", 25 November), Collection 544 B.V.A. Röling, 1915-1985, access no. 2.21.273, inventory no. 61, p. 2 (NAN).

[95] Pre-Advice on ICJ, p. 9, see *supra* note 74.

> At the present time, mutual accusations were very frequent. The agenda of the current session contained a number of accusations brought by certain members' states against others. He doubted whether in the current tense international situation sovereign states would be prepared to submit the members of their governments, in connexion with those accusations, to trial by an international criminal court which, if it found them guilty, would sentence them for crimes against peace or humanity.[96]

Röling thus expressed his doubt whether states caught up in the tense international relations of that time would be prepared to submit members of their government to an international criminal court.[97] He argued that "an international criminal court of worldwide compulsory jurisdiction could only be thought of in terms of the very distant future" and that for the moment only voluntarily accepted jurisdiction could be secured.[98] It therefore seemed impossible to establish an international criminal court as a UN principal organ (which required an amendment of the Charter). He proposed the following solution: the criminal court would be established as a "subsidiary organ" of the UN. This would imply that states could voluntarily accept criminal jurisdiction by treaty. As a result, criminal jurisdiction would only apply in respect of certain offences and for certain states.

Another option put forward by Röling, was the development of international criminal jurisdiction on a regional basis, i.e. through the Arab League, the Soviet Bloc, the Organization of American States and the Western European Union. While the scope of these organisations would be more limited than that of the UN, the relations among their member states were believed to be closer, and there was also a greater community of interest, mutual trust and understanding. These regional criminal courts could in turn pave the way for a future worldwide criminal court.[99]

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96 *Ibid.*, p. 1.

97 "The vagueness of international law, not only the content but also the legal intensity of its rules, makes that international law is too easily used for political expediency. One can safely assume that ICJ will only be accepted between certain states, and only with respect to certain offenses". *Ibid.*, p. 13.

98 *Ibid.*, p. 8, see *supra* note 74.

99 *Ibid.*, pp. 9–10.

It was these arguments and views on an international criminal court that Röling vigorously defended in the Geneva Committee.[100] When the Committee convened in August 1951 it was decided to discuss the preliminary draft article by article, as to determine the jurisdiction of an international criminal court. The Dutch, French and Israeli side preferred a discussion on the fundamental issues instead and protested against this solution. They argued that the logical sequence of discussion would be:

1) determination of the function of an international criminal court;
2) determination of the body that would perform this function;
3) determination of the manner in which this body was to be created.[101]

Their proposal was, however, rejected and as a result the subsequent discussions within the Committee were difficult and unstructured. It soon became clear to the members of the Geneva Committee that certain aspects needed to be studied in a more organised manner.[102] A drafting committee was therefore established of which Röling was made chairman, its other members being the American, Danish, French and Israeli delegates.[103]

In the words of M. Cherif Bassiouni, "the discussions and written comments [of the Geneva Committee], particularly those of major powers, clearly indicated that the project had no chance of acceptance and was politically premature".[104] On 31 August 1951 the Geneva Committee completed its report, containing the draft Statute of the international criminal court. In the report it was stated that the Statute of the

[100] The Geneva Committee consisted of 17 members representing Australia, Brazil, China, Cuba, Denmark, Egypt, France, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom, the US and Uruguay; India was originally part of the Committee but later stepped down as it had not been able to find a suitable representative. According to Röling, political motivations lay behind its absence as he knew that Radhabinod Pal had been willing to represent India in the Committee but had not been asked. Report I, see *supra* note 90.

[101] *Ibid.*, p. 2.

[102] Eindrapport ("Final Report"), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 1 (NAN).

[103] Rapport II van het werk van het Genève Committee (Report II), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 2 (NAN).

[104] Bassiouni, 1987, p. 581, see *supra* note 90.

international criminal court would hold no obligation for the founding members. The intent of the Statute was only the creation of an international criminal court. It was left to subsequent conventions to dedicate its jurisdiction.[105] The report was subsequently submitted to the member states of the UN in order that they might comment on the proposed text.[106] As expected, many were still unwilling to surrender any portion of their national sovereignty to an international criminal court. The Dutch government nonetheless kept supporting the proposed permanent international criminal court while the major powers, although not rejecting the project altogether, were more reluctant. [107] However, as no state wanted to assume political responsibility for the demise of such a court, a second special New York Committee was established. This Committee had to re-examine the Geneva draft while taking into account the comments of the member states.[108] The composition of the New York Committee deviated from that of the first, although five of the previous representatives retained their seats. Röling became its Rapporteur.

26.6. The New York Committee[109]

Whereas the fruits of the work of the Geneva Committee had more or less contributed to the study of international criminal jurisdiction, discussing the principal problems deriving from such a jurisdiction, the New York Committee believed enough study had been done.[110] It wanted to take

[105] Final Report, p. 1, see *supra* note 102.

[106] *Ibid.*

[107] "The government would welcome the establishment of the court to be coupled with the codification of international criminal law. The government – being of the opinion that international criminal jurisdiction must be founded on the international sense of justice, consider that the court should not be established by a limited number of states, as proposed by the Committee on International Criminal Jurisdiction, but by resolution of the general assembly of the UN. Court as a subsidiary organ of the General assembly". Observations by the Netherlands Government on the draft Statute for an International Criminal Court, framed by the Committee on International Criminal Jurisdiction which met at Geneva from 1st to 31st August 1951 (A/AC.48/4) Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

[108] Bassiouni, 1987, p. 581, see *supra* note 90.

[109] Röling Statement, 25 November, see *supra* note 94.

[110] 1953 Special Committee on International Criminal Justice: Argentina: Mr. Fernando Olano, Mr. Raul Laurel; Australia; Mr. Allen Loomes; Belgium; Mr. J. Dautricourt; China: Mr. Hua-Cheng Wang; Denmark: Mr. Birger Dons-Moeller; Egypt; Mr. Yehia Sami; France: Marcel Merle; Israel: Mr. Jacob Robinson, Mr. David Marmor; Netherlands:

things further.[111] The objectives of the committee were established as follows:

1) Consideration of the implications and consequences of establishing an international criminal court.
2) Methods by which an international criminal court might be established.
3) Relationship between an international criminal court and the UN and it organs.
4) Re-examination of the Geneva Statute.
5) Further considerations on the implications and consequences of establishing an international criminal court.
6) Adoption of the report of the Committee.[112]

The New York Committee entered into discussions of numerous details, such as "the number of judges, the organization of the Court, special authorities, as the Committing Chamber, the prosecuting authority, the board of clemency and parole, and lastly the procedure before the Court".[113] However, the most important question under consideration remained in Röling's words:

> Do we want an International Criminal Court now; do we consider it *possible* (in view of the present world relations) and *desirable* (in the sense that in the present time the advantages would surpass the disadvantages), to establish an International Criminal Court? It was recognized by many members of the Committee that at the present time an International Criminal Court could not be but an imperfect Court. In their view, it was useless and even dangerous to create a Court of inferior quality. They thought it was better to have no International Criminal Court than a second rate one. Other members maintained International Criminal

Röling; Panama: Mr. Ernesto de la Ossa; Peru: Mr. Manuel Maurtua; Philippines: Mr. Mauro Mendez; UK: Mr. Francis Vallat; USA: Mr. George Morris, Mr. John Maktos; Venezuela: Mr. Victor Perez-Perozo; Yugoslavia: Mr. Djuro Ninčić, Mr. Aleksandar Božović. Draft Report of the 1953 Committee on International Criminal Jurisdiction ("Draft Report"), A/AC 65/L.12, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 75 (NAN).

111 Röling, 1955, p. 281, see *supra* note 75.

112 Draft Report, p. 11, see *supra* note 110.

113 Röling, 1955, p. 281, see *supra* note 75.

> Jurisdiction, on the basis of a very modest beginning, should be given a chance to grow. It was better to create a Court with imperfect powers and limited competence, than to create none at all.[114]

Like he had done in the 1951 special Geneva Committee, Röling once again defended the establishment of an international criminal court in this New York Committee. Emphasising the growing (political) interdependence in the world, he criticised those governments who rejected the establishment of international criminal jurisdiction on the basis of its interference with state sovereignty.

> Now one can think of many attitudes as to this concept of absolute state sovereignty. On the one hand there are the states which still consider absolute state sovereignty the key stone of International Relations. But still those states have to recognize that the right to go to war, in former centuries considered the essence of sovereignty, does not longer exist; that state sovereignty consequently is limited by international law; that it is within the sovereign rights of a state to cooperate in creating international law, limiting this very state sovereignty.[115]

According to Röling the outcome of the IMTs in Nuremberg and Tokyo had thus limited state sovereignty. From this point on, states should realise that the nation state was no longer the primary unit and that the growing interdependence in the world would lead to the development of a global legal morality.

> There has grown an interdependence between the states of this world which tends to create common opinions about that is harmful to this world, and which creates such strong feelings about such things considered harmful that the concept of international criminality and of international punishment is bound to develop. In that interdependent world no longer is valid 'right or wrong my country'. In that interdependent world exists the strong opinion about common evil that should be repressed where and by whom

[114] *Ibid*.

[115] Rede van de vertegenwoordiger van Nederland in de commissie voor een Internationaal strafgerechtshof op 28 juli 1953 [Speech of Representative of Netherlands Commission, 28 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 1 (NAN).

> perpetrated. It is this opinion which is the most important factor in the process of establishing international criminal jurisdiction.[116]

Connected with the development of this global morality were the recognition of the individual in international law and the establishment of individual criminal responsibility in Nuremberg and Tokyo. In Röling's eyes individuals no longer had duties to national states but to the whole of mankind.

> International Law during WWII and thereafter has turned to the individual. It is one of the most important trends of modern law, this recognition of the individual. First of all recognition of his rights: universal human rights, the shape and content of which may be debated, the existence of which cannot be denied. Complimentary to those rights: the duties, the duties of the individual towards, not his state, but towards mankind.[117]

Confidence in this common moral standard was consequently needed to establish a functioning international criminal court. He acknowledged that this confidence was lacking "here and there" but denied "that at the present moment nowhere sufficient confidence could be found to build upon it international criminal jurisdiction".[118] When lobbying for the international criminal court he pointed as an example to the success of the European Coal and Steel Community, binding together six states, where a high authority executed international jurisdiction over individuals from these six states. "Here on a regional basis, and in a limited field of economic activity, international criminal jurisdiction has been realised. I give it as an example to those who maintain that international criminal jurisdiction is unrealistic".[119]

In Röling's view, international criminal jurisdiction not only derived from a common moral standard; it would also strengthen this standard at the same time and serve more or less as a tool to set global standards.

> I submit to you that the main purpose of punishment is the maintenance of order by the factual denunciation of the evil criminal deed. It implies the public demonstration that the

[116] *Ibid.*, p. 1.
[117] *Ibid.*
[118] *Ibid.*, p. 2.
[119] *Ibid.*

> act is an evil act, and the punishment expresses how evil the act is considered to be. This demonstration assists the community in maintaining and strengthening its convictions about good and evil. Consequently the real significance of punishment is the strengthening of moral value.[120]

He even drew a picture of this global morality, when he argued for its main features:

> Policy of good neighbourship, respect for others, recognition of everyone's right to exist- they are all the expression of the application of the concepts of common morality on international activities. Punishment of the international crime is but the consequence of this attitude.[121]

International criminal jurisdiction could fortify the public's opinion about what should and what should not be done, while promoting peace and human well-being. With the establishment of a general opinion about what was to be considered a common evil (found in the principles of Nuremberg and the Genocide Convention) and sufficient confidence in supranational organs that could be entrusted with the task of suppressing that evil, Röling argued that the time had come to provide international judicial action against individuals.

Despite all this, Röling considered the maintenance of peace, especially in an age of nuclear power, the most important function of international justice. He was well aware of the fact that peace could not always be established by the maintenance of rigid international justice and believed that sometimes the principle of "opportunity" should prevail over the principle of "legality".[122] According to Röling, it was therefore necessary that in international criminal jurisdiction the power of specific political organs (the Security Council, General Assembly or any other organ of the UN) should be recognised to prevent the prosecution of cases as matters of high policy.[123]

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[120] *Ibid*.

[121] *Ibid*., p. 3.

[122] "Do not misunderstand me. The disqualification of aggression as a crime will not prevent all aggression, as the prohibition of murder does not prevent all murder. But this general disqualification as a crime makes it more difficult for a government to get support for an aggressive policy. However there is a danger in the existence of strong moral feelings in IR […] The idea of the necessity of a crusade against every existing evil may develop". *Ibid*.

[123] *Ibid*.

> Our whole UN organization is set up for the maintenance of peace as its primary function. It may be easily understood that the rigid maintenance of justice could interfere with this primary function of the maintenance of peace. To punish someone as a criminal aggressor might prevent international settlement of an international conflict, and as such might do more harm than good […] It will therefore be necessary to provide for the possibility of disregarding in exceptional cases the rules of justice for the sake of the maintenance of peace.[124]

For these reasons, and the fact that he believed that the ties between the international criminal court and the UN should be made stronger than previously envisaged in the draft Geneva Statute, Röling once more defended the creation of an international criminal court by a General Assembly resolution, depending upon states' inclination to grant it jurisdiction for specific crimes.[125] According to him, the "creation of the court by UN resolution would ensure to international criminal jurisdiction the world-wide approach, would establish a court with United Nations authority, would justify the United Nations nomination of judges and would establish relations between the Court's activity and other United Nations activity".[126] The fact that the establishment of an international criminal court by resolution would lead to a more global framework was also decisive in Röling's decision to vote against a court by multilateral convention. He stated:

> The great advantage of this method is that by creating the court the gates are thrown open to the new fields of international cooperation and any state may decide for himself how far he will go into this new territory. It may be that some states are only willing to grant jurisdiction for specific crimes […] Rather than the convention which aims

[124] *Ibid.*

[125] By a vote of eight to two, with three abstentions, the members of the 1953 committee favoured the founding of an ICC by convention prepared by an international diplomatic conference under the auspices of the UN. Röling strongly disagreed. Draft Report, pp. 26–27, see *supra* note 110.

[126] Rede van de vertegenwoordiger van Nederland in de commissie voor een Internationaal strafgerechtshof op 30 juli 1953 [Speech of Representative of Netherlands Commission, 30 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 1 (NAN).

> at a full-fledged International Criminal Justice – and which would run the risk of not being concluded at all – this method creates the possibility of realising international Criminal Justice in a variety of degrees fitting well the different relations between the present states.[127]

Elsewhere Röling noted:

> [I]t will be more important since the judges will represent the various legal systems of the world, a representation that cannot be expected in case the court is established by multilateral convention concluded amongst a relatively small number of states.[128]

In the end the New York Committee revised the 1951 Statute so as to make it more acceptable for a larger number of states. However, no agreement could be reached by the members of the New York Committee "on the questions of possibility, practicability and desirability of the creation of an organized international criminal jurisdiction".[129] What was

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[127] *Ibid*., p. 1.

[128] *Ibid*., p. 3, see also Rede van de vertegenwoordiger van Nederland in de Commissie voor een Internationaal strafgerechtshof op 31 juli 1953 [Speech of Representative of Netherlands Commission, 31 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 2 (NAN).

[129] Röling expressed limited understanding for the position of the US:

> During the discussion of our former agenda item I tried to show that the law of Nuremberg amounted to a revolution and that the danger did exist that this resolution would be betrayed by the United Nations. The statement of the distinguished representative from the United States confirmed the reality of this danger. This statement "that the formulation of a draft-code of offences against the peace and security of mankind was neither possible nor opportune at the present time on account of the differences of view separating governments, particularly with regard to the extent of their obligations under international law and the possible criminal liability of their nationals" affirmed my fear. It is, however, an ambiguous statement. What "difference of views" are meant? In case it is differences of views as to the content of existing international "criminal law", the argument would be incorrect. Many of us agreed: a codification should not go beyond the affirmed principles, the recognized law of Nuremberg. The more doubts exist as to the international obligations, arising from the law of Nuremberg, the more reasons exist to take away that doubt by clear codification. Therefore it might seem that other 'differences of views' were meant, if the differences of views we casually call the cold war, and that the words of the United States delegation might signify; "There is no room for the law of Nuremberg during a Cold

agreed was "that on the basis of the preparatory studies made by the General Assembly and both the Special Committees the moment had come for the General Assembly to decide what, if any, further steps should be taken toward the establishment of an international criminal court".[130] The 1953 revisions were submitted to the General Assembly's first 1954 session, at which it found that it had to consider the work of the ILC concerning the Code of Crimes first.

The General Assembly thus created a link between the two projects and stalled the international criminal court project until the draft Code of Crimes project could be considered.[131] This draft Code of Crimes was completed and submitted to the General Assembly the same year.[132] The two committees on aggression however had not been able to define the term, as the issue was fraught with political considerations. The project of an international criminal court thus came to a standstill, as the General Assembly in 1954 decided to suspend consideration of the draft pending completion of the definition of aggression.[133] Röling strongly protested against the shelving of the definition.[134]

> In my protest I considered inaction on those issues a betrayal of the principles of Nuremberg and Tokyo, which were applied with the understanding that they would be universally valid. Furthermore, I argued that in a time of Cold War the world was more than ever in need of provisions which might diminish the chances of war. Well, it was all a bit Quixotic. The resolution to shelve the item was adopted, with one vote against, from the Netherlands.[135]

> War". I hope this interpretation is incorrect. If it is not incorrect, I simply cannot understand this attitude of a nation which is great and strong and which acts with a good conscience.

Röling Statement, 25 November, see *supra* note 94.

130 Bassiouni, 1987, p. 7, see *supra* note 73; Röling, 1955, pp. 281–82, see *supra* note 75.

131 Bassiouni, 1987, p. 7, see *supra* note 73.

132 Schabas, 2004, p. 9, see *supra* note 1.

133 Morton, 2000, p. 44, see *supra* note 66. See also Resolution 898 (IX) International Criminal Jurisdiction, 14 December 1954.

134 Draft Report, see *supra* note 110.

135 Röling and Cassese, 1994, p. 104, see *supra* note 17. See also Nederlandse Delegatie naar de Twaalfde Algemene Vergadering der Verenigde Naties, Commissie VI (Legal) agendapunt 56; Internationaal Strafgerechtshof, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 2 (NAN).

In the end, none of the three special committees established in the 1950s reached agreement on a definition. It required the establishment of a fourth Special Committee in 1967 and 16 more years before a definition of aggression was finally adopted by the General Assembly in 1974.[136]

The work on an international criminal court, however, did not resume until 1994 when the General Assembly decided to pursue its establishment once more.[137] In the following years, the ILC draft was heavily revised by several *ad hoc* committees, a Preparatory Committee and during informal meetings. During the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ('ICC') that convened in 1998 in Rome, the Statute of the ICC was finally adopted.[138]

26.7. Conclusion

As we have seen in the case of B.V.A. Röling, the experience of the Tokyo Trial shaped the ideas of its judges, their approach to international law and their contribution to the emergence of modern international criminal jurisdiction in post-IMTFE international law efforts. For Röling, the establishment of an international criminal court was a logical result of the recognition of international criminal law, as designated by the Judgments at Nuremberg and Tokyo. The IMTs had made international law "applicable to the members of the very governments which had violated it" and an international criminal court would be necessary to try these new crimes, since they could not be prosecuted under national law.

Röling's involvement with international criminal jurisdiction in the IMTFE also endowed him with more sensitivity towards global values and morality in legal issues.[139] His experience in Tokyo, as well as his

[136] The Committees were created by Resolution 688 (VII) of 20 December 1952, Resolution 895 (IX) of 4 December 1954, Resolution 1181 (XII) of 29 November 1957 and Resolution 2330 (XXII) of 18 December 1967.

[137] The ILC recuperated its work on the Draft Code in 1981 when Doudou Thiam was appointed Special Rapporteur of the Commission. Thiam produced annual reports on various aspects of the Draft Code, addressing a range of questions "including definitions of crimes, criminal participation, defences and penalties". The Commission adopted a revised version of the 1954 Draft Code in 1991, which was subsequently sent to the member states. Schabas, 2004, pp. 8–9, see *supra* note 1.

[138] *Ibid.*, pp. 8–9, see *supra* note 1.

[139] B.V.A. Röling, *International Law in an Expanded World*, Djambatan, Amsterdam, 1960, p. 21.

activities at the UN, also left him with the belief that a "law of nations" should be established to provide the foundation for peace and security.[140] In Geneva and New York he was, however, confronted with the fact that the world was not ready for the establishment of modem international law, as nationalist interests and the "contextual" problems surrounding legal issues prevailed. As a result, Röling developed an approach to law in which he tried to establish a balance between the realities of international politics and a progressive development of international law.

Although Röling's attempts in the 1950s to found an international criminal court did not culminate in a permanent court, it was the considerations made during this period that eventually led to an evolution of the legal system as laid down in the 1998 ICC Statute the constitution of the ICC itself at The Hague in 2002. Röling, when looking back to his engagement, stated with some scepticism:

> I discovered there that if you want to participate in the progressive development of international law, especially in the field of war and peace, you need more knowledge of societal forces, power relations, prevailing interests, existing values. You cannot just propose what you think is nice for the world. You have to evaluate ends and means. You have to know what has a change of succeeding or under what conditions it can succeed. Therefore, I came to the conclusion that it was necessary to know more about the causes of war and the condition of peace.[141]

In his later career, Röling argued that to overcome this pervasiveness of state sovereignty – in order to establish international criminal jurisdiction and its centralised organs for its enforcement – a "genuine world law" had to be developed. One had to take a global outlook, "that conceives of international law as a means of guiding and orienting international relations towards the good of the whole".[142] This law of nations would require a considerable extension of international law and would have to be created to the principle of "one world". In his book, *International Law*

[140] *Ibid*., p. x.

[141] Röling started the preparations for the establishment of a peace research institute at his university in the late 1950s. In 1962 the establishment of the Polemological Institute was authorised by the University of Groningen and it was formally set up. Röling and Cassese, 1994, p. 118, see *supra* note 17.

[142] *Ibid.*, p. 137.

in an Expanded World (1960) Röling summarised this point in suggesting that "the vision of international law being essentially European must be radically replaced by the view of international law as a body of legal rules functioning at the world level, and for the entire world community".[143] Not until the main forms of civilisation and the principal legal systems of the world were represented in international law could a general principle of law be recognised. According to Röling, inequality and inadequate representation of nations had significance for the progressive development and application of international law. He stated:

> uncertainty about the manner in which international custom and the "general principles of law as recognized by civilized nations" will be applied might be one of the reasons the new nations hesitate to submit their disputes to the ICC. A factor in this unwillingness is, without any doubt, the inadequate representation of the main forms of civilization.[144]

As long as the machinery and content of international law were not able to serve the well-being of all the members of the legal community international law "would be miserable".[145]

It can be argued that Röling with his ideas on a "world law" and "global legal standards" was ahead of his time. The former Dutch wartime Prime Minister Pieter Sjoerds Gerbrandy, for example, declared in 1956 that he "seriously wondered how a Mohammedan, or a Hindu, could grasp what the essence of aggression was; such a statement, he maintained, could only be given by States with a Christian culture". It comes therefore as no surprise that Röling's position got him into conflict with his own government. When he was deployed at the UN and issued a book in 1957 on the need to withdraw from the last remaining colony of Netherlands New Guinea, he was dismissed by the Dutch government as a UN envoy in 1958 and returned to academic life.[146] We may conclude that from the government's perspective, the transnational jurist had developed a rather inconvenient attitude during his Asian experience, which made the official position seem outdated.

[143] Cassese, 2010, p. 1146 see *supra* note 60.

[144] Röling, 1960, pp. 74–76, see *supra* note 139.

[145] Röling and Cassese, 1994, p. 133, see *supra* note 17.

[146] *Ibid*., pp. 8–9.

PART 6

Beyond Nuremberg and Tokyo: Post-Second World War Prosecutions in China and Southeast Asia

27

The 1956 Japanese War Crimes Trials in China

LING Yan*

27.1. Introduction

It is well known that after the Second World War, Class A Japanese war criminals were prosecuted before the International Military Tribunal for the Far East ('IMTFE'). Parallel to the Tokyo Trials, Class B and C Japanese war crimes cases were also tried by national military courts set up by the Allies at different locations such as Manila, Singapore, Saigon, Khabarovsk, Rabaul, Hong Kong and Batavia.[1] More than 2,000 war crimes suspects were detained for that purpose in China. By the end of the trials in April 1949, the Chinese military courts at 10 locations – Nanjing, Shanghai, Peking, Hankou, Guangzhou, Shenyang, Xuzhou, Jinan, Taiyuan and Taipei[2] – had sentenced 145 convicts to death, more than 300 others to imprisonment and acquitted the rest before repatriating them to Japan.[3] Due to the breakout of civil war in China soon after the Second World War – that led to a change of government in 1949 – judicial documents such as case files, transcripts and judgments of some war crimes trials went missing or were nowhere to be found. It is also difficult for international lawyers to have access to the information about these trials and judgments because of language barriers. The only judgment that can be found in English is a translated version of the case of Takashi Sakai published by the United Nations War Crimes Commission

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1 Suzannah Linton, "War Crimes", in Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2013, p. 101.

2 Zhang Fakun, "No Reversal of the Verdicts on Convicted Japanese War Criminals", in *Journal of Jianghan University*, 1997, vol. 14, no. 2, p. 21.

3 *Ta Kung Pao* [大公报], 27 January 1949 (Shanghai edition) in Xu Jiajun, "Tilanqiao Prison and the Imprisonment, Trial and Enforcement of Japanese War Criminals", *Shanghai Local Records*, 2005, no. 4.

('UNWCC') in Law Reports of Trials of War Criminals.[4] After the founding of the new Chinese government, 45 Japanese war criminals were prosecuted before a Special Military Tribunal ('SMT') sitting in Taiyuan and Shenyang in 1956. The judicial record of the trial has been kept intact and gradually opened to public in the 1980s.[5] This chapter first provides information about the efforts of the new Chinese government to investigate and prosecute Japanese war criminals and the crimes those criminals had committed during the Japanese war of aggression against China. It then analyses the legal basis of the trial and the trial procedure. Finally, it makes an assessment of the trial and draws a conclusion.

27.2. Investigation of the Japanese War Crimes

At the time the new Chinese government took power on 1 October 1949, a total of 1,526 Japanese prisoners of war were being detained.[6] Most of them were extradited from the Soviet Union in accordance with an agreement between China and the Soviet Union in 1950; the rest were captured during the civil war and detained in Taiyuan after they joined the troops of the nationalist general, YAN Xishan, in Shanxi province for the purpose of preserving the force for Japanese reconstruction after Japan's surrender.[7]

On 16 November 1951 the Supreme People's Procuratorate, the General Political Department of the People's Revolutionary Military Commission and the Ministry of Public Security jointly announced that those who were in custody in Taiyuan had participated in China's civil war and committed serious crimes in Shanxi province by means of killing, burning and looting. The crimes had to be fully investigated for the

4 "Trial of Takashi Sakai", in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, 1949, vol. 14, p. 1.

5 See, for example, Wang Zhanping (ed.), *Trial Justice: Prosecution of Japanese War Criminals Before the Special Military Tribunal of the Supreme Court*, People's Court Publisher, Beijing, 1990; Liu Meiling, *Written Confessions of Japanese War Criminals in the Invasion of China*, China Archives Press House, 2005. A list of the 45 convicted war criminals and a summary of their written confessions, in both Chinese and English, can be found on the website of the State Archives Administration of the PRC. This chapter follows the romanised spelling of Japanese names found on this website.

6 Long Xingang and Sun Jun, "On the 1956 Shenyang and Taiyuan Trials of the Special Military Tribunal", in *Literature of History of Communist Party*, 2009, no. 2, p. 9.

7 *Ibid.*

purpose of prosecution and punishment of the heinous war criminals.[8] A Shanxi Joint Office was set up to investigate Japanese war crimes in June 1952 in accordance with the announcement.[9] In the same year, investigation of war crimes committed in northeast China was also initiated but interrupted by the Korean War. In 1953 the Supreme People's Procuratorate set up a Northeast Working Group of Investigators, who travelled to 12 provinces and cities to collect evidence of war crimes committed during Japan's manipulation of the puppet state Manchukuo.[10]

The Northeast Working Group started the interrogation of war crimes detainees in March 1954, focusing on the crimes that high-ranking military commanders and former Manchukuo officials had committed. The crimes committed by Furuumi Tadayuki were revealed from the criminal investigation of the former Emperor Pu Yi and were further corroborated by the statements of Manchukuo ministers and officials. Furuumi then began to confess to his crimes in front of the detainees.[11] He also acknowledged that those who planned and commanded the war of aggression were Class A war criminals according to a new development in international law after the Second World War and those who committed various crimes during the war of aggression, whatever their ranks, could be classified as Class B or C war criminals by the victim states.[12] The other war crimes detainees followed his example and confessed to their crimes.

Through serious and painstaking investigations, the Shanxi Joint Office had collected 18,418 pieces of detailed evidence by 1956.[13] According to these materials, the Japanese war crimes suspects detained in Taiyuan had killed 14,251 Chinese, injured 1,969, captured and tortured 10,173, and enslaved 12,233,674. They had burned and destroyed

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8 Shanxi People's Procuratorate, *Investigation of the Japanese War Criminals*, Xinhua, Beijing, 1995, p. 509.

9 *Ibid.*, p. 1; Kong Fanzhi and Zhang Ruiping, *Two Trials of Japanese War Criminal in Taiyuan (II)*, in Shanxi Provincial Archives, Xi'an, 2008, no. 1, p. 49.

10 Li Fushan, "My Involvement in the Investigation of Japanese War Crimes", in *General Review of the Communist Party of China*, 2008, no. 5, p. 32.

11 *Ibid*., p. 34.

12 Ji Min, "Custody and Reformation of Japanese War Criminals", in *Wenyuan Jinghua*, 2002, no. 3, p. 8.

13 Shanxi People's Procuratorate, 1995, p. 65, see *supra* note 8.

20,257 houses, 47 temples, over 1,336 tons of grain, looted 11,236 livestock, 200 million tons of grain, over 2.6 trillion tons of coal, more than 200 tons of cotton and also plundered gold, silver, copper, iron, tin and other strategic materials and properties.[14] The Northeast Working Group's investigation demonstrated that though being only a small part of those involved in the Japanese war of aggression against China, these particular war criminals investigated had committed crimes causing a huge disaster, loss and damage to the Chinese people. The broader figures for China were much greater, of course. According to incomplete available statistics, in a 14-year period between the Mukden Incident of 1931 and Japan's surrender in 1945, they had planned, commanded and directly participated in killing 949,800 unarmed Chinese civilians and prisoners of war ('POW'), burning and destroying 244,000 houses, looting over 36 million tons of grain and plundering 222 million tons of coal and 20 million tons of steel, and so on.[15]

However, the Chinese government adopted a policy of educational reform of Japanese war criminals rather than prosecuting all of them. After three to five years of educational reform, many war crimes detainees admitted their sins and confessed to their crimes. Therefore, in August 1954 the People's Revolutionary Military Commission announced the pardon and release of 417 Japanese war criminals who had confessed and pleaded guilty.[16] Finally, only 45 were screened from the remaining 1,109 detainees of war crimes (47 died in custody) for prosecution on the basis of the collected and analysed evidence. They were the most responsible for the very serious crimes they had committed. The Premier ZHOU Enlai pointed out that they must be investigated, prosecuted and punished in order to dispense justice "for the Chinese people".[17]

27.3. The Trial of the Japanese War Criminals

The Standing Committee of the National People's Congress ('NPC') decided on 25 April 1956 that the Supreme People's Court should

[14] *Ibid*., p. 67; Kong and Zhang, 2008, p. 49, see *supra* note 9.

[15] Wang Heli, Zhang Jia'an and Zhao Xingwen, "Trial of Japanese War Criminals Before the Special Military Tribunal in Taiyuan", in *Jianghuai Wenshi*, 2001, no. 1, p. 167.

[16] *People's Daily* [人民日报], 20 August 1954.

[17] Liu Wusheng and Du Hongqi (eds.), *The Military Activities of Zhou Enlai (II)*, Central Documentary Publisher, Beijing, 2000, p. 392

establish a SMT to prosecute the Japanese war criminals. Although most of the accused persons were detained in Fushun, the central government decided to move the venue of the trial to Shenyang, the location of the Mukden Incident as well as the starting point of Japan's massive armed invasion: that the trial of the Japanese war criminals took place in Shenyang was thus of more historical significance.[18]

For the purpose of the trial, the Supreme People's Court appointed the President, Vice-President and Judges of the SMT.[19] On 1 May 1956 the Supreme People's Court Attorney General, ZHANG Dingcheng, signed the indictments against the 45 Japanese accused. The SMT prosecuted them in four cases. The first was the case of Suzuki Keiku and seven others. Suzuki was the Lieutenant Commander of the 117th Division of the Imperial Japanese Army. The eight accused persons were charged with massacres, torture, abuse, slavery and other serious crimes in violation of international law and humanitarian principles. The second was the case of Tominaga Juntaro, the head of the former Japanese spy agency, charged with war crimes and the crime of espionage. The third was the case of Jōno Hiroshi and seven others, who were charged with war crimes committed not only during the Second World War but also during the Chinese civil war by joining YAN Xishan's armed force as senior military officers. The fourth was the case of Takebe Rokusashi and 27 others, who had manipulated the puppet Manchukuo regime and brutally ruled the Chinese people in the northeast provinces.[20]

Between 9 and 19 June 1956 Trial Chamber One of the SMT sitting in Shenyang held public hearings in the case of Suzuki and seven others. General YUAN Guang presided over the case and General WANG Zhiping was the Chief Prosecutor. It was the first time that the trial proceedings were recorded.[21] On the basis of the specific criminal circumstances of

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18 Yuan Guang, "My Experience in Japanese War Criminal Trials".

19 JIA Qian, the member of the Supreme Court Judicial Committee and the head of the Criminal Division was appointed as the President of the SMT; Major General YUAN Guang, the Vice President of the PLA Court Martial, and ZHU Yaotang, the Deputy Head of the Criminal Civision of the Supreme Court, as the Vice Presidents of the SMT; Colonel WANG Xusheng, NIU Buyun and ZHANG Jian, Judges of the PLA Court Martial, and XU Yousheng, HAO Shaoan, YIN Jianzhong, ZHANG Xiangqian and YANG Xianzhi as Judges of the SMT. See Wang, 1990, p. 4, *supra* note 5.

20 *Ibid.*, pp. 15, 365, 515, 683, see *supra* note 5.

21 Tang Shanshan, "Tan Zhengwen and the Trial of the Japanese War Criminals", in *Fangyuan Magazine*, 2011, no. 308, p. 67.

each defendant, and in accordance with the relevant provisions of the NPC Standing Committee's decision, the Tribunal convicted the eight defendants and sentenced them to 13 to 20 years' imprisonment.[22] From 1 to 7 July 1956 Trial Chamber Two heard in public the case of Takebe and 27 others in Shenyang. Justice JIA Qian presided over the case and LI Fushan was the Chief Prosecutor. The 28 accused persons were convicted and given 12- to 20-year prison terms.[23]

On 10 and 12 June 1956 the SMT sitting in Taiyuan held public hearings to hear the case of Tominaga and the case of Jōno and seven others respectively. Judge ZHU Yaotang presided over the case and JING Zhuguo was the Chief Prosecutor. On 20 June the SMT convicted all defendants and sentenced Tominaga to 20 years' imprisonment,[24] while the eight others were given 8- to 18-year prison terms.[25] All convicts began to serve their sentences on the date of the Judgment. The time from the date of their arrest until the date of the Judgment was deducted from their term of imprisonment.

27.4. The Legal Basis for the Trial

27.4.1. International Legal Basis for the National Trial of the Japanese War Criminals

International and national laws established the legal basis for the national trial of the Japanese war criminals. At the international level, as early as 13 January 1942, nine Allied countries occupied by Germany signed the St James's Declaration in London, which placed

> among their principle war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them, [and] resolve to see it in a spirit of international solidarity, that (a) those guilty or responsible, whatever their nationality, are sought out,

[22] Wang, p. 495, see *supra* note 5.

[23] *Ibid.*, p. 320.

[24] *Ibid.*, p. 732.

[25] *Ibid.*, p. 660.

> handed over to justice and judged, (b) that the sentences pronounced are carried out.[26]

The Chinese envoy in the Netherlands was invited to attend the meeting and issued a written statement saying that the same principle should be applied to the atrocities committed in China by Japanese war criminals.[27]

At the Moscow Conference in 1943, the leaders of Britain (Winston Churchill), the US (Franklin D. Roosevelt) and the Soviet Union (Joseph Stalin) signed a Statement on Atrocities, by which they reiterated and declared that in addition to those "who [would] be punished by joint decision of the government of the Allies", those who had been responsible for atrocities, massacres and cold-blooded mass executions would "be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the law of these liberated countries".[28] The Statement clearly indicated that the Allies were determined to prosecute war criminals by their domestic courts as well as by joint international tribunals. Furthermore, through the Proclamation Defining Terms for Japanese Surrender (the 'Potsdam Proclamation') of 1945, the leaders of the US, China and Britain announced in Article 10 that:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.[29]

Finally, in the Japanese Instrument of Surrender, the written agreement that formalised the surrender of Japan on 2 September 1946, the Japanese

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[26] Inter-Allied Information Committee, "Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James's Palace, London, on 13th January, 1942 and Relative Documents", His Majesty's Stationery Office, London, 1942.

[27] Iko Toshiya (translated into Chinese by Lu Peng), "Research on Disposal Policy to Japanese War Criminals of National Government of China", in *Research on the History of Nanjing Massacre*, 2012, vol. 4, p. 91; Suzannah Linton, "Hong Kong's War Crimes Trials", Hong Kong's War Crimes Trials Collection, Hong Kong University, 2013, fn. 5

[28] Declaration of the Four Nations on General Security (Moscow Declaration), 30 October 1943.

[29] "Postdam Declaration (Proclamation Defining Terms for Japanese Surrender, July 26, 1945)", in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgment*, Oxford University Press, Oxford, 2008, p. 1.

government accepted the "provisions set forth in the Potsdam Declaration".[30]

As a result, the Supreme Commander of the Allied Powers, General Douglas MacArthur, issued on 19 January 1946 a special proclamation ordering the establishment of an IMTFE. He also emphasised in the proclamation that:

> Nothing in this order shall prejudice the jurisdiction of any international, national or occupation court, commission or other tribunals established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.[31]

In other words, all victim states of Japanese atrocities had jurisdiction over Japanese war criminals and the crimes the latter had committed during the Second World War. Pursuant to these documents, Britain, the US, France, the Netherlands, Australia, New Zealand, Canada, the Philippines, China and others set up national military tribunals, which conducted trials of about 5,700 Class B and C Japanese war criminals and sentenced 4,405 of them to imprisonment.[32]

27.4.2. The Domestic Legal Basis for the National Trial of the Japanese War Criminals

At the national level, although the new Chinese government abolished all laws enacted by the former government before 1949, a Decision on the Handling of Japanese War Criminals under Detention who Committed Crimes during the Japanese Invasion War ('Decision on War Criminals') was adopted on 25 April 1956 by the Standing Committee of the First National People's Congress at its 34th meeting and was issued by Chairman MAO Zedong.[33] Article 2 of the Decision on War Criminals

[30] "Japanese Instrument of Surrender", in *ibid.*, p. 3.

[31] "Special Proclamation – Establishment of an International Military Tribunal for the Far East, 19 January 1946", in *ibid.*, p. 6.

[32] Arujunan Narayanan, "Japanese Atrocities and British Minor War Crimes Trials after World War II in the East", *Jebat*, 2006, vol. 33, p. 1.

[33] Standing Committee of the National People's Congress, Decision on the Handling of Japanese War Criminals Under Detention who Committed Crimes during the Japanese Invasion War, 25 April 1956 ('Decision on War Criminals').

provided that the Japanese war criminals should be prosecuted before a SMT to be established by the Supreme People's Court.[34]

The Decision on War Criminals set forth the scope of the SMT's jurisdiction. First, according to the title of the Decision on War Criminals, the SMT's temporal jurisdiction should begin from 19 September 1931 when the Imperial Japanese Army invaded Manchuria until Japan's surrender on 9 September 1945. However, Article 1 of the Decision on War Criminals stated that those who committed new crimes in China after Japan's surrender should be prosecuted on joint charges. As a matter of fact, as we have seen, a number of Japanese Army soldiers joined YAN's Army in Shanxi province and continued the commission of crimes during the civil war. They were arrested around 1950 and detained in Taiyuan detention facilities. Therefore, the temporal jurisdiction would be extended at least to 30 September 1949. Second, although the Decision on War Criminals did not restrict the SMT's territorial jurisdiction, it limited the Tribunal's personal jurisdiction to those who not only committed crimes but were also detained in China. This meant that China would not make a request for extradition of those Japanese who were not detained in China at the time even if they were most responsible for the war crimes committed during the war of aggression. Not prosecuting those who were not held in custody in China would result in the impunity of some Japanese war criminals.

The Decision on War Criminals formulated the principles for handling the Japanese suspects. In general, the war crimes detainees would be treated leniently. The magnanimous treatment of a specific detainee depended firstly on the gravity of the crimes he had committed, and secondly on whether he had showed good signs of repentance. In fact the Decision on War Criminals stated that those whose alleged crimes were serious would be dealt with, where possible, according to the gravity of their crimes, taking into account their behaviour during detention. For those of secondary importance and those who showed remorse through good behaviour, treatment could be as lenient as exemption from prosecution (Article 1).

[34] Wang, 1990, p. 2, see *supra* note 5.

27.4.3. Subject Matter of the Jurisdiction

The 1956 Decision on War Criminals merely established the basic principles for handling Japanese war criminals; it did not provide the substantive law applicable to the trial of war criminals, i.e. the legal basis for charges and convictions. Due to the fundamental change in government, all legislation of the former Nationalist government was abolished after the founding of the People's Republic of China. The new Penal Code had not yet been developed in 1956, except a criminal regulation on punishing counter-revolutionary crimes promulgated on 21 February 1951, which contained 21 articles and listed 11 major crimes such as engaging in hostile and spy activities.[35] Still, whether the regulation could be applied retroactively to war crimes trial was questionable.

Nevertheless, the trial of war criminals after the Second World War was something new. Even the Charter of the International Military Tribunal ('IMT') at Nuremberg for the trial of German war criminals and that of the IMTFE for Japanese war criminals contained very simple provisions with respect to the subject matter. The crime against peace, crimes against humanity and war crimes under the jurisdiction of the IMTs were construed by the SMT's Judgments. The United Nations Resolution 95 (I), adopted on 11 December 1946, had confirmed the legal principles drawn upon in the Judgment at the IMT in Nuremberg.[36] In China, in order to understand the relevant international law, an in-depth study was arranged for the staff involved in the investigation, prosecution and trial of the Japanese war criminals. WANG Guiwu, the then Deputy Secretary General of the Supreme People's Procuratorate, lectured the staff on public international law and war crimes, while MEI Ju-ao, the legal adviser to the Ministry of Foreign Affairs and a Judge at the IMTFE, briefed them about the trial of the Class A war criminals at the IMTFE. ZHOU Gengsheng, a famous international law expert, and other experts were specially invited to advise and guide the preparation of the indictments and other legal instruments after the conclusion of the investigation.[37]

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[35] People's Republic of China Regulation on Punishing Counter-Revolutionary Crimes [中华人民共和国惩治反革命条例], 20 February 1951, arts. 6–7.

[36] UN General Assembly, Resolution 95 (I), 11 December 1946.

[37] Jin Weihua, "Li Fang – Prosecuting Japanese War Criminals before the Court", in *Procuratoral View*, 2009, no. 19, p. 66.

In the four cases prosecuted before the SMT, all accused persons were generally charged with the violation of international law and humanitarian principles during the Japanese war of aggression against China.[38] In addition, they were charged and convicted of specific crimes such as murder, massacres, killing, arrest, imprisonment, maltreatment, torture of peaceful civilians, turning residential areas into depopulated zones, destruction of towns and villages, expulsion of civilians, robbery, destruction of people's properties, seizure of farmers' land and housing, forced recruitment of civilians to engage in military service, rape, torture and mutilation of captured personnel, gassing, manufacture of biological weapons, tests of biological weapons on humans, espionage and so on. Most of these crimes were characterised as both war crimes and crimes against humanity. They were also charged with the crime of aggression. For example, the indictment against Takebe and others accused them of active implementation of Japanese imperialist policies of aggression, support of the Japanese imperialist war of aggression, manipulation of or participation in the Manchukuo puppet government and the usurpation of China's sovereignty. The indictments against Suzuki and others and Jōno and others accused them of active participation in the war of Japanese imperialist aggression against China. Accordingly, the crimes under the jurisdiction of the SMT were the same as those under the jurisdiction of the IMT at Nuremberg: the crime against peace or the crime of aggression, crimes against humanity and war crimes.[39] The wording of the SMT's indictments and verdicts reflected the fact that China had adopted and applied the law developed by the IMT at Nuremberg and the IMTFE through the trial of war criminals after the Second World War.

It is worth noting that the indictment against Jōno and seven others involved not only the crimes committed during the Second World War but also crimes committed after Japan's surrender. They were accused of the commission of a variety of serious crimes against the Chinese people by participation in YAN's counter-revolutionary army to conceal their conspiracy of actively saving the Japanese force in an attempt to revive Japanese militarism and to invade China again.[40] The SMT further judged in the case of Jōno that he "participated in Yan Xishan's armed force

[38] Wang, 1990, pp. 15, 365, 515, 683, see *supra* note 5.

[39] Charter of the IMT, London, 8 August 1945, art. 6 ('IMT Charter'); Charter for the IMTFE, 19 January 1946, art. 5 ('IMTFE Charter').

[40] Wang, 1990, p. 515, see *supra* note 5.

leading and commanding the counter-revolutionary armed force in the war against Chinese people's liberation and plotting Japanese military reconstruction".[41] This meant that the defendants also committed war crimes while participating in the civil war. Accordingly, the SMT applied war crimes to both situations of international armed conflict and non-international armed conflict. This practice may be considered a contribution to the development of international criminal law, though it has long been ignored.

27.4.4. Individual Criminal Responsibility

Following the principles of the Nuremberg IMT and the IMTFE,[42] the SMT only held individuals accountable for the crimes committed against China during Japan's war of aggression. The 45 accused were not major war criminals that formulated the policy of aggression and waged the war. Nevertheless, they played significant roles in the war. According to the indictments, Takebe, Furuumi and Saito Mio actively implemented Japan's policy of aggression and supported the war of aggression. They and three other accused Nakai Kuji, Utsugi Manyu and Jōno Hiroshi were most responsible for chairing or participating in decisions on the suppression of the Chinese people or planning and implementing relevant policies and laws. Another five accused, who had no authority to chair or participate in the decision-making process, executed and implemented the decisions, policies and laws. The rest of the defendants, except one, were involved differently in the planning, organising, directing, commanding, manipulating and leading subordinates to commit specific crimes. These accused persons were military commanders or superior administrative officials. They not only committed crimes personally but also committed bloody crimes through their subordinates.

Unlike defence arguments denying individual criminal responsibility raised at the IMTFE, none of the defendants argued in court that they should be exempted from criminal responsibility for their crimes committed under superior orders even though they were not the most

41 *Ibid*., p. 663.

42 "International Military Tribunal for the Far East, Judgment of 12 November 1948", in John Pritchard and Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Proceedings of the International Military Tribunal for the Far* East, Garland, New York, vol. 22, p. 48438.

senior Japanese military officials. However, some defence counsel brought the issue to the bench's attention that their clients' criminal responsibility should be distinguished from that of their superior commanders in order to get their sentences reduced.[43]

27.5. The Rules of Procedure and Evidence

27.5.1. Rules of Procedure

As far as the rules of procedure were concerned, the 1956 Decision on War Criminals contained very simple provisions. In addition to the two provisions relating to the rights of the accused, it only provided that the Judgment pronounced by the Tribunal shall be final (Article 5); therefore the Judgment could not be appealed, which was in conformity with the practice of the Nuremberg IMT and IMTFE. The Decision on War Criminals gave convicted persons the possibility of parole or early release while they were serving their terms of imprisonment (Article 6).[44]

However, the Organic Laws of the People's Courts[45] and People's Procuratorate[46] promulgated by the National People's Congress at its first meeting of the First Session in September 1954 and the Regulation on Arrest and Detention[47] promulgated the same year set forth some of the basic principles of criminal procedures in terms of trial in public, right to defence, right to the use of a citizen's native language to conduct proceedings, mechanism of the collegiate panel and so on.[48] The Central Government Legislative Committee drafted and circulated the first draft of the Criminal Procedure Ordinance in 1955. One year later, the Supreme People's Court promulgated a Summary of the Civil and Criminal Procedure based on the initial practice of civil and criminal

43 Wang, 1990, p. 287, see *supra* note 5.

44 *Ibid*., p. 2.

45 Organic Law of the People's Courts of the People's Republic of China [中华人民共和国人民法院组织法], 21 September 1954.

46 *Ibid.*

47 Regulation on Arrest and Detention of the People's Republic of China [中华人民共和国逮捕拘留条例], 20 December 1954.

48 Xu Henan, "Looking Back and Looking Forward to the Idea of Science of Criminal Procedure Law in Fifty Years (I)", in *Journal of National Procurators College*, 2000, vol. 1, p. 21.

proceedings at different levels.[49] By providing unified and consistent rules of civil and criminal procedure, this legal document had an important effect on the Shenyang and Taiyuan trials.

Traditionally, the rules of criminal procedure in China were similar to those in the civil law system. The trial procedure of the SMT can be summarised as follows. First, the prosecutor read the indictment, which was followed by the court's investigation. The presiding Judge interrogated the accused on each count and examined witnesses. With the permission of the presiding Judge, the public prosecutor and defence counsel could ask questions to accused persons and witnesses. The proceedings then went to the stage of a court debate. The public prosecutor and defence counsel spoke about their views on the case and evidence, and they could debate with each other. After the conclusion of the debate, the Court gave the defendant the opportunity to make a final statement before the Court adjourned for deliberation. Finally, the Judgment was pronounced in public.[50]

27.5.2. Rules of Evidence

LI Fushan, the prosecutor in the Shenyang trial, recalled that Chinese central government officials paid much attention to the trial of Japanese war criminals. They convened meetings to study the matter of evidence. Having fully examined and discussed the issue, the Supreme People's Procuratorate and judicial experts set five requirements for proof of crimes:

1) criminal facts of each offence must be clear;
2) evidence must be sufficient and conclusive, and there must be at least two or more pieces of evidence for each count;
3) evidence must be consistent with each other;
4) causal link to each offence must be clear; and
5) all legal documents and legal procedures relating to the investigative work must be complete with legal effect.[51]

[49] Fan Chongyi and Wu Hongyao, "Fifty Years and Future of Criminal Procedure Law", in *People's Procuratorial Semimonthly*, 1999, no. 12, p. 7.

[50] Wang, 1990, pp. 1–10, see *supra* note 5.

[51] Li, 2008, p. 35, see *supra* note 10.

The requirements were also considered as guidelines for the prosecution of offences. The prosecution repeatedly reviewed and verified materials relating to the indictments in accordance with these requirements to ensure that there was sufficient and conclusive evidence to proceed against the accused. It was reported that for each culpable fact there were five types of corroborated evidence: transcript of interrogation, accused's confessions and other materials, verified witness materials, documentary materials such as archives of the puppet regime of Manchukuo, and accusation and disclosure of the joint offenders.[52] The finalised investigation dossiers were given to the defendants to read, verify and sign.[53] Consequently, the evidence prepared for the trial was quite adequate. The SMT sitting in Shenyang, for example, had in hand 28,000 items of complaints, expertise reports and 8,000 copies of the puppet regime files related to the cases.[54]

The Courts examined piles of physical and documentary evidence and heard victims' complaints and witness testimonies in order to ensure that the evidence presented proved the charges beyond reasonable doubt. In the case of Suzuki and others the Court examined 338 criminal complaints made by 920 victims and their relatives, 19 items of criminal information submitted by their former subordinates and staff, 814 witness statements, the accused persons' verbal confessions, written statements and other evidentiary material, and heard 19 witness testimonies.[55] In the case of Takebe and others the court examined 642 criminal complaints made by 949 victims and their relatives, 360 statements made by 1,211 witnesses, 47 items of criminal information submitted by the accused persons' subordinates and staff, 315 items of documentary evidence and other material evidence, and heard 47 witness testimonies in Court.[56] In the case of Jōno and others the Court examined 316 criminal complaints submitted by 681 victims, 153 written statements given by 119 their former subordinates and staff, 143 witness statements, 349 items of files, documents and other evidentiary materials, and heard 12 victim

[52] Jin, 2009, p. 66, see *supra* note 37.

[53] Li Donglang, "Brief Discussion on the Trial of the Japanese War Criminals in New China", in *Theory Journal*, 2005, no. 8, p. 4.

[54] Wang, Zhang and Zhao, 2001, p. 170, see *supra* note 15.

[55] Wang, 1990, p. 496, see *supra* note 5.

[56] *Ibid.*, p. 322.

complaints and 23 witness testimonies.[57] In the case of Tominaga the Court examined 24 witness written statements, 102 Japanese statements and files, and heard 6 insiders' oral testimonies.[58] The evidence admitted by the SMT consisted of complaints lodged by citizens, witness statements, statements made by the defendants' former subordinates and colleagues, archive files, documents, transcripts of interrogation of the defendants, victims' complaints and witness testimonies in court.[59] As a result, all the defendants admitted the crimes they were charged with which were proved by a large amount of conclusive evidence.

27.5.3. Rights of the Defendant

27.5.3.1. Right of Being Informed of the Charges

The SMT fully respected the defendants' rights in the criminal proceedings. An accused person had the right to be informed of the charges against him, which is a fundamental right of an accused under international human rights law. Taking into account the fact that the defendants were Japanese, the Decision on War Criminals provided that languages and documents to be used by the SMT were to be translated into a language understood by the accused (Article 3). In the week before the commencement of the trial, a copy of the indictment, together with the translated Japanese version, was served on each defendant.[60] Despite the traditional practice of giving the indictment only to Judges, the Chinese government served indictments on the defendants in advance in accordance with international practice.

27.5.3.2. Right to Defence

That an accused has a right to defence is contained in the 1954 Constitution[61] and the Organic Law of People's Court,[62] and provided the legal basis for lawyers to participate in criminal proceedings. The law also

57 *Ibid*., p. 661.

58 *Ibid*., p. 729.

59 *Ibid*., pp. 322, 472, 661, 729.

60 For example, the trial of Jōno Hiroshi *et al.* commenced on 12 June 1956. Jōno Hiroshi received the Indictment on 6 June 1956. See *ibid.*, p. 540.

61 Constitution of the People's Republic of China (1954), 20 September 1954, art. 76.

62 Organic Law of People's Court, Article 7, see *supra* note 45.

safeguarded the legitimate rights and interests of the accused persons and provided legal protection for them. The SMT conducted trials with full respect for the rights of the accused as the Decision on War Criminals provided that an accused could defend himself in person or through an appointed lawyer who had registered with China's judiciary. In addition, the SMT was able to appoint defence counsel for an accused when necessary.[63] The SMT had selected and designated 32 defence counsel from law schools and judicial organs for the accused persons.[64] Defence counsel interviewed the defendants and discussed their cases with them several days before the hearing.[65] When the trial commenced, the Court informed the accused that he would have the right to defend himself either in person or by defence counsel, and have the right to make a final statement.[66]

The defence counsel conscientiously fulfilled their duties to ensure that the accused would receive a fair trial. Some of them spoke to the Court about the social and educational origin of the crimes;[67] one argued for the defendant that part of the alleged crimes was committed by his predecessor;[68] some brought the Court's attention to the defendants' personal circumstances, for example, a defendant had resigned from his job;[69] some pointed out that being low-ranking officials, the defendants were not involved in policy-making and therefore were not most responsible for the alleged crimes.[70] Some raised a further ground of defence that although the accused persons were senior Japanese commanders, the important operations must have been conducted under the command of the superior commanders. They suggested that the Court should distinguish criminal responsibility between the accused and their superiors or to mitigate their punishment.[71] Most defence counsel

63 Decision on War Criminals, art. 4, see *supra* note 33.

64 Nineteen defence counsel were assigned to the case of Takebe Rokusashi *et al.*, five to the case of Suzuki Keiku *et al.*, six to the case of Jōno Hiroshi *et al.*, and two to the case of Tominaga Juntaro. Wang, 1990, pp. 69, 385, 545, 695, see *supra* note 5.

65 Han Fenglu, "Defending Japanese War Criminals", 2007.

66 Wang, 1990, pp. 81, 388, 549, 696, see *supra* note 5.

67 *Ibid*., pp. 263, 267, 283, 482

68 *Ibid*., pp. 274, 285, 640.

69 *Ibid*., p. 280.

70 *Ibid*., pp. 264, 266, 270, 272, 275–76.

71 *Ibid*., pp. 268, 272, 277, 279–83, 286–89, 478, 482, 643–44.

emphasised the remorse that the defendants had shown and recommended lenient sentences for their clients to the Court.

However, in the court debate, the Prosecutor did not agree that the social origins of crimes could play a decisive role in the accused persons' commission of crimes because, in spite of the strength of opinion in favour of Japanese militarism, there was also a peace-loving progressive force in Japan. The Prosecutor believed that the defendants committed the serious offences on their own volition. They could not shirk criminal responsibility. [72] As for the defence that the defendants committed offences by execution of superior orders, the Prosecutor pointed out that high-ranking military officials understood international law and they knew that their acts constituted serious crimes. In addition, they had considerable authority to prevent the execution of orders that were of apparently criminal nature. Moreover, they could have made a moral choice, but did not do so. Consequently, they should bear serious responsibility for the crimes they had committed.[73]

Having agreed with the Prosecutor's view, though, the defence counsel stressed that those who executed superior orders should bear different responsibilities from those who planned and plotted the crimes. Besides, the low-ranking commanders had fewer moral choices than senior generals.[74] These defence arguments reflected the law developed by the IMTs that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[75] In its Judgment, the SMT did not mention that the responsibilities or punishments of the accused persons were mitigated for the reason that they had committed crimes under superior orders.

In addition to the performance of their duty to defend the accused before the Court, the defence counsel also raised some special issues to the Court to protect the rights and interests of the accused in special circumstances. For example, in the trial of Takebe, the accused was not able to be present in court due to his serious illness; the Court therefore granted the defence counsel's request to have the hearing held in the

72 *Ibid*., p. 484.

73 *Ibid*.

74 *Ibid*., pp. 484–85.

75 IMTFE Charter, arts. 6 and 8, see *supra* note 39

hospital where the accused was receiving medical treatment. Judge YANG Xianzhi, accompanied by the registry officer YU Weilou, was assigned to hear the case. The Prosecutor, CAO Zhenhui, and defence counsel GUAN Mengjue and ZHAO Jingzhi attended the hearing.[76] This protection of the accused's interests embodied the humane treatment of the defendant.

27.5.3.3. Right to a Public Trial

That an accused has a right to a public trial is clearly provided by many international human rights treaties and conventions. All the Shenyang and Taiyuan trials of the Japanese war criminals were conducted in public. Hundreds of representatives of democratic parties, civil associations and mass organisations, factories, schools, local offices and the People's Liberation Army ('PLA') attended the trials in Shenyang and Taiyuan. Central and local news media reporters observed and reported on the trials.[77] This procedure placed the trials under the supervision of the people to ensure the trials were transparent and fair. The significance of having the trials in public was to allow the victims or their families to see that justice was being done. It also provided a useful means to educate people about what they could do and what they could not.

27.5.4. Sentencing

After the conclusion of investigations in 1955, the Supreme People's Procuratorate, together with relevant government departments, studied the sentencing issue of war criminal trials. The Northeast Working Group recommended that 70 Japanese war criminals among the detainees were most responsible for the heinous war crimes; they should therefore be sentenced to death. However, the Politburo Standing Committee adopted a clemency policy on the treatment of the Japanese war criminals in a

[76] Liu Xueqin, "Chairman Mao Appointed Jia Qian to Try the Japanese War Criminals", in *General View of History of Communist Party*, 2005, no. 5, p. 40.

[77] "Jōno Hiroshi and Other 7 Japanese War Crimes Accused Have Been Tried in Taiyuan by the Special Military Tribunal of Supreme Court", *People's Daily*, 22 June 1956; "The Japanese War Criminal and Spy Tominaga Juntaro Has Been Tried in Taiyuan by the Special Military Tribunal of Supreme Court", *People's Daily*, 22 June 1956; "Takebe Rokusashi and 27 Other Japanese War Criminals Have Been Tried in Shenyang by the Special Military Tribunal of Supreme Court", *People's Daily*, 21 July 1956; "Eight Japanese War Criminals Have Been Tried in Shenyang by the Special Military Tribunal of Supreme Court", *People's Daily*, 22 July 1956.

meeting in December 1955, namely, that there should be few imprisonment sentences and no death penalty or life imprisonment at all.[78] The democratic parties, federations of industry and independents challenged the policy, as they felt it would be difficult to placate the people.[79] There were two reasons to adopt a clement sentencing policy. First, the criminals had been detained for a decade, which was sufficient to substitute the sentence for the crimes that most of them had committed. Longer terms of imprisonment were needed only for a small number of accused for their serious crimes. Second, given that a decade had elapsed since the end of the Second World War and the positions of the two countries in international affairs had changed significantly, adopting a clement sentencing policy would be helpful to promote the normalisation of Sino–Japanese diplomatic relations as well as to ease and stabilise the international situation. The Decision on War Criminals clearly stated that the crimes committed by these Japanese detainees had caused extremely serious damage to the Chinese people. They were deemed to have flagrantly breached international law and the principles of humanity, and therefore deserved to be severely punished. However, given that the situation had changed a decade after Japan's surrender and the development of friendly relations between peoples of the two countries, and in view of the fact that the vast majority of these war criminals had come to some form of repentance during detention, it was decided that they would be subject to different treatment in accordance with the clemency policy.[80]

In January 1956 leaders in charge of Japanese war criminal trials, as well as legal experts such as SHI Liang, ZHANG Zhirang, PAN Zhenya, ZHOU Gengsheng and MEI Ju-ao, had meetings to consider the sentencing issue in accordance with the clemency policy,[81] which was reflected in the SMT's Judgments. The SMT handed down Judgments of the four cases,

78 Shu Gong, "China's Trial of Japanese War Criminals in 1956", in *Across Time and Space*, 2006, no. 6, p. 20.

79 *Ibid.*

80 Wang, 1990, p. 2, see *supra* note 5.

81 Sui Shuying, "On the Trial and Release of the Japanese War Criminals by the Chinese Government in the 1950s", in *Journal of Yantai University (Philosophy and Social Science)*, 2006, vol. 19, no. 9, p. 461, citing "Archives in the Ministry of Foreign Affairs, Opinion on Investigation and Treatment of Japanese War Criminals, file No. 105-00501-17(1)".

finding that during the Japan's invasion of China, the accused had implemented Japan's policy of aggression against China, assisted in Japan's war of aggression, violated international law and the principles of humanity. Based on the factual findings and according to the applicable international and national law, the accused persons were convicted of war crimes and anti-revolutionary crimes, including usurping the sovereignty of China, planning and furthering an aggressive policy, destroying towns and villages, expelling civilians, looting property, rape, persecution and inhumane treatment, abuse, massacre of POWs, engaging in spy activities, the manufacture of bacteriological weapons and using poison gas. But no one was sentenced to life imprisonment or received capital punishment, although the crimes they had committed were grave enough to warrant severe punishment. All sentences imposed on the convicts were no more than 20 years' imprisonment.

27.6. Assessment of the Trial

27.6.1. Different Roads Lead to the Same Destination

Facing a large amount of conclusive evidence presented before the Court, the accused persons admitted their crimes and pleaded guilty one after another. Some of them kneeled to the victims and Judges and asked for a capital punishment in order to redeem their mortal crimes. Some burst into tears in court due to remorse.[82] Suzuki said that initially he had attempted to conceal his atrocities; but the humane treatment given by the Chinese people inspired him to examine his own conscience and to realise the crimes he had committed. Though he believed he could not deny the crimes that in the face of conclusive evidence, the SMT still appointed a defence counsel for him and informed him about his right to defence. He thanked the Chinese people and made a sincere apology to them.[83] Sakakibara Hideo admitted that he had committed a crime by making bacteriological weapons ready for bacteriological warfare and flagrantly violated universal conventions and humanitarian principles. He expressed his willingness to accept severe penalties that the Court might impose on him.[84] Jōno said in his final statement that he hated himself and Japanese

[82] Kong and Zhang, 2008, p. 52, see *supra* note 9.

[83] Wang, 1990, p. 752, see *supra* note 5.

[84] *Ibid.*, p. 750.

imperialism that had led him to commit crimes. He condemned to the world the crimes that Japanese imperialism had caused, which could be proven by the defendants' criminal facts.[85] Tominaga acknowledged that the trial proceedings were honest and fair. He could not but reflect on his own atrocities. He bowed and expressed a heartfelt apology to the Chinese people.[86]

Those detainees who had not been prosecuted also had a good understanding of their crimes and showed their remorse through the educational reform programme. First, they received humane treatment during detention. ZHOU Enlai instructed the Court to treat them in accordance with international customary rules relating to the treatment of POWs and to focus on their educational reform. There was a prohibition on beating, scolding and degrading the detainees held in the detention facilities. The national customs of the detainees should also be respected.[87] The Ministry of Public Security issued a regulation in accordance with ZHOU's instruction. The regulation also provided for health and medical treatment of the Japanese war crimes detainees. It allowed the detainees to meet with their relatives, read newspapers, listen to radio, watch films and carry out sports activities.[88]

Second, the detainees were educated and reformed through studies. Initially, there was some controversy about the detainees' status. They argued that they were POWs and not war criminals. By studying the Charter of the IMTFE, they learned about different classes of war criminals and the policy on their treatment. The managers of the detention facilities also organised for them to study and discuss issues about who led them onto the road of war crimes and how to end life in prison and start a new life outside. After continuous studies and discussions, the majority began to realise that only their sincere repentance could obtain the forgiveness of the Chinese people. So they began to reflect on their sins and confess to the crimes committed during the war.[89]

Third, they were educated by visiting Chinese communities. At the end of 1955 MAO and ZHOU issued instructions to organise community

[85] *Ibid*., p. 650.

[86] *Ibid*., p. 727.

[87] Ji, 2002, p. 4, see *supra* note 12.

[88] *Ibid*., p. 6.

[89] *Ibid*., p. 7.

visits for all war crimes detainees.[90] Arrangements were made for the detainees in Fushun and Taiyuan to visit Nanjing Massacre Memorial Hall and massacre sites in Fushun and Wuhan between February and August 1956. They listened to the complaints of tragedy survivors. By visiting Chinese communities, they obtained a better understanding of the crimes they had committed in China and came to repentance. Many of them expressed their apologies to the people they visited. They were determined to be reformed and would never re-engage in a war of aggression.[91]

Those 1,017 war crimes detainees who were exempted from prosecution were released and repatriated to Japan in three batches in 1956. Many of them were moved to tears when they heard the release announcement. One year later, they organised Chugoku Kikansha Remrakukai (China Returnee's Association).[92] The 45 who were convicted and sentenced were wholly released by 6 March 1964. They worked tirelessly for decades to relate their experiences and atrocities committed in China after returning to Japan through various lectures and publications. Not a single one revoked his confession and admission of guilt. They told the Japanese people that they must never repeat the same mistake. They returned some remains of Chinese soldiers to China in May 1957 and launched mass signature campaign in 1963 to promote the establishment of Sino–Japanese diplomatic relations.[93] The educational reform and clemency policy for these Japanese war criminals detained in China turned out to be really successful.

27.6.2. Rethinking the Trial

The Shenyang and Taiyuan trials were successful in the sense that they brought to account those responsible for crimes against peace, crimes of aggression, war crimes and crimes against humanity committed during the Japanese invasion of China. The trials also provided detailed information about Japan's wartime policies in China and uncovered the extremely brutal means that the Japanese war criminals employed to commit crimes

90 *Ibid.*, p. 9.

91 Zheng Yi, "Declassified Diplomatic Documents Revealed Inside Information of China's Exemption of Japanese War Criminals", in *Xiandai Shenji Yu Jingji*, 2006, no. 5, p. 44.

92 Ji, 2002, p. 14, see *supra* note 12.

93 Zheng, 2006, p. 44, see *supra* note 91.

against the Chinese people. The trials provided an official record of the nature and the truth of the war and the crimes. The trials were also successful in comparison with the Tokyo Trial, in that all Japanese war criminals prosecuted before the SMT admitted guilt of crimes whereas none of the Class A war criminals prosecuted before the IMTFE did so. Tōjō Hideki denied his guilt even when he was about to be executed. As far as the Tokyo Trial was concerned, although 28 Class A Japanese war criminals and the crimes they perpetrated were prosecuted, many individuals, notably the Emperor, evaded responsibility and 19 Class A criminals were released without trial.[94]

The Shenyang and Taiyuan trials, by contrast, did not complement the IMTFE because the SMT's jurisdiction was limited to war criminals detained in China. Those Class A, B and C criminals who were outside China could not be extradited from abroad and be prosecuted. A top war criminal such as Kishi Nobusuke even became Prime Minister in 1957 and continued going down the road to war that Tanaka Giichi and Tōjō Hideki had taken Japan, as Furuumi criticised.[95]

The Tokyo Trial omitted certain war crimes and crimes against humanity. For example, no charges were brought against the commission of crimes of forced labour, sexual slavery, biological experimentation and use of chemical weapons. This was due to incomplete criminal investigations in order to speedily wind up the Tokyo Trial or the desire of the US to acquire the information about chemical weapons and keep it secret.[96]

The Shenyang and Taiyuan trials in 1956 did prosecute the crime of forced labour that took place in China.[97] However, the fact that approximately 40,000 Chinese were taken forcibly to Japan in the period between 1943 and 1945 to work in 135 construction and mining

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94 He Tianyi, "Reflections on the Tokyo Trial", in *Journal of Studies of China's Resistance War Against Japan*, 1997, no. 3, p. 164.

95 Guo Xingwen, "From War Criminal to Peace Keeper", in *Rule by the Law and Society*, 2001, no. 2, p. 38.

96 Caroline Rose, *Sino-Japanese Relations: Facing the Past, Looking to the Future?*, Routledge, London, 2005, p. 35; Benjamin Garrett and John Hart, *Historical Dictionary of Nuclear, Biological and Chemical Warfare (Historical Dictionairies of War, Revolution, and Civil Unrest)*, Scarecrow Press, Lanham, 2007, p. 117.

97 Suzuki and other five accused were charged with forced labour, see the indictments in Wang, 1990, pp. 26–27, 34–35, 368, 524, and record of trial proceedings in pp. 115–16, 132–34, 219–20, 224–25, 417, 632, see *supra* note 5.

companies, and an estimated 7,000 lost their lives due to brutal treatment,[98] was not included in the indictments. The SMT could have prosecuted those who helped to send the forced labourers to Japan. The omission has become the focus of the victims' attention since 1980s.

The crime of the manufacture of biological weapons and biological experimentation was prosecuted in two cases involving three accused.[99] The use of chemical weapons was also charged in one case involving two accused.[100] The indictment identified the use of tear gas or poison gas causing injury and death of hundreds of civilians. This accusation did not fully reflect the gravity of the crime as it has been reported that "during the Sino-Japanese War (1937–1945), Japanese forces employed riot control agents, phosgene, hydrogen cyanide, lewisite and mustard agents extensively against Chinese targets".[101] It is estimated that 2,000 chemical attacks took place during the war leading to over tens of thousands of deaths and many more casualties.[102] The abandoned chemical weapons have been accidentally discovered in China, causing many injuries, illnesses and death since the end of the war.

The world was probably not aware of the crime of forced sexual slavery (so-called comfort women) during the Second World War until the 1970s when the issue of Korean comfort women was the subject of a book.[103] It seems understandable that the crime relating to Chinese comfort women was not prosecuted before the SMT in the 1950s. But the fact that thousands of "comfort stations" were established in 21 Chinese cities and a total of over 200,000 Chinese women were forced into prostitution by the Japanese army,[104] which involved so many individuals and families, could not be easily forgotten and neglected. The trials of 1956 could have helped in the identification of the crime and contributed

98 Rose, 2005, p. 78, see *supra* note 96.

99 See indictments in Wang, 1990, pp. 45, 47, 372–73, and trial proceedings in pp. 183–84, 179–80, 467–74, *supra* note 5.

100 See the indictment in *ibid.*, pp. 366, 372, and record of trial proceedings in pp. 409, 419, 456.

101 Robert Curley (ed.), *Weapons of Mass Destruction*, Britannica Educational Publishing, New York, 2012, p. 113.

102 Rose, 2005, p. 91, see *supra* note 96.

103 *Ibid.*, p. 38.

104 *Ibid.*, p. 88.

more to the development of international and national criminal justice if the crime had been investigated and prosecuted at that time.

Reparation is another issue that was not dealt with by the SMT. According to the Potsdam Declaration, Japan should pay reparations in kind to victim countries.[105] That victims of serious violations of international humanitarian law have the right to a remedy and reparation has been adopted as a principle by the United Nations.[106] China's government expressed her position to reserve the right to claim compensation in the early 1950s as China suffered the most, namely, 10 million killed, and US$50 billion in economic damages at the hands of the Japanese military.[107] However, the government had changed its stance by 1956. YUAN Guang, the Vice-President of the SMT, and LIAO Chengzhi suggested to ZHOU Enlai that the SMT had the authority to decide on reparations that Japan should pay to the victims because Germany had paid a large amount of compensation to victims and the Soviet Union had confiscated Japanese assets and properties in eastern China. ZHOU responded that it was better for China to waive the claim of Japan's reparations. In his view, the cost of compensation would eventually be inflicted on the Japanese people rather than the Japanese government.[108] Like the sentencing policy, the waiver of reparations was a part of China's magnanimous policy towards Japan. For the sake of friendship between the two countries, China's government adopted the policy of "return good for evil". Regretfully, the government ignored the victims' right to reparations, which cannot be measured merely by monetary value. Reparations are a crucial part of restorative justice and serve an important role in progress towards reconciliation.

[105] Potsdam Declaration, art. 11, see *supra* note 29.

[106] Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly, Resolution 60/147, 16 December 2005.

[107] Rose, 2005, p. 41, see *supra* note 96.

[108] Gao Fanfu, "The Friendly Element of the China's Waiver of the Compensation Claim to Japan", in *Journal of Studies of China's Resistance War Against Japan*, 2008, no. 2, p. 204.

27.7. Conclusion

The Japanese war criminals had a fair trial before the SMT in China in 1956. The trials were not only in conformity with modern international law but also made certain contributions to international criminal justice. On the one hand, an accessible historical record of the atrocities and heinous war crimes committed by Japanese war criminals was created by the trials. One can never deny them. On the other hand, those who were detained in China and responsible for the serious crimes had been individually held criminally responsible, actions that should not be passed on to future generations. For the remaining problems that were left unsolved due to historical reasons, each side should make unstinting efforts for a peaceful settlement. War crimes trials teach all people a lesson that waging wars of aggression will never lead to a good conclusion. The purpose of international and national criminal justice is to break the cycle of violence and to stop repeated hatred and revenge between perpetrators and victims, whether individuals or ethnic groups or nations. All peoples should remember the suffering that the war brought to the people and take actions to avoid or stop wars of aggression and war crimes that are happening or could happen anywhere in the world.

28

Chinese War Crimes Trials of Japanese, 1945–1956: A Historical Summary

Barak Kushner[*]

28.1. Introduction

As much as many who had suffered under Japanese imperial oppression might have wished, in the immediate aftermath of the Second World War, few had the ability or freedom to seek vengeance. As Marc Gallicchio explains: "Tokyo's announced intention to surrender in August 1945 did not produce an end to hostilities in Asia. Instead it signaled the beginning of a period of transition from war to peace".[1] The question then is how long did this transition take, who did it involve and what was at stake in the conflict? Newly energised political parties strove to move away from imperial violence and forge a new path for Sino–Japanese relations. China needed to emphasise and publicise its use of law to redress Japanese imperial wrongs as a way to demonstrate a victorious Chinese nation that deserved to be a member of the new post-war international order that formed in the wake of Japan's downfall. China was no longer alone in the world, it was a partner of the victorious West but it had not yet necessarily earned that position in international eyes. Nor was everyone in China of the same opinion.

The thrust of this chapter centres on analysing the repercussions from the ensuing military and diplomatic manoeuvres to bring Japanese imperial behaviour to justice. Both sides, Japan and China, incorporated new strategies into their bilateral relationships following the cessation of war. I examine how the Chinese legally dealt with Japanese war crimes,

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[1] Marc Gallichio, *The Scramble for Asia: US Military Power in the Aftermath of the Pacific War*, Rowman and Littlefield, Lanham, 2008, p. 42.

but in my larger work I also investigate the Japanese responses and how these processes shaped early Cold War Sino–Japan relations. Within this post-war surrender paradigm and fracture of the Japanese Empire, this research sits at the intersection of examining how Japanese rule was dissolved in post-war former colonies and occupied areas, the prosecution of Japanese war crimes and the dilemma of collaboration within the former empire. These problems are intimately tied together due to the transformation of post-war identity and colonial politics. In essence, this research derives from two historical reconsiderations. The first requires us to reframe Japan as a decolonising empire in a transnational context, not merely as a defeated country. The second point surrounds the shifting landscape of the concept of law in East Asia and how it sculpted relations in the region during the post-war era. International law was no longer merely the tool of the West to dominate the East. With the dawn of the United Nations ('UN') and a collective determination to pursue the new ideal of justice, China now had at its disposal a new set of tools to corral Japan. It was not a showdown between Japan and China, but the outcome was that for the first time both sides would look to use the vocabulary and ideas concerning international law and ideas of accountability that now seemed to permeate societies formerly at war. Ultimately, law was used to determine wartime responsibility but it was also linked with national identity. This lost narrative about efforts to adjudicate Japanese war crimes in China is a key element to understanding the full arc of post-war Sino–Japan relations. At the same time, this research exposes a critical juncture of the post-war era that can help us comprehend how contemporary China reacted towards what was then labelled its "magnanimous" policy toward the conquered Japanese.[2]

With such caveats in mind, I want to untangle how these issues were resolved, not only in Japan under the United States' domain of a well-ordered and managed occupation where clear lines of command and control were drawn early on, but in the post-war chaos of China as well. We need to remember that Japan was an empire in 1945, not merely a country, and at the end of the war the important story occurred not only at the centre, on Japan's four main home islands (and Okinawa), but at the periphery, the former imperial regions that lay outside the islands. We

[2] This was the "To Repay Hatred With Kindness" [以德报怨] speech that Chiang Kai-shek gave immediately after Japan's surrender.

should conceive of Japan's imperial collapse in China as an "edge" in the way that the eminent historian of Europe, Tony Judt, employed the term. His terminology, "the edges of empire", forces us to think about Japan's colonial grasp and what it actually meant to be Taiwanese, Japanese or Chinese in an empire at that time. Although Judt was writing about Europe, his concept is useful for thinking about the Japanese situation as well. He wrote:

> I prefer the edge: the place where countries, communities, allegiances, affinities, and roots bump uncomfortably up against one another – where cosmopolitanism is not so much an identity as the normal condition of life. Such places once abounded. Well into the twentieth century there were many cities comprising multiple communities and languages – often mutually antagonistic, occasionally clashing, but somehow coexisting.[3]

Reassessing the end of the Second World War in East Asia as a conflict that witnessed the demise of the Japanese Empire forces us to question what happened to the Japanese in post-war China and how the Chinese resolved the issue of Japanese imperial governance. Here, the notion of law was immediately important to both the Chinese and the Japanese since both sides wanted to claim equal domain over being able to implement the application of justice in their own jurisdictions. The Japanese seemingly believed that they were still in some form of managerial control over parts of China (and in fact were in many regions), while the Chinese needed to briskly establish military tribunals and courts to trumpet their own presence on the stage of international policy.

28.2. China and the Tokyo Trial

The International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') generated rivers of ink in the Japanese language and a few streams in the English and Chinese languages, but the history of war crimes trials in China has met mostly with academic silence until very recently. While the impact of the Tokyo Trial is still being debated, effectively the

[3] Tony Judt, "Edge People", in *The New York Review of Books*, 23 February 2010; Willem van Schendel suggests that such an analysis of "fringe" areas affects the manner in which academic opinions are formed. See his article, "Geographies of Knowing, Geographies of Ignorance: Jumping Scale in Southeast Asia", in *Environment and Planning D: Society and Space*, vol. 20, no. 6, 2002, pp. 647–68.

number of Japanese it put into the dock for China-related offences remains miniscule. For all of its lofty aims, and there were many, the Tokyo Trial was fundamentally Western-oriented and centred on adjudicating the start of the war against the Western Allies with the attack on Pearl Harbor and crimes against Western soldiers in prisoner of war ('POW') camps. It is true that evidence about the Nanjing Massacre and the situation in parts of Asia was submitted, but the heart of the trial lay elsewhere. A more fitting approach to analysing the war crimes puzzle at Japan's imperial periphery requires turning our attention to the 5,700 Class B and C war criminals who were prosecuted in some 2,244 cases that were adjudicated in 49 venues throughout Asia.[4]

Within that large set of Class B and C war crimes trials, the Chinese trials of Japanese war crimes are, in the end, a microcosm of the Japanese Empire at its worst and, at best, a record of how the stated aims of the war were actually experienced at the local level. Kuomintang (Chinese Nationalist Party, 'KMT') war crimes trials of Japanese Class B and C crimes began first in April 1946 in Beijing**,** close to the time of the opening of proceedings against the Class A Japanese defendants in the IMTFE, and held centre stage in 10 major Chinese cities for almost three years. Although the statistics are not completely reliable, it is generally calculated that the KMT brought 883 Japanese defendants to court in 605 cases and found 355 men guilty. Only 149 men were executed and 350 men were found not guilty. The trial of General Okamura Yasuji was the last trial in January 1949. The Chinese Communist Party ('CCP') continued to pursue Japanese war crimes and held its own trials in the summer of 1956.

Consequently, the post-war Chinese adjudication of Japanese soldiers demonstrates not only how the Japanese were perceived during the imperial reign but also signifies the manner in which China – both the KMT and later the CCP – attempted to appropriate power in the aftermath of surrender.

[4] If we count the Chinese Communist trials of Japanese war criminals that were held last, in 1956, there were 50 venues for tribunals. See one of the first mainland Chinese books to delve into war crimes beyond the Tokyo War Crimes Trial, Guo Dajun and Wu Guangyi, *Yuxue banian shufengbei: shouxiang yu shenpan* [浴血八年树丰碑: 受降与审判], Guangxi shifan daxue chubanshe, Guilin, 1994, pp. 349–83.

Regardless of the incongruity of responses to the war crimes trials between the two Chinas, one major reason these trials were really not spoken about until recently, either by the KMT or the CCP, gets to the heart of the matter concerning what happened to the rule of law in China post-1949 and in Taiwan.[5] The problem with much of post-war Chinese jurisprudence, either within the Nationalist or Communist camps, was the lack of continuity and the fact that many of the important legal players who were involved in such trials were later purged from power or positions where they could have extended and maintained their initial work concerning the application of the rule of law. To suggest a few examples, on the Nationalist side would be the first post-war governor of Taiwan, CHEN Yi, who found himself in charge of the former colony for the precise reasons of his expertise and closeness to Japan. But later he would face the sharp end of political criticism for having supposedly been a traitor to CHIANG Kai-shek and he was executed. On the Taiwan side, with the CHEN Yi fiasco, ultimately no real legal continuity could be created and the war crimes trials were quickly submerged in a sea of indifference and ignorance. The years of harsh KMT military rule on Taiwan that followed the civil war were colloquially known as the "white terror". YE Zaizeng, the young judge in charge of the Tani Hisao trial and several others in Nanjing, was also purged in post-war China. He had declined an invitation from his colleague SHI Meiyu, the Chief Justice of the KMT military trials in Nanjing, to flee to Taiwan with the Nationalists. Former Judge YE was arrested and imprisoned during the Cultural Revolution for four years from 1969 to 1974.[6] No less egregiously on the Communist side, LUO Ruiqing, the head of public security who pushed along the war crimes trials of Japanese in the early 1950s, was himself caught up in a political trap not long after the trials' closure. LUO had somehow or other irritated LIN Biao, who essentially controlled China's military policies in the mid-1960s as the Vietnam War heated up under increasing American intervention. LUO Ruiqing quarrelled with LIN, though this might have had more to do with LIN's chronic absences due to illness rather than strategic or ideological fissures

5 Neil J. Diamant, "Conspicuous Silence: Veterans and the Depoliticization of War Memory in China", in *Modern Asian Studies*, 2011, vol. 45, no. 2, pp. 431–61.

6 Mei Xiaobin and Ye Shubing, *Wei zhengyi qiaoxiang fachui: shenpan riben zhanfan de junshi faguan Ye Zaizeng* [为正义敲响法槌: 审判日本战犯的军事法官叶在增], Nanjing chubanshe, Nanjing, 2007, p. 351.

between the two men. Nonetheless, from November 1965, LUO made his last public speech and thereafter dropped from public view. He was struggled against in March 1966 during the early days of the Cultural Revolution and he was soon dismissed from all posts.[7] YANG Zhaolong, the international lawyer who helped craft China's legal framework, was also caught up in the anti-rightist movement of the late 1950s and briefly imprisoned. He was only rehabilitated decades later. If we start to line up all the important Chinese intellectuals and the other "purged" who had dealings with the Japanese war crimes trials, the lack of legal continuity within mainland China and Taiwan begins to appear less startling. The most famous, the Tokyo Trial Judge MEI Ru-ao (also spelt as Ju-ao by some authors), later followed LUO's public banishment during the Cultural Revolution.

28.3. Why Prosecute War Crimes?

At the onset of the early Cold War, the legal restructuring of East Asia and Japan's relations with its neighbours played a vital role in redressing colonial imbalances and imperial power claims to political authority. The Chinese and Japanese used the political shifts in the early Cold War to engage in new domestic and foreign propaganda to solidify support for their camps. During the late 1940s and early 1950s, new governments in East Asia shifted focus and raised the banner of "humanity and justice" as a means to fortify their own fragile legitimacy. Each nation tried to prove its level of "justness" by enacting what they deemed to be the proper and legal pursuit of Japanese war criminals in the immediate post-war period. John Ikenberry posed this as a question: "What is the glue" that holds industrialised societies and regions together?[8] That "glue", I argue, came in several forms – the most potent of which was the pursuit of justice through law rather than a dependence on military retribution to rectify wrongs. To pursue war crimes trials became an accepted trope in the immediate post-war period and served to help galvanise the leadership in these East Asian regions with a new sense of responsibility, but one tied

[7] Harry Harding, "The Chinese State in Crisis, 1966–9", in Roderick MacFarquhar (ed.), *The Politics of China, 1949–1989*, Cambridge University Press, Cambridge, 1993, pp. 163–65.

[8] G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*, Princeton University Press, Princeton, NJ, 2001, p. xii.

to laws that would sweep away vestiges of Japan's imperial management while setting the stage for post-war peace.

Legal questions concerning jurisdiction, international law and the nature of colonial responsibility still weigh heavily today within the historical legacy of Japanese imperialism. At the ground level, who exactly was responsible for Japan's war in Asia? In Nanjing, Chinese joined the prominent KMT leader WANG Jingwei's conciliatory government. Aborigines and Taiwanese served as soldiers for the Japanese imperial forces and guarded Allied POWs throughout the empire. Given the ambiguity of imperial guilt, in many circumstances it was often unclear precisely how post-war punishment and mercy should have been meted out. Those who previously lived in Manchukuo (Japan's puppet kingdom in northern China) and collaborators were difficult enough case studies due to the Chinese penchant for legally distinguishing between Japanese war crimes and Chinese treason. Taiwan was even more complex, unlike Korea or northern China, because even at the point of surrender, the Japanese had not really worn out their welcome as colonial overseers.[9] Because the island was on the periphery of the newly established geographic borders of Chinese Nationalist rule after 1945, Taiwan was at first not even a priority for Chinese political management or military administration, and would not become so until a few years into the Cold War. As Ruti Teitel explains, the Nuremberg and Tokyo Trials were venues where state crimes were whittled down and adjudicated in singular cases; the aim was to charge individuals with a failure to effectively command their troops in the case of military leaders or failure to curtail their military in the case of civilian defendants. This is why the nationality of the defendant was such a key issue. However, the entire selection process for defendants was not exactly neutral. Teitel states: "As a practical matter, it would seem that some selectivity is inevitable given the large numbers generally implicated in modern state prosecution, scarcity of judicial resources in transitional societies, and the high political and other costs of successor trials. Given these constraints, selective or exemplary trials, it would seem, can advance a sense of justice".[10]

[9] Tzeng Shih-jung documents these changes in Taiwanese perceptions about themselves in *From Honto Jin to Bensheng Ren: The Origin and Development of the Taiwanese National Consciousness*, University Press of America, Lanham, 2009.

[10] Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, p. 40.

The current wave of historical study tends to examine memory and its interaction with history, but we have failed to notice deep in the background the larger role the courts and the media of the time exerted in moulding this memory into firmer public opinion. Part of the reason for this neglect is that scholarship has needed to unearth the details and horror of the Japanese imperial atrocities first and has had less time to engage the process through which legal responsibility was pursued for all but the most tragic events. However, memory gives birth to emotional history – it tends toward personal recollection. Legal judgments, on the other hand, are a form of public memory that create *precedents* on which foreign policy and future strategy are built. Gerry Simpson notes that the reason war crimes trials are history and yet transcend it is because "[t]he trial confines a historical moment in its abnormality but wishes to make it less universal and atemporal".[11] This is particularly so in the Chinese case. National memory is personal and domestic while legal opinions are public, publicised and, more importantly, strive to be international. Legal proceedings are an attempt to balance personal experiences and biases with an accepted standard of norms which will, if followed correctly, allow the nation to join an international brotherhood of like-minded states that base their societies on the twin pillars of truth and justice. In addition to this, we must mix in what Marianne Hirsch has labelled as "post-memory", which "describes the relationship that the generation after those who witnessed cultural or collective trauma bears to the experiences of those who came before, experiences that they 'remember' only by means of the stories, images and behaviours among which they grew up. These experiences were transmitted to them so deeply and affectively as to *seem* to constitute memories in their own right".[12] I aver that these Class B and C trials, the act of bringing war criminals to justice, codified a certain form of Sino–Japanese history. Marc Galanter urges that such trials and ideas shape how we see history because we want to "undo the injustice of

[11] Gerry Simpson, "War Crimes: A Critical Introduction", in Timothy L.H. McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997, p. 21.

[12] Marianne Hirsch, "The Generation of Postmemory", in *Poetics Today*, 2008, vol. 29, no. 1, pp. 106–7 (emphasis in the original).

history" and "attempt to make history yield up a morally satisfying result that it did not the first time around".[13]

The issue of adjudicating legal responsibility for war crimes and collaboration became a struggle for legitimacy between the Chinese Nationalists and the Communists. The CCP touched on the idea of benevolence, as CHIANG Kai-shek had, but pushed harder on the issue of pursuing war criminals. In part, this was a calculated political move to show the Chinese populace that the CCP believed the KMT was reneging on its pledge to arrest Japanese war criminals, but it was also a move to force the matter more into the media spotlight. Contestation over the administration of post-war China and Taiwan remained a pitched battle between two main competitors – the KMT and the CCP – and sometimes the remaining Japanese. The KMT initially dragged its feet in looking at war crimes trials but faced the issue of traitors (*hanjian* [汉奸] in Chinese and *kankan* [漢奸] in the Japanese language) immediately. This was not just a major dilemma within the areas formerly occupied by Japan but a complex task in the relatively freer sections of the mainland where relations with the Japanese were often multilayered.[14]

The practical matter of assuming dominant power in formerly occupied China was the KMT's priority, not necessarily the stern prosecution of Japan's imperial misdeeds. One reason why Chinese war crimes trials did not mete out justice as harshly to the Japanese as they did to their own was because the Chinese Civil War distracted KMT efforts. Another major rationale was enmeshed within CHIANG Kai-shek's policy that promoted dealing with the Japanese aggressors in a unique fashion. CHIANG expressly announced this policy of *yi de bao yuan* (以德报怨), "to repay hatred with kindness" on the day of Japan's surrender. The Chinese generalissimo broadcast a radio message to the nation clearly enunciating that China held the "Japanese military clique as the enemy and not the Japanese people. We want to hold them responsible but do not

[13] Marc Galanter, "Right Old Wrongs", in Martha Minow (ed.), *Break the Cycle of Hatred, Memory, Law and Repair*, Princeton University Press, Princeton, NJ, 2002, p. 122.

[14] The wartime Japanese government was already aware of the endless Chinese debates concerning the legal definition of traitor. *Shanghai jimusho chôsashitsu*, Mantetsu (ed.), *Jûkei seiken no keiji hôki tokuni kankan ni taisuru seisai ni tsuite* [重慶政権ノ刑事法規特に漢奸ニ對スル制裁ニ就テ], Mantetsu Shanhai Jimusho Cho□sashitsu, Shanghai, 1941.

want to seek revenge on the innocent, nor add to their suffering".[15] The next day, an editorial in Chungking's (Chongqing) newspaper, *Zhongyang Ribao* (中央日报, *Central Daily News*), glossed the same message and editorialised that keeping the peace after the war was a difficult undertaking. The paper postulated that if China were too harsh with the defeated Japanese post-war, the relationship could descend into a more hateful scenario. Should they be too lenient, however, the newspaper theorised that China risked assisting the Japanese "to once again rally to their fantasies" of imperial domination. The editorial drove home the message that it was necessary to destroy Japan's machines of war and lead the defeated nation on the road toward democracy. "We have achieved peace, now we have to complete the process", the article concluded in a voice of hope.[16] This was a brave move given the lingering Japanese mood on the Chinese mainland. An Allied investigation team polled the Japanese who remained in Beijing in December 1945 concerning their thoughts on the war, East Asia and Japan. A clear majority of the respondents still believed that Korea was not mature enough to be independent and that Taiwan should not be returned to China. Even more telling was that an overwhelming percentage believed that Japanese were superior beings in East Asia and that if China had truly understood Japan's aims Japan would have won the war.[17] Japanese

[15] Tian Huan (ed.), *Zhanhou zhongri guanxi wenxianji, 1945–1970* [战后中日关系文献集, Collected Documents on Postwar Sino–Japanese Relations, 1945–1970], Zhonguo shehui kexue chubanshe [中国社会科学出版社, China Social Sciences Publishing House], Beijing, 1996, p. 10. See also Qin Xiaoyi (ed.), *Zhonghua minguo zhongyao shiliao chubian: Duiri kangzhan shiqi*, di 7 bian, *Zhanhou zhonguo*, vol. 4 [中華民國重要史料初編－對日抗戰時期，第七編：戰後中國，第4冊，Initial Compilation of Important Historical Documents on the Republic of China: Sino-Japan War Period, Series 7: China after the War, Book 4] Dangshi weiyuanhui [黨史委員會, Committee on Party History], Taipei, 1981, pp. 633–35. The speech in which this phrase was employed was translated into the Japanese language two years and published in Japan. Shô Kaiseki, *Bō o motte bō ni mukuyuru nakare: kakumeika enzetsushū* [暴を以て暴に報ゆる勿れ], trans. by Yamada Reizô, Hakuyôsha, 1947, pp. 3–8. The Chinese were not the only ones to cut short pursuit of Japanese war crimes. See also John Pritchard, "The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948", in *Criminal Law Forum*, vol. 7, no. 1, 1996, pp. 15–50.

[16] *Zhongyang Ribao* (中央日报, Central Daily News), Chungking, 16 August 1945, reprinted in Tian, 1996, pp. 11–12, see *supra* note 15.

[17] Yoshida Yutaka, *Nihonjin no sensôkan: sengoshi no naka no henyô* [日本人の戦争観: 戦後史のなかの変容], Iwanami shoten, 2005, p. 57; and Aaron William Moore, *Writing War: Soldiers Record the Japanese Empire*, Harvard University Press, Cambridge, MA, 2013, pp.

wartime propaganda had shaped a sturdy mindset that was not going to deflate overnight, regardless of the empire's collapse.

The CCP was quickly at the heels of both the KMT and the Americans for what they assessed to be the slow delivery of suspected Japanese war criminals to court. A Communist Party press conference was published on 15 December 1945 under the title, "Punish Japanese War Criminals", in *Jiefang Ribao*, (解放日报, *Liberation Daily*). WU Yuzhang, head of the Chinese Liberated Areas Investigation Committee on War Crimes, complained that already three months had passed after the war had ended and the US had occupied Japan. The Supreme Commander of the Allied Powers, General Douglas MacArthur, had put out arrest warrants for the former Japanese Prime Minister, Konoe Fumimaro, and some other lesser war criminals, but only slightly more than 300 people in total. The subtext of the media event was to proclaim that given the damage caused by Japan in China "this is an infinitesimally small figure" of arrested war criminals, the CCP complained.[18] The Communist leadership aimed to promote the message that, "[i]n order to make sure that Japan does not retain reservoirs of militarism the Potsdam articles of surrender need to be more effectively executed […]".[19] CCP officials wished to convince the Chinese population that in liberated areas, it was the Communists and not the Nationalists that pursued exactly the sort of justice that was lagging in occupied Japan.

28.4. KMT Legal Manoeuvrings

The varied Chinese attempts to pursue Japanese war crimes in the early post-war period did not occur in a vacuum but against the background of a diverse and cacophonous national and international debate about who owned the correct means to legally detain and try the Japanese. Moreover, as China had already experienced legal and political isolation during the previous century (including submitting to extraterritoriality), leaders on

248–49. See also Awaya Kentarô (ed.), *Shiryô nihon gendaishi*, vol. 3, *Haisen chokugo no seiji to shakai*, series 2 [資料日本現代史 3, 敗戦直後の政治と社会 2], Ôtsuki shoten, 1981, pp. 352–83.

[18] Wu Yuzhang, *Wu Yuzhang wenji* [吴玉章文集], *The Collected Works of Wu Yuzhang*, Chongqing chubanshe, Chongqing, 1987, pp. 275–76. Konoe committed suicide after receiving the news of his arrest warrant.

[19] *Ibid.*, p. 276.

all sides recognised that the pursuit needed to be conducted in concert with other like-minded nations. In China, as imperial Japanese power dissipated, Class B and C war crimes trials took up a larger portion of official and civilian attention as manifestations of the KMT leader CHIANG Kai-shek's and the CCP Chairman MAO Zedong's legal and moral magnanimity. These were shrewd political gambles but the rules of the game and the legal parameters behind such moves were not always known to all the players.[20]

Virtually coterminous with Chinese participation in European deliberations on war crimes, Chinese legal representatives faced the glare of the spotlight at the IMTFE. The history of the Chinese experience at the Tokyo Trial, directly connected to the evolution of Class B and C war crimes trials in China, is significant for two reasons. First, the Tokyo Trial proved to the Chinese that war crimes trials were not merely show trials and that the legal issues at stake were being taken seriously by the international community. The Tokyo Trial served as a steep learning curve for the Chinese interested in pursuing international justice for Japanese war criminals and as a sort of template for their Class B and C war crimes trials. As NI Zhengyu, the chief adviser for Chinese prosecutors at the Tokyo Trial explained in his memoirs as a judge and lawyer in pre-war and immediate post-war China, Chinese officials were wholly unprepared for the sort of jurisprudence the Tokyo Trial advocated. NI had been out of China from 1945 to 1946 in the US and Britain to observe their legal systems and to draw up reports, arranging for China's re-entry into the international juridical system but also to prepare for the nation's pursuit and successful adjudication of Chinese justice for Japanese war criminals. Unfortunately, as NI described the situation: "We were hoping for calm times but the wind never ceased blowing". He meant essentially that while the Chinese estimated the post-war pursuit of war crimes as a *fait accompli*, circumstances did not allow for the easy implementation of such a process.[21] The situation was thus:

[20] For the Chinese view of Japan during the occupation, see Adam Cathcart, "Chinese Nationalism in the Shadow of Japan, 1945–1950", Ph.D. Dissertation, Ohio University, 2005.

[21] Ni Zhengyu, "Ni Zhengyu huiyilu, danbo congrong li haiya" [倪征燠回忆录——淡泊从容莅海牙，Memoirs of Ni Zhengyu: Arriving in the Hague with a Peaceful Mind], in Yang Xiawu (ed.), *Nanjing datusha shiliaoji*, vol. 7, Dongjing shenpan [南京大屠杀史料集， 第 7 卷，东京审判], Collections of Historical Documents on the Nanking Massacre, vol. 7,

NI returned in the early winter of 1946 to China from his excursion at the moment when the Chinese prosecution team realised that its experience with the rules for admittance of evidence in the Chinese system were fairly incompatible with the more prevalent American and British systems of law that would be in use at the Tokyo Trial. The Chinese staff were surprised at the robust system of defence to be employed at the trial.[22]

The real issue vexing the Chinese team at the Tokyo Trial, the lawyers recalled, was that they had mistakenly assumed from the outset that the trial would merely be the victor's prosecution of Japanese war criminals and not a "real trial" so they really had not prepared quality evidence or given too much thought to its provenance or collection. As such, in the initial months the Allied defence lawyers made mincemeat of much of the evidence proposed by the Chinese side.[23] The defence's ability to poke holes in the Chinese prosecution's case was particularly damaging to the Chinese side when the Vice-Director for the Political Section of the KMT military, QIN Dechun, took the stand and was virtually laughed off for his hyperbolic statements that the Japanese killed Chinese and committed arson everywhere without leaving one place untouched.[24] QIN was the KMT head of the War Crimes Investigation Committee, established within the Ministry of Defence. He had met with MacArthur at least three times while in Tokyo but was caught off guard by the fierce questions concerning his supposed exaggerated testimony in court. When NI Zhengyu first went to see QIN Dechun back in China to talk about the legal whipping they had taken at the Tokyo Trial, QIN did not refrain from venting his frustration. "What part of that trial was us adjudicating them, it seemed more of a case where they put us on trial", he admitted to NI.[25] In his own memoirs, published years later, QIN does not remember it in the same manner but he did concede that his days of testimony in Tokyo were difficult and that he spent his nights worrying and preparing for the next day.[26] Chinese officials grossly miscalculated

Tokyo Trials], Jiangsu renmin chubanshe [江苏人民出版社, Jiangsu People's Publishing House], Nanjing, 2005, p. 642.

22 *Ibid*., p. 643.

23 *Ibid.*

24 *Ibid*., p. 644.

25 *Ibid.*, p. 645.

26 Qin Dechun, *Qin Dechun huiyilu* [秦德純回憶錄], Zhuanji wenxue chubanshe, Taipei, 1967, pp. 58–62.

what sort of process the Tokyo Trial would be and needed to regroup so as not to be caught behind. Prosecutor XIANG Zhejun and his team took advantage of the fact that the trial was still in its beginning stages and returned home to reorient, leaving the prosecution in US hands for the start of the trial. In their private conversations, QIN admitted to NI that no one had thought during the actual war of resistance to retain proof or think of collecting trial evidence so it was going to require redoubled efforts to collect after the fact.

There were several major issues impinging on war crimes trials in China: the ethno-political identity of those liable to be charged with war crimes and the availability of testimony with a viable court system in which to prosecute. Then there was the question of collaboration. The Nationalists needed to determine who was legally defined as a Japanese or a Chinese because this affected the manner in which the individual would or would not be prosecuted. Not only did the KMT have to delineate a policy regarding treatment for Taiwanese, particularly concerning collaboration, but lists also needed to be drawn up for the Japanese war criminals, many of whom had often already returned or even demobilised back to Japan years before the end of the war. Thus, before Chinese trials could even begin, officials needed the acquiescence and assistance of the occupying Americans to arrest and return suspected Japanese war criminals back to China. A further mitigating factor was the manner in which the Japanese responded to the end of the war in China and Taiwan; after all, at the dawn of surrender, there were still millions of armed Imperial soldiers (not to mention civilians) dotting the landscape and not all were pleased to lay down their arms or repatriate.

28.5. Ever-changing War Crimes Policies

On 6 November 1945 the KMT nominated QIN Dechun as head of the Committee to Deal with War Crimes. The following month the committee established offices in Shanghai, Nanjing, Beijing, Hankou, Guangzhou, Shenyang, Xuzhou, Jinan, Taiyuan and Taipei (Taibei) – a total of 10 venues where Chinese military courts for adjudication of war crimes were established. The KMT employed the legal precedents that grew from the start of the Tokyo War Crimes Trial, with a combination of the overriding concepts of international law, the Hague Convention on the Rules of Military Engagement, and added in its own domestic formulation of law

to prosecute Japanese war crimes.[27] The KMT defined surrendering Japanese soldiers not as POWs (*fulu*, 俘虏) but rather *tushou guanbing* (徒手官兵), a newly coined term that defined them literally as "bare-handed soldiers", rendering them almost into bureaucratic cadres. The idea was that they were legally considered not to possess firearms. This KMT rhetorical flourish allowed Japanese soldiers in certain areas to retain their small arms and not be forced to hand over all weapons. The Japanese Army's High Command in China was renamed as a "liaison group" to allow it to continue to function in a very different way from its original intent, while retaining its administrative talons. Chinese legal authorities continued to adapt processes even as the courts were dealing with cases. On 12 June 1946 the Committee to Deal with War Crimes decided that Japanese war criminals arrested and detained in China by the US, including US criminals, would have to be adjudicated along co-ordinated transactions with the Chinese Foreign Ministry and receive advance authorisation. This became practice from July so that Chinese local authorities could no longer just hand over war criminals to the US and wash their hands of the process to mete out justice. This had seemingly been the case with the actual first Allied war crimes trials in China, which the US had implemented in Shanghai. Part of the reason for these brisk American trials of Japanese and other former Axis Power alleged war criminals was that, according to the Chinese interpretation, the US President Franklin D. Roosevelt had declared that trials of war criminals should take place within the country where the crimes were committed and conducted by that country. In this vein, the US move to try its criminals in China was not in accord with the spirit of that deliberation. A memo of record from the American Embassy and the Chinese translation from a meeting on this issue, presumably from 19 August 1946, was polite but firm in its denunciation of the Chinese legal system. "[A]lthough Headquarters of the United States Army forces had every desire to cooperate with the civilian departments of the Chinese government, it is a fact that agreements in regard to war criminals of enemy nationality were reached at Chungking with appropriate Chinese military officials, concurred in by the representatives of several non-

[27] Mei and Ye, 2007, p. 101, see *supra* note 6.

military Chinese ministries who formed the Chinese-American Committee". [28]

28.6. CCP War Crimes Trials

Unlike the KMT's goal of merely seeking justice, Communist China's aim for its Japanese prisoners, in the words of the prisoners, Chinese guards and Beijing bureaucrats, was to make war criminals reflect on their crimes and to turn them from "devils back into men". Very rarely in the KMT special military tribunals or Class B and C trials in other venues did Japanese soldiers admit their crimes, but in the 1956 CCP trials amazingly every single Japanese prisoner did.

The Nobel laureate Amartya Sen opined that there are two ways to pursue justice – the "arrangement focused view" and the "realization-focused understanding" process of justice. The first method centres on the establishment and creation of a bureaucracy that can operate the mechanical structure for achieving justice. This is the "active presence that justice is being done", regardless if such a complex system actually achieves that goal. This sort of structure more closely followed the goals of what the Chinese Nationalists hoped to achieve. The "realization-focused understanding" process of justice was more the aim of the Chinese Communists who looked at the actual fruit legal institutions bore and whether justice as a palpable end had been achieved. [29] Nancy Rosenblum suggests that herein lies the gap between procedural and substantive justice. Substantive justice informs us about the actual harm caused, but the key point in Rosenblum's analysis is that the international prosecution of war crimes stems from the growth of the idea of a "universal jurisdiction". If we extrapolate in China's case, the goal was justice and the audience for the prosecution and subsequent punishment was the "world community". [30] The internationality of the law was not only in its application but also in its reception.

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[28] I am assuming this is the Yalta Conference of February 1945 that was referenced but it was not specifically stated in the record. Quanzonghao 18, Anjuanhao 2278, "Guanyu meiguojun zaihua dibu yindu ji shenpan zhanfan de anjian", Number Two Archives, Nanjing, China.

[29] Amartya Sen, *The Idea of Justice*, Allen Lane, London, 2009, p. 10.

[30] Nancy Rosenblum, "Justice and Experience of Injustice", in Martha Minow (ed.), *Break the Cycle of Hatred, Memory, Law and Repair*, Princeton University Press, Princeton, NJ, 2002, p. 88.

The trials of Japanese war criminals held in the People's Republic of China ('PRC') in 1956 were an entirely different affair from the sorts of trials the Chinese Nationalists and other Allies produced. First, the CCP had access to few Japanese war criminals they had arrested on their own. They began their pursuit with the 140 or so the CCP had taken prisoner in 1949 when the capital of Shanxi province, Taiyuan, fell to the People's Liberation Army at the end of the civil war. These soldiers were the ones whom the KMT had hired and who had "volunteered" under the Japanese General Sumita Raishirô, former imperial Japanese soldiers fighting alongside their Nationalist brethren against the Communist threat. Several hundreds more of these men were also captured and not incarcerated in Taiyuan, but Xiling, just east over the prefectural border in Hebei Province. Most of these soldiers, like their commander Sumita, managed to escape arrest on the eve of defeat in the Chinese Civil War but many were not so lucky.[31] The vast majority of the Japanese defendants in the CCP trials were actually transferred from Soviet custody in the summer of 1950 in an exchange. The CCP sponsored official trials in the cities of Taiyuan (Shanxi Province) and Shenyang (Liaoning Province) but many other unofficial "people's trials" in former Manchuria and the surrounding areas resulted in summary executions of Japanese soldiers and civilians. Various estimates place the number at possibly 3,500 individuals who met such a fate but since records are rare or not available it is difficult to state with any certainty.[32]

28.7. What Kind of Trials?

Suzuki Hiraku had never been an ideal Japanese prisoner of the Chinese Communists, but he had studied and pondered his crimes over many years of incarceration and eventually recanted in open court. His expression of contrition is emblematic of CCP results. "Over these last years I have thought about my crimes and they are just as expressed by the

[31] There is also a whole other subset of related POWs who were tried, namely Chinese officials who collaborated with the Japanese and KMT soldiers who were captured during the Civil War. My research here only focuses on the Japanese interaction with the CCP even though the KMT should not be forgotten since it is clearly linked.

[32] Handô Kazutoshi *et al.*, *BCkyû saiban o yomu* [BC 級裁判を読む], Nihon keizai shimbun shuppansha, Tokyo, 2010, pp. 24–25; Iwakawa Takashi, *Kotô no tsuchi to narutomo: BCkyû senpan saiban* [孤島の土となるとも: BC 級戦犯裁判], Kôdansha, Tokyo, 1995, pp. 544–47.

prosecution. I have killed many Chinese innocent civilians, burned homes, stolen much food and goods, and executed the 'three alls' policy. These are all things for which there is no way to express remorse", Suzuki admitted. "I have committed such serious crimes that I deserve punishment but over these six years under the gracious benevolence of the Chinese people I have earned a chance to reflect on my actions", he explained. In his personal testimony in front of the judges, Suzuki experienced a sort of epiphany, albeit one that had been written about and practised during the long years of incarceration. It might have been staged, but based on similar testimony after these men were released and their activities once repatriated in Japan, their zeal and emotion in their conversion from imperial aggressor to contrite war criminal is difficult to refute. "Who saved my life and protected me, that is to say who kept me healthy and alive after the war? It is the very same people that I murdered without reason, those whose very peaceful lives I destroyed, the very same ones who were harmed by me. When I consider what I have done it is almost unbearable and my heart feels as if it's about to break", he cried. The transcript then notes that Suzuki, a former Japanese imperial officer who fully believed in his mission during the war, began to weep in open court.[33]

The story of where the CCP retained Japanese war criminals from and an analysis of their trials and history reveals a hitherto unrecognised aspect of early Cold War CCP foreign policy in general and specifically toward Japan. Japan formalised a peace treaty with the Chinese Nationalists on Taiwan but excluded Mainland China with whom it had no formal diplomatic relations until the 1970s. The fact that Communist China expended precious financial resources and time on treating Japanese war criminals well, while the nation dispatched virtually one million of its best and brightest young soldiers to the frontlines of Korea to fight the Americans and other Allies during the Korean War, is testimony to the importance of this policy. As Ôsawa Takeshi has noted, in comparison to the Tokyo War Crimes Trial and even the trials the KMT pursued against post-war Japanese war criminals, the CCP's trials were the epitome of magnanimity. A majority of the Japanese detainees

[33] Wang Zhanping (ed.), *Zhengyi de shenpan: zuigao renmin fayuan tebie junshi fating shenpan riben zhanfan jishi* [正义的审判：最高人民法院特别军事法庭审判日本战犯纪实], Renmin fayuan chubanshe, Beijing, 1991, p. 486

were released from prison and no executions were ever held.[34] We could simplistically say that such benevolence was available because most of these Japanese soldiers had already been imprisoned for ten years in the Soviet Union but that avoids the Chinese decision-making process that ushered them to their final destination.

For the CCP, the goal was twofold. First, to testify to the world about Japanese aggressive war tactics and atrocities through the trials. Second, but no less important, to keep the Japanese prisoners in detention poised to "convert". By re-educating the "Japanese devils", who had managed a rapacious empire, and having them publicly admit their crimes, the CCP had them profess an understanding and ask for forgiveness. This policy was a qualitative ingredient of the Communist idea of justice. These aims were obviously quite separate from Allied and KMT legal requirements but very important to the new socialist PRC state. Western and KMT legal trials were mainly interested in convictions; Communist leaders ultimately remained focused on reformation. Such schemes had already started 20 years prior with the CCP plans for Japanese POWs in its policies to treat the Japanese well.[35] But even with such precedents, at the outset the CCP was divided in the path it wished to pursue. Premier ZHOU Enlai had initially stated that trials of Japanese war criminals did not belong to the realm of international law but rather military tribunals within China. This was because the PRC did not have a treaty with Japan, no diplomatic relations, and was thus still in a state of war.[36]

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[34] Ôsawa Takeshi, "Maboroshi no nihonjin 'senpan' shakuhô keikaku to Shû Onlai", in *Chûgoku kenkyû geppô* [中国研究月報], June 2007, p. 1; and Ôsawa Takeshi, "Chûka jinmin kyôwakoku no nihonjin senpan shori – sabakareta teikoku", in Masuda Hiroshi (ed.), *Dainihon teikou no hôkai to hikiage fukuin* [大日本帝国の崩壊と引揚・復員], Keiôgijiku daigaku shuppansha, 2012, pp. 109–38.

[35] For more on the CCP trials, see Adam Cathcart and Patricia Nash, "War Criminals and the Road to Sino–Japanese Normalization: Zhou Enlai and the Shenyang Trials, 1954–1956", in *Twentieth Century China*, vol. 34, no. 2, April 2009, pp. 89–111. For details on how important Japan was to the post-war CCP message of revolution, see Çağdaş Üngör, "Reaching the Distant Comrade: Chinese Communist Propaganda Abroad (1949–1976)", Ph.D. Dissertation, State University of New York at Binghamton, 2009. See also Toyoda Masayuki, "Chûgoku no tainichi senpan shori seisaku – genzaishugi kara 'kandai' e", in *Shien* [史苑], vol. 69, no. 181, 2009, pp. 15–44.

[36] Arai Toshio, "Chûgoku no senpan seisaku to wa nan datta no ka", in *Chûkiren* [中帰連], September 2000, p. 19.

There were actually three separate collections of Japanese war criminals in Communist China: those kept in Taiyuan, Shanxi Province; Xiling, Hebei Province; and Fushun, Liaoning Province. Those in Taiyuan were mainly remnants of Japanese soldiers who stayed on after 1945 but were taken prisoner when the province fell to the Communists, as were those soldiers in Xiling. The Fushun prison primarily housed Japanese who were "gifted" to China from the Soviet Union. In July 1950 the Soviets gave China 969 Japanese POWs to judge. In total, there were therefore close to 1,109 POWs in CCP custody by the early 1950s. Forty-seven died in custody so at the start of trials that meant approximately 1,062 were alive. Chinese sources sometimes have slightly different numbers but essentially the numbers break down to a bit more than 1,000 men. Most of the Fushun POWs were connected to the management of the former Manchukuo empire but there were some who had managed Mongolian relations as well. This selection suggests that the Soviet Union did not just randomly hand over a large number for the Chinese to adjudicate but, rather, chose carefully from among the ruling imperial class so that the new China could demonstrate its grasp of international law and show how it was now the authority over the Manchurian region. Among the POWs were former Manchukuo legislative and judicial staff, military men, policemen, South Manchurian Railway police, Japanese military police and affiliated staff.[37] The majority of these men were eventually released after their lengthy incarcerations as a demonstration of Chinese goodwill. The first lot, about 419 prisoners, was released from Xiling in August 1954. Then several times in 1956 other groups of POWs, mostly military, were released from Fushun prison and Taiyuan. Only 45 Japanese prisoners were put on trial and given longer sentences that kept them imprisoned in China, for some as late as 1964.[38]

Even though far fewer former Japanese soldiers and statesmen were charged and tried by the CCP, the legacy of treatment effected the biggest change on post-war Japanese society and yielded more influence than the

[37] Chinese sources put the total at 1,069, Yuan Shaoying and Yang Guizhen (eds.), [从人到鬼，从鬼到人：日本"中国归还者联络会"研究], Shehui kexue wenxian chubanshe, Beijing, 2002, pp. 13–14; Tao Siju (ed.), *Xin zhongguo di yiren gongan buzhang Luo Ruiqing* [新中国第一任公安部长罗瑞卿], Qunzhong chubanshe, Beijing, 1996, p. 117.

[38] For a full list of the defendants' names and sentences, see Arai Toshio and Fujiwara Akira (eds.), *Shinryaku no shôgen: Chûgoku ni okeru nihonjin senpan jihitsu kyôjutsusho* [侵略の証言—中国における日本人戦犯自筆供述書], Iwanami shoten, Tokyo, 1998, p. 278.

greater number of soldiers who had been involved in the KMT trials from 1946 to 1949, or arguably any other Class B and C war crimes tribunal. Once they returned home, Japanese who had been incarcerated by the CCP formed a lobby and education group called the Liaison Group of Returnees from China (Chugoku kikansha renrakukai, or Chûkiren for short) that took to publishing an account of Japan's atrocities before most other academic or civilian associations had even broached the topic in print.[39] Their diaries and memoirs form part of this chapter. In addition, there are a few Chinese memoirs that add to this picture, particularly those of the former warden in charge of education at the Fushun Correctional Facility, JIN Yuan.[40]

Such was the impact of Communist re-education that in 1984 JIN Yuan travelled a second time to Japan at the behest of an invitation from his former prisoners. The Liaison Group of Returnees from China also donated to Fushun Prison a "memorial stele of apology" because they saw Communist China as the site of their psychological and physical rebirth. On 22 October 1988 the surviving members dedicated the monument and the inscription is the clearest and least vague of all concerning Japanese military action and goals during its 15-year war:

> During the 15-year Japanese imperial war of aggression in China, we committed heinous crimes of arson, murder, and robbery. After the defeat, in Fushun and Taiyuan correctional facilities we received the Chinese communist

[39] This is now reprinted in expanded and revised form, Chûgoku kikansha renrakukai (ed.), Kanzenban Sankô [完全版三光, The Three Alls: A Complete Collection], Banseisha, Tokyo, 1984. The full history of the Chûkiren group, their trial experiences and activities in Japan to promote peace with China and educate subsequent generations about their war crimes has been written up in their edited volume, Chûgoku kikansha renrakukai (ed.), Kaette kita senpantachi no kôhansei: Chûgoku kikansha renrakukai no 40nen [帰ってきた戦犯たちの後半生—中国帰還者連絡会の四〇年], Shinpû shobô, Osaka, 1996. Some individual former prisoners took to publisher their accounts even more rapidly. See Hirano Reiji, Ningen kaizô, watashi wa chûgoku no senpan de atta [人間改造—私は中国の戦犯であった], Sanichi shobô, Kyoto, 1956.

[40] During his time with the Japanese prisoners Jin Yuan was assistant and then education director. Following their release he continued to work at the prison until 1978, rising through the ranks and ultimately to the position of warden of the prison, Fushun shi zhengxie wenshi weiyuanhui (ed.), *Weiman huangdi Puyi ji riben zhanfan gaizao jishi* [伪满皇帝溥仪暨日本战犯改造纪实], Zhongguo wenshi chubanshe, Beijing, 1990, p. 1. See also Liu Jiachang and Tie Han, *Ri wei Jiang zhanfan gaizao jishi* [日伪蒋战犯改造纪实], Chunfeng wenyi chubanshe, Shenyang, 1993.

> party, the government, and the people's revolutionary humanitarian support of "hate the crime but not the criminal". In this manner we regained our human conscience. Adhering to this magnanimous policy, not one person was executed and all prisoners were released to return home. This was an unimaginable event.
>
> Today, Fushun has been restored to its original state and here we dedicate our monument. We express our gratitude to the martyrs who opposed Japan and pledge to not let war break out again. We dedicate ourselves to peace and Sino-Japan friendship.[41]

Years later YUAN Guang, Deputy Chief Judge of the Chinese People's Supreme Military Tribunal, when estimating the significance of the CCP trials said: "Justice expanded its reach enough to offer solace to the spirits of those who valiantly fought against the Japanese or were martyred". He elaborated: "Within our national land, this is the first time in modern Chinese history that Chinese representatives of the people in a court of law judged Japanese war criminals and imperialist aggressors. These trials were not only the close of China's victory in the war against Japan but a sign that the Chinese people have arisen".[42]

28.8. Conclusion

Gary Bass has said, as have others including Hannah Arendt, that for most massacres throughout history there is really no such thing as an appropriate punishment, "only the depth of our legalist ideology makes it seem so". Echoing American officials who were initially opposed to allowing Nazi war criminals to be tried, as opposed to their summary

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[41] Jin Yuan, *Qiyuan: yige zhanfan guanli suozhang de huiyi* [奇缘: 一个战犯管理所长的回忆, Unusual Destiny: Reminiscences of a Director of War Criminal Prison], Zhongguo renmin jiefangjun chubanshe, Beijing, 1999, pp. 278–79. Former war criminal Tominaga Shôzô writes about what this monument meant for the former prisoners, Fushunshi zhengxiehui wenshi ziliao weiyuanhui (ed.), *Nanwang de zhongguo* [难忘的中国, The Unforgettable China] Liaoning daxue chubanshe, Fushun, 1992, pp. 137–42. See also his post-war memoir, Tominaga Shôzô, *Aru BCkyû senpan no sengoshi* [ある BC級戦犯の戦後史], Suiyôsha, 1977.

[42] Zhang Fulin, Tian Jingbao, Xia Mang and Zhang Yanfeng (eds.), *Shizheng: zhongguo jiaoyu gaizao riben zhanfan shilu* [史证:中国教育改造日本战犯实录, Witness to History: a Record of China's Educational Reform of Japanese War Criminals], Jilin renmin chubanshe, Changchun, 2005, p. 317.

execution, Bass opines that "war crimes tribunals risk the acquittals of history's bloodiest killers in order to apply legal norms that were, after all, designed for lesser crimes".[43] The Japanese war crimes trials in China fit perfectly into this zero-sum scenario. Tony Judt further expanded the problem by searching for a resolution to the conundrum: "How do you punish tens of thousands, perhaps millions of people for activities that were approved, legalised, and even encouraged by those in power?" In addition, "how do you justify leaving unpunished actions that were manifestly criminal even before they fell under the aegis of 'victor's justice'?" he asks.[44] In his opinion, trials will at most be inadequate.

There is no doubt that various subsets of Chinese war crimes trials held many flaws – poor translations, at times scant evidence and a lack of legally trained staff, to name just a few major lacunae. But, at the same time, the trials were a significant step in the right direction to stem a cycle of repetitive violence. The fact that the important history of these trials and the effect they had on the post-war political Sino–Japanese memory of the war was subsumed by subsequent Chinese domestic turbulence is all the more reason for our continued investigation into these topics.

[43] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2000, p. 13. Kerstin von Lingen points to some of these same issues in her work: *Kesselring's Last Battle: War Crimes Trials and Cold War Politics, 1945–1960*, University Press of Kansas, Lawrence, 2009; and *Allen Dulles, the OSS, and Nazi War Criminals: The Dynamics of Selective Prosecution*, Cambridge University Press, Cambridge, 2014.

[44] Tony Judt, "The Past is Another Country: Myth and Memory in Postwar Europe", in Istvan Deak, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton University Press, Princeton, NJ, 2000, p. 300.

29

The Forgotten Legacy: China's Post-Second World War Trials of Japanese War Criminals, 1946–1956

ZHANG Tianshu*

29.1. Introduction

Alongside the trial of the International Military Tribunal for the Far East ('IMTFE') held in Tokyo against Class A war criminals, the national trials involving Class B and C Japanese war criminals were conducted in the territory of states with which Japan had been at war, including China, Korea, the Philippine and others. In 1946 the Nationalist government of the Republic of China ('ROC') held the trials of Japanese war criminals in ten cities. The ROC trials sentenced 145 Japanese war criminals to death and 300 to limited or lifetime imprisonment.[1] Ten years later, the government of the People Republic of China ('PRC') established a Special Military Tribunal to bring detained Japanese prisoners to justice in two separate proceedings held in Shenyang and Taiyuan. This time, no one was sentenced to death or life imprisonment.[2]

Although two different governments conducted the Chinese war crimes trials, it is worth noting that these trials demonstrated, to some extent, a similar attitude towards international law. This entailed adopting a Chinese approach to deal with the Japanese war criminals, while also embracing international law and principles.

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1 Chen Jing, "The Trial of Japanese War Criminals in China: The Paradox of Leniency", in *China Information*, 2009, vol. 23, no. 3, pp. 447–48.

2 *Ibid.*, p. 448.

Because of the Chinese Civil War – which resumed in 1946 – and the isolation of the PRC government at the international level after its came to power in 1949, the contribution of these Chinese war crimes trials to international criminal law is not well-known in the wider world. Current research concerning these trials mainly discuss them from the perspectives of history and foreign policy. Little attention has been paid to the legal value of the Chinese war crimes trials, in which international law was involved and applied. In attempting to fill this gap, this chapter focuses on the coherence of the applicable law in the war crimes trials and its reflections on the development of international law. It is not the purpose of discussion here to examine every angle of the Chinese war crimes trials, but merely to critically review the laws upon which these trials were based and to analyse how international law was involved in the process and substance of the trials.

The chapter is organised into three parts. The first part addresses the ROC war crimes trials that started in 1946. Three main issues are dealt with in this part: the legality of the ROC national trials against the Japanese war criminals, the applicable law adopted by the ROC war crimes provisions and two most important cases among the pre-1949 trials, namely the Sakai Takashi case and the Tani Hisao case. In the second part, the chapter explores the PRC's war crimes trials held in Shenyang and Taiyuan in 1956. Similarly, this part assesses the PRC trials based on three grounds: the legitimacy of trying the Japanese war criminals, the applicable law invoked by the Special Military Tribunals and the main features of the judgments. Last, there is a comparative discussion on the Chinese war crimes trials and an assessment of their legacy and contribution to international law.

29.2. War Crimes Trials Under the Republic of China

On 14 August 1945 a defeated Japan surrendered to the Allies. The following day the Emperor of Japan delivered a radio broadcast – "the Imperial Rescript on the Termination of the War" – announcing to his people that Japan accepted the Proclamation Defining Terms for Japanese Surrender ('Potsdam Declaration') and unconditionally surrendered to the Allied states.[3]

[3] Zhang Xianwen, *A History of Republic of China*, Nanjing University Press, Nanjing, 2006, p. 608.

Before officially processing trials against Japanese war criminals who committed most serious crimes in China, the ROC Supreme National Defence Council, which served as the highest military authority, delivered an Opinion on Dealing with Issues on Japan ('Opinion') on 12 August 1945.[4] This Opinion consisted of two parts. An emphasis was placed upon the basic principle set out in Article 1, which provided for "[d]ealing with issues on Japan shall be in accordance with the Potsdam Declaration and the principles jointly decided by the Allies". Further, the Opinion pointed out that the purposes of post-war efforts were "to reform Japan, to democratise its system, to make it realise the value of peace, and to understand China and the Allies".[5]

On 6 November 1945 the Chinese Ministry of War, the General Staff, Ministry of Foreign Affairs, Ministry of Justice, the Secretariat of Executive Yuan, and the Far Eastern and Pacific Sub-Commission ('Sub-Commission') of the United Nations War Crimes Commission ('UNWCC') jointly established the Commission on Dealing with War Criminals ('War Criminals Commission') to specifically undertake the war criminals issue.[6] The War Criminals Commission's mandate was to formulate policies for war crimes trials, to investigate, arrest and extradite war criminals, and to monitor the process of war crimes military tribunals in general. In February 1946 the Supreme National Defence Council enacted the Regulation on Processing the War Criminals, War Crimes Trial Procedure and Detailed Rules of War Crimes Trial Procedure.[7] These legal documents provided detailed procedure to arrest, try and execute Japanese war criminals.

Realising that the IMTFE was dealing with Class A war criminals who participated in a joint conspiracy to start and wage war, the ROC government targeted war criminals who committed Class B (war crimes)

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4 Qin Xiaoyi, *Zhonghua Minguo Zhongyao Shiliao Chubian – Duiri Kangzhan Shiqi* [Important Documents Collection of the History of the Republic of China: The Period of the Anti-Japanese War], vol. 7(4), Central Committee of Chinese Nationalist Party, Taipei, 1981, pp. 637–40.

5 *Ibid.*, p. 638.

6 Hu Jurong, *Zhongwai Junshi Fating Shenpan Riben Zhanfan – Guanyu Nanjing Da Tusha* [Trials of Japanese War Criminals in Chinese and Foreign Military Tribunals: About the Nanjing Massacre], Nankai University Press, Tianjin, 1988, p. 112.

7 Ren Xiaoguang, *Zhonghua Minguo Shi* [History of the Republic of China], vol. 11, Zhonghua Book Company, Beijing, 2011, p. 232.

Items	Original detainees	Inadmissible	Not to prosecute	Acquitted	Fixed-term imprisonment	Life imprisonment	Death sentence	Sub-total	Non-war criminals (repatriated)	Ending cases	Remarks
Ministry of National Defence	8		58	18	12	10	6	102		144	13 unlisted
Northeast Xing Yuan[8]	329	13	197	72	23	4	9	318	11		
Wuhan Xing Yuan	232	17	75	91	18	5	5	211		21	
Guangzhou Xing Yuan	961		101	39	37	10	38	255	694	9	33 unlisted
Xuzhou HQ, Department of the Army	81		46	3	11	3	8	71	10		
Shanghai Military Tribunal	316		20	12	12	3	4	51	68		Terminated on 30 June 1947
The Second Sui Jing Qu[9]	137		40	8	5	1	9	63	74		
Taiyuan Sui Jing Gong Shu[10]	15			4	2	3	2	11		4	
Baoding Sui Jing Gong Shu	180		57	23	20	2	8	130	19	40	
Taiwan Garrison Command	121		69	13	27		1	110	11		
Total	2435	30	661	283	167	41	110	1292	878	218	

Table 1: ROC Military Tribunals for Japanese War Criminals (25 December 1947)[11]

[8] Xing Yuan [行辕], is also referred to as "Mobile Barracks of High Command". This is a Chinese term primarily referring to a ROC government Regional Special Office opened on behalf of the military supreme commander in a particular region, where there was a high-ranking government or military official as the regional representative of the supreme commander-in-chief.

[9] Sui Jing Qu [绥靖区] refers to the district in the conflict zone set by the ROC government for military and political purposes. The ROC government established a command in each Sui Jing Qu in order to control the district. See also *Central Daily News*, "Sui Jing Qu Shi Zheng Gang Ling" [The Administration Programme in Sui Jing Qu], 22 October 1946.

[10] Sui Jing Gong Shu [绥靖公署] refers to the administrative institution located in the principal city of a Sui Jing Qu.

and Class C (crimes against humanity) crimes in the territory of China. These Japanese war criminals were imprisoned in ten war criminal detention facilities run by Ministry of National Defence. According to the War Crimes Trials Procedure, war crimes military tribunals would be established in Beijing, Nanjing, Hankou, Guangzhou, Taiyuan, Xuzhou, Jinan, Taipei and Shenyang.[12]

From the second half of 1945 to the end of May 1947 the ROC war crimes military tribunals processed 1,178 cases in total, of which 281 were sentenced, 275 not prosecuted, 56 sentenced to death, 76 sentenced to fix-term imprisonment and 84 acquitted.[13] The general data of the detainees and the trials are illustrated in Table 1.

29.3. Legality of the ROC Military Tribunals and the Instrumental Preparation

It is generally recognised that the Potsdam Declaration constituted a solid foundation for the legitimacy of the ROC war crimes trials.[14] Article 10 of the Potsdam Declaration provided that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners".[15] In a parallel way, the IMTFE corresponded with but did not circumscribe national war crimes trials.[16] Article 3 of the Special Proclamation for Establishment of an IMTFE of 19 January 1946 pointed out: "Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals". Pursuant to these articles, it can be concluded that every victim state that suffered from Japan's invasion and acts of violence

[11] Ren, 2011, p. 234, see *supra* note 7. It should be noted that the total number and the number in each list do not match precisely in the original chart. Here it follows the original.

[12] *Ibid.*, p. 233; Hu, 1988, p. 129 see *supra* note 6.

[13] Hu, 1988, p. 120, see *supra* note 6.

[14] Long Xingang and Sun Jun, "1956 Nian Tebie Junshi Fating Shenyang Taiyuan Shenpan Yanjiu" [On the Special Military Tribunals Trials of Shenyang and Taiyuan in 1956], in *Literature on Party Building*, 2009, vol. 2, p. 10.

[15] Proclamation Defining Terms for Japanese Surrender, Potsdam, 26 July 1945.

[16] Weng Youli, "Guomindang Zhengfu Chuzhi Riben Zhanfan Shuping" [Comments on the National Government's Disposal of Japanese War Criminals], in *Journal of Southwest China Normal University (Philosophy and Social Sciences Edition)*, 1998, vol. 6, p. 112.

was entitled to exercise jurisdiction over the Japanese war criminals who had participated in atrocities.

As early as 1942 the ROC government had pronounced that Japan would be held responsible for all the crimes committed in China. Initially, it was the Ministry of Foreign Affairs that was responsible for investigating and collecting relevant evidence. However, it did not function as well as expected. In June 1943 the ROC authorities decided to set up a specific commission to investigate all offences perpetrated on Chinese soil. For this purpose, the Executive Yuan, Ministry of Justice, Ministry of Foreign Affairs and Ministry of War drafted the Rules Concerning the Organisation of an Investigation Commission on Crimes of the Enemy, which was adopted by the Assembly of the Executive Yuan and submitted to the Supreme National Defence Council for filing in June 1943.[17] On 23 February 1944 the Investigation Commission on Crimes of the Enemy was officially established in Chungking (Chongqing). Its mandate was to investigate all crimes perpetrated in China or against Chinese people, in relation to violation of the laws and customs of war, including 1) murder and massacres – systematic terrorism; 2) rape or abduction of women for the purposes of enforced prostitution; 3) forced labour of civilians in connection with the military operations of the enemy; 4) pillage; 5) imposition of collective penalties; 6) deliberate bombardment of undefended places or other non-military objects; 7) attacks on merchant ships without warning; 8) deliberate bombardment of hospitals or other charitable, educational and cultural buildings and monuments; 9) breach of rules relating to the Red Cross; 10) use of deleterious and asphyxiating gases; 11) killing prisoners of war and wounded; 12) producing, selling, transporting drugs, forced planting poppies or opening opium dens providing drugs; 13) illegal construction in occupied territory, and other acts of violations of the laws and customs of war.[18]

On 5 March 1945 the Investigation Commission on Crimes of the Enemy, together with the Investigation Commission on Damage and Loss of War, was integrated into the Interior Ministry. In addition, after the surrender of Japan, a special Investigation Commission for Crimes Committed in Nanjing (Nanking) was found on 7 November 1945.[19]

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17 Hu, 1988, p. 110, see *supra* note 6.

18 *Ibid*., p. 111.

19 *Ibid*., 1988, p. 112.

On 6 December of 1945, by approval of the Executive Yuan, the War Criminals Commission was eventually set up in Chungking. Not only were municipal departments engaged in preparation of the ROC war crimes trials but also national institutions like the Ministry of War, General Staff, Ministry of Foreign Affairs, Ministry of Justice and the Secretariat of the Executive Yuan, as well as the Sub-Commission of the UNWCC, an international body. The UNWCC had announced the establishment of the Sub-Commission in June 1944, with its site on the territory of China so as to assist the function of the main UNWCC in London. Although China provided the Sub-Commission with premises in Chungking, at that time the provisional capital of China, it had not been incorporated in the municipal law of China but was a truly international body not subject to any specific municipal legal order.[20]

Under the guidance of the War Criminals Commission, the Ministry of War was designated to issue warrants to arrest war criminals and other general assignments; the Ministry of Justice embarked on investigating and drafting the war criminals list; the Department of Martial Law of the General Staff was assigned to supervise trial proceedings and executions; the Ministry of Foreign Affairs tackled extradition and translation of war criminals lists which were supposed to be submitted to the Sub-Commission for final review.[21] On 28 February 1946 the Military Affairs Commission reported to the Supreme National Defence Council that the surrender of Japanese armies in conflict zones was complete, and simultaneously submitted drafts of three legal documents with regards to war criminals and the lists of detention facilities for Japanese war criminals and war crimes military tribunals.[22] Since Chinese national trials targeted Class B and C Japanese war criminals, much extradition work needed to be done before the commencement of trials. In October 1946 the ROC trials against Japanese war criminals finally entered into the court process stage.[23]

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20 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* ("History of the UNWCC"), His Majesty's Stationery Office, London, 1948, pp. 127–29.

21 *Ibid.*, p. 131; Hu, 1988, pp. 112–13, see *supra* note 6.

22 Qin, vol. 2(4), 1981, p. 397, see *supra* note 4.

23 Ren, 2011, p. 232, see *supra* note 7.

29.4. Applicable Law in the ROC War Crimes Trials

The ROC trials were the first time in history that China put foreign war criminals on trial. No precedent could be followed and no municipal law could be relied on. In order to process, adjudicate and detain Japanese war criminals under rule of law, three war crimes provisions were enacted by the Supreme National Defence Council on 28 February 1946, viz. Regulation on Processing the War Criminals (the 'Regulation'), War Crimes Trial Procedure (the 'Procedure'), Detailed Rules of the War Crimes Trial Procedure (the 'Detailed Rules').[24] These three documents have been deemed as the first set of rules governing war crimes process in China.

29.4.1. Initial War Crimes Provisions, February 1946

The Regulation on Processing the War Criminals contained 15 Articles with regard to the process of arrest and detention. Article 1 indicated that arrest was to be directed by the Ministry of War after disarming the Japanese troops and should not disturb the surrender procedure and regional order and peace. Articles 2 and 3 regulated supervision and registration of Japanese prisoners before and after their arrests. From Article 4 to Article 9, the Regulation divided Japanese war criminals into three groups based on which authorities' control they were under. For instance, pursuant to Article 5, for those under the Japanese government's control, the War Crimes Commission should notify the ROC Ministry of Foreign Affairs in writing, which would then present a note to the US government without delay, requesting the latter to transmit the note to the Supreme Commander for the Allied Powers ('SCAP') in Japan. After arresting the listed war criminals, the SCAP should extradite them to the Chinese authority. Articles 12 and 13 addressed the detention of the convicted war criminals which should be undertaken in the facilities appointed by the Ministry of War. Additionally, Article 14 provided that this Regulation applied to the cases of non-Japanese war criminals as well.[25]

The subsequent War Crimes Trial Procedure embodied 10 Articles, structuring a framework for applying international law and domestic law together in the trials. Article 1 defined the scope of the accused on trial.

[24] Qin, 1981, p. 397, see *supra* note 22.

[25] *Ibid.*, pp. 398–99.

With respect to matters not provided for in this Procedure, the tribunal had recourse to the Trials Procedure of the Army, Navy and Air Force and the ROC Criminal Procedural Law. Emphasis should be given to Article 8, which provided the applicable law for the trials, and which explicitly stated: "To convict any war criminal, the tribunal shall apply public international law, international customs, Criminal Law of the Army, Navy and Air Force, other special criminal laws and Chinese Criminal Law". Although Article 8 did not reveal the hierarchy of the laws, it can be seen from the sequence that international law took precedence over domestic law in this Procedure. In addition, Article 8 also reflected the principle of *lex specialis derogat legi generali*, by putting special criminal laws prior to criminal law in general.[26]

The Detailed Rules comprised 16 Articles with the purpose of assisting in applying the Procedure. It addressed the recommendation and appointment of judges and prosecutors for each military tribunal, the competence of prosecutors, the right to search of tribunals and its associated agencies, the rights of the defendants and the guarantee of a public hearing.[27] However, no provision in the Detailed Rules mentioned the applicable law. It did not interpret what exactly "public international law" or "international customs" contained in Article 8 of the Procedure meant, nor did it refer to any existing international treaties or convention to which China had acceded at that time.

29.4.2. War Crimes Trial Ordinance, October 1946

Acknowledging that the applicable law provided by the Procedure was too broad and ambiguous to implement, the Ministry of National Defence submitted an amendment to the Supreme National Defence Council on 26 August of 1946.[28] In its submission, the Ministry of National Defence plainly addressed the following: "Noting that since in our country no appropriate law could be applied for conviction of war criminal, it hence lacks standards for measuring penalty".[29] Therefore, the drafting of a

[26] *Ibid.*, p. 399.

[27] *Ibid*., pp. 400–1; Song Zhiyong, "Zhanhou Chuqi Zhongguo De Duiri Zhengce yu Zhanfan Shenpan" [Chinese Foreign Policy Towards Japan and the Trial of Japanese War Criminals in the Years Immediately after the Second World War], in *Nankai Journal*, 2001, vol. 4, p. 44.

[28] Qin, 1981, p. 408, see *supra* note 22.

[29] *Ibid.*

more comprehensive war crime provision was imperative. The draft was prepared by the Ministry of National Defence, Ministry of Justice, Ministry of Foreign Affairs and the Secretariat of Executive Yuan, reviewed by legal scholars and experts, and approved by the Legislative Yuan. The final text was eventually named the War Crimes Trial Ordinance (the 'Ordinance') and released on 23 October 1946.[30]

The Ordinance included 40 Articles, four times more than the number of articles in the Procedure. Article 1 directly identified the scope of applicable law: "For conviction and punishment of war criminals, in addition to public international law, the tribunal shall apply the Ordinance. Where matters are not provided in the Ordinance, the criminal law of the Republic of China shall apply". This Article released a clear signal that public international law had priority over other national laws in the war crimes trials. Taking Article 8 of the Procedure into account, the term "public international law" in the Ordinance should be construed in a broader manner that incorporated "international customs" and even other sources of public international law. Following public international law, the Ordinance would take second place. Failing that, the ROC Criminal Code governed. Observing the language of Article 1, the hierarchy of applicable law for war crimes trials was thus completely clear.

To be more specific, Article 2 provided that when applying the ROC Criminal Code, the tribunals should primarily rely on *lex specialis* regardless of the status of the accused; failing that, general criminal law would apply. Hence, Article 2 not only reflected the principle of *lex specialis* but also ruled out the application of the Criminal Law of the Army, Navy and Air Force. Some commentators have opined that the reason behind this implicit exclusion may mirror the leniency policy adopted by the ROC government.[31]

Compared to the three initial legal instruments mentioned above, the Ordinance improved the practicability and precision of the applicable law in the following aspects. First, Article 3 provided "war criminals" with a definition and divided them into four groups:

1) combatants or non-combatants from foreign states who before or during the war conducted the planning, preparation, initiation or waging of war of aggression

[30] Song, 2001, p. 45, see *supra* note 27.

[31] Qin, 1981, p. 393, see *supra* note 22.

against China in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

2) who, during the war or hostilities against China, perpetrated crimes directly or indirectly in violation of the laws or customs of war;

3) who, before or during the war or hostilities against China, conducted murder, extermination, enslavement, forced labour, deportation, anaesthesia or suppression of free thoughts, forced planting or use of poppies, forced taking or injection of drugs, forced sterilisation, persecutions on political or racial grounds and other inhumane acts committed against Chinese people;

4) who, during the war or hostilities against China, committed offences other than 1) to 3), shall be punished according to the ROC Criminal Code.

The identification and clarification of "war criminals" was critical for war crimes trials, as they provided practical scope for the prosecution and enhanced the efficiency of conviction. The characterisation of three groups of war criminals echoed three types of crimes under the IMTFE Charter, namely 1) crimes against peace, 2) conventional war crimes, and 3) crimes against humanity.

Second, the Ordinance listed crimes against humanity with an exhaustive list. Article 4 specified "inhumane acts" incorporated by Article 3(2), which denoted a similar description of crimes against humanity from a contemporary perspective.[32] The list of inhumane acts in Article 4 of the Ordinance was as follows:

i. Murder and massacres – systematic terrorism;
ii. Putting hostages to death;
iii. Torture of non-combatants or civilians;
iv. Deliberate starvation of non-combatants or civilians;
v. Abduction of women for the purposes of enforced prostitution;[33]
vi. Deportation of non-combatants or civilians;

[32] *Ibid.*, pp. 409–11.

[33] It must be noted that Article 4, sub-paragraph 5 was missing in the original text. See *ibid.*, p. 409.

vii. Internment of non-combatants or civilians under inhumane conditions;
viii. Forced labour of non-combatants or civilians in connection with the military operations of the enemy;
ix. Usurpation of sovereignty during military occupation;
x. Compulsory enlistment of combatants among the in habitants of occupied territory;
xi. Attempts to denationalise the inhabitants of occupied territory;
xii. Pillage;
xiii. Confiscation of property;
xiv. Exaction of illegitimate or of exorbitant contributions and requisitions;
xv. Debasement of the currency an issue of spurious currency;
xvi. Imposition of collective penalties;
xvii. Wanton devastation and destruction of property;
xviii. Deliberate bombardment of undefended places
xix. Wanton destruction of religious, charitable, educational and historic buildings and monuments;
xx. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew;
xxi. Destruction of fishing boats and of relief ships;
xxii. Deliberate bombardment of hospitals;
xxiii. Attack or destruction of hospital ships;
xxiv. Breach other rules relating to the Red Cross;
xxv. Use of deleterious and asphyxiating gases;
xxvi. Use of explosive or expanding bullets and other inhuman appliance;
xxvii. Directions to give no quarter;
xxviii. Ill-treatment of prisoners of war and wounded;
xxix. Employment of prisoners of war on unauthorised works;
xxx. Misuse of flags of truce;
xxxi. Poisoning of wells and food;

xxxii. Indiscriminate mass arrests;[34]
xxxiii. Malicious assault;
xxxiv. Forced occupation or extortion of property;
xxxv. Robbery of historical arts or cultural property;
xxxvi. Forced conduct on unauthorised works or prohibition exercising of legal rights;
xxxvii. Other acts in violation of laws and customs of war, and cruel or destructive conducts exceeding military necessity.

Third, the Ordinance delineated the extent and scope of jurisdiction, which had not been mentioned in any of the three initial legal instruments enacted in February 1946. Article 5 articulated temporal jurisdiction according to which the tribunals could only exercise jurisdiction over the offences under Article 3 that had taken place after 18 September 1931 and before 2 September of 1945. However, crimes under Article 3(1) and (3) constituted exceptions. That is to say, even if the crimes under Article 3(1) or (3) were committed before 18 September of 1931, they would fall within the jurisdiction of the ROC tribunals. The second sentence of Article 5 further pointed out that the statute of limitations provided by Article 80 of the Criminal Code did not apply to the case of war criminals. Those who committed the offences under Article 3 after 2 September 1945 would be subject to general military judicial organs according to the ROC Criminal Code. As to personal jurisdiction, Article 7 elucidated that, besides foreign soldiers and non-soldiers perpetrating crimes, the Ordinance also applied to people in Taiwan Province who committed offences under Article 3 before 25 October of 1945.[35]

Fourth, the Ordinance confirmed superior responsibility and addressed circumstances that could not relieve the accused of criminal responsibility. Article 10 referred to command responsibility: "For the war criminal who was in a position of authority or command and failed to prevent or repress the commission of the said crimes shall be criminally

[34] The above-mentioned crimes are almost identical to the list of war crimes drawn up by the Commission on Responsibilities of the Paris Peace Conference in 1919, which was adopted later by the United Nations War Crimes Commission after a discussion on 2 December 1943. See History of the UNWCC, pp. 477–78, see *supra* note 20.

[35] 25 October of 1945 is regarded by the ROC government as "Taiwan Retrocession Day", which signifies the end of 50 years of Japanese colonial rule of Taiwan and the recovery of Chinese authority in Taiwan.

responsible for the crimes". Pursuant to Article 9, the accused could not invoke the following grounds for excluding criminal responsibility: 1) the commission of the crimes was under orders of the superior; 2) the commission of the crimes was the outcome of performing his or her official duties; 3) the commission of the crimes was carried out in furtherance of a governmental policy; 4) the commission of the crimes was a political conduct.[36] The exclusions of exemption of criminal responsibility here appear slightly different from Article 6 of the IMTFE Charter. Only two circumstances in the IMTFE Charter were envisaged to rule out criminal responsibility of the accused: one was the official position and the other were acts under orders of his or her government or of a superior. Nevertheless, the IMTFE Charter allowed these two circumstances to be considered as factors in mitigating measures, "if the Tribunal determines that justice so requires".[37] The Ordinance contained no similar language or indication in this regard.

Fifth, the Ordinance established the parameters for sentencing. Article 11 articulated that for those committing crimes under this Ordinance as well as violations of the ROC Criminal Code, unless otherwise provided, the tribunals would adopt the standard of sentences under the ROC Criminal Code. In cases where the Criminal Code included no relevant provision of the crime, pursuant to Article 12 of the Ordinance, the tribunal would apply the sentencing standard under the similar provisions in the Criminal Code by analogy. Additionally, Article 13 set the death penalty and life imprisonment for those who committed the crimes under Article 3(1) or (3), namely crimes against peace or crimes against humanity, whereas Article 14 noted those who committed conventional war crimes and conducted the offences repeatedly, caused mass victims, resorted to extremely cruel means or other serious circumstances would be sentenced to more than 10 years' imprisonment or the death penalty, if the most severe sentence was under 10 years' imprisonment pursuant to the Criminal Code. In particular, Article 16 of the Ordinance ruled out any application of mitigating factors under the ROC Criminal Code.

Sixth, the Ordinance added a review mechanism for judgments. Article 37 provided that a judgment for a convicted accused should be

[36] Qin, 1981, p. 412, see *supra* note 22.

[37] Charter of International Tribunal for the Far East, 19 January 1946, Tokyo, Article 6.

submitted to the Ministry of National Defence for approval and execution. With respect to cases of life imprisonment or the death penalty, the Ministry of National Defence should submit them to the Chairman of the ROC Government for approval and execution. If the Ministry of National Defence or the Chairman considered the judgment contrary to the law or inappropriate, the judgment should be remanded to the original tribunal for a retrial.[38]

Interestingly, Article 36 of the Ordinance expressed concern about the judgments themselves. The provision read: "Regarding the main context of the judgment, the tribunal shall act in accordance with principles of public international law". What does the allusion to "principles of public international law" mean? It certainly does not purport to repeat provisions relating to applicable law in trials or sentence. Therefore, one possibility could be that this article suggested that the tribunals were draft the judgment in consistency with the structure or format of the international tribunals' judgments, such as those of the IMTFE.

29.5. International Law and Judgments of the ROC Trials: The Sakai Takashi Case and the Tani Hisao Case

As already noted, although the ROC trials were held in 10 cities, the War Crimes Military Tribunal of the Ministry of National Defence ('Nanjing War Crimes Tribunal') was nevertheless the most high-profile one.[39] The Nanjing War Crimes Tribunal acted in accordance with Article 2 of the Ordinance and was designated to process the cases delivered by various sources: the Ministry of National Defence, the Ministry of Justice, the Administrative Institution of War Criminals, other war crimes military tribunals and the extradited Japanese war criminals from the Chinese Delegation in Japan.[40] Fifty-two cases in total were presented to the Nanjing War Crimes Tribunal, among which the trials of Sakai Takashi and Tani Hisao were most significant.[41]

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38 Qin, 1981, p. 415, see *supra* note 22.

39 Ren, 2011, p. 233, see *supra* note 7; Hu, 1988, p. 129, see *supra* note 6.

40 Hu, 1988, p. 118, see *supra* note 6.

41 Luo Junsheng, "Shi Meiyu Yu Zhanhou Nanjing Dui Rijun Zhanfan de Shenpan" [Shi Meiyu and the Post-war Nanjing War Crimes Trials), in *The Scan of the CPC History*, 2006, no. 1, pp. 20–26.

29.5.1. The Sakai Takashi Case

The first case before the Nanjing War Crimes Tribunal was the Sakai Takashi case on 30 May 1946. Known as "Tiger of Hong Kong", Sakai was a Lieutenant General in the Imperial Japanese Army during the Second World War. In the summary translation of the Sakai Judgment, he was convicted of crimes against peace, war crimes and crimes against humanity. He had been found guilty of participating in the war of aggression and of inciting or permitting his subordinates to murder prisoners of war, wounded combatants or non-combatants; rape, plunder and the forced deportation of civilians; indulging in cruel punishment and torture; and causing destruction of property. For these crimes, he was sentenced to death on 27 August 1946 and subsequently executed on 30 September.[42]

As for the charges of crimes against peace, the Nanjing War Crimes Tribunal examined various kinds of evidence, including documents submitted by the Administrative Heads of northern China and written orders by Sakai himself to the Chinese authorities in northern China, which had been substantiated by evidence given by the war crimes investigators before the Tribunal and corroborated by the deposition of Major General Tanaka Ryūkichi before the IMTFE, and found that Sakai had violated international law by undermining the territorial and administrative integrity of China. Accordingly, Sakai was held criminally responsible for violating the Nine-Power Treaty of 1922 and the Paris Pact,[43] thereby constituting crimes against peace. Moreover, offences against the internal security of China were to be punished in accordance with the ROC Criminal Code.

Regarding the charges of war crimes and crimes against humanity, Sakai asserted that he participated in the war in line with the orders of the Japanese government and that he was not responsible for the acts committed by his subordinates because he was not aware of the

[42] United Nations War Crimes Commission, Chinese War Crimes Military Tribunal of the Ministry of National Defence: Trial of Takashi Sakai, Summary of the Proceedings (in English and Chinese), 27 August 1946, p. 2 ("Trial of Takashi Sakai") (http://www.legal-tools.org/en/go-to-database/record/3789a0/).

[43] Kellogg-Briand Pact, Paris, 27 August 1928. The ROC government had adhered to the Kellogg-Briand Pact after it became effective on 24 July 1929.

occurrences of those acts.[44] However, the Nanjing War Crimes Tribunal held that: "War of aggression is an act against world peace. Granted that the defendant participated in the war on the order of his Government, a superior order cannot be held to absolve the defendant from liability for the crime".[45] Furthermore, the Nanjing War Crimes Tribunal confirmed that "a field Commander must hold himself responsible for the discipline of his subordinates is an accepted principle" and that "in inciting or permitting his subordinates to murder prisoners of war, wounded combatants, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, Sakai had violated The Hague Convention, concerning the Law and Customs of War on Land and the Geneva Convention of 1929".[46]

In the final part of the Judgment, the Tribunal invoked the applicable law as follows: "Article 1 and Article 8 of the Procedure; Article 291 of the ROC Criminal Procedure Law; Article 1 of the Nine-Power Treaty; Article 1 of the Paris Pact; Article 4-7 Sub-sections 3 and 7 of Article 23; Articles 28, 46 and 47 of the Hague Convention;[47] Articles 1 to 6, 9 and 10 of the Geneva Convention;[48] Articles 3 and 4 of Criminal Law of the Army, Navy and Air Force; Paragraph 1 of Article 101 and Article 55 of the Criminal Code". From the sequence of the listing of applicable law, the procedural rules, i.e. the Procedure and the ROC Criminal Procedure Law, were placed in the first place and then followed the substantive law containing public international law and domestic law. In relation to substantive law, international treaties and conventions took precedence over municipal criminal law, within which the *lex specialis* principle applied. This is the precise structure of applicable laws, as indicated in Articles 1 and 8 of the Procedure. Hence, as at most international tribunals, the instruments that established the Nanjing War Crimes Tribunal governed the process in the first place. The reason that it was the Procedure and not the Ordinance that applied in the Sakai case is

44 Trial of Takashi Sakai, p. 4, see *supra* note 42.

45 *Ibid*., p. 5.

46 *Ibid*., pp. 5–6.

47 Convention Respecting the Laws and Customs of War on Land, Hague, 4 September 1900.

48 Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (http://www.legal-tools.org/en/go-to-database/record/1d2cfc/).

that the trial was conducted on 30 May 1946, whereas the Ordinance, as an amendment of the Procedure, was only adopted in August 1946.

29.5.2. The Tani Hisao Case

Tani Hisao was a Lieutenant General in the Imperial Japanese Army and used to serve as commander of the 6th Division at the time of the Nanjing campaign.[49] He was arrested by the Allied Powers in Tokyo on 2 February 1946, extradited to China on 1 August 1946 and finally detained in Shanghai for trial.[50]

In the indictment of the Chief Prosecutor Chen on 25 December of 1946, Tani was charged with crimes against peace, war crimes and crimes against humanity.[51] Concerning the charge of crimes against peace, the Prosecutor invoked Article 10 of the Covenant of the League of Nations, Article 1 of the Nine-Power Treaty, the Paris Pact and the 1899 Hague Convention for the Pacific Settlement of International Disputes to determine that Tani violated international law by participating in the Japanese invasion of Shandong and intentionally undermining the territorial and political integrity of China. For war crimes and crimes against humanity, the Prosecutor cited Articles 4–7, 23(3), 23(7), 28, 46 and 47 of the Hague Convention to support the charges. Additionally, the Prosecutor relied on the War Crimes Trial Ordinance, Criminal Code and Criminal Procedural Law to support charges against Tani before the Nanjing War Crimes Tribunal.[52]

Tani pleaded not guilty and raised several grounds for precluding his criminal responsibility: 1) he claimed that he had never been aware that his subordinates committed the offences of rape, murder and other atrocities; 2) there were many Japanese troops stationed in Nanjing, and the evidence was not sufficient to establish that the alleged crimes were perpetrated by his subordinates; 3) he had strict discipline to control the conduct of his subordinates and repeatedly warned them not to carry out

[49] Masahiro Yamamoto, *Nanking: Anatomy of an Atrocity*, Praeger, Westport, 2000, p. 194.

[50] Hu, 1988, p. 147, see *supra* note 6.

[51] Liu Daqun, "Chinese Humanitarian Law and International Humanitarian Law", in Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Martinus Nijhoff, Leiden, 2012, p. 354; Hu, 1988, p. 246, see *supra* note 6.

[52] Hu, 1988, p. 207, see *supra* note 6.

acts of violence against non-combatants; 4) the "comfort stations" established were under the approval of the local authorities, and the comfort women gave their consent too.[53]

In the Judgment, the Nanjing War Crimes Tribunal rebutted the defence by introducing the doctrine of individual responsibility in the mode of co-perpetration. The Tribunal held that "if the accused shared a common plan of committing a crime with other perpetrators and intended to utilise the acts of other perpetrators to achieve the purpose, he shall bear criminal responsibility for all acts performed by any person in execution of such plan". After examining evidence, including films made by the Japanese Army, the Nanjing War Crimes Tribunal found that the defendant was a high-level commander of the Army during the invasion of Nanjing, and having encountered intensive resistance, the defendant's troops, along with other Japanese armies, carried out, systematically, mass murder, rape, plunder and the destruction of property of civilians. The scale and consequence of such atrocities could not match the defendant's assertion of "undisciplined accidents". The Judgment went on:

> Based on the common plan with other Japanese commanders in Nanjing, the defendant jointly sent his subordinates to invade and harass civilians, which led to a large-scale mass murder, arson, rape, and plunder. By mutually utilising the co-commanders' power, the defendant achieved his goal of retaliation against the resistance from China […]
>
> Furthermore, it is confirmed that the defendant during the war indulged his subordinates to kill prisoners of war and non-combatants, to conduct acts of rape, plunder, destruction of property and other inhumane treatment towards civilians. Accordingly, the defendant shall be held criminally responsible for committing war crimes and crimes against humanity in violation of the Hague Convention respecting the Laws and Customs of War on Land and the Geneva Convention relative to the Treatment of Prisoners of War.[54]

Consequently, the Nanjing War Crimes Tribunal confirmed the charges of war crimes and crimes against humanity and invoked Article 291 of the ROC Criminal Procedure Law; Articles 4(1), 23(c), 23(g), 28, 46 and 47

[53] *Ibid.*, p. 205

[54] *Ibid.*, pp. 213–14.

of the Hague Convention;[55] Articles 2 and 3 of the Geneva Convention;[56] Articles 1, 2(2), 3(1), 4, 11, 24 and 27 of the Ordinance; Articles 28, 55, 56 and 57 of the ROC Criminal Code. On 10 March 1947, the Nanjing War Crimes Tribunal sentenced Tani to death.[57] On 26 April of the same year, he met his death by gunfire at Yuhuatai, or Rain Flower Terrace, located in the south of Nanjing.[58]

In comparison to the Sakai case, the distinctions of the applicable laws in the Tani case were displayed in the following aspects. First, since the Nanjing War Crimes Tribunal dismissed the charge of crimes against peace, the Nine-Power Treaty and the Paris Pact were not mentioned in the Judgment. Second, considering that the Ordinance replaced the Procedure, it served as both procedural and substantive law at the same time, which explains why the Nanjing War Crimes Tribunal cited the Ordinance subsequent to the Hague Convention and the Geneva Convention as a substantive legal basis for vindicating the defendant. Third, the Criminal Law of the Army, Navy and Air Force was not mentioned in the Tani Judgment, because the Ordinance excluded it on the grounds that martial law was too harsh and severe. So if the Nanjing War Crimes Tribunal insisted on applying it in the trials, almost all the Japanese war criminals would have been sentenced to death, which was contrary to the leading policy of leniency and pardon.[59] It should be borne in mind that, in convicting the accused of war crimes and crimes against humanity, the Nanjing War Crimes Tribunal constantly relied on the Hague Convention IV and the 1929 Geneva Convention, to which China had acceded on 12 June 1907[60] and on 19 November 1935[61] respectively.

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55 Convention Respecting the Laws and Customs of War on Land, Hague, 4 September 1900, see *supra* note 47.

56 Convention Relative to the Treatment of Prisoners of War, Geneva, see *supra* note 48.

57 Fei Fei Li, Robert Sabella and David Liu, *Nanking 1937: Memory and Healing*, M.E. Sharpe, New York, 2002, p. 55

58 Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II*, Basic Books, New York, 1997, p. 172.

59 Wang Jingsi, "Nanjing Shenpan Huigu" [Reflections on Nanjing Trial], in *Journal of Hunan Radio and Television University*, 2011, no. 1, p. 35; Song, 2001, p. 46, see *supra* note 27.

60 International Committee of the Red Cross, Treaties and States Parties to Such Treaties: China.

61 Convention Relative to the Treatment of Prisoners of War, Geneva, see *supra* note 48.

29.6. War Crimes Trials Under the People's Republic of China

After the war crimes trials from 1946 to 1947, the ROC government planned to send the Japanese war criminals who were sentenced to fixed-term or life imprisonment back to Japan to serve their sentences. However, given that China had no military presence in Japan, the ROC government was in no position to supervise these war criminals overseas. Hence, the prisoners were all detained in the War Criminal Prison of the Ministry of National Defence in China. After its defeat and retreat in the Civil War, the ROC government repatriated these war criminals to Japan in February 1949, who were then subjected to the control of the US forces stationed in Japan and the Japanese government.[62]

Between June and July 1956, the PRC Supreme People's Court established two Special Military Tribunals in Shenyang and Taiyuan. Forty-five Japanese war criminals were prosecuted for supporting the war of aggression and violating international law and humanitarian principles.[63] The trials were conducted by the relatively new PRC government. But the Chinese Communist Party's position in trying and punishing Japanese war criminals went back more than ten years to the end of the Second World War.

On 14 September 1945 *Jiefang Daily* released an editorial entitled "Punishing War Criminals Severely" ("Yancheng Zhanzheng Zuifan"), stating that "it [war crimes trials] is not for revenge, but for justice and long-lasting peace in the future".[64] According to the editorial, the war criminals fell into three groups: first, the military commanders who waged the war of aggression and executed the policy of aggression; second, the conspirators and accomplices of the war; and third, the active supporters and participants of the Japanese Army headquarters. "Those who violated the law and customs of war and crimes against humanity, such as massacre, torture of hostages, killing, enslavement, assault of

[62] Sui Shuying, "20 Shiji Wushi Niandai Zhongguo Dui Riben Zhanfan De Shenpan Yu Shifang" [On the Trial and Release of the Japanese War Criminals by the Chinese Government in the 1950s], in *Journal of Yantai University (Philosophy and Social Science Edition)*, 2006, vol. 19, no. 4, pp. 459–61.

[63] Liu, 2012, p. 355, see *supra* note 51.

[64] Zhao Shemin and Meng Guoxiang, "Zhonggong Shenpan Riben Zhanfan Gongzuo Shuping" [Comments on the PRC Trials of the Japanese War Criminals], in *Social Science in Nanjing*, 2009, vol. 8, p. 96.

civilians, pillage, destruction of private and public properties, shall be punished by criminal law, regardless of their status".[65]

The 1,062 Japanese war criminals subject to the 1956 trials came from two different battlefields. One group of 969 war criminals was captured by the Soviet Union in northeast China in 1945 at the end of the war and transferred to China in July 1950. This group of prisoners was held in Fushun and tried in Shenyang. The other group of 140 was captured by the ROC government. They were imprisoned and later tried in Taiyuan. Forty-six prisoners died because of illness during their detention.[66]

29.6.1. Legitimacy of the PRC War Crimes Trials

After the proclamation of the People's Republic on 1 October 1949, the PRC government has been the sole legitimate representative of China ever since. Under the principle of succession of government in international law, the PRC government had the authority to exercise jurisdiction over Japanese war criminals, especially for those who joined the Army of YAN Xishan after the Second World War[67] and participated in the Civil War against the PRC regime.[68] Many observers commented that the ROC war crimes trials did not fully respect the will and expectations of the Chinese people, particularly in the case of Okamura Yasuji.[69] Hence, the PRC government might be able to enhance its legitimacy with the Chinese people by bringing the unpunished Japanese war criminals to justice. In order to align the war crimes trials with international law and customs, as well as take the basic conditions of China into consideration, the PRC government invited Dr. Mei Ju-ao, who previously served as the Chinese

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65 *Ibid*., p. 97.

66 Chen, 2009, p. 452, see *supra* note 1; Sui, 2006, p. 460, see *supra* note 62.

67 YAN Xishan was a Chinese warlord who served in the government of the Republic of China and effectively controlled the province of Shanxi from 1911 to 1949. After the Second World War, Yan's troops, including thousands of former Japanese troops, held out against the Communists during the Chinese Civil War for four years. His forces held out until April 1949, after the Nationalist government had lost control of northern China, allowing the PLA to encircle and besiege his forces.

68 Long and Sun, 2009, p. 10, see *supra* note 14.

69 Wang Heli, Zhang Jia'an and Zhao Xinwen, "Tebie Junshi Fating zai Shenyang Shenpan Riben Zhanfan Shimo" [The Special Military Tribunal's Trials of Japanese War Criminals in Shenyang], in *Jianghuai Culture-History*, 2001, vol. 1, p. 19.

Judge at the IMTFE, as consultant in preparation of the war crimes trials.[70]

On 25 April 1956 the Standing Committee of the National People's Congress passed the Decision on How to Deal with Japanese War Criminals in Japan's Invasion of China ('War Criminals Decision'), which was regarded as the authoritative legal basis for conducting the entire war crimes trials. Pursuant to the War Criminals Decision, the Supreme People's Procuratorate decided not to impose charges on two groups of Japanese war criminals totalling 335 and 328 in number respectively.[71] With the assistance of the Red Cross Society of China, these detainees were repatriated to Japan in June and July 1956.[72]

On 9 June 1946 the Special Military Tribunal of the Supreme People's Court heard the first case in Shenyang. The reason that the location was transferred from Fushun, where the Japanese prisoners had been detained, to Shenyang was that Japan had planned and carried out the Mukden Incident in 1931 in Shenyang, which was considered as the start of the Anti-Japanese War of China. On 12 June the other Special Military Tribunal of the Supreme People's Court began to work in Taiyuan.[73]

29.6.2. Applicable Law in the PRC War Crimes Trials

In contrast to the ROC war crimes trials, the PRC government did not specifically enact any legislation to lay down the normative foundations for trying war criminals. Instead, the only instrument having legal character was the War Criminals Decision adopted at the 34th Meeting of the Standing Committee of the National People's Congress, promulgated

[70] Jin Hengwei, "Cong Erzhan hou Shenpan Guoji Zhanfan zhong Tanxi Xinzhongguo Zhengfu Shenpan Riben Zhanfan de Tedian" [The Characteristics of the PRC Trials against Japanese War Criminals: From the Perspective of Post-war Trials], in *Education for Chinese After-School*, 2011, vol. 1, p. 21.

[71] Wang Zhanping (ed.), *Zhengyi de Shenpan –Zuigao Renmin Fayuan Tebie Junshi Fating Shenpan Riben Zhanfan Jishi* [Just Trials：Japanese War Crimes Trials by the Special Military Tribunals of the Supreme People's Court], The People's Court Press, 1991, pp. 763–67.

[72] *Ibid*., pp. 760–70.

[73] Zhao and Meng, 2009, p. 67, see *supra* note 64.

by Order of the President of the People's Republic of China on 25 December 1956, and effective immediately.[74]

The War Criminal Decision stated:

> The detained Japanese war criminals committed various crimes against the Chinese people, publicly violating international law and the principle of humanity, and inflicted great pain and suffering on the Chinese people during the invasion of Japan. Judging by the crimes they committed, they deserved severe punishment. Yet, whereas current situations and changes have taken place over the past decade after Japan's surrender; whereas the friendly relations between the peoples of China and Japan have developed; whereas the majority of Japanese war criminals have realised their guilt, the Standing Committee decided to adopt a lenient policy to deal with this issue.[75]

The principles and regulations were illustrated as follows:

1) For the war criminals who were lower-ranked or showed repentance and expressed regret for the crimes committed, they may be treated with leniency and be exempted from prosecution; for those who committed serious crimes, they shall be charged magnanimously according to the nature of the crimes and their behaviour in detention; for those who committed other crimes in the territory of China after the surrender of Japan, they shall be given a combined punishment for the crimes committed;
2) The Trials against the Japanese war criminals shall be conducted by Special Military Tribunals organised by the Supreme People's Court;
3) The language and the documents used in the Special Military Tribunals shall be translated into the language understood by the defendants;
4) The defendant can conduct his own defence, or employ lawyers registered in the PRC judicial authority to

[74] Standing Committee of the National People's Congress, "The Decision on How to Deal with Japanese War Criminals in Japan's Invasion of China" ("Decision"), in Wang, Zhang and Zhao, 1991, p. 1, see *supra* note 69.

[75] *Ibid.*, p. 2.

defend on his behalf. If necessary, the Special Military Tribunal can assign a lawyer to the defendants;

5) The Judgment of the Special Military Tribunal is final and binding;

6) If the convicted war criminals behave well in serving their sentences, they may be given early release.[76]

It is clearly articulated in Article 1 of the War Criminals Decision that war criminals with different status and behaviour would be differentiated and treated in a generally lenient manner under the guidance of a magnanimous policy. Unlike the ROC War Crimes Procedure or the War Crimes Ordinance, which precluded any application of mitigating factors under the Criminal Code of Republic of China, the PRC War Criminals Decision plainly incorporated a lenient policy into the sentencing of the accused. In terms of the applicable law, the War Criminals Decision remained silent.

29.7. International Law and Judgments of the PRC War Crimes Trials

The PRC war crimes trials consisted of four trials in total: the case of Takebe Rokuzō and 27 others in Shenyang, the case of Suzuki Keiku and seven others in Shenyang, the case of Jōno Hiroshi and other seven Japanese war criminals, and the case of Tominaga Juntarō. The term "in violation of rules of international law and the principle of humanity" was cited repeatedly in the reasoning of each of the Judgments. Does this therefore mean that international law was a legal source of the PRC war crimes trials?

29.7.1. The War Criminal Trials in Shenyang: The Cases of Takebe Rokuzō, Furumi Tadayuki, Saito Yoshio and Miyake Hideya

In the Shenyang Special Military Tribunal, 36 Japanese war criminals were charged with war crimes in two separate cases, in which several defendants were jointly prosecuted. The first defendant, Takebe, was a Home Ministry bureaucrat in the Japanese government and the Director of

[76] *Ibid.*

the General Affairs Agency in Manchukuo from 1940 to 1945.[77] The Special Military Tribunal confirmed:

> During the invasion of the Japanese imperialist, the defendant committed crimes by furthering the aggressive policy of the Japanese Government, supporting the war of invasion waged by Japan against China, manipulating the puppet government of Manchukuo so as to undermine the sovereignty of China in violation of rules of international law and the principle of humanity; orchestrating, determining and carrying out a series of policies to suppress, enslave, poison civilians; forced labour and military service, pillage in northeast China; and enforcing the "exploration and immigration" policy so as to seize the farm land.[78]

The second defendant was Furumi, who served as section chief of the Accounting Division and deputy head of the General Affairs Agency of the puppet Manchukuo state council.[79] The Special Military Tribunal found that during the period of the Japanese invasion of China, Furumi committed crimes by

> furthering the aggressive policy of the Japanese government, supporting the war of invasion against China, participating in manipulation of the puppet government of Manchukuo so as to undermine the sovereignty of China in violation of the rules of international law and the principle of humanity; formulating and enforcing a series of policies for plundering China of its wealth, enslaving, poisoning and suppressing Chinese people; and implementing the "exploration and immigration" policy so as to forcibly occupy the farm land in northeast China".[80]

Third came Saito, who during the period of Japan's invasion between 1935 and 1945, served as the director of the gendarme command of Japanese Kwantung Army, chief of the public security section, senior

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77 Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975*, Stanford University Press, Stanford, 1982, p. 138.

78 *Ibid*., p. 325.

79 China Fushun War Criminals Management Centre, *Riben Zhanfan De Zaisheng Zhidi: Zhongguo Fushun Zhanfan Guanli Suo* [*Place of New Life of Japanese War Criminals: China Fushun War Criminals Management Centre*], China Intercontinental Press, 2005 ("Place of New Life"), p. 26.

80 Wang, 1991, p. 327, see *supra* note 71.

minister, chief of the police section and major general-director of the puppet Manchukuo gendarme training division.[81] The Special Military Tribunal held that he was criminally responsible for "committing crimes of carrying out the aggressive policies of Japanese government, supporting the war of invasion waged by Japan against China in violation of rules of international law and principle of humanity; formulating, determining and implementing policies and measures of suppressing the Chinese people; and directing arrest, interrogation, and massacre of the Chinese people".[82]

With regard to the fourth defendant Miyake, who used to serve as chief of Rehe Police Section of Manchukuo, and director of Fengtian Provision Policy Department,[83] the Special Military Tribunal considered that he was guilty of "violating rules of international law and the principle of humanity by carrying out a series of policies of suppressing Chinese people, forced labour and plundering food; and directing arrest, interrogation and wilful killing of civilians".[84]

From the above Judgments, it can be concluded that the Special Military Tribunal convicted the defendants of the crimes in very general terms, lacking the more specific characterisation of crimes as the IMTFE and the ROC military tribunals had. In the context of the Judgments, the PRC Special Military Tribunals chose not to indicate by name any of the crimes established in international law at that time, such as crimes against peace, war crime or crime against humanity. But it seemed not to reject them either. For instance, the titles of the indictments read as follows: "The Indictment of the Supreme People's Procuratorate of the People's Republic of China against Takebe Rokuzō and others 27 war criminals concerning *war crimes*",[85] "The Indictment of the Supreme People's Procuratorate of the People's Republic of China against Jōno Hiroshi and others seven war criminals concerning *war crimes and crime of counterrevolution*",[86] and "The Indictment of the Supreme People's Procuratorate of the People's Republic of China against Tominaga

81 Place of New Life, p. 18, see *supra* note 79.

82 Wang, 1991, p. 329, see *supra* note 71.

83 Place of New Life, p. 22, see *supra* note 79.

84 Wang, 1991, p. 331, see *supra* note 71.

85 *Ibid.*, p. 15 (emphasis added).

86 *Ibid.*, p. 515 (emphasis added).

Juntarō concerning *war crime and crime of espionage*".[87] While "crime of counterrevolution" and "crime of espionage" amount to national criminal law, the term "war crimes", however, definitely subscribes to international criminal law. In so doing, the PRC authority appeared to adopt the incorporation of international law into the war crimes trials in a subtle manner, while at the same time keeping some distance from publicly applying specific treaties or customs of international law as the ROC war crimes trials had done.

29.7.2. The War Criminal Trials in Taiyuan: The Case of Tominaga Juntarō

Similar to the Shenyang war crimes trials, the Taiyuan Special Military Tribunal was established for trying the Japanese war criminals captured in Shanxi Province. During the period of Japan's occupation of China, Tominaga Juntarō served as the second section chief of the Police Department of the Railway Administration, secretary-general of the Intelligence Department of the North China Transportation Company controlled by Japan and the puppet Manchukuo government, and Vice Captain of Peiping Radio Station of the ROC Ministry of National Defence after the surrender of Japan at the end of the war.[88] He was the last Japanese war criminal tried in China.[89]

The PRC Supreme People's Procuratorate charged Tominaga with war crimes and the crime of espionage during the Anti-Japanese War and after. The Special Military Tribunal concluded that during the period of the invasion of the Japanese Imperialists, the defendant

> indeed violated rules of international law and the principle of humanity. He shall bear criminal responsibility for implementing the aggressive policy of the Japanese Imperialists; participating in planning, determining and carrying out a series of spy and espionage activities; establishing and expanding police and organisations of spying and espionage; establishing the puppet government; stealing and spying on the intelligence of China; and

[87] *Ibid*., p. 683 (emphasis added).

[88] *Ibid*.

[89] Lin Xiaoguang, "Zhongguo Gongchandang Dui Qinhua Riben Zhanfan de Shenpan Chuli he Gaizao" [The CCP War Crimes Trials and Rehabilitation of Japanese War Criminals], in *Party History Research and Teaching*, 2004, no. 4, p. 32.

> suppressing, enslaving, arresting, torturing and killing Chinese people.

Furthermore, "after the surrender of Japan, the defendant committed crimes by conspiring to revive Japanese Imperialism in China, colluding with Hanjian [traitor to China] and spies, actively directed his agents to steal intelligence of the liberated areas and hence undermining the liberation of Chinese people". Consequently, the Special Military Tribunal accorded to the spirit of Articles 1(2) and (3) of the War Criminals Decision, and Article 7(3) of Regulations of the People's Republic of China on Punishing Reactionaries, convicting Tominaga of the crimes.[90]

Although the Special Military Tribunal invoked laws in the Tominaga Judgment, it nonetheless did not refer to international law specifically. But it should be underlined that this was the only Judgment that listed the applicable law amongst all the PRC war crimes trials in 1956.

29.7.3. Implications of Applying International Law

Examining all the above cases, it is beyond doubt that the PRC war crimes trials adopted international law in prosecuting and processing the Japanese war criminals. The most vital evidence was that the Special Military Tribunals constantly and continuously relied on the terms like "'violating' or 'in violation of' rules of international law and the principle of humanity" as the only legal standard to assess the crimes committed. Such expressions were identical to the language of the War Criminals Decision.[91]

Interestingly, the allocation of "'violating' or 'in violation of' rules of international law and the principle of humanity" appeared not to be fixed. For example, in the Takebe Judgment it was placed after the descriptions of the offence of furthering the Japanese policy of aggression and jeopardising the sovereignty of China, and before those of participating in suppressing, enslaving, torturing and killing Chinese people.[92] However, in the Miyake Judgment, the Special Military Tribunal primarily pointed out that "the defendant violated rules of

[90] Wang, 1991, p. 732, see *supra* note 71.

[91] Decision, in Wang, Zhang and Zhao, 1991, p. 1, see *supra* note 74.

[92] Wang, 1991, p. 325, see *supra* note 71.

international law and the principle of humanity" and then turned to describe the offences such as furthering Japanese policies of suppressing people, forced labour, torture and killing civilians.[93]

The reason for this distinction between the two Judgments is not the charges for which the war criminals were prosecuted but the actual crimes they committed. From the criminal offence descriptions of the Takebe case, it is not difficult to include "furthering the Japanese policy of aggression and jeopardising the sovereignty of China" in crimes against peace, while "participating in suppressing, enslaving, torturing and killing Chinese people" usually falls into the scope of war crimes or crimes against humanity.[94] And the phrase "in violation of rules of international law and the principle of humanity" was just allocated in between. By contrast, since Miyake had been convicted of the offences analogous to war crimes and crimes against humanity without any charges of crimes against peace, the expression of "violation of international law and the principle of humanity" went prior to the offence description. This pattern has been demonstrated by other PRC war crimes trials, such as the case of Suzuki and others[95] and the case of Hiroshi Kino and others, and the case of Tominaga Juntaro[96].

29.8. Remarks on Chinese War Crimes Trials, 1946–1956

When people look back and review the Chinese war crimes trials after the Second World War, they usually put weight on the policy of magnanimity

[93] *Ibid.*, p. 331, see *supra* note 72.

[94] According to Article 5 of the IMTFE Charter, "crimes against peace" refer to "the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"; "war crimes" refer to "violation of the laws or customs of war", and "crimes against humanity" refer to "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan".

[95] Wang, 1991, pp. 495–506, see *supra* note 71.

[96] *Ibid.*, pp. 663–76, 732–34.

adopted by both the ROC and the PRC governments in relation to internal and foreign affairs.[97] The interplay and interrelationship between Chinese war crimes trials and international law are rarely mentioned.

29.8.1. Contributions of Chinese War Crime Trials to International Law

29.8.1.1. The ROC War Crimes Trials: Chinese State Practice of International Criminal Law and International Humanitarian Law

Concerning the pre-1949 war crimes trials, the ROC government conducted and organised a series of steps for preparing the trials: initiating comprehensive investigations, collecting evidence on a large scale, extraditing Japanese war criminals from other states, enacting specific legislation as the applicable law, and finally establishing war crimes military tribunals. The preparatory work of the ROC trials followed the mode of establishing the Nuremberg IMT and the IMTFE.[98]

The enactment of the War Crimes Trial Procedure, Detailed Rules and the later War Crimes Trial Ordinance marked the means for China to incorporate, or at least try to incorporate, international law into municipal legislation and judicial decisions. Considering that the Charter of the Nuremberg IMT[99] and the Charter of the IMTFE were issued and released on 8 August 1945 and 19 January 1946, the ROC authorities adopted the conception of the classifications of crimes enshrined in these Charters, namely crimes against peace, war crimes and crimes against humanity.[100]

Furthermore, the ROC war crimes military tribunals relied on international law, especially international treaties and conventions to

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97 Adam Cathcart and Patricia Nash, "War Criminals and the Road to Sino-Japanese Normalization: Zhou Enlai and the Shenyang Trials, 1954–1956", in *Twentieth-Century China*, vol. 34, no. 2, 2008, pp. 89–93.

98 Zhao Lang, Liao Xiaoqing and Zhang Qiang, "Shenyang Shenpan Yu Niulunbao Dongjing, Nanjing Shenpan Bijiao Yanjiu" [A Comparative Study of the Trial in Shenyang and the Trials in Nuremberg, Tokyo and Nanjing], in *Journal of Liaoning University (Philosophy and Social Science)*, vol. 37, no. 6, 2009, p. 65.

99 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (http://www.legal-tools.org/en/go-to-database/record/844f64/).

100 Qin, see *supra* note 22, pp. 408–15.

which China had acceded, like the Nine-Power Treaty, the Paris Pact, the Hague Convention IV and the Geneva Convention III, to convict the accused. The application of these international legal sources even took precedence over that of Chinese domestic law like the ROC Criminal Code and the Criminal Procedural Law. In addition, the military tribunals contemplated crimes and criminal responsibility as separate issues, and confirmed several grounds that could not exempt the accused from criminal responsibility, for instance, superior orders or the execution of a state's policy.[101]

29.8.1.2. PRC War Crimes Trials: China's Consistent Attitude Towards International Law

Turning to the post-1949 war crimes trials held by the PRC government, a major factor was the limited judicial resources that the PRC government had at its disposal in 1956, when the national legal system and legislation were incomplete, and no criminal code or criminal procedural law were available for application. Under these circumstances, the PRC authority passed the War Criminals Decision to set forth the principles and general procedures for the war crimes trials.

In the War Criminals Decision, the most significant part relating to international law was that the Standing Committee of the National People's Congress deemed that the offences perpetrated by the Japanese war criminals "violated rules of international law and the principle of humanity". Despite the fact that no applicable law relating to international treaties or customs was invoked, it set up a basic standard to evaluate and assess the Japanese war criminals' acts in trials and had served as the applicable law in the final judgments. As Mei Ju-ao commented, though the outcome of the PRC war crimes trials displayed the policy of magnanimity of the PRC government,

> the judgments for the Japanese war criminals were solemn and just. Every piece of evidence had been gone through by careful investigation and inquiries, collaborating with each other. The defendants had access to a fair trial, including the right to defence. The procedure of the PRC war crimes trials was consistent with international customs and rules of

[101] Trial of Takashi Sakai, p. 4, see *supra* note 42.

> international law. It reflected the spirit of humanity as well as the demand of justice.[102]

Taking into account the isolation of the PRC government by the international community in the 1950s, it may be a little bit surprising that the PRC Standing Committee of the National People's Congress and the Special Military Tribunals put much weight on determining whether the Japanese war criminals violated rules of international law and the principle of humanity. It can explain why there was no explicit reference to any existing international treaties or convention, even though the pre-1949 war crimes trials had already put the Hague Convention IV and the Geneva Convention III into practice. Nevertheless, from the title and context of the indictments and the judgments, the PRC war crimes trials actually acknowledged the three-type classification and identification of crimes established in the Nuremberg Charter, Charter of the IMTFE and the ROC War Crimes Ordinance. In this regard, the post-1949 trials presented China's consistent attitude towards international law concerning war criminals.

29.9. The Forgotten Legacy of the Chinese War Crimes Trials

The reasons for the Chinese war crimes trials being neglected or overlooked are complex. The pre-1949 ROC trials were, on the one hand, conducted in parallel to the Tokyo Trial and other national war crimes trials. Given that national trials were designated to deal with Class B and C crimes, they could be easily overshadowed by the international tribunals that tackled Class A war criminals from the scale of the crimes to the impact of the final judgments. On the other hand, the ROC trials did not have enough time to be introduced to the world due to the outbreak of the Chinese Civil War and thus lost an opportunity to enhance China's influence on the international stage.[103]

The PRC government also seemed to overlook the significant meaning of the ROC trials in enhancing the position of China in international affairs. Apart from ideological issues and mutual hostility, it is believed that the legacy of the ROC war crimes trials had been contaminated by the acquittal of Okamura, the commander-in-chief of the China Expeditionary Army of Japan. He was released and immediately

[102] *Renmin Ribao* [People's Daily], 23 June 1956, in Wang, 1991, see *supra* note 71, p. 756.
[103] Song, 2001, p. 47, see *supra* note 27.

protected by the personal order of Chiang Kai-shek, and later retained as a senior military adviser to the ROC government in Chinese Civil War.[104]

According to a telegram sent by the ROC Ministry of National Defence to the war crimes military tribunals on 1 July 1947, "the objective and purpose of punishing the war criminals is to maintain humanity and justice, and to guarantee the dignity of international humanitarian law, rather than revenge".[105] Admittedly, the ROC war crimes trials essentially punished the major Japanese war criminals and applied both international and domestic law rigidly in trials. For the first time since 1840, the Chinese government had the ability to independently and justly try and punish the Japanese war criminals who had caused atrocities and tremendous suffering to the Chinese people under international law.[106] More importantly, these Chinese trials echoed and corresponded to the development of international criminal law at that time, particularly in confirming the laws and customs of war, crimes against peace, war crimes, crimes against humanity, and individual and command criminal responsibility.

Acknowledging rules of international law and the principle of humanity, the post-1949 trials marked the complete end of the Second World War,[107] and achieved an impossible mission: all the Japanese war criminals confessed and pleaded guilty without any objection. No precedent had ever taken place at the international or domestic level.[108] In the end, regardless of political concerns, the Chinese war crimes trials from 1946 to 1956 no doubt constituted state practices in consolidating the development of international humanitarian law and international criminal law. They showed China's respect for the principle of humanity and consistent attitude towards international law as an active participant; and eventually they served the ultimate objectives of international peace and justice.

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104 Zhao Lang *et al*., 2009, p. 65, see *supra* note 98.

105 Yan Haijian, "Guomin Zhengfu dui Nanjing Datusha An Shenpan de Shehui Yingxiang Lunxi" [On the Social Effect of the Nanking Massacre Trials by the National Government], in *Fujian Tribune (The Humanities and Social Sciences)*, 2011, vol. 4, p. 112.

106 Jing Shenghong, "Lun Nanjing Shenpan Zhanfan Junshi Fating Dui Nanjing Da Tusha De Shenpan" [On the Trial of Nanjing Massacre Conducted by Nanjing War Crimes Tribunal], in *Social Science in Nanjing*, 2013, vol. 6, p. 150.

107 Zhao and Meng, 2009, p. 100, see *supra* note 64.

108 Wang, Zhang and Zhao, 1991, p. 20, see *supra* note 69.

30

Post-Second World War British Trials in Singapore: Lost in Translation at the Car Nicobar Spy Case

CHEAH Wui Ling*

30.1. Introduction

Nestled in the Bay of Bengal, the Andaman and Nicobar Islands have long been celebrated by travellers and writers for their lush greenery and idyllic beauty.[1] It has been said that these islands "glitter like emeralds" and lie like a "broken pearl necklace" scattered across 780 kilometres of the Indian Ocean.[2] During the heyday of European colonial rivalry, they were coveted and courted by the Danes, French and British in turn, with Britain outmanoeuvring the rest to secure its colonial grip over the islands until India's independence in 1947.[3] Today they are administratively divided into the districts of Andaman and Nicobar with 36 of the 554 islands serving as home to various communities.[4] The islanders speak various languages such as Bengali, Hindi, Nicobarese and Tamil, and

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1 For a history of these islands, see generally, B.R. Tamta, *Andaman and Nicobar Islands*, National Book Trust, New Delhi, 2000; Laxman Prasad Mathur, *Kala Pani□: History of Andaman & Nicobar Islands with a Study of India's Freedom Struggle*, Eastern Book Corporation, New Delhi, 1985; Philipp Zehmisch, "Freedom Fighters or Criminals? Postcolonial Subjectivities in the Andaman Islands, South-East India", in *Kontur*, 2011, no. 22.

2 Tamta, 2000, pp. 2–3, see *supra* note 1.

3 *Ibid.*, p. 11; Tamta also explains that the British were reluctant to give up the Andaman and Nicobar Islands due to its strategic location. *Ibid.*, p. 79; Mathur, 1985, pp. 226–33, see *supra* note 1.

4 Tamta, 2000, p. 3, see *supra* note 1.

practise a variety of religions including Hinduism, Bahai, Christianity and animism.[5] In the Nicobar district the Nicobarese are the predominant communal group.[6] Historically they have lived off the land by cultivating coconuts and vegetables while engaging in the occasional act of piracy.[7] Despite British colonial rule they continued to follow their own social and political customs.[8] These were the self-sufficient and diverse peoples whom the Japanese found when they arrived on the islands on 23 March 1942.[9]

Japan's Second World War occupation of the Andaman and Nicobar Islands was a dark period in the islands' history. Initially Japanese military personnel treated the islanders well but their conduct soon degenerated into brutality and chaos.[10] As the islands came under Allied attack and as food supplies ran low, the Japanese military started to suspect the islanders of espionage and increasingly accused them of theft.[11] Japanese soldiers rounded up local people for questioning and subjected them to torture, summary trials and execution. The Japanese also organised the mass killings of "undesirables" who included women and children. Many of those responsible for these atrocities would subsequently be tried by the British military in Singapore after the Second World War. Survivors travelled from these islands to Singapore to give their testimony in court before Allied judges. The media reported on these trials, and the words of trial participants were captured for posterity through careful transcription and archival preservation. Yet, today, these trials and these crimes receive little study or attention. The atrocities committed by the Japanese in the Andaman and Nicobar Islands are less well known compared to other war crimes such as the Burma–Siam Death Railway, the Nanjing (Nanking) Massacre or Unit 731's medical experiments.

This chapter hopes to rectify this situation by closely studying the trial of Itzuki Toshio and others for crimes committed by the Japanese in

5 *Ibid*., pp. 123–27, 134.

6 *Ibid*., p. 130.

7 *Ibid*., pp. 130, 132.

8 *Ibid*., p. 144.

9 *Ibid*., p. 46.

10 *Ibid*., p. 47; Mathur, 1985, p. 247, see *supra* note 1.

11 Mathur, 1985, p. 249, 253, see *supra* note 1.

Nicobar.[12] The main focus is on the communication problems encountered by trial participants during the trial. The criminal trial is increasingly viewed as today's preferred response to wartime atrocities, regardless of the crime's location or the people involved. Christine Schwöbel observes how the prosecution of international crimes has become a "prioritisation", with this "being prioritised over other possible projects of humanitarianism".[13] Debates focus on improving the effectiveness of these trials but do not question their foundational assumptions.[14] One such assumption of the Western adversarial trial is that the prosecution and defence are operating on a level playing field, both equally equipped to argue their respective positions at trial.[15] The criminal trial as conceived from a Western legal tradition assumes that the accused is given a chance to publicly counter the case of the prosecution and the unfavourable testimony of witnesses.[16] The accused is to be a participant rather than an "object of proceedings".[17] At the most basic level this requires participants to share the same language or be supported

[12] British Military Court for the Trial of War Criminals, Trial of Itzuki Toshio and others, WO 235/834, 11–16, 18–29, 25 and 26 March 1946, National Archives, UK ('TNA') ("Trial of Itzuki Toshio and others"). A microfilm and e-version of this case file may be found at the Central Library of the National University of Singapore. As documents are not arranged in order in the file so, in the interest of accuracy, this chapter makes reference to the slide number of the microfilm or e-version. Text from the trial transcripts has been quoted unchanged but for their formatting and visual arrangement. Only glaring spelling errors by the transcriber have been corrected. I have followed the spelling of names used by the transcriber. Key documents in *United Kingdom v. Toshio Itzuki et al.* may be found in the ICC Legal Tools Database as follows: Charge Sheet (http://www.legal-tools.org/doc/d9acc4/), Judgment (http://www.legal-tools.org/doc/9a3772/) and Judge Advocate General's Report (https://www.legal-tools.org/doc/f7e1ba/).

[13] Christine E.J. Schwöbel, "The Comfort of International Criminal Law", in *Law Critique*, 2013, vol. 24, p. 172.

[14] *Ibid*., p. 170.

[15] Writing about the common law adversarial trial in the American context, Kenneth Nunn observes how the "common view" of the trial sees it as "a contest waged between two opponents who have a roughly equal chance of convincing the fact finder that their version of events is true". Kenneth B. Nunn, "The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform" in *American Criminal Law Review*, 1995, vol. 32, no. 3, p. 782.

[16] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, "Introduction: Towards a Normative Theory of the Criminal Trial", in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial Volume 1: Truth and Due Process*, Hart Publishing, Oxford, 2004, p. 2.

[17] *Ibid.*

by adequate interpretation and translation services. The case of Itzuki Toshio and others demonstrates how participant expectations and judicial fact-finding may be frustrated when trial participants speak a multitude of languages. In this case these problems were further complicated by the trial's broader political context. The islands where these crimes were committed played an important role in the independence strategies of Indian nationalists who sided with the Japanese during the Second World War to overthrow British colonial rule.[18] For the British organisers of the trial there must have been high political stakes in ensuring the trial's "success" regardless of the obvious communication problems plaguing it.

This chapter also attempts to give the reader an idea of how the trial proceeded, how witnesses were called, the type of questions asked and the answers given. This trial looks very different from present-day war crimes trials. But like the trial of Itzuki Toshio and others, trials conducted in our globalised world today often involve judges hearing defendants and witnesses with different linguistic and cultural backgrounds. Researchers working on domestic trials have been studying problems of communication that arise in these multicultural contexts for quite some time.[19] However, these problems have only received sustained attention of late from researchers working in international criminal law and transitional justice.[20] This chapter thus hopes to add to the growing scholarship on communication problems in war crimes trials by demonstrating that these problems are not new. They were similarly encountered in historical trials.

[18] Tamta, 2000, p. 68, see *supra* note 1; Mathur, 1985, p. 249, see *supra* note 1.

[19] For recent groundbreaking research conducted on war crimes prosecutions, see Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations in International Criminal Convictions*, Cambridge University Press, Cambridge, 2010; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2013.

[20] Examples of the rich research done on domestic courts are: Virginia Benmaman, "Legal Interpreting: An Emerging Professor", in *The Modern Language Journal*, 1992, vol. 76, no. 4, pp. 445–54; Elena M. de Jongh, "Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency" in *The Modern Language Journal*, 1991, vol. 75, no. 3, 285–95; Michael Cooke, "Understood by All Concerned? Anglo/Aboriginal Legal Translation", in Marshall Morris (ed.), *Translation and the Law*, John Benjamins Publishing, Amsterdam, 1995, pp. 37–66.

30.2. An Overview of the Crimes, Trial Proceedings and Trial Participants

Like other trials conducted by the British individually after the Second World War, the trial of Itzuki Toshio and others was conducted pursuant to the Royal Warrant adopted by the British executive in 1945[21] and its appended regulations[22] which referred to and incorporated British military law and rules.[23] Pursuant to this Royal Warrant, the British military established military courts comprising not less than three officers to try war crimes that were defined as "a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939".[24] These courts were authorised to sentence guilty individuals to death, life imprisonment, imprisonment, confiscation or a fine.[25] However, death sentences could only be handed down with the agreement of all judges when the court comprised three judges or with the concurrence of at least two-thirds when the court comprised more than three judges.[26] The findings and sentences of these military courts had to be confirmed by a confirming officer before they were considered valid, and any convicted accused could petition the confirming officer against the court's finding or sentence within 14 days of the trial's completion.[27]

On 11 March 1946 Itzuki Toshio and others was heard before a British military court convened in Singapore.[28] Sixteen Japanese defendants were prosecuted for the torture, ill treatment, unjust trial and

[21] War Office, Royal Warrant, 18 June 1945, Army Order 81 of 1945 ("Royal Warrant") (http://www.legal-tools.org/doc/386f77/).

[22] War Office, Regulations for the Trial of War Criminals Attached to Royal Warrant, 18 June 1945, Army Order 81 of 1945 ("Regulations for the Trial of War Criminals") (http://www.legal-tools.org/doc/386f77/).

[23] The British Military also passed Instruction No. 1 which set out trial procedure in greater detail. Allied Land Forces South-East Asia, War Crimes Instruction No. 1, 2nd ed., WO 32/12197, 4 May 1946 ("ALFSEA Instruction") (TNA). This instruction required the convening officer to provide the accused and his counsel with an interpreter.

[24] Regulation 1, Regulations for the Trial of War Criminals, see *supra* note 22.

[25] Regulation 9, *ibid.*

[26] *Ibid.*

[27] Regulations 10 and 11, *Ibid.*

[28] Trial of Itzuki Toshio and others, slide 00345, see *supra* note 12.

subsequent execution of civilian residents on Car Nicobar.[29] In summary, the prosecution argued that on various dates in July and August 1945, the accused had been involved in the arrest, trial and execution of numerous civilians suspected of spying against the Japanese on Car Nicobar, an island at the northern tip of the Nicobarese island chain. The Japanese had believed that the spying efforts of these Nicobarese had facilitated the Allied Powers' sea bombardment of Japanese military positions in July 1945. Due to their geographic location, the islands were of great strategic importance to both the British and the Japanese throughout the Second World War.[30] When the Japanese military first arrived on the islands they told the islanders that Japan would liberate them from their British colonial masters, most of whom had abandoned the islands at the news of Japan's impending invasion.[31] During the war the Indian Independence League, which fought on Japan's side with the aim of securing India's independence from British rule, asked Japan to hand over the islands so that they might be used as the League's base for government.[32] Subsequently, Japan's Minister of War Tōjō Hideki made a symbolic announcement that the islands were to be handed over to the Indian Independence League.[33] This explains why the British prioritised the islands' recapture during the Second World War and saw this as fundamental to the restoration of British prestige.[34] Allied espionage efforts and attacks on the islands caused the Japanese to turn their wrath on numerous civilians who were accused of colluding with the Allies and summarily executed. The trial of Itzuki Toshio and others dealt with some of such crimes committed by the Japanese against local people on these islands.

[29] The names and ranks of the defendants were: Major General Itzuki Toshio, Lieutenant Commander Ogura Keiji, Captain (Naval) Ueda Mytsharu, Lieutenant Colonel Sakagami Shigero, Lieutenant Colonel Saito Kaizo, Captain Sumi Toyosaburu, Captain Muneyuki Yasuo, Warrant Officer Kita Tomio, Petty Officer Arai Mitsui, Sergeant Major Matsuoka Hachiroemon, Lance Corporal Torii Kazuo, Lance Corporal Nakazawa Tanakichi, Private Kimura Hisao, Private Ono Minoru, Interpreter Ushida Masahiro and Interpreter Yasuda Munehara.

[30] Tamta, 2000, p. 45, see *supra* note 1.

[31] *Ibid.*; Mathur, 1985, p. 246, see *supra* note 1.

[32] Tamta, 2000, p. 68, see *supra* note 1.

[33] Mathur, 1985, p. 249, see *supra* note 1.

[34] *Ibid.*, p. 70.

The highest-ranking accused in Itzuki Toshio and others held the rank of Major General and the lowest-ranking accused held the rank of Private. Two of the accused had served as interpreters. The presiding judge, Lieutenant Colonel L.G. Coleman, was a solicitor and from the Department of the Judge Advocate General in India.[35] The other two members of the court were Major W.M. Gray and Captain R.D. Kohli.[36] The former was from the Scottish Rifles and the latter was a member of the 2nd Punjab Regiment.[37] The prosecutor, Captain L.B. Stephen, was a law student from the Gordon Highlanders.[38] All 16 of the Japanese accused were defended by two Japanese defence counsel: Nakazono and Toda, who were judges of the High Court in Japan.[39]

The trial featured four charges. The first charge alleged that between 1 July 1945 and 31 August 1945 the defendants had been "concerned in the torture and other illtreatment" of civilian residents resulting in the death of six civilians.[40] The second charge alleged that on 28 July 1945 Major General Itzuki Toshio and Captain Ueda Mytsaharu had been "concerned together in the unjust trial and judgment of civilian residents" which led to 49 civilians being condemned to death and executed.[41] The third charge stated that on 6 August 1945 Itzuki and Lieutenant Colonel Sakagami Shigero had been involved in another unjust trial leading to the sentencing and execution of 22 civilian residents.[42] The fourth charge accused Itzuki and Sakagami of being involved on 12 August 1945 in yet another unjust trial that led to the execution of 12 victims.[43] As a poignant aside, it should be noted that just two days after the 12 August 1945 killings, Japan would unconditionally surrender to the Allied Powers.[44] However, the British only arrived on the Andaman and Nicobar Islands on 8 October 1945, and it was only on

35 Trial of Itzuki Toshio and others, slide 00371, see *supra* note 12.
36 *Ibid.*
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*, slide 00368.
41 *Ibid.*
42 *Ibid.*
43 *Ibid.*, slide 00369.
44 Mathur, 1985, p. 253, see *supra* note 1.

9 October 1945 that the formal surrender ceremony took place on these islands.[45]

The entire trial lasted for 14 days from 11 to 26 March 1946. At the end of the trial, six of the accused were sentenced to death and executed on 3 May 1946 and 23 May 1946.[46] The rest were sentenced to imprisonment terms ranging from three years to 15 years.[47] The prosecution called nine individuals to give evidence, eight of whom were Nicobarese witnesses from Car Nicobar. Most did not have high levels of education.[48] The defence called 20 persons to testify, 18 of whom were Japanese and two of whom were British military personnel. Like other Singapore trials, courtroom interpretation was provided on a consecutive basis. Interpretation was at times given in indirect rather than direct speech.

30.3. The Trial Begins: The Prosecution's Case

The military trial of Itzuki Toshio and others began in Singapore at 10 a.m. on Monday 11 March 1946.[49] The presiding judge read out the order convening the court and swore in the members of the court, interpreters and shorthand writers. The charges were then read out to the accused persons who were asked how they would like to plead. Each of the accused entered a plea of not guilty.[50]

The prosecutor then delivered his opening address before the court. Immediately after that, Japanese defence counsel raised some concerns he had with interpretation:

> By the defence counsel:
>
> > Before calling the witness I should like to ask one thing of the Court.
> >
> > When question is put to the witness, Sir, I should like to have the answer to that question translated into Japanese before the next question comes.

[45] *Ibid.*, p. 255.

[46] Trial of Itzuki Toshio and others, slide 00569l, see *supra* note 12.

[47] *Ibid.*, 00569.

[48] Based on trial transcripts, when witnesses were asked their occupation, they stated that they were involved in "cultivation".

[49] Trial of Itzuki Toshio and others, slide 00371, see *supra* note 12.

[50] *Ibid.*, slide 00372.

By the court:

> That is the old story all over again. Mr. Nakazano has the advantage of a Japanese Interpreter, and it should be his duty to do just the very thing – to translate everything put to the witness and every answer. Ask Mr. Nakazano whether this is done or not?
>
> The Defence Counsel says that while the answer is being translated into Japanese by the Interpreter, the next question comes to him and the interpreter misses his chance of listening to the next question.
>
> Ask Capt. Stevens (Prosecuting Counsel) to go very slowly. If there is any question that Mr. Nakazano misses, he may direct it to the attention of the Court and we can see that it is duly translated.[51]

Language and interpretation were to be persistent themes throughout the trial. However, this was not a problem of language alone, but a broader one of culture as the judges encountered defendants and witnesses with cultural backgrounds that were significantly different from their own.[52] This cultural unfamiliarity was in fact recognised by the prosecution's first witness, Captain Robert Gilmour Sadler, who had taken part in British investigations of the crimes concerned. Sadler testified as to how British investigations were conducted on Car Nicobar and how statements had been taken from the Japanese accused and survivors by the British Court of Inquiry. Early on in his testimony Sadler spontaneously volunteered to provide the court with information on "the nature and background of these Nicobarese" as he believed that it had "a very important bearing on this case".[53] However, the court declined Sadler's offer, noting that while it did not dismiss the relevance of information regarding "the character and nature" of the Nicobarese, it was unable to accept Sadler as "an expert witness" on this question.[54]

During his cross-examination of Sadler, defence counsel referred to the interpretation provided during pre-trial investigations and raised doubts as to whether the British interpreters concerned had been fluent in Japanese. Sadler said that the British interpreters appeared to have been

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51 *Ibid.*, slide 00374.

52 Benmaman, 1992, p. 446, see *supra* note 20.

53 Trial of Itzuki Toshio and others, slide 00375, see *supra* note 12.

54 *Ibid.*, slide 00376.

fluent though he also admitted that he did not understand Japanese himself and was unable to therefore judge the British interpreters' level of fluency. The court intervened, asking Sadler whether the accused who had been questioned by these interpreters had "appeared to understand without difficulty", which Sadler confirmed.[55] This exchange underscores the problem faced by those investigating or judging cases involving defendants and witnesses who do not speak the same languages.[56] Investigators and judges are often only able to depend on the appearance or conduct of the witness when deciding whether any interpretation of such testimony proceeds well.

Upon concluding his examination of Sadler, and before calling the next witnesses who were from Car Nicobar, the prosecutor explained to the court that the Nicobarese language is "a language not spoken outside". The common language among Nicobar islanders is Nicobarese which has links to Indo-Chinese languages and which may be further distinguished into six different dialects spoken in different regions.[57] The prosecutor had been unable to secure an interpreter for the Nicobarese witnesses. He suggested that one of two prosecution witnesses who also spoke English serve as an interpreter. The first, Reverend John Richardson, was a priest. The second, Abednego, was a schoolmaster who could speak English and Nicobarese.[58] The court noted that this situation was "most unusual" but would not object to it unless the defence did.[59] The court then asked the court interpreter to explain the situation to defence counsel and to highlight the "unusual" nature of the prosecutor's proposed arrangement.[60] The defence counsel decided on Abednego as interpreter and the court granted this request.[61] Right after this was decided the court adjourned for lunch. When the court reassembled defence counsel explained that during lunch

55 *Ibid.*, slide 00377.

56 In her groundbreaking works on contemporary trials, Nancy Combs observes that it is similarly difficult to discover the reason for inconsistencies between pre-trial investigative statements and trial testimony, and whether such a mistake is due to translation, transcription, memory or lying. Combs, 2010, p. 218, see *supra* note 19.

57 Tamta, 2000, pp. 221–22, see *supra* note 1.

58 Note that the trial transcripts reflect Abednego's name also as Abnego in various places, though he is generally referred to as Abednego. Trial of Itzuki Toshio and others, slide 00379, see *supra* note 12.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

the defendants had told him that they were worried that Abednego would be biased as an interpreter. The defendants asked the court whether a Hindustani interpreter could be appointed instead as they believed most of the residents of Car Nicobar spoke Hindustani.[62] The court pointed out that none of the witnesses spoke Hindustani. It also explained that allowing interpretation in this case provided the defence with more advantages than disadvantages as Japanese defence counsel would be able to cross-examine witnesses from Car Nicobar on their admitted statements through the interpreter.

The prosecution called Richardson as its next witness. Richardson testified that he served as a priest of the mission on Car Nicobar.[63] From other historical accounts, Richardson had played an important role in Nicobarese society. As a young boy he had been sent by the church to Burma for further education and had returned to work for the church.[64] He later served as the first representative of the islands to the Lok Sabha, India's parliament.[65] At trial Richardson gave testimony about the Japanese military's treatment of civilian residents including the criminal incidents in question and the death of his son who had been accused by the Japanese of spying. He described the people of Car Nicobar as "primitive", who "don't know much" and "have very little knowledge about things", and confirmed the court's query whether they could be described as "not educated".[66] Richardson's examination in chief went relatively smoothly, especially when compared with other witnesses who did not speak English. Nevertheless when cross-examined by defence counsel, at one point he seemed unable to control his emotions. When asked whether one of the accused had been "good" to the inhabitants, Richardson declared: "Yes, that is all outward only, only whitewash, but in their hearts they had death. If they had felt so kind to us why did they want to kill our people".[67] The court intervened, asking Richardson to limit himself to answering the questions, as this was "a Court of Law".[68]

62 *Ibid.*

63 *Ibid.*, slide 00379.

64 Tamta, 2000, p. 243, see *supra* note 1.

65 *Ibid.*

66 Trial of Itzuki Toshio and others, slide 00382, see *supra* note 12.

67 *Ibid.*, slide 00383.

68 *Ibid.*

The next witness called by the prosecution gave his name simply as Peter and testified to being 16 years of age.[69] Peter had acted as an interpreter for the Japanese and was questioned about the abuse of certain civilian residents. Peter's courtroom testimony was problematic as the multiple chains of interpretation resulted in clear errors and confusion. Before beginning his cross-examination of the witness the Japanese defence counsel stated that he believed the witness had served as an interpreter and could understand Japanese. Peter denied that this was so. Therefore the defence counsel noted that he would first ask the witness questions in Japanese, which would be translated into English for the benefit of the court and prosecution, and then into Nicobarese for the witness.[70] It emerged during the court's examination of Peter that he did speak a little Japanese.[71] The court's examination of Peter revealed problems of understanding:

> Q. What is the Japanese word for wireless?
> A. I do not know.
>
> Q. How was that explained to him by the Japanese?
>
> (Japanese Interpreter) Excuse me, Sir, When you said "what is the Japanese word for Wireless" he (witness) answered in Japanese which he (Nicobarese Interpreter) misunderstood. He (witness) mentioned it in Japanese.
>
> Q. Is that right. Did he reply to that question?
> A. I do not know wireless except telephone.
>
> (Japanese Interpreter) He said telephone in Japanese a minute ago. "Denwa".
>
> Q. Is that the word he used?
> A. (Japanese Interpreter) Yes. That means telephone in Japanese.[72]

Upon concluding its questioning of Peter, and before allowing the prosecution to call its next witness, the court highlighted to the prosecution that it would be "very undesirable" for the interpreter Abednego to "interpret all the evidences and then give evidence

[69] *Ibid.*, slide 00394.
[70] *Ibid.*, slide 00391.
[71] *Ibid.*, slide 00392.
[72] *Ibid.*, slide 00393.

himself". [73] After an exchange with the court, the prosecution subsequently agreed that it would not call Abednego the interpreter as its witness. Japanese defence counsel protested to this as Abednego had given a statement which if used would be "rather disadvantageous" to the accused.[74] In light of this the court decided that the Japanese defence counsel could cross-examine Abednego on this statement though Abednego would not undergo any examination-in-chief by the prosecutor. Japanese defence counsel disagreed to this and asked the court to completely ignore Abednego's statement instead. This the court refused to do, explaining that it would be up to the court to decide how the statement should be treated upon its consideration of all relevant facts, including defence counsel's cross-examination of Abdenego.[75]

The court then adjourned for the day and assembled the next day at 10 a.m. on 12 March 1946. The prosecution's next witness was Mohd Husen, a resident of Car Nicobar. He was able to speak Hindustani so the court arranged for interpretation to be provided by Captain Kohli, one of the judges.[76] Such an arrangement, while convenient, casts doubt on the impartiality of a judge. Requiring a judge to serve as interpreter also risks diverting the judge's attention away from his observation of the case. However, Japanese defence counsel did not object to this arrangement. The examination of Mohd Husen proceeded relatively smoothly and without any significant communication issues. Before calling the next witness the prosecutor decided to tell the court that he believed that the Nicobarese interpreter, Abdenego, did not have as good a command of English as Richardson, and that many questions had not been understood by Abdenego.[77] The court replied that it had no other remedy to the situation as the defence had objected to Richardson serving as an interpreter.[78] The court then addressed itself to Abdenego and asked him to inform the prosecutor or the court when there were questions that he could not follow or things that he could not understand.[79]

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73 *Ibid.*, slide 00398.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*, slide 00412.

77 *Ibid.*, slide 00403.

78 *Ibid.*

79 *Ibid.*

The prosecution then called its next Nicobarese witness Leslie, a 22-year-old resident of Car Nicobar who had worked for the Japanese in the kitchen and at times as an interpreter. While working as an interpreter Leslie had witnessed the interrogation and beating of detained civilian residents by a number of the accused. During defence counsel's cross-examination of Leslie the former raised questions about the discrepancies between Leslie's courtroom testimony and his pre-trial statement. Counsel questioned Leslie about the pre-trial statement he had made in which he had failed to mention the involvement of a particular individual in the beating of Taruka, whose involvement Leslie had referred to in his courtroom testimony.

> Q. With regard to this question of beating Taruka, the witness stated here that Kimura and Sumi beat him. Did he state that when he was asked by the British Officer the same thing as he stated here with regard to the same matter?
> A. He did not mention Capt. Sumi in his statement.
>
> Q. So he stated that when he was asked at that time that it was only Kimura only who had beaten him.
> A. He forgot Sumi, so he mentioned Kimura only.
>
> Q. Was not it the case that Sumi did not beat him at all?
> A. Capt. Sumi beat him.
>
> Q. Why did he not say so at that time?
> A. Because he has forgotten but now he can tell the truth and no lies.
>
> (By Court) – You mean now that he has sworn he will tell the truth and not lies. If he has not sworn he is able to tell lies?
> A. He will not tell a lie anyway.[80]

Leslie's response must have raised concern over the integrity of his previous statement as well as his courtroom testimony, as reflected in the court's intervention to ask Leslie whether he was telling the truth. However, as defence counsel's questioning continued, Leslie's answers showed that his earlier responses may have been the result of awkward interpretation and could have been explained by more innocuous factors.

> Q. When this question was put to him in December last year – December was 3 or nearly 3 months from now – the

[80] *Ibid*., slide 0411.

> memory must be fresh in those days and he must have known much better than now, why was it he had forgotten at that time and he remembers it now?
> A. He did not mention Sumi, but he kept it in his mind.
>
> Q. When he had it in his mind why didn't he say so?
> A. During the time he made the statement he forgot it, but when the statement was over he remembered it.
>
> Q. Even if after the statement was made when he remembered it why didn't he say so to the Officer?
> A. Because he didn't go to Headquarters again.[81]

After Leslie, 18-year-old Kansoi was called to testify. He had worked in "cultivation" prior to working as an interpreter for three months for the Japanese and had witnessed the abuse of Nicobarese residents.[82] Despite working as an interpreter and receiving training from the Japanese, Kansoi explained that he did not speak Japanese very well. Nevertheless his questioning did not reveal any significant communication problems. The prosecution then called Hachis, who had been detained and interrogated by the Japanese. His swearing in gave rise to an interesting exchange in court.

> By the Court. Ask him whether he knows what truth is?
> A. He knows.
>
> Q. Has he got any religious beliefs at all?
> A. Truth.
>
> Q. That is his belief?
> A. Yes.[83]

The prosecution had problems attempting to get Hachis to respond to its questions and sought to get the court to declare the witness hostile. The court disagreed and noted that though the witness was "quite unsatisfactory", he had "no malice".[84] The prosecution then declined to proceed with its questioning of Hachis. Defence counsel declined cross-examination. However, the court then proceeded to question Hachis in some detail. Hachis responded well to the court's examination. When the

81 *Ibid.*

82 *Ibid*., slide 00416.

83 *Ibid.,* slide 00424.

84 *Ibid.,* slide 00425.

prosecution had questioned him earlier as to what had happened during or after the raid, the interpretation provided of Hachis' response was: "He does not know anything".[85] However, in response to the court's more detailed questioning, Hachis replied that he had been "beaten" by two of the accused as part of their interrogation regarding whether he was responsible for the sending up of rockets as a spy signal.[86] Hachis's earlier inability to answer may be explained by his lower education. Indeed, Hachis was unable to read numbers when he was previously asked by the court to identify the accused by reading the numbers on their chests. As a result, he was asked to identify the relevant accused by physically pointing them out to the court.[87]

The prosecution's next witness was Moosa Ali, a 22-year-old resident of Car Nicobar who similarly stated that he was engaged in "cultivation".[88] Like Hachis he had been detained by the Japanese and interrogated as a suspect for sending up rockets as a signal to the Allied Powers. In the middle of Moosa Ali's examination-in-chief the court adjourned for the day. It reconvened the next day at 10 a.m. on 13 March 1946 and continued with Moosa Ali's testimony. During his cross-examination of Moosa Ali, defence counsel challenged the latter's claim that he had witnessed the abuse of one Dr. Jones:

> Q. Defending Lawyer puts that there was not a case in which Dr. Jones was interrogated by anyone in the presence of other victims and he wondered if the witness's statement might not be some mistake?
> A. The witness states that he could not tell a lie.
>
> (By the Court) – It may not be a lie, but he may have been mistaken when he said he saw Dr Jones being ill-treated.
>
> A. He did not misunderstand. [89]

In this exchange, Moosa Ali insisted on the veracity and accuracy of his testimony. This demonstrates that even witnesses with low education levels are capable of providing clear and decisive testimony under the pressures of cross-examination in court. Though witnesses with lower

[85] *Ibid*., slide 00424.
[86] *Ibid*., slide 00425.
[87] *Ibid.*
[88] *Ibid*., slide 00432.
[89] *Ibid*., slide 00440.

education levels may buckle under pressure, this is not always the case and there is a need to avoid generalising.

Moosa Ali was the prosecution's final witness. It will be recalled that the court had decided earlier on to allow the defence to cross-examine the interpreter Abdenego on his admitted statement. However, the defence then declined to do so when invited by the court.[90] This was surprising given defence counsel's earlier objection to the court's admission of Abednego's statement, and may have been due to a lack of confidence on the part of Japanese defence counsel after having his objection to the statement's admission rejected by the court. The prosecution then proceeded to read to the court the proceedings of the Japanese court martial that had tried the victims.

At this juncture the court decided to recall Richardson.[91] Richardson was the only witness put forward by the prosecution who spoke English. This may explain why Richardson was chosen by the court to clarify questions that the court still had. The court asked Richardson detailed questions about the facilities on Car Nicobar, the layout of the island, whether the Japanese could have not known of any activities on the island and the possibilities of escaping from the island. Upon concluding its questioning of Richardson the court asked the defence whether it wished to question Richardson. The defence explained that because the questions had been "put in sequence", the defence and interpreter had both agreed for interpretation to be provided later to the defence.[92] This presumably meant that the court's questioning of Richardson had proceeded too quickly, and the interpreter had been unable to keep up. In light of this the court adjourned and permitted the defence to conduct its questioning of Richardson after the court's adjournment.

30.4. The Defence Makes Its Case

Before proceeding to call the first witness for the defence, defence counsel explained to the court that he had not yet decided whether the accused should give evidence on oath.[93] This may have been due to the

[90] *Ibid.*, slide 00447.
[91] *Ibid.*, slide 00448.
[92] *Ibid.*, slide 00449.
[93] *Ibid.*, slide 00451.

fact that the accused were unfamiliar with the British military court system and needed time to decide whether they should give evidence on oath. The first witness called by the defence was Captain Onida, who had been the Deputy Chief of Staff of the 10th Zone Fleet of the Imperial Japanese Navy and had knowledge of the circumstances in the region during the time of the alleged crimes.[94] Onida described the pressing military circumstances faced by the Japanese during the time of the alleged crimes, the behaviour of various accused persons towards inhabitants of Car Nicobar, the types of anti-Japanese spy activities occurring on the island and the nature of the court that had sentenced the civilians to death. During Onida's testimony, defence counsel intervened to correct the interpreter's use of the word "investigation".[95] To the court the defending officer explained that though "the word used by Captain Onida means in Japanese several things and although it was translated as investigated, the Defending Officer thinks it means 'trial'".[96] The court then adjourned for the day till the next day, 14 March 1946.

When the court reassembled at 2 p.m. on 14 March 1946 for the third day of trial, the defence called Captain Takahashi,[97] who had been based in the Nicobar Islands, and Colonel Oguri Genji,[98] who had been a senior staff officer in the Japanese Army and had been stationed in the theatre of operations that included the Andaman and Nicobar Islands. Then on the morning of 15 March 1946, accused Kimura Hisao took the stand.[99] Kimura had held the rank of an Army Superior Private and had been involved in the Japanese military's interrogation of resident civilians about spy rockets. When Kimura was questioned about pre-trial investigations, he claimed that the British interpreter had not provided accurate interpretations of his statement.

> Q. Who was the Interpreter for Japanese?
> A. It was a British Officer who came with him.
>
> Q. Did you think he understood Japanese fully?
> A. I did not think that he understood Japanese fully.

94 *Ibid*., slide 00452.
95 *Ibid*., slide 00459.
96 *Ibid.*
97 *Ibid*., slide 00446.
98 *Ibid*., slide 00486.
99 *Ibid*., slide 00491.

Q. Is that only what you think or is there any actual example of incident by which you were convinced that he did not understand Japanese?
A. There were several instances and there are some which I still remember regarding myself.
First of all he did not understand the Japanese word Minseibu meaning Civil Administration.
Also he did not understand the Japanese word Hinanchi which means a place for taking refuge.
He could not distinguish between the Japanese word Butsu and Tataku both meaning "beating".

The Defending Lawyer objects to the Interpretation of the Japanese Interpreter.

By the Court. What is his objection?

The Defending Lawyer says there is a difference between Butsu and Tataku. Butsu is the stronger type of beating than Tataku.

Q. The Defending Lawyer likes to have some other instance?
A. While I was examined I made this expression to describe my way of interrogation of the inhabitants. I said I only patted lightly on the shoulders or on the arms of the inhabitants in order to recall his memory and it was a way of beating which a School Master would have applied to his pupil [when] the pupil might have forgotten something. Then I expressed such beating in Japanese Tataku which the British Interpreting Officer understood as beating and he asked me back: "Did you beat him" in Japanese. I said it was Tataku as I could not think any adequate English word which could represent this light beating and I let it go as that. That was an instance of the British Officer not understanding Japanese sufficiently.

Q. That was your impression with regard to the general interpretation. Did you think your meaning was correctly translated by him?
A. I thought that my expression and my meaning were mistranslated to a certain extent.[100]

[100] *Ibid*., slides 00502–00503. In Japanese, *tataku* is used in a weaker way than "beat". For example, when one has stiff shoulders, one may ask a therapist to *tataku* one's shoulders.

Given the resource constraints under which British investigators were operating, and the communication problems plaguing the trial, it is very likely that similar communication problems had occurred during pre-trial investigations stage. However, it should also be borne in mind that such interpretation problems might have been claimed by the defence as part of its strategy. Kimura again alleged interpretation problems when cross-examined by the prosecution about the differences in his statement and his court testimony.

> Q. You also stated in your first statement you beat him with your fist when you were angry with him.
> A. If it is written that I beat him with my fist it was an invention of the interpreter.
>
> Q. So far nothing you said in this statement corresponds with anything you said this morning. Do you mean that the interpreter was so bad that he took down nothing you said correctly?
> A. Yes it comes to that and very apparently it is a mistake of the interpreter because when I was examined it was not through the Investigating Officer. What I did was with gestures.
>
> Q. Did you have this statement read over to you after you made it?
> A. No.
>
> Q. Capt. Sadler said all statements were read to the accused when they had made them.
> A. Who is this Capt. Sadler?
>
> Q. Capt. Sadler is one of the Officers in the Court of Inquiry when these statements were taken.
> A. One British Officer came to our place. In fact he was a British Major and he was not accompanied by any interpreter and when he came to our camps he called out the names of those who were wanted and when they came out he requested them to put their names and finger prints on the statements, and they did so.
>
> Q. And you did? That was very foolish was it not?
> A. I thought it was foolish but then all our people who had been interrogated by the British Officer were very severely scolded before that and we were afraid, and when we were

> told to do so we made it. Not only myself, but all the people did so.
>
> Q. What does he mean? Do you still deny that these statements are untrue?
> A. That is so.[101]

Kimura went on to explain that he had communicated with the British officer in charge of investigating the case through "gestures", and that this had led to misinterpretation and misunderstanding.[102]

The defence then called its next witness Major Jifuku, who had been an Army Judicial Major and had been engaged in Japan's investigation of spying activities on the island.[103] The defence handed Japanese regulations on their court martial system to the witness. After scrutinising the document, Jifuku explained that he did not know this document but knew its contents, explaining that it was a regulation on the Japanese Army's military court system. The court asked the court interpreter whether he had translated the said Japanese regulation. The interpreter confirmed that it had been done by his staff and that he had seen it. The court then asked whether the court interpreter was "satisfied that it was a correct interpretation", and to this, the interpreter gave an equivocal answer: "Yes, but with regard to legal terms, etc., I am not quite certain because I do not know about law, whereas that person who translated it in my place does. It had been done by many persons".[104] It is clear that the court had concerns over the accuracy and quality of document translation. Nevertheless, when the court continued to ask the interpreter whether he was prepared to state to the court that it was a "true interpretation", the interpreter said that he was prepared to do so.[105]

The next witness examined by the defence was Vice Admiral Hara Taiso, who was in the process of being tried by another court and who testified about the conditions on Car Nicobar.[106] After Hara, the defence called Petty Officer Chigi Hajime. He testified that he had personally seen

[101] *Ibid*., slide 00513.
[102] *Ibid.*, slide 00526.
[103] *Ibid*., slide 00529.
[104] *Ibid.*
[105] *Ibid*., slide 00530.
[106] *Ibid*., slide 00537.

signals sent by spies.[107] Chigi's testimony continued until 19 March 1946. The defence followed up by calling Captain Matsushita, a doctor by training who had treated some of the victims on Car Nicobar.[108] Matsushita's answers focused on his treatment of the victims and on the attitude of a number of the accused towards Nicobarese civilian residents. The defence then called Sergeant Kitamura Fukuo,[109] Army Sergeant Toyama Ayeski[110] and Petty Officer Kajiwara.[111] All three stated that they saw spy rockets being sent up on Car Nicobar.

On 20 March 1946 the defence called Captain Muneyuki Yasuo, an accused who had served as a company commander on Car Nicobar.[112] In the course of his testimony Muneyuki stated that his previous statement had been mistranslated. Specifically "wick of the lamp" had been mistranslated as "cover of the lamp".[113] During cross-examination the prosecutor asked Muneyuki whether his statement had been read back to him and whether he had understood it then. The defendant stated that he had understood "some" of what had been read back to him but had also not understood "some".[114] During his re-examination Muneyuki claimed: "There are many things besides which were stated by me and which were not copied in that statement".[115]

Interpretation errors were thus repeatedly raised by the defence as a strategy in the trial. To give further credence to this claim, on 21 March 1946 the defence called Captain Cameron as a witness with the aim of demonstrating British interpreters had made interpretation errors during pre-trial investigations.[116] Cameron had served as an interpreter during pre-trial British investigations of the alleged crimes and was questioned about the investigatory process. He explained that with respect to Kimura and Ueda, as they had some knowledge of English, the British Court of Inquiry had conducted its investigation partly in English and partly in

[107] *Ibid*., slide 00545.
[108] *Ibid*., slide 00552.
[109] *Ibid*., slide 00555.
[110] *Ibid*., slide 00558.
[111] *Ibid*., slide 00561.
[112] *Ibid*., slide 00576.
[113] *Ibid*., slide 00584.
[114] *Ibid*., slide 00592.
[115] *Ibid*., slide 00595.
[116] *Ibid*., slide 00600.

Japanese.[117] The Court of Inquiry had resorted to Japanese when the accused did not understand what was being said. Defence counsel then asked the court for permission to ask Cameron to interpret certain words into Japanese. This presumably was to test Cameron's interpretation skills and undermine his credibility as an interpreter.

> Q. Defending lawyer should like to ask the Court for permission to ask some of the English words in this document for translation into Japanese.
> (By the Court) – It is a very good idea to clear up some points.
>
> Q. Do you know the Japanese word "Jueiso"?
> A. "Jueiso" means rigorous confinement.
>
> Q. Why is it in this document as "rigorous imprisonment"?
> A. I consider 'rigorous imprisonment' and 'rigorous confinement' as being the same.
>
> Q. What is "Choeki" in Japanese.
> A. I forget.
>
> Q. It is rather strange to me if "Choeki" is not understood and "Jueiso" is understood.
>
> (By the Court) – What is the question?
> A. It is not a question but a comment.
>
> Q. So you don't understand?
> A. No. "Jueiso" is a military term.
>
> Q. Then what is "rigorous imprisonment" in Japanese?
> A. "Jueiso" as I said: rigorous confinement or rigorous imprisonment as meaning the same thing.
>
> Defending Lawyer says it would not do any good in making any further question, but the Defending Lawyer would like to explain to the Court the difference between "Jueiso" and "Choeki".
>
> (By the Court) – Presumably it means some sort of legal term the ordinary person wouldn't know.
>
> (By Defence Counsel) – There is a fundamental difference between "Jueiso" and "Choeki".

[117] *Ibid.*, slide 00601.

> (By the Court) – He can tell us the difference in due time, but while Capt. Cameron is on the stand he will ask questions.[118]

Defence counsel continued questioning Cameron on the meaning of certain Japanese words, resulting in the latter's admission that he was unable to understand two of four Japanese words or phrases that had put to him by defence counsel, specifically, "Lamp no Shin" and "Sukisasu".[119] The court expressed its exasperation. When the prosecution noted that he would be able to pick out "a few words in Japanese" that the witness would not be able to understand, the court commented: "Not even from the English dictionary for that matter!"[120] However, right before this particular exchange, defence counsel's questioning of Cameron had revealed a more serious problem.

> Q. Before making this statement, did the accused persons give oath?
> A. They were told by me that they were giving evidence on oath.
>
> Q. Did they actually take the oath?
> A. What I said was: "You must give your evidence on oath; you must speak the truth". I did not know what form the Japanese took an oath.
>
> (By the Court) – Is that what you call on oath? You tell them to give evidence on oath and tell them to tell the truth and nothing but the truth. Would you then say that you have taken an oath?
> A. That was the form which I gave them.
>
> Q. In other words they did not take an oath.[121]

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[118] *Ibid*., slides 00601–00602.

[119] *Ibid*., slide 00602. "Sukisasu" may be a misspelling of *tsukisasu* which means "pierce" or "stab" in Japanese. The surprise expressed by defence counsel when "choeki" was not understood by the witness while "juieso" was understood is perhaps well-founded. *Choeki* is used in the Japanese criminal code and almost all Japanese understand its meaning. On the other hand, *jueiso*, which probably refers to *eisou* (営倉) is a military term used to refer to military detention barracks, which can be translated into "monkey house" in English. As it is a military term, most Japanese people may not understand its meaning.

[120] *Ibid*., slide 00604.

[121] *Ibid*., slide 00602.

After the prosecution concluded its cross-examination of Cameron the court asked the latter to interpret a portion of an admitted statement. Cameron proceeded to do so, and the court then asked the court interpreter whether he had any problems understanding Cameron's interpretation. The interpreter responded: "Not much Sir".[122] The court then asked Cameron for the Japanese interpretation of the word "to beat".[123] Cameron explained that there were "at least 3 words" for that. The court asked: "If I were to say to you that I was beating a member of this Court with a short stick, could you mistake it for 'I beat him with a stick'?"[124] Cameron replied: "The Japanese can be very elusive. It can be both".[125]

Defence counsel adopted this same strategy when questioning its next witness Pilot Officer Stewart Kennedy Gibb.[126] Gibb had also served as an interpreter during British war crimes investigations. Defence counsel challenged Gibb's claim that he had read the typewritten statements of the accused back to them in Japanese by asking Gibb to interpret a number of Japanese words into English. Gibb appeared to hesitate and explained that during the investigations he had used a dictionary to look up certain words. The court asked Gibb to do his best, and defence counsel proceeded to test Gibb's interpretation skills. In the course of doing so, the defence counsel asked Gibb to interpret the phrase "rigorous imprisonment" into Japanese.[127] When the defence counsel challenged Gibb's interpretation of this phrase as "jueiso", Gibb explained that it was a word that he "very seldom" used and if he had encountered any doubts when interpreting he "would have referred to the dictionary".[128]

After allowing Japanese defence counsel to repeatedly test the Gibb's interpretation skills by asking him to interpret various terms the court appears to have become frustrated at the strategy pursued by

[122] *Ibid.*, slide 00605.

[123] *Ibid.*, slide 00606.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.*, slide 00609.

[128] *Ibid.* As explained above, "Jueiso", which probably refers to *eisou* (営倉), is a military term used to refer to military detention barracks.

defence counsel. When the defence counsel asked Gibbs whether he could remember if a particular word "Sukitsatsu" was used during investigations, Gibbs frankly replied that he was unable to do so.[129] At this point, the court observed: "I cannot see how he would be expected to remember". When it was clear that defence counsel was going to continue with the testing of Gibb's interpretation skills, the court finally asked counsel "how long" the "tedious lesson in Japanese" would continue.[130] Despite the court's apparent exasperation at defence counsel's strategy, the court then proceeded to proactively examined Gibb's interpretation skills after Gibb's cross-examination by the prosecution. The court asked Gibb to interpret a portion of an admitted English statement into Japanese. It then asked the court interpreter to interpret what Gibb had interpreted into English. This presumably allowed the court to check for interpretation mistakes.[131]

Interpretation errors continued to be asserted by various accused during their testimony throughout the trial. After Gibbs, the court heard accused Sergeant Major Matsuoka Hachiroemon whose testimony focused on how he had interrogated the victims and investigated the alleged spying.[132] After Matsuoka, the defence called the accused Private Ono Minoru who completely denied his involvement in the crimes and rejected portions of his statement which showed his involvement.[133] Major General Itzuki Toshio was then called by the defence to give his testimony.[134] Itzuki was the highest ranking defendant and had been in charge of Japanese investigations into the alleged spying incidents. His testimony was then followed by that of another accused Lance Corporal Nakazawa Tanakichi.[135] During Nakazawa's cross-examination, the prosecutor pointed out that he had admitted in his statement to beating one Panta. Nakazawa had denied doing so during his courtroom testimony. The defendant insisted that he had not used the word "beat"

[129] *Ibid*., slide 00610. "Sukitsasu" may be a misspelling of *tsukisasu* which means "pierce" or "stab" in Japanese.

[130] *Ibid.*

[131] *Ibid.*

[132] *Ibid*., slide 00611.

[133] *Ibid*., slide 00632.

[134] *Ibid*., slide 00635.

[135] *Ibid*., slide 00653.

when giving his statement. Rather, he had described how he had "urged" and "pat lightly" the victim.[136]

The defence continued by calling another accused Captain Ueda Mytsharu, who had been one of the judges on the Japanese military court martial. After Ueda, on 25 March 1946, the defence called accused Arai Mitsui.[137] Arai claimed that his earlier statement had been wrongly recorded. In his statement, he had claimed that he saw another accused, Kimura, beat the victim. Arai claimed that what he had really said during investigations was that he had seen Kimura patting or prodding the victim.[138] The prosecution asked Arai whether he realised that based on his claims "half" of his statement would then be incorrect:

> Q. And how do you account for this? Was the interpreter faulty?
> A. When I gave my story in Port Blair for the first time he wanted to tell me about interrogation so I started with my mission given to me and when I finished interpreting he said: "I do not understand your Japanese at all". So I repeated it again and when I came half way he said "I still do not understand you, let's stop and do it tomorrow", and it was postponed until the next time, and the next time he put various questions to which I replied and it was recorded.[139]

Arai alleged that this earlier statement recorded by the British interpreter was highly inaccurate. He argued that he had not stated that he had seen Kimura "beat" a Nicobarese but rather that he had seen Kimura "prodding" him with a "small piece of stick".[140] Though the raising of such interpretation problems may be understood as a mere strategy on the part of the defendants, it is noteworthy that Arai demonstrated genuine problems of understanding when the prosecution cross-examined him on whether he had been instructed to take part in an investigation during which the victim was allegedly beaten. The prosecution highlighted that Arai had said in his earlier statement that he had not been ordered to take part in the investigations. In response Arai explained that he had stated that "permission" had been given for him to partly investigate and partly

136 *Ibid*., slide 00655.
137 *Ibid*., slide 00674.
138 *Ibid*., slide 00677.
139 *Ibid.*
140 *Ibid.*

undertake liaison work. The prosecution then asked whether the "negative" was similar to the "affirmative" in Japanese, and in response to this, the interpreter stated that "I am afraid this is too high-class for him".[141] The interpreter's comment shows that even though Arai may have used interpretation problems as a defence strategy, he may also have had genuine problems understanding the questions posed to him.

This brought the questioning of defence witnesses to an end. Defence counsel prepared to read his closing speech and asked the court whether it should be read in Japanese before being read in English. The court agreed to this, noting that it was better for the accused to hear what is said in Japanese.

30.5. The Court's Findings and the Sentences Imposed

On 26 March 1945 the court assembled to hear the closing statements by the defence and the prosecution. The defence repeatedly highlighted the exigent circumstances faced by the accused and the fact that the victims had been tried according to Japanese laws prior to their execution.[142] In his closing address the prosecutor argued that this was as "sordid a case of inhuman brutality" and there was a "complete absence of moral code on the part of the accused", asking the court whether the death penalty could be considered as too much.[143] The court then issued its findings of guilt or innocence before permitting the defence counsel and two of the accused to address the court in mitigation. One of the accused, Saito Kaizo, was acquitted of the first and only charge against him. The court held that though it was not convinced that Saito was "entirely free from blame", the evidence was "not sufficient to lead to conviction with that certainty required by British Criminal Law".[144] All of the other accused were found guilty and their sentences ranged from three years' imprisonment to capital punishment.[145] Altogether six accused were sentenced to death, one by shooting and five by hanging.

As mentioned earlier, the court did not issue comprehensive judgments explaining the reasons for the findings or sentences. The court

[141] *Ibid*., slide 00678.
[142] *Ibid*., slide 00082.
[143] *Ibid*., slide 00102.
[144] *Ibid*., slide 00562.
[145] *Ibid*., slide 00569.

did briefly refer to factual findings when delivering its sentences. It first addressed itself to Itzuki, sentencing him to death by shooting, and finding that with "any serious consideration" he would have realised "the absurdity of his suspicions" based on which he had condemned the victims after a trial that was a "mockery and a travesty of justice".[146] The court described Kita Tomio, Matsuoka Hachiroemon, Kimura Hisao, Uchida Masahiro and Yasuda Munehara as "killers, killers without mercy and without humanity". They were sentenced to death by hanging for their crimes.[147] For Ueda Mytsharu, Sakagami Shigero and Ogura Keiji, the court noted that they had fortunately not played a "major part" in the crimes but nevertheless condemned their "callousness and indifference", sentencing them to 15, three and 12 years' imprisonment respectively.[148] The court then called on Sumi Toyosaburu, Muneyuki Yasuo, Arai Mitsui, Torii Kazuo, Nakazawa Takakichi and Ono Minoru to pay for the "pain" inflicted on "helpless people", sentencing all of them to 10 years' imprisonment except for Muneyuki who received a 12-year sentence and whose flogging of a 77-year-old victim was singled for particular criticism by the court.[149] The court's findings and sentences were eventually confirmed.[150]

30.6. Conclusion

The trial of Itzuki Toshio and others lasted 14 days. During this period, the court had heard eight persons testifying for the prosecution and 20 persons testifying for the defence. Out of these 28 individuals, only three gave their court testimony in English. As in all British post-Second World War trials, the judges in Itzuki Toshio and others did not issue any comprehensive reasons for the findings and there were no substantial discussions about the law. This chapter has sought to highlight how the trial was plagued by significant problems of interpretation and communication. In light of this, it is noteworthy that though the judges did not issue comprehensive findings and judgments, they did hand down dissimilar sentences for different accused persons. The court also made

146 *Ibid.*
147 *Ibid.*
148 *Ibid.*
149 *Ibid.*
150 *Ibid.*, slide 00345.

reference to the different roles and behaviour of the different accused when handing down sentences. These gradated sentences were supposedly to reflect the defendants' different levels of involvement and blameworthiness. Given the language and communication problems encountered at trial, such fact-finding and responsibility allocation by the court must not have been easy. Possibly, much accuracy had been lost in translation.

It is important to bear this in mind when organising or advocating for war crimes prosecutions today. These trials require much planning and resources. Their assumptions cannot be taken for granted. It would be very easy to assess post-Second World War trials like Itzuki Toshio and others using today's standards and dismiss them as simple "victor's justice", as vengeance clocked in legal form. However, I suggest that a close analysis of trial records reveals a more nuanced situation. It is true that these trials leave much to be desired in light of our contemporary standards and understandings. The judges were working under post-war conditions of scarcity and disorganisation; they were under pressure to complete their work expeditiously; and, to compound matters, they had to assess defendants and witnesses from different linguistic and cultural backgrounds. Yet trial records show these judges trying to address communication problems that arose during trial, though they may not have done so adequately or successfully. If any characterisation of these trials is necessary, they are probably best described as attempts rather than as charades, clumsy and awkward as they may have been.

31

Enforced Prostitution in International Law Through the Prism of the Dutch Temporary Courts Martial at Batavia

Nina H.B. Jørgensen[*] **and Danny Friedmann**[**]

31.1. Introduction

The crimes associated with the euphemistically named "comfort women" system instituted in the countries once occupied by Japan have largely gone unpunished. The surviving victims still await compensation and sometimes even acknowledgement of their ordeal. The Judgments of the Temporary Courts Martial located in Batavia in the Dutch East Indies (now Jakarta, Indonesia), relating to wartime sexual violence, are a largely forgotten and understudied resource. However, they represent the first occasion in history when individual members of the military as well as civilian "brothel" owners were convicted of enforced prostitution as a violation of the laws and customs of war.[1] Enforced prostitution and its

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[1] Netherlands Temporary Courts Martial at Batavia, Case Nos. 40/1946, 72/1947, 72A/1947 and 34/1948, Judgment.

counterpart – sexual slavery – have been persistent features of armed conflict since before the Second World War.[2] It is believed that in 1918 poverty-stricken Japanese women and girls, many from Kyushu, were forced into prostitution when Japan entered Siberia.[3] Following Japan's invasion of China in 1932 the use of girls and women for prostitution became systematised by the Imperial Japanese Army.[4] According to George Hicks, the first "comfort stations" under direct control of the Japanese military were established in Shanghai in 1932,[5] after which the system escalated. In contrast to the small number of cases addressing sexual offences in the trials held after the Second World War, those concerning modern conflicts, from the former Yugoslavia[6] to Sierra Leone,[7] have focused extensively on the victimisation of women and girls.

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2 "The War Crimes Commission, set up in 1919 to examine the atrocities committed by Germany and the other Axis powers during World War I, had found substantial evidence of sexual violence and had subsequently included rape and forced prostitution among the violations of the laws and customs of war". Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, Antwerp, 2005, p. 5.

3 Kazuko Watanabe, "Trafficking in Women's Bodies, Then and Now: The Issue of Military 'Comfort Women'", in *Women's Studies Quarterly*, 1999, vol. 27, nos. 1–2, pp. 20–21.

4 *Ibid.*

5 As the system expanded the military turned the management over to private operators. George Hicks, *The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War*, W.W. Norton, New York, 1997, p. 47.

6 International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998 (https://www.legal-tools.org/doc/e6081b/); ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23/1-T, Judgment, 22 February 2001 ("Kunarac and Others Judgment") (https://www.legal-tools.org/doc/fd881d/); ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-A and IT-96-23/1-A, Appeals Judgment, 12 June 2002 ("Kunarac and Others Appeal Judgment") (https://www.legal-tools.org/doc/029a09/); ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1, Judgment, 25 June 1999 ("Aleksovski Judgment") (https://www.legal-tools.org/doc/52d982/); ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Appeals Judgment, 24 March 2000 ("Aleksovski Appeals Judgment") (https://www.legal-tools.org/doc/176f05/).

7 Special Court for Sierra Leone ('SCSL'), *Prosecutor v. Alex Tamba Brima & Ors*, SCSL-2004-16-A, Appeals Judgment, 22 February 2008 (https://www.legal-tools.org/doc/029a09/); SCSL, *Prosecutor v. Moinina Fofana & Ors*, SCSL-04-14-A, Appeals Judgment, 28 May 2008 (https://www.legal-tools.org/doc/4420ef/); SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-14-1-A, Judgment, 26 October 2009 https://www.legal-tools.org/doc/7f05b7/); SCSL, *Prosecutor v. Charles Ghankay Taylor*,

The Judgments of the Temporary Courts Martial of Batavia which relate to enforced prostitution, the anonymised original copies of which were initially obtained in 2006 from the Royal Library in The Hague,[8] are now the subject of a project being co-ordinated at the Centre for Rights and Justice in the Faculty of Law at the Chinese University of Hong Kong. The project, initiated in February 2014, aims in its first stage to translate the Judgments from Dutch into English accurately and consistently, incorporating explanations as to relevant translation decisions, and to gather and organise the authentic material relating to the trials online, making it freely accessible. This will serve as a basis for the second stage of the project which aims at researching enforced prostitution in international law through the prism of the Batavia trials.[9] This chapter provides some preliminary insights into the significance of these trials, both in helping to identify the historical origins and definition

SCSL-03-01-A, Appeals Judgment, 26 September 2013 (https://www.legal-tools.org/doc/3e7be5/).

8 A translation project was established by Danny Friedmann in 2006. Three Judgments of the Temporary Courts Martial related to enforced prostitution, Case No. 40/1946, 72/1947 and 72A/1947, were acquired, and translated from Dutch into English by volunteers from the community of Korean adoptees in the Netherlands.

9 Despite their significance, the cases have not been comprehensively studied. Knut Dörmann contends that there are few legal sources clarifying the elements of enforced prostitution. It seems he was familiar with the Awochi case but not with the other Temporary Courts Martial relevant to enforced prostitution: Judgments of the interconnected Cases No. 72/47, 72A/47 and 34/1948. Knut Dörmann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 339. The unfamiliarity is in part due to the unwillingness of the Dutch Ministry of Foreign Affairs, the Archives of Instituut voor Oorlogs-, Holocaust- en Genocidestudies (Institute for War, Holocaust and Genocide Studies) in Amsterdam and the National Archives of the Netherlands in The Hague, who are restricting access to the relevant judgments of the Temporary Courts Martial in Batavia, namely for 75 years after the date of their publication. This means that the first Temporary Court Martial in Batavia of 1946 will be publicly available and accessible in 2022 and the last one of 1949 in 2025. The argument used is that this is done to protect the privacy of those involved in the cases, not just the victims, but also the accused. There is an exception if the people involved have passed away. After 75 years all restrictions to public accessibility are lifted, unless in exceptional circumstances, according to Article 15 Dutch Archive Act 1995 (*Archiefwet* 1995). Relevant examples can be found here: Number archive inventory (Nummer archiefinventaris): 2.09.19, Inventory of the Archives of the Courts-Martial (Army) in the Netherlands and Dutch East Indies, 1923–1962, National Archives of the Netherlands (*Inventaris van de archieven van de Krijgsraden (te Velde) in Nederland en in Nederlands-Indië, 1923–1962*, Nationaal Archief).

of the war crime of enforced prostitution and in re-igniting the ongoing quest for justice and reconciliation with regard to Japan's institutionalised system of sexual slavery during the Second World War.

The first part briefly explains the background to the Batavia trials and the applicable sources of procedural and substantive law. The war crime of enforced prostitution as defined in the trials is then described before turning to the modern definition of enforced prostitution and terminological controversies. In this context, the question of whether the war crime of enforced prostitution is a relic of the past or an active category in contemporary international criminal law is considered. Finally, the lessons learned or not learned at Batavia as it concerns Japan's ongoing reluctance to recognise full responsibility for the "comfort women" system are addressed.

31.2. Background to the Batavia Trials and Sources of Law

In 1943, while the Western and Eastern hemispheres were ensnared in conflict, 17 Allied Powers meeting in London established the United Nations Commission for the Investigation of War Crimes, which soon after became the United Nations War Crimes Commission ('UNWCC').[10] Its objects and powers were two-fold: first, to investigate and record the evidence of war crimes, identifying where possible the individuals responsible; and second, to report to the governments concerned in cases in which it appeared evidence might be expected to be forthcoming.[11] These functions were extended with advice and recommendations to member governments on questions of law and procedure to carry out the objects of the Allied Powers.[12] The 30 October 1943 Declaration of Moscow, signed by the Soviet leader Joseph Stalin, the US President Franklin D. Roosevelt and the British Prime Minister Winston Churchill on behalf of the Allied Powers, proclaimed that the "major" criminals should be dealt with as the Allies should decide, and that the "minor" criminals should be sent back to the countries in which they had done

[10] The United Nations War Crimes Commission was established in London on 20 October 1943.

[11] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Developments of the Laws of War*, His Majesty's Stationery Office, London, 1948 ("History of the UNWCC"), p. 3.

[12] *Ibid.*, p. 13

their atrocious deeds to be dealt with by the laws of those countries.[13] The four-power London Agreement of 8 August 1945 decided that an International Military Tribunal would be established for the trial of major war criminals.

Trial arrangements in the Western hemisphere were mirrored in the East. The major war criminals of Japan were to be tried before the International Military Tribunal for the Far East ('IMTFE') in Tokyo, established according to a declaration of General Douglas MacArthur, the Supreme Commander for the Allied Powers, on 19 January 1946.[14] A great number of the prosecutions in the Far East were conducted from various central offices in Yokohama, Singapore, Hong Kong and Batavia. In the Dutch East Indies, the Japanese "minor" war criminals were to be tried before the Temporary Courts Martial, based on national law in recognition of sovereignty, but also applying international law. The Allied South East Asia Command ('SEAC') was given the task of co-ordinating all activities in the field of prosecution and preliminary research. The Dutch trials were entrusted to the Temporary Courts Martial, which were provided for by the Revised Administration of Justice in the Army, established by an Ordinance of 28 June 1945[15] in Brisbane, where the Dutch East Indies government in exile partially resided.[16] In the meantime, the war with Japan continued until 15 August 1945. Lieutenant Governor-General in exile Hubertus van Mook ordered from Brisbane the establishment of a Bureau to Investigate War Crimes in the Dutch East

[13] *Ibid.*, p. 1.

[14] The Tokyo Charter was created by the Supreme Commander of the Allied Powers ('SCAP'), General Douglas MacArthur. Evan J. Wallach, "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?", in *Columbia Journal of Transnational Law*, 1999, vol. 37, pp. 851, 863; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, Antwerp, 2002, p. 196.

[15] Revised Administration of Justice in the Army (*Herziene Rechtspleging bij de Landmacht*), established by Ordinance of 28 June 1945 in Brisbane Bulletin of Acts and Decrees (*Staatsblad)* 1945/112, revised on 29 August 1945, Bulletin of Acts and Decrees (Staatsblad) 1945/126.

[16] The Dutch East Indies government in exile resided partially in Ceylon (Sri Lanka), which belonged to the British war theatre (place of operation) and partially in Melbourne, later Brisbane, which belonged to the American war theatre. Loe de Jong, *Het Koninkrijk der Nederlanden in de tweede wereldoorlog 1939–1945*, Part 11c (Nederlands-Indië III), Staatsuitgeverij, 's-Gravenhage, 1988, p. 2.

Indies on 11 September 1945,[17] while Lord Louis Mountbatten led the British occupation of Java in the same month.[18]

The trials before the Temporary Courts Martial in Batavia followed a procedure whereby the prosecutor (*Auditeur-Militair*) brought charges and requested a punishment for the accused. After the presentation of the evidence, a bench of military judges [19] announced the verdict. The punishment was then approved in a process known as the "fiat execution", according to which the High Representative of the Crown (*Hoge Vertegenwoordiger van de Kroon*) had the final say on carrying out the penalty. There was no possibility of appeal, but the commander-in-chief had a revising power.[20]

As Lord Wright, chairman of the UNWCC put it: "War is organised murder, devastation and destruction. But the laws of war draw a line between legitimate acts and illegitimate acts done in war".[21] Enforced prostitution was not a codified qualification in the Criminal Law of the Dutch East Indies. Its origins may be found in international law, beginning with Article 46 of the Hague Convention 1899 which requires respect for "[f]amily honours and rights, individual lives and private property, as well as religious convictions and liberty".[22] The protection of "family honours" as it was expressed in treaties of the pre-First World

17 *Ibid*., Part 12, second half, p. 892.

18 Jonathan Ritter, "Mountbatten, Anglo-American Policy, and the Creation of Modern Southeast Asia after World War II", in *Stanford Journal of East Asian Affairs*, 2010, vol. 10, no. 2, pp. 126, 131.

19 For the adjudication of war crimes it was held necessary that the courts martial had available a college presided over by legally qualified chairs. At the most important Temporary Courts Martial one or more members or substitute members were appointed from legal officials who would be first militarised if this was necessary. L.F. de Groot, *Berechting Japanse oorlogsmisdadigers in Nederlands-Indië 1946–1949. Temporaire Krijgsraad Batavia*, Art and Research, 's-Hertogenbosch, 1990, pp. 18–19.

20 The procedure that needs to be followed in case of a rejection of the fiat execution is a consequence of Article 113 juncto Article 114 Adjudication War Crimes, Bulletin of Acts and Decrees 1946 No. 74 (*"Rechtspleging Oorlogsmisdrijven" van de regelen welke ingevolge de "Ordonnantie Rechtspleging Oorlogsmisdrijven" van toepassing zijn op de strafrechtspleging ter zake van oorlogsmisdrijven*). Herein it is determined that if the Temporary Court Martial perseveres after the rejection of the fiat execution by the Commanding Officer, the latter should submit the case to the Governor General. If the Governor General considers that the judgment should be executed, he orders the Commanding Officer to provide the judgment with the fiat execution; *ibid.*, p. 20.

21 History of the UNWCC, p. 20, see *supra* note 11.

22 Laws and Customs of War on Land (Hague II), 29 July 1899.

War period, including Article 46 the Hague Convention 1907,[23] was based on the notion that women deserved protection as the property of men.[24] The first explicit reference to enforced prostitution, which arguably expresses the beginning of a reconceptualisation, is contained in the list of Violations of the Laws and Customs of War in the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission on Responsibility') presented to the Preliminary Peace Conference at the conclusion of the First World War.[25] "Rape" appears as point (5) on the list and "abduction of girls and women for the purpose of enforced prostitution" as point (6). Japan participated in the Commission on Responsibility and although it made reservations relating to the immunity of the Japanese Emperor and responsibility for abstaining from the prevention of crimes, it made no reservation to the prohibition of enforced prostitution.[26]

The proceedings at Batavia appear unique among the post-Second World War trials in invoking the war crime of abducting girls and women for the purpose of enforced prostitution. The Dutch government in exile issued an Extraordinary Penal Law Decree[27] in 1943 in an attempt to

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[23] Laws and Customs of War on Land (Hague IV), 18 October 1907.

[24] K. Alexa Koenig, Ryan Lincoln and Lauren Groth, "The Jurisprudence of Sexual Violence", in Sexual Violence and Accountability Project Working Paper Series, University of California, Berkeley, 2011, p. 5.

[25] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference, 29 March 1919", in *American Journal of International Law*, 1920, vol. 14, pp. 95, 114.

[26] *Ibid.*, pp. 151–52.

[27] Extraordinary Penal Law Decree of 22 December 1943 (*Besluit Buitengewoon Strafrecht 1943)*, published in *Bulletin of Act and Decrees of the Kingdom of the Netherlands* (*Staatsblad van het Koninkrijk der Nederlanden*), No. D.61, 22 December 1943, pp. 1–10, entry into force: 4 September 1944; as amended by Decree of 27 June 1947, Laying Down Detailed Provisions Regarding the Special Administration of Justice (*Houdende nadere voorzieningen met betrekking tot de bijzondere rechtspleging)*, published in *Bulletin of Act and Decrees of the Kingdom of the Netherlands*, No. H.206, 27 June 1947, pp. 1–20, and Act of 10 July 1947 on the Provision of the Prosecution of Persons Employed by the Enemy that Have Been Found Guilty of War Crimes against Humanity (*Wet van 10 juli 1947, houdende voorziening met betrekking tot de berechting van personen die in dienst bij of van den vijand zich hebben schuldig gemaakt aan oorlogsmisdrijven tegen de menselijkheid)*, published in *Bulletin of Act and Decrees of the Kingdom of the Netherlands*, No. H.233, 10 July 1947, pp. 1–2. See also M.S. Groenhuijsen, "Het Besluit Buitengewoon Straftrecht (1943) en het legaliteitsbeginsel", in G.J.M. Corstens and M.S. Groenhuijsen (eds.), *Strafzaken, Rede en Recht*, Gouda Quint, Deventer, 2000, pp. 153–70.

avoid implementing retrospective legislation and probably also to deter persons from committing war crimes. However, the scope of this Decree is only relevant for war crimes committed within the Netherlands, or outside the Netherlands within Europe.[28] In 1946 the Lieutenant Governor-General of the liberated Dutch East Indies passed four ordinances[29] for the Dutch East Indies to equip the Temporary Courts Martial with a substantive and procedural legal framework that would allow it to adjudicate war crimes in accordance with the norms of international law. Ordinance No. 44 on the Definition of War Crimes enumerates 39 such crimes.[30] Article 1 states: "War crimes are understood to mean facts which constitute a violation of the laws or customs of war in time of war committed by nationals of an enemy nation or by foreigners in the service of the enemy".[31] It is notable that the list provided in Ordinance No. 44 corresponds almost entirely with the categories in the Report of the Commission on Responsibility. Thus, the crime of enforced prostitution is included as follows: Ordinance No. 44, 1946: Article 1(7) Abduction of

[28] Articles 4 and 15, Extraordinary Penal Law Decree 1943, *ibid.*

[29] Ordinance No. 44 Definition of War Crimes (*Ordonnantie begripsomschrijving oorlogsmisdrijven* No. 44, *Stbl. v. N.I.* 1946). According to Ordinance Description Criminal Law No. 45 (*Ordonnantie strafrechtsomschrijving* No. 45) *Bulletin of Act and Decrees of Dutch East Indies 1946*, he is guilty who commits or has committed a war crime punishable by the death penalty or life imprisonment or temporary imprisonment of at least one day and a maximum of twenty years. In addition the Ordinance provides that the general provisions of the Military Penal Code, besides various provisions of the first book of the Criminal Code, do not apply (including Articles 50 and 51 of the latter Code, which exclude criminal liability for acts to execute a statutory provision or implement a legal requirement or to implement an official order issued by the competent authority. Ordinance Jurisdiction War Crimes No. 46 (*Ordonnantie rechtsmacht oorlogsmisdrijven* No. 46) *Bulletin of Act and Decrees of Dutch East Indies* declares the provisions relating to the jurisdiction of the military court in the Dutch East Indies, subject to certain modifications applicable in respect of war crimes. Ordinance Legal Procedure War Criminals No. 47 (*Ordonnantie rechtspleging oorlogsmisdadigers* No. 47, *Bulletin of Act and Decrees of Dutch East Indies* determines whether the Revised Justice in the Army is applicable to criminal proceedings in respect of war crimes and also any new arrangements that criminal justice established.

[30] Ordinance No. 44, Definition of War Crimes (*Ordonnantie begripsomschrijving oorlogsmisdrijven*) *Bulletin of Act and Decrees of Dutch East Indies 1946*.

[31] *Ibid.*, Article 3, War Crimes Definitions Ordinance makes clear that the Ordinance came into effect as of 4 June 1946. The general Dutch East Indies substantive criminal law remained applicable to war crimes in so far there were not rules for war crimes expressly deviating rules from the general criminal law. The provisions in regard to war crimes were designated as special criminal provisions within the meaning of Article 63(2) Criminal Law of the Dutch East Indies.

girls or women for the purpose of enforced prostitution, enforced prostitution.

31.3. The War Crime of Enforced Prostitution in the Batavia Trials

The collection of cases addressing enforced prostitution at Batavia include Case No. 40/1946 against Washio Awochi; Case No. 72/1947 against 12 accused (whose identities are not disclosed in the available version of the Judgment but revealed by De Groot[32]); Case No. 72A/1947 against one accused (understood to be Colonel Ikeda Shoichi[33]); and Case No. 34/1948 against General Major Nozaki Seiji. The victims were all Indo-European or Dutch nationals.[34] The fact pattern that forms the basis of the charges in these cases involves women and girls, some in the 12- to 16-years-old age group, being taken from internment camps on the pretext that they would work in an office for the Japanese authorities or in a restaurant. Instead they ended up in brothels where they were beaten and repeatedly raped, and forced to serve Japanese men as prostitutes in what emerges as an organised system directed by the military with civilian collaboration. The charges in these cases include rape, ill-treatment, abduction of girls and women for the purpose of enforced prostitution, and enforced prostitution.

The UNWCC published a summary of the Washio Awochi case in the *Law Reports of Trials of War Criminals*.[35] The full text of the Judgment of the Temporary Courts Martial in Batavia supplements this interpretive summary. Awochi was a civilian hotel keeper who ran the so-called Sakura Club where women and girls were recruited and forced, under direct or indirect threat of intervention by the Japanese Military Police ('Kempeitai'), to serve Japanese civilian men as prostitutes. As the

[32] Why De Groot waited for 40 years to publish his two-volume book is an intriguing question. After publication in 1990 it has not been reprinted. De Groot, 1990, see *supra* note 19. He did, however, write an article for the military legal journal in 1985. L.F. de Groot, "De rechtspraak inzake oorlogsmisdrijven in Nederlands Indië (1947–1949)", in *Militair Rechterlijk Tijdschrift*, 1985, pp. 81–90.

[33] De Groot, 1990, pp. 32–33, 66, see *supra* note 19.

[34] See further Christine J. Hung, "For Those Who Had No Voice: The Multifaceted Fight for Redress by and for the Comfort Women", in *Asian American Law Journal*, 2008, vol. 15, pp. 177, 186–87.

[35] UNCWW, "Trial of Washio Awochi", in *Law Reports of Trials of War Criminals*, 1949, vol. VIII, p. 122 (http://www.legal-tools.org/uploads/tx_ltpdb/File%206136-6137.pdf).

judgment notes, the notion of contact with the Kempeitai in a society under Japanese occupation was regarded at a minimum as being synonymous with deprivation of liberty and physical abuse. Awochi was convicted of the war crime of enforced prostitution and sentenced to 10 years' imprisonment, the young age of some of the victims constituting an aggravating factor. Abduction was not a feature of the case and the outcome points to the conceptual separation for the first time of the war crime of "abduction of girls or women for the purpose of enforced prostitution" from "enforced prostitution", both categories appearing in the Ordinance No. 44. The case stressed the involuntary aspect of enforced prostitution, amounting to "compulsion in all its possible forms".[36]

The remaining three cases concerned members of the military charged alone or jointly with civilians. These cases shed more light on the planning of the crimes, the chain of command and the absence of voluntariness of the girls and women. Case No. 72/1947 dealing with events in Semarang, for example, charged military officers described as "*heitan* officers" under a concept that resembles the modern notion of command responsibility. The evidence that proved involuntariness on the part of the women and girls included the deception used to lure them from the internment camps, the fact that many attempted to run away, to commit suicide or simulated insanity and illness, and the fact that threats and coercion were employed to break their resistance. The Judgment states in an *obiter dictum* that even if some of the women and girls were recruited voluntarily, the inhuman circumstances they then faced were "contrary to morality and humanity" and therefore criminal, suggesting that such coercive conditions would exclude any possibility of consent. A clear statement was also made to the effect that representatives of the government of the occupying forces used the situation of "helplessness, dependence and subjection" in the internment camps in an organised manner to force the women and girls into prostitution.

Some of those convicted by the military courts at Batavia, including three related to Case No. 72/1947, were pardoned and released much

[36] *Ibid.*, p. 124.

earlier than the sentences that were pronounced at the Temporary Court Martial[37] and approved by the High Representative of the Crown.

31.4. Enforced Prostitution in Contemporary International Criminal Law

According to Dan Plesch and Shanti Sattler, the extensive work of the UNWCC and the tribunals associated with it serves as a source of customary international law that relates directly to the current work of the International Criminal Court and the *ad hoc* tribunals in operation since the 1990s.[38] Indeed, the International Committee of the Red Cross ('ICRC') has identified customary international humanitarian law and catalogued 161 rules, including Rule 93 which prohibits enforced prostitution as one of the forms of sexual violence.[39] The ICRC also made

[37] Major General Nozaki Seiji was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 34/1948) of the war crimes of "enforced prostitution", "rape" and "ill-treatment of prisoners" and was sentenced to 12 years' imprisonment. However, Nozaki was discharged on 30 July 1953, after five years, because he was paroled. De Groot, 1990, p. 406, see *supra* note 19. Colonel Ikeda Shoichi was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 72A/1947) for the war crimes of "enforced prostitution", "rape" and "ill-treatment of prisoners", was sentenced to 15 years' imprisonment, but was paroled after six years on 18 March 1954. De Groot, 1990, pp. 419–20 see *supra* note 19. Furuya Iwao, who was a citizen in the service of the Japanese Army, was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 72/1947) for the war crime of "enforced prostitution" and was sentenced to 20 years' imprisonment. The Minister of Foreign Affairs, J. Luns, decided on 5 December 1958, taking into account Article 11 of the San Francisco Peace Treaty with Japan and the request by the Japanese government to remit the remaining imprisonment time to the criminals of war crimes from the B and C category, that whereas the conduct of the war criminals after their provisional release has not given rise to complaints, the remaining imprisonment time will be waived. Therefore Furuya was released after 11 years. De Groot, 1990, pp. 435–36, see *supra* note 19.

[38] Dan Plesch and Shanti Sattler, "Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948", in *International Community Law Review*, 2013, vol. 15, pp. 203–23, 205; Dörmann *et al*., 2003, see *supra* note 9.

[39] Rule 93, "Rape and Other Forms of Sexual Violence are Prohibited", in Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. 1, *Rules*, Cambridge University Press, Cambridge, 2005, pp. 323–27. See also the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery ("Women's International War Crimes Tribunal"), Case No. PT-2000-1-T, Judgment, 4 December 2000, para. 605, referring to the "customary humanitarian law prohibition on forced prostitution" at the time of the wars in the Asia-Pacific. The

reference to national law contained in military manuals stating that rape, enforced prostitution and indecent assault are prohibited and may constitute war crimes.[40]

The conclusions of the ICRC are supported by the 1949 Geneva Conventions. Article 27 of Geneva Convention IV [41] provides that: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".[42] This Article, according to the Commentary to Article 76 of Protocol I Additional to the Geneva Conventions of 1977, was introduced as a reaction to the abuses perpetrated against women during the Second World War.[43] Article 76(1) of Protocol I[44] states: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault".[45] Article 75(2)(b) Protocol I to the Geneva Conventions[46] provides fundamental guarantees that are gender neutral.[47] It states that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents. Therefore, in the history of the Geneva

paragraph cites the Temporary Court Martial in Batavia Judgment Case No. 72/1947 as an implementation of this customary humanitarian law.

40 Henckaerts and Doswald-Beck, *Ibid.* fn. 145 citing military manuals of Argentina (§§ 1584–1585); Australia (§§ 1586–1587); Canada (§ 1588–1589); China (§ 1590), Dominican Republic (§ 1591); El Salvador (§ 1592); France (§§ 1594–1595); Germany (§ 1596); Israel (§ 1597); Madagascar (§ 1598); Netherlands (§ 1599); New Zealand (§ 1600); Nicaragua (§ 1601); Nigeria (§ 1602); Peru (§ 1603); Senegal (§ 1604); Spain (§ 1605); Sweden (§ 1606); Switzerland (§ 1607); Uganda (§ 1608); United Kingdom (§§ 1609–1610); United States (§§ 1611–1615); Yugoslavia (§ 1616).

41 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

42 Article 27, Geneva Convention IV 1949, third sentence.

43 Comment to Article 76 Protocol I to the Geneva Conventions 1987, para. 3152, pp. 892–93.

44 Article 76 Protection of Women Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

45 Notably the word used in the English version is "forced" rather than "enforced", in French "*la contrainte à la prostitution*".

46 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

47 Commentary on Article 75 Protocol I to the Geneva Conventions, 1987, para. 3049, p. 874.

Conventions and their Additional Protocols, enforced prostitution originated as an attack on a woman's honour and was then prohibited as an outrage upon personal dignity.[48]

Enforced prostitution is included in the Statute of the Special Court for Sierra Leone as a crime against humanity and as a war crime under the category of outrages upon personal dignity.[49] In the Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute') it is mentioned as an outrage upon personal dignity.[50] Though not expressly enumerated, outrages against personal dignity have also been charged under the non-exhaustive Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute').[51] However, enforced prostitution had almost disappeared from the international criminal trial scene as a relevant characterisation of sexual violence until it was specifically named as a war crime and a crime against humanity in the Rome Statute of the International Criminal Court ('ICC Statute'). Article 8(2)(b)(xxii) of the ICC Statute prohibits with respect to armed conflicts of an international character "committing rape, sexual slavery, enforced prostitution, forced pregnancy, […] enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions". A provision expressed in similar terms in Article 8(2)(e)(vi) is applicable to non-international armed conflicts. The distinctive elements of enforced prostitution as expressed in the ICC Elements of Crimes[52] include:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by

[48] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010, p. 256.

[49] Article 2(g), Statute of the Special Court for Sierra Leone, January 16, 2002. Article 3(e) Statute of the Special Court for Sierra Leone refers directly to Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 which criminalises "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

[50] Article 4(e) Statute of the ICTR, 31 January 2010 (https://www.legal-tools.org/doc/8732d6/).

[51] Aleksovski Judgment, see *supra* note 6; ICTY, Aleksovski Appeals Judgment, see *supra* note 6.

[52] International Criminal Court, *Elements of Crimes*, The Hague, ICC, 2011.

threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

According to Robert Cryer *et al*., some delegations were concerned by the "paucity of precedent" for the element of pecuniary or other advantage but it was nevertheless adopted.[53] The definition was apparently designed to distinguish enforced prostitution from sexual slavery having reference to the ordinary meaning of the term "prostitution".[54] No charges have so far been brought under the ICC provisions concerning enforced prostitution and in the jurisprudence of the *ad hoc* tribunals as well as the developing jurisprudence of the ICC, much more attention has been paid to the related concepts of enslavement[55] and in particular sexual slavery.[56] The core elements of sexual slavery are "exercising any or all of the powers attaching to the right of ownership over one or more persons and causing the victim to engage in one or more acts of a sexual nature".[57]

Cryer *et al*. have argued that the concept of enforced prostitution is "problematic in that it obscures the violence involved, it is rooted in chastity and family honour, and it degrades the victim; thus 'sexual slavery' is generally preferred as properly reflecting the nature and seriousness of the crime".[58] Consistent with the notion of honour current at the time, there was an assumption expressed in the Batavia cases that Dutch women and girls would be unwilling to serve the "enemy" in a profession considered "indecent and in conflict with respectability

53 Cryer *et al*., 2010, pp. 256–57, see *supra* note 48.

54 *Ibid*., p. 257.

55 The ICTY Trial Chamber and Appeals Chamber Judgments extended the qualification "enslavement" in the context of a system of "rape camps" in the Kunarac and Others case. They were found guilty of enslavement. Kunarac and Others Appeal Judgment, see *supra* note 6.

56 Special Court for Sierra Leone cases, see *supra* note 7.

57 ICC, 2011, see *supra* note 52.

58 Cryer *et al*., 2010, p. 256, see *supra* note 48.

according to Western standards".[59] This might point to discriminatory attitudes towards women inherent in the very word "prostitute".[60] The Special Rapporteur reporting to the UN Sub-Commission on the Promotion and Protection of Human Rights on the topic of "Systematic rape, sexual slavery and slavery-like practices during armed conflict" states that "the only party without honour in any rape or in any situation of sexual violence is the perpetrator".[61] She argues that sexual slavery encompasses most, if not all, forms of enforced prostitution and claims enforced prostitution, as it appears in international treaties, has been "insufficiently understood and inconsistently applied" though without citing any attempts at its application.[62] While acknowledging that "enforced prostitution remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations", she states a clear preference for conduct which might amount to enforced prostitution to be characterised and prosecuted as sexual slavery.[63] She refers to the "comfort stations" in Japan during the Second World War and the "rape camps" more recently in the former Yugoslavia as particularly egregious examples of sexual slavery.[64] According to the Judgment of the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery ('Women's International War Crimes Tribunal'), established by Asian women's organisations in 2000 as a people's tribunal, survivors of the "comfort women" system vehemently object to the crimes against them being classified as forced prostitution.[65] The Women's International War Crimes Tribunal argued that sexual slavery constituted a crime under international law between 1937 and 1945, even though the terminology of sexual slavery was not used at the time.[66] It then went on to say that the "identification of sexual

[59] Netherlands Temporary Court Martial at Batavia, Case No. 72/1947, Judgment, p. 13.

[60] Women's International War Crimes Tribunal, Case No. PT-2000-1-T, Judgment, 4 December 2000, para. 635.

[61] UN Sub-Commission on the Promotion and Protection of Human Rights, "Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report, Submitted by Gay J. McDougall, Special Rapporteur", 22 June 1998, para. 16.

[62] *Ibid.*, para. 31.

[63] *Ibid.*, paras. 32–33.

[64] *Ibid.*, para. 30.

[65] Women's International War Crimes Tribunal, Case No. PT-2000-1-T, Judgment, 4 December 2000, para. 606.

[66] *Ibid.*, para. 621.

slavery as an international crime in our Charter and as a matter of international law today is, in our opinion, a long overdue renaming of the crime of (en)forced prostitution".[67] The basis for this statement was that the terminology of enforced prostitution obscures the gravity of the crime, hints at a level of voluntariness, and "stigmatizes its victims as immoral or 'used goods'".[68]

The Batavia cases to an extent suggest the contrary – that the crime was considered uniquely serious – and warranted focused cases to highlight the particular suffering of the women and girls involved. Sentences were sometimes as high as twenty years' imprisonment or in one case even the death penalty. It should also be noted that *in*voluntariness was considered the major element of the crime. It can only be speculated whether a similar factual scenario would be prosecuted under the heading "enforced prostitution" today when various other characterisations are available in the ICC Statute. It emerges from the Batavia Judgments that the visitors paid for the services provided. It is clear that the victims were coerced into working hard to increase earnings for the brothels and the accused Awochi, for example, drew a very good income. The ICC definition of enforced prostitution appears applicable in such circumstances.

An important consideration highlighted by the Women's International War Crimes Tribunal is that characterising Japan's military "comfort women" system as enforced prostitution may assist those who deny responsibility in describing the victims as prostitutes and "camp followers", suggesting voluntariness and immorality and thus Japan's innocence.[69] This consideration extends beyond the individual criminal responsibility perspective and links the discussion to the ongoing problem of Japan's failure as a state to acknowledge responsibility.

31.5. Lessons Learned or Not Learned at Batavia and the Kōno Statement

On 4 August 1993 the Chief Cabinet Secretary of Japan, Yōhei Kōno, made a statement which included the following assumption: "The recruitment of the comfort women was conducted mainly by private

[67] *Ibid.*, para. 634.

[68] *Ibid.*, para. 634.

[69] *Ibid.*, para. 634.

recruiters who acted in response to the request of the military".[70] Kōno also stated: "We hereby reiterated our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history".[71] Prime Minister Shinzō Abe's first cabinet in March 2007 made the statement: "The material discovered by the government contained no documentation that directly indicated the so-called coercive recruitment by the military or the authorities". Neither Kōno nor Abe seem to have taken the evidence of the Temporary Courts Martial in Batavia into account. In November 2013 the *Japan Times* reported that Hirofumi Hayashi, Professor of Modern Japanese History at Kanto Gakuin University, "found trial documents at the National Archives of Japan relating to six cases heard before tribunals set up for Class B and Class C war criminals after the end of WW II by China's Nationalist Party and the Netherlands, then the colonial ruler of the Dutch East Indies". Hayashi indicated that the materials needed to be further scrutinised, adding that he did not understand why the Japanese Ministry of Justice did not submit those documents as evidence at the time the Kōno statement was drafted.[72]

Abe stated that: "The Kōno statement put dishonour on the back of Japan by indicating that the military stormed into houses, kidnapped women and turned them into comfort women".[73] Arguably Abe has aggravated the problem by not only refusing full recognition of the war crimes but also by visiting the Yasukuni Shrine,[74] where war criminals of

[70] Ministry of Foreign Affairs of Japan, "Statement by the Chief Cabinet Secretary Yohei Kōno on the Result of the Study on the Issue of 'Comfort Women'", 4 August 1993.

[71] *Ibid.*

[72] "Archive Data for Years Have Shown 'Comfort Women' Were Taken by Force: Professor", in *Japan Times*, November 21, 2013.

[73] Abe was considering to review the Kōno Statement to make its scope more limited; "Abe: No Review of Kono Statement Apologizing to 'Comfort Women'", in *Asahi Shimbun*, 1 February 2013. Yohei Kōno criticised Abe for challenging his statement for going too far; John Hofilena, "Kono: PM Abe Wrong to Challenge Japan's 1993 'Comfort Women' Apology", in *Japan Daily Press*, 1 July 2013.

[74] An overview of the history of the Yasukuni Shrine and visits to it by Japanese prime ministers between 1945 and 2005, can be found in Mike M. Mochizuki, "The Yasukuni Shrine Conundrum: Japan's Contested Identity and Memory", in Mikyoung Kim and Barry Schwartz (eds.), *Northeast Asia's Difficult Past*, Palgrave Macmillan, London, 2010, pp. 31–52.

Class A and B[75] are enshrined. It has been suggested that some of the Taiwanese and Korean victims of the enshrined war criminals are also enshrined to "serve the emperor and protect the divine nation"[76] in the hereafter. A controversial process of schoolbook revisionism has been underway, aiming to downscale the number of civilians killed by Japanese soldiers during the 1937 Nanjing Massacre, and to present as disputable whether the Japanese Army played a direct role in forcing women from Korea and elsewhere to provide sex to its soldiers.[77] This leads to an educational climate whereby historical facts are glossed over if they are not welcome to the national agenda.[78]

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[75] Class A crimes are "against the peace", Class B crimes are "war crimes", Class C crimes are "crimes against humanity", according to the categorisation of Article 5 International Criminal Tribunal for the Far East Charter, 19 January 1946 (http://www.legal-tools.org/uploads/tx_ltpdb/CHARTER_OF_THE_INTERNATIONAL_MILITARY_TRIBUNAL_FOR_THE_FAR_EAST.pdf).

[76] "Kidnapped and slaves to Japan's military in life, tens of thousands of Taiwanese, Koreans and other in death have been subjected to Shinto ritual by Yakusuni Shrine priests hijacking, imprisoning, and enslaving them as guardian spirits of Japan to serve the Emperor and protect the divine nation along side some 1,000 war criminal souls, including perpetrators of atrocities against Taiwanese, Koreans, and others, and members of the deceased's own families". Barry Fisher, "Yasukuni Shrine, Typhoon's Eye of Japan's Spiritual/Political Storm Rejecting Wartime Victim Redress", Paper Presented at International Academic Symposium: Yasukuni Shrine, Columbia University, New York, 8 November 2007.

[77] Martin Fackler, "In Textbook Fight, Japan Leaders Seek to Recast History", in *New York Times*, 28 December 2013.

[78] Abe also appointed Katsuto Momii as Director-General of the state broadcaster NHK, who discussed the sex slavery issue on 25 January 2014, making the remark that "such women could be found in any nation that was at war, including France and Germany" and characterised the international anger as "puzzling"; "Japan NHK Boss Momii Sparks WWII 'Comfort Women' Row", BBC News, 26 January 2014. The next day Morii apologised; "Japan's NHK Boss Apologises for 'Comfort Women' Comments", BBC News, 27 January 2014. Toru Hashimoto, the Mayor of Osaka, first stated that war sex slaves were necessary to "maintain discipline in the ranks and provide rest for soldiers who risked their lives in battle"; "Japanese Mayor: Wartime Sex Slaves Were Necessary", in *Jakarta Post*, 14 May 2013. One week later Hashimoto made it publicly known that he doubted whether it was the state's will to engage in organised abduction of women for human trafficking, and argued that there is an understanding of the majority of Japanese historians that there is no evidence of the involvement of the government. Hashimoto also said that Japanese armies were not the only army involved in sexual misconduct during the Second World War; "Osaka Mayor Hashimoto Inflames 'Comfort Women' Row", BBC News, 27 May 2013. See also "Japan's National Broadcaster: My Country Right or Righter: The Ghosts of the Past Once Again Embrace Shinzo Abe", in *The Economist*, 8 February 2014.

The polarised attitudes towards these historical events are reflected in media reports of incidents of Koreans slicing off the top of their little finger in protest.[79] Less bloody but not more sanguine, every Wednesday since 1992, a protest has been held at the Peace Monument, the memorial for sex slaves opposite the Japanese embassy in Seoul.[80] It is organised by the Korean Council for the Women Drafted for Military Service by Japan[81] and demands the following actions: acknowledge the war crime; reveal the truth in its entirety about the crimes of military sexual slavery; make an official apology; make legal reparations; punish those responsible for the war crime; accurately record the crime in history textbooks; and erect a memorial for the victims of military sexual slavery or establish a historical museum in Japan. In 2013 the Japanese ambassador to Seoul demonstrated against a memorial opposite the Japanese embassy for Korean sex slaves.[82] In February 2014, 300 legislators signed a petition to remove the replica of the Seoul memorial in Glendale, California.[83]

The issue of wartime enforced prostitution remains an unresolved legal problem and obstacle for reconciliation in the countries of the Asia-Pacific region that were occupied by Japan. In South and North Korea, China,[84] Taiwan, the Philippines, Singapore, Malaysia, Myanmar, Papua

[79] Don Kirk, "Koreans Slice Their Fingers in Anti-Japan Rite", in *New York Times*, 14 August 2001.

[80] The Wednesday demonstrations [수요 집회], which means "demand meeting" in Korean, aim to obtain justice for the sex slavery committed during the Japanese occupation of Korea.

[81] Korean Council for the Women Drafted for Military Service by Japan. The Wednesday demonstrations are now in their twenty-second year. Jo Hyeong-guk, "22nd Anniversary of Wednesday Demonstration: 'We've Waited 22 Years Not a Word of Apology from Japan'", in *Kyunghyang Shinmun*, 10 January 2014. See also Jaeyeon Woo, "Tears, Gratitude and Anger Mark the 1,000th Protest", in *Korea Realtime*, 14 December 2011.

[82] Adam Westlake, "Japanese Government Protests South Korea's 'Comfort Women' Statue outside Seoul Embassy", in *Japan Daily Press*, 22 April 2013.

[83] Kirk Spitzer, "Japan's Lawmakers Launch Campaign Against 'Comfort Women' Memorials", in *Time*, 25 February 2014.

[84] Sun Xiaobo and Xie Wenting talked with Gen Nakatani, Deputy Secretary-General of Japan's ruling Liberal Democratic Party and Member of the House of Representatives: "It's reasonable to say that historical issues hinder the progress of security". See "Territorial Issues Stick in Throat, but Tokyo and Beijing Can't Give Up Eating", in *Global Times*, 18 February 2014.

New Guinea,[85] Timor-Leste, Guam,[86] Indonesia and the Netherlands, the matter is extremely sensitive[87] and topical, kept alive by surviving victims, now 55 from South Korea[88] alone, their families and compatriots. For the victims it might be said that: "The past is never dead. It's not even past".[89] The UN Security Council conference "War, Its Lessons and the Search for a Permanent Peace", which was held on 29 January 2014,[90] made it painfully clear how divided memories,[91] or rather patriotic versions of the truth, can obstruct reconciliation[92] between nations. South Korea, North Korea and China all condemned the Japanese Prime Minister's visit to the Yasukuni Shrine,[93] revisionism of Japan's history textbooks[94] and the way Japan is dealing with the "comfort women" issue.[95]

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85 Hank Nelson, "The Consolation Unit: Comfort Women at Rabaul", in *Journal of Pacific History*, 2008, vol. 43, p. 1.

86 Christine J. Hung, "For Those Who Had No Voice: The Multifaceted Fight for Redress by and for the Comfort Women", in *Asian American Law Journal*, 2008, vol. 15, pp. 177, 190.

87 James Card, "A Chronicle of Korea-Japan 'Friendship'", in *Asia Times*, 23 December 2005.

88 Ashley Fantz and Paul Armstrong, "Another Voice Lost, Korean 'Comfort Woman' Dies", CNN, 5 February 2014.

89 William Faulkner, *Requiem for a Nun*, Random House, New York, 1950, p. 73.

90 The Jordanian Permanent Representative to the United Nations initiated a conference "War, Its Lessons and the Search for a Permanent Peace" on 29 January 2014.

91 See the research of Daniel Snyder entitled "Divided Memories and Reconciliation", Shorenstein Asia-Pacific Research Center, Stanford University, which started in 2006.

92 Reconciliation, the common definition is the restoration of friendly relations; the action of making one view or belief compatible with another. However, one can also see reconciliation as both a goal and a process. David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, p. 12.

93 Oh Joon, Representative of South Korea to the UN, stated for example: "Many Japanese leaders had continually shown an attitude of historical revisionism by paying tribute at Yasukuni, where Second World War criminals were enshrined". Japan's Representative to the UN, Kazuyoshi Umemoto, answered: "Yasukuni enshrined 2.5 million souls, and they were not only Second World War criminals, but also those who had sacrificed their lives in domestic turmoil. The Prime Minister had visited the shrine to renew Japan's pledge never to wage war again, not to pay homage to the war criminals". Security Council, 7105th Meeting, UN Doc. SC/11266.

94 The Representative of South Korea stated that "the leadership of Japan had a distorted view of what happened under imperialism". The Representative of Japan did not respond to the issue of history books. The Representative of South Korea urged Japan to reconcile

In February 2014 the Chief Cabinet Secretary Yoshihide Suga announced that Japan was considering a re-examination of the Kōno Statement, to make its scope more limited. He said: "The testimonies of comfort women were taken on the premise of their being closed-door sessions. The government will consider whether there can be a revision while preserving" the confidence in which they were given.[96] However, Abe said in the same month that Japan will not review the Kōno Statement.[97]

31.6. Conclusion

Japan was accused by the Allies of adopting a policy of total war,[98] "not merely because all the nation's resources of men and material were swept into the war, but also because the war was waged with a total disregard of all human and moral or legal restraints".[99] John Hickman observed a striking difference between how the Japanese Army first scrupulously adhered to international humanitarian law in the 1904–1905 Russo-Japanese War and in the First World War, but seemed to ignore international law during the Second Sino-Japanese war in 1937–1945 and

with its past and with the victims of its aggression, while teaching the same to its youth". The Chinese Representative stated that Japan should draw lessons from war "required facing history squarely because facts spoke louder than words". The Representative of North Korea warned that they would meet defeat if they continued in that direction; *ibid.*

95 The Representative of South Korea stated that Japan had yet to take governmental responsibility in addressing the "comfort women" issue. The Representative of China stated that regarding "comfort women", the "Yasukuni Shrine still validated as deities war criminals, whom Japan's delegate had described as having made the ultimate sacrifice". The Japanese Representative answered that "Japan had also expressed remorse over the question of 'comfort women', an issue that should not be politicised". Then the South Korean Representative responded that "[o]n the issue of 'comfort women' forced into sexual slavery Japan had never accepted legal responsibility. It was not a charity or humanitarian issue, but a matter of crime and accountability"; *ibid.*

96 "Japan Considers Revision of Comfort Women Apology", Agence France-Presse, 24 February 2014.

97 "Abe: No Review of Kono Statement Apologizing to 'Comfort Women'", see *supra* note 73.

98 In the Shōwa period, under the reign of Emperor Shōwa (Hirohito), Imperial Japan launched several policies to promote a total war effort against China and Western powers and increase industrial production. These included the National Spiritual Mobilization Movement and the Imperial Rule Assistance Association. Elise K Tipton, *Modern Japan: A Social and Political History*, Routledge, London, 2008, pp. 136–37.

99 History of the UNWCC, p. 9, see *supra* note 11.

the Second World War, which degenerated into unprecedented brutality.[100] Knut Dörmann *et al*. contended that due to the findings of the Awochi case, a compromise was made about the elements of enforced prostitution, so that both pecuniary advantage and other advantages were included.[101] One can argue that the "other advantage" was that the deployment of enforced prostitutes became part of the total and brutal war: to strengthen the fighting spirit of the soldiers, to prevent the soldiers from becoming disabled by sexually transmittable diseases and, especially after the Nanjing massacre, which was widely publicised and internationally criticised, to prevent them from raping local women.[102]

Kim Hak-sun became the first survivor of the Japanese "comfort women" system to go public with her story in 1991[103] which might have acted as a catalyst for the interest in the issue. Subsequently, the actions of human rights advocates culminated in a public hearing in Tokyo in 1992,[104] and the establishment of the Women's International War Crimes

[100] John Hickman suggests three explanations: indoctrination in brutality of the ordinary soldiers and officers, the changed perception by its leaders of Japan's role in the international system, and Japanese military decision-makers learned from waging protracted war in continental China against the conventional and guerrilla forces of an enemy that could be bested on the battlefield yet not defeated, practices transferred to other fronts and military occupations in Southeast Asia and the insular Pacific. John Hickman, "Explaining the Interbellum Rupture in Japanese Treatment of Prisoners of War", in *Journal of Military and Strategic Studies*, 2009, vol. 12, p. 1.

[101] Dörmann *et al*., 2003, p. 339, see *supra* note 9.

[102] Kazuko Watanabe, "Trafficking in Women's Bodies, Then and Now: The Issue of Military 'Comfort Women'", in *Women's Studies Quarterly*, 1999, vol. 27, pp. 19, 21.

[103] Chunghee Sarah Soh, "From Imperial Gifts to Sex Slaves: Theorizing Symbolic Representations of the 'Comfort Women'", in *Social Science Japan Journal*, 2000, vol. 3, pp. 59, 65; "How Did the Comfort Women Issue Come to Light?", Digital Museum: The Comfort Women Issue and the Asian Women's Fund; Kim Tae-ick, "Former 'Comfort Women' Hold 1,000th Protest at Japanese Embassy", in Chosun Ilbo, 14 December 2011.

[104] The issue was first raised at the Commission on Human Rights in 1992 and subsequently before other UN bodies. Public hearings were held in Tokyo and again at the Vienna World Conference on Human Rights in 1993. Christine Chinkin, "Toward the Tokyo Tribunal 2000", Women's Caucus for Gender Justice. The International Public Hearing in Tokyo concerning Japanese war crimes and post-war compensation was supported by the Japan Federation of Bar Associations and by Tokyo-based human rights citizen groups, 9–10 December 1992. Bernice Archer, *The Internment of Western Civilians under the Japanese 1941–1945: A Patchwork of Internment*, Routledge Curzon, London, 2004, p. 240.

Tribunal in Tokyo in 2000,[105] all organised by non-governmental organisations, because of the reluctant stance of the Japanese government. Survivors[106] and perpetrators[107] have written their memoirs and given their testimonies[108] about enforced prostitution under Japanese occupation. Scholars have investigated the possibility of reparations[109] from a human rights perspective and mapped the different international treaties under which enforced prostitution could fall.[110] However, there is a gap in the knowledge regarding the adjudication of the war crime of enforced prostitution following the Japanese occupation. In this respect, the Judgments of the Temporary Courts Martial in Batavia are of great historical significance. Not only did they sentence for the first time those accused of the war crime of enforced prostitution, they also demonstrated the planning, selection, abduction, management – in short the systematic involvement – of the Japanese military and clarified the lack of

[105] Asian Center for Women's Human Rights, "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery" (https://www.legal-tools.org/uploads/tx_ltpdb/doc28020.pdf).

[106] Jan Ruff-O'Herne, *Fifty Years of Silence: The Extraordinary Memoir of a War Rape Survivor*, Random House, New York, 1994.

[107] Kiyosada (Seiji) Yoshida, *Atashino Sensō Hanzai: Chōsenjin Kyōsei Renkō* [My War Crimes: The Impressment of Koreans], Sanichi shobo, Tokyo, 1983, in which the author confesses to forcibly procuring women from Jeju Island in Korea under the direct order from the Japanese military.

[108] Korea Verband, "Testimonies of Former 'Comfort Women' from Korea"; Korea Verband, "Testimonies of Former 'Comfort Women' from Taiwan". Lee Ok-Seon spent three years in a Japanese military brothel in China against her will during the Second World War. Esther Felden, "Former Comfort Woman Tells Uncomforting Story", in *Deutsche Welle*, 2 September, 2013; Maria Rosa Henson, *Comfort Woman: A Filipina's Story of Prostitution and Slavery under the Japanese Military*, Rowman & Littlefield, Lanham, 1999; "Statement of Lola Felicidad de los Reyes", in *Review of Women's Studies*, 1998, vol. 8, p. 105; "Who Were the Comfort Women? – The Pacific War and Spreading Comfort Station", Digital Museum: The Comfort Women Issue and the Asian Women's Fund. "Researcher Details Shattered Lives of Local Comfort Women", in *Malaysiakini*, 11 August 2001; Margaret Mitsutani, "Fifty Years of Silence: Three Taiwanese Women Silence to Light: Japan and the Shadows of War", in *Manoa*, 2001, vol. 13, p. 176.

[109] David Boling, "Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility", in *Columbia Journal of Transnational Law*, 1994/95, vol. 32, p. 533; Cheah Wui Ling, "Walking the Long Road in Solidarity and Hope: A Case Study of the Comfort Women Movement's Deployment of Human Rights Discourse", in *Harvard Human Rights Journal*, 2009, vol. 22, p. 63.

[110] Nora V. Demleitner, "Forced Prostitution: Naming an International Offense", in *Fordham International Law Journal*, 1994/95, vol. 18, p. 163.

"voluntariness" of the girls and women. One can argue that the Judgments are also still germane for the survivors, their families and compatriots, since they might be used as evidence in a case for reparations against Japan. Further, women often experience difficulties in some countries of asylum in being recognised as refugees when the claim is based on such persecution.[111] An unequivocal recognition such as this is pertinent when recalling the invisibility of enforced prostitution, rape and sexual bartering that so dominated the landscape of occupied and liberated Asia-Pacific after the Second World War.

The representation of the "comfort women" issue has undergone a symbolic shift from the vocabulary of "prostitution" to that of "slavery".[112] Judges at the ICTY have qualified rape as torture,[113] sexual enslavement and crimes against humanity;[114] and at the ICTR, rape as genocide.[115] This combination of two or more qualifications is creative, and can provide a solution when there is no more precise qualification available. In the Kunarac case, where women were taken to apartments and hotels run as brothels for Serb soldiers, enforced prostitution as a possible outrage against personal dignity was not considered and enslavement was deemed the right qualification.[116] Arguably, the trend is to usher the war crime of enforced prostitution from the stage of individual criminal responsibility. Further study of the origins of this crime as contained in the historical and perhaps also historic Judgments of the Dutch Temporary Courts Martial at Batavia may help to determine its future relevance.

[111] Beijing Declaration and Platform for Action, 15 September 1995, para. 137 (https://www.legal-tools.org/uploads/tx_ltpdb/BDPfA_E_01.pdf).

[112] Soh theorises the ideologies of the three principle parties, wartime Imperial Japan, the troops and contemporary activists, respectively, implicated in the debate as patriarchal fascism, masculinist sexism and feminist humanitarianism. Soh, 2000, p. 61, see *supra* note 103.

[113] ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, No. IT-96-21-I, Čelebići Judgment, 16 November 1998, para. 493 (https://www.legal-tools.org/doc/6b4a33/).

[114] Kunarac and Others Judgment, see *supra* note 6; ICTY, Kunarac and Others Appeals Judgment, see *supra* note 6.

[115] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras. 731, 733 (https://www.legal-tools.org/doc/b8d7bd/).

[116] Kunarac and Others Judgment, see *supra* note 6.

32

Obscuring the Historical Origins of International Criminal Law in Australia: The Australian War Crimes Investigations and Prosecutions of Japanese, 1942–1951

Narrelle Morris*

32.1. Introduction

As the Second World War slowly drew to a close in 1945, the Australian Government faced the difficult task of following through with numerous promises that it had articulated to the Australian public that it would vigorously pursue and bring all suspected Japanese war criminals to justice. While this laudable goal was loudly reiterated time and time again, the actual policies and practices by which Australia investigated and prosecuted Japanese for war crimes – what can be said to be part of the historical origins of international criminal law in Australia itself – have been, by comparison, relatively obscure. Indeed, the numerous war crimes investigations from 1942 and 300 Australian war crimes trials involving 812 principally Japanese accused war criminals that took place in Morotai, Wewak, Labuan, Rabaul, Darwin, Singapore, Hong Kong and on Manus Island from 1945 to 1951 had almost passed from popular memory until recently when, all of a sudden in this past decade, there has been a long overdue boom in war crimes studies in Australia. At this late stage, there are obvious difficulties involved in properly gathering together, understanding and analysing Australia's policies and practices in relation to breaches of international criminal law during that period, but these are dramatically increased by the veils of censorship, secrecy and obscurity that have been either deliberately or, through inaction, laid over the war crimes investigations and prosecutions during and since the Second World War.

This chapter briefly examines the changing attitudes and actual restrictions over time regarding the dissemination of knowledge of war crimes investigations and prosecutions in the public sphere in Australia, and the impact of those restrictions for the consolidation of knowledge of international criminal law since the Second World War. Notwithstanding

the existence of a severe regime of censorship during most of the war, which impacted on the publicity of atrocity stories, knowledge of the extent of alleged Japanese war crimes, if not the precise details of those war crimes, was reasonably widespread among the Australian public. Serving members of the armed forces undoubtedly knew more, as many had either the opportunity to personally witness evidence of Japanese atrocities or had atrocity stories repeated to them.[1] Knowledge of alleged Japanese war crimes became very widespread after the war, as censorship was lifted and members of the armed forces returned home to give personal accounts. However, the degree of publicity given to atrocity stories during certain stages of the war crimes trials from 1945 to 1951 made some actively call for the return of censorship.

For much of the post-war period, it has been reasonably difficult to acquire detailed knowledge of Australia's war crimes investigations and prosecutions of Japanese.[2] For many decades, the war crimes investigation files and trial proceedings were inaccessible, as they were restricted government documents. Even though the trial proceedings were finally opened to public access in 1975, the enormous wealth of material on war crimes investigations and prosecutions now held by the National Archives of Australia, scattered across several locations and with few finding aids, has regrettably continued to preclude all but the most devoted scholars or

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1 For an overview of Australian military views of the Japanese as the enemy, including the impact of hearing reports of and witnessing physical evidence of Japanese atrocities, see Mark Johnston, *Fighting the Enemy: Australian Soldiers and their Adversaries in World War II*, Cambridge University Press, Cambridge, 2000, pp. 73–128.

2 The standard internationally cited work on the Australian trials, for instance, has remained Philip Piccigallo's 1979 book, even though Piccigallo used newspaper reports of the trials, not the trial proceedings, for his analysis: Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979, see chap. 7 on "Australia and Other Commonwealth Trials (Canada, New Zealand)", pp. 121–42.

researchers from delving into it.[3] Since the Second World War, therefore, the limitation of both national and international knowledge of Australia's war crimes investigations and prosecutions has meant that Australia's contribution to the development of international criminal law has been effectively, and most regrettably, elided from the historical narrative.

32.2. Atrocity Stories and Censorship in Australia

That atrocities are an inevitable part of even a modern war was well known in Australia prior to the Second World War.[4] That atrocities were also playing a part in the new war against Japan was very rapidly brought home to Australians in early 1942, as disturbing reports of breaches of the laws and usages of war began emanating from the field. In April 1942, for instance, Australian military personnel who had escaped from the Japanese occupation of New Britain told "horror" stories to the press about "acts of ferocity" by the Japanese towards surrendered Australians.[5] These included accounts of the "shocking" and "cold-blooded" massacre of Australian prisoners of war ('POWs') at Tol plantation, which had taken place in January 1942.[6] Given that there had been semi-official

[3] For selected references utilising the trial proceedings, see Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints", in David A. Blumenthal and Timothy L.H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* Martinus Nijhoff, Leiden, 2008, pp. 244–45; David Sissons, "Sources on Australian Investigations into Japanese War Crimes in the Pacific", in *Journal of the Australian War Memorial*, 1997, vol. 30; and also David Sissons, "The Australian War Crimes Trials and Investigations (1942–1951)", n.d., Papers of D.C.S. Sissons, MS 3092, Series 10, National Library of Australia. Regrettably, none of the three substantial Ph.D. theses on the trials has been published in full: Caroline Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific 1943–1961", Ph.D. Thesis, University of New South Wales, 1998; Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints", Ph.D. Thesis, University of Melbourne, 2005; and Dean Michael Aszkielowicz, "After the Surrender: Australia and the Japanese Class B and C War Criminals, 1945–1958", Ph.D. Thesis, Murdoch University, 2012.

[4] Even as early as September 1914, various Australian newspapers instructed their readers at length on "what is fair fighting?" and provided a list of "war crimes" in response to claims that the Germans were committing them; see, for example, "War Crimes. What is Fair Fighting? Early Atrocities", in *Sydney Morning Herald*, 7 September 1914, p. 5.

[5] Letter from E.G. Bonney, Chief Publicity Censor to Brigadier E.G. Knox, Director-General of Public Relations, Department of the Army, explaining the "background to Censorship policy with regard to enemy atrocities", 3 December 1942, A11663, PA33, National Archives of Australia ('NAA').

[6] See for example, "AIF Massacre. Survivor's Story. Wholesale Murder. 125 Men Die; 2 Escape", in *West Australian*, Perth, 10 April 1942, p. 5.

reassurances after the fall of Singapore in early 1942 that Japan was properly treating Australian POWs, and advice that the public should disregard "sensational stories" and "rumours" spread by "morbid-minded people",[7] the impact of the "horror" stories appeared substantial. In South Australia, for instance, Gilbert Mant, the State Publicity Censor, reported to Edmund Bonney,[8] the Chief Publicity Censor, on 10 April 1942 that press stories of Japanese atrocities were "causing much distress here amongst relatives of soldiers known to be in enemy hands" and that the public in general was "greatly concerned". Mant advised that it was felt that "no useful purpose" was being served by "such gruesome detail" from New Britain. While it was "problematical [sic]" whether atrocity stories fell within the scope of censorship, he thought that the stories "should be of a milder nature".[9] After being taken "severely to task"[10] over the fact that the stories from New Britain had been passed for publication, Bonney warned all state censors on 11 April 1942 that "further Japanese atrocity stories" should be given "the closest scrutiny".[11] Indeed, the Advisory War Council ('AWC'), the bipartisan parliamentary body set up instead of a negotiated national government during the war, swiftly directed that "atrocity stories should not be published", unless they were officially released under the name of a government minister, the chief of staff of an armed service or by General Headquarters and then only after it was decided whether the "probable effect on public morale would be good or bad".[12]

7 From, for instance, Major General Gordon Bennett, the General Officer Commanding, Australian Infantry Force in Malaya, who had just controversially "escaped" from the fall of Singapore: Adele Shelton Smith, "Special Interview with Major-General Bennett", in *Australian Women's Weekly*, 14 March 1942, p. 7. See also "Gen Bennett's Views on War Captives", in *News*, Adelaide, 11 March 1942, p. 3.

8 See John Hilvert, "Bonney, Edmund Garnet (1883–1959)", *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, Canberra, n.d.

9 Telegram from "PresCensor Adelaide" to "FedCensor Canberra", stamped 10 April 1942 and letter from State Publicity Censor, South Australia, to the Chief Publicity Censor, 10 April 1942, SP109/3, 329/07 (NAA).

10 As recalled by E.G. Bonney, Chief Publicity Censor, in a letter to the State Public Censor, Brisbane, 10 March 1944, SP109/3, 329/07 (NAA).

11 Letter from E.G. Bonney, Chief Publicity Censor to the Secretary, Department of Defence, 18 April 1942, SP109/3, 329/07 (NAA).

12 Letter from E.G. Bonney, 3 December 1942, *supra* note 5.

The AWC's direction in early 1942 was effectively the start of concerted censorship of atrocity stories – and, therefore, censorship of knowledge of alleged war crimes – in Australia, although the press had been subject, from the very beginning of the war, to severe censorship, which would venture well beyond that experienced in other Allied countries.[13] Under regulation 16 of the National Security (General) Regulations 1939 issued pursuant to the National Security Act 1939 (Cth), censorship was authorised:

> if it was necessary or expedient so to do […] in the interest of the public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.[14]

A Press Censorship Order was issued pursuant to regulation 16 in October 1939, which specified a number of matters which were subject to censorship, prudently encompassing a variety of national security and military operational matters, and also

> any other matter whatsoever information as to which would or might be directly or indirectly useful to the enemy or prejudicial to the public safety, the defence of the Commonwealth or of any other part of His Majesty's dominions, the efficient prosecution of the war, or the

[13] For example, American war correspondent Theodore White commented in *Time* magazine, "Never anywhere have we encountered political censorship of such a character as exists in Australia", cited in Roger Bell, "Censorship and War: Australia's Curious Experience, 1939–1945", *Media Information Australia*, no. 6, November 1977, p. 1.

[14] Regulation 16 "Censorship", National Security (General) Regulations, no. 87 of 1939, made on 13 September 1939 (as amended by Statutory Rules no. 34 of 1940, no. 120 of 1940, no. 9 of 1941, no. 475 of 1942 and no. 137 of 1943) pursuant to the National Security Act 1939 (Cth). For an analysis of the passage of the National Security Act 1939 and operation of wartime censorship, see Paul Hasluck, *The Government and the People 1939–41*, in *Australia in the War of 1939–1945*, series 4 – Civil, vol. I, Australian War Memorial, Canberra, 1952, pp. 174–87. On publicity censorship, see John Hilvert, *Blue Pencil Warriors: Censorship and Propaganda in World War II*, University of Queensland Press, St. Lucia, 1984; and Sam Headon, "Censored! A Study of the Relationship between the Press and the Government in Australia during World War II", Honours Thesis, Australian National University, 1999. For an excellent study of the Department of Information, under whose control publicity censorship fell from 1939 to October 1941 and from September 1943 to 1945, see Edward Vickery, "Telling Australia's Story to the World: the Department of Information 1939–1950", Ph.D. Thesis, Australian National University, 2003.

> maintenance of supplies and services essential to the life of the community.[15]

In practice, this matter was interpreted from 1939 to 1944 as encompassing anything that might negatively affect public morale. Censors were officially advised, for instance, that:

> in this war the term "Security" has a much wider application than in any previous war. It must cover the morale of civilians as well as Service personnel.[16]

As the official historian Paul Hasluck later described, the censor thus "became the protector of what was called 'public morale'. The public must not be alarmed or incited. It had to be protected from bad news and from anything that might shake confidence".[17] Interestingly, even though there were repeated references during the war to the importance of not just maintaining but improving public morale,[18] it was never at all clear what public morale actually encompassed, as the term was not defined.[19] Moreover, as Edward Vickery has observed, the "machinery needed to assess the state of public morale" in Australia, such as public opinion polls, was never put in place during the war.[20] At best, as Hasluck acknowledged, there were "opinions on the state of opinion".[21]

Given the importance placed on public morale, even though the concept itself was vague and undefined, neither censors nor the press appeared to question the authority to apply censorship to atrocity stories, at least until 1944 when protecting public morale as a basis for any censorship was itself challenged (as discussed below). Despite this, the

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15 Order 3(vi), Press Censorship Order, issued 4 October 1939 (later repealed and re-issued in 1943 as Press and Broadcasting Censorship Order), pursuant to regulation 16, National Security (General) Regulations, *ibid.* Similar censorship orders over film and radio broadcasting and postal, telegraphic and telephonic communications were also issued pursuant to regulation 16.

16 *For State Censor's Information: Why War-time Censorship is Necessary*, official guidance booklet, cited in Vickery, 2003, p. 197, see *supra* note 14.

17 Paul Hasluck, *The Government and the People 1942–45*, in *Australia in the War of 1939–1945*, series 4 – Civil, vol. II, Australian War Memorial, Canberra, 1970, p. 401.

18 Hasluck suggested that these references were overblown, given that Australians in 1942 appeared to be "in a fighting mood" and "aroused by danger as they had never been stirred before"; see *ibid.*, p. 128.

19 Vickery, 2003, p. 22, see *supra* note 14.

20 *Ibid*., pp. 6, 23–24, 243.

21 Hasluck, 1970, p. 129 and appendix 7, pp. 745–50, see *supra* note 17.

application of censorship to atrocity stories actually took some time to firm up from 1942, as opinion was divided as to the probable effect of publishing atrocity stories on public morale. Lacking the "machinery" to assess morale, there were never any formal attempts to evaluate whether publicity of atrocity stories did affect morale, how it affected it and to what extent. There were only numerous hearsay reports that it did, such as that conveyed by the South Australian censor in the wake of the "horror" stories from New Britain. Some commentators thus thought that censorship of atrocity stories was warranted, as publication raised the level of alarm and created anxiety amongst the public, thereby impacting negatively on morale. Particular attention was drawn to the likely detrimental impact of atrocity stories upon relatives and friends of those serving in the armed forces, even more so if they had been already taken POW, or upon those who had not yet enlisted, as it might discourage them from doing so. Others, however, were all for the publication of verified and approved atrocity stories as part of the carefully orchestrated propaganda campaign against Japan, which built on decades of fear of the "yellow peril".[22] The rationale was, apparently, that presenting the Japanese as a despised enemy race innately prone to committing systematic atrocities and Japan itself as a savage outlier nation, which had little, if any, respect for international law would alleviate public complacency about the degree of danger that Japan posed to Australia and harden support for a "war without mercy".[23] Lieutenant General John Northcott, the Army's Chief of General Staff, for instance, apparently held the view that "so long as the stories were well authenticated, the

[22] For analysis of the concept of the 'yellow peril', see Richard Austin Thompson, *The Yellow Peril, 1890–1924*, Arno Press, New York, 1978; Gina Owens, "The Making of the Yellow Peril: Pre-war Western Views of Japan", in Phil Hammond (ed.), *Cultural Difference, Media Memories: Anglo-American Images of Japan*, Cassell, London, 1997, pp. 27–47; Narrelle Morris, "From 'Yellow Peril' to 'Japan-bashing': Historical Images of Japan in the West", in Narrelle Morris, *Japan-Bashing: Anti-Japanism since the 1980s*, Routledge, London, 2011, pp. 14–29.

[23] For discussion of this point in an Allied context, see John W. Dower, *War Without Mercy: Race & Power in the Pacific War*, Pantheon Books, New York, 1986, pp. 33–73. In Australia, the Department of Information embarked on a racist anti-Japanese campaign in newspapers and on radio in March 1942, which included the claim that the Japanese were "devils" who would "torture, murder, [and] enslave". The public reaction to the campaign was broadly critical and the campaign ceased after two weeks; see Hilvert, 1984, pp. 115–18, *supra* note 14.

more nakedly the horrible truth was told the better".[24] A newspaper editorial in April 1942, amidst the "horror" stories emanating from New Britain, also thought that there was a certain utility in publishing such stories, observing:

> Atrocity disclosures make sickening reading. But they serve as a warning, and as a stimulus to the fighting spirit and determination of the Australian nation […] factual stories like those of the massacre in New Britain give us a clear picture of the kind of enemy we are up against.[25]

In the end, the willingness to accept some possible detriment to public morale from the publication of atrocity stories in return for the apparent value of verified and approved atrocity stories to the propaganda campaign against Japan meant that plenty of information about alleged Japanese war crimes actually seeped, with the concurrence of censors, through the censorship regime to the Australian public in 1942 to 1945. This was because while censorship of atrocity stories was strict, it was not absolute, given the proviso allowing publication of 'official releases'. The censorship instruction on atrocity stories issued by Bonney, the Chief Publicity Censor, in early 1942, read:

> A.8 Atrocities. Atrocity stories concerning Australians or relating to incidents in the Southwest Pacific area may not be published unless officially released under the name of a Commonwealth minister, the chief of staff of the service concerned or by General Headquarters.[26]

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[24] As reported in a letter from T.P. Hoey, State Publicity Censor, Victoria to the Chief Publicity Censor, 21 December 1942, A11663, PA33 (NAA). See H.J. Coates, "Northcott, Sir John (1890–1966)", *Australian Dictionary of Biography*, *supra* note 8.

[25] Editorial, "War Against the Beast", in *News*, Adelaide, 8 April 1942, p. 2.

[26] See for example, Consolidated Censorship Directions issued pursuant to the Press and Broadcasting Censorship Order, 30 April 1943, p. 3, J2813, CENSORSHIP (NAA). This censorship direction was renumbered as A.9 in new directions issued in late 1944. While a literal reading of "Atrocity stories concerning Australians" in the censorship direction suggests that it could also apply to stories of atrocities allegedly committed by Australians, it is probably more likely that the press and censors practised self-censorship in relation to reporting such stories, akin to the practice discerned in the United States; see Karen Slattery and Mark Doremus, "Suppressing Allied Atrocity Stories: The Unwritten Clause of the World War II Censorship Code", in *Journalism & Mass Communication Quarterly*, vol. 89, no. 4, December 2012, pp. 624–42. My own search of press coverage during the war has been unable to find anything beyond the most cursory reference to Australian atrocities, usually dismissed as, for instance, "lurid tales": see for example, "Italian Treachery in Libyan campaign", in *Advertiser*, Adelaide, 14 August 1941, p. 6. It is clear,

The censors were privately instructed that "in handling Japanese atrocity stories remember that if [stories were] too startling [the] effect may be frightening to relatives of soldiers known to be in enemy hands thus lowering morale". They were also instructed that while it was "difficult" to impose the "rule" in all cases, "most careful scrutiny [was] essential".[27] Elsewhere, Bonney explained that the censorship of atrocity stories was "designed to prevent the publication of atrocity stories without due consideration of all the issues involved". He continued:

> It is obviously undesirable to publish stories of atrocities where these can do nothing but cause distress to relatives and friends of men of the Fighting Services, or where the stories might inculcate fear of the enemy. On the other hand, it sometimes is necessary to ask our own people to face the facts of a situation so that they may realise the nature of the enemies we are fighting. It is also sometimes necessary to proclaim to the world that an enemy has violated international law and the essential decencies of civilisation.[28]

With the approval of censors, therefore, certain atrocity stories were publishable. For instance, a proposed press report which described Japanese atrocities in Timor by the war correspondent Bill Marien was passed for publication by censors in late December 1942, although it is not entirely clear whether the report was passed by "relaxing" the censorship direction regarding atrocities or whether the report received imprimatur as an "official release".[29] The approved draft of Marien's report stated, for instance:

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however, that Australian service personnel did commit atrocities against Japanese, including killing surrendering Japanese or Japanese POWs, see for example, Johnston, *Fighting the Enemy*, pp. 80–81, *supra* note 1.

27 Telegram from "FedCensor" to "PresCensor Sydney", stamped 11 April 1942, SP106/1, PC551 (NAA).

28 Suggested draft letter from E.G. Bonney, Chief Publicity Censor to Minister for Information for reply to E.V. Raymont, undated but circa June 1942, SP109/3, 329/07 (NAA).

29 T.P. Hoey, State Publicity Censor, Victoria, initially suggested that Marien's report had been passed by "relaxing" the censorship instruction which "prevents references to happenings in Timor except for official disclosures": see letter from State Publicity Censor to Brigadier E.G. Knox, Director-General of Public Relations, Department of the Army, 23 December 1942, A11663, PA33 (NAA). Later, however, Hoey advised the Chief Publicity Censor that the "Publication of official releases recently – Marien articles […] etc. did not constitute a relaxation", which suggested that he now viewed Marien's report as an

> There are many authenticated instances of Japanese inhumanity to the natives. They have destroyed native food crops, cattle, horses, pigs and houses […] Japanese have not only violated native women but have forced them into brothels[30] where they have become infected with venereal disease with which the Japanese themselves seem to be universally affected.

The approved draft also discussed Japanese "brutalities" against others in Timor, including the murder of priests and "one authenticated case of Japanese atrocities committed on Australian commandos".[31] Marien's report on Timor was eventually published in a number of Australian newspapers in early January 1943.[32]

Other atrocity stories similarly received approval for publication during the war for propaganda purposes, particularly if the alleged victims were not Australians, as it thought that these were less likely to be significantly detrimental to public morale. Sometimes the victims were, in fact, Australian but the Australian connection was sanitised, not always very successfully and sometimes in a rather shambolic manner. For instance, a press report was widely published on 6 October 1943 concerning the Japanese execution by beheading of an Allied airman in New Guinea in March 1943, drawn from a detailed and graphic witness account of the execution in a captured and translated Japanese diary.[33] The publication of the report was made with the approval of General Headquarters South Pacific Area, General Douglas MacArthur himself (which made it an "official release"), on the grounds that the story would "bestir Australians and Americans from their complacency", and as it was

approved official release: letter from T.P. Hoey, State Publicity Censor to Chief Publicity Censor, 4 January 1943, A11663, PA33 (NAA).

30 This appears to be an early reference to evidence of "comfort" women.

31 Bill Marien, untitled article known as Timor No. 6 on "Natives", A11663, PA33 (NAA).

32 See, for example, Bill Marien, "Commandos Helped by Natives", in *Argus*, Melbourne, 4 January 1943, p. 12.

33 See for example, "An Abominable Example of Jap Barbarism. From General MacArthur's Headquarters", in *Barrier Miner*, New South Wales, 6 October 1943, p. 1; "Japs Behead Airman Prisoner", in *Argus*, Melbourne, 6 October 1943, p. 3; and Axel Olsen, "War Prisoner Beheaded by Jap Officer. Body Mutilated to Suit Samurai Code", in *Canberra Times*, 6 October 1943, p. 1. The report was also widely published around the world, see for example, *The New York Times*, 6 October 1943, p. 1.

"desirable in the interests of the war effort".[34] In response to the publication, and noticeably reinforcing the motivational message underpinning the story's release, Prime Minister John Curtin stated that he was "sure all Australians would be deeply shocked at the story of the Japanese atrocity", and that "the barbarity […] must bring home to the Australian people the type of enemy we face. It must stiffen us to throw in all we have against the ruthless foe".[35]

On the following day, the censors were instructed that no speculation in the press was permissible concerning the nationality of the executed airman.[36] Unfortunately, while the story might have, in the longer term, "stiffened" Australia's fighting resolve, the immediate effect of the executed airman's anonymity was tremendous agitation amongst the public. W.H. Lamb, State Member for Granville, asked in the New South Wales Parliament whether the Premier would approach the Federal Government to enquire what the "public and national value the publication of such a gruesome narrative has" and whether

> the nerve-wracking distress, pai[n] and fear suffered by the parents and near relatives, particularly mothers, of boys at present fighting in New Guinea were taken into consideration before the publication was authorised.[37]

Similarly, the Returned Services League of Victoria directly asked the Prime Minister to release the name of the airman, as the anonymity had left many relatives "in suspense".[38] Moreover, as was always the danger with such stories, notwithstanding their apparent verification, it was soon reported in the press that Japan had declared the story a "fabrication", one that revealed not only an "utter ignorance of the Japanese character" but

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[34] Memorandum from E.G. Bonney, Chief Publicity Censor, to the Prime Minister, 7 October 1943; and memorandum from E.G. Bonney, Chief Publicity Censor to the Secretary, Prime Minister's Department, 13 October 1943, SP109/3, 329/07 (NAA).

[35] "Mr Curtin's Comment", in *Western Mail*, Perth, 7 October 1943, p. 45.

[36] Priority telegram from "FedCensor" to "All States", 7 October 1943, SP109/3, 329/07 (NAA).

[37] Quoted in letter from the Premier, New South Wales to the Prime Minister, 8 October 1943, SP109/3, 329/07 (NAA).

[38] See for example, "Dead Airman's Name Sought", in *Courier-Mail*, Brisbane, 8 October 1943, p. 1.

the "desperate position" of the Allies who were "frantically trying to boost public morale".[39]

As a result of the public agitation, there was an immediate attempt to silence further reporting on the story, with the censors instructed on 8 October 1943 that "[n]o further references permissible to Japanese beheading Allied airman" and that the censorship instructions on atrocities must be "strictly observed".[40] The instruction's "background for censors only" advised that it was

> unlikely that any further atrocity stories will be released for some to come. The reason is that it is difficult to keep subsequent publicity within bounds. Every time an atrocity story is published it is enlarged upon by correspondents, who concoct "think-pieces" about even more hideous examples of Japanese cruelty.[41]

Similarly, in New South Wales, H.H. Mansell, the State Publicity Censor, instructed his censors on that day that "[a]ll references to Japanese atrocities to be submitted to censorship". That would have been fairly innocuous but for the part of the instruction designated for "censors only", which stated "[a]ll such submissions to be 'killed'".[42] An "off the record" and "confidential" document, apparently aimed at the press, articulated three reasons for the government's policy "against publishing atrocity reports". Firstly, as the government's "international reputation" was "staked on the veracity of charges it makes", it was necessary to "authenticate" information as "far as possible" before publication, although this was noticeably not a reason "against" publishing stories, just a reason for delaying publication until verification. Secondly, it claimed that publication led to "widespread anxiety on the part of relatives of all members of the Forces", which was the standard "public morale" justification for censorship. The third and final reason was that "publication may provoke or lead to demands for reprisals on our part.

[39] See for example, "Japan Denies Atrocity. Says Story of Airman's Execution 'Fabrication'", in *Advertiser*, Adelaide, 8 October 1943, p. 5.

[40] Priority telegram from "FedCensor" to "All States", 8 October 1943, SP109/3, 329/07 (NAA).

[41] Memorandum from E.G. Bonney, Chief Publicity Censor to F. McLaughlin incorporating Censorship Instruction of 8 October 1943 and "Background for Censors Only", 8 October 1943, SP109/3, 329/07 (NAA).

[42] See Action Sheet for censorship instruction R7, 8 October 1943, SP106/1, PC551 (NAA).

Should this lead to counter-reprisals, we are incapable of competing with a barbarous foe in 'frightfulness'".[43]

Eventually, this single atrocity story caused such a level of public anxiety that Curtin issued a statement on 13 October 1943 in which he admitted that the airman had been Australian, although he still refused to identify him by name, as it was a "private and intimate matter" for his kin.[44] Especial care was taken a few days later, therefore, to ensure that no connection was made in the press between the executed airman and the announcement of a posthumous award of a Victoria Cross, Australia's highest military honour, to Flight Lieutenant W.E. Newton, an airman who had indeed been captured and executed by beheading in New Guinea in March 1943. On 19 October 1943, the day of the award's announcement, the censors were instructed that Newton's award "must in no circumstances be linked even inferentially at present with beheading atrocity".[45] Alas, the attempt to avoid making a connection to Newton was not entirely successful: when a Japanese photograph showing an Allied POW about to be beheaded was discovered in April 1944, it was widely published around the world showing the imminent execution of Newton. It took some time before the identity of the Allied POW in the photograph was confirmed as that of Army Sergeant L.G. Siffleet,[46] not Newton. In the end, the relative shambles that had been made of the attempted use of this atrocity story to shore up public support for the war aptly demonstrated how the use of propaganda could backfire.

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[43] "Execution of Airman by Japanese. Off the Record Reasons for the Government's Policy", Canberra, 11 October 1943, A5954, 671/1 (NAA). While reprisals were lawful in international law and Australian military law as a coercive measure taken against a belligerent in response to illegitimate acts of warfare in order to force future compliance with the law, there were procedural rules to follow. For instance, an injured party could not at once resort to reprisals but had to first lodge a complaint with the offending belligerent; moreover, the form of a reprisal must not be "excessive and must not exceed the degree of violation committed by the enemy"; see the Australian *Manual of Military Law 1941*, Australian Government Printer, Canberra, 1941, chap. XIV, paras. 452–60.

[44] "Airman Executed by Japs. Australian, But Name Withheld", in *Singleton Argus*, New South Wales, 13 October 1943, p. 2.

[45] Priority telegram from "FedCensor" to "All States", 19 October 1943, SP109/3, 329/07 (NAA).

[46] Captain Noto Kiyohisa and CPO Watanabe Teruo, were eventually tried in an Australian Military Court at Rabaul for the murder of Siffleet and two others. For the trial proceedings, see A471, 81210 (NAA).

Undoubtedly due to the potential consequences of publication of certain atrocity stories on public morale, the decision whether to pass certain stories for publication occasionally reached the highest level of the government. The Chief Publicity Censor, Bonney, was "accustomed" to making his "suggestions, complaints and criticisms" about censorship directly to Curtin, who held ministerial responsibility for censorship from October 1941 to September 1943.[47] Even after Arthur Calwell, Minister for Information, took over ministerial responsibility for censorship, Bonney still sought Curtin's counsel. For example, Bonney advised Curtin in March 1944 that he had been hesitating over whether to approve for publication some atrocity stories of a "particularly gruesome character", namely cannibalism. Bonney acknowledged to Curtin in relation to his forthcoming decision: "Some people will think whatever we do is wrong".[48] In turn, Curtin solicited the opinion of H.V. Evatt, the Minister for External Affairs and the Attorney-General, on whether the stories should be passed, who responded:

> Publication of such accounts […] only arouses morbid interest and cause a lot of anxious relatives to enquire whether their menfolk had been victims of Japanese cannibalism. While there is much to be said for telling the public the truth about Japanese barbarities – using only well-authenticated stories – I feel that we should avoid distressing relatives over the purely gruesome.

[47] Hasluck, 1970, pp. 399–400, *supra* note 17. Bonney enjoyed considerable public support from Curtin. For example, Curtin described Bonney in a speech in August 1942 as "competent and impartial" and a "patriotic servant of Australia". Commonwealth Government, *Digest of Decisions and Announcements and Important Speeches by the Prime Minister (The Right Hon. John Curtin)*, no. 37, 10–15 August 1942, p. 5, B5459, 37 (NAA). Curtin was also supportive of Bonney in private, advising senior journalists in one of his regular "secret" press briefings in May 1943 that he had the "utmost confidence" in Bonney. Clem Lloyd and Richard Hall (eds.), *Backroom Briefings: John Curtin's War*, National Library of Australia, Canberra, 1997, p. 151.

[48] Letter from Prime Minister John Curtin to Dr. H.V. Evatt, Minister for External Affairs, including text of memorandum from Chief Publicity Censor to the Prime Minister dated 7 March 1944, undated but circa 15 March 1944, A989, 1944/43/735/577/1 (NAA). The draft cannibalism stories in question can be read in SP109/3, 329/07 (NAA).

Evatt recommended "strongly" that the "these particular cannibal accounts" not be released.[49]

32.3. The Australian War Crimes Investigations under Sir William Webb

Even if certain atrocity stories, particularly those involving Australians as victims, were unknown to the Australian public, the extent to which Japan appeared to be in breach of international law became quickly apparent to the Australian military and the Australian Government in 1942. In response to the successful Japanese landings in New Britain, Timor and on Ambon early that year, the Army convened a Court of Inquiry in May 1942, which was instructed to enquire into and report on, amongst other things, "any acts of terrorism or brutality practised by the Japanese against Australian troops"; the "treatment of Australian prisoners of war by Japanese troops" (including deaths occurring after capture); and "any breaches of International Law or rules of warfare committed by Japanese forces".[50] The Court of Inquiry found that the Tol massacre in New Britain, for instance, had been established "beyond all possible doubt" and that "[n]o excuse whatever existed for this outrage", which was a "clear" and "most flagrant" breach of international law.[51] Moreover, the evidence that Australian POWs still held by the Japanese in New Britain were being "reasonably well treated" was "meagre".[52] While the Court of Inquiry's report had "very limited circulation", a number of government departments and the military were becoming "interested in this question of Japanese atrocities".[53] By the end of 1942, only a year after the declaration of the war against Japan, the Australian Army had issued instructions to its commands that reports on allegations of breaches of

[49] Copy of letter from Dr. H.V. Evatt, Minister for External Affairs to Prime Minister John Curtin, 24 March 1944 (this copy is marked "Original returned to Dr. Evatt"), A989, 1944/43/735/577/1 (NAA).

[50] See the proceedings of the Court of Inquiry with Reference to Landing of Japanese Forces in New Britain, Timor and Ambon, Australian War Memorial ('AWM'): AWM226, 1/1.

[51] *Ibid*., p. 23.

[52] *Ibid.*, p. 24.

[53] Department of the Army Minute Paper, "Japanese Atrocities", 7 April 1943, MP742/1, 336/1/1145 (NAA).

rules of warfare be forwarded to Army Headquarters in Melbourne.[54] In that same month, Australia also applied to be represented on the United Nations War Crimes Commission ('UNWCC'), [55] although it would be more than a year before the UNWCC held its first official meeting.[56]

Australia's national programme to investigate alleged Japanese atrocities and war crimes got firmly underway in 1943, when the government, in response to a request by the Army, commissioned Sir William Flood Webb, who went on to be the Australian Judge and President at the International Military Tribunal for the Far East ('IMTFE'), to conduct a war crimes inquiry.[57] Webb was instructed on 23 June 1943 to enquire into "[w]hether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or of the Territory of Papua".[58] While Webb's commission to conduct a special inquiry for the Australian Government was publicly known (as Chief Justice of the Supreme Court of Queensland, he could not just abruptly disappear from his position), the press was prohibited from "speculation" on the "object" of the inquiry under a censorship instruction which was issued on 1 July 1943, although the censors themselves were privately informed that the inquiry related to atrocities.[59] Indeed, Webb himself had "raised the matter of undesirable premature publicity" in relation to the inquiry and "recommended censorship of any further additional reference to his appointment".[60]

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54 Memorandum from Brigadier W.J. Urquhart for the Adjutant-General to the Secretary, Department of the Army attaching "Statement Concerning Action Taken to Apprehend Japanese War Criminals", 27 September 1945, MP742/1, 336/1/980 (NAA).

55 Cablegram from the Prime Minister's Department to the Secretary of State for Dominion Affairs, London, 8 December 1942, A989, 1943/735/580 (NAA).

56 For a history of the UNWCC, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948.

57 Letter from Prime Minister John Curtin to F.M. Forde, Minister for the Army, 8 April 1943, MP742/1, 336/1/1145 (NAA). Webb's three commissions in 1943–1945 were pursuant to the National Security (Inquiries) Regulations, no. 35, 1941, also made pursuant to the National Security Act 1939 (Cth).

58 Sir William Webb, "A Report on Japanese Atrocities and Breaches of the Rules of Warfare", March 1944, AWM226, 5 (AWM).

59 See Action Sheet for censorship instruction O2, 1 July 1943, SP106/1, PC551 (NAA).

60 Reported in letter from Col –, Acting Director General of Public Relations, Department of the Army, to the Chief Publicity Censor, 10 July 1943, SP109/3, 329/07 (NAA).

Only a few months later in October 1943, however, amidst the "wave of horror"[61] caused by the story of the beheaded airman, it seems that censorship instruction about the inquiry was either relaxed or withdrawn. Oddly, while it was now permissible to publicise that there was an inquiry underway into Japanese atrocities, Webb's connection to it was now concealed. Several newspapers reported, for instance, merely that an "eminent Australian with special qualifications" or "an Australian with special qualification" had been appointed to undertake an investigation into allegations of Japanese atrocities.[62] The nexus between Webb and the atrocities inquiry was finally made clear on 31 January 1944, when Curtin responded to accounts of Japanese atrocities revealed in Britain and the United States of America ('US') with his first detailed public comment on the subject.[63] On the same day, Evatt issued a lengthy statement on Webb's commission, including the comment that Japan's record of "crimes and barbarities"

> demonstrates Japan's complete lack of civilised practice and stands as an indictment against the whole Japanese military administration and warrants the condemnation of the civilised world.[64]

Perhaps feeling the sting of criticism about apparent government inaction up until that point, Curtin also privately asked senior journalists "in a somewhat truculent manner" in February 1944 to "make it clear that Webb has been working [on the inquiry] for some months".[65]

Webb's remit was broadened for his second war crimes inquiry, when he was instructed on 8 June 1944 to enquire into "whether there have been any war crimes on the part of individual members of the

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61 "Australia Horrified", in *Dubbo Liberal and Macquarie Advocate*, New South Wales, 7 October 1943, p. 1.

62 "Japanese Atrocities to be Investigated", in *Mercury*, Tasmania, 7 October 1943, p. 2; "Inquiry into Jap Atrocities", in *Courier-Mail*, Brisbane, 7 October 1943, p. 1.

63 For a summary of overseas press reporting, see "Storm of Protest in Britain, USA. Feelings of Horror about Japanese Atrocities", in *Argus*, Melbourne, 31 January 1944, p. 12; "Anger at Atrocities. Sharp World Reaction", in *Advertiser*, Adelaide, 31 January 1944, p. 1.

64 "Commission to Probe Jap War Crimes", in *Canberra Times*, 1 February 1944, p. 2. See also "Inquiry into Jap War Crimes. Body Set Up By Federal Govt.", in *News*, Adelaide, 31 January 1944, p. 3; "Japanese Atrocities in Pacific. Australian Commission of Inquiry Appointed", in *Mercury*, Hobart, 1 February 1944, p. 2.

65 Lloyd and Hall, 1977, p. 199, see *supra* note 47.

Armed Forces of the enemy against any persons who were resident in Australia prior to the present war, whether members of the Forces or not".[66] Webb's second appointment did not appear to be subject to censorship, for both his appointment and the subject matter of his inquiry were publicised.[67] The instructions given to the Board of Inquiry into war crimes, also headed by Webb, on 3 September 1945 expanded the remit even further to embrace both British subjects and citizens of allied nations. The Board of Inquiry was instructed to enquire into

> [w]hether any war crimes have been committed by any subjects of any State with which His Majesty has been engaged in war since the second day of September, [o]ne thousand nine hundred and thirty-nine, against any persons who were resident in Australia prior to the commencement of any such war whether members of the Defence Force or not, or against any British subject or against any citizen of an allied nation.[68]

The three comprehensive reports that Webb (and his fellow commissioners in respect of the third report) produced are not surprisingly known as the "Webb Reports". However, details of the evidence being gathered from witnesses and the review of captured Japanese documents throughout 1943 to 1945 remained closely held. As Webb himself described in his first report in March 1944, he had been amply instructed from the very beginning in the need for "the utmost secrecy" and that when the subject matter of the inquiry was discussed in military correspondence, it was classified as "most secret".[69] He advised that he had, therefore, heard all evidence "in camera", as he was empowered to do,[70] and had warned each witness that their evidence was "most

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66 Sir William Webb, "A Report on War Crimes against Australians Committed by Individual Members of the Armed Forces of the Enemy", October 1944, AWM226, 7 (AWM).

67 See for example, "Webb to Sift War Crimes", in *Courier-Mail*, Brisbane, 18 August 1944, p. 1.

68 Sir William Webb, "Report on War Crimes Committed by Enemy Subjects against Australians and Others", January 1946, AWM226, 8 (AWM).

69 See Webb's discussion of "The Need for Secrecy" in "Report on Japanese Atrocities and Breaches of the Rules of Warfare", preamble address to the Attorney-General dated 15 March 1944, pp. 4–5, A10943, 1 (NAA).

70 The whole or part of an inquiry's proceedings might be "heard in private" if the commissioner "considers that it is desirable in the public interest to do so"; see regulation 15, National Security (Inquiries) Regulations, *supra* note 57.

secret".[71] As it had been "repeatedly urged" to him that "so much of the information in this report would be of immense value to the Japanese", he recommended that

> no part of it [the report] be published without the concurrence of General Sir Thomas Blamey. Moreover, in the interests of parents and other relatives of victims of atrocities, it is very desirable not to release to the public their names, or anything else that would enable their identity to be established; except where those particulars have been released already. Above all, the greatest care is required to ensure that none of people in Japanese occupied territory suffer as a result of any publication.[72]

Webb did not reiterate his description of his practices or his recommendation against publication in his second report, submitted in October 1944; however, it was marked at the beginning as "Most Secret (According to Army Classification)".[73]

When completed, the Webb Reports were provided to the Australian Government under the terms of the various commissions, and copies or summaries were provided to the UNWCC and selected Allied nations, including Britain, several other British Commonwealth nations (including Canada and New Zealand) and the US. Copies of the full reports and the summaries were typically marked "secret".[74] The Australian Government did, apparently, briefly consider whether to make public all or some of the first Webb Report in 1944. Certainly, the regulations under which Webb's three inquiries took place appeared to contemplate the eventual publication of the reports, as they offered protection against civil or criminal proceedings, such as defamation, being instigated against any person "publishing in good faith for the information of the public".[75] Conferral with Britain and the US about possible publication, however, revealed that they "did not favour any

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71 "Report on Japanese Atrocities and Breaches of the Rules of Warfare", p. 4, A10943, 1 (NAA).

72 *Ibid*., p. 5.

73 Webb, October 1944, see *supra* note 66.

74 See, for example, "Summary of Report on Japanese Atrocities and Breaches of the Rules of Warfare Presented to His Majesty's Government in the Commonwealth of Australia on March 15, 1944, by Sir William Webb Kt", which is marked as the "secret" copy for H.V. Evatt, A1066, H45/580/2/8/1 (NAA).

75 Regulation 16, National Security (Inquiries) Regulations, see *supra* note 57.

further publicity on Japanese atrocities at present".[76] The Australian Government therefore decided in early July 1944 not to publish a "detailed" statement regarding the "atrocities" disclosed by Webb's first inquiry.[77]

Interestingly, the decision to withhold the first Webb Report from publication, in full or in part, was seemingly not on the ground of the probable effect of very detailed atrocity stories on public morale, which was usually the rationale given for censorship. Rather, the issue of whether to publish or publicise the Webb Report became a fundamental part of broader and complex Allied policy discussions regarding the publicity campaign aimed at Japan in general (which encompassed propaganda about Japanese atrocities) and, in particular, the likely effect of further publicity of atrocity stories on efforts that were then ongoing to secure better Japanese treatment of Allied POWs and internees. Indeed, as Evatt informed the AWC, in making the decision not to publish the Webb Report, the government had given "regard to the interests of the Australian prisoners-of-war in Japanese hands".[78] Instead of publishing the Webb Report, the government decided to issue only a general statement that Webb had received a second commission in order to continue his investigations; the results of Webb's inquiries would eventually be brought before the UNWCC; and that Australia was "determined that those individuals responsible for atrocities shall be brought to justice and punished".[79] Curtin therefore briefly announced in July 1944 that the Webb Report would "not be made public at present".[80] Even so, the nature of the Webb Reports would have been clearly evident to the Australian public from the general statement issued by the government and other verified atrocity stories that were passed by the censors in 1942 to 1945.

The censorship regime was eventually reformed in early 1944, after a press revolt about the application and degree of censorship to various

[76] Reported in Advisory War Council Minute, 19 October 1944, A2680, 22/1945 (NAA).

[77] Memorandum for Advisory War Council, "Investigation of War Crimes Against Australians", 3 July 1944, A989, 1944/43/735/577/1 (NAA)

[78] *Ibid*.

[79] *Ibid*.

[80] "Atrocities Report Not to be Published Yet", in *The Advertiser*, Adelaide, 6 July 1944. p. 5.

subjects, including criticism of the government.[81] Censorship had developed, as one newspaper complained in March 1944,

> an unblushing political character, a zest for suppression, and a fussy preoccupation with matters supposed to relate to public morale […] Since nothing that it [censorship] does, however arbitrary or irrational, can be publicly referred to, it enjoys complete immunity from challenge or exposure on specific instances of suppression.[82]

The claim of "complete immunity from challenge" was a definite exaggeration given the confrontation that came to a head in April 1944 between the (principally Sydney) press and the censorship authorities, which eventually reached the High Court of Australia. The dispute was settled out of court, with the outcome being authorisation of censorship only in cases of national security or military operations, thereby removing the public morale ground.[83]

Notwithstanding the censorship reformation, the application of censorship to atrocities stories continued virtually unabated. Indeed, a priority telegraph from Bonney, the Chief Publicity Censor, stamped May 1944 addressed "for censors only" stated that "notwithstanding new [1944 censorship] code", the censorship direction regarding "atrocities still stands […] the only stories publishable will be those released by GHQ [General Headquarters]".[84] In fact, censorship of atrocity stories could well have enlarged in dimension thereafter, due to an instruction that the censorship direction also be construed as including "Japanese atrocities committed in the Indian Ocean Area or elsewhere, irrespective of the nationality of the victims".[85] It was not until May 1945 that Bonney, faced with the influx of atrocity stories which had been published overseas and were being republished in Australia, and without much recourse should a disgruntled newspaper challenge a censorship ruling against an atrocity story, suggested that it might be time for a realistic reappraisal of Australian censorship policy regarding such stories. Bonney advised:

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81 Hilvert, 1984, pp. 174–96, see *supra* note 14.

82 "It is Happening Here", in *Sydney Morning Herald*, 3 March 1944, p. 4.

83 See the new censorship principles in Hasluck, 1970, p. 413, *supra* note 17.

84 Telegraph from "FedCensor" to 'PresCensor Melbourne", stamped 31 May 1944, A11672, 1/1/47 (NAA).

85 Extract from Temporary Censorship Directions – 8. Japanese Atrocities, Department of Information, 5 December 1944, A2680, 22/1945 (NAA).

> Normally, I would ban all horror stories affecting Australian troops on the ground that the effect on relatives and on younger soldiers might be bad, and their publication would not, in my opinion, add an ounce to the war effort. We have to face the fact, however, that the new [1944 censorship] code lays it down that censorship shall not be imposed for the maintenance of morale or the prevention of despondency or alarm. Moreover, it is a fact that horror stories are being released elsewhere.[86]

Indeed, some Australian newspapers had republished atrocity stories cabled to Australian after publication in the US, "despite the standing prohibition contained in publicity censorship directions",[87] but seemingly without action being taken against them. The War Cabinet most curiously decided in June 1945, however, that the "existing Publicity Censorship Instructions on atrocities be adhered to".[88]

As might be surmised, in the immediate aftermath of the war, with the lifting of wartime censorship and the surge of publicity of first-hand accounts of atrocity stories, the imminent public release of the first Webb Report – which was described in the press in August 1945 as "perhaps the most horrifying war document yet compiled" – was hotly anticipated.[89] At the same time, the prominence now being given to atrocity stories, and their level of detail, was criticised on the grounds that it was furthering the suffering of relatives of Australian POWs. Calwell, the Minister for Information, stated:

> There has been a difference of opinion amongst Government advisers on the wisdom of allowing these stories to be published. Unfortunately, the government's censorship power does not cover these cases […] censorship could deal only with questions of security. The Government's power to

[86] Memorandum from E.G. Bonney, Chief Publicity Censor, to the Secretary, War Cabinet, 8 May 1945, A2671, 234/1945 (NAA).

[87] War Cabinet Agendum on "Publication of Stories Relating to Japanese Cannibalism", no. 234, 1945, p. 2, A2670, 234/1945 (NAA). One such story, using the by-line "From Australian Associated Press, New York", was said to be "Cannibalism by Japs in New Guinea", in *Argus*, Melbourne, 24 April 1945, see extract in A2670, 234/1945 (NAA). This article was indeed published on that date on p. 16.

[88] War Cabinet Minute, 12 June 1945 on War Cabinet Agendum on "Publication of Stories Relating to Japanese Cannibalism", no. 234, 1945, A2670, 234/1945 (NAA).

[89] Massey Stanley, "Evatt Presses for Release of Damning Report", in *Sunday Telegraph*, Sydney, 19 August 1945, held in A2680, 22/1945 (NAA).

> prevent publication of such stories is strictly limited. The matter, finally, depends on the good taste of newspaper proprietors. Unfortunately, many of them find in atrocity stories what they regard as sensational news, and, regardless of exacerbations they cause, and the sufferings they impose on the relatives of prisoners of war, the profit motive wins every time.[90]

The editor of the *Sydney Morning Herald*, which published Calwell's comment, responded that while it was "realised" that such stories "must distress the relatives of men who have been in enemy hands", their publication was

> part of a newspaper's duty to inform its readers of the facts on a subject of international importance. The suggestion that this news is published simply for the purpose of increasing circulation is an outrageous one and typical of Mr. Calwell.[91]

One subsequent letter of protest plaintively asked Calwell if it was "quite impossible to stop the publication of atrocity stories completely", at least "could not the papers be prevented from splashing these stories on front-page, back-page, and every page, with pictures and fat head-lines?" Calwell responded with the advice that while the government also deplored the newspapers' actions, censorship could no longer be invoked and protests should be addressed to newspaper editors, whose responsibility it was to consider the "bad effect which these sensational atrocity stories create".[92]

When extracts of the first Webb Report were eventually made public in September 1945,[93] the report was labelled "one of the most

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[90] "Atrocity Stories Mentioned in Federal House", in *Sydney Morning Herald*, 6 September 1945, p. 5.

[91] The editorial comment is at the end of another version of *Sydney Morning Herald* article, *ibid.*, said to have been published on the same day, which was clipped for retention for the Advisory War Council, held in A2680, 22/1945 (NAA). Calwell had a very antagonistic relationship with the press, see Headon, 1999, p. 3, *supra* note 14.

[92] Letter from Dr. Greta Hort, Principal, University Women's College, Melbourne, to A.A. Calwell, Minister for Information, 10 September 1945; and letter in response from Calwell, 19 September 1945, SP109/3, 329/07 (NAA).

[93] While the first Webb Report was tabled in Parliament and publicised in September 1945, it was not until April 1946 that the second Webb Report was tabled in Parliament; see statement by Dr. H.V. Evatt, Commonwealth, Parliamentary Debates, House of Representatives, Hansard, 10 April 1946, pp. 1294–97.

important documents Australia has presented to the world".[94] The resulting deluge of publicity about Japanese atrocities served to firm up the Australian Government's resolve to investigate and prosecute suspected Japanese war criminals, and certainly the rhetoric about doing so. As Norman Makin, the acting Minister for External Affairs, advised the House of Representatives on 12 September 1945, it was "[o]ur duty to future generations to ensure that *all* those responsible for those crimes against humanity shall be brought to justice". Makin thus argued that the "apprehension and bringing to trial of *all* classes of Japanese war criminals should commence forthwith".[95] A similar resolve regarding all war criminals can be seen in the instructions issued by the Australian Army in relation to war crimes investigations. As various Australian forces and command areas were advised in January 1946: "It is the policy of the Australian and Allied Governments that no stone should be left unturned in bringing ALL Japanese war criminals to justice".[96] The Army's own history of its war crimes operations, written in 1951, suggests that

> a policy was strictly adhered to under which every possible action was taken, irrespective of the expense and effort involved, to ensure that every war criminal received his just des[s]erts.[97]

32.4. The Prosecution of War Criminals

The goal to prosecute every single accused Japanese war criminal was, of course, doomed to failure. While a newspaper report trumpeted in October 1946 that the "greatest manhunt in the history of the Asia and the Pacific has already netted *most* of the Japanese responsible for the worst

[94] "Webb Report", in *Daily Telegraph*, Sydney, 12 September 1945, clipping held in A2680, 22/1945 (NAA).

[95] Italics added for emphasis: N. Makin, Question on 'Japanese Atrocities', Commonwealth, Parliamentary Debates, House of Representatives, Hansard, 12 September 1945, pp. 5284–85.

[96] Capitalisation in the original: memorandum by Brigadier W.J. Urquhart for the Adjutant-General entitled "Investigation of War Crimes", 11 January 1946, SP196/1, 22, PART 2 (NAA).

[97] "Report on the Directorate of Prisoners of War and Internees, 1939–1951", Part V, Introduction, A7711, VOL 1 (NAA).

crimes against Australian prisoners-of-war",[98] these were, of course, only a very small number of those who had committed such crimes. Moreover, only a smaller number of those detained went on to be prosecuted, for a variety of reasons. The most pressing difficulty facing the Australian Government in late 1945, however, was not the numbers of suspects, the number of stones to be overturned or the expense or effort but the fact that Australia had never before prosecuted anybody for committing a war crime. Moreover, the Australian Army, which was tasked with that duty, had also never held custody of a convicted war criminal sentenced to a term of imprisonment or, in fact, ever carried out a death sentence on any person at all, let alone a convicted war criminal sentenced to death. As might be surmised, the story of how Australia proceeded to do all these things from zero base knowledge has much to offer those who study the historical origins of international criminal law.

While the war crimes trials were ongoing in various locations in 1945 to 1951, it was possible, theoretically, to learn a great deal about how Australia was approaching the prosecution of accused war criminals. The legislative machinery for the trials, the War Crimes Act 1945 (Cth), and its subsidiary Regulations for the Trial of War Criminals, were gazetted, as is the legislative practice in Australia. Moreover, pursuant to the regulations, the trials were open to the public to attend, space permitting and unless the Court itself decided that the public should be excluded.[99] In practice, of course, the far-flung trial locations meant that few members of the public did attend, apart from service personnel in their off-duty hours or their spouses. A party of nurses, for instance, were interested attendees at the Darwin trials in early 1946 (see Figure 1).

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[98] See "Post-war Manhunt: Nemesis and the Japanese", in *West Australian*, Perth, 26 October 1946, p. 6 (emphasis added).

[99] Regulation 14 of the Regulations for the Trials of War Criminals provided: "The sittings of Military Courts will ordinarily be open to the public so far as accommodation permits. But the Court may, on the ground that it is expedient so to do in the national interest or in the interests of justice, or for the effective prosecution of war crimes generally, or otherwise, by order prohibit the publication of any evidence to be given or of any statement to be made in the course of the proceedings before it, or direct that all or any portion of the public shall be excluded during any part of such proceedings as normally take place in Open Court, except during the announcement of the finding and sentence pursuant to the preceding regulation". As far as I know, however, this regulation was used only once in 300 trials to exclude the public from a trial for "torture", which principally encompassed sexual assault, see the Rabaul R35 trial proceedings, A471, 80782 (NAA).

Figure 1: Three nurses spectating at a war crimes trial in Darwin, taken on 4 March 1946 (Photograph in the collection of the Australian War Memorial, NWA1071).

Official publicity regarding the trials was, therefore, quite vital for the dissemination of knowledge to the Australian public and, just as importantly, to audiences outside Australia. In early 1946, for instance, the Minister for the Army, F.M. Forde, suggested to the Army that it was "desirable" for "greater publicity" to be given to the results of trials because of their "international importance".[100] Lieutenant General V.A.H. Sturdee, then the acting-commander-in-chief of the Australian Military Force, agreed on the "desirability of greater publicity" and thereafter provided "periodical statement[s] giving the details of the charges, findings, sentences, results of appeal, etc. for release to appropriate

[100] Memorandum from the Secretary to the Minister for the Army to the A/Commander-in-Chief, Victoria Barracks, Melbourne, 7 February 1946, MP742/1, 336/1/980 (NAA).

publicity channel".[101] Such particulars were given, for instance, to the Shortwave Division of the Department of Information in early to mid-1946 for "Japanese news broadcasts", which were made in the Japanese language.[102]

Of course, press correspondents, if they were in or could get to the trial locations, were also free to attend the trials and to file reports, now free of censorship. The relative accessibility of Darwin, for instance, meant that several newspapers had correspondents in place for the trials there in early 1946 and the trials were photographed far more comprehensively than those in any other location. By comparison, a reporting share agreement had to be put in place for the Manus Island trials in 1950–1951, due to the limited space for accommodation on the military base. The Army also deliberately manipulated the selection of the press representatives, claiming limited accommodation, so as to "discreetly circumvent" having to admit a press photographer who might "not confine his activities to subjects directly associated with the War Crimes Trials and may possibly feature certain aspects of progress being made with Defence installations".[103] The Army also, for no apparent reason, prohibited photographs from being taken in court on Manus Island, although it allowed photographs to be taken of the accused being taken to court.[104] While limited representatives of the press were allowed to witness executions of convicted war criminals, no photographs were allowed to be taken for publication.[105] As the Secretary of the Army

[101] See letter from Lieutenant General V.A.H. Sturdee, Acting Commander-in-Chief, Australian Military Force to F.M. Forde, Minister for the Army, 9 February 1946, MP742/1, 336/1/980 (NAA).

[102] See the exchange of correspondence in MP742/1, 336/1/569 (NAA).

[103] Unsigned copy of memorandum from the Press Relations Officer to the Minister for the Army, 25 May 1950, held in Papers of Major Harold Alexander Richardson, Wallet 4, PR02009 (AWM)

[104] Message from "Army Melbourne" to "CrimSec Manus", 7 June 1950, AWM166, 4 (AWM).

[105] Lieutenant General V.A.H. Sturdee, then Acting Commander-in-Chief, originally held the view that the press should be excluded from executions. He wrote: "My own view is that it would be wrong to carry out these executions in any but the most solemn form. I don't think the admission of the Press, and especially photographers, would be in the interests of Australia": letter from Lieutenant General V.A.H. Sturdee to F.M. Forde, Minister for the Army, 9 February 1946, MP742/1, 336/1/980 (NAA). Sturdee later decided, however, to follow British practice; see minute from F.R. Sinclair, Secretary of the Army to the Minister for the Army, 21 February 1946, MP742/1, 336/1/980 (NAA). See also

pointed out in February 1946, however, the decision to admit the press as witnesses to executions "should not be regarded as an open invitation to the press to proceed from Australia to the scene of the executions, but that local press representatives in the area will be admitted".[106]

To the ongoing regret of some in the government, it was no longer possible to apply censorship to the press, which meant that atrocity stories in all their "nakedness", as Northcott had put it earlier, were freely reported from the trials. Members of the public and various veterans' organisations wrote many letters, including directly to the Prime Minister and the Minister for the Army, protesting about the publication of names of Australian victims, or photographs of them, during reporting on the trials, due to the distress it was causing to families and friends. The protestors were usually informed, however, that while the government shared and fully endorsed their view of the indelicacy of the practice, the trials were being conducted in open court and it was no longer possible to impose censorship on the press. The impetus to resolve complaints about press reporting did seem to come to a head, finally, in relation to the Manus Island trials in 1950.[107] After official discussions with a representative from the Australian Newspaper Proprietors Association, the government received assurances that newspapers would voluntarily withhold names of Australian victims from publication,[108] in effect introducing a practice of self-censorship.

The Australian Government continued to hold firm to the policy that names and photographs of Australian victims should not be published well into the 1950s. For example, a T.M. Johnson of New York sought permission from the Australian Government in 1957 to publish the name, which he knew, of the Army sergeant who had been executed by the Japanese in New Guinea in 1943. The execution of Sergeant Siffleet, mentioned earlier, was already infamous worldwide due to the photograph of it that had been seized in 1944. Even though 14 years had passed since

"Admission of Press Representatives to View the Executions of War Criminals Press Statement", Melbourne, 23 February 1946, MP742/1, 336/1/980 (NAA).

[106] Memorandum from F.R. Sinclair, Secretary of the Army to the Minister for the Army, 23 February 1946, MP742/1, 336/1/980 (NAA).

[107] For selected examples of the correspondence at this stage, see MP742/1, 336/1/2044; MP742/1, 336/1/2050; and MP742/1, 336/1/2054 (NAA).

[108] Memorandum from C.A. Nicol, Press Relations Officer, Department of the Army to the Secretary, Department of the Army, 9 June 1950, MP742/1, 336/1/2044 (NAA).

Siffleet's execution, Johnson's request to publish his name was refused to spare Siffleet's relatives from the "anguish and distress that may result from publication", as his next-of-kin had "not been advised of the nature of his death whilst a prisoner of war of the Japanese".[109] Interestingly, while Johnson's article entitled "Execution of a Hero" included the infamous photograph when it was published in *People* magazine in March 1958, and acknowledged that the photograph had previously been mistakenly identified as showing Flight Lieutenant Newton, the article did not give Siffleet's name, explaining that the Australian Government had requested the identity of the serviceman not be revealed.

32.5. Restricting Access to the War Crimes Trials after 1951

After the trials were completed in 1951, a new veil, not so much of secrecy this time but one of obscurity descended, one borne largely through inaction rather than deliberate action. It is, to a legal historian, a crime in and of itself that the Australian trial proceedings were kept out of public knowledge for decades after they concluded, thereby inhibiting research into the Australian policies and practices in relation to war crimes and how these were positioned vis-à-vis the practices of other nations or international criminal law itself as it was developing in this critical period.

After being returned from the various trial locations to Melbourne, the original trial proceedings were retained in house by the Department of the Army while the trial programme was ongoing. The Australian War Memorial sought in 1946 to obtain copies of the trials already completed for inclusion in its library,[110] but eventually conceded that it "should meet requirements" for the writing of the official history of the war that the Attorney-General's Department would allow "access" to the trial

[109] See letter from G. Long, General Editor, Official War History to the Secretary of the Department of the Army, 30 January 1957 and letter from A.D. McKnight, Secretary of the Department of the Army to Long, 12 February 1957, MP927/1, A336/1/71 (NAA). It was "always" the "policy governing notification of casualties to the next of kin of prisoners of war who were killed during captivity" to "withhold information as to the circumstances surrounding the member's death unless the next-of-kin asked that the information be furnished"; see memorandum from the Adjutant-General to the Secretary of the Army, "Publication of Names of AMF Personnel – Manus Trials", 14 June 1950, AWM166, 4 (AWM).

[110] Letter from A.W. Bazley, Acting Director, Australian War Memorial to the Secretary, Department of External Affairs, 28 August 1946, MP742/1, 336/1/1000 (NAA).

proceedings for "official historical purposes".[111] The War Memorial mistakenly believed at this stage that the Attorney-General's Department also held copies of the trial proceedings, following the practice to transmit copies of military courts martial to that department. The War Memorial duly complained to the Army in 1947, therefore, when the official war historian[112] applied to the Attorney-General's Department to inspect the proceedings but was told that the department did not hold them. The Department of the Army explained to the War Memorial that the files were "constantly being perused to check whether information can be obtained which will help in the preparation of charges against other Japanese" and, as such, they had "not yet been sent for filing".[113] In 1949, however, the original trial proceedings, which formed the "only complete copy" of each trial, began to be transferred to the Attorney-General's Department.[114] There were some incomplete copies of some trials: for instance, the War Memorial eventually received incomplete photostat and microfilm copies of some trials, principally from Rabaul.[115] Cost seemed to be the prohibitive consideration against wider distribution in Australia of the trial proceedings. Even the official historian, after he reviewed the relevant files, advised the War Memorial that while a "complete set of [trial] proceedings would be of value", the "labour and expense which would be involved in producing copies" of the trials "would not be justified".[116]

Interestingly, while the official war historian was able to review the trial proceedings, other applicants were not permitted to see original

[111] Letter from J.L. Treloar, Director, Australian War Memorial to Lieutenant Colonel E.A. Griffin, Director of Prisoners of War and Internees, AHQ Melbourne, 18 October 1946, MP742/1, 336/1/1000 (NAA).

[112] This is probably a reference to Gavin Long, the General Editor of the Second World War Official Histories and also the author of *The Final Campaigns, Australia in the War of 1939–1945, Series 1 – Army, Volume VII*, The Australian War Memorial, Canberra, 1963.

[113] Letter from F.R. Sinclair, Secretary, Department of the Army to the Director, Australian War Memorial, 17 September 1947, MP742/1, 336/1/1000 (NAA).

[114] These did not, of course, include the Manus Island trials, which had yet to take place. See letter from J.L. Treloar, Director, Australian War Memorial to the General Editor, Official War History, 30 September 1949, AWM113, 5/6/1 (AMW).

[115] Memorandum from J.L. Treloar, Australian War Memorial to the Secretary, Department of the Army, 16 April 1949, AWM113, 5/6/1 (AMW).

[116] As reported in letter from J.L. Treloar, Director, Australian War Memorial to the Officer-in-charge, Military History Section, AHQ, Victoria Barracks, 14 December 1948, AWM113, 5/6/1 (AMW).

documents pertaining to the trials, even though they seemingly had legitimate reasons for doing so and were quite persistent about it. E.J. Ward, the Federal Member for East Sydney, for instance, asked in 1957 for detailed information about the numbers of war criminals convicted, their offences, penalties imposed and, if to imprisonment, the actual periods of confinement and where they served their sentences.[117] Ward appeared to be greatly aggrieved by the fact that war criminals who had been sentenced to life imprisonment had received, in his view, the "sudden generosity" of being released in 1956, even though he believed that the government had given an undertaking that the war criminals returned to Japan would serve their full sentences.[118] The Departments of External Affairs and the Army spent more than three weeks drafting and redrafting a very general and brief statement in response which, naturally, did not satisfy Ward, who continued to press his request to inspect the "official records".[119] Both departments concurred, however, that Ward should "simply be informed that these records remain confidential".[120]

While considerable effort has gone into officially documenting Australia's history of the war, the characteristics of comprehensiveness and widespread dissemination of information have never quite coincided in relation to the discrete topic of Australia's war crimes investigations and prosecutions. A detailed official history was drafted in the early 1950s, for instance, of the Army's Directorate of Prisoners of War and Internees, which had ultimate responsibility for investigating and prosecuting war crimes, but the report appears to have had extremely

[117] Letter from E.J. Ward to A. Fadden, Acting Prime Minister, 1 July 1957, MP927/1, A336/1/73 (NAA).

[118] Extract from Hansard – 11 September 1957 on Japanese War Criminals by E.J. Ward, MP927/1, A336/1/73 (NAA). The reasons behind his action were probably numerous but Ward was in 1957 a senior Labor figure in opposition to the Liberal government; he also disliked Prime Minister Robert Menzies (although his correspondence on this issue went to the Acting Prime Minister, as Menzies was overseas). Moreover, Ward has been described as someone who pursued "sensational allegations with characteristic vindictiveness": Ross McMullin, "Ward, Edward John (Eddie) (1899–1963)", *Australian Dictionary of Biography*, see *supra* note 8.

[119] Letter from Acting Prime Minister to E.J. Ward, 25 July 1957; and letter from E.J. Ward to the Acting Prime Minister, 31 July 1957, MP927/1, A336/1/73 (NAA).

[120] Teleprinter message from the Secretary, Department of External Affairs to the Secretary, Department of the Army, 4 September 1957 and teleprinter message in response, 5 September 1957, MP927/1, A336/1/73 (NAA).

limited circulation and has never been published.[121] The official histories of the Second World War are, as might be expected, extremely comprehensive and widely known but the volumes necessarily concentrate on the 1939–1945 period. While they do mention Japanese atrocities (including executions and massacres) and alleged war crimes, and briefly cover the Webb investigations, the post-war war crimes trials are mentioned only briefly.[122]

The Australian war crimes trials were not systematically reported and, indeed, there appeared to be no serious consideration in the immediate post-war of publishing a law reports series, even though the importance of reports of the trials was recognised by at least one eminent Australian historian. Kenneth Binns, the distinguished Parliamentary and National Librarian (1928–1947), noted in an April 1947 memorandum:

> This may be an opportune time to raise the question of the Reports of the Japanese War Trials, any information concerning the publication and supply of which we should appreciate. We are anxious to secure a set as soon as possible.[123]

Only five of the 300 Australian trials were eventually reported as a part of the UNWCC's *Law Reports of Trials of War Criminals* (1947–1949),[124] even though microfilm copies of about a third of the 300 Australian trials

[121] "Report on the Directorate of Prisoners of War and Internees, 1939–1951", see *supra* note 97. The archival note to series A7711, which solely holds this history, advises, for instance, that the "master copy" is held by the Directorate, with copies held by the Australian War Memorial, the Department of Defence and that the National Archives of Australia holds the "third copy".

[122] Lionel Wigmore, *The Japanese Thrust, Australia in the War of 1939–1945, Series 1 – Army*, vol. IV, The Australian War Memorial, Canberra, 1957, p. 669; Long, 1963, p. 583, see *supra* note 112; and George Odgers, *Air War Against Japan, 1943–45, Australia in the War of 1939–1945, Series 3 – Air*, vol. II, The Australian War Memorial, Canberra, 1957, p. 386.

[123] Memorandum from Parliamentary Librarian to the Secretary, Department of External Affairs, 12 April 1947, A1838, 1550/3 (NAA). See Pauline Fanning, "Binns, Kenneth (1882–1969)", *Australian Dictionary of Biography*, see *supra* note 8.

[124] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, His Majesty's Stationery Office, London, 1947–1949. These were the Rabaul R26 trial of Sergeant Major Ōhashi Shigeru and others, vol. V, pp. 25–31; the Rabaul R31 trial of Captain Shinohara Eitarō and others, vol. V, pp. 32–36; the Rabaul R59 trial of Captain Katō Eikichi, vol. V, pp. 37–38; the Rabaul R176 trial of Lieutenant General Baba Masao, vol. XI, pp. 56–61; and the Rabaul R161 trial of Sergeant Major Tanaka Chūichi, vol. XI, pp. 62–63.

from various trial locations, principally from Rabaul but also trials from Darwin and Labuan, were sent to the UNWCC.[125] The trial proceedings themselves were not otherwise widely circulated outside Australia, again in part because of the considerable cost involved in copying them. For instance, the US Library of Congress enquired through the Australian Embassy in Washington in early 1947 about obtaining transcripts of the Australian trials held in New Guinea, whether by carbon copy or microfilm, at the Library's expense.[126] The Army estimated, however, that the approximate cost for microfilming the trials requested would be £223–6–8,[127] a considerable sum at the time. As of August 1949 the Library of Congress was still considering the purchase of the transcripts[128] and it is unclear whether they ever obtained them. Certainly, the catalogue of the Library of Congress includes only a few standard sources on Australian war crimes trials, although, unexpectedly, it does have what appears to be a transcript of three of the 26 trials held on Manus Island in 1950–1951. It was clear, however, that not all applicants for copies of the Australian trials would receive them, even if they were prepared to pay the costs.

During the decades after the war, the Australian Government held understandable concerns that if the Australian trial proceedings were freely accessible, commentators, particularly in Japan, would criticise them as "victors' justice", a concept that was in circulation well before Richard Minear's book in 1971.[129] This concern meant that a request by the Japanese Government in the 1950s for copies of the Australian trial proceedings was refused. Judging by the attention given in Australia to how the other Allied Powers were handling similar Japanese requests for their trials, the same or similar concerns about Japanese criticism were held elsewhere. As with many of the Allied decisions made regarding Japan in the post-war period, the Japanese requests to the US, Britain, France and the Netherlands for copies of their various trials were "refused

[125] See the list of trials provided in Memorandum from the Secretary, Department of External Affairs to the External Affairs Officer, London, 15 December 1947, A1838, 1550/3 (NAA).

[126] Letter from Chancery, Australian Embassy, Washington to the Department of External Affairs, 2 May 1947, A1838, 1550/3 (NAA).

[127] Letter from F.R. Sinclair, Secretary, Department of the Army to the Secretary, Department of External Affairs, 1 April 1949, A1838, 1550/3 (NAA).

[128] Letter from O.L. Davis, First Secretary, Australian Embassy, Washington to the Secretary, Department of External Affairs, 1 August 1949, A1838, 1550/3 (NAA).

[129] Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971.

by agreement" in 1959. Another Japanese request for copies of the Australian trial proceedings arrived in 1965, together with strong reassurances about the purposes for which Japan wanted the copies and the conditions it was willing to abide by to receive them. The Japanese Ministry of Justice explained that it was collecting "all available material concerning war trials" to facilitate research, as it was "convinced that these researches contribute to the development of international law and to the prevention of war". The Ministry reassured Australia that it had "no intention of repudiating the war trials themselves" and advised that, if received, the copies would be "made available only to those scholars who can make good use of them for a purely academic purpose".[130]

The Japanese request was considered at some length over the next few years. This delay was not merely an overabundance of caution on Australia's part but a realistic appraisal that, in some cases, there were valid grounds for criticism. As a 1967 report by the Attorney-General's Department into the issue of whether to grant access observed, while the trials were "generally satisfactory" and did not cause "any substantial miscarriage of justice":

> Since war crimes trials are a controversial issue in general, they provide material for a troublemaker to use against the country which conducted them […] Almost all of the trials of "B" and "C" class criminals have elements appearing on the face of the records which would provide a hostile reader with anti-Australian ammunition.[131]

The report cautioned, therefore, that "[w]e should therefore be wary of providing adverse propaganda against ourselves".[132] One of the report's conclusions, however, was that a refusal to grant access to the trials "might imply that we have something to hide".[133] R.J. Percival of the Australian Embassy in Tokyo presented the decision to be made as a balancing act: in his mind, the advantages to be gained by releasing the copies outweighed the possible disadvantages from a refusal. Percival, too, thought that refusing the request would not only suggest that Australia had something to hide but that "our action would also doubtless

[130] Embassy of Japan, Note Verbale, no. 51, 25 April 1965, A432, 1967/2152 (NAA).

[131] See Lyndel V. Prott, report entitled "Release of Records of Japanese War Crimes Trials", 5 April 1967, pp. 1, 2, 5, A432, 1967/2152 (NAA).

[132] *Ibid*., p. 1.

[133] *Ibid*., p. 11.

be regarded as evidence that a strong element of distrust and antipathy remains in Australia's attitude towards Japan".[134] After considerable consultation, again with the other Allied Powers, Australian approval was finally granted in late 1968 for partial copies of the trial proceedings[135] to be made available to the Japanese Government and for "bona fide Australian scholars" to be able to review the trials. There was no instruction given, however, as to how to determine whether an applicant was a "bona fide Australian scholar", perhaps because, as of 1967, there was "no record of any interest ever being expressed by scholars in the trials".[136] Indeed, it was erroneously presumed at this stage that as the trials lacked written judgments, this meant that they were of "little value for research" and, in particular, their "usefulness […] for research into international law" was "dubious".[137]

It was not until 1975 that the public at large was granted open access to the trial proceedings,[138] which had, by then, been handed over to the National Archives of Australia, where they reside today. In announcing his decision to lift the access restrictions, the Attorney-General, Keppel Enderby QC, remarked:

> For too long Australian scholars have been hampered in their attempts to interpret Australia's history. Restrictions like this one [on access to the trial proceedings] no longer serve a useful purpose […] The past should be everyone's property.[139]

Of course, it was not only Australia's history that was obscured by the long-term restrictions on accessing the trial proceedings but also that of international criminal law.

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134 Confidential memorandum for the Secretary, Attorney-General's Department, 14 August 1968, A432, 1967/2152 (NAA).

135 The copies were not to include the Judge Advocate General's reports, pursuant to the practice not to provide such confidential and privileged reports when transcripts of Australian court-martial proceedings were ordinarily made available.

136 Department of External Affairs cablegram, 11 April 1967, A432, 1967/2152 (NAA).

137 Prott, 1967, pp. 11, 13–14, *supra* note 131.

138 This was comparatively late, as the United States reportedly made their trial proceedings "available to U.S. scholars" since 1962: advised in cablegram from Australian Embassy, Washington to Department of External Affairs, 3 April 1967, A432, 1967/2152 (NAA).

139 Attorney-General's Department, "Access to Historical Records", press release, 2 June 1975, A1838, 3103/10/13/12, PART 16A (NAA).

Today, the Australian trial proceedings are digitised in full,[140] as are many associated files, including war crimes investigation files, and are freely available online to anyone anywhere in the world. As the director of the Australian War Memorial accurately predicted in 1946, the "proceedings of the trials of Japanese war criminals […] will be of value to the Australian official historians and later to other historians and students as records of the Second World War".[141] Interestingly, the National Archives continues to practice, in effect, its own form of "censorship" of atrocity stories. Pursuant to the Archives Act 1983 (Cth), information in certain categories may be exempt from public access, including if the disclosure of the information would "involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)".[142] This allows the National Archives to redact a document, as but one example, when it names a person who is said to have been a victim of cannibalism. The practice is, however, sporadic and inconsistent; it is certainly possible to find information redacted in one file and unaltered and freely readable in another.[143] The exemption practice is, ultimately, about sensitivity towards family members and not, as has been recently suggested in the Australian press, indicative of a government cover-up or a deliberate suppression of information to hide Japanese war crimes from the Australian public.[144] After all, access decisions that certain information is exempt are appealable.[145]

[140] Apart from a handful of large maps tendered as exhibits during the trials, the size of which currently precludes digitisation.

[141] As quoted in memorandum from the Attorney-General's Department to the Secretary, Department of External Affairs, 11 October 1946, A1067, UN46/WC/8 PART 5 (NAA).

[142] Section 33(1)(g), Archives Act 1983 (Cth).

[143] An example of this inconsistent practice is that the name of the victim in respect of charges of mutilation of the dead and cannibalism in the Wewak MW1 trial, and the names and units of witnesses whose identities might disclose the identity of the victim, have been redacted from the trial proceedings otherwise open to the public. For the trial proceedings, see A471, 80713 (NAA). The identity of the victim is, however, ascertainable from other files which I have similarly, out of sensitivity, chosen not to provide the details of here.

[144] Rory Callinan, "Commandos' Horrific End Kept Secret", in *Sydney Morning Herald*, 5 October 2013, p. 3.

[145] I have successfully challenged decisions to exempt some documents from public access, although, as far as I am aware, none are related to atrocity stories.

Regrettably, the constraints of space mean that it is not possible to recount in full the extent of Australia's contribution to international criminal law as revealed by the Melbourne Law School's project, in conjunction with the Australian War Memorial and Department of Defence's Legal Division, to finally create a comprehensive and systematic *Law Reports Series* for the Australian trials, which shall be published in the coming years. However, it is possible to share one brief conclusion about the issue of victors' justice and the trials. Given the general Australian animosity towards Japan during the war, heightened by the deluge of atrocity stories in the immediate post-war period, it was entirely possible that the official Australian attitude towards the prosecution of war criminals might have given rise to something resembling the quintessential "kangaroo court". For instance, Archie Cameron, Federal Member for Barker, took a Churchillian view and reportedly suggested in September 1945 that it should be Allied policy to "execute every convicted Japanese war criminal",[146] presumably no matter the war crime. It is heartening, however, to find statements by Australian government officials and military officers directly associated with the trials that expressed the desire to uphold standards of fairness, justice and accountability. Indeed, there was an acute awareness and a clear understanding by many involved that Australia would be judged in the future on its conduct. As Webb observed in June 1945, for example:

> Posterity cannot condemn us if we deal with our enemies in the strictly legal way recognised by International Law, to which after all, our enemies have professed their adherence. I respectfully suggest that we should not abandon this strictly legal method, to join with other Nations in spectacular public trials in a special Court created for the occasion and savouring perhaps of the barbaric.[147]

[146] Quoted in "Enquiries on Atrocities: Federal Measures to Sift Evidence", in *The Advertiser*, Adelaide, 13 September 1945, p. 5. It was not surprising that Cameron held firm views on Japanese war criminals, as he had worked in the Directorate of Military Intelligence at AHQ Melbourne during the war and, in addition kept up with not only his own parliamentary duties but those of A.M. Blain, the Member for the Northern Territory, who was being held as a POW by the Japanese: John Playford, "Cameron, Archie Galbraith (1895–1956)", *Australian Dictionary of Biography*, see *supra* note 8.

[147] Letter from Sir William Webb to J.D.L. Hood, Acting Secretary, Department of External Affairs, 26 June 1945, A1066, H45/580/6/2 (NAA).

Given his later position at the "spectacular", "public" and "special" IMTFE, of course, this early viewpoint on the advisability of adhering to legal norms becomes rather ironic. However, many other officials knew that the Australian trials would be judged and of the necessity for a legal, instead of an emotional, approach to the prosecutions of accused war criminals. The Secretary of the Department of the Army suggested in December 1945, for instance, that a critical view would be taken of the Australian trials in the years to come and

> it might be held that any departure from the normal methods of administration and justice cannot be justified because the motives which underlie our activities in bringing our former enemies to trial cannot be said to be altogether disinterested or unbiased.

He was concerned, in particular, with ensuring that sentences were not imposed as a "measure of retaliation against a former enemy" but that the "underlying motive" in each trial was "the securing of strict justice".[148] Various individual Australian Military Courts themselves were certainly clear that they were not operating out of a desire for vengeance. For instance, Colonel J.L. McKinlay, the President of the very first trial, which commenced at Morotai on 29 November 1945, observed that in sentencing the convicted, the Court was

> merely carrying out the laws of British and International justice. We are not taking our vengeance, but protecting society from the ravages of cruelty and imposing a sentence to act as a deterrent to others who, in the years to come, may be like minded.[149]

That questions of justice were routinely raised and considered by officials in their private correspondence in the lead-up to and during the trials demonstrates that the public promises made to the Australian people about bringing all Japanese war criminals to *justice* were not merely verbiage designed to cloak otherwise unfair trial policies and practices, motivated in full or in part by vengeance, with legal respectability. Indeed, the protracted survey of all 300 Australian trials that I have conducted over the last five years in fact reveals very few instances of

[148] Memorandum from the Secretary, Department of the Army for the Minister, 6 December 1945, A472, W28681 (NAA).

[149] For the trial proceedings, see A471, 81718 (NAA).

gross unfairness to the accused, which are detailed elsewhere.[150] Of course that does not mean that criticism cannot be made of the trials nor, indeed, of the few instances of clear injustice that occurred. The line between vengeance and justice was, then as it is now, extremely thin. As a public servant submitted to Cabinet when it was considering clemency for convicted war criminals in 1955:

> Perhaps the emotions at the time [of the trials] varied between "Hang the Kaiser" and "Crime Does Not Pay" themes. The whole philosophy of international punishment for war crimes is equivocal. From the viewpoint of the vanquished it is difficult to avoid seeing in punishment of individuals a vindictiveness towards the beaten. But what were we to do? To allow these men to go unpunished would have done violence to our own feelings, and would have caused the Japanese to think we were both soft and easily hoodwinked. We wanted to ram home the ideas that to use war as an instrument of policy is evil, but that if war is used there are conventions of humanity to be observed, which somewhat soften its impact.[151]

No doubt, if there were a wider knowledge of Australian policies and practices in relation to breaches of international criminal law during the Second World War, and particularly of the Australian war crimes trials, some of the most prevalent criticisms of the various Allied international and national war crimes trials of the Japanese – including that they were nothing more than victors' justice or disregarded Asian-Pacific victims or failed to prosecute for sexual crimes – would be far less sustainable. Moreover, we would know a great deal more about certain less usual war crimes, such as cannibalism[152] or the extensive discussion in a number of trials of what actually constituted a fair and proper trial for committing a war crime under international law. Finally, we would have a

[150] See the forthcoming book, Georgina Fitzpatrick, Timothy McCormack and Narrelle Morris (eds.), *Australia's War Crimes Trials 1945–51*, Martinus Nijhoff, Leiden, forthcoming 2015.

[151] Ronald Mendelsohn, Comments on Cabinet Submission No. 315, "Japanese War Criminals'", 12 April 1955, A4940, C1233 (NAA).

[152] "Offences committed against Dead Bodies", as an "exceptional" war crime, received only one small paragraph of consideration in the UNWCC's *Law Reports of Trials of War Criminals*, vol. XV, p. 134, *supra* note 124.

more consolidated understanding of how international criminal law developed and was applied in this crucial period.

PART 7

Beyond Nuremberg and Tokyo:
Post-Second World War Prosecutions in Europe

33

An "Indispensable Component of the Elimination of Fascism": War Crimes Trials and International Criminal Law in the German Democratic Republic

Moritz Vormbaum*

33.1. Introduction

The prosecution of crimes committed under the National Socialist ('Nazi') regime was a matter of great importance for the political leadership of the German Democratic Republic ('GDR' or 'East Germany'). During the time of occupation by the Soviet Union, and in the years that followed the foundation of the GDR in particular, a large number of trials for war crimes and other mass crimes committed in the Third Reich were held. These trials saw the application of international criminal law by the East German courts. In the legislative arena, the GDR had already in the 1950s referred to international law as a source when creating new regulations in the field of criminal law. In 1968, when the GDR enacted a new penal code, it even included a whole chapter on international crimes. In this regard, the attitude of the political leadership in the GDR was completely different from the attitude in the Federal Republic of Germany, where the government for a long time had no intention to prosecute Nazi atrocities or to enact special regulations for the prosecution of international crimes. Of course, in the GDR both the prosecution of crimes committed during the Nazi regime and the creation of laws on international crimes also played an important political role. In addition, it must not be forgotten that human rights violations were systematically committed in the GDR but were not prosecuted by the East German judiciary (at least not until after the fall of the Berlin Wall). This chapter gives an overview of the trials in the GDR for Nazi crimes as well as the laws on international crimes that were enacted by the East German government, it analyses the link between these trials and the persecution of political opponents, and it highlights the political importance of both the trials and rules on international crimes in the GDR.

33.2. Prosecution of National Socialist Atrocities during the Soviet Occupation (1945–1949)

33.2.1. Historical Background

After representatives of the German *Wehrmacht* (armed forces) had signed the declaration of unconditional surrender on 8 May 1945, the victorious Allied Powers assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority".[1] A few weeks later, at the Potsdam Conference,[2] it was agreed that the highest executive powers for Germany as a whole should be assigned to the Allied Control Council. At the same time, the former German Reich was reduced in size and the remaining territory was split up into four occupational zones. For each of these zones, one occupational power had the highest administrative authority. However, as the Allied Control Council could only take decisions unanimously (and was *de facto* dissolved on 20 March 1948 when the Soviets left it in order to protest against the London Six-Powers Conference), the most important legislative and executive competences were with the occupational power of each zone. In the eastern zone, the Soviet Military Administration for Germany (Sowjetische Militäradministration in Deutschland, 'SMAD') was the highest-ranking institution. It administered its zone through so-called SMAD Orders which had the status of law and which could not be contested by the German authorities. The structure and organisation of the SMAD was unclear and complicated;[3] however, there is no doubt that it

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1 Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, 5 June 1945, Amtsblatt des Kontrollrats in Deutschland 1946, Supplement No. 1, pp. 7 ff.

2 This conference took place from 17 July to 2 August 1945 at Cecilienhof in Potsdam, Germany.

3 On the SMAD, see Jan Foitzik, *Sowjetische Militäradministration in Deutschland (SMAD) 1945–1949*, Akademie Verlag, Berlin, 1999.

was controlled by the political leadership of the Communist Party of the Soviet Union in Moscow. In order to implement an effective administrative system, the SMAD also established German administrative institutions in various political areas (the economy, justice, interior, etc.). From April 1946 the new Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands, 'SED'), a forced merger of the former Communist Party of Germany (Kommunistische Partei Deutschlands, 'KPD') and the Social Democratic Party of Germany (Sozialdemokratische Partei Deutschlands, 'SPD'), gradually took over political control in East Germany – always in consultation, of course, with the "big brother" in Moscow.

In this period shortly after the war, the prosecution of "Nazi criminals" and "war criminals"[4] was of particular ideological significance for both the Soviets and the SED. Now that the Nazi regime was defeated, the political leadership proclaimed a two-phase model to establish a new society: the anti-fascist democratic transformation of German society was the first phase, and the systematic build-up of socialism was the second. The consistent punishment of crimes committed under the old regime was seen as an important feature of the first phase – in the criminal law manual of the GDR, it was retrospectively described as "an indispensable component of the elimination of fascism and a guarantee that it never arises again".[5]

33.2.2. The Allied Legal Framework for the Prosecution

The Allied Powers had declared their intent to prosecute crimes committed under the Nazi regime during the Second World War and had developed basic principles for the punishment of the perpetrators.[6] After the Second World War, in Article III No. 5 of the Potsdam Agreement,[7] it was laid down that "war criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment". In

4 The terminology (in German, "*Nazi- und Kriegsverbrecher*") was undifferentiated, i.e. no distinction was made between "Nazi crimes" on the one hand and "war crimes" on the other, cf. Christian Dirks, *Die Verbrechen der anderen*, Ferdinand Schöningh Verlag, Paderborn, 2006, p. 28.

5 John Lekschas *et al.*, *Strafrecht der DDR, Lehrbuch*, Zentralverlag, East Berlin, 1988, p. 87.

6 Especially in the declarations of the Moscow Conference agreed upon on 30 October 1943.

7 Reports of the Potsdam Conference (Potsdam Agreement) of 2 August 1945.

addition, leaders, supporters and high-ranking officials of the National Socialist movement, as well as "any other persons dangerous to the occupation or its objectives" should be "arrested and interned". Sometime later, the London Charter established the International Military Tribunal ('IMT') and created with its Statute – which contained the regulations on the international core crimes – the legal framework for the Nuremberg Trials against the major war criminals.[8] Finally, on 20 December 1945, Control Council Law No. 10 ('Law No. 10') was enacted,[9] which adopted and further developed the basic principles of the Nuremberg Statute in order to prosecute those perpetrators who had not been tried before the IMT.

Alongside these norms, the Allied Control Council enacted, by way of Control Council Directive No. 24 ('Directive No. 24') and Control Council Directive No. 38 ('Directive No. 38), important regulations regarding the "denazification" of German society. While Directive No. 24 was mainly concerned with purging the public sector of supporters of the National Socialist Party, Directive No. 38 allowed for the punishment of "activists" and "supporters" of the old regime and for administrative sanctions against its "followers". According to Directive No. 38, persons who had not been involved in atrocities committed between 1933 and 1945 but who were still considered to "endanger the peace of the German people or of the world, through advocating National Socialism or militarism or inventing or disseminating malicious rumours" also qualified as "activists" and were accordingly subject to punishment.[10] Although both directives contained provisions on criminal sanctions, their lack of a precise description of the criminal acts and the possibility for the executive organs to take preventive measures meant that they had the character of administrative regulations.[11]

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8 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, reprinted in *American Journal of International Law*, 1945, vol. 39, Supplement, p. 257.

9 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 ("Law No. 10").

10 Control Council Directive No. 38, The Arrest and Punishment of War Criminals, Nazis, and Militarists and the Internment, Control, and Surveillance of Potentially Dangerous Germans, 12 October 1946.

11 Klaus Marxen, "Die Bestrafung von NS-Unrecht in Ostdeutschland", in Klaus Marxen, Koichi Miyazawa and Gerhard Werle (eds.), *Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland*, Berliner Wissenschaftsverlag, Berlin, 2001,

33.2.3. Trials by the Soviets in the Eastern Zone

The above-mentioned laws and directives were part of the laws of the occupying forces and could therefore, at least at the beginning, only be applied by their authorities. In the eastern zone, war crimes trials initially took place before military tribunals of the Red Army that applied both Allied and Soviet laws.[12] The individuals who were accused before these tribunals had often been kept in Soviet mass detention camps for which the premises of former National Socialist concentration camps had been used. It is estimated that up to one third of the detainees died due to poor living conditions in these camps before a trial could be initiated against them.[13] Against those who were tried, the courts frequently imposed the death penalty[14] or sentences of 15 to 20 years' imprisonment. A considerable number of the convicted, in fact, were not held liable for crimes committed in the Third Reich but were instead seen by the Soviets as political opponents and accordingly were convicted for counter-revolutionary crimes on the basis of Article 58 of the Russian Criminal Code.[15] The Soviet tribunals were in effect until 1953, although the number of perpetrators tried before these courts decreased over time.

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pp. 167 ff.; Christian Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, Berliner Wissenschaftsverlag, Berlin, 1998, p. 159; Günther Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland 1945 bis 1990", in *Neue Justiz*, 2003, vol. 57, no. 3, p. 114; Günther Wieland, "Die Ahndung von NS-Verbrechen in Ostdeutschland 1945–1990", in Christiaan Rüter (ed.), *DDR-Justiz und NS-Verbrechen*, Amsterdam University Press and K.G. Saur Verlag, Amsterdam and Munich, 2010, pp. 13, 29.

12 Dirks, 2006, p. 33, see *supra* note 4; Wieland, 2010, pp. 13, 29, see *supra* note 11.

13 Klaus Dieter Müller, "Bürokratischer Terror", in Roger Engelmann and Clemens Vollnhals (eds.), *Justiz im Dienste der Parteiherrschaft*, Ch. Links Verlag, Berlin, 1999, pp. 59, 62. On the Soviet detention camps in East Germany, cf. Karl Wilhelm Fricke, *Politik und Justiz in der DDR*, 2nd ed., Verlag Wissenschaft und Politik, Cologne, 1990, pp. 69 ff.; Michael Klonovsky and Jan Flocken, *Stalins Lager in Deutschland 1945-1950*, Ullstein, Berlin, 1991.

14 According to Marxen, 2001, p. 162, see *supra* note 11, and Meyer-Seitz, 1998, p. 36, see *supra* note 11, 776 persons in total were punished with the death penalty by Soviet military tribunals.

15 Dirks, 2006, pp. 35 ff., see *supra* note 4; Fricke, 1990, pp. 106 ff., see *supra* note 13; Marxen, 2001, pp. 159, 162, see *supra* note 11. According to Müller, 1999, pp. 59, 87, see *supra* note 13, of the judgments rendered by Soviet military tribunals in Germany between 1945 and 1953, 29.6 per cent related to war crimes and mistreatment of civilians, 47.7 per cent to "violent anti-Soviet resistance" and 22.7 per cent to "non-violent anti-Soviet resistance".

33.2.4. Trials before East German Courts

The first trials before East German courts for crimes committed under the National Socialist dictatorship were initiated shortly after the end of the Second World War and at the same time as the trials that took place before Soviet military tribunals. As a legal basis, the courts mainly relied on the Criminal Code of the German Reich, which the Allied Control Council had earlier purged of the worst elements of Nazi legislation introduced during the Hitler regime.[16] In addition, German courts also had the competence to apply Law No. 10 in cases in which crimes were allegedly committed by German perpetrators against German victims and when the competent occupying authorities had authorised the German courts to do so.[17] However, in reality, the cases referred to the German courts by the Soviets also included those in which crimes were committed by Germans against foreigners. In this regard, the practice of referral to German courts was inconsistent and sometimes reflected a contradictory attitude on the part of the Soviets.

The first big trial before an East German court for crimes committed in the Third Reich took place in Dresden on 25–28 September 1945. Several of the judges in this trial were experienced lawyers while others were so-called "people's judges" (*Volksrichter*). The latter were, in fact, not lawyers by training but had rather been trained in courses lasting only a few months before they were put on the bench.[18] This enabled the SED leadership to attempt to compensate for the lack of anti-fascist judges in the East German judiciary after the Second World War, as, indeed, a considerable number of German lawyers had more or less closely co-operated with the National Socialist regime.[19] The accused in the Dresden trial were two members of the Gestapo and three policemen who allegedly had participated in the killings of forced labourers from, *inter alia*, Poland, the Czech Republic, Serbia and Italy. The regional administrative authorities of the Federal State of Saxony, where the trial

[16] See Control Council Law No. 1, Repealing of Nazi Laws, 20 September 1945, Amtsblatt des Kontrollrats 1945, p. 6.

[17] Cf. Article III section 1 subsection (d) of Law No. 10, see *supra* note 9.

[18] Of course, during these short training courses, the new judges acquired insufficient basic legal knowledge, especially as the focus was more on communicating the communist ideology to the new judges and less on providing sound judicial knowledge.

[19] On the affiliation of German lawyers with the Nazi regime, see Ingo Müller, *Furchtbare Juristen*, Kindler Verlag, Munich, 1985, p. 35 ff.

took place, had created an Act for the punishment of Nazi criminals especially for the purpose of this trial.[20] The trial ended with two death sentences, one sentence of life imprisonment and two sentences of six and three years of imprisonment respectively. The judgment was not open for appeal.[21] The Act was not applied again following this trial.

Despite these efforts by the East German judiciary, the majority of the trials for crimes committed under the Nazi regime were tried before Soviet tribunals. This situation changed considerably with the promulgation of SMAD Order No. 201 ('Order No. 201') on 16 August 1947.[22] This order gave the German authorities the competence to take over cases in which Directive No. 24 and Directive No. 38 were applicable. This included the imposition of sanctions contained in Directive No. 38. Therefore, Order No. 201 constituted a link between the denazification regulations of the Allied Powers and the German prosecutorial authorities.

As regards the procedure introduced by Order No. 201 (and especially by its Executive Regulation No. 3), the order declared that the "Organs of the Ministry of Interior" should be the authorities primarily responsible for the investigation procedure. This meant that the investigations were controlled by the police and not by the public prosecution service, as had been the case according to traditional German criminal law. The police investigations were led by the so-called K5-Divisions – the fifth divisions of the police forces. These divisions were notorious for their brutal methods and were integrated into the Ministry for State Security ('Stasi') when it was founded in 1950.[23] According to the new procedural rules, an investigation would be triggered by the registration of a suspect. Grounds for registration were a confession, a complaint by a citizen or a public servant, as well as documents from which it could be derived that the suspect was to be categorised into one of the groups in Directive No. 38. After registration, the case would be investigated by the police and once the investigation was complete, the

[20] The text of the statute is reprinted in the brochure *Die Haltung der beiden deutschen Staaten zu den Nazi- und Kriegsverbrechen*, Staatsverlag, Berlin, 1965, pp. 130 ff., which was published by the Prosecutor General and the Ministry of Justice of the GDR.

[21] See in the named statute.

[22] Zentrales Verordnungsblatt, 16 August 1947, pp. 185 ff.

[23] Dirks, 2006, pp. 44 ff., see *supra* note 4; Fricke, 1990, p. 40, see *supra* note 13; Wieland, 2003, p. 114, see *supra* note 11.

case files would be submitted to the prosecutor. The police, however, would remain as the main protagonist of the proceedings and would be responsible for filing arrest warrants as well as the final indictment. The main task assigned to the prosecutor was to approve of the police's work and this was, ultimately, a mere formality. The courts did not take part in the investigative procedure; instead, the local organs of the Soviet military administration had to be kept informed about the investigation.[24] During the main proceedings the accused person theoretically had the right to consult legal counsel. (According to Order No. 201, legal representation could be allowed "on application of the accused or at the discretion of the court".[25]) However, as the case files were submitted to the accused's counsel only once the main proceedings were opened, it was *de facto* impossible for the accused to consult legal counsel during the investigative procedure.[26] In addition, the order emphasised that the investigations should be closed "in as little time as possible" and that the courts should pronounce their verdicts "swiftly".[27] At the Regional Courts, deviating from the rules of the German Judicature Act, special judicial chambers (so-called 201 chambers) were created. On the bench of these chambers sat two judges and three laypersons. The laypersons were normally selected from SED members and the party's mass organisations.[28] A convicted person had the right to appeal against a judgment within seven days before the Higher Regional Court.

The assignment of the prosecution of crimes committed under the National Socialist regime to the East German authorities was a crucial test for the judiciary with its new anti-fascist staff, especially for the people's judges. It was subsequently stated by GDR lawyers that these trials were "important training for the investigative organs, prosecutors and judges of the people in confronting the class enemy".[29] For this confrontation with

[24] Marxen, 2001, p. 167, see *supra* note 11.

[25] Executive Regulation No. 3 to SMAD Order No. 201, Section 17 ("Regulation No. 3").

[26] Hermann Wentker, *Justiz in der SBZ/DDR 1945-1949*, Oldenbourg Verlag, Munich, 2001, p. 405.

[27] Regulation No. 3, Section 10, see *supra* note 25.

[28] *Ibid*., Section 16(a).

[29] Hilde Benjamin, Max Becker, Karl Görner and Wolfgang Schriewer, "Zwanzig Jahre DDR. Von der Entstehung der Macht des werktätigen Volkes. Der Entwicklungsprozess zum sozialistischen Strafrecht in der DDR", in *Staat und Recht*, 1969, vol. 18, no. 7, pp. 1112, 1119.

the class enemy, Order No. 201 had introduced considerable changes to the traditional German law of criminal procedure which were to have a negative impact on the rights of the accused. Although the order did not formally alter the Code of Criminal Procedure, the changes it introduced for the "201 cases" were only initially restricted to the prosecution of crimes committed during the Third Reich. In 1952 they were made part of the general provisions of the new Code of Criminal Procedure in the GDR.

33.3. Between Coming to Terms with the Past and Oppressing Political Opponents (1950s)

After tensions between the Soviet Union and the Western bloc had grown drastically in the late 1940s, the GDR was officially founded on 7 October 1949 with the enactment of its Constitution.[30] "Anti-fascism" remained an important key word in the political propaganda and was used to legitimise the new state[31] and its policies.[32] In consequence, while the trials for crimes committed under the National Socialist regime continued, these efforts began to increasingly merge with the oppression of political opponents.

33.3.1. Legal Terror: The Waldheim Trials

The prosecution of atrocities committed in the Third Reich reached its peak with the so-called Waldheim trials. This was a set of trials against alleged Nazi perpetrators conducted in the small town of Waldheim in Saxony in the spring of 1950.[33] The background to these trials was the

[30] Verfassung der Deutschen Demokratischen Republik vom 7. Oktober 1949, Gesetzblatt der DDR 1949, pp. 5 ff.

[31] The preamble to the GDR Constitution of 1968, for instance, stated that the citizens of the GDR had given themselves this Constitution "firmly based on the accomplishments of the anti-fascist democratic and socialist revolution of the social order". On the concept of anti-fascism as legitimation of the GDR, cf. Sigrid Meuschel, *Legitimation und Parteiherrschaft in der DDR*, Suhrkamp Verlag, Frankfurt, 1992, pp. 29 ff.; Herfield Münkler, "Antifaschismus als Gründungsmythos der DDR", in Manfred Agethen, Eckhard Jesse and Ehrhart Neubert (eds.), *Der missbrauchte Antifaschismus*, Verlag Herder, Freiburg, 2002, pp. 79 ff.

[32] The best example of this is the "anti-fascist bulwark" – as the Berlin Wall was called in the official language of the SED.

[33] On the Waldheim trials, see Wolfgang Eisert, *Die Waldheimer Prozesse, Der stalinistische Terror 1950*, Bechtle Verlag, Munich, 1993; Norbert Haase and Bert Pampel (eds.), *Die*

decision of the Soviets to dissolve the remaining three former National Socialist concentration camps which, since the end of the Second World War, had been used as detention camps for alleged war criminals (these were the camps of Bautzen, Buchenwald and Sachsenhausen). The political leadership of the GDR was very supportive of this endeavour as, in their view, the maintenance of these camps would sooner or later have led to resentment in the population towards the new party regime, which would have undermined the efforts of the political leadership to consolidate its power. However, before the camps could be dissolved, the last inmates, 3,422 persons altogether, had to be put on trial. In this regard it turned out to be problematic that the Soviets had never conducted serious investigations into the alleged involvement of detainees in these camps in Nazi crimes. As the political leadership of the GDR was pushing to close this unpleasant chapter as soon as possible – according to an order from a high-ranking party official the trials had to be finished within six weeks[34] – further investigations were not carried out by the German authorities either.

The trials started on 26 April 1950. The political leadership's guidelines for the judges included the provision that the trials should be "just, but at the same time strict", which meant that it was expected that the verdicts would lead to sanctions of at least ten years' imprisonment.[35] The hearings generally took place *in camera*; the public was allowed to participate in very few sessions. The accused were generally not allowed to have a defence counsel, nor were they able to call witnesses in their favour. In many cases, not even the prosecution called witnesses. Correspondingly, the evidence in the trials was very thin and basically comprised a small amount of documents that were forwarded to the judges by the Soviets as well as questionnaires which the accused persons had to complete before the trials started. The establishment of individual guilt was not required; proof of membership in the National Socialist Party was seen as sufficient. Each trial normally took no longer than a few minutes – a fact from which one may easily draw the conclusion that the verdicts had been agreed upon among the judges and the political leadership before the start of oral proceedings.

Waldheimer "Prozesse" – fünfzig Jahre danach, Nomos, Baden-Baden, 2001; Wieland, 2010, pp. 53–60, see *supra* note 11.

34 Wieland, 2010, p. 55, see *supra* note 11.

35 *Ibid*.

In total, 33 death sentences were handed down in Waldheim, of which 24 were executed. The verdicts also included 146 life sentences, 1,901 sentences of between 15 and 25 years' imprisonment, 947 sentences of between 10 and 14 years' imprisonment, 290 sentences of between five and nine years' imprisonment as well as four sentences of less than five years' imprisonment. Of the 1,317 applications for appeal, in 159 cases new trials were initiated which led in 154 cases to higher sanctions, and only in five cases was a death sentence converted into prison sentence.[36]

From a present-day point of view, the Waldheim trials clearly were not in line with the basic principles of the rule of law and due process. In the GDR, these trials were later regarded as a national stain and remained almost unmentioned in the political propaganda of the party, despite the fact that Nazi trials in the GDR were normally accompanied by huge media publicity.[37] Even today the significance of the Waldheim trials in the context of denazification in East Germany is a topic of lively debate among legal historians. The basic question centres on the issue of whether these trials were an exceptional case of "judicial excess" or whether they must rather be seen as an integral part of the development of the prosecution of former Nazis and political opponents in the GDR.[38] This question cannot be dealt with in detail in this chapter. However, it is difficult to differentiate retrospectively between judicial measures taken by the GDR leadership, especially as they were all carried out by the same judiciary.[39] It is thus more convincing to see continuity between the Waldheim trials and other trials against Nazi perpetrators and political

[36] *Ibid.*, pp. 55, 56; Annette Weinke, "Die Waldheimer 'Prozesse' im Kontext der strafrechtlichen Aufarbeitung der NS-Diktatur in der SBZ/DDR", in Norbert Haase and Bert Pampel (eds.), *Die Waldheimer "Prozesse" – fünfzig Jahre danach*, Nomos, Baden-Baden, 2001, p. 30. See also the data in the annex to this chapter.

[37] In the SED-controlled newspaper *Neues Deutschland* only very few short articles were published on the outcome of the trials. The only article in a GDR law journal is a one-page report: Hildegard Heinze, "Kriegsverbrecherprozesse in Waldheim", in *Neue Justiz*, 1950, vol. 4, no. 7, p. 250.

[38] On this issue, see Meyer-Seitz, 1998, p. 36, *supra* note 11; Weinke, 2001, p. 32, *supra* note 36; Falco Werkentin, *Politische Strafjustiz in der Ära Ulbricht*, 2nd ed., Ch. Links Verlag, Berlin, 1997, pp. 161 ff.

[39] With regard to a "unity interpretation" of the legal order of dictatorial regimes, see Wolfgang Naucke, *Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts*, Berliner Wissenschaftsverlag, Berlin, 2000, pp. 301 ff.

opponents in the GDR, although the Waldheim trials were certainly the most extreme form of dealing with the past in the GDR.[40]

33.3.2. Continuation of Trials for Atrocities Committed in the Third Reich

The Waldheim trials were the peak but not the end of the prosecution of Nazi crimes, despite this having been the intention of the political leadership of the GDR before their commencement.[41] Although after the Waldheim trials, the period in which each and every former member of the National Socialist Party who resided in the GDR ran the risk of being put on trial was history, the sheer number of grave crimes committed under the Nazi regime was so huge that in the early 1950s the GDR was still far from having prosecuted all of them. Therefore, in the years to follow, crimes committed by supporters of the National Socialist movement continued to be investigated and perpetrators punished.

From a legal point of view, however, the problem that arose in the mid-1950s was that the Soviets repealed a number of laws that had been enacted by the occupational powers and which had served as a legal basis for the trials for crimes committed by National Socialists (especially Law No. 10 and Directive No. 38). As the GDR had not enacted special provisions for the prosecution of Nazi crimes themselves, the courts turned to the traditional provisions of the Criminal Code of the German Reich (especially those on murder, manslaughter, assault, etc.).

3.3.3. Oppression of Political Opponents on the Basis of Constitutional Law

Alongside the prosecution of Nazi crimes, the early 1950s saw a development of the law relating to political offences which further blurred the line between the prosecution of Nazi crimes and of political opponents. The new main tool in this context was Article 6 of the new GDR Constitution, a regulation that had the character of a criminal law

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[40] See Falco Werkentin, "Die Waldheimer 'Prozesse' – ein Experimentierfeld für die künftige Scheinjustiz der SED?", in Norbert Haase and Bert Pampel (eds.), *Die Waldheimer "Prozesse" – fünfzig Jahre danach*, Nomos, Baden-Baden, 2001, pp. 6 ff.

[41] Wieland, 2010, p. 59, see *supra* note 11, which states that the expectation that the prosecution of former National Socialists would stop after the Waldheim trials was unrealistic from the start.

provision despite being in the Constitution. This provision contained the prohibition of certain types of "propaganda" and "agitation", terms without clear meaning and previously unknown to German criminal law.[42] On the basis of Article 6, almost any act or expression which was not in line with the politics of the party regime could easily be declared as criminal and be prosecuted. Especially in the early years of the GDR, and in particular up until the death of Stalin in 1953, this provision was the main legal tool for the relentless oppression of people with different political opinions through the judicial system.

With the promulgation of Article 6 of the Constitution, the line between the prosecution of Nazi crimes and the prosecution of acts of political opponents became increasingly indistinct. Article 6 was frequently applied together with Order No. 201 and Directive No. 38 (for as long as they were not repealed by the Soviets). As Directive No. 38 provided that a person who made propaganda for the National Socialist ideology was a criminal activist, the Supreme Court of the GDR applied this provision alongside Article 6 of the Constitution. The Directive alone was normally applied in minor cases as it was seen as the more lenient law in comparison with Article 6.[43]

33.3.4. The Peace Protection Act

A new instrument for the oppression of political opponents which made reference to international law was the Act for the Protection of Peace of 15 December 1950 ('Peace Protection Act'),[44] the first Act of purely criminal law character enacted in the GDR. The political leadership

[42] The wording of Article 6 can be translated as follows: "Boycott agitation [*Boykotthetze*] against democratic institutions and organizations, murder agitation [*Mordhetze*] against democratic politicians, expressions of hatred against faith, races or nations, military propaganda and war agitation and all other acts directed against the equality of human beings are crimes under the Criminal Code".

[43] See, for example, the judgment of the Supreme Court of the GDR of 4 October 1950, in *Neue Justiz*, 1950, vol. 4, no. 11, pp. 452, 455; the judgment of 3 December 1953, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 3, pp. 27, 53; the judgment of 21 December 1953, in *Neue Justiz*, 1954, vol. 8, no. 1, pp. 26, 30; the judgment of 20 January 1954, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 3, pp. 105 ff. See also Fricke, 1990, pp. 261 ff., *supra* note 13, with further examples of cases decided by the judiciary of the GDR.

[44] Gesetz zum Schutz des Friedens vom 15. Dezember 1950, Gesetzblatt der DDR 1950, p. 1199 ("Peace Protection Act").

pointed out that the creation of the Peace Protection Act was a response to recommendations of the Second World Peace Conference, held on 16–22 November 1950 in Warsaw and to the Korean War, which broke out shortly before the conference took place.[45]

According to the preamble of the Peace Protection Act, "war propaganda, no matter under which circumstances carried out […] represents one of the worst crimes against humanity". The offences covered by the Act included different kinds of war propaganda and "agitation" (in this regard, the Peace Protection Act and Article 6 of the Constitution covered the same conduct). The provisions for punishment in the Act included imprisonment and, where the offence was committed under aggravating circumstances, hard labour (*Zuchthaus*). Under especially aggravating circumstances, in particular when the offence was committed carrying out an order of another state, the punishment was hard labour for not less than five years, life imprisonment or the death penalty.[46] The Act also covered the attempt to commit the offence as well as preparatory measures.[47] As supplementary punishment the Act included provisions on fines and forfeiture – in the case of a sentence of more than five years of hard labour, the forfeiture of all property belonging to the convicted person was mandatory.[48] A provocative provision with a view to the Federal Republic of Germany provided that the courts of the GDR were also competent "in cases where the offence of a German citizen was not committed on the territory of the GDR, and the offender was not resident in the GDR".[49]

In the view of criminal lawyers in the GDR, the Peace Protection Act was "the most important piece of criminal law legislation in the first years after the GDR was founded".[50] However, the Act was not significant in a practical sense as, unlike the above-mentioned Article 6 of

[45] Gerhard Stiller, *Die Staatsverbrechen*, Zentralverlag, Berlin, 1959, pp. 9, 36; Wolfgang Weiß, "Das Gesetz zum Schutze des Friedens", in *Neue Justiz*, 1951, vol. 5, no. 1, p. 12.

[46] Peace Protection Act, Section 6, see *supra* note 44.

[47] *Ibid*., Section 7.

[48] *Ibid*., Section 8.

[49] *Ibid*., Section 10(3).

[50] John Lekschas *et al.*, *Strafrecht Allgemeiner Teil*, 2nd ed., Staatsverlag, Berlin, 1978, p. 101.

the Constitution, it was only applied in very few cases.[51] It was important in the field of legal propaganda, however, as it proved, at least in the view of the political leadership, the efforts of the GDR for peace in the time of the Cold War. According to Hilde Benjamin, Vice President of the Supreme Court and subsequently the Minister of Justice, with the enactment of the Peace Protection Act, the GDR acknowledged the London Agreement of 8 August 1945 as well as general principles of international law. In her view, this "contributed significantly to increase the reputation of the GDR with all peace-loving powers in the world".[52] However, in reality, the preamble of the Peace Protection Act was in its wording everything but peaceful – "martial" would have been a better description.[53] The same is true for the crimes included in the Act with their severe provisions relating to punishment and their ideologically influenced offences which were a precursor for a set of Stalinist laws that were enacted shortly thereafter (that, however, cannot be dealt with in this chapter).

This strategy of the political leadership – presenting severe laws against political opponents as being an expression of principles of international law – was a typical feature of the legislative work in criminal matters of the party regime until the end of the GDR.

33.4. Prosecution of National Socialist Crimes and the Inner-German Conflict (1960s)

Over the years, the number of trials that were initiated in the GDR for crimes committed under the Hitler dictatorship decreased as most of the

[51] In the early 1950s only one judgment was handed down on the basis of the Peace Protection Act; see the judgment of the Supreme Court of the GDR of 1 May 1952, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 2, pp. 14 ff. A second judgment in which the Act was applied was delivered in 1962; see the judgment of the Supreme Court of the GDR of 29 December 1962, in *Neue Justiz*, 1963, vol. 17, no 2, pp. 36 ff.

[52] See Benjamin, Becker, Görner and Schriewer, 1969, p. 1126, *supra* note 29.

[53] There, it was said, *inter alia*, that the politics of the Western powers were directed towards a "new world massacre" and a "deadly war of brothers". See in this context also the comment by a judge of the Supreme Court in the judgment of the Supreme Court of the GDR of 1 May 1952, *supra* note 51, which included a blatant threat towards the Western bloc: "If our enemies get serious with the threatening of the peace, we will get serious with applying the Peace Protection Act". The quote is taken from Hilde Benjamin, "Das Oberste Gericht der Deutschen Demokratischen Republik im Kampf gegen Spionage und Sabotage", in *Neue Justiz*, 1952, vol. 6, no. 6, p. 245.

perpetrators had in the interim either died, had already been convicted or had escaped to West Germany.[54] However, despite the fact that the political leadership proclaimed that it had successfully eliminated fascism in the GDR, the prosecution of Nazi crimes as well as the creation of laws relating to international crimes remained politically relevant.

33.4.1. Show Trials Against West German Politicians

Beginning in the early 1960s the political leadership of the GDR invested considerable effort in taking political advantage of the reluctance of the West German government to elaborate on its own dark past. This was a strategically well-thought-out tactic as the GDR itself had prosecuted a large number of National Socialist perpetrators and had thoroughly purged the public sector of supporters of the former regime. West Germany, in contrast, only started in the course of the 1960s – and even then only very reluctantly – to conduct prosecutions for Nazi crimes on a broader basis. In addition, there were a considerable number of former high-ranking members of the National Socialist Party who still held important positions in the judiciary and even in the government of West Germany.[55] This created opportunities for GDR propaganda campaigns in which the political leadership published incriminating documents about the Nazi past of high-ranking officials of the West German government which they had received through their secret service (the Stasi) and the governments of allied countries in the Communist bloc.

The GDR judiciary played a pivotal role in these campaigns. At the beginning of the 1960s the propaganda department of the party organised several huge show trials and among the accused were Theodor Oberländer, a member of parliament for the conservative party, and Hans Globke, Secretary of State in the then government of Chancellor Konrad Adenauer. Both Oberländer and Globke were sentenced *in absentia* to lengthy prison sanctions (which they never served as they remained in West Germany). Whereas in the trial against Oberländer the Supreme Court based its judgment on the provisions of the German Criminal

[54] For statistics, see the data in the annex to this chapter.

[55] See Müller, 1985, pp. 211 ff., *supra* note 19; Gerhard Werle and Thomas Wandres, *Auschwitz vor Gericht*, Beck Verlag, Munich, 1995, pp. 20 ff.

Code,[56] in the Globke trial it took a remarkable turn and applied Article 6 of the Nuremberg Statute.[57] From that trial on, this provision was the legal basis for all GDR prosecutions for crimes committed under the National Socialist regime. This reference to the Nuremberg Statute by the courts was in principle a suitable approach for dealing with these crimes, especially in comparison with West Germany where the judiciary had serious difficulties in basing convictions for Nazi crimes on the domestic criminal law.[58] However, for the political leadership of the GDR, the enormous political and propagandistic potential which the direct application of the Nuremberg Statute entailed also played a significant role in this shift. It was set out that "in each and every war crimes trial militarism is in the dock", and that these trials "also and not least must lay bare the economic, political and ideological roots of militarism".[59] As the Communist bloc was classified by the GDR as being genuinely peaceful this meant, in other words, that in war crimes trials the capitalistic monopolies and their interests were being accused. With the application of the Nuremberg Statute, the leadership of the GDR tried to discredit the class enemy by using recognised norms of international law. In this way, the Nuremberg Trials against the major war criminals were even qualified as "anti-fascist", "anti-imperialistic" and "anti-monopolistic", as they were said to have uncovered "the connection between fascism, imperialism and monopolies".[60]

33.4.2. The Auschwitz Trial in the GDR

In addition to the campaigns and show trials against West German politicians a further spectacular trial for atrocities under the National Socialist dictatorship has to be mentioned: the trial against Horst Fischer. Fischer had served as medical doctor in Auschwitz from 1942 to 1944 at

[56] See the judgment against Oberländer that was published as a special supplement to *Neue Justiz*, 1960, vol. 10.

[57] See the judgment in the Globke case that was published in its entirety in *Neue Justiz*, 1963, vol. 17, no 15, pp. 449 ff.

[58] See Gerhard Werle, "Völkerstrafrecht und geltendes deutsches Strafrecht", in *Juristenzeitung*, 2000 vol. 55, no. 15, p. 756.

[59] Michael Kohl, "Zu einigen aktuellen Fragen der Ahndung von Kriegsverbrechen", in *Neue Justiz*, 1961, vol. 15, no. 14, p. 477.

[60] Wassili Wassiljewitsch Kulikow, "Aktuelle Lehren des Nürnberger Prozesses", in *Neue Justiz*, 1976, vol. 30, no. 24, p. 731.

the same time as Josef Mengele, infamous for his inhumane experiments with inmates of the concentration camp. Although he had been in personal contact with Mengele in Auschwitz, Fischer himself had not acted in such a cruel way as his colleague. However, there is no doubt that Fischer was part of the extermination machinery of Auschwitz and had, for example, selected the prisoners arriving on the trains who would either work until their death or who would be immediately killed in the gas chambers. After the end of the Second World War, Fischer had lived and worked unrecognised for 20 years in a small town in East Germany until the Stasi finally identified and detained him. His trial took place at around the same time as the West German Auschwitz trials in Frankfurt. Just as the political leadership and the judiciary had agreed upon before the trial, Fischer received the death sentence[61] and was executed on 8 July 1966.[62] This sanction was imposed on him not least to create a counterbalance to the rather mild sanctions which were imposed on the defendants in the Frankfurt Auschwitz trials and which were harshly criticised in the GDR.[63]

33.4.3. Statute of Limitation

An important issue that arose in the 1960s in both East and West Germany with regard to the prosecution of crimes committed between 1933 and 1945 was the question of the applicability of the statute of limitation for these crimes. On 1 September 1964 the GDR enacted the Act on the Non-Applicability of the Statute of Limitation for Nazi and War Crimes.[64] In this Act, it was stated that "persons who had committed, ordered or abetted between 30 January 1933 and 8 May 1945 crimes against peace, crimes against humanity or war crimes" were to be prosecuted and punished "in line with the duties under international law". In addition, the "regulations on the application of the statute of limitation" were declared "not applicable to these crimes".

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61 See the judgment of the Supreme Court of the GDR of 25 March 1966 against Fischer in *Neue Justiz*, 1966, vol. 20, no. 7, pp. 193 ff.

62 On the *Fischer* trial, see Dirks, 2006, *supra* note 4, pp. 188 ff.

63 Dirks, 2006, p. 301, see *supra* note 4. On the West German Auschwitz trial, see in detail Werle and Wandres, 1995, pp. 41 ff., *supra* note 55.

64 Gesetz über die Nichtverjährung von Nazi- und Kriegsverbrechen vom 1. September 1964, Gesetzblatt der DDR 1964 I, p. 127.

In contrast, West Germany had shown serious attempts to prosecute Nazi crimes only very late and had initiated trials exclusively on the basis of domestic criminal law. Therefore, questions regarding the applicability of the statute of limitation inevitably became a looming problem for the prosecutorial authorities. After long debates and after the government introduced special regulations on two occasions so that the worst crimes would not fall under the statute of limitation,[65] in 1979 the West German legislator declared the rules of the German Criminal Code on the statute of limitation inapplicable for the crime of murder. This created the possibility of continuing to prosecute at least those cases in which the crimes in question were to be regarded as murder according to Section 211 of the German Criminal Code. However, a large number of perpetrators of crimes under the Nazi regime had by then already benefited from the short time limits.[66]

In contrast to the West German legislator's hesitant approach, the GDR had 15 years earlier already taken legislative measures to ensure the continuation of prosecutions. This was another political victory for the regime that once again cultivated its image as the more progressive German state when it came to the confrontation of crimes of the Nazi regime.

33.5. Codification of International Crimes (1968

In the course of the 1960s the GDR also increased its efforts with regard to the creation of rules on international crimes. In 1963 the State Council (*Staatsrat*)[67] convened a legislative commission to draft a completely new Criminal Code.[68] When the commission started its work it was undisputed that the new Code should include a chapter on international crimes.[69]

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65 First, by way of postponing the application of the statute of limitation, then by extending the period of time in which crimes of murder prescribed to 30 years.

66 On this issue see Müller, 1985, pp. 245 ff., *supra* note 19; Werle and Wandres, 1995, pp. 25 ff., *supra* note 55.

67 The State Council was the official head of state of the GDR from 1960 to 1990. It was put in place after the former President of the GDR, Wilhelm Pieck, had passed away.

68 Until then, the Criminal Code of the former German Reich of 1871 had remained the basic legal document of criminal law in the GDR, although it had been considerably amended.

69 See the "working conception" paper of 30 August 1963 by the subcommittee whose task was to draft "provisions for the protection of peace and humanity", BA DY 30/IVA2/13/184, Federal Archive Berlin ('FAB')

While drafting the new regulations, the commission referred to Article 6 of the Nuremberg Statute, Law No. 10 and the UN Genocide Convention as examples.[70] That the political leadership of the GDR also aimed for political goals with its implementation of regulations on international crimes is evidenced, for example, by a statement of Prosecutor General Josef Streit according to whom these "provisions as well as the sanctions included […] are necessary as the main powers of imperialism in the last years, though not having grown stronger, have become more aggressive". [71] Therefore, it was no surprise that the chapter on international crimes in the new Criminal Code – which was located at the beginning of a Special Part in order to demonstrate its importance – not only included provisions that were, at least to a certain extent, in line with recognised principles of international criminal law, but also GDR-specific, i.e. alleged international crimes which were designed to fight the political enemy.

33.5.1. Provisions on the Basis of Acknowledged International Criminal Law

Chapter One of the Special Part of the Criminal Code of the GDR contained provisions on aggression, crimes against humanity and war crimes. With regard to the crime of aggression, Section 85 criminalised the announcement, planning, preparation and waging of a war of aggression. This provision followed up on the elements of Article 6(a) of the Nuremberg Statute, except with respect to an announcement of a war of aggression that had not been included in the Statute. In addition, Section 86 defined "acts of aggression". It was argued by criminal lawyers in the GDR that the definition of aggressive acts, which the Soviet Union had submitted to the UN in 1953, had been a role model for this provision which also defined indirect, economic and ideological acts as acts of aggression.[72] While the role these provisions played in judicial practice was not particularly significant, their political importance for the leadership of the GDR cannot be underestimated. First, military

[70] See the grounds for the draft presented by sub-committee on 30 November 1963 ("Grounds for the Draft"), BA DY 30/IVA2/13/184, p. 8 (FAB).

[71] Josef Streit, "Der Schutz der Souveränität der DDR, des Friedens, der Menschlichkeit und der Menschenrechte im neuen Strafrecht", in *Neue Justiz*, 1967, vol. 21, no. 6, p. 170.

[72] Hans Heilbronn *et al*., *Strafrecht der DDR, Lehrkommentar*, vol. II, Staatsverlag der DDR, Berlin, 1970, p. 16.

interventions by Western forces – for example, the war of the US in Vietnam, and the alleged support of West German politicians for this war – could be defined as a war of aggression and a crime under GDR law.[73] Second, and more importantly, due to the rather broad scope of the provisions, various actions by the West German government or individuals opposed to the GDR – for instance, decisions on economic sanctions (especially the so-called Hallstein Doctrine) or individual attacks against the Berlin Wall – fell under the definition of aggression.[74] This was in line with earlier political accusations against the Federal Republic – for instance, in 1961, when the sealing of the borders with West Germany and the erection of the wall in Berlin were proclaimed as a protective measure against alleged plans of the Western powers to start a war of aggression against the GDR.[75]

The provision on crimes against humanity, Section 91 of the Criminal Code, included the persecution, displacement, extermination (in whole or in part) or other inhumane treatment of a "national, ethnic, racial or religious group". A nexus between crimes against humanity and a war was not required; in this regard, the provision in the GDR Criminal Code was quite progressive.[76] With regard to the protected groups, the provision on crimes against humanity followed up on Article II of the Genocide Convention; a provision on genocide was not included in the Criminal Code, at least not under this name. The main difference in comparison to the provision on crimes against humanity in the Nuremberg Statute was that Section 91 of the GDR Criminal Code did not include the protection of political groups. This was surprising as earlier drafts of the Criminal Code had, in fact, included such groups.[77] At that time, the main

[73] Streit, 1967, p. 170, see *supra* note 71. On the invasions by the Soviets of, for example, the Czech Republic, the voices in the GDR, of course, remained silent.

[74] On "acts of aggression against the borders of the GDR", see Michael Kohl's article in *Neue Justiz*, 1962, vol. 16, no. 19, p. 585 ff. On the Hallstein Doctrine, see Heilbronn *et al*., 1970, p. 18, *supra* note 72.

[75] Peter Przybylski, "Zum Charakter der Aggressionshandlungen gegen die Staatsgrenzen der DDR", in *Neue Justiz*, 1964, vol. 18, no. 4, p. 97.

[76] The non-requirement of a nexus to war was at that time not yet general opinion, see Antonio Cassese, *International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 90; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, marginal no. 871 ff.

[77] See the sub-committee's draft of the chapter on crimes against peace and humanity, 10 December 1963, BA DY 30/IVA2/13/184, p. 6 (back page) ("Draft Chapter") (FAB).

argument for the *inclusion* of political groups had been to create the possibility of defining discriminative actions taken against communist activists and GDR citizens by the West German government as crimes against humanity.[78] One can only speculate as to why political groups were in the end excluded. The most plausible explanation is that a provision that protected political groups would have inevitably also covered oppressive acts of the political leadership of the GDR against its own citizens. This could have been used by the West German government or civil rights groups to attack the political leadership of the GDR. In order to avoid, on the one hand, a situation in which the regime could have come under political attack and, on the other hand, to fill the gap with regard to acts against communists and GDR citizens in West Germany, political groups were not mentioned in the provision on crimes against humanity but special provisions – Section 89 on "persecution of supporters of peace movement" and Section 90 on "persecution of citizens of the GDR in breach of international law" – were created.

As a third international core crime, the Criminal Code criminalised war crimes in Section 93. It reflected in its elements various treaties which the GDR had previously signed and ratified – for instance, the Geneva Convention of 1949.[79] However, with Section 93, similar to the creation of the provision on crimes against humanity, the political leadership's main purpose was to capture actions taken by the imperialists. In the grounds that were internally provided to explain the draft of the provision, it was stated:

> The significance of the creation of a provision for war crimes is that imperialists and fascists, for whom the commission of such crimes is part of their general politics, may clearly and emphatically be warned.[80]

In the course of the internal discussions about the draft provision on war crimes, it was even debated whether it should be indicated that war crimes could only be punished when being committed by the party that had initiated the war. With this, it was argued, it could be demonstrated that war crimes *de facto* only could be committed by the capitalist bloc, as the

[78] *Ibid*., p. 7, see *supra* note 77.

[79] The GDR had become a member of the Geneva Conventions already on 30 August 1956. See Gesetzblatt der DDR 1956, p. 365.

[80] Grounds for the Draft, 1963, p. 3, see *supra* note 70.

socialist bloc *per se* was considered to be peaceful.[81] However, in the end this plan was not realised as it was feared that this provision could have been seen as a breach of international law.[82]

In addition to the regulations that captured the international core crimes, the Criminal Code made provision for the exclusion of the statute of limitation for international crimes in Section 84.[83] Moreover, according to Section 95, the commission of an international crime could not be justified with the argument that the perpetrator had acted on superior orders. These provisions were in line with acknowledged principles of international criminal law.

33.5.2. GDR-specific International Criminal Law Provisions

Apart from the provisions that basically reflected principles of international criminal law (even though partly configured according to the needs of the political leadership) the chapter on international crimes included a number of regulations that followed the line of the provisions that had been used by the political leadership since the 1950s to suppress political opposition. In the Criminal Code these provisions appeared alternately with the Nuremberg Statute's provisions. With this the legislator continued with its strategy of creating regulations against political opponents while trying to make them look on the surface like a reflection of recognised principles of international law.

In this regard, Sections 87 ("recruitment for imperialistic military services"), 89 ("war agitation and propaganda") and 92 ("fascist propaganda and propaganda against nations and races") made various

[81] In the subcommittee that drafted the chapter on international crimes it was even said that a soldier of the socialist forces was genuinely unable to commit a war crime. As a member of the committee argued: "My two sons have received a good training and ideological education as conscripted soldiers in the National People's Army of the GDR. They would vigorously dissent if they were to be regarded as potential perpetrators of war crimes. It is completely unthinkable that the socialist armies could commit any war crimes". See the protocol on questions regarding international law of the draft of the Criminal Code, 9 June 1967, BA DO 1/11283, p. 18 ("Protocol on Questions") (FAB).

[82] In this regard, another member of the sub-committee said: "I am afraid we will get into international trouble if we express that only the aggressor may commit war crimes". See Protocol on Questions, 1967, p. 18, *supra* note 81.

[83] This provision repeated the content of the Act on the Non-Applicability of the Statute of Limitation for Nazi and War Crimes of 1964, see above Section 33.4.3.

crimes included in the Peace Protection Act of 1950[84] part of the Criminal Code. The Peace Protection Act, despite having hardly been applied in practice, remained in effect, which had the strange effect that some of its core provisions from then on existed *de facto* in two different Acts. In addition, as seen above, the crime of "persecution of citizens of the GDR in breach of international law" in Section 90 filled the gap which had been generated by not including political groups in the section on crimes against humanity. According to Section 90, it was a crime to persecute GDR citizens for the exercise of their civil rights. The provision was meant to cover acts such as body searches, the initiation of investigations or expulsion of GDR citizens by West German authorities.[85] In contrast, the crime of "participation in acts of suppression" in Section 88 was directed towards GDR citizens. The practical relevance of this crime was insignificant. Its purpose was rather to show that acts of suppression were incompatible with the socialist social order.[86]

33.6. Prosecution of National Socialist Crimes until the Fall of the Berlin Wall (1970s and 1980s)

The prosecution of crimes committed in the Third Reich continued to play an important role in the last two decades of the GDR's existence. In as late as 1985 the Prosecutor General characterised the prosecution of these crimes as an "urgent imperative",[87] while the political leadership stressed that it was determined to "chase Nazi criminals to their last hiding place and punish them".[88] Despite the fact that the number of cases was low, the prosecutorial authorities continued their work almost right up until the fall of the Berlin Wall – the last registered trial for Nazi crimes took place on

84 On this Act, see above Section 33.3.4.

85 Heilbronn *et al*., 1970, p. 27, see *supra* note 72.

86 *Ibid*., 1970, p. 21. That the provision came into force almost at the same time as the bloody oppression of the "Prague Spring" can be seen as fatal coincidence.

87 Günther Wieland, "Verfolgung von Verbrechen der Nazijustiz – ein dringendes Gebot" [Prosecution of Crimes of the Nazi Judiciary – An Urgent Imperative], in *Neue Justiz*, 1985, vol. 39, no. 1, p. 14.

88 See the comment on a judgment by the Regional Court of East Berlin by Deputy Prosecutor General of East Berlin Rolf Beinarowitz, in *Neue Justiz*, 1982, vol. 36, no. 1, p. 40, in which the author adds that this had been "the repeatedly articulated will of our socialist State".

12–25 September 1989, just a few weeks before the borders to West Germany were opened.[89]

The trials which dealt with crimes that dated back decades were made possible through the good relationships that the GDR enjoyed with the countries in Eastern Europe, where, in fact, most of the victims of the Nazi regime came from.[90] The legal basis in these trials continued to be the Nuremberg Statute. This was formally confirmed by Section 1 paragraph 6 of the Introductory Act to the Criminal Code, according to which the prosecution of "crimes against peace, crimes against humanity and war crimes which were committed before the coming into force of the Criminal Code" should take place "on the basis of international law". Thus, the new regulations on international crimes which the Criminal Code had brought about did not play a decisive role in the prosecution of Nazi crimes. In this context the new provisions were only applied with regard to sanctions and this also only because Article 6 of the Nuremberg Statute did not contain related regulations.[91]

The propagandistic and ideological potential that the trials for crimes committed during the Third Reich entailed continued to play an important role for the political leadership even though the inner-German conflict was no longer as harsh as it had been in the 1960s.[92] Although show trials against West German politicians were no longer initiated, the political leadership of the GDR found new ways to point to the deficiencies of the Federal Republic of Germany. When the political leadership of the GDR received incriminating documents from allied countries in the Eastern bloc concerning perpetrators living in West

89 In this trial, the Regional Court of Rostock convicted a 79-year-old man for crimes against humanity and war crimes and sentenced him to life imprisonment. According to the judgment, the defendant had worked as a guard in an arms factory in Poland; his tasks included ensuring that the forced labourers that were used in the factory would not escape. When three young Polish workers tried to flee, the accused was said to have shot them. See the wording of the judgment in Christiaan Rüter, *DDR-Justiz und NS-Verbrechen*, vol. 1, Amsterdam University Press and K.G. Saur Verlag, Amsterdam and Munich, 2002, pp. 3 ff.

90 Wieland, 2010, p. 79, see *supra* note 11.

91 This was expressly stated in Section 1 para. 6, sentence 2 of the Introductory Act to the Criminal Code.

92 Among the main reasons for this were the change of politics under Social Democratic Chancellor Willy Brandt and the fact that the GDR was increasingly dependent on credits from West Germany.

Germany, it forwarded them to the West German authorities with the demand that they start an investigation. In the event that a procedure was initiated, the leadership of the party took efforts to accredit a GDR advocate (in most cases, this was the famous GDR counsel Friedrich Karl Kaul) as a party in cases in which the victims were residents of the GDR or Eastern European countries.[93] In this way, the East German counsel was able to denounce the reluctant attitude of the West German state with regard to the prosecution of crimes committed under the Hitler dictatorship in court and before the international media.

Finally, further evidence that the general attitude of the GDR leadership towards Nazi criminals did not change until the party regime broke down was that during the general amnesty of 1987 – the biggest amnesty in the history of the GDR – Nazi criminals and war criminals were explicitly excluded.[94]

33.7. Conclusion

The GDR prosecution of crimes committed under the National Socialist rule and the role that international criminal law played in this context is a multifaceted topic which has to be evaluated carefully. In general, one must clearly acknowledge as positive the fact that prosecutions for the mass crimes committed in the Third Reich were carried out in the GDR on a larger scale. The same is true with regard to the application of rules on international crimes in these trials – for example, Article 6 of the Nuremberg Statute, and with regard to the implementation of regulations on international crimes into the domestic legal order. This is particularly true if one compares the efforts of the GDR with the reluctant attitude of the Federal Republic's government towards both the prosecution of Nazi crimes and the implementation of international criminal law.

However, if one analyses the measures taken by the GDR more thoroughly, a number of negative aspects come to the surface. The prosecution of crimes committed by the National Socialists must also be

[93] See, for example, the reprint of the final arguments of Friedrich Karl Kaul in a trial against former members of the SS in Cologne, in *Neue Justiz*, 1980, vol. 34, no. 4, pp. 173 ff.

[94] See Festlegung des Vorsitzenden des Staatsrates der Deutschen Demokratischen Republik zur Durchführung des Beschlusses des Staatsrates über eine allgemeine Amnestie aus Anlass des 38. Jahrestages der Gründung der Deutschen Demokratischen Republik, Gesetzblatt der DDR 1987 I, p. 192.

seen as the starting point of the establishment of a criminal law against political enemies which departed from the basic principles of traditional German criminal law as they related to the protection of the rights of the accused (an escalation in this development was seen in the Waldheim trials). This development was driven by the general politicisation of the prosecution of Nazi crimes. In the GDR, "anti-fascism" was a key word that was used to legitimise the state and its policies – the elimination of fascism consequently played a fundamental role. Although a thorough "de-fascistisation" of East German society after the Second World War cannot be criticised in principle (one would have wished that the government in West Germany had taken more effort in purging the public sector of supporters of the old regime), the importance of these trials had the effect that basic principles of the rule of law were seen by the political leadership as an impediment in reaching its political-ideological aims and were accordingly suspended. At the same time, the line between a thorough prosecution of National Socialist mass crimes and the oppression of political opponents was blurred – the punishment of fascists and of neo-fascists (who were frequently punished only for being against the socialist ideology) in the GDR were closely related.

This also led to an amalgamation of the rules against international crimes and the rules for the oppression of political enemies. As laid down in a Stasi manual, the basic understanding in the GDR of international crimes was that they were "a typical expression of imperialism in its general aggravating crisis" while they were seen as "foreign to socialism".[95] With this understanding, the political leadership declared the rules on international crimes to be inapplicable to everyone who followed the "correct" ideology and added another weapon to its arsenal of instruments against political opponents.

[95] See the manual of the Stasi academy in Potsdam, Strafrecht, Besonderer Teil, vol. 1, 1986, p. 14, MfS/JHS/40/86/I, Archive of the Stasi Records Office Berlin.

Annex 1: Convictions for Nazi Crimes in the East German Courts[96]

Year	Death penalty	Prison sentence				Total
		Life	More than 10 years	3–10 years	Less than 3 years	
1945	2	1		2	1	6
1945	9	3	22	35	58	127
1947	8	6	22	130	578	744
1948	10	12	62	709	3,756	4,549
1949	13	11	70	401	2,138	2,633
1950	49	160	2,914	384	585	4,092
1951	8	9	30	112	173	332
1952	2	6	17	53	61	139
1953	1	7	18	44	15	85
1954	2	2	7	20	5	36
1955	4	4	5	8	2	23
1956			1			1
1957				1		1
1958		1		1		2
1959	1	1	1	3		6
1960	4	4		2		10
1961	2			4		6
1962	3	2		5		10
1963	1	4	3	3		11
1964		2				2
1965		2		1		3
1966	1	6		2		9
1967		1				1
1968	1	2				3
1969	1					1
1970		1	3			4
1971	1	1	1			3
1972	2					2
1973	1		2	1		4
1974	1	6		1		8

[96] The figures rely on Wieland, 2010, pp. 97 ff., see *supra* note 11.

1975		3	2	1		6
1976	1	1	1			3
1977	1	1	2			4
1978		3	2			5
1979		1				1
1980			1			1
1981		2	1			3
1982			1			1
1983		4		1		5
1984						0
1985		1				1
1986		2				2
1987		1	2			3
1988		1				1
1989			1			1
Total	129	274	3,191	1924	7,372	12,890

34

Towards the Domestic Prosecution of Nazi Crimes Against Humanity: The British, Control Council Law No. 10 and the German Supreme Court for the British Zone, 1947–1950

Christian Pöpken[*]

34.1. Introduction

Against the backdrop of the Allied war crimes trials of leading representatives of the so-called Third Reich (used as a designation for the Nazi regime in Germany from 30 January 1933 to 8 May 1945), which took place in Nuremberg before the International Military Tribunal ('IMT') (1945–1946) and United States ('US') military courts (1946–1949), the most controversial German legal scholar and political theorist of the twentieth century, Carl Schmitt, dealt with the term and nature of 'crimes against humanity'. On 6 May 1948 he noted:

> What specifically remains, if one takes away from crimes against humanity the old known criminal offences of murder, robbery, rape and so on? Crimes that show an extreme will to exterminate; crimes, to which something particular is added, namely, the anti-human as a subjective element. What is added? No realus, but rather just an animus.[1]

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[1] Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, Eberhard Freiherr von Medem (ed.), Duncker & Humblot, Berlin, 1991, p. 145 (my translation):

> Was bleibt als das Spezifische übrig, wenn man von den Verbrechen gegen die Menschlichkeit die alten bekannten kriminellen Tatbestände Mord, Raub, Vergewaltigung usw. abzieht? Verbrechen, die 'einen krassen Vernichtungswillen' erkennen lassen, also Verbrechen, zu denen auf der subjektiven Seite noch etwas Besonderes, das Gegen-Menschliche nämlich, hinzukommt. Was kommt hinzu? Kein Realus, sondern nur ein Animus.

From Schmitt's point of view these crimes were "*Gesinnungs-verbrechen*" (convictional crimes). He stated that establishing an international legal norm for such crimes would not only be obsolete but rather discriminatory treatment of the defeated side – in this case, the Germans. Polemically, he takes the part of the Allied Powers prosecuting Nazi crimes against humanity on the legal bases of the London Charter of the IMT[2] and Control Council Law No. 10 ('CCL 10'),[3] when he describes these atrocities as

> *Gesinnnungsverbrechen* on the negative side. They must have occurred with dialectical necessity, after *Gesinnungs-verbrechen* were discovered for humanitarian reasons out of a good heart. In other words: they are the deeds, emerging from inhuman attitudes and reflecting such attitudes; so, that which the person, who has been declared the enemy of mankind, does. Political in the most extreme and intense sense of the word. "Crimes against humanity" is just the most general of all general clauses for the destruction of the enemy.[4]

In order to expose the hypocrisy of the Allies, whom he accused of victor's justice, the former "Crown Jurist of the Third Reich" pointed out on 6 December 1949: "There are crimes against and for humanity. The crimes against humanity are committed by Germans. The crimes for humanity are committed against Germans".[5] This perception being quite

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2 Charter of the International Military Tribunal, 8 August 1945 ("IMT Charter") (http://www.legal-tools.org/doc/64ffdd/).

3 Control Council Law No. 10, 20 December 1945 ("CCL 10") (https://www.legal-tools.org/en/doc/ffda62/).

4 Schmitt, 1991, p. 145, see *supra* note 1 (my translation):

> Gesinnungs-Verbrechen von der negativen Seite. Sie mußten mit dialektischer Notwendigkeit kommen[,] nachdem aus Humanität die Gesinnungs-Verbrechen aus guter Gesinnung entdeckt worden waren. Mit anderen Worten: es sind die aus menschenfeindlicher Gesinnung entstandenen und von solcher Gesinnung zeugenden Taten, also: das, was der zum Feind der Menschheit Erklärte tut. Politisch im extremsten und intensivsten Sinne des Wortes. 'Verbrechen gegen die Menschlichkeit' ist nur die generellste aller Generalklauseln zur Vernichtung des Feindes.

5 *Ibid.*, p. 282 (my translation):

> Es gibt Verbrechen gegen und Verbrechen für die Menschlichkeit. Die Verbrechen gegen die Menschlichkeit werden von Deutschen

unilateral fits in with the anti-liberal approach that Schmitt had adopted already during the Weimar Republic when he wrote *The Concept of the Political*. One of the most striking phrases of this earlier enigmatic study was: "Whoever invokes humanity, wants to cheat".[6] The German intellectual, who was dismissed from his post as a professor of law in 1945 and detained by the Allies until 1947, rejected 'humanity' (in its double meaning of *Menschheit* and *Menschlichkeit*) as a political concept aimed at the destruction of the enemy.

Did Schmitt notice that German courts in the British, French and Soviet zones applied CCL 10 to punish Nazi atrocities – albeit only in cases where the victims were German or stateless persons? Probably, yes. And surely he refused to recognise this jurisdiction because of his denial of the existence of 'crimes against humanity', which he did not consider a legal norm but rather a battle cry. Were these atrocities, as the German lawyer stated, indeed nothing more than ordinary crimes, that were committed because of a conviction (*Gesinnungsverbrechen*) that was condemned by the winning side of the war?

The German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone*, 'OGH'), sitting in Cologne, answered this question in the negative by way of its legal practices concerning CCL 10.[7] Though adjudicating for only two and a half years – from May 1948 to September 1950 – the OGH provided a remarkable interpretation of

begangen. Die Verbrechen für die Menschlichkeit werden an Deutschen begangen.

6 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*, 8th ed., Duncker & Humblot, Berlin, 2009, p. 51 (my translation): "Wer Menschheit sagt, will betrügen".

7 Regarding the German Supreme Court for the British Zone and its jurisprudence on crimes against humanity, see: Justizministerium des Landes NRW (ed.), *Verbrechen gegen die Menschlichkeit – Der Oberste Gerichtshof der Britischen Zone*, Düsseldorf, 2012, Juristische Zeitgeschichte NRW, vol. 19; Werner Schubert (ed.), *Oberster Gerichtshof für die Britische Zone (1948–1950): Nachschlagewerk Strafsachen – Nachschlagewerk Zivilsachen – Präjudizienbuch der Zivilsenate*, Peter Lang, Frankfurt, 2010, Rechtshistorische Reihe, vol. 402; Hinrich Rüping, "Das 'kleine Reichsgericht': Der Oberste Gerichtshof für die Britische Zone als Symbol der Rechtseinheit", in *Neue Zeitschrift für Strafrecht*, 2000, vol. 20, no. 7, pp. 355–59; Gerhard Pauli, "Ein hohes Gericht – Der Oberste Gerichtshof für die Britische Zone und seine Rechtsprechung zu Straftaten im Dritten Reich", in Justizministerium des Landes NRW (ed.), *50 Jahre Justiz in NRW*, Düsseldorf, 1996, Juristische Zeitgeschichte, vol. 5, pp. 95–120; Karl Alfred Storz, *Die Rechtsprechung des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1969.

crimes against humanity geared towards making the Allied legal norm applicable to the German jurisdiction and promoting the judicial process of coming to terms with the Nazi past. In the context of one of its first decisions, which was made on 20 May 1948, the high appellate court gave a definition of crimes against humanity showing its claim of contribution to the coining of an international criminal law norm that was just emerging:

> If in connection to the system of violence and tyranny, as it existed in National Socialist times, human beings, goods and values were attacked and damaged in a way expressing an absolute contempt for spiritual human value with an effect on mankind, a person who caused this by way of conscious and intended acts of aggression has to be punished for a crime against humanity if he can be accused of it.[8]

The OGH was probably the first higher domestic court to provide strict guidelines for the legal protection of human dignity. Almost 50 years later, the International Criminal Tribunal for the former Yugoslavia ('ICTY') made reference to the legal practice of this appellate court when it searched for appropriate case law. Against this backdrop two questions arise. First, which historical and institutional factors enabled the OGH to contribute to international criminal law? And second, which of its legal constructions had an impact on the further development of this relatively new branch of justice?

These two approaches are crucial for this chapter. Nevertheless, the focus lies mainly on the historical issue, which is brought out in sections 34.2 to 34.4, stressing the conditions that allowed the OGH to shape its particular jurisprudence. Among these factors are the interests and conduct of political and legal institutions as well as of individuals and

[8] OGH, P. case, StS 3/48, Judgment, 20 May 1948, in Mitglieder des Gerichtshofes und der Staatsanwaltschaft beim Obersten Gerichtshof (eds.), *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, 3 vols., Walter de Gruyter, Berlin, 1949–1950 ("Entscheidungen"), vol. 1, 1949, p. 11 (i.e. headnote):

> Wenn im Zusammenhang mit dem System der Gewalt- und Willkürherrschaft, wie sie in nationalsozialistischer Zeit bestanden hat, Menschen, Menschengüter und Menschenwerte angegriffen und geschädigt wurden in einer Weise, die eine Für-Nichts-Achtung des ideellen Menschenwerts mit Wirkung für die Menschheit ausdrückte, so ist wegen Unmenschlichkeitsverbrechen zu bestrafen, wer dies durch ein bewußtes und gewolltes Angriffsverhalten verursacht hat, sofern ihm dies zum Vorwurf gereicht.

networks of relationships on both the British and the German sides. Section 34.5 gives an overview of the most important contributions that the OGH made to international criminal law. This requires investigating contemporary legal practice, especially of the ICTY.

34.2. The British Strategy and Control Council Law No. 10

34.2.1. The Emergence of the British Prosecution Will, 1944–1945

The *sine qua non* for the significant jurisprudence of the OGH regarding CCL 10 was the strong will and claim of the British authorities to secure the effective prosecution of crimes against humanity committed by Germans against Germans or stateless persons. Already during wartime, the Foreign Office had to change its attitude towards the treatment of these crimes.[9] At first the British had refused to deal with German atrocities against nationals of the Axis Powers by arguing that it would be a breach of the international law principle that prohibited intervention into the domestic affairs of other states. But in view of the radicalisation of German warfare at that time and the extermination of European Jewry, public pressure increased, and the condemning of Nazi war crimes and so-called "atrocities other than war crimes" in official declarations developed its own dynamics. In the end, London found itself forced to strike a new path. On 31 January 1945, Richard Law, Minister of State, emphasised the attitude of the Foreign Office as follows:

> [C]rimes committed by Germans against Germans are in a different category from war crimes and cannot be dealt with under the same procedure. But in spite of this, I can assure my hon. Friend that His Majesty's Government will do their utmost to ensure that these crimes do not go unpunished. It is the desire of His Majesty's Government that the authorities in post-war Germany shall mete out to the perpetrators of these crimes the punishments which they deserve.[10]

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[9] See, for example, Priscilla Dale Jones, "British Policy towards German Crimes against German Jews, 1939–1945", in *Leo Baeck Institute Yearbook*, 1991, vol. 36, pp. 339–66; Arieh J. Kochavi, "The Response to Nazi Germany's Crimes Against Axis Nationals: The American and British Positions", in *Diplomacy & Statecraft*, 1994, vol. 5, no. 2, pp. 334–57.

[10] House of Commons, Debate, 31 January 1945, vol. 407, col. 1425; Jones, 1991, pp. 356–57, see *supra* note 9; Kochavi, 1994, p. 348, see *supra* note 9; Wolfgang Form, "Justizpolitische Aspekte west-alliierter Kriegsverbrecherprozesse 1942–1950", in Ludwig Eiber and Robert Sigel (eds.), *Dachauer Prozesse: NS-Verbrechen vor amerikanischen Militärgerichten in*

In the summer of 1945, after the unconditional surrender and occupation of Germany, British authorities were still insecure about how to deal with these "atrocities other than war crimes". Which jurisdiction offered the best preconditions to come to terms with the Nazi past? How could justice be restored? At least, with 'crimes against humanity', a new international legal category was developing that provided starting points for a prosecution strategy in view of German crimes against German or stateless victims.

34.2.2. The International Legal Term of 'Crimes Against Humanity', 1943–1945

The emergence and definition of the legal term 'crimes against humanity' was closely connected with the negotiations in the United Nations War Crimes Commission ('UNWCC'),[11] which began its work on 20 October 1943 in London. The UNWCC was entrusted with the collection and evaluation of evidence concerning Nazi war crimes, the clarification of legal issues and the judicial preparation of war crimes trials. It was during the debate on the delicate question of German atrocities against nationals of the Axis Powers, especially Jews, that Herbert C. Pell,[12] the US delegate, took the floor and stated: "It is clearly understood that the words 'crimes against humanity' refer among others to crimes committed against stateless persons or any persons because of their race or religion; such crimes are justiciable by the United Nations or their agencies as war

Dachau 1945–1948 – Verfahren, Ergebnisse, Nachwirkungen, Wallstein-Verlag, Göttingen, 2007, Dachauer Symposion zur Zeitgeschichte, vol. 7, p. 52.

11 For more details on the UNWCC, see The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948; Jia Bing Bing, "United Nations War Crimes Commission", in Antonio Cassese (ed.), *The Oxford Companion of International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 554–55; Dan Plesch and Shanti Sattler, "A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals", in *Criminal Law Forum*, 2014, vol. 25, nos. 1–2, pp. 17–43; Kerstin von Lingen, "Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, nos. 1–2, pp. 45–76.

12 On Pell (1884–1961), see Leonard Baker, *Brahmin in Revolt: A Biography of Herbert C. Pell*, Doubleday, New York, 1972.

crimes".[13] Following this statement made on 16 March 1944, the UNWCC went on to discuss the characteristics of this criminal offence and the potential courses of action until December. In addition to Pell, Hersch Lauterpacht[14] became another pioneer of 'crimes against humanity' because it was he who induced Robert Jackson,[15] who was representing the US at the London Conference, to insert the notion in the IMT Charter of 8 August 1945.[16] It was this document that fixed crimes against humanity for the first time as an international criminal offence (Article 6c). In the same provision, a differentiation was introduced between murder- and persecution-type crimes. However, these atrocities were punishable only if perpetrated "in execution of or in connection with any crime within the jurisdiction of the Tribunal".[17] That meant that a connection with crimes against peace or war crimes was required.

34.2.3. The Initial Stages of a British Prosecution Strategy, 1945–1946

Thus, the British discovered that the IMT Charter was quite unsuitable as a legal basis for the prosecution of Nazi crimes of which the victims were German or stateless persons. But soon memoranda circulated fixing the central ideas that the military government aligned itself with during the following years. On 17 October 1945 the Secretary of State for War, Jack Lawson,[18] informed the Foreign Secretary, Ernest Bevin,[19] about a proposal, which stated "that certain atrocities committed since 30th January, 1933, involving the infliction of death, torture or gross physical

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13 Cited in *ibid.*, p. 292. See, for example, Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 146.

14 On Lauterpacht (1897–1960), see Martti Koskenniemi, "Hersch Lauterpacht and the Development of International Criminal Law", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 3, pp. 810–25.

15 On Jackson (1892–1954), see Gary D. Solis, "Jackson, Robert", in Cassese (ed.), 2009, pp. 389–90, see *supra* note 11.

16 Antonio Cassese, *International Criminal Law*, 3rd ed., revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, Oxford University Press, Oxford, 2013, p. 86; Koskenniemi, 2004, p. 811, see *supra* note 14.

17 IMT Charter, see *supra* note 2.

18 On Lawson (1881–1965), see Duncan Bythell, "Lawson, John James (1881–1965)", in *Oxford Dictionary of National Biography*, Oxford, 2004.

19 On Bevin (1881–1951), see Alan Bullock, *Ernest Bevin: Foreign Secretary, 1945–1951*, Oxford University Press, Oxford, 1985.

maltreatment should be tried, if appropriate, by military government courts under existing German law".[20] Lawson was aware of the apparent contradiction between guaranteeing fair and just trials for Nazi criminals and the plan to decrease the number of legal officers. Foreseeing the danger that the British prosecution policy could fail and thus discredit itself, he suggested

> that it might be possible, so far as military government courts are concerned, to have three or four special trials each concerned with one of the types of crimes against humanity mentioned in Article 6(c) of the Constitution of the International Military Tribunal, e.g. one for inhumane acts, one for persecution on political, racial and religious grounds respectively, and that thereafter if possible the matter might be left to the German courts.[21]

The Legal Division[22] of the military government was aware that such representative cases being tried before British judicial panels had to be thoroughly investigated in order to constitute sound precedents.[23] Meanwhile, there was a suitable legal basis for the punishment of Nazi atrocities against German or stateless persons at the disposal of the British.

34.2.4. The Legal Basis: Control Council Law No. 10, 1945

CCL 10 had been brought into force on 20 December 1945. The Allied law served as the uniform legal basis for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity in Germany. In its Article II (1c) it defined the latter as

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[20] Jack Lawson, Secretary of State for War, to the Foreign Secretary, 17 October 1945, Foreign Office 371, no. 46797, National Archives UK ('TNA').

[21] *Ibid*. See also Wolfgang Form, "Der Oberste Gerichtshof für die Britische Zone. Gründung, Besetzung und Rechtsprechung in Strafsachen wegen Verbrechen gegen die Menschlichkeit", in Justizministerium des Landes NRW (ed.), 2012, pp. 15–16, *supra* note 7.

[22] For more details on the Legal Division, see Joachim Reinhold Wenzlau, *Der Wiederaufbau der Justiz in Nordwestdeutschland 1945 bis 1949*, Athenäum, Königstein, 1979, pp. 74–81.

[23] Director of the Military Government Courts Branch to D/Chief, Legal Division, Advanced HQ, 29 December 1945, Foreign Office 1060, no. 747 (TNA); Peter Bahlmann, "Verbrechen gegen die Menschlichkeit? Wiederaufbau der Justiz und frühe NS-Prozesse im Nordwesten Deutschlands", Ph.D. Dissertation, University of Oldenburg, 2008, p. 60.

> [a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[24]

As a further development of the IMT Charter, the law abandoned the nexus with war. Thus, it laid the foundation for the independence of crimes against humanity as a criminal category. For the first time, there was a legal basis for the prosecution of atrocities being committed by Germans against Germans during the entire Third Reich. For this purpose, CCL 10 created favourable preconditions (most of which were admittedly already part of the IMT Charter). Apart from its quite open definition, the Allied law provided a broad range of punishments from fines to the death penalty (Article II 3) and stated that not only principals but also accessories or other persons aiding and abetting a crime could be found guilty under its provisions (Article II 2). Neither should an official position or a superior order free from criminal liability (Article II 4) nor should persons accused benefit "from any immunity, pardon or amnesty granted by the Nazi regime".[25] CCL 10 also enabled the four military governments in Germany to authorise German courts to pass judgment on crimes against humanity that were committed by Germans against other Germans or stateless persons (Article III 1d).[26]

34.2.5. The British Application of Control Council Law No. 10, 1946–1949

On the part of the Allied forces, CCL 10 was applied by the US military courts, Soviet military courts,[27] by British military government courts – respectively Control Commission courts – and by French military

[24] CCL 10, see *supra* note 3.

[25] *Ibid.*

[26] According to Art. III 1d CCL 10, each occupying authority had within its occupation zone "the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities", *ibid.*

[27] Hermann Wentker, "Die juristische Ahndung von NS-Verbrechen in der Sowjetischen Besatzungszone und in der DDR", in *Kritische Justiz*, 2002, vol. 35, pp. 62–63.

government courts.[28] Only one of these legal practices has become the object of a broad range of research: the 12 subsequent Nuremberg Trials against members of Nazi functional elites before US military tribunals.[29] In contrast to the Americans, the Soviets, British and French made use of the option to transfer jurisdiction over crimes against humanity committed by Germans against German or stateless persons to German courts. So in the Soviet,[30] French[31] and British zones, German tribunals dealt with cases under CCL 10, Art. II 1c.

British legal practice regarding war crimes and atrocities consisted of two approaches. On the one hand, military courts, which were based on the Royal Warrant of 18 June 1945, carried out about 250 war crimes trials in Germany.[32] On the other hand, the military government initiated

[28] Yveline Pendaries, *Les procès de Rastatt (1946–1954): Le jugement des crimes de guerre en zone française d'occupation en Allemagne*, Peter Lang, Bern, 1995, Contacts: Série II, Gallo-germanica, vol. 16. Relatively well known is the case of the steel magnate Hermann Röchling who was convicted in 1949 to 10 years' imprisonment for crimes against humanity the victims of which were foreign forced labourers, see Daniel Bonnard, "Kriegsprofiteure vor Gericht: Der Fall Röchling", in Kerstin von Lingen and Klaus Gestwa (eds.), *Zwangsarbeit als Kriegsressource in Europa und Asien*, Schöningh, Paderborn, 2014, Krieg in der Geschichte, vol. 77, pp. 391–408.

[29] For an overview of the subsequent Nuremberg Trials, see Kim Christian Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Berghahn Books, New York, 2012, Studies on War and Genocide, vol. 16.

[30] Christian Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, Berlin Verlag Arno Spitz, Berlin, 1998, Schriftenreihe Justizforschung und Rechtssoziologie, vol. 3, especially pp. 43–84, 89–123, 211–34 and 310–13; Wentker, 2002, pp. 64–66, see *supra* note 27.

[31] One of the few famous CCL 10 cases before German courts in the French Zone was the trial against Heinrich Tillessen in 1946/47. This right-wing extremist had murdered the former Reich Minister of Finance Matthias Erzberger in 1921 and had been exempted from punishment under the Nazi regime in 1933; for this see Cord Gebhardt, *Der Fall des Erzberger-Mörders Heinrich Tillessen. Ein Beitrag zur Justizgeschichte nach 1945*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1995, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, vol. 14; Martin Broszat, "Siegerjustiz oder strafrechtliche 'Selbstreinigung': Aspekte der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945–1949", in *Vierteljahreshefte für Zeitgeschichte*, 1981, vol. 29, no. 4, pp. 495–500; *War Crimes News Digest*, no. XXIII, 22 January 1947, p. 9 (https://www.legal-tools.org/en/doc/ac48f8/), and no. XXVI, 21 March 1947, p. 3 (http://www.legal-tools.org/doc/0d0330/).

[32] The Royal Warrant, 18 June 1945 (http://www.legal-tools.org/doc/386f77/). See Katrin Hassel, *Kriegsverbrechen vor Gericht. Die Kriegsverbrecherprozesse vor Militärgerichten in der britischen Besatzungszone unter dem Royal Warrant vom 18. Juni 1945 (1945–1949)*, Nomos, Baden-Baden, 2009. With regard to the first trial on the legal basis of the

criminal proceedings against Germans suspected of having committed war crimes or crimes against humanity under CCL 10. Since 1947 the Control Commission courts had jurisdiction over these Nazi crimes.[33] According to a British report, these courts carried out four such trials with 36 accused persons up to 30 June 1947.[34] One and a half years later a total of 148 defendants had already been tried before British courts for crimes against humanity.[35] At first, this legal practice was limited to cases with German or stateless victims[36] – with the exception of a military government court trial (which is dealt with later). In the summer of 1947 the situation changed. Proceedings on account of atrocities against Germans had become subject to German jurisdiction, whereas Control Commission court judges sat in judgment of quite a lot of persons being charged with cruelties, the victims of which were Allied civilians, especially forced labourers.[37] At the top of the Control Commission court system was the Court of Appeal in Herford. In February 1947 the New Zealander Lindsay Merritt Inglis[38] became chief judge of this higher court. Twelve of its judgments regarding CCL 10 are documented in its reports,[39] and some of them are referred to in international criminal law as

Royal Warrant in Germany, see John Cramer, *Belsen Trial 1945: Der Lüneburger Prozess gegen Wachpersonal der Konzentrationslager Auschwitz und Bergen-Belsen*, Wallstein Verlag, Göttingen, 2011, Bergen-Belsen: Dokumente und Forschungen, vol. 1.

33 Ordinance No. 68 – Control Commission Courts, 1 January 1947, in *Military Government Gazette Germany: British Zone of Control*, no. 15, p. 364.

34 Assistant Director of Prosecutions at the Zonal Office of the Legal Adviser to Secretariat Section, 17 January 1949, Foreign Office 1060, no. 4 (TNA); Form, 2012, pp. 23–24, see *supra* note 21.

35 Appendix D – Figures of people tried in Germany for war crimes, given by the Under Secretary of State for Foreign Affairs on March 28 1949 in reply to a parliamentary question, Foreign Office 370, no. 2899 (TNA); Form, 2012, p. 24, see *supra* note 21.

36 United Nations War Crimes Commission, Minutes of Meeting held on 16th October 1946 (Meeting no. 114), p. 2 (https://www.legal-tools.org/en/doc/3ebb79/).

37 This applies, for instance, to the Control Commission court proceedings against Walter (High Court of Lübeck, Walter Case, J/314, Judgment, 12 December 1947, Foreign Office 1060, no. 4145 [TNA]), Hollmann (High Court of Detmold, Hollmann Case, HC/DET/130/48, Judgment, 6 September 1948, Foreign Office 1060, no. 4140 [TNA]) and Voß (High Court of Oldenburg, *Voß et al. Case*, HC/OLD/4, Judgment, 11 April 1949, Foreign Office 1060, no. 1556 [TNA]).

38 On Inglis (1894–1966), see Paul Goldstone, "Inglis, Lindsay Merritt", in *Dictionary of New Zealand Biography. Te Ara: The Encyclopedia of New Zealand*, 23 October 2013.

39 Control Commission of Germany, *Control Commission Courts: Court of Appeal Reports – Criminal Cases*, published by order of the Supreme Court, Herford, 1947–1950 ("Court of Appeal Reports").

case law; among these are the cases of Hinselmann,[40] Neddermeier[41] and Kottsiepen.[42] However, research on the British jurisprudence over crimes against humanity and war crimes according to the Allied criminal law remains a desideratum. But three of these proceedings will be referred to below. In 1949 the Legal Division authorised German courts to try cases of Nazi atrocities committed against Allied nationals. Yet these trials were not tried under CCL 10 but under the German Penal Code.[43]

34.2.6. Ordinance No. 47 and its Gradual Implementation

CCL 10 opened up a new perspective to the British. On 3 January 1946 the Legal Division integrated it as the legal basis into its strategy concerning the prosecution of crimes against humanity being committed by Germans against German or stateless persons. At that time, the military government had received the order to "try eight or nine representative cases of the type envisaged in Control Council Law No. 10. Having tried those cases and due publicity having been given to the trials we will then hand over to the German Courts the trial of the balance".[44] Concerning its intention of bringing persons to trial for committing crimes against humanity the Legal Division noted:

> [U]ntil we ourselves have decided what crimes we are going to try, it is a bit premature to bring the full force of the German legal machine into action on this question. Further it would be advisable before we informed the

[40] British Court of Appeal, Hinselmann *et al*. case, Judgment, 24 March 1947, in Court of Appeal Reports, 1947, pp. 53–61, see *supra* note 39; Christine Byron, "Hinselmann and Others", in Cassese (ed.), 2009, pp. 725–26, see *supra* note 11; Cassese, 2013, pp. 54–55, see *supra* note 16.

[41] British Court of Appeal, Neddermeier case, Judgment, 10 March 1949, in Court of Appeal Reports, 1949, no. 1, pp. 58–61, see *supra* note 39; Emily Haslam, "Neddermeier", in Cassese (ed.), 2009, p. 840, see *supra* note 11; Cassese, 2013, p. 103, fn. 47, see *supra* note 16.

[42] British Court of Appeal, Kottsiepen case, Judgment, 31 March 1949, in Court of Appeal Reports, 1949, no. 1, pp. 108–13, see *supra* note 39; Giulia Pinzauti, "Kottsiepen", in Cassese (ed.), 2009, pp. 767–68, see *supra* note 11.

[43] Verbrechen gegen die Menschlichkeit – Zuständigkeit in Fällen, in denen alliierte Staatsangehörige als Opfer betroffen sind. Allgemeine Verordnung des Niedersächsischen Ministeriums der Justiz, 22 July 1949, in *Niedersächsische Rechtspflege*, 1949, vol. 3, no. 8, pp. 131–32.

[44] Chief Legal Division to Director of the Ministry of Justice Branch, 3 January 1946, Foreign Office 1060, no. 747 (TNA).

> *Generalstaatsanwälte* [chief public prosecutors] and *Oberlandesgerichtspräsidenten* [presidents of the higher regional courts] of our intention, to get clear in our own minds how we are going to hand it over to them. It appears there are three major problems requiring consideration. The first is the composition of the German Courts to hear these cases; secondly, the procedure in the German Courts and thirdly, the powers of sentence in the German Courts. There is a subsidiary matter namely, what supervision we are going to exercise over the Courts which may be trying these cases.[45]

By enacting Ordinance No. 47 on 30 August 1946, the British authorities used the opportunity to empower German courts to prosecute crimes against humanity with German or stateless victims.[46] At the same time, the Legal Division took precautionary measures to assure the success of this jurisdiction, in which the British public had a keen interest. Doubts prevailed among British officials about the ability and the will of the German judicial personnel to try Nazi crimes. Those doubts were legitimate on account of both the negative experience with the Leipzig Trials, which had failed to fulfil their purpose of punishing German war criminals after the First World War,[47] and the dilemma arising from the contradiction between the claim of denazification and the necessity of reconstructing the German judicial system. In fact, since the autumn of 1945 the British had already been watering down the rule that prohibited the German administration of justice from employing former members of

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45 *Ibid.*

46 Ordinance No. 47 – Crimes against Humanity (Control Council Law No. 10), 30 August 1946, in *Military Government Gazette Germany. British Zone of Control*, no. 13, p. 306, ("Ordinance of 1946"). In this ordinance the Legal Division stated that "[t]he German Ordinary Courts are authorised to exercise jurisdiction in all cases of Crimes against Humanity as defined by Article II, paragraph 1(c) of Control Council Law No. 10 committed by persons of German nationality against other persons of German nationality or stateless persons".

47 On the issue of the Leipzig trials, see Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg*, Hamburger Edition, Hamburg, 2003; Harald Wiggenhorn, *Verliererjustiz: Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg*, Nomos, Baden-Baden, 2005, Studien zur Geschichte des Völkerrechts, vol. 10; Hassel, 2009, pp. 33–56, see *supra* note 32; for a brief overall view, see Gerd Hankel, "Leipzig Supreme Court", in Cassese (ed.), 2009, pp. 407–9, *supra* note 11; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 4th ed., Penguin, London, 2012, p. 305.

the Nazi Party because of the lack of qualified judicial personnel who were free from involvement in National Socialism.[48] Mistrust was at least one factor moving the Legal Division to follow a strategy with educational effect: in a first step limiting the German prosecution to those crimes that were also offences under German penal law and then gradually extending it to further atrocities. Implementing ordinances were published that extended the jurisdiction of German courts to cases of inhumane acts as well as of political, racial and religious persecutions.

These enactments referred to parent cases being carried out in order to set examples of how to deal with crimes against humanity. This was done – as the Legal Division itself clarified – for political considerations.[49] The proposal of Jack Lawson of October 1945 had been adopted. Three of these trials were tried before British courts and one before a German court. The former belonged to the aforementioned proceedings before military government and Control Commission courts under CCL 10.

34.2.7. Parent Cases

In the first of these trials a German soldier was found guilty by a military government court in Oldenburg on 29 August 1946 of murder and crimes against humanity. Nineteen-year-old Willi Herold had appropriated the uniform of a captain, put it on and thus succeeded in gathering a group of soldiers around him with whom he gained control of a penal camp in northwest Germany. Finally, he ordered the execution of more than 100 prisoners, many of whom he himself shot. It is worth noting that the only charge under CCL 10 in this trial concerned the murder of five Dutchmen, whereas the criminal liability for the death of a large number of German prisoners was based on Section 211 of the German Criminal Code. Herold was sentenced to death and executed.[50] In an enactment of 10 September

48 Wenzlau, 1979, p. 130, see *supra* note 22.

49 Erlass der Militärregierung – Legal Division – zur Ausführung der Militärregierungsverordnung Nr. 47, 10 September 1946, in *Hannoversche Rechtspflege*, 1946, vol. 2, no. 12, p. 142 ("Order of 10 September 1946").

50 Foreign Office 1060, no. 1674 (TNA); see also *ibid.*, no. 939, death warrant of Herold, 2 November 1946, and report to the commander-in-chief upon the proceedings of a Military Government Court, 21 October 1946; T.X.H. Pantcheff, *Der Henker vom Emsland: Dokumentation einer Barbarei am Ende des Krieges 1945*, 2nd ed., Schuster, Leer, 1995; Paul Meyer, "'Die Gleichschaltung kann weitergehen!' Das Kriegsende in den nördlichen

1946 the Legal Division reported on the end of the trial, pronouncing that German courts were from now on allowed to punish atrocities that had been perpetrated by guards or members of the Gestapo, Schutzstaffel ('SS') or civil police against inmates of prisons, concentration camps and forced labour camps according to CCL 10.[51]

The only German trial serving as a parent case was tried by the regional court of Berlin. The former accountant Helene Schwärzel was charged as an indirect perpetrator of murder in conjunction with committing a crime against humanity because she had informed the authorities of the whereabouts of Carl Goerdeler, an accomplice of the organisers of the failed assassination attempt on Hitler of 20 July 1944. On account of Schwärzel's information, Goerdeler was captured, sentenced to death and executed; the informer was rewarded for her "patriotic" act with one million Reichsmark. On 14 November 1946 she was sentenced to 15 years' imprisonment. Within the Legal Division's implementing ordinance of 21 November, this verdict was briefly announced as a precedent for the punishment of denunciations. Although, from now on, Nazi informers could be put on trial before German courts according to CCL 10, the military government also showed great understanding for the concerns of some German jurists. It took their warning seriously that in certain cases convictions would be difficult to achieve. This was aimed at cases that did not constitute violations of German law; violations the punishment of which could be easily contested as a breach of the principle of *nulla poena sine lege*. Addressing this concern, the Legal Division offered the German courts the option to submit questionable cases to the German Central Legal Office for the

Emslandlagern und der falsche Hauptmann Willi Herold im Spiegel britischer und deutscher Gerichts- und Ermittlungsakten", in KZ-Gedenkstätte Neuengamme (ed.), *Die frühen Nachkriegsprozesse*, Edition Temmen, Bremen, 1997, Beiträge zur Geschichte der nationalsozialistischen Verfolgung in Norddeutschland, vol. 3, pp. 209–13; *War Crimes News Digest*, no. XVII, 23 September 1946, p. 3, provides a brief overview of the case, yet mistakenly presupposing that this was a German trial (https://www.legal-tools.org/doc/9c410f/).

51 Order of 10 September 1946, see *supra* note 49. On 3 December 1946 the UNWCC provided an early overview of the war crimes and crimes against humanity cases being heard and pending at that time before British military government courts (https://legal-tools.org/doc/c78097/).

British Zone (*Zentral-Justizamt*)[52] for examination. It also envisaged the establishment of special tribunals in the British Zone for the prosecution of persons charged with "membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal",[53] which could also be entrusted with the punishment of denunciations.[54] But all these arrangements were finally found to be inadequate, so that the Legal Division transferred the jurisdiction over cases of denunciation without limitations to the German ordinary courts on 23 May 1947.[55]

The second British parent case led to a judgment being delivered by a military government court in Hamburg on 7 December 1946. Doctors and policemen who were involved in the forced sterilisation of at least eight Sinti and Romanies in the winter of 1944–1945 were convicted of crimes against humanity. Among the accused was the famous gynaecologist and clinic director Hans Hinselmann, who was sentenced to three years' imprisonment and a fine of 100,000 Reichsmark.[56] "This is a case of illegal operations on racial grounds", stated the Legal Division on 16 December,

> and as far as this Branch is concerned, any case relating to prosecution on racial grounds can be tried by the Germans forthwith under Control Council Law No. 10, excepting any case which may relate to Jewish persecutions, as a Trial relating to that matter will shortly be held at Aachen and as

[52] Harold Percy Romberg, "The Central Legal Office for the British Zone of Germany", in *Journal of Comparative Legislation and International Law*, 3rd series, 1950, vol. 32, pp. 6–9; Wenzlau, 1979, pp. 193–285, see *supra* note 22.

[53] CCL 10, see *supra* note 3.

[54] Aburteilung von Denunzianten – Erlaß der Militär-Regierung – Legal Division, 21 November 1946, in *Hannoversche Rechtspflege*, 1946, vol. 2, no. 12, p. 142 ("Order of 21 November 1946"). With regard to the Schwärzel case, see Inge Marßolek, *Die Denunziantin. Die Geschichte der Helene Schwärzel 1944–1947*, Edition Temmen, Bremen, 1993.

[55] Betr. Kontrollratsgesetz Nr. 10 – Verbrechen gegen die Menschlichkeit, Anordnung der Legal Division, 23 May 1947, in *Niedersächsische Rechtspflege*, 1947, vol. 1, no. 1, p. 10; Andrew Szanajda, *Indirect Perpetrators: The Prosecution of Informers in Germany, 1945–1965*, Lexington Books, Lanham, 2010, p. 112.

[56] Byron, 2009, pp. 725–26, see *supra* note 40. *War Crimes News Digest*, no. XXII, 31 December 1946, pp. 10–11 (https://www.legal-tools.org/doc/164c42/). On Hinselmann (1884–1959), see Ernst Klee, *Das Personenlexikon zum Dritten Reich. Wer war was vor und nach 1945*, Fischer Taschenbuch Verlag, Frankfurt, 2005, p. 257.

> soon as that Trial has been held this Branch will inform you as to the result.[57]

In addition, four days later the relevant British regulation was adopted proclaiming not only the conviction and sentence of the defendants but also the authorisation of German courts to adjudicate cases of sterilisations and other illegal surgical procedures that were carried out for racial or political reasons and concerned German or stateless victims.[58]

The aforementioned trial relating to Jewish persecutions was tried before a CCC in Aachen. The case dealt with the burning down of an Aachen synagogue in the *Reichspogromnacht* of 9 November 1938. On 12 June 1947 the judgment was handed down. Among the convicted were the former police chief Carl Zenner[59] and the local *Kreisleiter* (district leader). Both were sentenced to five years' imprisonment and a fine of 5,000 Reichsmark.[60] Just as in the case of Hinselmann *et al.*, the military government in its implementing ordinance of 5 July announced the names of the defendants, the verdicts of guilty and the penalties imposed before making the decision that:

> 3. Copies of the judgement of the Control Commission Court will be circulated in due course.
> 4. The German Ordinary Courts are now hereby authorised to try persons charged with committing crimes against humanity against Jews, or were Jews are involved, provided that the crimes were committed against persons who were German nationals or stateless persons.

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57 Director of the Military Government Courts Branch to Ministry of Justice, Legal Division, 16 December 1946, Foreign Office 1060, no. 1061 (TNA).

58 Verbrechen gegen die Menschlichkeit – Erlaß der Militärregierung – Legal Division – zur Ausführung der Militärregierungsverordnung Nr. 47, 20 December 1946, in *Hannoversche Rechtspflege*, 1947, vol. 3, no. 1, pp. 5–6; *War Crimes News Digest*, no. XXII, 31 December 1946, p. 11, see *supra* note 56.

59 On Zenner (1899–1969), see Klee, 2005, p. 692, *supra* note 56; Heinz Boberach, "Kein 'ganz normaler Mann' – der Polizeipräsident und SS-Brigadeführer Carl Zenner", in: *Zeitschrift des Aachener Geschichtsvereins*, 1999/2000, vol. 102, pp. 473–90; regarding his time as Aachen police chief (1937–1941), see *ibid.*, pp. 475–77.

60 Zuständigkeit der ordentlichen Gerichte für Verbrechen gegen die Menschlichkeit – Judenverfolgungen – Anordnung der Legal Division, 5 July 1947, in *Zentral-Justizblatt*, 1947, vol. 1, no. 2, p. 43. For more details on the Zenner trial, see Boberach, 1999/2000, pp. 487–88, *supra* note 59.

> 5. The effect of this instruction is to implement fully Ordinance No. 47 and the German Ordinary Courts now have complete freedom to try under that Ordinance, all cases of crimes against humanity as defined by Control Council Law No. 10.[61]

Whether the Aachen judgment was in fact distributed among the judicial administrations and German courts is unclear. Until now one must assume that its written reasons – if extant – were unknown to these institutions, for they were found neither in the archives of the Foreign Office nor in those of the German legal administrations. The same applies to the first instance decisions in the cases of Herold, Schwärzel and Hinselmann. (Since it was not common practice for British military courts to produce judgments with written reasons,[62] Control Commission courts – at least in certain cases – delivered judgments discussing legal-dogmatic problems, as can be seen by some first instance decisions on crimes against humanity[63] and by the law reports of the Court of Appeal including, for example, the second instance decision in the Hinselmann case.[64]) The purpose of the parent cases lay in demonstrating that particular criminal offences were justiciable under CCL 10. In addition, the imposed sentences and penalties should set examples for German legal practice as the Legal Division had explicitly pointed out.[65] But this approach could not provide the German lawyers with concrete instructions for handling the Allied law. It simply failed to teach them

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61 Chief Legal Division to Chief Legal Officers, 5 July 1947, Foreign Office 1060, no. 826 (TNA).

62 Wolfgang Form, "Quellen und deren Erschließung am Forschungs- und Dokumentationszentrum für Kriegsverbrecherprozesse (ICWC)", in Jürgen Finger, Sven Keller and Andreas Wirsching (eds.), *Vom Recht zur Geschichte: Akten aus NS-Prozessen als Quellen der Zeitgeschichte*, Vandenhoeck & Ruprecht, Göttingen, 2009, p. 248; Cramer, 2011, pp. 249–50, see *supra* note 32.

63 This applies, for instance, to the Hollmann case, see *supra* note 37.

64 On 24 March 1947 the British Court of Appeal dismissed the appeals of a couple of defendants confirming, for example, the sentence against Hinselmann, who was still held responsible for the crimes under discussion, see British Court of Appeal, Hinselmann *et al*. case, pp. 58–59, *supra* note 40. Meanwhile, the court changed the conviction of another accused to bodily injury according to the German Criminal Code (Sec. 230) because he acted negligently (*fahrlässig*). To meet the *mens rea* requirements of CCL 10 a crime would have had to be committed with at least gross negligence, see Cassese, 2013, pp. 54–55, *supra* note 16.

65 Order of 21 November 1946, see *supra* note 54.

how to deal dogmatically with CCL 10 Article II 1c. What was missing was the case law of a supreme court interpreting the provisions of the Allied law for legal practice.

The Legal Division monitored German legal practice regarding crimes against humanity in the British Zone by demanding reports from the court districts and carrying out inspection missions. But upon evaluating the German courts' jurisdiction, it must have been apparent that the judicial process of coming to terms with the past was difficult: The proceedings made slow progress and yielded results that were unsatisfying. With the establishment of the OGH as an appellate court for the entire zone, the British particularly aimed at a breakthrough for CCL 10.

34.3. The German Application of Control Council Law No. 10 in the British Zone

Apart from the British impetus to secure the prosecution of German crimes against humanity committed against German or stateless persons, the German debate about the application of CCL 10, reflecting widely shared reservations, played a decisive role for the jurisprudence of the OGH that will be focused on later. It will be shown how the underlying interactions between administrative structures and the participating protagonists influenced the legal practice of German courts in regard to the prosecution of the atrocities under discussion.

As a result of its total defeat in the Second World War, Germany had lost its sovereignty and had been divided up into four occupation zones. Starting in June 1945 the Allied Control Council in Berlin exercised governmental authority. At the same time the Supreme Court of the Reich (*Reichsgericht*) in Leipzig was closed – an act symbolising both the collapse of Germany and the preceding destruction of its legal culture and tradition under Nazi rule. The German judicial system came to a complete standstill.[66] Its reconstruction was characterised by the Allied efforts to denazify the German law and judicial personnel.[67] In the British Zone, courts were reopened, beginning in the summer of 1945, starting

[66] Wenzlau, 1979, p. 64, see *supra* note 22.

[67] With regard to the denazification of the German judicial personnel in the British Zone, see *ibid.*, pp. 119–42; Broszat, 1981, pp. 508–16, *supra* note 31.

with the local and regional courts (*Amts- und Landgerichte*) and ending with the higher regional courts (*Oberlandesgerichte*).[68]

In view of the prosecution of crimes against humanity, the regional courts were courts of first instance. According to an ordinance of the *Zentral-Justizamt* of 22 August 1947, courts of assizes, which were re-established at the regional courts, were charged with trying atrocities under CCL 10.[69] Above these judicial panels were the eight higher regional courts (in Brunswick, Celle, Cologne, Düsseldorf, Hamburg, Hamm, Oldenburg and Schleswig), which functioned as appellate courts until the OGH was entrusted with their jurisdiction on 1 January 1948.

Yet the prosecution of Nazi atrocities encountered serious obstacles for the law enforcement authorities. Among these were logistical problems, for instance the difficulty to gain access to defendants and witnesses still being detained in Allied internment camps or living in other occupation zones. Furthermore, the gathering of evidence often reached its limits, especially when crimes being investigated had been committed several years before the investigation was started.[70] This applied not least to cruelties against political opponents and Jews in the course of the Nazi seizure of power or during the *Reichspogromnacht*. Lastly, it was the German jurists who constituted a heavy burden for the enforcement of CCL 10, in so far as a majority of them were either unable or unwilling to apply it.

On the one hand, the prosecutions and courts showed significant uncertainties in the handling of the Allied law, especially in cases being described by Ordinance No. 47 under the heading "Offences under German Law":

> If in any case the facts alleged, in addition to constituting a crime as defined by Article II, paragraph 1(c) of Control Council Law No. 10, also constitute an offence under ordinary German Law, the charge against the accused may be framed in the alternative and the provisions of Article II, paragraph 5

[68] *Ibid*., pp. 509–10, fn. 86a.

[69] Verordnung zur Wiedereinführung von Schöffen und Geschworenen in der Strafrechtspflege, 22 August 1947, in *Verordnungsblatt für die Britische Zone*, 1947, no. 16, pp. 115–22; Form, 2012, p. 26, see *supra* note 21.

[70] Chief Legal Officer of the Military Government of North Rhine Westphalia to Legal Division and others, 3 June 1947, Foreign Office 1060, no. 1075 (TNA).

> of Control Council Law No. 10 shall apply mutatis mutandis to the offence under ordinary German law.[71]

To make a long story short, many lawyers – a lot of them intentionally – misunderstood this provision as the granting of a freedom of choice concerning the application or non-application of CCL 10. The clause "the charge […] may be framed in the alternative" revealed a clear trend towards ignoring the Allied law. This tendency forced the British authorities to react. On 16 January 1948 the chief of the Legal Division, Jack Rathbone,[72] informed the chief legal officers in the *Länder* (federal states) of the British Zone about this awkward situation and gave instructions:

> As a consequence of this procedure criminal proceedings have resulted in acquittals of persons accused in accordance with German law and the Courts have declined to substitute a conviction under Control Council Law 10, since no charge has been laid under this law. […] It is the opinion of this Division that an offence offending against both Control Council Law 10 and ordinary German law falls under § 73 StGB (Idealkonkurrenz [concurrence of offences]). You are therefore requested please to instruct German prosecutors through the Ministers of Justice or other appropriate authorities in your Länder to lay a charge in every relevant case both under Law No. 10 and under the German Criminal Code, in accordance with § 73 StGB.[73]

On the other hand, a large number of judges and prosecutors were biased in the matter of the punishment of Nazi criminals. Shaped by the nationalist, undemocratic and patriarchal society of the Wilhelmine Germany they had, in general, loyally served the Nazi state and refused CCL 10 as victor's justice. As the Legal Division stressed they

> have always had little sympathy for persons with a different political and religious outlook from their own. The victims of crimes against humanity were either Jews or persons of left wing politics. The judges and prosecutors have less sympathy for such persons than for the accused. The fact that millions of innocent persons were put to death by the

[71] Ordinance of 1946, see *supra* note 46.

[72] On Rathbone (1909–1995), see Wenzlau, 1979, pp. 76–77, *supra* note 22.

[73] Chief Legal Division to the Chief Legal Officers at the four *Länder* headquarters, 16 January 1948, Foreign Office 1060, no. 924 (TNA) (emphasis in original).

> Nazis seems to have made little or no impression on many legal officials.[74]

In addition, notable legal experts pointed out that the Allied law could not be put to use by German penal courts because it meant a violation of the principle of *nullum crimen, nulla poena sine lege*.[75] This argument was also put forward by the president of the higher regional court in Celle, Hodo von Hodenberg.[76] As an opponent of the Nazi regime, the former lawyer had quickly won the trust of the military government. "Jurisprudentially conservative and politically nationalistic",[77] he also earned recognition within the German judiciary. Later, Hodenberg became a protagonist of the "Heidelberg Circle" (*Heidelberger Juristenkreis*), which was joined by leading law professors and attorneys having participated in the IMT defence and aiming at amnesty for German war criminals in Germany and abroad.[78] To the displeasure of the British, he developed into the most important opponent of the application of CCL 10 before German courts, who even managed to disseminate his standpoint in a famous legal magazine. "Rigidly positivistic in his jurisprudence […] Hodenberg appealed to the likes of Montesquieu, Beccaria and Feuerbach to demonstrate the importance of *nulla poena* as a bulwark against arbitrary power".[79] Insinuating that the retroactivity of the Allied law was an alarming echo of the Nazi disregard of legality, he pointed out "the fresh danger that draconian punishments are being demanded as the result of the influence of political perspectives, punishments that cannot be justified by an objective grasp of the

[74] Zonal Executive Offices of the Legal Division to Director of Ministry of Justice Control Branch, 11 November 1947, *ibid.*, no. 1075 (TNA).

[75] Lawrence Douglas, "Was damals Recht war … *Nulla Poena* and the Prosecution of Crimes against Humanity in Occupied Germany", in Larry May and Elizabeth Edenberg (eds.), *Jus Post Bellum and Transitional Justice*, Cambridge University Press, Cambridge, 2013, pp. 44–73.

[76] On Hodenberg (1887–1962), see Barbara Simon, *Abgeordnete in Niedersachsen 1946–1994: Biographisches Handbuch*, Schlüter, Hannover, 1996, pp. 166–67.

[77] Douglas, 2013, p. 69, see *supra* note 75.

[78] With regard to the "Heidelberg Circle", see Norbert Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, 2nd edition, Deutscher Taschenbuch Verlag, Munich, 2003, pp. 163–66.

[79] Douglas, 2013, p. 65, see *supra* note 75.

situation".[80] By stressing that the definition of crimes against humanity was so general and unspecific that German lawyers would have to raise objections against it, the controversial Celle court president contested its character as an independent criminal offence. For him – as for Schmitt – it seemed that 'crimes against humanity' served as a collective term for more or less ordinary crimes distinguishing themselves from others only through a mode of perpetration that was inhuman and highly worthy of punishment.[81]

As a consequence of this point of view that was shared by the majority of German jurists, there would not have been a legal basis for the prosecution of certain atrocities not being punishable under German penal law. This applied especially to denunciations because informing the state authorities about undesirable behaviours of members of the German "national community" (*Volksgemeinschaft*) – such as listening to enemy broadcasts and making defeatist comments – had not violated any positive law. The Nazis had rather requested it. In order to criminalise denunciations, a change of perspective was necessary: Who willingly denounced a person while at the same time being aware of the inhumane consequences to be expected – for instance, a death sentence – could be considered as an indirect perpetrator. However, such a reading demanded the confession that the laws being applied had been unlawful.[82] It is no wonder that the jurists concerned often resisted accepting this interpretation.

But it was already in August 1946 that the highly respected legal scholar Gustav Radbruch[83] provided an interpretation that legitimated the retroactive punishment of Nazi atrocities and accordingly the prosecution of denunciations. In view of the Third Reich, he developed his theory of "lawful illegality" (*gesetzliches Unrecht*) according to which the positive law had to make way for justice in cases where it was intolerably unjust

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80 Hodo von Hodenberg, "Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch deutsche Gerichte", in *Süddeutsche Juristenzeitung*, 1947, vol. 2, Sondernummer, March 1947, col. 120; the English translation is quoted from Douglas, 2013, p. 65, see *supra* note 75.

81 Hodenberg, 1947, col. 116, see *supra* note 80.

82 Peter Bahlmann, "Der Oberste Gerichtshof und die materielle Rechtsprechung im OLG-Bezirk Oldenburg", in Justizministerium des Landes NRW (ed.), 2012, p. 145, see *supra* note 7.

83 On Radbruch (1878–1949), see Marijon Kayßer, "Radbruch, Gustav (1878–1949)", in Michael Stolleis (ed.), *Juristen: Ein biographisches Lexikon: Von der Antike bis zum 20. Jahrhundert*, C. H. Beck, Munich, 2001, pp. 525–26.

and lacked the quality of law in a proper sense.[84] The IMT against the major Nazi war criminals provided a complementary approach in its judgment of 1 October 1946 by stressing – though concerning the criminal liability of those accused who were alleged to have committed crimes against peace –

> that the maxim '*nullum crimen sine lege*' is not a limitation of sovereignty, but it is in general a principal of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong.[85]

Those lawyers, who endorsed the prosecution of crimes against humanity and considered CCL 10 to be the appropriate legal basis, regularly agreed with the above interpretations of the Nuremberg Tribunal and Radbruch's formula. Two of them – the chief public prosecutor of Brunswick, Curt Staff,[86] and the presiding judge at the Cologne higher regional court, August Wimmer[87] – were later appointed to judgeships at the German Supreme Court for the British Zone. It is worth noting that even Schmitt, in his legal expertise on the punishability of the crime of aggression of August 1945, conceded that certain Nazi atrocities,

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[84] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", in *Süddeutsche Juristenzeitung*, 1946, vol. 1, no. 5, p. 107:

> Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als >unrichtiges Recht< der Gerechtigkeit zu weichen hat.

See, for example, Douglas, 2013, pp. 56–57, *supra* note 75. With regard to Radbruch's role in the natural law debate at that time, see Lena Foljanty, *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*, Mohr Siebeck, Tübingen, 2013, Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, vol. 73, pp. 52–66.

[85] IMT in Nuremberg, Göring *et al.* case, Judgment, 1 October 1946, p. 52 (https://www.legal-tools.org/doc/45f18e/).

[86] On Staff (1901–1976), see Thomas Henne, "Curt Staff zum 100. Geburtstag", in *Neue Juristische Wochenschrift*, 2001, vol. 54, no. 41, pp. 3030–31.

[87] On Wimmer (1899–1988), see Friedrich Wilhelm Bosch, "August Wimmer", in *Neue Juristische Wochenschrift*, 1989, vol. 42, no. 27, p. 1660.

"especially the monstrous atrocities of the SS and the Gestapo",[88] constituted crimes *mala in se* for which the principle of *nullum crimen* could not be a bar against retroactive prosecution.[89]

Nevertheless, the jurisdiction over crimes against humanity led to a legal confusion and lenient sentences for Nazi perpetrators. This fact was criticised not only by the Legal Division but also by sections of the public and some representatives of the German justice. And of course, it played an important role in the establishment of the OGH and its later legal practice. However, it is important to consider that the German judicial system as a whole had a great interest in the creation of a supreme court, mainly due to the need of an institution which re-established legal unity.

34.4. The German Supreme Court for the British Zone and its Legal Practice in Regard to Crimes against Humanity

34.4.1. The Establishment, Jurisdiction and Judicial Personnel

With Ordinance No. 98 of 1 September 1947 the British military government established the OGH.[90] It was entrusted with a dual jurisdiction in so far as it functioned as a supreme court guaranteeing legal unity and as an appellate court for cases that were adjudicated by courts of assizes, including crimes against humanity trials.[91] But its opening was delayed on account of negotiations with the US military government (and the German *Länder* concerned) with regard to the idea of a united supreme court for both zones of occupation. Probably due to these exploratory talks, the choice for the court's seat fell on Cologne being located near the British-American Zone border.[92] After the bi-zonal option had been cancelled, the OGH was opened in May 1948.[93]

At the same time, the legal authorities had dealt with the recruitment of the judicial personnel. The Legal Division claimed that

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88 Carl Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege"*, with remarks and an epilogue by Helmut Quaritsch (ed.), Duncker & Humblot, Berlin, 1994, p. 81.

89 *Ibid.*, p. 23; Douglas, 2013, p. 59, see *supra* note 75.

90 Ordinance No. 98 – German Supreme Court for the British Zone, 1 September 1947, in *Military Government Gazette Germany. British Zone of Control*, 1947, no. 20, p. 572.

91 Pauli, 1996, p. 99, see *supra* note 7; Rüping, 2000, p. 355, see *supra* note 7.

92 Form, 2012, p. 41, see *supra* note 21.

93 Wenzlau, 1979, pp. 303–8, see *supra* note 22; Form, 2012, pp. 42–43, see *supra* note 21.

judges and prosecutors who had been members of the Nazi Party or who had somehow been involved in Nazism should not be appointed.[94] This provision made the search for candidates quite difficult. Finally, six judges and one chief public prosecutor were found so that one civil and one criminal division, each consisting of three judges, could be set up. It was not until 1 January 1950 that a second criminal division took up its work. However, the workload constantly exceeded the court's capacities, even though further judges were appointed.[95] The vice-president of the OGH, Ernst Wolff, who later became the president in February 1949, had been a distinguished lawyer in Berlin known for his expertise in civil law. Yet in 1938 his admission to the Bar was revoked for racial reasons. In 1939 he escaped the anti-Semitic persecution of the Nazis by emigrating to England. In London he worked as an advocate and as a member of commissions dealing with the European post-war order.[96]

There were two other men who became key figures for OGH jurisprudence concerning crimes against humanity: the aforementioned Curt Staff and August Wimmer. The former – a member of the Social Democratic Party of Germany – had been dismissed as a judge in 1933 and spent 14 months as a prisoner in Dachau concentration camp without being charged of a crime.[97] In 1945 he was appointed as the chief public prosecutor in Brunswick, where he set up a task force to promote the prosecution of Nazi criminals.[98] From October 1946 to February 1947 Staff headed the penal law department at the *Zentral-Justizamt*,[99] holding a key position between the Legal Division and the German judicial administration with regard to the implementation of CCL 10. Thus, he gained the confidence of the British – notably of Rathbone who characterised him as a "staunch upholder of democracy and an opponent of the Nazi regime"[100] as well as "the best legal official I have yet met".[101]

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94 Wenzlau, 1979, p. 308, see *supra* note 22; Rüping, 2000, p. 356, see *supra* note 7.

95 Storz, 1969, p. 3, see *supra* note 7; Wenzlau, 1979, pp. 308–9, see *supra* note 22.

96 On Wolff (1877–1959), see Georg Maier-Reimer, "Ernst Wolff (1877–1959): Führender Anwalt und Oberster Richter", in Helmut Heinrichs *et al.* (eds.), *Deutsche Juristen jüdischer Herkunft*, C.H. Beck, Munich, 1993, pp. 643–54.

97 Henne, 2001, p. 3031, see *supra* note 86.

98 Werner Sohn, *Im Spiegel der Nachkriegsprozesse: Die Errichtung der NS-Herrschaft im Freistaat Braunschweig*, Appelhans, Braunschweig, 2003, p. 51.

99 Broszat, 1981, pp. 518–19, see *supra* note 31.

100 Cited in Edith Raim, *Justiz zwischen Diktatur und Demokratie. Wiederaufbau und Ahndung von NS-Verbrechen in Westdeutschland 1945–1949*, Oldenbourg

Taking into account Staff's approval of CCL 10, it was not surprising that he became the presiding judge of the OGH criminal division on 1 January 1948.[102]

The certificate of appointment for Wimmer was dated on the same day. He was married to a Jewish woman who had converted to Catholicism. For this reason and because of his Christian humanist opposition to the Nazis, he was dismissed as a judge in 1938 and detained by the Gestapo in 1944. After his appointment as a presiding judge at the higher regional court in Cologne in 1945,[103] he wrote an article on the prosecution of crimes against humanity and the principle of *nullum crimen sine lege*. Taking a stand for the retroactivity of CCL 10 he stated that:

> The state has an inescapable ethical responsibility to punish all perpetrators of crimes against humanity; there is no other way to atonement and prevention. German criminal law does suffice to cover every case and situation; anomalously, the principle of 'n.c.s.l.' has to defer to the ethical necessity of promulgating a new special retroactive law.[104]

Like Staff, Wimmer had experienced political – and indirectly racial – persecution during the Third Reich, which meant that both looked at the issue of prosecuting such atrocities from a perspective differing from that taken by those jurists who had come to an arrangement with National Socialism. They were convinced that the Allied law offered the best

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Wissenschaftsverlag, Munich, 2013, Quellen und Darstellungen zur Zeitgeschichte, vol. 96, pp. 133–34.

101 Cited in *ibid.*, p. 259.

102 Storz, 1969, p. 4, see *supra* note 7.

103 Bosch, 1989, see *supra* note 87.

104 August Wimmer, "Die Bestrafung von Humanitätsverbrechen und der Grundsatz *nullum crimen sine lege*", in *Süddeutsche Juristenzeitung*, 1947, vol. 2, Sondernummer, March 1947, col. 130 (emphasis in original):

> Es besteht eine unabweisbare ethische Verpflichtung des Staates, *alle* Humanitätsverbrecher zu bestrafen, und es gibt keinen anderen Weg zur Sühnung und Prävention; das deutsche Strafrecht reicht hierzu nicht in allen Fällen und in jeder Beziehung aus; insoweit hat der Grundsatz 'n.c.s.l.' ausnahmsweise zurückzustehen hinter der ethischen Notwendigkeit, ein neues, rückwirkendes Ausnahmegesetz zu schaffen.

The English translation is quoted from Douglas, 2013, p. 65, see *supra* note 75. See, for example, Foljanty, 2013, pp. 70–71, *supra* note 84.

preconditions to restore justice, whereas their opponent Hodenberg, higher regional court president in Celle, argued that its retroactive application undermined the confidence of the German people in the still fragile legal system. Both judges brought the demand for justice into position against the primacy of legal certainty. (Similar to the Heidelberg Circle member Hodenberg, Schmitt, who had not held any public office since the end of the war, imposed the far-reaching and general requirement of an amnesty for Nazi criminals in 1949.[105]) Their appointment to the OGH, which was proposed by the *Zentral-Justizamt* and approved by the Legal Division, was closely connected with the British efforts to ensure the punishment of Nazi crimes against German nationals, as both were known to be supporters of CCL 10.[106] Referring to natural law arguments, Staff and Wimmer had an important stake in the legal practice of the OGH under CCL 10 as can be shown by a glance at the leading cases bearing their judicial signatures.

34.4.2. Prosecution of Crimes Against Humanity

From May 1948 to September 1950 the OGH produced 583 decisions and judgments concerning crimes against humanity with German or stateless victims. Among these were atrocities against Communists, Social Democrats, Jews, Sinti and Romanies, disabled people and others, for example: denunciations (202), brutal behaviour of officials (73) – especially maltreatment of concentration camp prisoners –, crimes connected with the Nazi seizure of power (110), the *Reichspogromnacht* (118) or the final period of Nazi rule (24).[107]

Contrary to the IMT and the subsequent Nuremberg Trials, the focal point of the German law enforcement in accordance with CCL 10 was on the middle- and low-level perpetrators – among them neighbours, husbands and employees having delivered people from their immediate surroundings to the Nazi state or men of the "Storm Division"

[105] Carl Schmitt, "Amnestie oder die Kraft des Vergessens", in *id.*, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969*, with a preface and remarks by Günter Maschke (ed.), Dunker & Humblot, Berlin, 1995, pp. 218–21.

[106] Broszat, 1981, p. 534, see *supra* note 31.

[107] Form, 2012, p. 50, see *supra* note 21. For a concise overview of the Nazi policy of exclusion and repression, see Nikolaus Wachsmann, "The policy of exclusion: repression in the Nazi state, 1933–1939", in Jane Caplan (ed.), *Nazi Germany*, Oxford University Press, Oxford, 2008, pp. 122–45.

(*Sturmabteilung*) who had detained, abused and murdered their own countrymen for racial or political reasons. By 30 September 1949 German courts had conducted 1,385 trials for crimes against humanity, which involved 3,269 persons. In a significant percentage of cases the parties filed appeals. In total, the OGH tried 539 appeal cases involving 978 defendants (909 men, 69 women) and leading to 583 decisions.[108]

Because of its dual jurisdiction as a supreme court and as an appellate court for German trials under CCL 10, the OGH was in charge of defining 'crimes against humanity' and how they differ from 'ordinary' crimes under German penal law. This was crucial, especially in view of denunciation cases on which the court focused immediately after starting its judicial work. Characteristically, 50 out of 84 decisions collected in the first volume of the OGH law reports covering the time between May 1948 and April 1949 dealt with cases of crimes against humanity – among these no less than 26 dealt with denunciations.[109] By devoting a great deal of attention to the question of which objective and subjective elements were required for crimes against humanity, the criminal division aimed at providing a systematic interpretation of the Allied legal norm, thus facilitating and enforcing its application. Due to the necessity of these efforts to unify the prosecution, the OGH created legal constructions which made its decisions valuable case law for international criminal law. With its first judgment the court already laid the foundation for the later development when it stated that

> [r]etroactive punishment is unjust when the action, at the time of its commission, not only does not fall foul of a positive rule of criminal law, but also does not contravene the moral law. This is not the case for crimes against humanity. In the view of any morally-oriented person, serious injustice was perpetrated, the punishment of which would have been a legal obligation of the state. The subsequent cure of such dereliction of a duty through retroactive punishment is in keeping with justice. This also

[108] Form, 2012, p. 54, see *supra* note 21.

[109] Entscheidungen, vol. 1, 1949, see *supra* note 8. The relevant information provided by Broszat, 1981, p. 534, see *supra* note 31, is misleading.

> does not entail any violation of legal security but rather the re-establishment of its basis and presuppositions.[110]

In this way the OGH confirmed the applicability of the controversial CCL 10 and contributed to an appropriate prosecution of serious Nazi crimes. In the following period, the court set aside a lot of acquittals by insisting on the application of the Allied law and dismissed the appeals of many defendants.[111] It is not the purpose of this essay to address in detail the issue of the contribution of the OGH to the German judicial process of coming to terms with the Nazi past. Nevertheless, it should be mentioned that for a short time, the appeal court gained recognition for establishing a legal practice that helped to make the German prosecution of crimes against humanity more consistent. Thus it probably achieved a breakthrough for the legal construction of *Idealkonkurrenz* (see section 34.3) facilitating not least the prosecution of denunciations.[112]

But on the German side, there were also many jurists refusing to recognise the merits of the OGH – among them some judicial panels which explicitly declined its jurisprudence. A judgment given by a court of assizes in Lower Saxony (Niedersachsen) affected Staff, presiding

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[110] OGH, Bl. case, StS 6/48, Judgment, 4 May 1948, in Entscheidungen, vol. 1, 1949, p. 5, see *supra* note 8:

> Rückwirkende Bestrafung ist ungerecht, wenn die Tat bei ihrer Begehung nicht nur nicht gegen eine positive Norm des Strafrechts, sondern auch nicht gegen das Sittengesetz verstieß. Bei Verbrechen gegen die Menschlichkeit ist davon nicht die Rede. Nach der Auffassung aller sittlich empfindenden Menschen wurde schweres Unrecht begangen, dessen Bestrafung rechtsstaatliche Pflicht gewesen wäre. Die nachträgliche Heilung solcher Pflichtversäumnis durch rückwirkende Bestrafung entspricht der Gerechtigkeit. Das bedeutet auch keine Verletzung der Rechtssicherheit, sondern die Wiederherstellung ihrer Grundlage und Voraussetzung. Unrechtssicherung ist nicht Aufgabe der Rechtssicherheit.

The English translation is mainly quoted from Cassese, 2013, p. 89, fn. 18, see *supra* note 16. With regard to the Bl. Case, see for example, Christoph Burchard, "BL.", in Cassese (ed.), 2009, see *supra* note 11, pp. 606–7

[111] For a quantitative analysis of OGH jurisprudence regarding crimes against humanity, see Form, 2012, pp. 49–63, *supra* note 21.

[112] Broszat, 1981, pp. 533–34, see *supra* note 31.

judge of the OGH criminal division, so strongly that he considered the submission of a complaint to the *Land* minister of justice.[113]

From a historical point of view, there is another interesting dimension. The OGH delivered judgments and decisions with elaborate reasoning also providing a critical interpretation of Germany under Nazi rule. This applies for example to the case of the German director Veit Harlan who was indicted of a crime against humanity because he had shot the anti-Semitic propaganda film *Jud Süß* (1940). The criminal division set aside the contested acquittal and pointed out that the film was a part of the whole of the inhuman campaign against the Jews. In this context, the OGH analysed the mechanisms of the racial persecution of the Jews in a very clear-sighted way.[114] Addressing the courts of first instance, the OGH set forth, in the headnotes of the decision, that it was an infringement of the law not to take sufficiently into account the historical facts and experience for the legal assessment of the factual findings.[115] In another decision, it claimed that judges could commit crimes against humanity by imposing inhuman sentences – even if the penalty was in conformity with the law. The reasoning contained the admission that parts of the legal system – especially the "People's Court" (*Volksgerichtshof*) and the "Special Courts" (*Sondergerichte*) – had handled the law in such a way as to turn it into an instrument of the terrorist suppression and extermination of entire groups of the population.[116] Of course, in view of

[113] Rüping, 2000, p. 358, see *supra* note 7.

[114] OGH, Harlan case (*Jud Süß* case), StS 365/49, Judgment, 12 December 1949, in Entscheidungen, vol. 2, 1950, pp. 291–312, see *supra* note 8; Boris Burghardt, "Harlan (*Jud Süß* Case)", in Cassese (ed.), 2009, pp. 720–21, see *supra* note 11; Pauli, 1996, pp. 116–19, see *supra* note 7; Broszat, 1981, pp. 537–39, see *supra* note 31.

[115] OGH, Harlan case, p. 291 (i.e. headnote), see *supra* note 114: "Die unzureichende Berücksichtigung geschichtlicher Tatsachen und der Erfahrung bei der rechtlichen Würdigung der Tatfeststellungen ist ein Rechtsverstoß".

[116] OGH, Müller case, StS 36/49, Judgment, 10 May 1949, in Entscheidungen, vol. 2, 1950, pp. 23–46, especially p. 43, see *supra* note 8:

> Wenn auch viele deutsche Richter dem während des Krieges von den nationalsozialistischen Machthabern ausgeübten Druck widerstanden und ihre Entscheidungen nach ihrer vom Gesetz und ihrem Gewissen gelenkten Überzeugung trafen, so gehört es doch zu den offenkundigen Erfahrungstatsachen, daß zahlreiche Gerichte, vor allem der Volksgerichtshof und viele Sondergerichte, das Strafrecht in einer Weise handhabten, die dazu führte, daß das Recht, statt begangenes Unrecht zu sühnen, mehr und mehr zum Mittel der

the current state of knowledge, this interpretation did not go far enough in its analysis of the entanglement of the judiciary in National Socialism. But taking into account that at the same time jurists were seeking to create the legend that "the overwhelming majority of German judges did not capitulate to Hitler",[117] the statement of the OGH was quite bold and far from mainstream thinking.[118]

Sinking into oblivion after the closing on 30 September 1950, the appeal court's approach to restore justice was highly valued by historians and legal scholars. With regard to the Harlan decision, Martin Broszat dignifies the reasoning as remarkable,[119] while Gerhard Pauli describes it as a highlight of the post-war jurisprudential culture.[120] Similarly, Hinrich Rüping points out the pioneering role of the appeal court in view of its CCL 10 handling, though conceding that it was also disputable both dogmatically and in reference to the underlying criminal justice theory.[121] More recently, Antonio Cassese and Kai Ambos have dealt with the legal practice of the OGH concerning crimes against humanity. As will be shown in the next section, both jurists emphasise the pioneering role of the Cologne court regarding several aspects of international criminal law.

> terroristischen Unterdrückung und Ausmerzung ganzer Bevölkerungsgruppen wurde.

See, for example, Pauli, 1996, pp. 109–13, *supra* note 7; Helmut Irmen, "Der Oberste Gerichtshof für die Britische Zone und der Umgang mit NS-Juristen", in Justizministerium des Landes NRW (ed.), 2012, pp. 99–103, see *supra* note 7.

117 Cited in Douglas, 2013, pp. 63–64, see *supra* note 75.

118 Pauli, 1996, pp. 112–13, see *supra* note 7.

119 Broszat, 1981, p. 539, see *supra* note 31: "Solche Urteilsbegründungen konnten sich […] sehen lassen".

120 Pauli, 1996, p. 119, see *supra* note 7: "Diese Entscheidung […] stellt einen Höhepunkt der Rechtsprechungskultur in der Nachkriegsjudikatur dar".

121 Rüping, 2000, p. 358, see *supra* note 7:

> In der strafrechtlichen Spruchpraxis […] beschreitet [der OGH] in der Handhabung des KRG Nr. 10 richtungweisend für die Nachkriegsjudikatur neue Wege. […] Seine Rechtsprechung zu den Humanitätsverbrechen bleibt dogmatisch angreifbar, ebenso die darauf bezogene Straftheorie.

34.5. The Contribution of the OGH to International Criminal Law

A review of the legal practice of the ICTY shows that during the late 1990s, the jurisprudence of the OGH regarding crimes against humanity served as a central source for case law. References to the appeal court's decisions were made in several ICTY proceedings and judgments – for example, in the cases against Tadić,[122] Erdemović,[123] Furundžija,[124] Kupreškić,[125] Blaskić[126] and Kunarac.[127]

Against this backdrop, it is not surprising that the international criminal law compendia being published by the former President of the ICTY, Cassese, dignify the legal practice of the OGH. In his textbook *International Criminal Law*, the famous legal practitioner and scholar quotes not less than 30 of its judgments,[128] whereas *The Oxford Companion of International Criminal Justice* includes 20 contributions on trials held by the German appeal court.[129] Another expert, the law professor Kai Ambos, submitted a detailed study on the general part of international criminal law attending thoroughly to the OGH jurisprudence about crimes against humanity.[130] A significant portion of the OGH decisions regarding atrocities committed against German or stateless victims has been made available in

[122] ICTY, Tadić case, Trial Chamber, Judgment, 7 May 1997, paras. 657–58; Appeals Chamber, Judgment, 15 July 1999, paras. 201 (fn. 247), 257–62, 290 (fn. 351); Appeals Chamber, Judgment in Sentencing Appeals, Separate Opinion of Judge Shahabuddeen, 26 January 2000, p. 41. With regard to the Tadić case, see Robertson, 2012, pp. 469–76, *supra* note 47.

[123] ICTY, Erdemović case, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 17 (fn. 12).

[124] ICTY, Furundžija Case, Trial Chamber, Judgment, 10 December 1998, paras. 205–9. Discussing these paragraphs, it was the International Criminal Tribunal for Rwanda ('ICTR') which also made reference to the related OGH decisions dealing with the legal doctrine of aiding and abetting, see ICTR, Bagilishema case, Trial Chamber, Judgment, 7 June 2001, para. 34.

[125] ICTY, Kupreškic case, Trial Chamber, Judgment, 14 January 2000, paras. 555, 625 (fn. 900).

[126] ICTY, Blaskić case, Trial Chamber, Judgment, 3 March 2000, para. 210.

[127] ICTY, Kunarac *et al.* case, Trial Chamber, 22 February 2001, para. 432 (fn. 1109); Appeals Chamber, Judgment, 12 June 2002, para. 98 (fn. 114).

[128] Cassese, 2013, pp. xix–xxxviii (i. e. Table of Cases), see *supra* note 16.

[129] Among these are the aforementioned Bl. case, see Burchard, 2009, *supra* note 110, and Harlan case, see Burghardt, 2009, *supra* note 114.

[130] Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, Duncker & Humblot, Berlin, 2004, Strafrecht und Kriminologie, vol. 16, pp. 163–82.

the Legal Tools database of the International Criminal Court ('ICC') in The Hague, most of which deal with cases of the brutal behaviour of officials.[131]

Why was the OGH jurisprudence under CCL 10 so well received by international criminal law? Apart from its judicial quality, the decisive factor was that the court's criminal division had published three volumes of law reports containing its most important decisions concerning crimes against humanity.[132] This was probably the most valuable collection of domestic case law available to the prosecutors and judges at the ICTY. After all, the OGH followed in the footsteps of the *Reichsgericht* in so far as it provided full written judgments discussing legal-dogmatic issues on the basis of an analysis of superior court case law and the jurisprudential literature. Despite the fact that they were published in abridged versions, many judgments still exceeded 10 pages. Obviously, the judges paid no regard to a provision which was adopted on 16 June 1948 and stated that the findings should be delivered as briefly as possible and limited to the legal question at hand.[133] But this was not a disadvantage – it was rather due to these elaborate decisions that Ingo Müller characterised the OGH law reports as a rare element of German legal culture[134] standing in contradiction to a general legal practice that refused to accept the legal force of CCL 10.

Below, a brief overview of the OGH interpretation of crimes against humanity shall be given. For this purpose, it is instructive to recall the headnote of one of the court's first decisions, which was already quoted in the beginning (section 34.1).[135]

34.5.1. "If in connection to the system of violence and tyranny, as it existed in National Socialist times": The Contextual Element

The OGH made use of historic narratives – for example, concerning the role of the German judiciary during the Third Reich (see section 34.4) –

[131] Under the heading "National Cases Involving Core International Crimes" (http://www.legal-tools.org/en/go-to-database/ltfolder/0_2399/#results) and the sub-category "Germany" the Legal Tools database currently offers access to important legal documents of 73 OGH trials under CCL 10.

[132] Entscheidungen, 1949, see *supra* note 8.

[133] Pauli, 1996, pp. 100–1, see *supra* note 7.

[134] Ingo Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, Kindler, Munich, 1987, p. 211.

[135] OGH, P. case, p. 11 (i. e. headnote), see *supra* note 8.

to demonstrate the contextual element that allowed the differentiation between an "ordinary" crime under German law and a crime against humanity. Atrocities under CCL 10 required, as the appeal court stressed repeatedly, that "the aggressive behaviour of the agent and the inhumane injury to the victim have to be objectively connected with the Nazi system of violence and tyranny".[136] Thus, the court provided an interpretation that anticipated the development of international criminal law. According to the Rome Statute of the ICC, a crime against humanity must meet the requirement of "a widespread or systematic attack directed against any civilian population".[137] Such atrocities must "be of extreme gravity and not be a sporadic event but part of a pattern of misconduct".[138]

34.5.2. "[H]uman beings, goods and values were attacked and damaged in a way expressing an absolute contempt for spiritual human value with an effect on mankind": The Legally Protected Interest

With this wording the OGH gave an interpretation of human dignity and humanity as supra-individual, legally protected interests, the violation of which constituted an attack on mankind, that is the bearer and protector of "spiritual human value".[139] This was probably the first such interpretation handed down to a domestic jurisdiction and certainly one of the most distinguished. Meanwhile, this legal conception has become an important element of customary international law. As Cassese states in his textbook, crimes against humanity require "particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons".[140]

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[136] OGH, J. and R. case, StS 65/48, Judgment, 16 November 1948, in Entscheidungen, vol. 1, 1949, p. 168, see *supra* note 8:

> [D]as Angriffsverhalten des Täters und die unmenschliche Schädigung des Opfers müssen objektiv im Zusammenhang stehen mit dem System der nazistischen Gewalt- und Willkürherrschaft.

The English translation is quoted from Cassese, 2013, p. 93, fn. 26, see *supra* note 16. See, for example, Christoph Burchard, "J. and R.", in Cassese (ed.), 2009, p. 731, *supra* note 11; Ambos, 2004, pp. 165–66, *supra* note 130.

[137] Rome Statute of the International Criminal Court, 17 July 1998, p. 3 (https://www.legal-tools.org/doc/7b9af9/).

[138] Cassese, 2013, p. 92, see *supra* note 16.

[139] Ambos, 2004, p. 165, see *supra* note 130.

[140] Cassese, 2013, p. 90, see *supra* note 16.

34.5.3. "[A] person who caused this by way of conscious and intended acts of aggression": Intent and *Dolus Eventualis*

Crimes against humanity require two mental elements: the *mens rea proper* to the underlying offence – for instance, murder or torture – and "the awareness of the existence of a widespread or systematic practice".[141] When the OGH began its work in May 1948, such a definition was missing because CCL 10 lacked any provisions for dealing with the subjective elements of the criminal offences it defined. As a result, the appeal court had to use general legal principles to clarify the circumstances under which individual criminal responsibility could be established.[142] For the intent of a perpetrator, the OGH declared in view of a case of denunciation that neither a concrete idea of the consequences nor an abominable attitude was required. The informer did not need to share the Nazi ideology, it was not necessary that he acted out of racist or political motives – it was enough that he acted intentionally and knew that through his actions he would deliver someone over to a system of violence and tyranny.[143] It was this very question – whether a crime against humanity could be committed for purely personal motives – that concerned the ICTY judges in the Tadić case and led them to search the OGH law reports for appropriate case law. In the opinion of the Appeals Chamber in The Hague, this German jurisprudence concerning over Nazi atrocities appeared to be more pertinent than the decisions that had been made between 1946 and 1949 by US tribunals under CCL 10 in Nuremberg which

> involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for

[141] *Ibid*., p. 98.

[142] Ambos, 2004, p. 171, see *supra* note 130.

[143] OGH, E. and A. case, StS 43/48, Judgment, 17 August 1948, in Entscheidungen, vol. 1, 1949, p. 60 (i. e. headnote), see *supra* note 8:

> Bei der Denunziation ist zur inneren Tatseite erforderlich und genügend, daß der Täter sein Opfer bewußt an Kräfte der Willkür ausliefert. Er braucht weder eine bestimmte Vorstellung von den Folgen seines Tuns gehabt zu haben, noch ist ein Handeln aus unmenschlicher oder verwerflicher oder niedriger Gesinnung erforderlich.

See, for example, Ambos, 2004, pp. 171–72, *supra* note 130; and Cassese, 2013, p. 99, fn. 38, *supra* note 16.

> personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal" defence which has as its premise "non-official acts". The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons.[144]

The Appeals Chamber in the Tadić case referred to several OGH judgments – among these, of course, some denunciation cases – before it came to the conclusion "that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated".[145]

In this regard, the OGH even held that *dolus eventualis* (*Eventualvorsatz*), being equivalent to recklessness (*Fahrlässigkeit*), sufficed to establish liability for a crime against humanity.[146] In another denunciation case, the court pointed out that in order to be considered a crime against humanity, it was necessary that

> the offensive behaviour of the perpetrator be conscious and intentional (or at least the perpetrator took the risk), that it actually occurred and the perpetrator, through his act, willed that the victim be handed over to powers that did not obey the rule of law, or at least, that he took this possibility into account.[147]

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144 ICTY, Tadić case, Appeals Chamber, 1999, para. 263, see *supra* note 122.

145 *Ibid.*, para. 270.

146 With regard to recklessness and *dolus eventualis* in international criminal law, see Cassese, 2013, pp. 45–49, *supra* note 16; Alberto di Martino, "Dolus eventualis", in Cassese (ed.), 2009, pp. 302–4, *supra* note 11.

147 OGH, R. case, StS 19/48, Judgment, 27 July 1948, in Entscheidungen, vol. 1, 1949, p. 47, see *supra* note 8:

> Notwendig und ausreichend ist, daß das Angriffsverhalten des Täters bewußt und gewollt, zumindest evtl. mitgewollt, geschah und weiter,

34.5.4. "[H]as to be punished for a crime against humanity if he can be accused of it": Unavailability of Duress as an Excuse where a Person has Knowingly Joined a Criminal Organisation

In a trial against two defendants, who were alleged to have participated in the destruction of a synagogue and committed arson on 10 November 1938, the OGH rejected duress as an excuse for those persons who had knowingly and voluntarily joined a criminal organisation. It stated:

> As an old member of the [National Socialist] Party T. knew the programme and the fighting methods of NSDAP. If he nevertheless made himself available as official *Standartenführer*, he had to count from the start that he would be ordered to commit such crimes. Nor, in this condition of necessity for which he himself was to blame, could he have benefited from a possible misapprehension of the circumstances that could have misled him as to the condition of necessity or compulsion.[148]

Almost half a century later, Cassese issued a separate and dissenting opinion in the ICTY Erdemović appeal stressing that case law had established that

> duress and necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.[149]

> daß der Täter das Opfer durch die Tat nichtrechtsstaatlichen Kräften ausliefern will, oder das zumindest in Kauf nimmt.

The English translation is quoted from Cassese, 2013, p. 47, fn. 16, see *supra* note 16.

[148] OGH, T. and K. case, StS 40/48, Judgment, 21 December 1948, in Entscheidungen, vol. 1, 1949, pp. 200–1, see *supra* note 8:

> Als alter Parteigenosse kannte T. das Programm und die Kampfmethoden der NSDAP. Wenn er sich ihr dennoch als hauptamtlicher Standartenführer zur Verfügung stellte, so hatte er von vornherein damit zu rechnen, zu derartigen Verbrechen befohlen zu werden. Bei selbstverschuldetem Notstande aber käme ihm weiter auch ein etwaiger Irrtum über Umstände, die ihm eine Nötigungs- oder Notstandslage vorgetäuscht haben könnten, nicht zugute.

The English translation is quoted from Cassese, 2013, p. 216, fn. 24, see *supra* note 16.

[149] ICTY, Erdemović case, para. 17, see *supra* note 123.

In this respect, he made reference to the above quoted OGH judgment in the T. and K. case, approving its reasoning and characterising it as "particularly significant in this respect".[150]

34.5.5. Causality

In several cases the appeal court dealt with the question of causality, most prominently in the Harlan Case (see section 34.4). In the related decision, the OGH held the opinion that the court of first instance was wrong by assuming that for the commission of a crime against humanity it was absolutely necessary that the alleged conduct constituted a *conditio sine qua non* for concrete persecution measures. It stated that Harlan's anti-Semitic film *Jud Süß*, which had been viewed by about 20 million people, was "an integral element of the Nazi propaganda machinery against Jews, which provided the setting for the German population to accept not only the racial discrimination of the Jews but even their violent persecution".[151] By directing such a film, the OGH criminal division stressed, the director had fulfilled the *actus reus* of an offence according to Art. II 1c of CCL 10 because his conduct contributed – among other factors – substantially to the inhuman Nazi policy against the Jews.[152]

34.5.6. The "Approving Spectator"

In the Furundžija case, the ICTY Appeals Chamber gave a great deal of attention to case law in respect of the legal doctrine of aiding and abetting. Among the examined judgments were the so-called "Synagogue case"[153] and the "Pig-cart parade case"[154], which had been decided by the

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[150] *Ibid.*, para. 17, fn. 12.

[151] Burghardt, 2009, p. 720, see *supra* note 114.

[152] OGH, Harlan case, p. 300, see *supra* note 114:

> Angesichts dieser Entwicklung der Dinge steht die *Mit*ursächlichkeit des Films für die Judenverfolgung *durch hetzerische Beeinflussung der öffentlichen Meinung im judenfeindlichen Sinne als einer wichtigen Grundlage der Verfolgung und Schädigung der Juden* […] fest (emphasis in original).

See, for example, Ambos, 2004, pp. 168–69, *supra* note 130; and Burghardt, 2009, p. 720, *supra* note 114.

[153] OGH, K. and A. case (Synagogue case), StS 18/48, Judgment, 10 August 1948, in Entscheidungen, vol. 1, 1949, pp. 53–56, see *supra* note 8.

OGH in 1948. They were referred to as examples of how to deal with the "approving spectator" scenario.[155] In view of the "Synagogue case" the ICTY judges held that "[i]t may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity".[156] Trying the "Pig-cart parade case", the OGH completed the picture by emphasising that several defendants, who had participated in an SA "parade" in a small German town in May 1933, had a part in the humiliation and maltreatment of a Socialist senator and a Jewish inhabitant, whereas the conduct of another accused did not meet the objective requirements of a crime against humanity. The criminal division found that

> [P.] followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown […] His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.[157]

34.5.7. Private Persons as Perpetrators

The OGH repeatedly pointed out that not only officials of the state but also private persons could commit crimes against humanity. This is best illustrated by the numerous decisions the appeal court made concerning

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[154] OGH, L. *et al*. case (Pig-cart parade case), StS 37/48, Judgment, 14 December 1948, in Entscheidungen, vol. 1, 1949, pp. 229–34, see *supra* note 8. See, for example, Christoph Burchard, "L. and Others", in Cassese (ed.), 2009, p. 791, *supra* note 11.

[155] With regard to the "approving spectator" scenario, see Cassese, 2013, pp. 195–96, *supra* note 16.

[156] ICTY, Furundžija case, para. 207, see *supra* note 124. See also Ambos, 2004, p. 170, *supra* note 130.

[157] OGH, L. *et al*. case, p. 234, see *supra* note 154:

> P. ist dem Umzuge lediglich unter den Zuschauern in Zivilkleidung gefolgt, wenn er auch dabei war, einem Dienstbefehle der SA. zu einem ihm noch unbekannten Zwecke Folge zu leisten. […] Sein Verhalten kann nicht einmal sicher als objektive und subjektive Zustimmung gedeutet werden. Zudem wäre eine nicht mitursächliche stumme Billigung auch keineswegs tatbestandsmäßig.

The English translation is quoted from ICTY, Furundžija case, para. 208, see *supra* note 124.

denunciations.[158] Under the presiding Judge Cassese, the ICTY investigated this legal issue in the Kupreškić case in 2000,[159] whereupon it referred to the so-called "Weller case", which had been tried by the OGH.[160] In May 1940 Weller, a member of the SS, and two other men had broken into a house that was known to be inhabited by Jewish families. The intruders (probably drunken) maltreated and abused at least 10 inhabitants. The fact that Weller – unlike his comrades – wore civilian clothes led the court of first instance to conclude that his actions did not constitute a crime against humanity. The OGH did not agree. Rather, it held that state officials, who acted in a private capacity and on their own initiative, could commit atrocities according to Article II 1c of CCL 10, like any other private person. The prerequisite was that the crime was connected to the Nazi system of violence and tyranny.[161]

34.5.8. Military Persons as Victims

The ICTY emphasised that the German Supreme Court "gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military".[162] This statement was related to an OGH judgment against members of a German court martial, who had imposed the death penalty on three marines for desertion on 5 May 1945 in Denmark.[163] The judges found that the defendants were guilty of complicity in a crime against humanity. "[T]he glaring discrepancy between the offence and the punishment constituted", as the ICTY summarised the reasoning of the OGH, "a clear manifestation of the Nazi's brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State".[164] With this interpretation, the German appellate court anticipated recent

[158] Cassese, 2013, p. 100, see *supra* note 16.

[159] ICTY, Kupreškić case, para. 555, see *supra* note 125.

[160] OGH, Weller case, StS 139/48, Judgment, 21 December 1948, in Entscheidungen, vol. 1, 1949, pp. 203–8, see *supra* note 8.

[161] *Ibid.*, p. 206. See, for example, Cassese, 2013, p. 101, fn. 41, *supra* note 16.

[162] ICTY, Tadić case, Appeals Chamber, 1999, para. 290, fn. 351, see *supra* note 122.

[163] OGH, P. *et al.* case, StS 111/48, Judgment, 7 December 1948, in Entscheidungen, vol. 1, 1949, pp. 217–29, see *supra* note 8.

[164] ICTY, Tadić case, Appeals Chamber, 1999, para. 290, fn. 351, see *supra* note 122.

developments in international criminal law in so far as there is a recognisable "trend towards loosening the strict requirement that the victims of murder-type crimes against humanity be civilians".[165]

34.6. Summary and Outlook

The OGH probably did not succeed in convincing the controversial Carl Schmitt or the conservative Hodo von Hodenberg of the necessity and importance to understand 'crimes against humanity' as an independent legal norm. They refused to support the appeal court's approach to promote the judicial process of coming to terms with the Nazi past. While Schmitt considered the new legal concept a despicable political instrument to destroy an enemy, Hodenberg warned of the danger to the rule of law that the retroactive application of CCL 10 could represent. The latter argument, which was agreed to by the majority of the German jurists, was rejected by the OGH. In its first decision, the criminal division stated that retroactive punishment of perpetrators for the atrocities under discussion did not constitute a "violation of legal security but rather the re-establishment of its basis and presuppositions". In this context, the judges also adopted the Radbruch formula, which provided a natural law reasoning for the precedence of justice over the "lawful illegality" (*gesetzliches Unrecht*) of substantial parts of the Nazi legislation and judiciary. Thus, the court laid the foundation for its further interpretation of crimes against humanity, which aimed at making the Allied law applicable in German courts and guaranteeing legal unity. For this purpose, it was important to define legally protected interest and to develop criteria for individual criminal liability. This included, in particular, the objective and subjective elements of the criminal offence as well as guidelines for the handling of legal issues like causality, perpetration, aiding and abetting or the availability of excuses. As demonstrated in the previous section, the attempt of the OGH to shape the legal concept of crimes against humanity was well received as case law both by the ICTY and scholars of international criminal law.

Sections 34.2, 34.3 and 34.4 were guided by the question: Which historical and institutional factors enabled the German appeal court to make its concrete contribution to international criminal law? As a starting

[165] Cassese, 2013, p. 103, see *supra* note 16.

point for answering that question, the British policy towards Germany was chosen; for it was the will and claim of the Foreign Office and the military government to secure the prosecution of Nazi atrocities against Germans or stateless persons. This impetus resulted in a strategy that provided the German judiciary with guidelines and parent cases, which aimed at teaching the wartime enemy how to restore justice. Indeed, transferring the prosecution of those atrocities to domestic courts was based on the idea that this was a German matter and the only suitable means for the German society to come to terms with its past. Of course, cost savings also played a role for the British.

At first glance, it is surprising that only a few years after the collapse of the Third Reich a German higher court could develop an interpretation of crimes against humanity, which has had a notable impact on international criminal law since the 1990s. But a closer look reveals that within the judiciary of the post-war period, there was a trend towards a serious examination of the possibilities and limits of the Allied legal norm. Two opposing camps struggled with this issue. The majority of German jurists rejected the retroactive application of CCL 10, whereas a minority of judges and prosecutors endorsed it as the appropriate legal basis for the punishment of Nazi crimes, referring to natural law and ethical arguments. Like Curt Staff and August Wimmer, quite a lot of them had experienced Nazi persecution, so that the restoration of justice was a central concern to them. The aforementioned debate was closely connected with the question of informers, whose prosecution was highly disputed among German lawyers. A legal basis was missing, until the military government empowered German courts to try cases of denunciations under CCL 10.

As has been shown in section 34.4, a large part of the remarkable jurisprudence of the OGH over crimes against humanity was derived from these very proceedings: 202 out of 583 CCL 10 decisions respectively 26 out of 84 judgments, which the appellate court published in the first volume of its law reports, were related to denunciation cases. It was, in general, the specific jurisdiction over atrocities, which were committed by mid- and low-level perpetrators against their own nationals, and its dual nature as a supreme court and an appellate court that gave the OGH particular reason for its strict interpretation of legal-dogmatic aspects. Finally, it must be underlined that the profile of the judicial personnel, which was characterised not only by judicial qualification but also by the

personal experiences and democratic attitudes of the judges and prosecutors, shaped the legal practice of the German Supreme Court.

After the closing of the OGH on 30 September 1950,[166] its legal practice approach, which aimed to restore justice, was soon dropped and forgotten. In the face of the Cold War, the British will to secure the prosecution of Nazi crimes had gradually disappeared. Since the spring of 1948 the military government called for a rapid completion of the German CCL 10 proceedings and reduced its own efforts to put Nazi criminals on trial before courts martial.[167] At the same time, the situation of the German judiciary changed fundamentally. After the founding of the Federal Republic of Germany in May 1949, the new government granted amnesty to those Nazi criminals whose penalty was expected not to exceed six months' imprisonment.[168] Furthermore, it was significant that Staff and Wimmer, the two prominent supporters of CCL 10, were not appointed to the German Federal High Court (*Bundesgerichtshof*, 'BGH') in Karlsruhe when this court was established in October 1950. The BGH stayed all proceedings still pending under the Allied law until the British military government finally withdrew the authorisation of its application by German courts on 31 August 1951.[169] Since the middle of the 1950s, the BGH developed a legal practice, which permitted the German justice system to exculpate many Nazi perpetrators by categorising them as aiders and abettors (*Gehilfen*), whose guilt was, allegedly, lesser than those of the perpetrators.[170] Taking this into account, the contribution of the OGH to the further development of international criminal law might have been greater than its impact on the German process of coming to terms with the past. That was surely not intended – but it was a side effect, which is to be highly regarded.

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[166] Ordinance No. 218 – Repeal of Military Government Ordinances Nos. 15 and 98, 1 October 1950, in *Official Gazette of the Allied High Commission for Germany*, no. 36, p. 618.

[167] Broszat, 1981, pp. 534–37, see *supra* note 31.

[168] Form, 2012, p. 59, see *supra* note 21.

[169] Ordinance No. 234 – Repeal of Military Government Ordinance No. 47, 31 August 1951, in *Official Gazette of the Allied High Commission for Germany*, no. 65, p. 1138.

[170] Nathalie Gerstle, "III.A11 Gehilfenjudikatur", in Torben Fischer and Matthias N. Lorenz (eds.), *Lexikon der 'Vergangenheitsbewältigung': Debatten- und Diskursgeschichte des Nationalsozialismus nach 1945*, 2nd ed., Transcript Verlag, Bielefeld, 2009, pp. 145–47.

35

Prosecution of War Criminals in the North: Danish and Norwegian Experiences after the Second World War

Ditlev Tamm*

35.1. Introduction

Prosecution of war criminals after the Second World War, even if based on international agreements, took very different shapes in different countries. The number of individuals in Denmark and Norway prosecuted for war crimes during and after the Second World War was rather limited. To a great degree this was a result of varying local conditions and the historical situation in these countries both during and after the war. In Denmark a total of a little more than 250 names were investigated and, of these, 83 individuals were prosecuted for war crimes, while in Norway the number of investigations was somewhat higher at around 350 but the number of prosecutions comes fairly close to the Danish figure. These numbers do not include nationals who committed crimes that can be classified as war crimes. In official statistics, only foreigners were listed as war criminals and specific statutes in Denmark and Norway were directed against non-nationals who were not included in the prosecution of nationals considered as traitors or collaborators.

Among the Nordic countries, only two experienced occupation by German forces. During the war Sweden had, in principle, kept its neutrality, while Finland had had its own wars with the Soviet Union and a different relationship with Germany. By contrast, both Denmark and Norway were occupied by German troops from 9 April 1940 onwards. The response to the German attack was different in each of these countries. Norway resisted for some months, when the Government and the King fled to London, whereas military resistance was abandoned in Denmark after a few hours of fighting and an agreement was made between the two countries in which Denmark recognised the German occupation. From that moment two different regimes of war administration were imposed in Denmark and Norway. These differences

were clearly reflected in the way in which the prosecution of war criminals was envisaged.

Before entering into the history of prosecution of war crimes in the Nordic countries it may be useful to remember how in the first century BC Cicero in his speech *Pro Milone*[1] coined the famous words "*silent enim leges inter arma*" (laws are silent when arms are raised), which have been instrumental as to the question of the degree to which warfare allows the law to be set aside. A slightly different version of this saying was given in 1998 by the US Chief Justice William Rehnquist, who, after having examined the view that necessity would curtail civil liberties during wartime, expressed his view: "The laws will thus not be silent in time of war, but they will speak with a somewhat different voice"[2]. Even more strongly, Justice Antonin Scalia has stated the view that "liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges*" had no place in matters of constitutional rights.[3]

In the two thousand years that separate Cicero from Rehnquist and Scalia, the world has experienced a great deal of warfare and heard many different voices regarding how to handle the delicate question of the relationship between the belligerent god Mars and his subordinates and

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1 Marcus Tullius Cicero, *Pro Milone*, lV, translated by N.H. Watts, 2nd ed., Harvard University Press, Loeb Classical Library, Cambridge, MA, 1953.

2 William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime*, Vintage, New York, 2007.

3 Supreme Court of the United States, *Hamdi v. Rumsfeld*, Scalia, J., dissenting, 542 U.S. 507, 2004.

the frail woman whom we know as Justice. The story of Denmark and Norway after the Second World War is only one of many tales of the attempt to do justice in this field, an attempt which at that time was completely new in the Nordic countries.

In 1945 the International Military Tribunal ('IMT') for Germany in Nuremberg set a new standard introducing and defining crimes against peace, war crimes and crimes against humanity and by not just honouring the excuse that the defendant had acted under orders of his government or his superiors. The IMT was invested with the right to impose the death penalty or other punishment determined to be "just" upon convicted defendants. The way in which the question of war criminals was dealt with in Denmark and Norway was inspired by the IMT and the procedure and the punishments reflected the standard set by it. As is well known, the basic scheme of crimes to be punished by such a court was refined in the Rome Statute which established the International Criminal Court ('ICC') and ratified in 2002. Punishments were then adjusted to new standards and limited to imprisonment of up to 30 years, whereas the question of the death penalty plays a crucial role in the Danish and Norwegian cases.

In the quotations given here, basic notions such as "just", "different voices" and "constitutions" are used. The question of what is considered "just" in such cases must thus be seen against a background of "different voices". This raises, especially in Norway, the question of the importance of constitutional rights when judging war criminals. Thus, taken together, the judgment of war criminals in Denmark and Norway illustrates in a magisterial way some of the more complicated issues connected with international criminal justice.

35.2. Transitional Justice in the Nordic Countries

In all Nordic countries, the war and the dominant position of Germany in the area determined the policies to be followed during and after the war. After 9 April 1940 German forces occupied Denmark and Norway. Even if Sweden remained neutral, the Swedish Government was nonetheless forced to accept that, for example, German troops had access to the Swedish railway system for transportation of both troops and materials necessary for warfare, whereas Finland, to a certain extent, was allied with Germany after having been attacked by the Soviet Union. Iceland, far away in the Atlantic Ocean, and independent from Denmark since

1944, was occupied by British troops, as were the Faroe Islands, whereas Greenland was occupied by the US.

As already mentioned, the situations in Denmark and Norway during wartime were quite different from one another. The German memorandum presented to the Danish Government guaranteed that Danish political and legal institutions were respected by Germany. On the other side, Denmark accepted the fact of occupation by German forces. This memorandum gave the occupation of Denmark its own character. That is, legally it was not a normal belligerent occupation but the situation was classified as an *occupation sui generis*. The Danish King did not flee to London but remained in Denmark. The Parliament was working, as were the Courts and the administrative system including the police and the Danish Army and Navy. Official life functioned as normal with the only – and of course quite notable – difference being that the country was in fact occupied by the German *Wehrmacht* (armed forces) and thus had to conform to certain demands from the occupying power. The situation was dynamic in the sense that German demands became increasingly controversial and at a certain point led to the withdrawal of the Government. Relations between Denmark and Germany were maintained at the top level as if they were two independent countries. No war administration was organised but relations between occupied and occupier were kept at the level of the Foreign Ministers.

Nazi representation in the Danish parliament was minimal. The party never gained more than around 30,000 members and a similar number of votes out of a population of more than 4 million. This meant that the German authorities did not have sufficient interest in setting up a Nazi puppet government which would find no popular support and complicate relations between the two countries. A certain influence was exercised as to the choice of the Danish Prime Minister, but basically the election system and the Government functioned independently even when under constant pressure from Germany for more concessions.

Both Denmark and Germany benefited from this system, which in Danish history is known as the politics of negotiation. It stressing the continuous dialogue between the Danish and German authorities in order to avoid, on the one hand, unacceptable concessions and, on the other hand, a breach which would harshen conditions and force the Germans to take over jurisdiction of Danish citizens or even set up a war regime. From a German point of view there was a point in maintaining the cost of

occupation at a minimum and at the same time having access to Denmark and Danish airports as a springboard to the strategically much more important Norway. Denmark is a country without natural resources and thus completely dependent on the import of raw materials for maintaining its economy. Germany allowed these imports and provided the necessary raw materials, while from the Danish side the main contribution to the German war effort became the export to Germany of agricultural products necessary to keep Germany and its army fed. Major Danish enterprises were also instrumental in the construction of German military installations abroad. As in other occupied countries, some Danes – around 6,000 to 8,000 – even volunteered to fight as a separate unit in the Waffen-Schutzstaffel ('SS', Armed Protective Squadron) on the Eastern Front. Additionally, Danes either went to Germany as workers or were employed on the construction of airbases or fortifications directed against a possible Allied invasion on the Danish west coast.

In principle, Denmark was legally neutral but in a practical sense it definitely was not. The situation was that of extensive official collaboration both economically and physically. To a high degree, the Danish Government – up to a certain point – encouraged this collaboration. The question after the war was to find out how to balance official collaboration conceived as the national interest, *raison d'état*, and private collaboration, which deserved punishment after the war. The rather complicated and, in many ways, entangled political play between the two countries during the war can be justified as an attempt to minimise the costs of the war for the population, but on the other hand it also made boundaries unclear between active collaboration and what could be seen as political concessions.

During the war, more and more German troops were concentrated in Denmark. Gradually, too, with the growth of a Resistance movement, the German police established departments in Denmark and the Gestapo, partly staffed by Danish helpers, became instrumental in fiercely combating the Resistance, using unusual methods of interrogation. As will be seen, war crimes in Denmark – and even more so in Norway – were especially concentrated around members of the German police forces and their behaviour and methods when combating the Resistance, whereas the behaviour of members of the German *Wehrmacht* only in very few cases gave rise to prosecution.

As indicated, the Danish situation during the war was quite subtle and complicated to grasp. In the first years after the occupation, the

Danish Government still functioned. Even when the Danish Government ceased to function after having refused to accept new demands from the occupying power in August 1943, relations between high Danish officials and the representatives of the Third Reich were still maintained with the German representative, the German *Reichsbevollmächtigter*, and mutual negotiations such as handling situations involving tension could still be positive, though in a somewhat different climate. Additionally, German interest in keeping Denmark as a working economic unit led to a continuation of exports and imports to and from Germany and its allies throughout the war.

To understand the way in which the past was dealt with in Denmark after 5 May 1945, and the way in which war crimes were handled, it is necessary to keep in mind this picture of an occupied country without serious destruction, a history of officially encouraged collaboration with the occupying force, a continuously functioning judicial and administrative system, an ongoing economy and farmers who prospered from demand for their products and the high prices these fetched. The occupation itself, on the other hand, was felt in Denmark as a humiliation and a breach of trust by a neighbouring country, and also in some way with a sense of shame. In Denmark it is still a hot issue whether the country actually took too convenient a position and maintained the peace when other countries were fighting for the same cause. Seen from a military point of view, Denmark was defenceless against the German military machine, but still it is an issue whether more resistance should have been shown. Politically the country suffered from restrictions as to fundamental rights, but materially the country was nearly unharmed and there was also a definite consciousness that it could have been much worse. This was instrumental in later negotiations as to how best to deal with war crimes.

Transitional justice became an important part of the return to normal life after the war. A new government representing both traditional politicians and the Resistance movement took over and within a few months new statutes were passed by the Parliament, which had immediately reassumed its functions. Extraordinary penal and procedural statutes were issued as a supplement to the existing Criminal Code and Procedural Code.[4] The Danish Criminal Code of 1930 did not foresee a

[4] As to the following, see Ditlev Tamm, *Retsopgøret efter besættelsen*, Gyldenhal, Copenhagen, 1984.

situation of such an untypical occupation as had happened. The Code criminalised only acts of collaboration with the enemy during time of war or imminent danger of war. Even if the Resistance maintained that a war had been waged in Denmark, legal experts endorsed specific legislation with retroactive force in order to establish a valid basis for adjudication. This was especially seen as necessary if collaborators such as Danes who had volunteered as soldiers in the German Army were to be punished. The level of punishments was also changed. The death penalty had been abolished in 1930 outside military jurisdiction but it was felt in Parliament that just retribution required its reintroduction. The death penalty especially envisaged those Danes who had served in the German police and who had committed torture or murder. Representatives of the Resistance movement pushed for severe treatment of people considered as collaborators with Germany or directly as traitors. A total of about 14,000 people were convicted under these statutes, which were knowingly given retroactive force. Unlike in Norway, this question did not raise much discussion in the Danish Parliament. The line of argument, which came to be accepted as a general viewpoint, was that new statutes with retroactive force were considered necessary to placate the widespread feeling of justice having to be done and to avoid private revenge and people taking the law into their own hands. Whether this fear had a real basis is open to discussion.

Trials of German war criminals in Denmark were a part of this general picture of transitional justice with the aim of doing away with the past in an orderly manner and then returning to normality. The way in which it was done can only be understood from this historical background. However, prosecution of war criminals in Denmark has a history of its own detached from the general purge and with a different scope.

Significant differences as to the prosecution of war criminals in Denmark and Norway were due to the different war regimes in the two countries. Whereas military resistance – as already mentioned – was abandoned in Denmark in 1940 after a series of short skirmishes on 9 April, in Norway the Army continued fighting for months until their final surrendering. In the meantime, the Norwegian King and the Government had fled to London. A provisional Norwegian Government was installed. From 1942 this government was headed by the arch-collaborator Vidkun Quisling, an ardent Nazi whose name later became an eponym for a

collaborator. Unlike Denmark, Norway was subjected to a war regime headed by a brutal German *Reichskommissar*, Josef Terboven. A harsh period of occupation began, with concentration camps, persecution of Norwegian Jews and a Nazi regime all very different from the atmosphere of negotiation between ostensibly equal parties that was characteristic of the situation in Denmark. In both countries a Resistance movement gradually arose, though organised in different ways. Another important difference was that the Norwegian Nazi Party (Nasjonal Samling) had much stronger support than the corresponding Danish party (Danmarks Nationalsocialistiske Arbejderparti) and that the Norwegian police force was strongly Nazified and was the executive force of a Nazi Government.

Yet another important difference compared with the situation in Denmark was the existence of an exiled Norwegian Government based in London. Thus even during the occupation norms were laid down in the shape of so-called provisional statutes that were the necessary basis for trials of traitors and war criminals. However, this specific situation also gave rise to complicated constitutional questions which in Norway were more controversial than in Denmark as the Norwegian Constitution expressly prohibited issuing penal laws with retroactive force. This question especially became crucial in the case of war criminals. In Denmark no such constitutional prohibition existed as to retroactive force.

35.3. Dealing with War Crimes

After the war, prosecution of traitors and collaborators led to a high number of convictions in both Denmark and Norway. In both countries the post-war trials included German war criminals.[5] Prosecution of war criminals in Denmark took place under a specific statute passed in Parliament and issued on 11 July 1946. The statute was directed against non-Danish citizens who had committed crimes punishable under Danish law for disregarding international law and custom as to the rules of occupation and war. Moreover, the statute generally criminalised war crimes and crimes against humanity so far as such acts were committed against the rules of occupation and war, deportation or persecution on the grounds of religion or race or other acts punishable by the statute for the

[5] See Johs Andenæs, *Det vanskelige oppgjøret*, Tanum-Norli, Oslo, 1980 and Berit Nøkleby, *Krigsforbrytelser: brudd på krigens lov i Norge 1940–45*, Pax Forlag, Oslo, 2004 with a complete list of trials.

International Military Tribunal.[6] This Danish statute, while part of a complex of statutes with retroactive force which was introduced as a basis for transitional justice in the years after 1945, nonetheless had its own character. The statute was clearly inspired by the statute of the Nuremberg IMT and it likewise included the death penalty.

The late date of this act reflects a certain Danish reluctance to take an effective stand against war crimes.[7] In July 1945 Denmark became a member of the United Nations War Crimes Commission ('UNWCC') and only in November 1945, after Denmark had signed the London Agreement (which included the Charter establishing the IMT) did official deliberations start as to war criminals in Denmark. An argument for prosecution of war criminals in Denmark was the international position of the country. The Danish Ministry of Foreign Affairs took the initiative, and it was argued that neglecting prosecution outside Denmark could be seen as a sign that Denmark was still trying to maintain a sort of neutrality and did not want to stand up as an ally, with the result that Denmark's international reputation could be harmed. Leading politicians, on the other hand, feared that charges of war crimes against those principally responsible for German policy during the occupation would not lead to sentences harsh enough to satisfy the population. Thus, it would be better not to prosecute war criminals in Denmark. In particular, it was foreseen that international law on the rights of an occupying power to protect itself would be invoked in these cases in favour of measures taken by supposed war criminals and to the detriment of the legality of actions by the Danish Resistance movement. The question of prosecution thus had both an external and an internal aspect. Investigations were therefore made concerning the possibility of handing over German war criminals in Denmark to the British. This, however, turned out not to be a possibility and eventually the view prevailed that Denmark had an international duty to prosecute war criminals in Denmark. In February 1946 a commission was appointed with the task of deliberating legal questions in connection with prosecution of war criminals in Denmark and eventually preparing the necessary legal basis for prosecution. One discussion during preparation of a specific penal act concerning war criminals was whether

6 Lov nr. 395 af 12. Juli 1946 om kriggsforbrydelser (Act on War Crimes, 12 July 1946).

7 On this and the following discussion, see Tamm, 1984, *supra* note 4; and Winther Hansen, "Opgøret med krigsforbryderne", Unpublished Paper, p. 20.

a designated tribunal should be established or whether the ordinary Courts should handle cases. The latter standpoint prevailed in Parliament. Compared to the intense debates in Parliament concerning prosecution of Danish collaborators, interest seemed to be low in discussing war criminals and complicated questions connected to prosecution of war criminals. This was a task that had to be done according to international agreements. The Law on the Punishment of War Criminals was issued on 12 July 1946. The original draft of this law was closer to the Statute of the IMT than the end result due to the draft being amended in Parliament.

From the Danish side there was also some interest in the actual procedures at Nuremberg. A Danish delegation was formed and some of the individuals indicted in the Danish processes also gave testimony at Nuremberg. Generally, however, it can be stated that the course of the Nuremberg Trials did not influence Danish prosecutions or the way the Courts handled cases. The Danish approach to handling cases was thus completely shorn of the publicity attached to the IMT.

In Denmark, a total of 83 individuals were prosecuted for war crimes. Of these, 77 were German citizens. Three Danish citizens were also prosecuted for war crimes committed outside Denmark.[8] The Danish Courts sentenced 77 war criminals. Nothing was really prepared in these cases, which therefore only slowly started when the Act was issued in July 1946. Indeed, more than a year was to pass before the first cases could be brought before the Court. As in other countries, some of those wanted for war crimes had disappeared and the first step necessarily was to establish which of those on the list of suspected war criminals could actually be identified and found. In many cases, sufficient proof was complicated to establish, and in general the prosecutors gave priority to the ongoing purge directed towards national collaborators and postponed the more complicated issue of international war criminals. Priority was also given to the cases against the German leaders, with the prosecution expressing the wish that the smaller cases should not be handled until the Courts had established the responsibility of the leaders. As the cases against the German leadership were more complicated than the others,

[8] These cases dealt with concentration camp guards. War crimes committed by Danish soldiers in the Waffen-SS in general were neither investigated nor prosecuted and have only recently been described in Dennis Larsen, *Fortrængt grusomhed: Danske SS-Vagter 1941–45*, Gyldenhal, Copenhagen, 2010.

this point of view would necessarily lead to a general postponement of cases against war criminals.

General prosecution strategy was laid down by the Ministry of Justice, which also maintained relations with the UNWCC in London. At that time prosecution of war criminals in Norway had been in progress for some time. There, about half of the cases investigated were not pursued further and a similar course was followed in Denmark. The general rule was therefore that only cases of a certain seriousness were pursued. That would include most cases of physical torture against members of the Resistance in order to obtain a confession, whereas the Norwegians would only pursue a case if a certain number of incidents of torture had taken place. There also seemed to be a tendency to pursue criminals who were present in Denmark and abandon cases if the criminal had to be found abroad. Thus it proved impossible for any suspected war criminals to be handed over by the Soviet Union. In the case of war criminals outside Denmark only more serious crimes were pursued, such as systematic torture in several cases. This meant that a stricter line was followed than in Norway. This may reflect the fact that in Norway several more serious cases to pursue were found and a certain limit had to be set up in order to avoid too many convictions. In the summer of 1947 the Danish Ministry of Justice also became aware that the UNWCC was changing its practice and had raised the borderline between war crimes and petty cases not to be pursued. All in all, the preparation of cases for final acceptance by the UNWCC was another factor that contributed to delaying the start of prosecution of war criminals in Denmark. Originally, investigations had been directed against 234 individuals, with cases divided into A Cases, which were clear, and the more dubious B Cases. Around a third of cases, so-called C Cases were abandoned. In January 1948 around 160 individuals on the Danish list had been accepted by the UNWCC. The final prosecution was directed against 83 individuals, of whom 77 were Germans, two were Austrians, one was a former Swiss and three were Danes.

The Copenhagen Municipal Court handled all cases. The first sentence was handed down on 26 November 1947.[9] The cases concerned a member of the German police, Hans Krüger, who was convicted of two cases of rape. This was not a typical case of torture or murder. Krüger was

[9] *Ugeskrift for Retsvæsen*, 1948, p. 909.

sentenced to 12 years' imprisonment and the verdict was corroborated by the High Court on appeal. Around three quarters of the remaining cases were decided during 1948. The last case, against Horst Issel, a member of one of the gangs established to execute German terror, was decided on appeal on 19 November 1950.

The most spectacular and significant cases concerned the highest German authorities in Denmark. In the second level there followed cases against German policemen who had taken part in killing or torture. The great majority of cases were directed against German police officers and concerned homicide, torture and other maltreatment of prisoners, mostly from the Danish Resistance movement. These cases resulted in a series of sentences ranging from life imprisonment to several years and generally the punishment was more lenient than in the case of Danish helpers or assistants to the German police. None of the trials resulted in a final death sentence, even if this was possible under the specific Act on the Punishment of War Criminals passed in Parliament in July 1946.

Unlike their Norwegian counterparts, the highest German leaders had neither fled the country nor committed suicide by the end of the war but did come to trial. The most significant of the two bigger war criminal trials in Denmark was directed against the so-called German *Reichsbevollmächtigter*, Werner Best, and with him the leader of the SS in Denmark, Günther Pancke, and the chief of the German Security Police, Otto Bovensiepen. This process also initially included General Hermann von Hanneken, head of the *Wehrmacht* forces in Denmark. However, he was acquitted at first instance. The second, so-called "smaller" war crime case was directed against the head of the Gestapo in Denmark, Karl Heinz Hoffmann, and a series of Gestapo officers.

A crucial figure in German politics in Denmark during the occupation was Best, who in many ways can be considered a model figure for an understanding of the complicated web of Nazi policies. The process against him was not typical but can be seen as iconic for the complicated legal questions involved in the Danish prosecution of war criminals. Unlike the two police leaders and his Norwegian colleagues, Best had not acted directly through violence and brutality. Rather, he used his power to play a much more subtle role, which as things went on was so convincingly subtle that he was not unmasked – as we tend to see the Nazi leaders today – by the somewhat naive Danish Courts, which would listen to excuses and consider his position in Denmark without regard to

his role in building up and maintaining the Nazi regime and his responsibility for Nazi crimes in general.

Best has his own biography by the German historian Ulrich Herbert.[10] Best belonged to the generation of young German academics who, disillusioned by the Peace Treaty of Versailles, were radicalised and at an early age were attracted by Hitler and Nazism. He was a lawyer, graduated as a *Doktor* of law, worked as a lawyer and joined the Nazi Party in 1930 and the SS in 1931. He was actively involved in the Nazis coming to power in 1933 and immediately became chief of police in Hessen. He was already suspected at that time of murder and was one of the first to establish a concentration camp for political adversaries. In 1934 Best joined Heinrich Himmler and took part in the murderous "Night of the Long Knives" against the paramilitary *Sturmabteilung* (SA) at the same time as he obtained a leading position in the Gestapo, where he saw to it that the Gestapo stood outside any official legal control.

In 1935 he was the editor of a *Festschrift* to Himmler in which he exposed his ideas of German supremacy, the so-called *Grossraum*, the inferiority of certain peoples and the claim by Aryan Germany to rule and organise the world. In his article, Best also exposed his view as to governing people of a higher standard. In this case brutality should not be used but as far as possible these people should govern themselves within the framework set up by German hegemony. This was exactly what he practised when he came to Denmark in 1942 as *Reichbevollmächtigter* and thus representative of the German Foreign Ministry. In 1939 he was the third in the organisation of the German police after Himmler and Reinhard Heydrich. He wrote a book on the function of the German police which was standard reading, and in Poland after the German occupation he took an active part in organising specific forces with the murder of civilians as their task. In 1940 he came to occupied France and was active in the deportation of French Jews; in 1942 he joined the foreign service and in that capacity was sent to Denmark in the same year as German representative. His prehistory was only vaguely known in Denmark and was also not taken into account in the war crimes trial against him in Copenhagen. In Court, Best took the position of not recognising the jurisdiction of any Danish Court over him as a

[10] Ulrich Herbert, *Best: Biographische Studien über Radikalismus, Weltanschauung und Vernunft 1903–1989*, Verlag J.H.W. Dietz, Bonn, 1996.

representative of a sovereign power. He therefore did not address the Court, but he accepted being defended by a Danish lawyer, who actually did quite a good job for him.

In the period between 1942 and 1945, relations between occupied Denmark and the German occupying forces changed dramatically from rather peaceful to active resistance. The Germans tried to intimidate resistance by terror, so-called *Nacht-und-Nebel* (night and fog) or anti-terror action, which implied murder and destruction of property without responsibility being taken by the occupying force. Organising such action was an important part of the indictment against Best and the police leaders. The prosecution also maintained that Best should be seen as the main person responsible for action taken in October 1943 against Danish Jews, who until then had lived peacefully in Denmark. As is well known, most of the 8,000 Danish Jews were evacuated to Sweden, but still around 500 were sent to concentration camps. A third charge, especially against the two police officers and von Hanneken, was based on action taken in September 1943 against the Danish police. Nearly 2,000 Danish policemen were arrested and taken to concentration camps in Germany, where several died.

The war crimes case against Best started in 1948. He was charged with responsibility for having himself taken the initiative for action against Danish Jews and for his part in German acts of terror. The trial had a complicated course. How active and decisive the role of Best really was in action against the Jews is still discussed and difficult to clarify completely. It is a fact that Best directed himself to his superiors in Berlin and asked for action to be carried out with the purpose of having Denmark "*Judenfrei*". However, the plan was leaked to the Danish authorities and the Jews were warned, thus enabling evacuation of the great majority of Jews to neutral Sweden without German forces really actively trying to hinder it. Whether it was Best himself who leaked the plan or authorised a subordinate to do it, or whether it was a subordinate alone, cannot be completely clarified. At first instance, however, Best was held responsible both for this action and for actively planning German terror acts and was sentenced to death. Bovensiepen, head of the German police, was also sentenced to death at first instance.

At second instance, in the High Court, the tables were somewhat turned. The Court preferred not to hold Best responsible for action against Jews and, as to the terror acts, the Court took into consideration as

mitigating circumstances that Best had tried to avoid harsher action and in general international law as to the right of an occupying power to defend itself and organise limited action to prevent sabotage was taken into consideration. The result was a sentence of five years' imprisonment. There were widespread popular protests against this mild sentence. The case was brought before the Supreme Court and the end result was a sentence of 12 years' imprisonment. The two police chiefs were sentenced by the Supreme Court to 20 years for Pancke and life imprisonment for Bovensiepen. Other German war criminals such as the Gestapo leader and those who had committed homicide as part of the terror similarly received long prison sentences. The question of using the death penalty is crucial. In modern society the death penalty seems unacceptable and, as a consequence, the rules of the ICC do not include the death penalty. After the Second World War, the death penalty was actually used and in Denmark 46 individuals were executed mostly for homicide or torture committed in German service. It remains a question whether a person such as Best, with so much intellectual responsibility for the politics and behaviour of the Third Reich, really was handled with too much leniency due to a lack of understanding of the crucial role that individuals of his stature precisely played in the atrocities of the Third Reich and for which those mainly responsible were actually executed.

Of 83 individuals prosecuted in Denmark only six were not convicted. Of the remaining 77 war criminals, 20 were in the end sentenced to five years or less in prison, 25 to prison from five to 10 years, 17 sentenced to between 10 and 15 years, and 17 to sentences of more than 15 years of which two received life sentences. At first instance, eight individuals were sentenced to death. Only one of those sentences was confirmed in the end. This was the case of a Danish concentration camp guard who had committed systematic acts of violence against prisoners in concentration camps outside Denmark. The case was handled by the Courts at a time when the death sentence was no longer carried out. All cases of life imprisonment or death had been handled at three instances. Most cases that were appealed to the High Court resulted in the punishment being mitigated.

Rough statistics of the character of the crime, based on a selection of cases at first instance, show that in 25 cases homicide was decisive for the outcome of the case, and in 39 cases torture and maltreatment. It is

thus clear that basically the general guidelines were followed and only more serious cases were brought before the Courts.

Shortly after 1950 new relations began between Denmark and the new German Federal Republic. That war criminals would be part of the negotiations with a new Germany was already foreseen when prosecution of war criminals was planned in negotiations between the Danish Foreign Ministry and the Ministry of Justice. Both the Danish and the German sides wished to overcome the past and start anew. A feature of this story is that a minority of around 25,000 Germans live north of the German–Danish border and around 50,000 Danes live south of the border. In 1955 a minority agreement was made and part of the history leading to this agreement was the release of German prisoners of war ('POW') in Danish prisons. Those who had been sentenced to less than five years' imprisonment were released more or less immediately after sentencing due to a general policy of reduction of punishments followed since 1948. Additionally, war criminals (the same as Danes convicted under acts against Danish collaborators) sentenced to imprisonment of more than five years were eventually able to benefit from this general policy of punishment reductions. A similar practice was actually followed in Norway and Belgium, whereas the Dutch were more restrictive. Best was released in 1952, and by the end of 1953, after the German government had intervened in favour of releasing the remaining war criminals, the last war criminals sentenced to life imprisonment were released. At that time, it was the position of the Danish Government that Denmark should not be more restrictive than Norway. In December 1952 the Danish Minister of Justice publicly declared that there had been no pressure from the German side for the release of the last war criminals. However, this was true with certain modifications. Danish nationals sentenced for war crimes were not included in reduction of penalty and release. They were sentenced to 14 and 18 years' imprisonment and one to death. They were only released in 1955, 1957 and 1960.

In 1950, after agreement with the Allied Powers, an ordinance was issued with the scope of having the remaining German war criminals in Danish prisons transferred to Allied prisons in Germany. This ordinance was resisted by the war criminals as they feared worse conditions in Germany. The war criminals had this ruling successfully reviewed before the Danish Courts, which stated that a transfer to German prisons would not be in conformity with the rules under which the war criminals were

actually completing their sentences. It is also part of the history of war crimes that after Best returned from Danish prison, German prosecutors tried several times to put him on trial for acts committed in Poland but that until the last moment he evaded justice, relying on his age and health.

The Danish and the Norwegian way of handling war crimes came close to one another, but their differences are also remarkable. By the end of the war, the highest German leaders had nearly all committed suicide and thus were no longer accessible for justice. The Norwegian occupation had been harsher than the Danish one and thus war criminals were more exposed in Norway than in Denmark. In the end, the Norwegian war criminals were punished more severely than the Danish ones, including the imposition of several death penalties. However, the strategy of only accepting cases of a certain seriousness was the basis of the Norwegian prosecution and served as a model in Denmark. The Norwegian guideline seemed to be that a punishment of at least ten years' imprisonment should be expected in order to start a case. The Danish authorities, as already mentioned, were not so strict. Moreover, in Norway the ordinary Courts handled these cases and many of those difficulties both of a practical and legal nature mentioned in relation to prosecution of Danish war criminals were also characteristic of the Norwegian prosecution. Generally speaking, the Norwegians started out before Denmark and the initiative to have the last remaining German war criminals released also stemmed from Norway. It was thus possible in Denmark to learn from the Norwegian experience. In the end, 81 individuals were sentenced in Norway. Of these, 15 were sentenced to death (two were pardoned) and 12 were executed (one committed suicide in prison). Another 16 were sentenced to prison for life and the rest to over 10 years' imprisonment.

A decisive difference between Denmark and Norway was that the prosecution of war criminals had already been planned before the end of the war. Prosecution of German war criminals in Norway was thus based on a provisional decree of 4 May 1945 (later amended and substituted by the Law for the Punishment of Foreign War Criminals passed by the Norwegian Parliament on 13 December 1945). As already mentioned, a Norwegian government in exile in London was able to issue legislation. The provisional statute of 4 May on punishing foreign war criminals was just such a provisional ordinance. Article 1 of this Ordinance runs as follows:

> Acts which according to their nature are subject to Norwegian criminal law can be punished under Norwegian law when they are contrary to the laws and customs of war, are committed by enemy citizens or other foreigners in the service of the enemy or subordinated to him, and the act was perpetrated in Norway or was directed against Norwegians or Norwegian interests.[11]

The Ordinance introduced the death penalty for such crimes. Already in 1942, an Ordinance from London had reintroduced the death penalty in cases of homicide and maltreatment which could be punished by prison for life. It was also stated that an order from a superior could not be used as an excuse.

The central figures in the German war regime in Norway had been the *Reichskomissar* Terboven, member number 25247 of the Nazi Party and a veteran of the Beer Hall Putsch of November 1923. Next came the commander of the *Sicherheitsdienst* (SD, Security Service) and *Sicherheitspolizei*, Gestapo in Norway, Heinrich Fehlis, a lawyer, and Wilhelm Rediess, leader of the SS in Norway. Both of the latter also had a record from Germany of participating in deportations and killings of Jews. Educated as an electrician and a member of the SA and the Nazi Party since 1925, Rediess had organised so-called gas wagons for the systematic killing of mentally disordered Jews and was known for paying a reward for each Jew killed. His position in Norway was a consequence of this initiative. In Norway he organised the *Lebensborn* programme, which furthered sexual relations between Norwegian women and German soldiers and resulted in 8,000 Aryan children being registered in Norway. He, along with Terboven and Fehlis, committed suicide immediately after the German capitulation and thus was not brought to justice. All three men were notorious for their behaviour and most probably would have been sentenced to death after the war.

The preliminary words of the Ordinance expressly stressed that it was not issued with retroactive force because crimes covered by the act were already punishable under international law. However, it was also seen as a consequence of respect for Norwegian legal culture that the Courts should not convict anybody directly under international law but that a Norwegian statute was necessary as the basis for a sentence.

[11] My translation.

The Ordinance of 4 May 1945 gave rise to a legal dispute as to whether it was the case that the Ordinance could be said not to have retroactive force because those crimes were punishable under international law, even if it was the legal position that Norwegian Courts could only consider international law if it had been converted into Norwegian legislation. This issue was important as Article 97 of the Norwegian Constitution of 1814 expressly prohibited legislation with retroactive force.

The question of retroactive force was taken up in the first war crimes trial in Norway directed against Karl-Hans Hermann Klinge, a German Gestapo official who had actively and brutally participated in the persecution and investigation of the Norwegian Resistance movement. He was charged with the systematic torture of 18 prisoners by beatings, pressure and cold baths which in some cases had led to death. The torture was bad but could only result in the death penalty if he was sentenced under the Ordinance of May 1945. In this case, which has since been a model case as to the relationship between international law and national law in the Nordic countries, Justice Reidar Skau spoke for the majority of the Supreme Court who would uphold the Ordinance as in accordance with the Constitution, stressing that the crimes were crimes not under Norwegian law but that they were war crimes against the laws of humanity and the laws and customs of war. He thus could not recognise that there was a conflict with the Norwegian Constitution. He also pointed to the fact that the Ordinance of 1945 was a consequence of Allied agreements as to punishing war criminals. To this he added the consideration that the Constitution did not aim at protection of foreigners who attacked and maltreated Norwegian society and its people. If that should be the case, he saw his sense of justice offended. A minority of two out of 11 judges saw the prohibition in the Constitution against retroactive force as absolute and stressed that it should especially be applied in extraordinary situations and therefore they could not accept the death penalty. The spokesman for the minority said that for him it was no disaster that the Courts did not choose a road that could be understood so that the border against arbitrariness was not kept in penal procedure. This case is a showcase of Norwegian respect for the rule of law. With all sympathy for the dissenting Judge Anton Holmboe, it could be argued with Justice Skau that the Courts must sometimes take a firm stand in extraordinary situations.

Many Norwegian cases had to do with Gestapo maltreatment of prisoners. The local Eichmann case was a case against Wilhelm Wagner, leader of the department for Jewish matters in the German police and responsible for the arrest and transportation of 531 Jews in 1942 by the ship *Donau*. The persecution of Jews in Norway took a disastrous course very different from the Danish case. Only 10 Norwegian Jews returned from the concentration camps to which they had been sent. The question in the case of Wagner was whether he could foresee the fatal consequences of his action. He was sentenced to death at first instance, but his punishment was reduced to 20 years' imprisonment by the Supreme Court, which heard his excuse as to having to follow orders and found that the initiative was not his.

A question that also became relevant in Danish cases was the degree to which the excuse should be admitted that certain acts of retaliation were permitted by international law. A much discussed case in Norway concerned the executioner Oscar Hans, who had conducted 215 executions. This was not the issue in the case. To be an executioner is not in itself a crime. However in 78 cases only a decision by the police authorities and no formal judgment formed the basis of the execution. The question therefore arose whether execution in these cases could be considered illegal and should be treated as homicide. Hans's excuse was that he did not understand this distinction. This excuse was not heard by the Court at first instance. The Supreme Court, however, quashed this decision in 1947 and Hans was sent to Germany. His destiny has not been traced. He is said to have been judged by a British Military Court.

The Norwegian trials of war criminals were more or less in their totality directed against German police officers. However, a number of Norwegian nationals committed crimes which would normally be counted as war crimes but, as far as Norwegian legislation and statistics were construed, count as ordinary collaborators sentenced according to legislation affecting Norwegian nationals. The most spectacular cases of breach of the rules of warfare related to the treatment of Yugoslavian and Russian POWs kept in camps in northern Norway. It is reckoned that between 3,000 and 4,000 Yugoslav prisoners, including Croats and Bosnian Muslims, some of whom were civilians, who were deported to Norway and made to do forced labour, lost their lives due to maltreatment by the SS commander Hermann Dolp and his German and Norwegian helpers. In particular, the Norwegian camp guards known as the

hirdvaktbataljon (using an old Nordic term) were notorious for their cruel treatment of prisoners. An especially ominous event was the so-called Beisfjord massacre in 1942. In this case 288 Yugoslavs afflicted by typhus in Beisfjord prison camp were simply shot after having been asked to dig their own graves. Other prisoners were burned alive in their beds.[12] To this should be added the fact that between 10,000 and 15,000 Russian POWs lost their lives in Norwegian camps.

War crimes, especially those committed against Yugoslav POWs, are still discussed in Norway, and it is an ongoing question whether these cases were judged properly, as is the case of those who participated in the arrest of the more than 700 Norwegian Jews who were sent to extermination camps. Moreover, Norwegian volunteers in the German Army participated in the extermination of Jews. These darker sides of Norwegian history during the Second World War have been, in recent years, at a comfortable distance from the events, the object of a renewed debate on Norwegian history during the war. The question is raised whether these cases were investigated and punished with sufficient energy at that time.[13] These issues were not systematically brought before Norwegian Courts after the war, although several camp guards were convicted during the ordinary court trials of Norwegian collaborators and are listed in the statistics there. Of 363 Norwegians on duty in these camps, a total of 21 were sentenced for homicide, six for participating in summary executions, 29 for maltreatment and a few for other crimes. Two were executed, while two were sentenced to death in 1947 but pardoned.

In a 1947 case the Court of the *Eidsiva Lagmannsrett* said about the camps that "it seems beyond doubt that these camps were pure annihilation camps and that the aim was the systematic annihilation of all prisoners". The experience of having Norwegian guards at the camps seemed too atrocious even for the German authorities who later took over the camps from the Norwegians. In the Norwegian Supreme Court, Justice Skau formulated his opinion opposing the view maintained by the defendants' attorney that the atrocities were more excusable than ordinary

[12] Nils Christie, *Fangevoktere i konsentrasjonsleire*, Pax Forlag, Oslo, 2010; Rakel Kamsvåg, "Yugoslav Prisoners of War", 2012, available at http://www.norveska.org.rs/News_and_events/News-and-events1/Yugoslav-Prisoners-of-War-in-Norway/#.VH2sLocWG-o.

[13] Nazi-hunter and director of the Simon Wiesenthal in Jerusalem, Efraim Zuroff, has recently addressed these questions.

homicide due to the special circumstances in the camps which had diminished respect for life. Skau said:

> The […] crime is not just a crime under aggravating circumstances, it is properly considered a war crime – a crime against the laws of humanity […] Prisoners during a war – be they military or civilians – are especially exposed and their only protection consists of that which can be offered by strong legal protection.

35.4. Final Remarks

In both Denmark and Norway, it was an important issue that transitional justice after the Second World War should be done in a way worthy of a "*Rechtsstaat*" and in accordance with the rule of law. Constitutional issues were at stake, especially in Norway. German war criminals enjoyed all the guarantees of such a system apart from the question of retroactive force. The conviction of war criminals was a necessary part of achieving justice after the war. In Norway, more Germans were executed due partly to the generally much harsher conditions of occupation. It is difficult to deny that the Danish situation was specific. The way the war crimes trials were conducted reflects this ambiguity, which also reflected a general insecurity by the judges as to how to handle difficult cases, implying unusual questions of international law. Both the magnitude of the crimes and the complex personalities of some of the leading war criminals posed a challenge to judges used to more ordinary cases and criminals. It is probably a fact that no war criminal in Denmark or Norway was punished harder than he deserved, but as always in such cases one may ask whether those who did the dirty job were punished more severely than those who planned the actions and had the power to do otherwise.

36

Martyrs and Scapegoats of the Nation? The Finnish War-Responsibility Trial, 1945–1946

Immi Tallgren*

36.1. Why and How to Write about the Finnish War-Responsibility Trial Today?

> In place of a complicated empirical world, men hold to a relatively few, simple, archetypal myths, of which the conspiratorial enemy and the omnicompetent hero-savior are the central ones. In consequence, people feel assured by guidance, certainty and trust rather than paralyzed by threat, bewilderment, and unwanted personal responsibility for making judgements.[1]

For the political historian Karl Deutsch, a nation is "a group of people united by a mistaken view about the past and a hatred of their neighbours". Accounts of the past are one of the ways in which individuals and communities construct their identity. The histories of struggle of good and evil and the search for 'heroes' and 'villains' bind or separate people. In a world where individuals identify with their nation states, there is a tendency to find heroes in the home country and anti-heroes abroad. Problems emerge when this collective view of the world is violently shaken in a short period of time. The narrative of heroism and its violent unsettling into ambiguity where no closure is at hand offers one key to understanding the story of the Finnish war-responsibility trial, held

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1 Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence,* Academic Press, New York, 1971, p. 83.

against eight Finnish leaders in Helsinki from 15 November 1945 to 21 February 1946.

The Finnish trial was conducted by Finns in Finland applying Finnish law, but based on an international obligation, the Moscow Armistice between the Soviet Union and Britain with Finland of September 1944,[2] and under tight Allied (Soviet) surveillance. The alleged crimes for which the Finnish accused were tried were in substance similar to crimes in other national and international post-Second World War trials. Considering that it presented neither extravagant legal nor procedural elegance in its proceedings, was held in the secretive vernacular language and did not contain obvious elements of drama, such as capital punishments, it is perhaps unsurprising that the trial is not well-known abroad. Despite the increased attention to international criminal law in the past 20 years, the Finnish war-responsibility trial remains absent in international criminal law textbooks cataloguing post-Second World War national trials.[3] Yet in Finland, it is still a topic of public interest and sensibility, perhaps as a symbolic culmination of the controversies relating to the traumatic period of the Second World War.[4] The ardent controversies concerning the criminal accountability for the war started as soon as the Moscow Armistice was signed. In Article 13 it stated: "Finland shall co-operate with Allied Powers to arrest and pass judgment on those accused of *war crimes*".[5] Together with the use of the

[2] See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series), 4/1944.

[3] See the market-leading textbooks, such as Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013; Robert Cryer Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010.

[4] Most of the historians of recent Finnish history have addressed the trial in one way or another. Much less research has taken place by legal scholars, and even less so from the point of view of international law. For a study commissioned by the Ministry of Justice, see Jukka Lindstedt and Stiina Löytömäki, *Sotasyyllisyysoikeudenkäynti*, Oikeusministeriön selvityksiä ja ohjeita, Helsinki, 2010.

[5] See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) no. 4/1944, and the national implementing law act Suomen säädöskokoelma (Finnish Law Gazette) no. 645/1944. The Armistices between the Allies and Romania and Bulgaria contained a similar clause. The Armistice with Hungary added an obligation to deliver the accused to the concerned governments; see also Tamás Hoffmann, "Post-Second World War Hungarian Criminal Justice and International Law: The Legacy of the People's Tribunals", *HOICL*, vol. 2, 2014, pp. 735–63.

established legal term "war crimes", the lack of substantial discussions on the Article in the negotiations seem to have led the Finnish leadership to believe that the obligation concerned prosecution of conventional war crimes only, not responsibility at the highest political level of foreign relations.[6] The confusion persisted throughout the preparations to implement the treaty obligation, and it was also brought up in the trial. A parallel can be drawn to the controversy concerning the International Military Tribunal at Tokyo that was established in January 1946 based on Principle 10 of the Potsdam Declaration, which promised stern justice for *war criminals*.[7] Adding to the confusion, the Soviet Union also immediately used Article 13 to require national prosecution of conventional war crimes allegedly committed by the Finnish military in the Soviet territories that Finland was occupying.[8] Today, it appears likely that nobody in the autumn of 1944 knew for sure what types of legal measures were to be covered by Article 13. The search for its 'meaning' was in that sense futile. It was a placeholder for some sort of criminal accountability to follow in legal developments of the near future and, as such, it offers a telling example of the elasticity of legal argumentation in times of crisis and transition. As the Allies developed their plans concerning the prosecution of the major war criminals of the Axis, after the conclusion of Finland's armistice it became clear that they expected the highest leadership of wartime Finland to also face criminal liability for the war of aggression.[9]

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6 See, for example, Jukka Tarkka, *13.artikla*, WSOY, Porvoo, Helsinki, 1977, pp. 49–55. On the negotiations of the Armistice in general, see Tuomo Polvinen, *Teheranista Jaltaan*, WSOY, Porvoo, Helsinki, 1980, pp. 92–124.

7 The defence in the Japanese trial challenged the tribunal's jurisdiction for crimes against peace. The challenge was rejected by arguing that the Japanese government had understood that war criminals referred also to those responsible for initiating the war, see International Military Tribunal for the Far East ("IMTFE"), *The United States of America et al. v Araki, Sadao et al.*, Judgment, 4 November 1948, p. 48 (http://www.legal-tools.org/en/doc/28ddbd/). I have not been able to find information on similar legal arguments in Romania, Bulgaria or Hungary, see *supra* note 5.

8 In 1944 Finnish soldiers were arrested for expected trials. Most of them were freed after pre-trial detention without charges and received compensation from the Finnish state for deprivation of liberty. On the so-called List No. 1, in which the Soviet Union had included 61 names of alleged war criminals, see Lauri Hyvärinäki, (Hannu Rautkallio, ed), *Lista 1:n vangit : vaaran vuosina 1944-48 sotarikoksista vangittujen suomalaisten sotilaiden tarina*,, Weilin & Göös, Helsinki, 1983.

9 See Tarkka, 1977, pp. 56–72, 96–126, *supra* note 6; Tuomo Polvinen, *Jaltasta Pariisin rauhaan*, WSOY, Juva, 1981, pp. 131–38.

At the time, some Finns regarded the trial as part of the local communists' preparation for revolution, behind which the whole of international communism was mobilised. [10] For others, criminal responsibility was simply evident and the absence of pre-existing national legislation on the crimes was merely a detail.[11] In the midst of the claims that the principle of legality had been violated and that the trial was a form of victors' justice or national political vengeance, the histories of the trial continue to represent a battlefield of political, ideological and generational conflicts and forms of identification.[12] Commentaries, legal actions and political motions have proliferated down the decades. Distance in time has certainly started to render the controversies less burning and more a matter of principle, considering that even the remaining eyewitnesses who experienced the post-war period as children are today in an advanced age. Yet the memory of the trial still stirs public emotions, and it has a place amongst other sore points of commemoration of Finland's past.[13] These sensitivities persist also in academic research, whether from a historical, legal or sociological perspective, as several scholars conducting research on the period of the Second World War have pointed out.[14]

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[10] See, for example, Yrjö Soini, *Kuin Pietari hiilivalkealla, Sotasyyllisyysasian vaiheet 1944–1949*, Otava, Helsinki, 1956, p. 373.

[11] See, for example, Minister Leino in a government meeting on 8 August 1944, see Hannu Rautkallio (ed.), *Sotasyyllisyyden asiakirjat*, EC-Kirjat, Espoo, 2006, p. 318.

[12] See, for example, Jukka Tarkka, "Tuomio, syyllisyys ja kunnia", in Jukka-Pekka Pietiäinen (ed.), *Sota ja tuomio*, Edita, Helsinki, 2002. For a compilation of personal recollections, see Aarne Långfors (ed.), *Isänmaan vangit*, Otava, Helsinki, 1997.

[13] Zägel and Steinweg point to the particular feature that the position from which history is remembered in Finland is typically that of a victim, in the absence of sentiments of responsibility or guilt and thus the absence of a *Vergangenheitsbewältigung* in the German sense, see Jörg Zägel and Reiner Steinweg, *Vergangenheitsdiskurse in der Ostseeregion*, LIT Verlag, Berlin, 2007, pp. 168–72. On the "victim myth" in Austria, see Heidemarie Uhl, "From Victim Myth to Co-Responsibility Thesis", in Richard Ned Lebow, Wulf Kansteiner and Claudio Fogu (eds.), *The Politics of Memory in Postwar Europe*, Duke University Press, Durham, NC, 2006.

[14] See, for example, Seppo Hentilä, "Aseveljeyden nurjalla puolella: saksalaisten sotavankileirit Suomessa 1941–1944", in Pirjo Markkola (ed.), *Historiallinen aikakauskirja*, SHS and Historian ystävien liitto, Helsinki, 2009, pp. 346–49; Sari Näre and Jenni Kirves, "Esipuhe", in Sari Näre and Jenni Kirves (eds.), *Ruma sota: Talvi- ja jatkosodan vaiettu historia*, Johnny Kniga Publishing, Helsinki, 2008, pp. 7–10. Lauri Hannikainen refers to a tendency of "whitewashing of Finland", see Lauri Hannikainen, "Military Occupation of Eastern Karelia by Finland in 1941–1944: Was International Law Pushed Aside?", in Kjeitl Mujezinovic Larse, Camilla Guldahl Cooper and Gro Nystuen

The most explicit sign of relevance of the histories of the Finnish trial are the recent legal actions that gained considerable attention in the media and public opinion. The events started with an annulment claim to the Supreme Court of Finland in 2008, on the basis of the general Finnish law on annulment of judgments or extraordinary appeals for procedural fault. Ilkka Tanner, grandson of the Social Democratic Party wartime minister Väinö Tanner, requested annulment of the 1946 judgment by which Väinö Tanner had been declared guilty of "misuse of official authority to the detriment of the nation", as well as the annulment of his five and a half-year prison sentence. The Supreme Court of Finland rendered a detailed analysis of the law of 1945 as well as the trial. It unequivocally stated that the trial had violated many of the essential principles of the Finnish legal order. However, it emphasised that the establishment of the tribunal and its activity took place on exceptional grounds and in exceptional circumstances. The Court pointed out that the law of 1945 did not contain provisions on means of appeal, ordinary or extraordinary. Highlighting these special circumstances, the Supreme Court concluded that a retroactive examination of the judgment and the procedure leading to it on the basis of the law on annulment of judgments or extraordinary appeals for procedural fault was not within its competence.[15]

Ilkka Tanner brought the case before the European Court of Human Rights ('European Court'). He based his claim on Article 13 of the European Convention of Human Rights ('ECHR'), which sets out the "right to an effective remedy", and on Article 2 of Protocol No. 7 on the "right of appeal in criminal matters". The applicant claimed that since annulment of the war-responsibility judgment was not explicitly excluded in the law of 1945, the Supreme Court could have considered itself competent. The applicant further claimed that the lack of any means of appeal violated his rights.

In the wake of these domestic and European legal procedures, active public discussion followed, prompting the Ministry of Justice ('Ministry') to react. The Ministry considered various alternative ways to redress the situation, including legislative means to either open a

(eds.), *Searching for the Principle of Humanity in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, pp. 200–1.

[15] Supreme Court of Finland, *Ylimääräinen muutoksenhaku – Tuomion purkaminen rikosasiassa Sotasyyllisyysoikeus*, Decision no. 2008:94, 20 October 2008.

possibility for extraordinary appeal or directly annul the judgment.[16] The Ministry ordered an expert report on the legal aspects of the past trial and the potential options for an official reaction to it outside the sphere of legal remedies, such as a public apology or a statement. In the meantime, the European Court, by a committee of three judges including the Finnish judge, declared the application inadmissible on 23 February 2010. The basis of incompatibility evoked in the decision was that of *ratione personae*, i.e. the appellant could not be considered a victim of a violation in the sense of Article 34 of the ECHR.

The report commissioned by the Ministry, published on 12 March 2010, offers a detailed and carefully balanced reading of the problematic situation it was requested to advise on. In the manner symptomatic of the sensibility of the topic, the report skilfully performs – in the language of figure skating dear to Finns – three salchows, a lutz and an axel, and then leaves the rink. At its boldest, it states without ambiguity that Finland's military activity in the Soviet Union fulfilled the material elements of crimes against peace, as understood in international law at the time of the trial.[17] The report, however, questions whether international law was already considered to supersede potentially contradictory national law at the time of the trial, and whether the London Agreement formed a sufficient basis for the individual criminal responsibility imposed on the eight accused in the Finnish trial in accordance with Article 13 of the Moscow Armistice. Oscillating between expressions of strong reservations and a literature analysis supporting a progressive view of international law at the time, the report hesitatingly concludes in the positive.[18] At the same time, it dwells at length upon the serious breaches of the Finnish Constitution, as well as other highly problematic aspects of the trial.[19]

The Finnish trial and its polemic aftermath are by no means unique in Europe or globally. They highlight questions of collective memory and

[16] "Väärät tuomiot sotasyyllisyydestä ministeriön syyniin", in *Helsingin Sanomat*, 5 February 2009. See also Lindstedt and Löytömäki, 2010, pp. 84–85, *supra* note 4.

[17] Lindstedt and Löytömäki, 2010, pp. 82, 51, see *supra* note 4, the latter with reference to Hannikainen, 2013, see *supra* note 14.

[18] Lindstedt and Löytömäki, 2010, pp. 51–57, see *supra* note 4. For a critical view on this, see Mikaela Heikkilä, "Suomen sotasyyllisyysoikeudenkäynti ja kansainvälinen rikosoikeus", in *Lakimies*, 2010, no. 4, p. 638.

[19] See Lindstedt and Löytömäki, 2010, pp. 29-48, *supra* note 4.

its politics: What does the memory of the trial represent and to whom?[20] Why does the story of this trial matter so much? What sense does the judicial treatment of (legal) history have? Can the past be revisited in a court, and perhaps improved the second time? How should today's democracies look back to legally deficient past trials, if they revisit them at all? Should controversial judgments be annulled or public apologies presented, as is frequently proposed in Finland?[21] If yes, which judgments among the many? As the report of 2010 emphasises, the war-responsibility trial is by far not the only controversial or questionable legal episode in Finnish history.[22] That is among the reasons why the report cautions against using legislative means to retroactively redress the outcome of the war-responsibility trial. With regard to the other means, such as a public apology or a statement aimed at nullifying the judgment or other political reactions, the report does not advance a clear opinion.[23] As the report points out, the practice of expressing public apologies by the government is almost unheard of in Finland.[24] An exception took place in 2000, when Prime Minister Paavo Lipponen apologised publicly for the Finnish State Police handing over eight Jewish refugees, including two children, to the German authorities, all but one of whom died in Auschwitz.[25] Meanwhile efforts to 'render the honour' of the convicted, in one way or another, continue. In April 2012 the newly elected

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[20] On collective memory, see Maurice Halbwachs, *La mémoire collective*, Albin Michel, Paris, 1997; Paul Ricoeur, *La mémoire, l'histoire, l'oubli*, Le Seuil, Paris, 2000; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, New Brunswick, 1997. See also Lebow, Kansteiner and Fogu (eds.), 2006, *supra* note 13.

[21] Among the earliest powerful demands, see Yrjö Soini, *Toinen näytös - entä kolmas?*, Karisto, Ha□meenlinna, 1968.

[22] Lindstedt and Löytömäki, 2010, p. 88, see *supra* note 4. See also, Jukka Kekkonen, "Sotasyyllisyys ja kansakunnan muisti", in *Helsingin Sanomat*, 10 March 1996, p. A2.

[23] Lindstedt and Löytömäki, 2010, pp. 81–88, see *supra* note 4.

[24] *Ibid*., p. 85. However, Markku Jokisipilä, *Aseveljiä vai liittolaisia?*, Suomalaisen kirjallisuuden seura, Helsinki, 2004, p. 25 refers to an apology presented by the Finnish Council of State to the families of the convicted of 1946 war-responsibility trial, without further information on the occasion and time of the apology. The same information is repeated in a few academic works, such as Jouni Tilli, *Luovutuskeskustelu menneisyyspolitiikkana*, M.A. Thesis, Institute of Social Sciences and Philosophy, University of Jyväskylä, 2006, but is absent in Lindstedt and Löytömäki, and Tarkka, *Hirmuinen asia*, WSOY, Helsinki, 2009. Upon my request in September 2014, the information service of the Council of State and the National Archive were unable to find a trace of such an apology.

[25] Elina Sana, *Luovutetut – Suomen ihmisluovutukset Gestapolle*, WSOY, Helsinki, 2003, pp. 15–16.

conservative President Sauli Niinistö was presented with a petition asking for a rehabilitation of the convicted.[26]

Under these conditions and with the distance of time of 70 years, what is the sense of studying the Finnish trials today, in particular as part of a collective research effort into the "origins" of international criminal law? Several alternative approaches and historiographical choices present themselves. For example, is a history of the Finnish trial constructed as a description of a separate single event, or as a part of a chain of evolution of the principle of individual criminal responsibility in international law? Is it connected to a broader argument, such as the inherently political nature of international law or the limited sovereignty of small states in terms of realpolitik? Should a history told today in the context of the above-mentioned research objectives primarily address issues that can be considered to have relevance to current discussions on international criminal trials? An example of such a 'useful' focus would be to analyse the jurisdictional frame of the Finnish trial as a confrontation between an international legal obligation, on the one hand, and national legislation on the other, with its vernacular judicial culture. A comparative study on this could try to elucidate the potential limits of prosecuting large-scale leadership criminality in *ad hoc* justice established for specific situations, with a fixed jurisdictional slice in time and space, and a pre-set focus of prosecution.[27]

The Finnish trial could also be approached as a case study on whether criminal justice is able to appease post-conflict societies and support their transition to peace-loving members of the "international community" with new, democratic governments. Did the trial bring closure and, if so, for whom? Whose interests did it serve? What are the perspectives of different actors, whether the accused, the judges, the new Finnish government, the Soviet or British governments? The political and practical difficulties encountered by the recent *ad hoc* tribunals or the International Criminal Court ('ICC') in the areas of their territorial jurisdiction, as well as the uncertainties about their legacy in the societies

[26] Veikko Saksi, *Sotasyyllisten rehabilitaatio vai tuomioiden purku*, Kustannusosakeyhtiö Otava ja Karjalan Kuvalehti, Helsinki, 2012, pp. 205–6.

[27] I have touched upon this question in Immi Tallgren, "The Finnish War-Responsibility Trial in 1945–46: The Limits of Ad Hoc Criminal Justice?", in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013.

concerned could be evoked in comparison. What difference does it make that – as a striking contrast to today's international trials – the individual victims of Finnish aggression and occupation of the Soviet territories (civilian victims of casualties in combat, military victims, prisoners of war, civilians interned in Finnish concentration camps, owners of pillaged property, etc.) were not present, neither physically in the trial nor in a significant manner evoked in the discussions? Instead, the Soviet and British military and political representatives in the Allied Control Commission ('Commission') followed the trial, acting in the role of the "owners of the cause". The *Rechtsgut* violated by the Finnish crimes appears to have been primarily understood as the sovereignty of the injured state (in this case, the Soviet Union) and its territorial integrity. Human suffering and losses of civil populations or the military were considered accessory. This interpretation could serve as a starting point for analysing the paradigm change of the position of the individual in international law that international law scholarship often situates in the post-Second World War period, in particular the Nuremberg and Tokyo trials and the Universal Declaration of Human Rights. In the Finnish trial, then, the new role of the individual was visible through the manner in which a few individuals, having exercised functions in the Finnish leadership, were personally held accountable for large-scale political and military actions undertaken over four years. Yet from the perspective of victims, the individual suffering and loss did not yet have relevance, and those individuals had no standing in the trial. A study on how the collective and individual victimisation by the crime of aggression has been understood in different past trials would have primary interest to today's scholarship, considering the recent amendments to the ICC Statute to define the crime and to include it in the ICC jurisdiction, which is currently under ratification in many countries, including Finland.[28]

My attention in this chapter is focused on yet another direction, less directly identifiable as "contributing to the development of international criminal law",[29] an expectation towards research and researchers that I

[28] The jurisdictional revisions are yet to be confirmed by another conference. See, for example, Claus Kress and Leonie von Holzendorff, "The Kampala Compromise on the Crime of Aggression", in *Journal of International Criminal Justice*, 2010, vol. 8, p. 1179–1217.

[29] Centre for International Law Research and Policy, "The Historical Origins of International Criminal Law: Seminar 1 Concept and Programme".

critically analyse in the foreword to this volume.[30] As with many other authors with their particular contributions in this volume, I had to face the challenge of presenting the Finnish trial at the length of a seminar paper, to an audience largely unfamiliar with either the big picture of Finland's history or the particular events of the Second World War in Finland, and thus unfamiliar with the political, sociological and legal context where the trial took place. Considering that in the case of small states the archive materials and an overwhelming majority of commentaries are available only in the national language not accessible to many, the researcher has no other choice than to assume the responsibility of both translating most of the references and trying to convey a dense academic and public discussion unknown by her readers. The inevitable need to simplify and condense, to offer background and yet to highlight issues that one personally finds most significant, based on one's education, professional background and view of the world in general, are practical demonstrations of the dilemmas of authorship and perspective in disciplinary histories that I problematise in the foreword.[31] Such complexities and limits, emblematic of interdisciplinary research in legal histories in collective, comparative projects were never far in preparing this chapter. Communicating rich sediments of national historiographical and legal analysis in a few pages – a common method of work in these projects – can easily turn to serving snapshots of the past imagined by a local informant, trading historical anecdotes, worn-out clichés, ignorant "selfies" in the midst of popular polemics, all these served together as tiny portions of colourful tapas on the enlarging plate of "global history".

The remedies with which I tried to cope when faced with those dilemmas are three-fold: 1) being open to these difficulties, by purposefully breaking any illusion of a single coherent story of the Finnish trial that I would be authorised, competent and able to deliver; 2) striving to provide some references to material published in other languages, even if the analysis in "short histories" or comparable may not always be at the level of precision and insight of the domestic ones – in order to avoid presenting only arguments on which there is no way for a reader unacquainted with the vernacular language to form an independent

[30] Immi Tallgren, "Foreword", in *HOICL*, vol. 1, 2014, pp. xi–xxx.

[31] *Ibid*.

opinion;[32] 3) stating explicitly the direction in which my interest was focused in drafting the chapter, in the search for an aspect that could somehow have more general interest in today's analysis of criminal justice for crimes of an international nature, beyond the particularities of the Finnish context and its events and actors.

Now turning to the third point: the motivation in writing this chapter was to approach the Finnish story as a potential case study as part of a larger research effort tracing representations of heroism, martyrdom and sacrifice in international criminal trials.[33] In the case of the Finnish trial and its reception, the question posed was: What would a reading in terms of sacrifice or martyrdom bring to historiography of the trial? Whereas sacrifice can refer to heterogeneous ritual practices in different religions, it is here used in a non-specific cultural understanding, which

[32] For general aspects of Finnish history in English, I have used: Fred Singleton and Anthony F. Upton, *A Short History of Finland*, Cambridge University Press, Cambridge, 1998; David Kirby, *A Concise History of Finland*, Cambridge University Press, New York, 2006. See also William R. Trotter, *The Winter War: The Russo–Finnish War of 1939–40*, Aurum Press, London, 2003. In German, Zägel and Steinweg's comparative study, 2007, see *supra* note 13, was very useful, and it also provides a bibliographical online resource. In French, a recent general presentation is Bernard Le Calloc'h, *Histoire de la Finlande*, Editions Glyphe, Paris, 2010. Earlier editions of Osmo Jussila, Seppo Hentilä, Jukka Nevakivi's much-used commentary, the latest original edition of which is *Suomen poliittinen historia 1809–2009*, WSOY, Helsinki, 2009, have been translated into several languages, see, for example, *Histoire politique de la Finlande - XIX^e–XX^e siècle*, Editions Fayard, 1999; *From Grand Duchy to a Modern State: A Political History of Finland since 1809*, Hurst and Co., London, 1999. See also Tuomo Polvinen, *Between East and West, Finland in International Politics 1944–1947*, Werner So□derstro□m Osabeyhtio□, Helsinki, 1986, that is an edited compilation of Polvinen's three-part study published in Finnish in 1979–1981.

[33] In my ongoing research project "Images of History", heroism, sacrifice and martyrdom are understood as broad cultural, anthropological and theological concepts. A detailed analysis of relevant literature is beyond the scope of this article; some references to commentaries evoking sacrifice and martyrdom in the context of international criminal trials are presented in the conclusions chapter. For examples of theological readings of international law, including analysis of sacrifice see, for example, Judith Grbich, "Secrets of the Fetish in International Law's Messianism", in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006, pp. 197–220; Anne Orford, "Trade, Human Rights and the Economy of Sacrifice", in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006; Jennifer Beard, "Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology", in *Australian Feminist Law Journal*, 2003, vol. 18, pp. 27–54; Jennifer Beard, *The Political Economy of Desire: Law, Development, and the Nation*, Routledge-Cavendish, London, 2006.

ranges from the metaphorically offering of individuals' lives or destinies to a higher purpose, to the selfless, voluntary good deeds for others in return for a greater long-term gain or higher cause. Sacrifice is understood as a performative ritual exercise, with potentially deep socio-psychological and cultural repercussions. Similarly, martyrdom can be understood beyond its specific meanings in different religions, in an extended metaphorical sense of a believer or one who has adopted an ideological cause and is called to witness for this belief or conviction, and on account of bearing witness endures negative consequences, such as criminal punishment, loss of honour and social status. My initial impression was that the Finnish trial presents aspects of both scapegoating sacrifice and martyrdom, depending on the point of time and perspective from which it is interpreted. In the commentaries on the trial, both terms appear very often either to describe how the Finns at the time or today feel about the convicted or as a personal opinion of the author, but the terms do not get further analysed.[34] To go beyond the intuition, in the following section I will briefly present the geopolitical and legal context of the trial and how that context, the trial and the convicted individuals have been and continue to be represented.

36.2. The Geopolitical Background of the Alleged Crimes and the Trial[35]

When Stalin says "dance", a wise man dances.[36]

In 1938 the Soviet Union, threatened by Germany, started to pressure Finland with territorial claims to gain space for its defence, in particular

[34] See, for example, Zägel and Steinweg, 2007, p. 169, *supra* note 13; Lasse Lehtinen and Hannu Rautkallio, *Kansakunnan sijaiskärsijät*, WSOY, Helsinki, 2005; Jussila, Hentila and Nevakivi, 2009, p. 225, *supra* note 32; Henrik Meinander, *Tasavallan tiellä: Suomi Kansalaissodasta 2000-luvulle*, Schildts, Espoo, 2012, pp. 254–55; Jouko Vahtola, *Suomen historia: jääkaudesta Euroopan Unioniin*, Otava, Helsinki, 2003, p. 382; Martti Turtola, *Risto Ryti: Elämä isänmaan puolesta*, Otava, Helsinki, 1994, p. 339; Niku, *Kahdeksan tuomittua miestä: Sotasyyllisten vankilavuodet*, Edita, Helsinki, 2005, p. 229. As the compilation of materials reprinted in Rautkallio, 2006, see *supra* note 11, demonstrates, the terms were in use already at the time of the trial, in particular by Prime Minister and later President J.K. Paasikivi, see, for example, pp. 347, 358.

[35] This summary presentation follows in broad lines Jussila, Hentilä, Nevakivi, 2009, see *supra* note 32, and Singleton and Upton, 1998, see *supra* note 32.

[36] Nikita S. Khrushchev, in *Khrushchev Remembers*, cited by Trotter, 2003, unnumbered front page, see *supra* note 32.

to protect the city of Leningrad. At that point Finland had only been an independent state for 21 years, having previously been part of the Russian Empire as an autonomous territory until 1917. The early existence of an independent Finland had been marked by a violent civil war in 1918 where the industrial and agricultural working classes (the Reds) fought against the conservative government (the Whites), led by later war hero and president, Marshal Carl Gustaf Mannerheim and supported by a German military intervention. The civil war was followed by heavy judicial and extrajudicial repression of the lost party, the Reds.[37]

It was not the first time in the short history of independent Finland that it had to negotiate about its territory with its huge Eastern neighbour. After Finland's independence in 1917, it took a few years before the border between Finland and Russia/Soviet Union became stabilised. Although the area of Eastern Karelia had been part of Russia since the Peace Treaty of Stolbovo between Sweden and Russia in 1617, Finland claimed the right to annex that area to its territory, arguing linguistic and ethnic proximity between Finns and the inhabitants of Eastern Karelia. An ideological motivation was to save the kindred populations from Bolshevik rule. Another motor was nationalism: in the late nineteenth- and early twentieth-century nationalistic movement leading to Finland's independence, that area had been projected as a place of mythical importance for the Finnish kindred peoples.[38] The Peace Treaty of Dorpat in 1920 was preceded by three military expeditions by the Finns, aimed at gaining positions in Eastern Karelia.[39] A declaration by the Soviet Russian government concerning the autonomy of Eastern Karelia was annexed to the Treaty of Dorpat, but the Russian government never applied it. In 1921 Finland brought the issue of the Eastern Karelian populations to the League of Nations, and an advisory opinion of the

[37] See Jaakko Paavolainen, *Poliittiset väkivaltaisuudet Suomessa 1918. Osa 1: Punainen terrori*, Tammi, Helsinki, 1966; Paavolainen, *Osa 2: Valkoinen terrori*, Tammi, Helsinki, 1967; Jukka Kekkonen, *Laillisuuden haaksirikko. Rikosoikeudenkäyttö Suomessa vuonna 1918*, Lakimiesliiton Kustannus, Helsinki, 1991; Lauri Hannikainen, "The Finnish Civil War in 1918 and its Aftermath", in Lauri Hannikainen, Raija Hanski and Allan Rosas (eds.), *Implementing Humanitarian Law Applicable in Armed Conflicts, The Case of Finland*, Martinus Nijhoff, Leiden, 1992, p. 8.

[38] Jussi Niinistö, *Bobi Sivén, Karjalan puolesta*, SKS, Helsinki, 2001, pp. 16–21, 80–96, 220–38; Toivo Nygård, *Suur-Suomi vai lähiheimolaisten auttaminen*, Otava, Helsinki, 1978, pp. 50–85.

[39] See Jussi Niinistö, *Heimosotien historia 1918–1922*, SKS, Helsinki, 2005.

Permanent Court of Justice was sought. The Court declined to grant it for lack of jurisdiction.[40]

In 1938 and 1939 the negotiations between the Finnish and the Soviet government were conducted in a tense atmosphere, with the Soviet side advancing repeated threats on Finland's territorial integrity. At that point of time, the Finnish government was not aware that the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics, also known as the Molotov-Ribbentrop Pact, signed on 23 August 1939, included a secret protocol that divided the territories of Romania, Poland, Lithuania, Latvia, Estonia and Finland into Nazi and Soviet "spheres of influence" anticipating potential "territorial and political rearrangements" of these countries. In November 1939 the Soviet Union attacked Finland. Finland requested help from its Nordic neighbours and beyond. It received mainly moral or political support, including the exclusion of the Soviet Union from the League of Nations on 14 December 1939. Sweden assisted by delivering arms, material and volunteers, but did not want to commit itself to more direct involvement. Promises of military help by Britain and France did not materialise in time, partly because Norway and Sweden were unwilling to grant their troops the right of passage.[41]

The balance of power in the war that began was very unequal. Finland's population was 3.7 million, whereas the Soviet Union had a population of 180 million. Finland's army was small, unprepared and poorly equipped compared to the Red Army. The manner in which the population became united, despite its previous divisions during the Civil War, and managed to defend its territory with the scarce means is referred to as the "spirit of Winter War", a "mythical" miracle of national unity.[42] By the end of February 1940, however, Finland was at the point of military collapse. On the Soviet side, 127,000 military personnel were dead or missing, and 190,000 wounded. On the Finnish side, some 23,000 military personnel were dead or missing, and 44,000 wounded.

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[40] Permanent Court of International Justice, *Status of Eastern Carelia*, Advisory Opinion, 23 July 1923.

[41] On the heterogeneous expressions of support and offers of help, see Trotter, 2003, pp. 194–202, *supra* note 32.

[42] On these and other images of Winter War internationally, see Martti Julkunen, "Talvisodan kuva: Suomen hetki kansainvälisen huomion huipulla", in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007.

Finland and the Soviet Union concluded the Moscow Peace Treaty in March 1940.[43] The Finns considered the conditions of peace extremely harsh.[44] Finland had to cede some 11 per cent of its territory and some 30 per cent of its economic assets, accept a Soviet military base on its coast, and evacuate and resettle over 400,000 persons from the lost territories. Despite the Peace Treaty, the Finnish government continued to keep the army on war alert. It undertook important fortification and rearmament projects, using up to 50 per cent of its budget on military spending.[45] As a result, Finland's military preparedness was remarkably higher soon after the Winter War than it had been before the war.

Following the Winter War, the Finnish government prioritised the establishment of good relations with Germany. Contacts and mutual visits on different levels intensified. The relations with the Soviet Union remained tense, with several minor conflicts arising from the implementation of the Moscow Peace Treaty or subsequent demands by the Soviets. In September 1940 an agreement with Germany was concluded, granting German troop transfers in Finland's territory, in order to supply the German troops in northern Norway. Finland started to secretly acquire arms and military material from Germany. At the latest in spring 1941 Finland was negotiating its participation in Germany's war effort on the Finnish front and thus preparing for the war. As will be discussed in the following section, the war was generally considered as a continuation of the Winter War, and it was regarded by many as an opportunity to seek compensation for the losses arising from the latter. The Finnish politicians and leaders of associations on the left that were considered too close to the Soviet Union were administratively interned based on the law on "protection of the nation".[46]

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43 Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) 3/1940.

44 "Man hat den Frieden von Moskau das finnische Versailles genannt", wrote Väinö Auer and Eino Jutikkala, *Finnlands Lebensraum: das geographische und geschichtliche Finnland*, Metzner, Berlin, 1941.

45 See Ohto Manninen and Kauko Rumpunen (eds.), *Risto Rytin Päiväkirjat 1940–1944*, Edita, Helsinki, 2006, where the period of 14 months of "peace in between", as it is called in Finland, is presented based on diaries and other materials by and on the Prime Minister and President Risto Ryti, accompanied with *post facto* commentaries by the editors, pp. 18–110.

46 Similar detentions had already taken place during the Winter War. For personal histories on the conditions of detention, see Sari Näre, "Turvasäilöön ja keskitysleireille –

The Continuation War began in June 1941, in the official story, with Soviet bombardments of Finnish airports and other installations. The Finnish leadership took great care to present the beginning of the hostilities as a Soviet attack.[47] As is known today, Finland had in fact participated in the planning of the war for at least months, if not longer, and consented to Germany using Finnish territory and airspace as well as Finnish assistance in its attack on the Soviet Union on 22 June.[48] Finland's effort to declare itself neutral in the conflict between the Soviet Union and Germany was complicated by the radio declaration by Adolf Hitler on 22 June that Finland was fighting "in union", "*im Bunde*", with Germany. The Finnish offensive into Soviet territory started on 10 July, with an army of 450,000 soldiers and some 150,000 persons assisting the army. By September, Finland had reached its previous borders from the Dorpat Peace Treaty of 1920. In Eastern Karelia, Finnish troops crossed these borders to finally occupy a part of Soviet territory that it had been interested in since the first years of its independence. In major parts of the political and military leadership and the Finnish population, plans for a "Great Finland" had support; in others they caused concern and fear.[49] President Risto Ryti had started to prepare for a new eastern border for Finland in the spring of 1941, in the likely eventuality that the Soviet Union would soon be dismantled and governed by Germany and its allies. Historical, ethnographic and geographic studies were commissioned to support Finland's enlargement, not only to Eastern Karelia but also up the peninsula of Kola.[50] Two studies, entitled *Finnlands Lebensraum*[51] and *Die Ostfrage Finnlands*[52] were published in German.

In the occupied territories, the treatment of the civilian population that was considered as representatives of the kindred peoples of Finland

poliittisten vankien kohtelu sodan aikana", in Sari Näre ja Jenni Kirves (eds.), 2008, see *supra* note 14, p. 249.

47 See, for example, Prime Minister Rangell's speech on 25 June 1941, "Tiedonanto eduskunnalle".

48 See, for example, Jokisipilä, 2004, *supra* note 24; Manninen and Rumpunen, 2006, *supra* note 45.

49 See Ohto Manninen, *Suur-Suomen ääriviivat*, Kirjayhtymä, Helsinki, 1980.

50 *Ibid*., pp. 133–37; Zägel and Steinweg, 2007, p. 153, see *supra* note 13.

51 Väinö Auer and Eino Jutikkala, *Finnlands Lebensraum: das geographische und geschichtliche Finnland*, Metzner, Berlin, 1941.

52 Jalmari Jaakkola, *Die Ostfrage Finnlands*, Söderström, Helsinki, 1941. See also Zägel and Steinweg, 2007, p. 153, *supra* note 13.

was preferential.[53] In order to separate the kindred from the foreign, studies on racial profiling were carried out. Soviet civilians of mainly Russian or Ukrainian origins were interned in concentration camps, with the purpose of creating "a racially clean regular population with an organic link to the Finnish people in Eastern Karelia".[54] In historiographical research, it appears uncontroversial that the intention was not to exterminate, but to concentrate non-desired civilians for future transfers away from the Finnish occupied territories, potentially in exchange for kindred people elsewhere in the Soviet territory soon under German control, according to the plans of the time.[55] At their maximum height in 1942, the camps contained some 24,000 individuals, mainly children, women and the elderly. Hunger, illnesses and confinement took their toll; a total of some 4,000 to 7,000 camp inmates died. Occupation of the Soviet territories was condemned by several states that had previously been on friendly terms with Finland. The widespread international sympathy Finland had benefited from as the tiny victim of the Soviet aggression during the Winter War started to fade away. This development further isolated Finland internationally, thus making it even more dependent on Germany for food and military supplies. An additional cause of international criticism was the treatment of Soviet prisoners of war (POWs). Some thirty percent of the estimated 64,000 Soviet POWs died in Finnish prison camps, to which the International Committee of the Red Cross (ICRC) was not granted access.[56]

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[53] On the occupation in general, see Antti Laine, *Suur-Suomen kahdet kasvot, Itä-Karjalan siviiliväestön asema suomalaisessa miehityshallinnossa 1941–1944*, Otava, Helsinki, 1982; Zügel and Steinweg, 2007, pp. 154–56, *supra* note 13. See also Antti Laine, "Finnland als Okkupationsmacht in Sowjetkarelien und die Kollaboration der Karelier", in Werner Röhr (ed.), *Okkupation und Kollaboration (1939–1945): Beiträge zu Konzepten und Praxis der Kollaboration in der deutschen Okkupationspolitik*, Hüthig, Berlin, 1994, pp. 319–33. On the occupation evaluated in terms of international law, see Hannikainen, 2012, *supra* note 15.

[54] On Mannerheim's order, 9 July 1941, and its implementation, see Laine, 1982, pp. 116–25, *supra* note 53. On the deceptions the occupiers had to face with regard to the fantasised unity of the "Finnish kindred" peoples, see *ibid.*, pp. 302–14.

[55] See the references in *supra* note 58, in particular Laine, 1982, pp. 109–56. See also Manninen, 1980, pp. 184-197, *supra* note 49.

[56] See Lars Westerlund, "The Mortality Rate of Prisoners of War in Finnish Custody Between 1939 and 1944", in Lars Westerlund (ed.), *POW Deaths and People Handed Over to Germany and the Soviet Union in 1939–55: A Research Report by the Finnish National Archives*, Kansallisarkisto, Helsinki, 2008, pp. 14–84. See also, Antti Kujala, "The Unlawful Killings of POW's during the Continuation War, 1941–1944", in Lars

After a two and a half-year standstill in the hostilities, during which Germany's future defeat started to become evident, the Soviet Union intensified its counter-offensive in the summer of 1944. Soviet troops drove the Finns back to behind the 1940 borders and forced Finland to accept an armistice. Finland had lost 66,000 military personnel and some 160,000 were wounded. On the Soviet side, some 200,000 military personnel were dead or missing, and almost 400,000 were wounded. The Moscow Armistice between the Soviet Union and Britain with Finland in September 1944[57] meant ceding Finnish territories even further than in the 1940 Moscow Peace Treaty, as well as massive reparations to be paid to the Soviet Union, the dismantling of Finnish "fascist-minded" organisations and the handing over to the Soviets of various categories of persons. The armistice also obliged Finland to actively disarm and remove German troops from Finland. In the "Lapland War" between Finland and Germany that followed from this obligation in 1944-1945, northern Finland was devastated.[58] The Paris Peace Treaty of 1947[59] confirmed the conditions of the Moscow Armistice.

36.3. Contradictory Interpretations

> Forgetting, I would even go so far as to say historical error, is a crucial factor in the creation of a nation, which is why progress in historical studies often constitutes a danger for [the principle of] nationality. Indeed, historical enquiry brings to light deeds of violence which took place at the origin of all political formations, even those whose consequences have been altogether beneficial. Unity is always effected by means of brutality.[60]

The character of the Continuation War is among the most controversial questions in the research of recent Finnish history, as well as in popular

Westerlund (ed.), *POW Deaths and People Handed Over to Germany and the Soviet Union in 1939-55: A Research Report by the Finnish National Archives*, Kansallisarkisto, Helsinki, 2008, pp. 85–93.

57 Discussed already under 36.1., , see *supra* note 5.

58 On the "Lapland war" in English, see, for example, Polvinen, 1986, pp. 37–54, see *supra* note 32.

59 See Suomen asetuskokoelman sopimussarja (Finnish Treaty Series) no. 20/1947.

60 Ernest Renan, "Qu'est-ce qu'une nation?", in a conference at Sorbonne on 11 March 1882, printed in Homi Bhabha (ed.), *Nation and Narration*, Routledge, London, pp. 8–22.

conceptions of history in Finnish public opinion.[61] My brief presentation was unable to delve into all of the problematic open questions and, in particular, into those relating to national politics. Was the war inevitable, with Finland irresistibly drifting into the war as a log in a river by the force of flowing water? Was Finland an ally of Nazi Germany or merely fighting a "separate war" on the side? In Jere Linnanen's analysis, the treatment of these questions among historians and social scientists has taken place on two main horizons of understanding that have affected the constant interplay of argumentation and historical reconstruction. The first approach leans towards nationalism, in the sense of seeing the existence of Finland as a sovereign state and its attendant interests as the central criteria when evaluating past actions and actors. The second approach features a critique of nationalism, an orientation seeking to measure past actions and actors against broader standards, and in particular international law, international human rights, and their underlying political principles, such as the prohibitions of the use of force or the persecution of minorities, for example.[62] In how far a third, value relativist or neutral, approach to that period has been possible in the past or is emerging today remains open to discussion.

The interpretation arguing for the inevitability of the war rests on the idea that Finland was the victim of the 1939 aggression by the Soviet Union, and the following years of the Second World War should be seen in this light. In that way of presenting the past, the geopolitical situation in 1940 and 1941 was simply too difficult for a young, tiny, pacific state caught in the middle of two dangerous giants: its communist neighbour, the Soviet Union, and its historical, cultural ally Germany, now ruled by an aggressive dictator. There were no alternatives to the Continuation War: it was a political necessity, a battle for survival of an independent

[61] Research on the "drifting" of Finland into the war as a result of the general geopolitical situation versus an active stance by Finland in that direction has been vivid for decades, see, for example, Timo Soikkanen's historiographical mapping, Timo Soikkanen, "Objekti vai subjekti? Taistelu jatkosodan synnystä", in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007. Heikki Ylikangas has suggested that a promise by Hermann Göring of a future recuperation of the lost territories together with the German ally was behind the reasons why Finland accepted the severe Moscow Peace Treaty in 1940. Thus a conscious plan on the Continuation War would have existed very early, see Heikki Ylikangas, *Tulkintani talvisodasta*, WSOY, Helsinki, 2001.

[62] See Jere Linnanen, *Trauma, syyllisyys, armahdus – tarkastelussa sotasyyllisyysasia, valvontakomission britit ja suomalainen historiankirjoitus*, M.A. Thesis, University of Helsinki, 2012, in particular pp. 8–15.

state of Finland. In this light the war begins to appear as a form of self-defence since, the argument goes, the Soviet Union (or Germany) would have attacked Finland in any case. The only principle guiding the action of the Finnish leadership or the Finns in general was thus the survival of Finland as an independent state.

The external view of Finland's actions at the time was much less nuanced. The Paris Peace Treaty of 1947 states unambiguously: "Finland, having become an ally of Hitlerite Germany and having participated on her side in the war against the Union of Soviet Socialist Republics, the United Kingdom and other United Nations".[63] Nevertheless, both in Finnish academia and in political discourse, the idea of a separate war has been and to some extent remains part of the dominant narrative about the geopolitical and historical context of the Second World War.[64] Proponents of this understanding maintain that while participating in the German invasion of the Soviet Union starting in the summer of 1941 (Operation Barbarossa), Finland was solely engaged in its own fight to restore the injustice and the lost territories of the Winter War. To support the claim that the war was separate, it is often stated that Finland did not sign the Tripartite Pact, unlike the Axis countries.[65] Of course, the Tripartite Pact did not contain any obligation to fight a common war as such. In any case, parts of the Finnish political and military leadership assisted in the planning of the German aggression of the Soviet Union and adhered to written and oral agreements on practical co-operation with Germany, and Finland also received some material and military guarantees subject to correspondence between Hitler and the Finnish President Ryti.[66] Whereas the exact scope and significance of these agreements remain controversial, Finland *de facto* acted as Germany's ally, allowing for the presence of some 200,000 Wehrmacht soldiers within its territory and

63 Treaty of Peace with Finland, 10 February 1947, Preamble, 48 UNTS 2003.

64 See President Mauno Koivisto's speech in 1993, referred to in Tarkka, 2009, pp. 360–61, *supra* note 24; the speech by President Tarja Halonen at the French Institute of International Relations (IFRI), 1 March 2005: "For us the world war meant a separate war against the Soviet Union and we did not incur any debt of gratitude to others".

65 However, Finland signed the Anti-Komintern agreement, yielding to heavy pressure by Germany, see, for example, Manninen and Rumpunen, 2006, *supra* note 45.

66 Manninen and Rumpunen, 2006, pp. 87–121, see *supra* note 45. President Ryti acknowledged when interrogated on 8 October 1945 to have received "3–4 letters from Hitler during his presidency", see Sotasyyllisyysoikeudenkäynnin asiakirjat, istunto, 16 November 1945, pp. 15, 20–21.

participating in co-ordinated military activities. In return Finland received important material support, in arms, technology, food, energy and raw materials. Based on this, it has been maintained that as a military ally Finland's position can be qualified as an independent co-belligerent of Germany, not decisively different from Hungary, Italy or Romania.[67] It is striking to notice in comparison how similar the drive for arguing for the separateness of the war effort and a decisive "national specificity" of the participation in the war on the side of Hitler has been in several countries.[68]

The thesis of a separate war also tacitly emphasises that for Finland's part, the war in co-operation with the Germans was "in conformity with international norms, as clean as warfare could be"[69] and that Finland had always kept a certain political distance to its brother in arms, Nazi Germany. In historiographical research, it appears uncontroversial that Finland was neither a totalitarian dictatorship like Nazi Germany, nor was it involved in formulating the latter's imperialistic territorial objectives or ideology of racial dominance aiming at destruction of others. Likewise, concerning the Nazi Holocaust and its potential repercussions in Finland, it appears uncontested that the Finnish government or administration generally refrained from participating in the Nazis' extermination campaign against Jews. Jewish citizens of Finland were integrated in society and were not subjected to discrimination, including in the army. Finnish Jews fought in the Finnish army together with the Germans during the Continuation War.[70] However, a number of foreign Jews, either refugees or Soviet POWs in Finnish custody, were transferred to the Germans or perished under Finnish control. The exact numbers and the particular causes of the treatment in individual cases are

67 See Mauno Jokipii, *Jatkosodan synty*, Otava, Helsinki, 1987, pp. 625–28; Mauno Jokipii, *Hitlerin Saksa ja sen vapaaehtoisliikkeet*, Suomalaisen kirjallisuuden seura, Helsinki, 2002, p. 46.

68 On the national or nationalistic histories, see Markku Jokisipilä, "Toinen mailmansota ihmiskunnan kollektiivisessa muistissa", in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007, pp. 13–21. See also Uhl, 2006, *supra* note 13.

69 Jokipii, 1987, pp. 398–99, see *supra* note 67.

70 Even a field synagogue was active at the Finnish–German front. The picture was not always as idyllic as that, however; some discrimination and tension existed. Aee Hannu Rautkallio, *Suomen juutalaisten aseveljeys*, Tammi, Helsinki, 1989, pp. 124–66.

not established in research with sufficient clarity.[71] Public and academic discussion of the treatment of Jews in Finland during the Second World War remains polemical, oscillating between picturing Finland as the rescuer (of the Finnish Jews) to be celebrated, or as the persecutor (of foreign Jews) to be either tacitly disguised or revealed for public scrutiny.[72] Research into these questions has been subject to controversies and turbulence, also between academic historiography and other accounts of the past, demonstrating the complexity of memory politics.[73]

A few post-war studies and some recent ones have forcefully questioned the "separate war" narrative, leading to a reorientation in dominant historiographical interpretation that is currently ongoing.[74] Other studies suggest that the walls separating Finland from its Nazi ally in military and executive activities may not have been as watertight as is often maintained.[75] Research on the latter theme has been scarce, and its

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71 See, for example, Ida Suolahti, "POW Transfers During the Continuation War 1941-44", in Westerlund (ed), 2008, *supra* note 56; Oula Silvennoinen, "The Transfers of Civilians to German Authorities", in Westerlund (ed), 2008, *supra* note 56. For journalistic accounts that stimulated public discussion, see Elina Suominen, *Kuolemanlaiva S/S Hohenhörn – juutalaispakolaisten kohtalo Suomessa*, WSOY, Helsinki, 1979, and Sana, 2003, *supra* note 25. The numbers of Jews transferred to German authorities start from the notorious case of eight individuals (see my discussion on this *supra* pp. 498–99) , up to some 80, whereas the highest estimations could amount to a few hundreds. The haziness of the figures appears to have many explanations, see Heikki Ylikangas, *Heikki Ylikankaan selvitys valtioneuvoston kanslialle*, Valtioneuvoston kanslian julkaisusarja, Helsinki, 2004.

72 See, for example, Hannu Rautkallio, *Holokaustilta pelastetut*, WSOY, Helsinki, 2004; Hannu Rautkallio, *Ne kahdeksan ja Suomen omatunto*, Weilin & Göös, Helsinki, 1985; Suominen, 1979, *supra* note 71; Sana, 2003, *supra* note 25.

73 For an analysis of history politics that followed the publication of Sana, 2003, see *supra* note 25, see Tilli, 2006, *supra* note 24. For a general analysis on the historiographical controversies on Finland and the Holocaust, see Zägel and Steinweg, 2007, pp. 184–88, *supra* note 13.

74 Among the major landmarks were Jokipii, 1987, see *supra* note 67 and Jokisipilä, 2004, see *supra* note 24. For analysis of historiographical evolutions, see Markku Jokisipilä, "Kappas vain, saksalaisia!", in Markku Jokisipilä (ed.), *Sodan totuudet*, Ajatus, Helsinki, 2007; Soikkanen, 2007, *supra* note 61.

75 For recent research on the co-operation between the Finnish and German security police during the Continuation War, implying the knowledge of and some participation of the Finnish State Police in the torture and execution of POWs, mainly Jews and communists by the German authorities, see Oula Silvennoinen, *Salaiset aseveljet: Suomen ja Saksan turvallisuuspoliisiyhteistyö 1933–1944*, Otava, Helsinki, 2008, also published in German as *Geheime Waffenbrüderschaft. Die sicherheitspolizeiliche Zusammenarbeit zwischen Finnland und Deutschland 1933–1944*, Wissenschaftliche Buchgesellschaft, Darmstadt, 2010. For a journalistic account of the handing over by the Finnish authorities to the

reception has been turbulent.[76] Another sensitive topic is to consider the extent to which Finland's own attack and occupation policies in the Soviet Union cast shadows on the idealised "clean" war of defence and survival. In the preceding short account, I was neither aiming to nor capable of bringing new elements to these historiographical controversies. They were evoked simply because of the evident connection between the historiographical interpretations of the Second World War in Finland and the evaluation of the acts and omissions addressed as crimes in the war-responsibility trial in 1945–1946 from the point of view of international law, as well as the role that representations and dogmas of history have played in the evaluation of the trial. Whether the war is presented as Finland's own war of defence and restitution, separate from Germany's criminal aggression in the Soviet Union, and whether the Finnish leadership is considered "clean" from assisting in or committing conduct that can be qualified as war crimes or crimes against humanity in international criminal law terms – these narratives figure as fundamental background dilemmas which no history of the Finnish war-responsibility trial can avoid touching upon, whether implicitly or explicitly, unconsciously or consciously. The fact that attention to the trial is exclusively directed toward crimes against peace at the political and diplomatic level is, at first sight, only natural, considering the interpretation that was given to Article 13 of the Moscow Armistice in the preparation of the Finnish law as well as within the trial itself. Yet the focus may also seem curious, in particular considering how most other Second World War trials addressed not only crimes against peace but also, or even in particular, war crimes and crimes against humanity. In Finland, the highest level political responsibility for acts that could qualify under those categories,[77] such as detrimental treatment of civilian

German authorities of POWs or other individuals, presumably based on various discriminatory grounds, see Sana, 2003, *supra* note 25. See also the research report Westerlund (ed.), 2008, *supra* note 56.

[76] See, for example, Seppo Hentilä, "Aseveljeyden nurjalla puolella: saksalaisten sotavankileirit Suomessa 1941–1944", in Pirjo Markkola (ed.), *Historiallinen aikakauskirja*, SHS and Historian ystävien liitto, Helsinki, 2009, pp. 346–49.

[77] In accordance with Article 6 of the IMT Charter, "(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) crimes against

populations in the occupied territories, planned forced transfers of civilians potentially amounting to ethnic cleansing, and treatment of POWs has not been addressed. This pertinent silence has contributed to a purification of the convicted leaders, and it may, in the public imaginary, form an element in the construction of their sacrifice in the trial that I now proceed to discuss.

36.4. The Law on War-Responsibility and the Tribunal

When the Finnish government was faced with the obligation under the Moscow Armistice of September 1944 to "co-operate with Allied Powers to arrest and pass judgment on those accused of war crimes" (Article 13, see *supra* pp. 495, 498), Finland was not an occupied country. In comparison with several other countries required to assume similar obligations, this difference certainly was an important factor in how the war-responsibility issues were addressed. The legislative choices, the prosecution, the tribunal and the enforcement of sentences remained national, at least on the surface. However, the Allied Control Commission, established in Article 22 of the Moscow Armistice "to undertake the regulation and control of the execution" of the agreement "under the general direction and instructions of the Allied (Soviet) High Command, acting on behalf of the Allied Powers" that sat in Helsinki from September 1944 to September 1947 exercised strong influence in the war-responsibility issue, both in the period of over a year before the Finnish government finally acted upon its obligation and during the trial. The Commission consisted of a majority of Soviet officers, complemented by Britons.

Much controversy in historical research has related to the question of the exact role and position of the British members of the Commission. It appears that they were seen to represent the Western view on Finland's choices in the war, in particular whether or not it identified as a Western democracy, a view that may persist in some contemporary readings. A recent analysis has highlighted great divisions in the interpretations of this

humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (https://www.legal-tools.org/uploads/tx_ltpdb/Charter_of_International_Military_Tribunal_1945_03.pdf).

question in Finnish commentaries.[78] What appears uncontroversial is that throughout its activity, the leadership of the Commission was in Soviet hands, and the British members of the Commission were not always informed of events. When they were, even if only retrospectively, it appears that the Britons generally supported the Soviet position.[79] Archive materials and autobiographical sources seem to demonstrate that the British members explicitly made the Finns understand that any hope of more favourable treatment from the Western powers was futile.[80] A recent and controversial claim contesting the existence of a palpable pressure on Finland to organise the trial relies on another interpretation. It argues that British representatives in the Commission actually had expressed support for the Finnish government's reluctance to organise the trial, with this attitude indicating the hollowness of Soviet threats of serious consequences on behalf on the Allies in case no satisfactory solution was proposed. The trial would then have been produced instead through internal political actors, and in particular the Minister of Justice Urho Kekkonen, manipulating the Finnish leadership and public opinion by claiming that there were external threats. Already in the polemic title of the book, the convicted leaders literally become the "scapegoats of the nation".[81]

The Allied demands for a trial created public controversy in post-war Finland. Parliamentary questions, authoritative legal opinions and committee reports addressed the issue.[82] Overwhelmingly, the impossibility of such retroactive criminal trials in Finnish law and legal tradition was highlighted. However, there was also strong internal political support for clarification of political and legal responsibility for the war.[83] The Commission's impatience with the Finnish government

78 See Linnanen, 2012, *supra* note 62.

79 On the role of the Commission and its power constellations, see Tarkka, 2009, pp. 121–46, *supra* note 24; Tuomo Polvinen, *Jaltasta Pariisin rauhaan*, WSOY, Helsinki, 1981, pp. 147–48; H. Magill and Jukka Tarkka (eds.), *Tasavalta tulikokeessa: muistelmia Suomesta kuuman ja kylmän sodan vuosina*, Weilin & Göös, Mikkeli, 1981, pp. 99–124.

80 See, for example, Magill and Tarkka, 1981, pp. 130–37, *supra* note 79; Tarkka, 2009, pp. 131–47, *supra* note 24; documents reproduced in Rautkallio, 2006, pp. 611–46, *supra* note 11; comparative literature analysis by Linnanen, 2012, pp. 32–45, *supra* note 62.

81 Lasse Lehtinen and Hannu Rautkallio, *Kansakunnan sijaiskärsijät*, WSOY, Helsinki, 2005.

82 For a summary, see Lindstedt and Löytömäki, 2010, pp. 19–22, *supra* note 4.

83 See, for example, Jukka Nevakivi, *Zdanov Suomessa, Miksi meitä ei neuvostoliittolaistettu?*, Otava, Helsinki, 1994, pp. 154–69; Tarkka, 1977, pp. 73–95, *supra* note 6.

culminated after the approval of the London Agreement of 8 August 1945, containing its now famous Charter of the International Military Tribunal ('IMT Charter'). In response to escalating external and internal pressures, two weeks later the Finnish government presented the draft law on the responsibility for war.[84]

The draft law follows the broad lines of the IMT example of the leadership crime of aggressive war by establishing the criminal responsibility of individuals who had, in their official capacity as state actors, "in a significant manner contribut[ed] in Finland's engagement in the war [...] or prevent[ed] peace" in 1941 to 1944. With the explicit temporal limitation included in the law, the trial could only address the Continuation War of 1941–1944. The preceding Soviet attack on Finland and the Winter War of 1939–1940 was left outside its scope. The draft law created a special tribunal to conduct the trial, consisting of the presidents of the Supreme Courts, a law professor from the University of Helsinki and 12 Members of Parliament ('MPs') appointed by the Parliament. The prosecution was to be carried out by the Chancellor of Justice. There was no mention of a right of appeal, but amnesty was made possible. The draft law contained no reference to the political and military context of the war, in the sense of Finland's alliance with Nazi Germany. The Chairman of the Commission later referred to this tactful omission as a sign of the extraordinary tolerance accorded to Finland in letting it organise its own trial.[85]

The special character of the draft law was made evident in the government bill proposing the law in two main aspects. First, the law was to be adopted according to the special legislative procedure for the enactment of constitutional legislation (where a regular law is considered to deviate from the constitutional order). In essence this means applying the highest qualified majority voting rule (5/6). According to the bill, the deviations concerned the constitutional prohibitions of retroactive criminal law and of establishing special tribunals. Secondly, the bill, as well as the preamble of the draft law, made direct reference to Article 13 of the Moscow Armistice, thus positing the international legal obligation binding on Finland as the reason behind the proposal.

[84] Hallituksen esitys nro 54/1945 vp. laiksi sotaan syyllisten rankaisemisesta, 21 August 1945.

[85] See Polvinen, 1981, pp. 139–41, *supra* note 79.

Serious controversies persisted throughout the parliamentary procedure. Many of these concerned retroactivity: the draft law created the tribunal, established penal responsibility and defined the crimes *ex post facto*. The government bill acknowledged this retroactivity but referred to the example of the IMT Charter to argue that the responsibility for war could now entail individual criminal responsibility.[86] The general opinion and opinions of authoritative judicial or political actors were doubtful. The Supreme Court, following a request from the Constitutional Law Committee of the Parliament, declared that the draft contained so many fundamental deviations from the Constitution and the general principles of law that it could not be regarded as compatible with the Finnish legal order.[87] The Court returned to the initial confusion concerning the scope of Finland's obligations when it observed that Article 13 of the Moscow Armistice referred to "war crimes" that the IMT Charter defined as a separate category (Article 6(a)) from the "crimes against peace" (Article 6(b)). The wording of Article 13 could therefore not also cover the "responsibility for war" portion of the Finnish draft law, which was more properly understood as a crime against peace according to the logic of the IMT Charter.

A professor of constitutional and international law at the University of Helsinki, Kaarlo Kaira, argued that the wording "war crimes" in Article 13 of the Moscow Armistice had to be interpreted in a restrictive manner, to include only crimes against the laws and customs of war. Yet he acknowledged that a broader interpretation could not be totally excluded. In any case, he observed, the London Agreement could not be binding on Finland because it was concluded after the Moscow Armistice. Kaira also emphasised that although the London Agreement dealt with those guilty of aggressive war, this type of individual responsibility was novel in international law and should therefore be interpreted narrowly. The Constitutional Law Committee concluded that the London Agreement and the responsibility for crimes against peace concerned the leadership of the Axis only; it could not be applied to the political leadership of Finland.[88]

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[86] See Hallituksen esitys, *supra* note 84.

[87] Opinion of the Supreme Court to the Constitutional Law Committee, n 1488, 28 August 1945, 1945 Vp., reprinted in Rautkallio (ed.), 2006, pp. 674–78, see *supra* note 11.

[88] Opinion of the Constitutional Law Committee, n 40/1945, 4 September 1945, reprinted in Rautkallio (ed.), 2006, pp. 666–73, see *supra* note 11.

Just before the decisive vote in the Parliament, the Allied Control Commission published its view on the validity of the draft law in the major newspapers. It claimed that the Constitutional Law Committee and the Supreme Court had interpreted Article 13 of the Moscow Armistice erroneously and arbitrarily. It further argued that the Moscow Armistice superseded any contradictory Finnish legislation and therefore sufficed in itself as a necessary basis for the trial of leaders.[89] The Parliament finally accepted the logic of political necessity behind the government proposal and adopted the law.[90] The President ratified the law on 12 September 1945. The nomination of the members of the tribunal, pre-trial investigations and preparation of the charges began shortly thereafter.

36.5. The Accused and the Charges

The law was very succinct; it contained no special provisions on the rules of participation, *mens rea* or comparable aspects of criminal responsibility. It was understood that for these parts, the regular Finnish law in force was to be followed. The exceptional character of the trial is demonstrated by the fact that the indictments were prepared by the Council of State, and the prosecution was led personally by the Chancellor of Justice. The scope of the accused and the details of the charges largely followed the approach of the first investigatory committee on the matter, but in subsequent investigations the Minister of Justice Urho Kekkonen personally exercised an important role.[91] The wartime President Ryti, six members of the government and the ambassador in Berlin were prosecuted. The military leadership was left out of the scope of the prosecutions entirely. The Allied Powers, and in particular the Soviet Union, played an important role in determining the scope of the

[89] See Polvinen, 1981, pp. 137–38, *supra* note 79; Tarkka, 1977, pp. 148–49, *supra* note 6.

[90] For an analysis of the decision-making in the Parliament, see, for example, *ibid.*, pp. 139–49.

[91] For the conclusions of the Committee, see the memo by its chairman Onni Petäys 24 October 1945, OKV sotasyyllisyyden asiakirjat 1945/1432, Ea 166 (KA). For an analysis of the preparation of the indictment, see Lindstedt and Löytömäki, 2010, pp. 35–39, *supra* note 4.

prosecutions. This influence may have been most obvious in the decision not to indict the wartime hero and post-war president, Mannerheim.[92]

The prosecution detailed the charges in seven counts.[93] The first two covered the acts of engagement in the war. The accused were charged for having continued to keep the country in a state of war alert after the Winter War; having allowed the German forces to trespass and to settle in Finland; having *de facto* given a declaration of war to the Soviet Union; having occupied the previously Finnish territories lost in the Moscow Peace Treaty in 1940; and, finally, having penetrated into the Soviet territories in Eastern Karelia beyond the previous borders of Finland and having occupied those territories. The third count covered conduct by members of the government in relation to the state of war with Britain. These three first counts appear to correspond to what is normally understood as "crimes against peace" in the London Agreement.[94]

The Finnish particularity starts with the latter four counts concerning the "preventing peace" part of the tribunal's material jurisdiction. The interpretation given to "prevention of peace" by the prosecution consisted of heterogeneous decisions or acts, interpreted by the prosecution as having caused Finland to stay in the war from 1941 to 1944, despite several opportunities to seek a separate peace settlement. The counts singled out the following episodes. Diplomatic or informal contacts via the United States or other channels after August 1941 proposing peace negotiations with the Soviet Union were declined by the

[92] On the pre-trial investigations and the choice of the accused, see Tarkka, 1977, pp. 157–77, *supra* note 6; Tarkka, 2009, pp. 206–13, *supra* note 24; Lindstedt and Löytömäki, 2010, pp. 35–39, *supra* note 4.

[93] The records of the trial, including also the investigation materials and transcripts of interrogations are available in the National Archives of Finland in Helsinki, part of the archives of the Chancellor of Justice, from Ea:166 to Ea:173. The charges were confirmed on 6 November 1945 and communicated to the tribunal in a document of 23 pages by the Chancellor of Justice Toivo Tarjanne. For a compilation of extracts, related documents and correspondence, see Rautkallio (ed.), 2006, *supra* note 11, in which the government's official communication on the charges figures are on pp. 425–27. See also Tarkka, 1977, pp. 181–83, *supra* note 6.

[94] Charter of the International Military Tribunal, 8 August 1945 (http://www.legal-tools.org/uploads/tx_ltpdb/Charter_of_International_Military_Tribunal_1945_02.pdf). 6 (a): "Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

Finnish government. In 1943 a further effort to mediate a separate peace treaty between Finland and the Soviet Union was launched, but the Finnish government decided to communicate this effort to Germany. Unsurprisingly, Germany then urged the Finnish government to decline the negotiations. In the early spring of 1944 the government gave an insufficient mandate to the peace negotiators it sent to Moscow, and thereby caused a cessation of the negotiations. In summer of 1944 the Finnish government recommended giving an assurance to Germany that Finland would not seek peace separately with the Soviet Union. The assurance was signed by Ryti in his personal capacity.[95]

The interpretation of these situations was strongly contested by the accused and their defence. Perhaps the most concerned was Väinö Tanner, leader of the Social Democratic Party. Tanner had been minister in several governments preceding and during the war, but not in the government that took the decision to go into war. In his powerful defence, Tanner was presented as a man who was firmly against the war since the beginning, and who did not rest in his efforts to find opportunities for peace.[96] Tanner dismissed one by one the nature of the events singled out in the charges as "opportunities for peace" that in his view were non-existent.[97] The tragic position of Tanner was accentuated by how he was, also in his own words, in disgrace with both the German and the Soviet governments.[98] Tanner himself appears to turn his disgrace into an ultimate sign of his independence and orientation towards Sweden or Britain, the lost landmarks of Finland. Also concerned was Risto Ryti who had been a long-time director of the Finnish Bank before becoming a Minister, Prime Minister and President of Finland. Ryti's sacrifice in the public imaginary reaches its height in the events targeted in the last count: how he had to bind himself to sign the Ribbentrop agreement in the summer of 1944, in a tactical move to acquire additional German supplies so that the Finnish troops at the border of a collapse could still, for a short

[95] For Ryti's point of view, see, for example, Manninen and Rumpunen, 2006, pp. 334–46, *supra* note 45. See also Zägel and Steinweg, 2007, pp. 157–58, *supra* note 13.

[96] On Tanner's "fight" to defend himself, see also Jaakko Paavolainen, *Väinö Tanner 4: Patriootti, Elämänkerta vuosilta 1937–1966*, Tammi, Helsinki, 1989.

[97] See Väinö Tanner, *Väinö Tanner puolustuu*, Tampereen sos-dem kunnallisjärjestö, Tampere, 1946, see pp. 87–99, 106–7.

[98] *Ibid*., pp. 57–59. See also Tuomo Polvinen, *Barbarossasta Teheraniin*, WSOY, Porvoo, 1979, p. 286.

while, resist the strengthened Soviet attack. Only if the Finnish troops halted the attack could peace be negotiated in tolerable conditions, keeping the risk of the occupation of the country at an arm's length, a goal accomplished by Ryti's selfless gesture to bind himself explicitly in the agreement with Ribbentrop.[99]

That fact that crimes against peace are interpreted to consist also of decisions or acts by politicians or diplomats in the course of an ongoing state of war that result in preventing the conclusion of a peace agreement seems to depart from a standard understanding of the Nuremberg Charter Article 6(a). The logic of the Finnish legislator and prosecution seems to be that prolonging the war of aggression by not concluding peace, any kind of peace, as swiftly and unconditionally as possible, is comparable to waging the war. Such an interpretation appears to be a Finnish particularity. It can be questioned whether this special approach resulted from the efforts of the Finnish legislators and prosecution, faced with the international obligation to prosecute in a manner that would satisfy the expectations of the Allies, to dress the events in the predefined period of 1941–1944 retroactively to fit the new criminalisation of crimes against peace. Since some individuals in the circle of government members that were publicly already singled out by the Allies and the government as responsible for the war had actually entered the government only after the decisive steps of engagement to war, perhaps the only way to target these individuals was to also include acts committed after the start of war in 1941. More research would be necessary to elucidate how purposeful or manipulated the creative, broad reading of "crimes against peace" by the Finnish legislators and prosecutors really was. Arguments pointing to a strategy to deliberately adjust the scope of criminal responsibility to 'catch' particular individuals would certainly support the views of the trial as part of an orchestrated political transition, not a criminal trial. In any case, this Finnish particularity underlines the problems that retroactivity of criminal law and jurisdiction may typically cause.

[99] See, for example, Martti Turtola, *Risto Ryti: Elämä isänmaan puolesta*, Otava, 1994, pp. 280–307. Turtola refers to Ryti's "moral victory in the eyes of the Finnish people", see unnumbered page with pictures after p. 320.

36.6. The Trial and Enforcement of Sentences

The trial was conducted in Helsinki, organised and carried out exclusively by Finns, but under the control of the Allied Control Commission which at several occasions interfered in the work of the tribunal. Its task was to make sure that Finland adequately fulfilled the terms of the Moscow Armistice, including the criminal responsibility for war. A failure by the Finns to do so was believed to lead to negative consequences, potentially the realisation of threats by the Chairman of the Commission, Andrei Zdanov: "We will take the matter out of its own hands, the list of accused will be prolonged, and the punishments hardened".[100] In that sense, the function that the Commission exercised with regard to the trial may remind contemporary observers of the ICC context where the relationship of national and international jurisdiction in international crimes is referred to as the "complementarity" of international criminal jurisdiction. While the term is not used explicitly, the concept of complementarity is anchored in Articles 17 and 20 of the ICC Statute, and can be condensed as follows: the ICC may proceed with a case only if the state or states with jurisdiction are unwilling or unable to genuinely carry out the investigation or prosecution.[101] In order to determine whether this is the case, independence and impartiality of national proceedings are evaluated, as well as whether the national proceedings or decisions were made with the purpose of shielding the person concerned from criminal responsibility. In the Finnish story, there is a presence of elements of a comparable evaluation exercised by the Commission and the Finnish executive, albeit awkwardly and illegally.

[100] See Nevakivi, 1994, p. 159, *supra* note 83, with reference to the Archives of the Allied Control Commission. Zdanov has also been reported to orally have threatened Finland with a new war, although the threat may have been rhetoric only, see Tarkka, 2009, pp. 127, 340–41, *supra* note 24.

[101] See John T. Holmes, "The Principle of Complementarity", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Martinus Nijhoff, The Hague, 1999, p. 41; William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System on International Justice", in *Harvard International Law Journal*, 2008, vol. 49, p. 53. See also Immi Tallgren, "Completing the 'International Criminal Order' – The Rhetoric of Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court", in *Nordic Journal of International Law*, 1998, vol. 67, p. 107. For the resolution of the Kampala Diplomatic Conference on Complementarity, see Resolution RC/Res. 1, 8 June 2010.

The nomination of the members of the tribunals – the Presidents of the two Supreme Courts, a law professor from the University of Helsinki and 12 MPs appointed by the Parliament – occasioned several manoeuvres and controversies, as well as claims of bias.[102] The trial was public and the accused had defence attorneys. However, the defence were not granted access to all of the files they requested and they were only allowed to present the defence to a limited extent.[103] For example, no references to the Winter War and the Soviet aggression of Finland or the harsh conditions of peace of the Moscow Peace Treaty of March 1940 were allowed. According to the accused, this led to omitting essential parts of the context in which the subsequent acts amounting to Finland's entry into the Continuation War took place.[104] Such a restriction in the temporal causality of events demonstrates a more general problem faced by any *ad hoc* tribunals with a particular slice of time and place as their jurisdictional frame: what and whose actions can be considered relevant for the determination of the matters in the jurisdiction of the tribunal.

Major incidents of tension between the Commission, the Finnish government and the tribunal occurred. The decision of the tribunal to set four of the accused free during the trial, with the obligation to appear in its sessions, was a red flag to Zdanov. By virulent protestations, he succeeded in persuading the tribunal to reconsider its decision, and all but one were arrested again.[105] Zdanov also strongly criticised the soft and courteous "club-like" way in which the trial proceeded. The accused were allowed to interact with members of the public while entering and leaving the courtroom, receiving visible expressions of support, and in trial sessions they were always addressed respectfully with their previous official titles. Some restrictions were introduced at Zdanov's request. The respect and confidence with which the Finnish leaders were treated in the trial could be seen as one of the examples of the differences between trials in occupied or non-occupied countries after the war. But it also further supports the reading of the trial as a forum for the sacrifice and martyrdom of the Finnish leaders. This is underlined by the curious mixture of attitudes and behaviour. There were expressions of solemn

[102] See Tarkka, 1977, pp. 178–81, *supra* note 6; Tarkka, 2009, pp. 215–20, *supra* note 24.

[103] See Tarkka, 1977, pp. 188–96, *supra* note 6; Tarkka, 2009, pp. 235–63, *supra* note 24.

[104] See, for example, Tanner, 1946, p. 56, *supra* note 97.

[105] See Polvinen, 1981, pp. 139–41, *supra* note 79; Tarkka, 2009, pp. 224–35, *supra* note 24.

respect and compassion to the accused in and after the sessions of the tribunal, which appears to point to a strong basis of resistance to the trials. Yet there was a total absence of any efforts to express the resistance in a manner that would disturb or impede the smooth proceedings against them.

The Commission's most flagrant interference in the trial concerned the Judgment. The Commission had previously signalled its expectations as to the gravity of the sentences. When the draft version of the Judgment was leaked to the Commission two days before it was due to be declared, the Commission was very disappointed. The draft Judgment convicted seven of the accused to prison sentences ranging from two to eight years to Ryti and the members of the government. Kivimäki, the ex-ambassador in Berlin, was acquitted. In the absence of Zdanov, it was his deputy Grigori Savonenkov who angrily protested against the fact that the Commission had not been consulted on the draft Judgment. The leadership of the Commission was appalled by the Finnish government's lack of control over the judicial proceedings – apparently a surprise for high Soviet officials – and requested that the announcement of the Judgment be postponed.[106] The British also exerted explicit pressure on the Finnish government to have the sentences toughened, both in London by diplomatic means, urgently relayed by the Finnish ambassador to London, as well as in Helsinki.[107]

The Finnish government took the threatening interventions seriously and passed them on to the tribunal both formally and informally. After troublesome manoeuvres among the members of the tribunal to satisfy the demands of the Commission, the Judgment was rewritten.[108] In the revised Judgment delivered on 21 February 1946, all of the accused were found guilty.[109] The most severe sentence was given to Ryti – ten years' hard labour. The other accused were sentenced to prison sentences ranging from two to six years. Tanner was sentenced to five and a half

[106] For correspondence and Paasikivi's notes on the events, see the material compiled in Rautkallio, 2006, pp. 605–16, *supra* note 11.

[107] See Magill and Tarkka, 1981, *supra* note 79, p. 136–37; Rautkallio, 2006, pp. 617–19, 622–23, *supra* note 11.

[108] See Polvinen, 1981, pp. 145–48, *supra* note 79; Tarkka, 2009, pp. 264–74, *supra* note 24; Toivo T. Kaila, *Sotaansyyllisemme s äätytalossa*, Werner Söderström, Helsinki, 1946, pp. 224–26.

[109] The Judgment is published in Rautkallio, 2006, pp. 631–41, see *supra* note 11.

years' imprisonment. The most directly affected by the reversal of fates was Ambassador Kivimäki, acquitted in the original Judgment but now condemned to five years' imprisonment.

The enforcement of sentences took place in a prison in central Helsinki. The condemned had material conditions of relative comfort, considering the general deprivation and shortages in the post-war period. Generous food packages and other material support arrived at the prison in a regular and organised manner. The condemned were allowed to wear civilian clothing and had opportunities for sports and socialising. They used most of their time for literary and scientific work. Dozens of books were published by the group of convicts. Most of the work undertaken by them in prison was remunerated.[110]

As soon as the Commission left Finland in September 1947, paroles and pardons of the sentences began. They were granted in accordance with the law in force at the time. For those convicts with the shortest sentences this happened later than the normal application of the law would have meant. The last group of the condemned was pardoned by President Juho Paasikivi in May 1949, including Ryti, who was already hospitalised with a serious illness.[111] Those former convicts who were in good health were smoothly integrated back into society. Expressions of respect and new professional opportunities were presented to them. They received academic honours and leading posts in academia, for example, as professors or rector of the University of Helsinki. Tanner regained his position as the chairman of the Social Democratic Party. Two of the convicts were re-elected as MPs. When Ryti died in 1956, he was given a state funeral. Huge crowds of Finns were present in the centre of Helsinki to follow the funeral procession; the military, university students and scouts by the thousands in their attire formed the honorary corridor for the President's coffin, solemnly transported through the streets of Helsinki, lightly covered by the early snow of November. Most of the condemned are buried in the national honorary cemetery in Helsinki.[112]

[110] This paragraph is based on a recent study by Risto Niku, *Kahdeksan tuomittua miestä. Sotasyyllisten vankilavuodet*, Edita, Helsinki, 2005, p. 47–108 and 167–95. See also Turtola, 1994, pp. 328–39, *supra* note 99.

[111] Niku, pp. 197–227, see *supra* note 110.

[112] *Ibid.*, pp. 229–40.

36.7. Conclusions: When a Trial for International Crimes Becomes a Sacrifice for the Nation

> War responsibility cases have become actuality at the wake of the Second World War and are today highly fashionable, in certain circles. People who had to suffer all sorts of strains during the six years of war seem to long for some outlets for their repressed feelings. For this purpose, scapegoats are sought – real or imagined.[113]

Were the crowds in Helsinki mourning only the deceased President, or also the pains, losses or errors of Finland in the war? An observer today familiar with descriptions of the Soviet pressure on Finland throughout the Cold War may wonder how such a celebration of a national leader convicted to 10 years' hard labour for aggressive war was possible. Beyond the grief of those who personally knew Risto Ryti, the mourning appears as a powerful public ritual, a demonstration of Finland's political independence, after all. As David Kertzer writes, "rather little that is political involves the use of direct force".[114] Public funerals or services in the memory of the dead are part of commemorating sacrifice or martyrdom. As Lloyd Warner argues in the American context, the Memorial Day in Newburyport, by focusing on the symbolism of death, acquires special force, converting the emotion generated by anxiety over death to common sentiments and actions uniting people with fellow community members. The martyrs worshipped "become powerful sacred symbols which organise, direct, and constantly revive the collective ideals of the community and the nation".[115]

If rituals are, as Clifford Geertz claimed, metasocial commentary, "stories that people tell themselves about themselves",[116] what is the story told by the rituals of sacrifice in trials for international crimes? The

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[113] Defendant Väinö Tanner's first intervention in the trial, on 17 December 1945, reprinted in Tanner, 1946, p. 55, see *supra* note 97.

[114] David I. Kertzer, *Ritual, Politics and Power*, Yale University Press, New Haven, 1998, p. 2.

[115] Lloyd W. Warner, "An American Sacred Ceremony", in Russell E. Richey and Donald G. Jones (eds.), *American Civil Religion*, Harper and Row, New York, 1974 [1953], p. 111. On the Soviet use of the war deaths to foster national solidarity around the government, see Christel Lane, *Rites by Rulers*, Cambridge University Press, Cambridge, 1981, pp. 145–46.

[116] See Clifford Geertz, *The Interpretation of Cultures*, Basic Books, New York, 1973, p. 448.

references to sacrifice in the context of international criminal justice relate to either victims or those held individually responsible for international crimes. The sacrifice of those victimised by international crimes is typically evoked in emotional, commemorative rhetoric, such as here by the United Nations Secretary-General Kofi Annan in 2004: "May the victims of the Rwandan genocide rest in peace. May our waking hours be lastingly altered by their sacrifice. And may we all reach beyond this tragedy, and work together to recognise our common humanity".[117] Regarding international humanitarian law ('IHL'), Gregor Noll explains the fact that incidental loss of civilian life is considered legal under specific conditions with a reading on sacrifice: "the residual group of civilians which may be lawfully killed under IHL are a materialization of the scapegoating mechanism".[118]

The sacrifice of the individuals accused in international criminal trials is more frequently evoked than that of victims. The sacrifice of the accused or convicted individuals has various dimensions in the different commentaries. When the individual accused is featured as a sacrificial victim offered for trial in the place of others more responsible or on behalf of a collective, such as a state, the reference to sacrifice expresses the perception of the selective or even random nature of individual criminal responsibility actually enforced in international trials, and the discrepancy between the immensity of the crimes and the limits of an individual agency.[119] Such an interpretation of sacrifice may be seen to find concrete expression in the exemplatory nature of severe punishments imposed on the individual, as suggested by Damien Scalia.[120] While rituals of international law in general could be understood optimistically as performances that present and emphasise the power of the norm and of the norm system and culture, the references to sacrifice typically occur as

[117] Kofi Annan speaking at Memorial Conference on the Rwandan Genocide in New York in 2004.

[118] Gregor Noll, "Sacrificial Violence and Targeting in International Humanitarian Law", in Ola Engdahl and Pål Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be*, Brill, Leiden, 2008, p. 9.

[119] This is, in my interpretation, the general sense in which Edwin Bikundo in his interesting analysis refers to sacrifice, see Edwin Bikundo, *International Criminal Law: Using or Abusing Legality?* Ashgate, Farnham, 2014; Edwin Bikundo, "The International Criminal Court and Africa: Exemplary Justice", in *Law and Critique*, 2012, vol. 23, no. 1, p. 21.

[120] Damien Scalia, *Le droit international penal à l'épreuve de la légalité des peines*, Bruylant, Brussels, 2011, pp. 277–80.

part of various critiques of international criminal justice, either in academic commentaries or by parties to an international trial. For example, the defence counsel in the ICC Lubanga trial argued that because international criminal justice is not able to prosecute all the subjects potentially guilty of the large-scale crimes in its jurisdiction, it attacks the individuals accessible as a proxy: "The accused then becomes or risks becoming a scapegoat".[121]

The emphasis is different when sacrifice is evoked in a broader vision of the aesthetic and ritualistic aspects of international criminal justice. In an adaptation of Antoine Garapon's analysis not related to international criminal justice,[122] a trial for international crimes becomes a ritual of purification or expiation, exercising functions in expressing fundamental values in the concerned community or beyond.[123] In Edwin Bikundo's view, the accused in international criminal trials are sacrificed for the cause – in critical analysis, the putative cause – of humanity, peace or justice, in international spectacle-trials where the exercise of justice takes on religious tones.[124] A distinct interpretation appears in Gerry Simpson's reading of sacrifice in international criminal trials expressed in the post-Second World War intention, to quote Simpson, "to legitimate or […] exculpate the culture which tries the criminal"; when "Nuremberg tells us that Nagasaki was not a war crime and that the Soviet invasion of Finland in 1941 [sic: 1939] was not aggression".[125] In Guyora Binder's

[121] ICC Trial Chamber 1, *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-01/06, Transcript, 27 January 2009, p. 31 (https://www.legal-tools.org/uploads/tx_ltpdb/doc623848_01.pdf).

[122] Antoine Garapon, *L'âne portant des reliques: Essai sur le rituel judiciare*, Centurion, Paris, 1985, in particular pp. 138–59.

[123] For a recent analysis on communication of values by international criminal law, see Diane Bernard, *Trois propositions pour une théorie du droit international penal*, Presses de l'Université Saint-Louis, Brussels, 2014. For a critical analysis of criminal trials for international crimes as "ritual spectacles" (p. 8), "the liberalist human rights project that aims to choreograph the management of life without attention to those who are sacrificed in the process" (p. 6), see Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009.

[124] See, for example, Bikundo, 2014, *supra* note 119, analysing critically how Africans, in particular, end up sacrificed in international criminal justice, and questioning the function of international criminal trials as morality tales, supposedly serving social catharsis.

[125] Gerry Simpson, "War Crimes: A Critical Introduction", in Timothy McCormack and Gerry Simpson (eds.), *The Law of War Crimes: National and International Perspectives*, Kluwer Law International, The Hague, 1997, p. 23.

analysis, the trial of Klaus Barbie in France becomes a trial devoted to exculpating (or not) the French for alleged crimes against humanity in Algeria: "every noble ideal attributed to France in such a trial served to distinguish France's repression of Algeria as more crimes of war because, after all, the French were not Nazis".[126]

What brings together the varying meanings given to sacrifice in Scalia's, Bikundo's, Simpson's and Binder's work, as well as Noll's analysis on targeting in international humanitarian law, is a reference to René Girard's famous theory of sacrifice and violence, even if it is not always specified how exactly Girard's complex theory is intended to be read to support the argument. Girard based his original vision of sacrifice on a broader idea of religions as human responses to the problem of disorder, of violence that threatens to destroy a human community, finding resolution in the mechanisms of expiatory sacrifice. The hypothesis of mimesis explains, for Girard, both the origin and the progression of desire in social violence. In broad terms, sacrifice was a first type of response to end the violent cycle of revenge and retaliation, long before the establishment of legal and judicial systems. Parallel to myths, the sacrificial rites control the apparition of violence, they repeat what the victim has done to save the community, and the prohibitions prevent the actions attributed to the victim in its function of having caused the violence. By dissipating violence by way of the sacrifice, a new social order is produced. The society that ignores the mechanism in force makes of the victim the external reason of its new situation. The community remains terrified, and it sacralises the victim that has now become the reason for peace. The victim is sacrificed as the real cause of the evil that affects the community, not as a scapegoat. The mass never thinks of having transferred onto the victim its own conflicts. In always resolving violence through means of violence, the sacrifice only displaces it and postpones it.[127] Girard has afterwards developed and amplified his theory by analysing the fundamental impact of the Christian Revelation, which

[126] Guyora Binder, "Representing Nazism: Advocacy and Identity in the Trial of Klaus Barbie", in *Yale Law Journal*, 1989, vol. 98, p. 1372.

[127] René Girard, *La violence et le sacré*, Editions Grasset et Fasquelle, Paris, 1972. René Girard, *Des choses cachées depuis la fondation du monde*, Grasset et Fasquelle, Paris, 1978. For analysis, see for example, Mario Roberto Solarte Rodriguez, "Mimésis et sacrifice à l'ère de la globalisation", in *Dix-huit leçons sur René Girard*, Desclée de Brouwer, Paris, 2001, p. 345.

according to him constituted a rupture with the previous form and use of sacrifice.[128] Girard considers that the Revelation makes possible for the community to understand that the victim – Jesus Christ – is actually innocent.[129] This acknowledgement of the innocence of the scapegoat could also be seen as being a starting point for a more "objective" and "rational" approach of judicial systems.[130]

As this analysis has demonstrated thus far, there is no historiographical or public consensus either of the events leading to the Finnish trial, the trial itself or its later meaning. Clearly there can be no single reading of the trial as sacrifice either. In this chapter, I am unable to engage in a structured and systematic analysis of anthropological or religious phenomena and disciplinary concepts such as sacrifice or ritual. A Girardian reading of the Finnish trial must be reserved for another occasion. In the context of the Finnish trial, a setting for what could in broad cultural terms be understood as sacrifice, scapegoating or martyrdom appears in a perspective that both concurs with some aspects of the above-referred interpretations in current or recent international criminal law and departs from them in important aspects. The multiple layers of complexity keep open possibilities for varying interpretations depending at what point of time and from which perspective the trial is analysed. My emphasis is on the core difference of the Finnish context with references to sacrifice in the current era of international criminal jurisdictions, a reading that may have broader bearing in understanding histories of other national trials for international crimes based on an international obligation, either in the past or today.

The difference culminates in *who* sacrifices and *for whom*. In terms of the main elements of sacrifice in the landmark study on the nature and social functions of sacrifice by Henri Hubert and Marcel Mauss, the sacrifice can be divided in the following main elements: the subject that makes the sacrifice; the object, animal or human being offered upon for sacrifice; and the immaterial but representable idea, being or deity to whom the sacrifice is made. An additional element is that of the intermediary, such as the priest. The relationships, intermediary roles and representations between these elements are complex. The "*sacrifiant*", the

[128] René Girard, *Le bouc émissaire*, Editions Grasset et Fasquelle, Paris, 1982.

[129] René Girard, *Je vois Satan tomber comme l'éclair*, Editions Grasset, Paris, 1999, p. 181.

[130] Pascal Coulon, *René Girard: L'impensable violence*, Editions Germina, 2012, p. 151.

individual, community, family, clan, tribe, nation or secret society, providing the victim and making the sacrifice is the subject that "*recueille ainsi les bénéfices du sacrifice ou en subit les effets*".[131] A collective subject either collectively completes the sacrifice or delegates it in order be represented by its member; a family by its head, a society by its judges. This subject gets transformed by the sacrifice, liberating itself from an unfavourable characteristic, or acquires a (religious) characteristic it did not previously have.[132]

In the interpretations discussed above, the community making the sacrifice is either figuratively the "international community", or in legal terms the United Nations (establishing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) or the States parties to the ICC Statute, and, in the last example, the victorious Allies of the Second World War and France, in particular. The immaterial but representable idea, being or deity to whom the sacrifice is made in these examples could be expressed in idealistic terms as humanity, survival of humankind on Earth, international law, justice or peace. However, it simultaneously also melts into the defence of a certain status quo, the historical hegemonic position of a certain civilisation in international politics and international law. In contrast, the "*sacrifiant*" in the Finnish trial is the Finnish nation, represented by the Finnish judges in the special tribunal created for the purpose by the government and elites that take over after the war. Since Finland has lost the war and struggles for its existence, the trial is not a spontaneous sacrifice, but is rather forced from the outside. Yet the immaterial idea to which the sacrifice is made is not that of the "international community" with its universalist values that takes shape in the post-Second World War critical moments. It is rather that of the nation of Finland, both its immaterial ethnic, cultural and linguistic existence as well as it territory, constitution and independent government, the latter also symbolising its desire of identification as a sovereign "Western" democratic state.[133]

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[131] Henri Hubert and Marcel Mauss, "Essai sur la nature et la fonction du sacrifice", in Henri Hubert and Marcel Mauss (eds.), *Mélanges d'histoire des religions*, Librarie Félix Alcan, Paris, 1929, p. 11.

[132] *Ibid.*

[133] On the ideology of nationalism, see Craig Calhoun, *Nationalism*, Open University Press, Buckingham, 1997.

The difference is also evident in how the function of the trial is understood. International or other transitional criminal trials are today pictured as "monumental spectacles" [134] that dramatise "the contrast between a totalitarian past and a democratic present", representing "constitutional moments"[135] in the societies concerned. Capturing public imagination, they are believed to have an incontestable "impact on how the events and the period of history that they deal with are collectively remembered".[136] The Finnish trial and its legacy until today in terms of sacrifice concurs with the latter in the sense of the lasting if not fundamental impact that the trial or its related Second World War traumas have occupied and, to some extent, may continue to occupy in the self-definition of Finns. Yet the events are remembered differently. The dramatic sacrificial "spectacle" in Helsinki does not appear to have been experienced by the contemporaries as a transition between a totalitarian past and a democratic present. The trial may be more plausibly interpreted as a strategy for returning to the democratic past (a reality or an illusion), in post-war conditions experienced as political and legal supremacy by a totalitarian foreign power. In that light, the sacrifice appears as an act of dissidence, as part of the struggle to liberate the country from foreign influence. Respecting fully the terms of the armistice signed in Moscow in 1944 was believed to be necessary in order to avoid a scenario where foreign powers could again interfere in Finland, at worst by a Soviet occupation. No matter the current appreciation of the post-war geopolitical situation, the hazards felt at the time of the trial were not minor: Finland was pressed in between two major totalitarian powers that had both had a decisive role in forming what the young state had become. [137] The trial had to follow the external forms of a judicial proceeding, in an atmosphere of general calm and dignity, to safeguard Finland's integrity and constitution.

[134] Osiel, 1997, p. 3, see *supra* note 20.

[135] Susanne Karstedt, *Legal Institutions and Collective Memories*, Hart Publishing, Oxford, 2009, p. 2.

[136] *Ibid*.

[137] A further element is the strong exemplary role played by the legalistic culture of Sweden, Finland's long-term "colonial" master, as an ideal of a Western democracy with a rule of law, often unattainable for Finland considering its strategic geographical position and its economical and political weaknesses. To resist the interpretation, prevalent in the trial, of the Finnish responsibility for war and too close relations to Nazi Germany is part of the Finnish post-war aspirations to identify as a state in the category of Sweden.

The sacrifice was thus solemnly carried out, but at the same time the rejection of the trial turned into an expression of, in Jürgen Habermas's terms, "constitutional patriotism".[138] As the preparation of the trial and its reception highlight, the resistance to the trial became a channel for Finns to define themselves in the defence of their achievements as members of a society founded on the rule of law and fundamental rights in the constitution. In a manner not foreign to Max Lerner's "fetishism of the Constitution", Finns may have used their constitution as "an instrument for controlling unknown forces in a hostile universe […] to fix their emotions".[139] The continuous resistance to the trial and the commemoration of its 'victims' is then not only related to cherishing the past sacrifice as collective expiation of guilt but also a channel of celebration of the survival of the constitution and national legal system in general. Paradoxically to today's understanding of international criminal law as motivated by empathy for victims of international crimes, Finns may have been building their legalistic society by identifying with the fake outlawry, 'victims' of the "judicial murder".[140] For Finland the door towards a regained recognition in the family of nations was opened by the Peace Treaty of Paris in 1947 that allowed for Finland to become a member state of United Nations. In a reading of the trial as a sacrifice, one part of the price that had to be paid for Finland's reintegration was the convictions of 1946.

That there had been abundant internal violence in Finland's history, often dealt with in a manner in striking contrast with the rule of law or constitutional rights, paradoxically accentuates the logic of the sacrifice in the trial in 1945–1946. The horror of the criminal justice imposed on Finland by the Allies – presented as retroactive, selective, biased, political and, first and foremost, unconstitutional – was deemed outside interference dirtying what was regarded as sacred. The shameful trial by

[138] Jürgen Habermas, "Historical Consciousness and Post-traditional Identity", in Shierry Nicholsen (ed.), *The New Conservatism: Cultural Criticism and the Historians' Debate*, MIT Press, Cambridge, MA, 1989. On war crimes trials and dissidence, see Simpson, 1997, p. 139, *supra* note 125.

[139] Max Lerner, *Ideas of the Ice Age: Studies in a Revolutionary Era*, Viking, New York, 1941, p. 236.

[140] Speech by a close collaborator of President Ryti, L.A. Puntila at the funeral of Risto Ryti, see *Risto Ryti – Muistokirja Suomen tasavallan viidennestä presidentistä*, Otava, Helsinki, 1957, p. 21. On the outlawry and identification in international trials, see Gerry Simpson, *Great Powers and Outlaw States*, Cambridge University Press, Cambridge, 2004, p. xi.

its weight contributed to concealing how the nest had been dirtied so many times before: in the early years of independence marked by the wave of violence on both sides during the Civil War, and its legal aftermath by the Whites that respected few legal guarantees; in outbursts of right-wing political violence that preceded the war; in the internment of political opponents during the wars; in Finland's aggressive war in union with a totalitarian ally; and the racial occupation policies. As if burned away from the scope of relevance by the enormity of the trauma of the Second World War culminating in the sacrifice of the eight convicted leaders, those violent memories started to fade. In that sense, the sacrificial ritual in the trial and its continuous commemoration correspond to Max Gluckman's view on rituals not as expressive means to gain coherence, but expressions of social tensions and dynamics. All social systems have a zone of tension with ambiguities and ambivalences. Rituals canalise social contradictions and have thereby a cathartic, therapeutic character.[141]

In this analysis, the focus has been mainly on the eight accused collectively. Yet focus on individual histories would certainly add more pertinence and nuance. For example, Minister and party leader Väinö Tanner's "sacrifice for the nation" was also a sacrifice for his party. It may have been crucial in legitimising the Social Democratic Party as an independent and truly Finnish political force in post-Second World War Finland, in that sense clearly demarked from the Finnish communists.[142] Risto Ryti's tragic fate as a culmination of the sacrifice stands out clearly in Finnish commentaries. The way he is represented emphasises his exceptional competence and selflessness, demonstrated also by the distinct historical moment of extreme devotion in the last moments of the war (see *supra* pp. 522–23). The image can be completed by him being sentenced to the heaviest punishment, his illness in prison and his untimely death, as well as the national grief expressed at his funeral. His personal aptitude to martyrdom is suggested by an anecdote of his attitude

[141] See Max Gluckman, "Les rites de passage", in Max Gluckman (ed.), *Essays on the Rituals of Social Relations*, Manchester University Press, Manchester, 1962, pp. 1–52. See also Christoph Wulf and Jörg Zirfas, "Perfomative Welten", in Christoph Wulf and Jörg Zirfas (eds.), *Die Kultur des Rituals. Inszenierungen. Praktiken. Symbole*, Wilhelm Fink Verlag, Munich, 2004, p. 15.

[142] See, for example, Prime Minister Paavo Lipponen's speech on 15 November 2001, available at http://vnk.fi/ajankohtaista/puheet/puhe/fi.jsp?oid=102968.

towards the trial, told by his close collaborator L.A. Puntila.[143] As the preparation of the war responsibly trial advanced, Ryti was shocked by the anti-constitutional special law. He declared to prefer to be delivered to an international jurisdiction to be 'tried' there (read: illegally, severely, perhaps in a harsh Bolshevik manner), rather than to accept that Finland was denying its legalistic traditions and its Constitution by enacting a retroactive special criminal law and tribunal. Like the soldiers that had died at the front to protect the territory of their country, Ryti consciously offered himself as the sacrificial lamb to canalise violence and lead it away from Finland. Although Ryti's sacrifice was not realised in its extreme, he is at the centre of the commemorations.

In light of today's tendency to view international criminal trials as parts of a transition and thus as rites of degradation that are "also important in delegitimizing the authority associated with the symbolism of leaders of the past",[144] the history of the Finnish trial may represent a counter-example. The commemoration of the convicted and more broadly the Second World War events in Finland figure amongst other "rites of nationalism" that not only "foster a certain view of the political world" but also "a feeling of national solidarity".[145] This does not necessarily imply that individuals share the same values or specific rationalisations by which they account for the commemoration.[146] To reiterate Maurice Halbwachs' analysis, collective memories are pluralised and multiple, but they can also be constructed and stored in a process of establishing a common core.[147] In modern societies this is a task of legal institutions, archives, academic research, bureaucracies, museums, memorials and, to some extent, the media. For today's commentators, law and legal institutions have an increasing share of the task, providing "legal blueprints" in constructing collective and broadly shared memories.[148] Establishing collective memories is, in Susanne Karstedt's summary,

[143] See Puntila, 1957, pp. 20-21, *supra* note 140. See also Turtola, 1994, p. 321, *supra* note 99, interviewing President Ryti's son Niilo Ryti.

[144] Kertzer, 1998, p. 28, see *supra* note 114.

[145] *Ibid.*, p. 73.

[146] In Ernst Cassirer's view, the person participating in the ritual "lives a life of emotion, not of thoughts". Ernst Cassirer, *The Myth of the State*, Yale University Press, New Haven, 1946, p. 24.

[147] Halbwachs, 1997, see *supra* note 20.

[148] Osiel, 1997, see *supra* note 20.

considered to imply "both that a shared meaning is given to events of the past, and that there are shared practices of their commemoration".[149] Criminal trials, in particular, "give deeply ingrained meanings and interpretations to 'facts' by establishing guilt and innocence and meting out sentences and punishment as moral closure to these events".[150]

In Finland, "the shared practices of commemoration" (*idem*) are primarily directed elsewhere, in the commemoration of the heroic war efforts, victimhood and the sacrifice at the trial. The legal actions and petitions seeking an official re-evaluation of the trial, reversal of the judgment, and the rehabilitation of the convicts are efforts to confirm an official, shared meaning of history, and to thereby definitively exclude the attribution of any criminal responsibility to the Finnish leadership. This would represent a "moral closure" (*idem*) of a different kind, as a resistance to the criminal judgments. For the moment the story remains open-ended, inviting further interdisciplinary and comparative research on how in the aftermath of large-scale collective violence, political and social crisis, and a general loss of (national) securities, the rejection of a trial – past or present – for international crimes may sometimes turn into a channel of reinforcing the national or other collective narratives of the past and of national social solidarity, perhaps as a necessary "self-deception" providing the "moral safety" in the life of individuals and of a nation.[151]

[149] Karstedt, 2009, p. 4, see *supra* note 135.

[150] *Ibid*.

[151] Leszek Kolakowski, "Amidst Moving Ruins", in *Daedalus*, 1992, vol. 121, no. 2, p. 43.

37

Soviet War Crimes Policy in the Far East: The Bacteriological Warfare Trial at Khabarovsk, 1949

Valentyna Polunina*

37.1. Introduction

In late December 1949 the Soviet Union conducted a somewhat unexpected war crimes tribunal in the Russian Far East city of Khabarovsk ('Khabarovsk Trial'). It was the only Allied trial entirely dedicated to the Japanese bacteriological weapons programme and human experiments related to it. Twelve Japanese war criminals had to finally stand trial before a Military Tribunal after they had been held captive by the Soviets for four years. They were sentenced to a forced labour camp for between two and 25 years, but all those convicted returned to Japan by 1956. The unusually light sentences seem to have been handed down in exchange for "valuable" data on bacteriological warfare.

A question remains about why the Soviet government decided to establish a Military Tribunal so late, at a time when the global wave of prosecuting wartime atrocities was largely over. It seems that justice for the victims was not among the primary goals of the Khabarovsk Trial. After the fiasco of the Soviet performance at the Nuremberg and Tokyo Trials, Moscow needed to reassert itself during an internationally recognised war crimes trial. The Tribunal in Khabarovsk presented an ideal opportunity to promote the Soviet vision of war crimes policy after the Second World War. Nevertheless, even more important for the conduct of the trial were geopolitical considerations in the emerging bipolar world – to establish good relations with the newly born People's Republic of China ('PRC') and to oppose the growing influence of the United States ('US') in the Far East during the early days of the Cold War. By prosecuting Japanese war criminals responsible for the suffering of numerous Chinese victims, Soviet leaders hoped to gain the support of the PRC in the changing geopolitical climate when Japan was no longer seen as an opponent by the US but rather as a new ally. Furthermore, the Khabarovsk Trial had a more practical meaning for Sino–Soviet relations:

in the eyes of the Soviet leaders it could facilitate the signing of the Treaty of Friendship, Alliance and Mutual Assistance between the two states in 1950.

Although the Soviet government had nurtured high hopes for the trial as a beacon of the Soviet version of justice for the atrocities committed in Asia during the Second World War, the Military Tribunal in Khabarovsk did not achieve the objectives assigned to it. The findings of the trial were ignored in the West and the Khabarovsk Trial itself was dismissed as mere communist propaganda.[1] Changing foreign policy goals of the Soviet Union and the Sino–Soviet split in 1956 led to a situation in which the trial was largely forgotten even within the Soviet bloc. Nevertheless, despite all the drawbacks of the trial, it would be too shortsighted to reduce the Soviet tribunal to a simple "show trial".

This chapter seeks to analyse the Soviet bacteriological trial as a case study that shows how post-Second World War prosecutions were influenced by a mix of propaganda and political considerations, which resulted in an "ambivalent" attitude towards prosecuting war criminals. The chapter discusses the main problems associated with the Khabarovsk Trial that later led to its dismissal: its vague legal basis, the rushed nature of the trial, lenient sentences and a strong sentiment of propaganda. The analysis is located in the political context of the early Cold War, which heavily influenced the decision to initiate the prosecution of Japanese war criminals at such a late stage and offers one of the first comprehensive introductions to the Soviets' war crime trials policy in the Far East.

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1 Jing-Bao Nie, "The West's Dismissal of the Khabarovsk Trial as 'Communist Propaganda': Ideology, Evidence and International Bioethics", in *Journal of Bioethical Inquiry*, 2004, vol. 1, no. 1, p. 38.

37.2. Run-up to the Trial

During the years leading up to the Second World War, and throughout the war itself, Japanese military and civilian medical personnel conducted organised, structured and systematic experiments on humans without their consent. One of the most infamous of these medical death camps has become known by the name Unit 731 and was located in Harbin, Manchuria.[2] The crimes committed in these facilities "caused the death of several hundred thousand individuals and were part of the official Japanese government policy covering biomedical experimentation on humans, beginning as early as 1930 and lasting until the Japanese surrender in August 1945".[3] Atrocities performed by Japanese doctors can be classified in three categories: research comprising experimentation on humans and the mass production of lethal micro-organisms; the training of army surgeons; and biological warfare field tests that were carried out mainly in China and on a smaller scale in the Soviet Union.

One of the most dreadful features of the Japanese bacteriological weapons programme was the vivisection of humans that occurred not only under the auspices of this programme but was also widely practised in hospitals and clinics to train army surgeons. The leader of Japan's network of human experimentation laboratories was the microbiologist Lieutenant General Ishii Shirō, an ultranationalist, who was convinced that bacteriological warfare represented the weapon of the future.[4]

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[2] Unit 731 – the biggest biological weapons research facility – was officially established by an Imperial Decree on 1 August 1936 as the Anti-Epidemic Water Supply and Purification Bureau. The laboratories would engage in legitimate water purification work, but they would also be the disguise for secret bacteriological weapons research with humans. In 1938 Unit 731 moved to the new base in Ping Fan (a village located 24 kilometres south of Harbin). The facility covered an area of approximately 6 square kilometres. It was a complex of more than 150 buildings. It was the most complete and modern bacteriological weapons research facility of its time.

[3] Sheldon H. Harris, "Japanese Biomedical Experimentation during the World-War-II Era", in *Military Medical Ethics*, 2003, vol. 2, p. 466.

[4] More on the Japanese biological warfare programme and Unit 731 can be found in Peter Williams and David Wallace, *Unit 731: The Japanese Army's Secret of Secrets*, Hodder and Stoughton, London, 1989; Sheldon H. Harris, *Factories of Death: Japanese Biological Warfare and the American Cover-up*, Routledge, London, 1994; Jing-Bao Nie, Nanyan Guo, Mark Selden and Arthur Kleinman (eds.), *Japan's Wartime Medical Atrocities: Comparative Inquiries in Science, History, and Ethics*, Routledge, New York, 2010; Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II*, Westview Press,

The majority of high-ranking members of the medical research units within the Kwantung Army, including Ishii, managed to escape to Japan. The headquarters of Unit 731 in Ping Fan had been completely destroyed during the rushed withdrawal of the Kwantung Army from Manchuria, so the Soviet troops did not even consider it necessary to secure first-hand evidence or take pictures of the ruins.[5] After the war, the Soviets obtained only a small part of the research findings from the few captured members of Unit 731. The Americans were more successful in getting access to the key documents. Directly after the war, the US authorities secretly granted Ishii and some other leading researchers immunity from war crimes prosecution in exchange for data gained from human experimentation.[6]

While it is obvious that the American authorities were trying to prevent the disclosure of Japanese medical atrocities in order to cover up their own co-operation with Japanese war criminals, the question arises as to why the Soviets did not raise the issue during the International Military Tribunal for the Far East ('IMTFE') in Tokyo. The facts indicate that the Soviet authorities learned, with certainty, about Unit 731's medical crimes in early 1946, after interrogating the prisoner of war ('POW') Surgeon Major Karasawa Tomio, who would be brought to trial in Khabarovsk three years later.[7] Despite Soviet accusations of not allowing Soviet evidence on biological warfare to be further investigated in Tokyo due to pressure from the American prosecutor Joseph Keenan,[8] the Soviet prosecution team in Tokyo in fact appeared to be reluctant to mention the bacteriological weapons issue in the courtroom. Such irrational behaviour can be explained by the growing interest in bacteriological warfare in the Soviet Union since the end of the Second World War. The Soviets were obviously dissatisfied with the amount of information they had received. Moreover, being aware of the fact that the US authorities had captured the

Boulder, CO, 1996; and Daniel Barenblatt, *A Plague Upon Humanity: The Secret Genocide of Axis Japan's Germ Warfare Operation*, HarperCollins, New York, 2004.

5 Williams and Wallace, 1989, p. 180, see *supra* note 4.

6 Jing-Bao Nie, "On the Altar of Nationalism and the Nation-state: Japan's Wartime Medical Atrocities, the American Cover-up, and Postwar Chinese Responses", in Nie *et al.*, 2010, p. 126, see *supra* note 4.

7 Williams and Wallace, 1989, p. 181, see *supra* note 4.

8 M.I. Raginskii and S.I. Rosenblit, *Mezhdunarodnyi protsess glavnykh iaponskikh voennykh prestupnikov*, Izdatelstvo akademii nauk SSSR, Moscow, 1950, p. 38.

most important Japanese researchers, the Soviet leaders counted upon exchange of valuable data with the Americans. Nevertheless, the latter "certainly had no wish to give the Soviets any opportunity to enlarge on what they had already learned".[9]

In light of this, the later dismissal of the Khabarovsk Trial as an "exercise in communist propaganda" seems to be explicable not only through the shortcomings of the trial itself but also by "the most direct political factor",[10] namely the leading role of the US in East Asian war crimes prosecution and its rejection of indicting the sensitive bacteriological warfare issue as an attempt to prevent this "valuable" information from spreading throughout the world.

In 1946 the Soviet Committee for State Security (Komitet gosudarstvennoy bezopasnosti, KGB) started to purposefully seek out persons involved in the Japanese bacteriological weapons programme among about 600,000 Japanese POWs captured by the Red Army during and after the Second World War.[11] Apparently the Soviets managed to identify more than a dozen officers involved in Japanese medical crimes; the victims were mostly Chinese nationals. It is known that the investigators spoke with more than 10,000 prisoners to obtain evidence for the trial.[12] Twelve captured ex-members of Unit 731 and another research and development detachment, Unit 100 of the Japanese Kwantung Army, had been identified in 1949 by the Soviet prosecution to be mostly responsible for implementation of the bacteriological weapons programme. They were:

1. General Yamada Otozō, former commander-in-chief of the Kwantung Army;
2. Lieutenant General Kajitsuka Ryuiji, a bacteriologist and former chief of the Medical Administration in the Kwantung Army;
3. Lieutenant General Takahashi Takaatsu, head of the Veterinary Division of the Kwantung Army from 1941 to 1945;

[9] Williams and Wallace, 1989, p. 187, see *supra* note 4.

[10] Nie, 2004, p. 38, see *supra* note 1.

[11] Suzy Wang, "Medical-related War Crimes Trials and Post-war Politics and Ethics", in Nie *et al.*, 2010, p. 126, see *supra* note 4.

[12] Boris G. Iudin, "Research on Humans at the Khabarovsk War Crimes Trial: A Historical and Ethical Examination", in Nie *et al.*, 2010, p. 62, see *supra* note 4.

4. Major General Kawashima Kiyoshi, chief of the Production Division in Unit 731 from 1941 to 1943, whose responsibility was the organisation of the mass production of bacteriological weapons;
5. Lieutenant Colonel Nishi Toshihide, chief of Branch 673 of Detachment 731, who was in charge of supplying Unit 731 with material needed for production of bacteriological weapons (breeding fleas and animals to grow bacteria);
6. Major Karasawa Tomio, head of a section in the Production Division of Unit 731 from 1943 to 1945, who was in charge for production of germs on a large scale and took part in human experiments of biological weapons;
7. Major Onoue Masao, chief of Branch 643 of Unit 731, who was involved in research work on bacteriological weapons and in training of special personnel, bred rodents and plague-carrying fleas for Unit 731;
8. Major General Satō Shunji, chief of Unit 731's divisions, Detachment Nami based in Canton and Detachment Ei (or Tama) based in Nanking, directed the devising and production of bacteriological weapons and training of bacteriologists;
9. Lieutenant Hirazakura Zensaku, veterinary surgeon, a researcher in Unit 100, who was involved in research and mass production of bacteriological weapons, headed reconnoitring groups that were active on Soviet territory;
10. Senior Sergeant Mitomo Kazuo, who participated in breeding of lethal bacteria and testing of bacteriological weapons on humans in Unit 100;
11. Corporal Kikuchi Norimitsu, served in Branch 643 of Unit 731 where he was involved in cultivation of typhoid and dysentery germs;
12. Private Kurushima Yuji, served as a laboratory orderly in Branch 162 of Unit 731, and took part in cultivating cholera, typhoid and other germs.[13]

[13] *Materials on the Trial of Former Service Men of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, Foreign Languages Publishing House, Moscow, 1950, p. 34 ("Materials on the Trial").

It remains unclear why exactly these 12 persons were chosen to stand trial, whereas some other POWs connected to the bacteriological weapons programme (for example, Captain of the Medical Service Kanazawa Kazuhisa, chief of the First Division of Branch 673 of Unit 731; Sub-Lieutenant of the Quartermaster Service Hotta Ryoichiro, member of the Hailar Branch of Detachment 731; or Sub-Lieutenant of the Veterinary Service Fuzukumi Mitsuyoshi, physician in Unit 100) were only called as witnesses.

It is obvious that the group of the defendants was very heterogeneous; it ranged from a general, who had been commander-in-chief of the Kwantung Army, to a corporal. This can be explained by the fact that the staff of Unit 731 was almost entirely evacuated to Japan and the Soviets captured only a few military personnel directly involved in the preparation and carrying out of the biological war.[14] Moreover, there are reasons to believe that for the Soviets it was more important to have selected a representative group that would indicate the overall involvement of Japanese officers in the bacteriological weapons programme and crimes associated with it rather than to prosecute according to the rank and involvement in Japanese medical crimes.[15]

The charges brought against them were as follows: formation of special units for the preparation and implementation of bacteriological warfare; criminal experiments on human beings; employment of bacteriological weapons in the war against China; and preparations for bacteriological warfare against the Soviet Union. Thereby the prosecution team built on the legacy of the International Military Tribunal at Nuremberg ('IMT') and IMTFE at Tokyo. For example, they adopted the principle of individual responsibility, according to which the execution of an order of a superior did not free defendants from responsibility: "No pleading with reference to orders from superiors or to the status of servicemen can serve as justification for the heinous crimes they committed, and which have been fully proved in Court".[16]

[14] Vladimir Baryshev, "Khabarovskii sudebnyi protsess nad iaponskimi voennymi prestupnikami (k 60-letiiu sobytiia)", in *Zhurnal mezhdunarodnogo prava i mezhdunarodnikh otnoshenii*, 2009, no. 3.

[15] Williams and Wallace, 1989, p. 221, see *supra* note 4.

[16] Materials on the Trial, 1950, p. 447, see *supra* note 13.

It was important to legitimise the Khabarovsk Trial by referring to the findings of the internationally recognised IMTFE, namely that

> the Japanese ruling clique had, in conjunction with Hitler's Germany, planned, launched and waged aggressive wars, and had for many years engaged in active preparations for a large-scale aggressive war against the Soviet Union […] The Tribunal also attested to the fact that Japan had entered into a criminal conspiracy with Hitler's Germany and fascist Italy against peace and humanity.[17]

The unusually lenient verdict, announced on the evening of 30 December 1949, also contained a hidden message – the humanism of the Soviet judicial system and the generosity of the Soviet people (apart from the intention to keep the defendants alive in order to exploit their knowledge further in developing biological weapons). Indeed, despite the fact that all the accused were found guilty, they received unusually lenient sentences, not very typical of Soviet practice. Even more surprising was the fact that the sentences handed down in Khabarovsk did not correspond to the demands of the prosecution, which was a violation of an unwritten law at that time. Only four of the accused – Yamada, Kajitsuka, Takahashi and Kawashima received the highest possible imprisonment term – 25 years' forced labour. Satō and Karasawa were sentenced to 20 years, Nishi to 18 years, Onoue to 12 years, Mitomo got 15 years in labour camp, Hirazakura 10 years, Kurushima three years and Kikuchi two years.[18] When analysing the trial proceedings, several aspects deserve consideration, namely the legal basis, the preparation and the propaganda aspect of the whole trial.

37.3. Legal Basis of the Proceedings

One of the most controversial aspects of the trial that affected its international recognition was certainly its legal basis. All defendants were charged following the Decree of the Presidium of the Supreme Soviet of the USSR of 19 April 1943 entitled "On Measures of Punishment for German-Fascist Criminals Who Are Guilty of the Murder and Torture of Soviet Citizens and Red Army Prisoners of War and for Soviet Citizens Who Are Spies and Traitors to the Motherland and for Their

[17] Materials on the Trial, 1950, p. 9, see *supra* note 13.

[18] *Ibid.*, pp. 534–35, see *supra* note 13.

Accomplices". The Decree had been released with a view to punishing Nazi perpetrators in the European part of the Soviet Union. It was classified and its provisions remained unknown to the accused and their defence counsel. The provisions of paragraph 1 of the Decree were quoted neither in the indictment nor in the sentence. Nevertheless, this fact did not prevent its obligatory use, which resulted in the sentencing of not fewer than 40,000 persons (among them at least 25,209 foreigners) under the Decree from 1943 to 1952.[19]

The defendants at Khabarovsk were also charged under paragraph 1 of the Decree. It states: "To establish that German, Italian, Romanian, Hungarian, Finnish fascist villains convicted of murder and torture of civilians and Red Army prisoners of war as well as spies and traitors among Soviet citizens are punishable by death through hanging". As is evident from this, Japanese defendants were not listed in the Decree. In this case, the Decree was applied to the Japanese military by analogy, which constituted a grave shortcoming in the preparation of the trial. The Soviets were well aware of this inconsistency. In a report sent to Stalin on 22 November 1949 –"On the results of the investigation into criminal activities of nine persons among accused Japanese generals and officers serving in the anti-epidemic Detachment 731" – the following procedure was adopted: the former Minister of Foreign Affairs Viacheslav Molotov, Deputy Chairman of the Council of Ministers Georgii Malenkov, members of the Presidium of the Central Committee of the Communist Party Lavrentii Beria, Lazar Kaganovich and Nikolai Bulganin, and a working group consisting of the Minister of Internal Affairs Sergei Kruglov, Prosecutor General Gregory Safonov and Minister of Justice Konstantin Gorshenin offered Stalin to put all accused Japanese war criminals on trial according to the Decree, while at the same time acknowledging that "although Japanese military are not mentioned in this Decree, their criminal activities are analogous to the crimes of the fascist German army".[20]

After analysing the published materials of the trial as well as the correspondence between the working commission and Stalin held at the

[19] Iudin, 2010, p. 63, see *supra* note 12.

[20] "Results of the Investigation into Criminal Activities of Nine Persons among Accused Japanese Generals and Officers Serving in the Anti-epidemic Detachment 731", Report No. 5270/k, 22 November 1949, p. 16 ("Results of Investigation"), R 9492, Op 1a, D 596, State Archive of the Russian Federation ('GARF').

State Archive of the Russian Federation in Moscow, it seems apparent that the Soviets did not consider there to be a big difference between the Japanese and Nazi regimes. They considered "the alliance between Hitler's Germany and imperialist Japan" a "criminal conspiracy against peace".[21] In a speech made on behalf of the accused Satō, the defence counsel P.Y. Bogachov asserted:

> The evil deeds which have been the objects of your investigation have something in common with the atrocities committed by the German fascists in the territory of the Soviet Union and of other European countries […] They have the same ideological basis. The crimes investigated were the direct result of the alliance between imperialist Japan and fascist Germany.[22]

In his speech, the Soviet State Prosecutor Lev Smirnov, who had already served as Chief Prosecutor at the IMT in Nuremberg, went further and compared Japanese biological warfare experiments with human experiments conducted in German Nazi concentration camps: "One's attention cannot help being drawn to the similarity in the methods of destroying human beings on a mass scale employed by the Hitlerite war criminals and by the Japanese imperialists".[23] Smirnov justified the need for the prosecution of the Japanese medical crimes by referring to the legacy of the Nuremberg Trial and the notorious crimes at Dachau concentration camp:

> Thus, the experimenters in the Ishii Detachment performed the same experiments as those performed by that sinister S.S. experimenter Dr. Rascher, which the Nuremberg International Tribunal quite justly classified among the cruellest and most inhuman of the experiments on human beings performed by the vile Hitlerites.[24]

Some researchers argue that the Decree of 19 April 1943 was wrongly used as a legal basis for the Khabarovsk Trial, not only because it could not be applied to Japanese war criminals but also because there were no Soviet civilians and Red Army POWs among the victims.[25]

[21] Materials on the Trial, p. 409, see *supra* note 13.

[22] *Ibid.*, p. 496.

[23] *Ibid.*, p. 410.

[24] Materials on the Trial, 1950, p. 432, see *supra* note 13.

[25] Baryshev, 2009, see *supra* note 14.

Despite the fact that Chinese citizens constituted the biggest group among the victims of the Japanese bacteriological weapons programme, there is evidence that Soviet citizens were also killed as a result of Japanese human experiments. The Soviet investigation commission came to the conclusion that "Chinese patriots and Soviet citizens who for various reasons found themselves detained on the territory of Manchuria by authorities of the Kwantung Gendarmerie and Japanese Military Mission were used in order to conduct experiments on the effect of bacteriological means manufactured in Unit 731".[26] Therefore, it came in handy that some witnesses confirmed the presence of Russian victims. For example, the accused Yamada testified that he "sanctioned the violent killing of Chinese, Russians and Manchurians, who were sent for experimental purposes by the Kwantung Gendarmerie".[27] Questioned about the activities of Unit 731, Kawashima said that "imprisoned Chinese patriots and Russians whom the Japanese counter-espionage service had condemned to execution" were used for the purposes of experiments with lethal bacteria.[28] The former deputy chief of the Japanese Hogoin camp who participated in the court proceedings as a witness remembered a case of a Soviet soldier, Demchenko, who was sent to Unit 731 for "physical extermination", which meant murder through experimentation.[29] Another witness Iijima confirmed sending Soviet citizens from the Hogoin camp to Unit 731: "In all, I on various occasions sent about 40 Soviet citizens from the Hogoin camp to certain death; they all died under the experiments".[30] The accused Mitomo testified about "a case of a Russian on whom, in August 1944, various experiments were performed for two weeks".[31] A witness Furuichi stated in his testimony that "a group of Russians, Manchurians, Chinese and Mongolians" were objects of frostbite experiments which were carried out in connection with preparation of military operations against the Soviet Union.[32]

But after assessing this evidence, the question remains as to how many victims had been Soviet citizens and not just Russians permanently

[26] Results of Investigation, p. 14, see *supra* note 20.

[27] Materials on the Trial, 1950, p. 16, see *supra* note 13.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*, p. 21.

[32] *Ibid.*, pp. 21–22.

living in Manchuria under Chinese citizenship. It seems that the investigation team did not clearly distinguish between these two groups in order to exaggerate the number of Soviet victims and justify the trial against Japanese war criminals who had committed their crimes mostly on Chinese soil. Moreover, the Decree was obviously created with the aim of prosecuting crimes against Soviet citizens committed within the territory of the Soviet Union. Apparently, the blurred distinction between the Russian and Soviet people should have helped make the application of the Decree look more convincing.

The Decree itself deserves special analysis. The fact is that this document had little in common with the legal foundation for war crimes trials in the West. The text of the Decree contains no clear juridical definitions of war crimes. Instead, such vague and subjective terms as "brutality" and "atrocities" are repeatedly used. However, it must also be underlined that the Decree was the first of the Second World War proclamations covering war criminals and reflected the political aims of the wartime Soviet Union. It was already released in 1943 and could therefore not rely on later models such as the IMT or IMTFE Charters or draft definitions from there. It is also important to mention the severity of the document. Paragraph 1 introduced the death penalty by hanging which was to be carried out publicly:

> Enforcement of military courts' sentences – hanging of convicted to death – to be carried out publicly in front of people; the bodies of hanged persons should be left on the gallows for several days for everyone to realise what punishment and retribution will come upon anyone who commits violence and reprisals against civilians and who betrays their homeland.[33]

It should be noted that such criminal sanction as hanging was not listed in Article 13 of the Basic Principles of Criminal Law of 1924, and Articles 20 and 21 of the Criminal Code of the Russian Soviet Federative Socialist

[33] Ukaz Prezidiuma Verkhovnogo Soveta SSSR, "O merakh nakazaniia dlia nemetsko-fashistskikh zlodeev, vinovnykh v ubiistvakh i istiazaniiakh sovetskogo grazhdanskogo naseleniia i plennykh krasnoarmeitsev, dlia shpionov, izmennikov rodiny iz chisla sovetskikh grazhdan i ikh posobnikov" [Decree of the Presidium of the Supreme Soviet of the USSR, "On Measures of Punishment for German Fascist Criminals Guilty of the Murder and Torture of Soviet Civilians and Red Army Prisoners of War; also for Spies and Traitors to the Motherland among Soviet Citizens and their Accomplices"], 19 April 1943.

Republic of 1926. However, after the Presidium of the Supreme Soviet of the USSR adopted a new Decree entitled "On the Abolition of the Death Penalty" (*Ob otmene smertnoi kazni*) on 26 May 1947,[34] the death penalty in the Soviet Union was replaced by imprisonment in labour camps for up to 25 years. Nevertheless, capital punishment was to be restored on 12 January 1950, which leads us to another shortcoming of the Khabarovsk Trial, namely its rushed conduct.

37.4. Preparations and Timing of the Trial

The rushed preparations for the Khabarovsk Trial, without any prior announcement, contributed further to its image as a "show trial": the 12 former servicemen of the Japanese Army were tried for the manufacture and use of bacteriological weapons within only six days, from 25 to 30 December 1949. Ironic as it may sound, it appears that this haste was based on the intention to assure lenient sentences for the accused. Apparently, it was decided long before the start of the proceedings that the Japanese defendants would not receive severe punishment. Timing was crucial for the Soviet investigators who were forced to end the trial by the end of 1949 before the restoration of the death penalty by the Decree of the Presidium of the Supreme Soviet of the USSR "On the Use of the Death Penalty for Traitors to the Motherland, Spies and Subversive Saboteurs" issued on 12 January 1950. This Decree re-established the death penalty for "grave crimes against the Soviet state".[35] It is likely that the prosecution team was deliberately trying to avoid the death penalty for the defendants by any means and was looking for a plausible excuse in the public eyes. However, the argument is not entirely convincing, because in other Soviet trials of that era, the abolition of the death penalty did not prevent the accused from being executed.[36] In this instance,

[34] Ukaz Prezidiuma Verkhovnogo Soveta SSSR, "Ob otmene smertnoi kazni" [Decree of the Presidium of the Supreme Soviet of the USSR, "On the Abolition of the Death Penalty"], 26 May 1947.

[35] Ukaz Prezidiuma Verhovnogo Soveta SSSR, "O primenenii smernoi kazni k izmennikam rodiny, shpionam, podryvnikam-diversantam" [Decree of the Presidium of the Supreme Soviet of the USSR, "On the Use of the Death Penalty for Traitors to the Motherland, Spies and Subversive Saboteurs"], 12 January 1950.

[36] A series of fabricated criminal cases in the late 1940s and early 1950s initiated by Joseph Stalin in order to eliminate some prominent members of the Communist Party of the Soviet Union. They were accused of treason and of planning to create an anti-Soviet organisation based in Leningrad.

capital punishment was applied to the accused retroactively. It thus underlines the fact that apparently the Japanese defendants enjoyed special protection due to their still unexploited insider knowledge.

The official decision to organise the Tribunal was made on 8 October 1949 by the Resolution of the Soviet of the Ministers of the USSR [37] under Stalin's chairmanship, "About the organisation in Khabarovsk of a trial of the so-called Japanese 'Anti-epidemic unit number 731' senior officials preparing bacteriological means for the war with the Soviet Union and China".[38] By 22 November 1949 the working group of Kruglov, Safonov and Gorshenin had already proposed to Stalin and his Deputy Chairmen in the Council of Ministers to start legal proceedings in Khabarovsk on 7 December and finish "no later than 14 December". [39] They proposed sentences of 10 to 25 years in prison depending on the degree of each defendant's guilt.

In his speech, State Prosecutor Smirnov did not give a detailed explanation of what criteria he used to determine penalties for each defendant (from 25 to three years in prison), stating only that "all the accused committed heinous crimes" and deserved "severe punishment".[40] Nevertheless he urged the judges to adhere to a differentiated approach while delivering their verdict. The early versions of the Prosecutor's speech help us to shed light on this aspect of the Khabarovsk Trial. The draft of Smirnov's speech from 21 November 1949 deals with the question of which punishment would match the severity of the atrocities committed by the defendants. In this case, he stated, the severity and the scope of the crimes were so big that all the defendants "would deserve capital punishment". However, the absence of the death penalty should also serve as a sign of the "humanism" of the Soviet state:

> Driven by the great ideas of socialist humanism, the Soviet Union abolished death penalty in times of peace. Soviet people […] gave vivid examples of generosity to defeated

[37] Resolution No. 4284-1783s of the Soviet of the Ministers of the USSR.

[38] Report to Stalin, Molotov, Malenkov, Beria, Kaganovich and Bulganin from Minister of Internal Affairs of the USSR Kruglov, Prosecutor General of the USSR Safonov and Minister of Justice of the USSR Gorshenin, p. 13 ("Report to Stalin *et al.*"), Report No. 5270/k, 22 November 1949, p. 16, R 9492, Op 1a, D 596 (GARF).

[39] *Ibid*.

[40] Materials on the Trial, 1950, p. 465, see *supra* note 13.

> enemies and by fulfilling […] socialist justice the Soviet court never acts out of revenge.[41]

Nevertheless, during the preparations for the trial there emerged the idea of demanding the maximum possible punishment of 25 years in prison for each of the accused. Smirnov argued that even Mitomo, the least guilty and most junior in rank in the list of the defendants, deserved 25 years' imprisonment for his deeds, so it would be obviously wrong to ask for a more lenient punishment for the other defendants who committed more serious crimes.[42]

The awareness that even the maximum sentence was lower than what the defendants deserved most likely led to omission of this controversial topic in the final version of the State Prosecutor's speech. Archival documents confirm this suggestion. In his comments on the draft speech made on behalf of, the legal adviser Colonel of Justice Dorman recommended not mentioning the issue of capital punishment. "Can we talk about the fact that the defendants deserve the death penalty? The penalties required by the Prosecutor are lower than those deserved by the defendants. Therefore it would be more correct if the Prosecutor demanded harsh penalties, without specifying them in relation to each defendant".[43]

But why was it so important for the Soviets not to impose capital punishment? It seems that "the unusually light sentences handed down at Khabarovsk were a form of barter"[44] for valuable information on bacteriological weapons that could be obtained from them. Another crucial question is why the Soviet authorities waited till 1949 to initiate the trial if, as some sources suggest, they were aware of the Japanese activities regarding development of biological weapons even before the war had ended.[45] Although this topic still needs some deeper analysis, it is likely that the decision to wait for more than four years from the capture of Japanese military involved in the bacteriological weapons programme until their prosecution seems to stem from the waiting game of the Soviets

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41 A Draft of the State Prosecutor's Speech, 21 November 1949, p. 71, R 9492, Op 1a, D 596 (GARF).

42 *Ibid.,* p. 118.

43 Recommendations of the Legal Adviser Colonel of Justice Dorman concerning the Prosecutor's speech, 27 December 1949, p. 122, R 9492, Op 1a, D 596 (GARF).

44 Iudin, 2010, p. 69, see *supra* note 12.

45 Williams and Wallace, 1989, p. 181, see *supra* note 4.

who were engaged in a competition with the US over capturing the Japanese research data after Japan's surrender. Political interests in the re-use of the bacteriological weapons programme from both new superpowers can also partially explain the omission of the Japanese medical-related crimes at the IMTFE. [46] Their expectations were unrealistic and the US was not eager to share the information on bacteriological weapons, so they decided to use the captive Japanese for ideological and geopolitical purposes.

37.5. Propaganda Elements in the Trial Proceedings and Beyond

The propaganda element was another problem associated with the trial. The central message of the propaganda was to praise the leading role of the Soviet Union in defeating Japan and rescuing the world from an inevitable bacteriological war. It was especially evident in the final speech of Smirnov who claimed that "it was only the swift crushing blow of the Armed Forces of the Soviet Union that paralysed the enemy, saved the world from the horrors of bacteriological warfare".[47] He continued using the common propagandistic rhetoric:

> Peace in the Soviet Far East was maintained only as a result of the genius of Stalin's policy, as a result of the victorious consummation of the Stalin five-year plans, as a result of the vigilant concern displayed by the Bolshevik Party and the Soviet Government for the strengthening of the Soviet Armed Forces.[48]

Even the speeches of the defence lawyers and the defendants themselves were not free from propaganda connotations, as they hastened to praise

[46] Ken Alibek claims that the Japanese documents on bacteriological weapons research that were captured in 1945 were sent to Moscow and thoroughly studied. Thereafter, Stalin ordered the establishment of a Soviet bacteriological weapons facility that should achieve or even exceed the accomplishments of the Japanese. A year after a new Army biological research complex was established at Sverdlovsk (now Ekaterinburg); see Ken Alibek, *Biohazard*, 2008, Random House, New York, p. 37. This opinion is shared by the authors of *The Soviet Biological Weapons Program*. Although it is difficult to identify what exactly Soviet scientists learned from the Japanese programme, it is a fact that the Soviet bacteriological weapons programme benefited from the Japanese experience; see Milton Leitenberg and Raymond A Zilinskas with Jens H Kuhn, *The Soviet Biological Weapons Program: A History*, Harvard University Press, Cambridge, MA, 2010, p. 36.

[47] Materials on the Trial, p. 466, see *supra* note 13.

[48] *Ibid.*, p. 407.

Stalin who had finally arrested the evil wrongdoers. Counsel Borovik, who defended Kawashima, expressed "the profoundest gratitude and love to the man whose wisdom foresaw and warned the Soviet people […] of the deadly danger that hung over our Motherland in the Far East; to the man whose bright genius turned aside the raised hand of the enemy and saved us from frightful calamity and suffering".[49]

The question of fair trial has always strongly been connected with the propaganda claim. It is difficult to say if the defendants acted under pressure, when some of the accused also mentioned in their last pleas gratitude for "the human treatment", for being provided with defence counsel and for the generosity of the Soviet Court. For example, defendant Kawashima asserted that "the Soviet Union is a democratic country which cares for the welfare of the people and stands on guard for peace".[50] Mitsomo went on to add that for the first time he learned "the truth about the Soviet Union, I came to know the Soviet people; I saw that they are humane and noble".[51] Moreover, all the accused repented, and 11 of them fully confessed their guilt with only one exception: Kajitsuka pleaded partially guilty.

It is most likely that the accused did not have any other choice than to confess their guilt. Although they were provided with highly qualified and experienced defence lawyers from the Moscow Bar Association,[52] the strategy of the defence lawyers was not aimed at proving the innocence of the accused but merely mitigating their guilt. In contrast to the practice at the Nuremberg and Tokyo Trials, the defendants in Khabarovsk had been presumed guilty already before the start of the trial (even if it had also already been decided they should be spared the death penalty). The Court's role was ultimately limited only to the determination of each defendant's degree of guilt. This fact facilitated the image of the Khabarovsk Trial as an exercise in communist propaganda, even while we consider that the IMT and the IMTFE were not completely free from propaganda either. For example, Counsel Belov considered the guilt of his defendant Yamada as proved:

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49 *Ibid.*, p. 479.

50 *Ibid.*, p. 515.

51 *Ibid.*, p. 520.

52 Report to Stalin *et al.*, p. 14, see *supra* note 38.

> there is no room for debate concerning the facts and proofs as such. The evidence of the witnesses, the original documents at hand in the case which were collected during the stage of preliminary investigation, and the detailed explanations given by the accused themselves, have confirmed in their sum total the factual side of the indictment.[53]

The Soviet offensive in Manchuria of 1945 was presented as a preventive military measure that "put a stop to the criminal preparations for aggressive war against the Soviet Union and other peaceful nations with the object of creating 'Greater East Asia'".[54] This rhetoric was aimed at justifying the legitimacy of the Soviet Union to prosecute crimes committed on the territory of another country by foreign nationals. At the same time, the message of the court proceedings would help to deter such crimes in the future and serve as a warning to the new ideological enemies who might have been "contemplating new crimes against mankind, and preparing new means for the wholesale extermination of human beings".[55] Otherwise they would confront "the mighty front of democratic forces headed by the great Soviet Union".[56]

The Court as an ideological stage was quite evident in other statements of the lawyers. They concentrated their efforts on persuading the judges that the accused were not only brutal criminals but also a product of the Japanese imperialist system who were "not only to be condemned but also to be pitied".[57] Belov stated that Soviet science of criminal law had "never made common cause with the so-called anthropological school of criminal law and its doctrine of the born criminal".[58] The official narrative was to give the defendants another chance; they were not hopeless criminals but persons who still could be re-educated under the right auspices. This is not so surprising an

53 Materials on the Trial, 1950, p. 467–68, see *supra* note 13.

54 *Ibid.*, p. 409.

55 *Ibid.*, p. 466.

56 *Ibid.*

57 *Ibid.*, p. 478.

58 *Ibid.*, p. 468.

approach, as "the Soviets […] had initially hoped to 'indoctrinate' the POWs and to convert them to communism before releasing them".[59]

Immediately after the proclamation of the verdict, the Soviets started to spread information about the Khabarovsk Trial and its findings. As early as 1950, the materials of the trial – including testimonies of the accused, documentary evidence and the findings of the experts – were published in a book and translated into Chinese, Japanese and English. Since that time, this publication has been used as a leading source of information on the Japanese bacteriological weapons development programme as access to archival material is still restricted. The centralised Soviet press intensively reported from the courtroom and the biggest Soviet newspapers such as *Pravda* and *Izvestiia* published the most important documents, including the verdict that appeared on their front pages on 1 January 1950 together with propagandistic caricatures and excerpts from the Chinese newspaper the *People's Daily* (*Renmin Ribao*).

37.6. International Response

It was also not accidental that the voices of gratitude from the young People's Republic of China were forthcoming soon after the verdict appeared in the Soviet press. The verdict was important in anticipation of the signing of a Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance scheduled for February 1950 and to create an image of the Soviet Union as the closest ally of the PRC.

The PRC enthusiastically supported the propaganda campaign started by the Soviets. The full indictment was translated and published in the *People's Daily*. The Khabarovsk Trial was depicted as "an expression of friendship of the Soviet people towards the Chinese people" and "a warning to Anglo-American warmongers trying to use biological weapons and endanger peace in the Far East and throughout the world".[60] The information about the American collaboration with Japanese war criminals and the demands for Emperor Hirohito of Japan's liability as a

[59] Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979, p. 150.

[60] "Chinese Newspapers on the Trial of Former Military of the Japanese Army", in *Pravda*, 1 January 1950, no. 1, p. 4.

war criminal featured in the headlines of the Chinese press.[61] The propaganda campaign in the Chinese media emphasised the suffering of the Soviet people side by side with Chinese victims of the Japanese bacteriological weapons experiments, promoting at the same time the idea of a natural alliance between the two communist states in the face of a threat coming from the US and Japan.[62] Moreover, the Soviet Union was depicted as a defender who could protect China from further bacteriological attacks from Japan:

> Finally and yet most importantly, we need more and ever-increasingly to let the Soviet Union lead the peaceful democratic people of the world in unity and cooperation. Soviet power will protect us from those who love war […] Proof of this idea can be seen in the first-ever decision of a court to try the Japanese scientists [in Khabarovsk] who are the bacteriological warfare war criminals for their especially big crimes dating from years back.[63]

The Soviet message emanating from the trial was heard in China where the Soviet propaganda campaign was used to reinforce anti-Japanese and anti-American sentiment as a justification for more intense friendship between the Soviet Union and the PRC.[64] Moreover, the Khabarovsk Trial encouraged the first widespread education and propaganda campaigns throughout the country that were accompanied by collecting further evidence of Japanese medical crimes.

This message was intended not only for the new Chinese partners but also for the rest of the world, especially the opposing Western bloc led by the new US superpower. The Soviets made efforts to spread the information about the Khabarovsk Trial and its findings through both media and diplomatic channels.[65] On 1 February 1950 the Soviet

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61 Justin Jacobs, "Preparing the People for Mass Clemency: The 1956 Japanese War Crimes Trials in Sehnyan and Taiyuan", in *The China Quarterly*, 2011, vol. 205, p. 160.

62 Adam Cathcart, "'Against Invisible Enemies': Japanese Bacteriological Weapons and China's Cold War, 1949–1950", in *Chinese Historical Review*, vol. 16, no. 1, 2009, p. 67.

63 Li Shiliang, "Imperialism is itself an Atrocity", in *Lüshun-Dalian Daily*, 8 January, 1950, cited in *Ibid.*, p. 69.

64 Adam Cathcart and Patricia Nash, "'To Serve Revenge for the Dead': Chinese Communist Responses to Japanese War Crimes in the PRC Foreign Ministry Archive, 1949–1956", in *The China Quarterly*, 2009, vol. 200, p. 1057.

65 Information about the media reaction to the trial in foreign countries was thoroughly collected by the Foreign Reference Editorial Office of the Telegraph Agency of the Soviet

ambassadors in Washington, London and Beijing, on behalf of the Soviet Government, handed in a diplomatic note on the trial to the Governments of the US, Britain and China. Two days later, the note was published in the Soviet press. This document set out the basic facts established during the trial. In connection with the note, the Soviet Government proposed to try Emperor Hirohito, Generals Ishii, Kitano Masaji, Wakamatsu Yujirō and Kasahara Yukio in the near future before a special International Military Court for committing war crimes.[66] However, this diplomatic démarche of the Soviet government was unsuccessful.

The media response more generally was not successful either. By and large, the message was ignored outside Japan and the socialist states. The Khabarovsk Trial was briefly mentioned in a couple of British newspapers, but only the communist *Daily Worker* published an extensive article on the trial that criticised the US for defending those "who have admitted the most atrocious war crimes".[67] Short messages about the Soviet trial were broadcast in France, Spain, Denmark, West Germany and East Germany.[68]

The Khabarovsk Trial provoked even less reaction in the American media. The very few mentions of the tribunal referred to it as an attempt to distract the international community from the fate of Japanese POWs in the Soviet Union.[69] A secret US District Field Intelligence Report contains probably the best summary of the public perception of the findings presented in Khabarovsk in Allied countries. The report points to all the drawbacks of the Khabarovsk Trial that consequently led to its dismissal: no previous announcement, "no means for determining the authenticity of […] official writs", dependency on the confessions of the accused who "willingly expanded upon their guilt and described at length their participation in a diabolic plan for mass slaughter with bacterial weapons", "Communist technique of justice" and finally the "legalistic

Union (TASS) and analysed in secret reports. This indicates much interest in the trial's perception abroad.

66 "Note of the Soviet Government to the Governments of the USA, Great Britain and China", in *Pravda*, 3 February 1950.

67 Williams and Wallace, 1989, p. 228, see *supra* note 4.

68 Response to the Trial of Former Servicemen of the Japanese Army in Japan, R 4459, Op 27, D 10518, D 12331; Op 38, D 229 ("Response to the Trial") (GARF).

69 *Ibid.*, p. 68.

burlesque".[70] The new geopolitical situation had its impact on public reactions in the countries that once sailed in the same boat under the veil of bringing justice for war crimes. The Cold War was a reality of the post-war world, and Allied unity that had existed in the face of a common enemy was already a thing of the past.

37.7. Conclusion

Despite all the efforts of the Soviets to spread its version of the Khabarovsk Trial through diplomatic and media channels, the facts about the Japanese bacteriological weapons programme verified at the trial were dismissed as communist propaganda and largely forgotten. This was a direct result of the growing Cold War conflict between the Soviet Union and the US. A representative of General Douglas MacArthur's headquarters even stated that after a "full investigation" they could not find any evidence of the use of biological weapons by Japan.[71] The time had come when national, political and ideological interests gained priority over justice.

The shortcomings associated with the Khabarovsk Trial helped to strengthen the opinion in the West that the Soviet tribunal was nothing but a trick. No previous announcement of the proceedings (the trial was a complete surprise even for the PRC), deliberate exclusion of international observers, efforts to control all the aspects of the trial all made it easy to portray it as a mere show trial. Strong propaganda sentiment and a vague legal basis did not promote its worldwide recognition even if efforts to adhere to the standards of a fair trial are discernible. Each defendant had a defence counsel. Defendants enjoyed the "right during the Court proceedings to put questions to witnesses, experts, and to each other, and to make explanatory statements on the substance of the case". They could also call further witnesses and experts or call for other "proofs and documents".[72] Despite all the efforts and the attributes of a fair democratic trial, it has to be underlined that they were applied through rules which were valid in the Soviet Union and which did not have much in common with Western legal practice.

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70 Williams and Wallace, 1989, p. 229, see *supra* note 4.

71 Response to the Trial, p. 67.

72 Materials of the Trial, 1950, p. 244, see *supra* note 13.

Nevertheless, it would be unjust to dismiss all the findings of the trial as, unlike in the case of the Stalin show trials of the 1930s, evidence was not likely to be fabricated and has been proven to be accurate. The point of view advanced by some scholars can be agreed with – that it is important to distinguish between the flaws in the legal proceedings and great quantity and quality of the evidence presented in Khabarovsk, between the basic facts and propaganda.[73] Boris Iudin, for example, argues that it would have been impossible to fake such a huge amount of evidence. He points out the different nature of the evidence presented at show trials: "The materials presented at these trials [1930s show trials] contained many more unfounded invectives and much less factual material than was the case at Khabarovsk. Moreover, many of the alleged crimes of these 'enemies of people' simply defied credibility and common sense".[74]

The most reasonable explanation of why the Soviets opted for "belated justice" and decided to organise the Khabarovsk Trial long after the end of the war, and even after the IMTFE, seems to be that they had "finally given up hope of persuading the West to allow them access to Ishii and the other Japanese scientists".[75] There was no chance that they would receive the missing parts of the experimental data on bacteriological warfare, so there was no need to keep silent about the agreement between the Americans and Japanese medical war criminals. Moreover, the Soviet propaganda machine could even benefit from bringing justice to "Chinese patriots" and "Soviet citizens",[76] thereby establishing close contacts with the newly-born PRC and at the same time embarrassing the Americans. The trial further served as a means to stage a Soviet version of coming to terms with Japanese war atrocities, given the fact that the Soviet performance at the Tokyo Trial had been experienced as a true disaster from the Soviet point of view.

Ultimately, the prosecution at Khabarovsk was trying to prove that the IMTFE failed to address Japan's biological weapons. From the Soviet perspective, the Japanese had committed exceptional crimes comparable to the Nazi atrocities that required special legal treatment, especially with

[73] Nie, 2004, p. 39, see *supra* note 1; Iudin, 2010, p. 69, see *supra* note 12.

[74] Iudin, 2010, p. 69, see *supra* note 12.

[75] Williams and Wallace, 1989, p. 230, see *supra* note 4.

[76] Materials of the Trial, 1950, pp. 15–16, see *supra* note 13.

regard to bacteriological weapons. Khabarovsk was set up to show that the accused Japanese had conceived even worse crimes than those raised at Tokyo: they had planned biological warfare as a form of aggressive war; their actions had already led to aggression against China and the Soviet Union; and their actions might have led to a global bacteriological war. The Khabarovsk Trial, designed as an alternative to Tokyo, presented an ideal opportunity to promote the Soviet version of the events of the Second World War in the Far East. Moreover, the captive Japanese were useful for Soviet ideological and geopolitical purposes during the onset of the Cold War – not only blaming the Americans for the omission of the Japanese biological weapons programme in Tokyo but also embarrassing them through the fact of co-operation with Japanese war criminals and protection of Emperor Hirohito from war crimes charges.

Despite all its drawbacks and the fact that the process did not enjoy an international character, the Khabarovsk Trial should be recognised as an attempt to present and prove the evidence of Japanese medical crimes during the war. The Khabarovsk Trial is thus a telling example not only of the Soviet war crimes trials policy during the early Cold War period with regard to its geopolitical interests in Asia but also of the entanglement of political context, propaganda and an ambivalent attitude towards prosecuting war crimes on the part of one of the major Allies of the Second World War.

38

The Supreme National Tribunal of Poland and the History of International Criminal Law

Mark A. Drumbl[*]

38.1. Introduction

The Supreme National Tribunal of Poland (Najwyższy Trybunał Narodowy, the 'Tribunal') operated from 1946 to 1948. It implemented the 1943 Moscow Declaration. This instrument provided for the repatriation of Nazi war criminals to the countries where they allegedly committed atrocities to stand trial and, if convicted, to be sentenced on the basis of national laws. The Tribunal presided over seven high-profile cases that implicated 49 individual defendants targeted as major perpetrators.

This chapter discusses two of the Tribunal's trials: that of Rudolf Höss, *Kommandant* of Auschwitz (Oświęcim), described as the site of the largest mass murder in history,[1] and Amon Göth, commander of the

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[1] The Höss proceedings are reported and summarised in Trial of Obersturmbannfuhrer Rudolf Franz Ferdinand Hoess ("Höss case") (http://www.legal-tools.org/en/go-to-database/record/9e87ed/). "Rudolf Höss has killed more people than any man in history, and Auschwitz (Oświęcim) was the greatest charnel house of all time"; Joseph Tenenbaum, "Auschwitz in Retrospect: The Self-Portrait of Rudolf Höss, Commander of Auschwitz", in *Jewish Social Studies*, 1953, vol. 15, nos. 3/4, p. 219 noting: "The sprawling Camp Auschwitz extended for over 40 square kilometers, with 60 affiliated labor camps […] At its peak, Auschwitz contained 140,000 prisoners".

Kraków-Płaszów labour camp.[2] The chapter then pivots from these trials to a more general examination of the Tribunal as an inflection point for contemporary international criminal law. Elsewhere I have written about the Tribunal's first trial, involving Arthur Greiser (the notorious Governor of the Warthegau). As with Höss and Göth, Greiser was convicted and executed. The Greiser case in fact constitutes the first conviction of an influential Nazi German official for the crime of waging aggressive war (predating the judgment and sentence of the International Military Tribunal ('IMT' or 'Nuremberg Tribunal').[3]

The trials conducted by the Tribunal in Poland had didactic as well as punitive goals. They aspired to educate the world about Poland's suffering during the Nazi occupation. Accordingly, the Tribunal's trial narrative tended to project the Final Solution as crimes against the Polish peoples and the Slavic nations, as well as against Europe's Jewish population. Poland clamoured – unsuccessfully – for special status at the IMT.[4] The Tribunal was a response to the Allies' having rebuffed this request. Polish prosecutors felt the IMT judgment did not engage sufficiently with the suffering of the Polish people at the hands of the Nazis; the work of the Tribunal was intended to remedy this deficit. Each of the Tribunal's seven cases was selected with a separate expressive purpose in mind. In contrast to the IMT (oriented to crimes against the peace), the Höss and Göth cases aimed squarely at the Holocaust and

[2] The Göth proceedings are reported and summarised in Trial of Hauptsturmfuhrer Amon Leopold Goeth ("Göth case") (http://www.legal-tools.org/en/doc/7ac212/).

[3] Mark A. Drumbl, "Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946", in *Washington & Lee Legal Studies Paper No. 2011-20*, 2011, Social Science Research Network. Each of the Höss, Göth and Greiser cases is summarised in English in the *Law Reports of Trials of War Criminals*, a compiled anthology of notes and reports of selected post-Second World War proceedings assembled by the United Nations War Crimes Commission ('UNWCC'). These summaries are found in the Legal Tools Database and this chapter cites to them extensively and authoritatively. The *Law Reports* do not verbatim reproduce the judgment, but summarise the indictment, trial and the judgment (on occasion directly excerpting the Tribunal's language) while also providing analysis of key legal issues and factual background. Göth case, see *supra* note 2; Höss case, see *supra* note 1. The Greiser proceedings are reported and summarised in Trial of Gauleiter Artur Greiser ("Greiser case") (http://www.legal-tools.org/doc/e963c2/). The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VII ("Law Reports"), His Majesty's Stationery Office, London, 1948.

[4] Alexander V. Prusin, "Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948", in *Holocaust and Genocide Studies*, 2010, vol. 24, no. 1, p. 2.

related crimes against civilians. The Tribunal also intended to expose the ineffectiveness of the pre-war Polish government.

Notwithstanding these didactic aspirations, outside Poland comparatively little has been written about the Tribunal. This dearth of attention traces to several factors: the influence of the Anglosphere in international criminal law and resultant linguistic barriers, the hagiography of Nuremberg's IMT and American Military Tribunal ('AMT'), the Cold War divide, and Poland's own complex relationship with the crimes of the Holocaust which includes Polish persecution of Jews and Polish resistance to such persecution. One of the few English-language scholarly articles on the Tribunal is entitled "Poland's Nuremberg", thereby attesting to the iconicity of Nuremberg in the international legal imagination, notwithstanding the fact that the Tribunal issued its first two judgments before – and continued its work well after – the release of the IMT judgment.[5] The neglect of the Tribunal's work in international scholarship might also boil down to the more mundane fact that Tribunal judgments were not widely disseminated to a global audience.

Regardless, the paucity of discussion about the Tribunal disappoints in light of the nature of its work, its relevance to Poland and its myriad jurisprudential contributions. While the Tribunal was informed by the IMT and international instruments, it also cultivated its own voice and its own agenda which at times departed from the IMT's. This chapter seeks to recover the Tribunal's place within the history of international criminal law. In this regard it also seeks to highlight the role of East Europeans in the construction of post-war justice, including eventually within the United Nations War Crimes Commission ('UNWCC').[6] This role is often neglected, stereotyped or downplayed.

Inadvertently, however, the Tribunal also warns of the shadow-side of international criminalisation. The Tribunal's foundational legal decrees

5 *Ibid.*

6 See the chapter by Patrycja Grzebyk, "The Role of the Supreme National Tribunal of Poland in the Development of Principles of International Criminal Law", *HOICL*, vol. 2, 2014, p. 603: "In fact it was the Polish and the Czechoslovakian governments in exile that initiated the organisation of the international conference at St James's Palace, London in January 1942, where the Inter-Allied Declaration condemning German atrocities in occupied territories and a proposal for the creation of a United Nations Commission for the Investigation of War Crimes were adopted".

– deployed to assert jurisdiction over Nazis in the name of human rights – also inflated the punitive reach of Polish Communist authorities against other domestic "traitors" seen as inimical to the state and, thereby, channelled the violation of human rights in the post-war period. These foundational legal decrees generated the Tribunal as well as separate summary courts that served *inter alia* social control purposes. Dual juridical tracks thereby arose. Special legislation to punish war criminals, often presented as heroic, may – once domesticated – come to serve illiberal agendas, in this case against dissenters from Communist autocracy. These dual aspects of international criminal law – namely, as simultaneous conduits for justice and for repression – are surprising only if one accepts the pervasive *mystique* of international criminal law as messiah plagued only by lack of adequate enforcement. Janus-like duality is, after all, routinely imputed to municipal criminal law.

What is more, in this instance a third track also emerges from the domestication process. These very same foundational instruments also enabled the prosecution in Polish courts of some Poles who massacred Jews during (and following) the German occupation and Poles who collaborated with the Nazis.[7] These cases brought to light occasional Polish complicity and initiation of anti-Jewish pogroms while also condemning this violence through Polish judicial institutions. Many Polish Jews – seen to be Communists – were persecuted by anti-Communist forces. These cases thereby coarsened the narrative circulated by the Tribunal – namely, that of Poles as collective victims – by underscoring instances of Poles as individual perpetrators acting with agency and independence in murdering Jews.[8] These trials therefore contribute to the historiography of Polish-Jewish relations in a manner that complexifies Polish projections of victimhood.[9] The Tribunal, in any

[7] Krzysztof Persak, "Not Only Jedwabne", in *Tygodnik Powszechny*, 2002.

[8] See, for example, The Verdict of Circuit Court in Lomza, 16–17 May 1949 (involving the Jedwabne massacre of 1941).

[9] Monika Rice, "The 'Gross' Effect: Polish-Jewish Historiography in Poland after *Neighbors*", in *The American Association for Polish-Jewish Studies*, January 2014:

> Could it be possible that revealing that not all the nation fought uniformly against the Germans and that, indeed, whole segments of the society – the peasants, for example – benefitted from collaborating with Nazi decrees – would ultimately lead Poles to question their self-satisfaction concerning their behaviour during the War?

event, did not elaborate upon crimes committed by Poles against Jews. Its focus was on German crimes. Assessment of Polish criminality would have fit uneasily with the Tribunal's overarching purpose.

38.2. The Tribunal: Background, Political Context and Denouement

A Polish Decree of 22 January 1946 delineated the Tribunal's jurisdiction and powers.[10] Subsequent decrees were adopted *inter alia* on 17 October 1946 [11] and 11 April 1947. The 17 October Decree extended the jurisdiction of the Tribunal to all war criminals rendered to Poland for trial and over alleged war crimes regardless of their place of commission. Earlier decrees from 1944 and 1945 elucidated the Tribunal's substantive law of application. Particularly noteworthy in this regard is a Decree of 31 August 1944 (*Sierpniówka*), promulgated by the Polish Committee of National Liberation (*Polski Komitet Wyzwolenia Narodowego*), concerning the punishment of "fascist-hitlerite criminals" and "traitors to the Polish nation".[12] This Decree was adopted shortly after the liberation of some Polish territories yet before the emergence of the fully-fledged Communist state. All told, the substantive law applied by the Tribunal took the form of a hodgepodge of special decrees, pre-existing Polish municipal law, newly created enactments and the London Agreement – understandable, to be sure, in light of the absence of comprehensive law

In addition to Jan Gross, whose work has attracted considerable controversy, Rice also identifies other historians working on this subject matter.

[10] Andrzej Rzepliński observes that as early as 1940 the exiled Polish government (in London) approved of "hood courts" attached to commanders of the Polish underground anti-German resistance; Andrzej Rzepliński, "Prosecution of Nazi Crimes in Poland 1939–2004", Paper Presented in the First International Expert Meeting on War Crimes, Genocide, and Crimes Against Humanity, International Criminal Police Organization, Interpol General Secretariat, Lyon, 2004, p. 1. These "hood courts" conducted secret proceedings, passed summary sentences and could punish only by the death penalty. Their law of application was "the violation of international agreements on warfare and occupation"; *ibid.*

[11] This Decree abolished the Special Criminal Courts for trials of alleged war criminals.

[12] The Decree of 31 August 1944 (as modified, amended and jurisdictionally expanded) was eventually consolidated in a Schedule to the Proclamation of the Minister of Justice dated 11 December 1946. One subsequent Decree, from 13 June 1946, was ominously introduced as "concerning crimes particularly dangerous in the period of the reconstruction of the State". Law Reports, Annex, p. 90, see *supra* note 3. According to Rzepliński (writing in 2004), the main provision of this decree (Article 1[1]) still remains in force in Poland, although as of 1 September 1998 the death penalty had been replaced by life imprisonment. Rzepliński, 2004, pp. 1, 5–6, see *supra* note 10.

regarding war crimes, crimes against humanity and crimes against the peace available at the time.[13] Prosecutions were overseen by the Chief Commission for the Examination of German Crimes in Poland.[14] Although the Tribunal's seat was in Warsaw, it conducted some of its trials in other cities in Poland. While Tribunal verdicts were final, the President of the National Council (and, subsequently, the President of Poland) had a right to issue a pardon or commute any sentence.

The Decree of 31 August 1944 listed offences and identified modes of liability. It also provided penalties, which were the death penalty (for certain crimes) and imprisonment up to 15 years or for life (for other crimes). Convicts also forfeited their public and civic rights and were subject to the full confiscation of their property.[15] While the confiscated property was intended to be returned to the original private party owner who had been dispossessed, such claims proved difficult to establish and, frankly, the state had limited interest in supporting them.[16] This meant the property remained with the Polish state. In fact, state takings as criminal punishment – along with the evacuation of German or *Volksdeutsche* populations throughout Eastern Europe – "caused much economic wealth to fall in the hands of the sequestering state".[17] On this latter note, convictions of deemed traitors or collaborators under the Decree supported the Polish government's push towards nationalisation (often without compensation) in the liberated country.[18]

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[13] In the Höss case, the prosecution additionally alleged that crimes committed against Soviet prisoners of war violated the Geneva Convention relative to prisoners of war. Law Reports, p. 18, see *supra* note 3.

[14] Rzepliński notes that the Commission was established by governmental decree of 10 November 1945.

[15] A series of specific decrees and laws from 1944 to 1946 extended the confiscation and restitution regime quite broadly. For details, see Samuel Herman, "War Damage and Nationalization in Eastern Europe", in *Law and Contemporary Problems*, 1951, vol. 16, no. 3, pp. 508–9.

[16] In the end, in Poland "of the bulk of properties seized, confiscated, or acquired under forced transfers by the Nazi occupiers, little, in fact, was returned to the previous owners on the pre-1939 basis"; *ibid.*, p. 509.

[17] *Ibid*., p. 507.

[18] *Ibid*., p. 486, noting that throughout Eastern Europe "war damage" moves away from "war claims" and merges with the fundamental political considerations of the economies of reconstruction.

The creation of the Tribunal as a special enforcement mechanism underscored the extraordinary nature of the defendants' criminality. Although concerns arose over bias, victor's justice, retroactivity and emaciated due process,[19] the work of the Tribunal has nonetheless been lauded.[20] Alexander Prusin, for example, renders a favourable assessment of the quality of the Tribunal's work when placed within its historical and temporal context:

> In sharp contrast to the numerous political trials carried out in the country during the same period, in which thousands of individuals accused of "hampering socialist reconstruction" were sentenced to death or long prison terms, the [Tribunal's] proceedings applied conventional legal and moral standards comparable to those used in Western courts and investigated each case comprehensively on its own merits.[21]

Prusin underscores that personnel associated with all branches of the Tribunal had "impressive" professional credentials and, more importantly, were able to conduct their work unmolested by governmental meddling.[22] It is, moreover, important not to overstate the legalism of "Western" courts at the time. These courts also impinged upon non-retroactivity principles in the name of the self-evident greater good of convicting Nazis.

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19 Matthew Lippman, "Prosecutions of Nazi War Criminals Before Post-World War II Domestic Tribunals", in *University of Miami International and Comparative Law Review*, 1999–2000, vol. 8, p. 11.

20 In Greiser's case, see, for example, Catherine Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland*, Oxford University Press, Oxford, 2010, noting that, despite the fact that "[b]y western standards [Greiser] hardly had a fair proceeding", overall, "the court arrived at a fair estimation of Greiser's crimes". For Epstein, "[d]espite the flaws of the proceedings, Greiser's trial served both justice and history reasonably well", p. 329.

21 Prusin, 2010, p. 17, at abstract, see *supra* note 4. Prusin recognises certain process defects, nevertheless, such as the fact that the prosecution had greater resources than the defence, along with more time to present and prepare the case. The fact that more serious perpetrators receive richer due process – even if the outcomes may be largely preordained – is not an unusual phenomenon in international criminal law. In Rwanda, for example, persons indicted by the International Criminal Tribunal for Rwanda ('ICTR') benefit from higher levels of due process and superior conditions of confinement than lower-level defendants prosecuted domestically in Rwanda itself.

22 *Ibid.*, p. 5.

The favourable assessment of the Tribunal's work when it came to high-profile Nazis, however, belies the ulterior deployment of its foundational instruments. The Decree of 31 August 1944, for instance, has been characterised as an "infamous" piece of legislation "promulgated by the Communist proxy regime and used mainly as a political and legal tool of repression" that facilitated post-war prosecutions, harassment and torture of persons deemed anti-Communist.[23] This Decree, it has been argued, was used to target anti-Communists on the pretext they were Nazi sympathisers. When it came to this group of defendants, "the intention of the authors of the August Decree was to limit, if not outright preclude, the possibility of a fair investigation and a fair trial".[24] Nonetheless, the work of courts operating under the Decree also served as a basis – decades later – for scholars to mine the much more complex historiography of Polish-Jewish relations, thereby establishing a variety of instances of Polish involvement in the persecution of Jews and, notably, Jews taken to be Communists.

The Tribunal delivered its first judgment on 7 July 1946. It convicted Arthur Greiser of membership in a criminal organisation, aggressive war and exceeding the rights accorded to the occupying power under international law (in other words, war crimes and crimes against humanity). While the heart of the Greiser case was the charge of aggressive war, the judgment also unpacked the avid Germanisation he initiated in what historian Wendy Lower calls the "Wild East".[25] The Greiser case narrated the German *Drang nach Osten* (yearning for the East) and the terrors left in its wake. It connected the conquest of the Eastern living space to something even more existential than aggressive war, namely, genocide. The Greiser case, in fact, has been described as the "first ever legal ruling on the crime of genocide" even though the

[23] Marek Jan Chodakiewicz, "The Dialectics of Pain: The Interrogation Methods of the Communist Secret Police in Poland, 1944–1955, Part II", in *Glaukopis*, 2004–2005, vol. 2, no. 3, p. 1, noting also that "[t]he language of the August Decree […] reflected the language of contemporary Communist propaganda".

[24] *Ibid*. p. 2.

[25] For general discussion of Germanisation in the Eastern front (including in the Warthegau), and specifically of the historically ignored role of German women in that process, see Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields*, Houghton Mifflin Harcourt, Boston, 2013; Germanisation also emerged as a theme in the Tribunal's prosecution of Albert Forster, the *Gauleiter* of Danzig-West Prussia and a rival to Greiser. Forster was convicted in 1948 in Gdansk and executed in 1952.

Genocide Convention was not yet in existence at the time.[26] In this regard, the Tribunal blazed a new path – which continued in the Höss and Göth judgments – towards the imposition of penal responsibility for genocide before the crime was even recognised under international law. Although the Polish decrees that governed the trial did not explicitly mention genocide,[27] in the Greiser case the Tribunal referenced the defendant's actions within the framework of crimes against humanity as a "general totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own".[28] A linkage was thereby established with the concept of denationisation. The Tribunal noted the genocidal character of the violence and the genocidal nature of the attacks on Polish culture and learning.[29] Raphael Lemkin's neologism was used to explicate the systematic and legislative nature of the violence against the Polish and Jewish populations. The Tribunal contemplated the physical, biological, spiritual and cultural aspects of genocide, including Nazi destruction, confiscation, theft and seizure of cultural property, art and archives (whether publicly or privately held). The Tribunal, therefore, "broadly conceiv[ed] of genocide as encompassing both the cultural and physical extermination of a religious or national group".[30] This understanding persisted in the subsequent Höss and Göth cases.

"While the Greiser indictment did not ignore Holocaust crimes", it nonetheless subsumed the "Final Solution under crimes against the Polish people".[31] Germanisation was seen as destroying the Polish nation and also the Jewish population. This approach also informed the Göth and Höss cases, although less evidently, and these two latter trials exposed the horrors of the concentration camps and the targeting of European Jews. Centralising the narrative of Polish suffering, nonetheless, served

[26] David L. Nersessian, "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals", in *Texas International Law Journal*, 2002, vol. 37, p. 253.

[27] Nor did it precisely define war crimes or crimes against humanity.

[28] Law Reports, p. 114, see *supra* note 3.

[29] *Ibid*., p. 112.

[30] Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later", in *Arizona Journal of International and Comparative Law*, 1990, vol. 15, p. 448.

[31] Epstein, 2010, p. 317, see *supra* note 20. The focus of the Greiser proceedings on the aggressive war against Poland also intentionally dovetailed with this narrative.

immediate political purposes for Polish post-war authorities. As Andrzej Rzepliński acidly observes:

> The prosecution and punishment of war crimes and crimes against humanity, committed by German military, police and civilian occupation authorities proceeded briskly and […] was seen as one of the instruments of winning a neutral attitude of the general public, who took a clearly anti-Communist stance, particularly so in the face of the ever-increasing Communist terror.[32]

During the Second World War, German occupation encompassed 48 per cent of the area of the pre-war Polish state (inhabited by 22 million Polish citizens) while Soviet occupation in the east encompassed the remaining 52 per cent of the area (13 million Polish citizens).[33] The Soviets perpetrated atrocities as well,[34] yet the singular focus of the Tribunal, and judicial activity generally, on Nazi horrors had the effect of obscuring Soviet crimes. To be sure, public discussion of Soviet crimes was not permitted at the time. Any such discussion would have resulted in severe sanction. It is only in recent years, after the transition from Soviet domination, that attention has gravitated towards accountability for these crimes.

The Tribunal was a specially created institution of primary jurisdiction that dealt with only a small number of notorious defendants. Other trials of Nazis and collaborators were summarily conducted in common district courts which retained residual jurisdiction and also in military courts.[35] The

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[32] Rzepliński, 2004, p. 1, see *supra* note 10; Prusin, 2010, p. 2, see *supra* note 4.

[33] Institute of National Remembrance, Commission for the Prosecution of Crimes against the Polish Nation, Public Education Office, *The Destruction of the Polish Elite: Operation AB-Katyn*, Warsaw, 2009, pp. 22, 25, 81, noting that "repressive operations were preludes to Poland's Germanization on the one hand, and Sovietization on the other".

[34] *Ibid*., foreword. "More than 100,000 people were arrested [by Soviet occupying authorities in 1939–41], and more than 300,000 deported to the east into the depths of the USSR. The memory of the Katyn massacre and almost 22,000 Polish Army officers, policemen and political prisoners murdered by decision of the Political Bureau of the Central Committee of the VKP(b) of 5 March 1940, is still living among Poles".

[35] Rzepliński, 2004, p. 1, see *supra* note 10. "Special Criminal Courts were established on 12 September 1944, each composed of a professional judge and two lay judges, to try Nazi crimes, which were called in Poland, until late 1990s, 'Hitlerite crimes'. Those were summary courts. On 17 October 1946 their powers were taken over by common courts, but they continued to sit as summary courts".

stipulated decrees also applied to these prosecutions,[36] which continued for decades. All told, Rzepliński cites sources that by the end of December 1977 at least 17,919 persons were convicted under the decree, "[a]bout 1/3 [of whom] were Germans, Austrians and the so-called Volksdeutsche".[37] Rzepliński also determines that "[a]bout 95% of all investigations into Nazi crimes and other war crimes concern victims of Polish nationality".[38] A separate prosecutorial office was established in 2000 (following post-Communist transition). This office had a broader mandate. By early 2004 it had "conducted 1295 investigations, including 335 […] in Nazi crime cases, 878 […] in Communist crimes cases, and 82 […] in cases concerning other crimes".[39]

Among the institutions that enforced the 1944 Decree (as subsequently consolidated), the Tribunal was the most transparent, judicious and attentive to due process concerns. Prusin argues that this is because the Tribunal itself was composed of quality personnel coming from the many diverse strands of Polish political life at the time. Hence, it was politically balanced and professionally pedigreed. Yet, to gesture towards the shadow side mentioned earlier, the legislative moves that established the Tribunal also empowered a variety of trials at various levels that served ominous motives and were cloaked in celerity and secrecy. Post-war Polish Communist authorities appeared more concerned with the prosecution of their political opponents than the prosecution of

[36] Law Reports, Annex, p. 97, see *supra* note 3. "As regards war crimes cases, all these courts apply the same substantive law as laid down in the Decree of 31 August, 1944".

[37] Rzepliński, 2004, p. 3, see *supra* note 10. Rzepliński mentions here a Decree of 31 December 1944, although I am uncertain whether this refers to another decree, or is simply a transcription error and the reference is meant to be to the Decree of 31 August 1944. In 1991, prosecutorial responsibilities were expanded to include Stalinist crimes committed in Poland between 1944 and 1956; *ibid.*, p. 3, fn. 12; Prusin, writing in 2010, concludes: "[A]mong the former Soviet satellites, Poland was the most consistent in investigating and prosecuting war crimes: between 1944 and 1985, Polish courts tried more than 20,000 defendants, including 5,450 German nationals. The post-Communist Polish justice system has continued the work of prosecuting war crimes; by February 2004 it had investigated 335 cases". Prusin, 2010, pp. 1–2, footnote omitted, see *supra* note 5,

[38] Rzepliński, 2004, p. 3, see *supra* note 10.

[39] *Ibid.* For extensive discussion of these investigations in the case of Nazi crimes, see *ibid.*, pp. 4–12.

erstwhile Nazi oppressors.[40] At the time, the Communist grip on power was tenuous. Non-Communist parties posed a challenge. The Polish government was willing to give the Tribunal a robust margin of appreciation in its work, and considerable discretion, which enabled it to adhere to a legalist agenda, build public support and impress foreigners.[41] This was not the case, however, for the deployment of the Polish judiciary to prosecute large numbers of persons – also deemed to be enemies of the state – for "hampering socialist reconstruction" at times on the basis of what Marek Chodakiewicz has described as "[f]alse confessions" extracted in some instances by torture.[42] Prusin concluded that the Tribunal

> stood apart from the special penal courts, which operated on the Stalinist model and purged the regime's political opponents in numerous show trials […] [T]he [Tribunal] did not adjudicate a single case pertaining to the "fascistization of the country".[43]

In this regard, the existence of the Tribunal helped distract attention from the collateral use of its foundational decrees as conduits for state coercion.

The Tribunal's work also helped remind the public that "only a unified Polish society, led by the new government in alliance with the USSR, could effectively thwart the 'German menace'".[44] In actuality, however, Polish Communist authorities feared internal dissent rather than any threat from what was then a totally devastated Germany. Hence, the 1944 Decree was applied to "real" Nazi collaborators as well as "alleged" Nazi collaborators, with the ascription of collaborator status being

[40] Prusin, 2010, p. 2, see *supra* note 4. For exposition of the use of torture by the post-war Communist secret police against perceived political opponents, see Chodakiewicz, 2004–2005, see *supra* note 24.

[41] *Ibid.*, p. 18, noting that the Tribunal's "reputation reflected well upon the government, supporting its claims about its democratic credentials and its desire to re-establish an orderly and just society".

[42] Chodakiewicz, 2004–2005, p. 11, see *supra* note 23.

[43] Prusin, 2010, p. 5, see *supra* note 4. See also Chodakiewicz, p. 7, see *supra* note 23: "In contrast to special penal courts, where evidence in many cases consisted only of few eyewitness testimonies, in the [Tribunal] trials documentary materials reflected each defendant's crimes and respective rank in the occupation system".

[44] Prusin, 2010, p. 18, see *supra* note 4.

routinely invoked to smear politically incorrect individuals.[45] Undesirable individuals deemed to be political opponents in post-war Poland often were labelled as "fascists" and "Hitlerite collaborators", thereby squaring with the language of the 1944 Decree.[46] Chodakiewicz posits:

> This was a convenient propaganda device commonly employed to dupe the West into believing that the opponents of the Communists were pro-Nazi and that the brutal crushing of the independentist insurrection and the parliamentary opposition in Poland was simply a mop-up operation which fittingly concluded the anti-German struggles of the Second World War. This was also a useful tool to rally the population behind the Communists in meting out justice to alleged Polish "Hitlerites".[47]

The Holocaust also was invoked in this regard to stigmatise political opponents.[48] Chodakiewicz notes that this rhetorical move was intended to "endear the proxy regime to the Jewish community at home and abroad", and was predicated on the requirement that "the Communists effusively play the role of the sole protectors of the Jewish people".[49]

Nonetheless, the Tribunal's political usefulness eventually tapered off. It was disbanded in 1948 despite the fact that it was still preparing future cases against major war criminals.[50] Its jurisdiction was reassigned

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[45] Chodakiewicz, 2004–2005, p. 15, see *supra* note 23. Chodakiewicz characterises the 1944 Decree as "promulgated by the Communist proxy regime and used mainly as a political and legal tool of repression against the independentists fighters and politicians"; See also *ibid.*, p. 14, noting the collateral prosecution of dissidents under the Soviet legal system, notably, pursuant to Article 58 of the Soviet Penal Code, and the sentencing thereunder on the basis of being a "traitor", "counter-revolutionary", "Hitlerite collaborator" and "fascist".

[46] *Ibid*. See also p. 15: "The language of the August Decree was extremely violent. […] And the Communists dubbed as 'fascists' and 'reactionaries' anybody who disagreed with them".

[47] *Ibid*., p. 16, footnote omitted.

[48] *Ibid*. "Whoever killed Jews was not just a traitor, but also 'an agent of Hitler'. Anybody who opposed the Communists was also a potential 'Jew-killer', or at least could be accused of such terrible anti-Semitic deeds, and, hence, branded 'a Nazi collaborator'".

[49] *Ibid.*, p. 16 and fn. 46.

[50] Grzebyk, 2014, p. 613, see *supra* note 6, noting the intention to prosecute those responsible for the destruction of Warsaw and the demolition of the Warsaw ghetto. Grzebyk also posits that another reason the Tribunal was disbanded is because Western states became less likely to extradite an accused to a state now behind the Iron Curtain.

to the regional courts.[51] Prusin reports that some Tribunal members fell into disfavour with the Polish government. Greiser's defence lawyer, who had conducted himself with great integrity as an official of the court, was "subjected to a vicious slander campaign […] [when] the secret police focused attention on [his] 'bourgeois' credentials; ultimately, [h]is apartment was confiscated and he was forced to terminate his law practice".[52] One of the leading prosecutors (who participated in the Göth case, among others) fared worse. He was "charged under the terms of the August Decree with the 'fascistization of the country' and sentenced to five years' imprisonment".[53] While the Tribunal's work ended in 1948, prosecutions of political opponents conducted under the auspices of the initial 1944 Decree continued thereafter. These foundational instruments were not repealed.

One response to the dual use of the Polish decrees, then, might be to suggest that criminal law domesticated immediately following the crucible of atrocity should contain a sunset provision such that its role in transitional justice remains truly transitional. The drawbacks to this approach involve difficulties in presenting an appropriate time for the sunset; also lost is the potentiality of the law to shape-shift back into a force for good. In the Polish case, after all, the foundations laid by the 1944 Decree as concatenated also helped facilitate the investigation, in the post-Communist era, of crimes committed by the secret police between 1944 and 1956. In some instances, these investigations implicated the very "Stalinist" torturers that had turned to the 1944 Decree to torment perceived opponents.

38.3. The Göth Case

Amon Leopold Göth was commandant of the forced labour camp at Płaszów-Kraków between 11 February 1943 and 13 September 1944. He also was a member of the Nazi Party (Nationalsozialistische Deutsche Arbeiterpartei, 'NSDAP') [54] and the Waffen-SS (Armed Protective Squadron) – two criminal organisations. In addition to having "personally

[51] Prusin comments that the termination of the Tribunal "signaled that the Communists had assumed total control over the country". Prusin, 2010, p. 19, see *supra* note 4.

[52] *Ibid*.

[53] *Ibid*.

[54] Göth became a member of the Nazi Party in Austria in 1932.

issued orders to deprive of freedom, ill-treat and exterminate individuals and whole groups of people", he also was accused of having himself "murdered, injured and ill-treated Jews and Poles as well as people of other nationalities".[55] Göth was the Tribunal's second trial. Many decades later, Göth was portrayed by Ralph Fiennes in Steven Spielberg's film *Schindler's List* as "an irrational, sadistic monster who took pleasure in personally inflicting torture".[56]

Göth, an Austrian national born in Vienna on 11 December 1908, faced multiple charges in his indictment.[57] First, in his capacity as commandant of the Płaszów forced labour camp, he was accused of causing the death of "about 8,000 inmates by ordering a large number of them to be exterminated".[58] Göth "governed [this] camp in a calculated brutal manner, and for the slightest of complaint, he fired at prisoners, selected by him, himself, or he ordered others to do this, or conducted public hangings".[59] Second, as SS-*Sturmführer* he was accused of having carried out the "final closing down of the Cracow ghetto", a liquidation action that began on 13 March 1943 and which "deprived of freedom about 10,000 people who had been interned in the camp at Płaszów, and caused the death of about 2,000".[60] The Kraków ghetto was set up on 21 March 1941 and initially contained 68,000 residents;[61] purges occurred previous to the final liquidation; and the notes on the Göth case provide considerable details on the events that preceded the establishment of this ghetto and the progressive restrictions imposed on Jewish residents, including Göth's role in ordering and himself shooting many people. Third, Göth was charged with demolishing the Tarnów ghetto, also in Kraków district, as a result of which "an unknown number of people perished".[62] Fourth, Göth was accused of closing down the forced labour

55 Law Reports, p. 1, see *supra* note 3.

56 Laurence Rees, "Rudolf Höss – Commandant of Auschwitz", BBC, 17 February 2011.

57 The indictment against Göth was filed with the Tribunal on 30 July 1946 – two months before the pronouncement of the Nuremberg judgment.

58 Law Reports, p. 1, see *supra* note 3.

59 "The Trial of Amon Göth: The Indictment Part 1", Holocaust Education and Archive Research Team, 2010.

60 Law Reports, p. 1, see *supra* note 3.

61 *Ibid.*, p. 2.

62 *Ibid.*, p. 1. In the reported background to the case, the following details are presented:

camp at Szebnie "by ordering the inmates to be murdered on the spot or deported to other camps, thus causing the deaths of several thousand persons".[63] Finally, in addition to this litany of criminality, Göth was accused of extensive property infractions. Of note, furthermore, is the general part of the indictment that charged Göth with membership in two criminal organisations, to wit, the Nazi Party and the Waffen-SS.

Göth was arrested by the SS police in Kraków on 13 September 1944. His arrest effectively ended his career. Göth fraudulently misappropriated considerable inmate property for personal use, rather than confiscating it for official Reich purposes. He thereby amassed a fortune. Göth's cruelties were so excessive that they flouted SS regulations regarding how a labour camp was to operate. He was so violent and rash with his own staff (he killed SS men) that they and his superiors became concerned.[64] Göth's arrest by the SS demonstrates the Nazi tendency not to favour sadists or persons who zealously killed for their own personal enrichment.

Göth lorded over the Płaszów camp and ostentatiously discarded any pretence of rules or regulations:

> Göth lived a very high style of life, in a luxury villa, where drinking parties were never ending, to which his friends from Kraków were invited. He had his permanent orchestra, consisting of prisoners and servants, whose members he was

> During the last week of June, 1942, in the course of the liquidation of the Tarnow ghetto about 6,000 Jews were removed to Belzec death camp and nearly the same number murdered on the spot. At the beginning of September, 1943, the ghetto was completely liquidated in this way. It was then, for instance, that the accused Amon Göth himself shot between thirty and ninety women and children and sent about 10,000 Jews to Auschwitz by rail, organizing the transport in such a way that only 400 Jews arrived there alive, the remainder having perished on the way.

Ibid., p. 2.

63 *Ibid*., p. 1.

64 "The interrogating judge wanted to know, right down to the smallest detail, everything concerning the increasing financial personal level of Göth […] The SS judge Trauers had with him detailed information that prisoners in Płaszów, were not treated in accordance with the set SS standards of a concentration camp [… and] several of [Göth's] SS subordinate officers […] felt they were brutally treated by him". Holocaust Education and Archive Research Team, see *supra* note 59. See also *ibid.*: "The accusations laid against Göth, paradoxically included the fact that he treated the prisoners brutally, well beyond the SS regulations as laid down by the SS high command".

> killing at the slightest excuse, or simply when being drunk. He had two dogs, one called Ralf and the other called Rolf, both trained to attack and savage people. Many people have lost their lives, following being attacked by these dogs, on command of Göth.[65]

Witnesses at his trial reported the villa – known as the "Red House" – being the site of "orgies". Göth was reportedly always drunk; he had a series of mistresses, who at times intervened to stop him from killing or further beating detainees; he ordered forced prostitution at the camp.[66] Although arrested by the SS, Göth was never prosecuted or investigated by the SS police – apparently because of the "collapsing fortunes of Germany" at the time.[67] He in fact escaped from prison at the end of the war, but was captured by the Americans and subsequently extradited to Poland by the Allies. The witnesses before the Tribunal delivered extensive testimony about Göth's conduct in the labour camps, including the following gratuitous barbarities:

- When the children were being taken out of the camp, Göth ordered nursery songs to be played in the camp by the orchestra […] at a time when the mothers of these children, forced to stand on the parade ground, had to look on, and witness the transportation of their children to their deaths.[68]
- There were frequent cases when the accused, having not slept at night, as he spent the night at some orgy, went out at 6 in the morning when the prisoners were assembling into their work groups, and there started shooting them without any reason or warning […] [W]hen he appeared there drunk […] he approached the first person in line and shot him, because his coat is too long, the second one because he has a ominous look, and that he does not like it, and so on.[69]

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65 *Ibid.*

66 *Ibid*. "Chairman: What does the witness know about the "Merry House"? Witness: The accused ordered the selection from among the female prisoners, of several Polish girls, who were accommodated separately, in a special barrack, where only SS men had access to, and also the Ukrainians, to satisfy their sexual needs".

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

> – The whip would be passed to another SS man there, it was impossible being hit so many times, to count properly, people were making mistakes and the beatings were starting afresh. And so the beatings went on and on, the tables were covered in blood as every hit, meant a fresh cut in someone's flesh. As anyone went off the table, he was virtually one bloody mass of cut flesh. Everyone getting off the table was ordered to report, standing to attention, "I report humbly that I have received my sentence".[70]

Unlike the Greiser trial, which focused on the victimisation of Poles, the Göth trial jointly highlighted the extermination of the Jewish population and the suffering of Poles.[71] The Prosecution placed Göth's conduct squarely within the context of the progressive persecution of European Jews orchestrated by the Nazi regime, which began with the imposition of personal and economic restrictions on the Jewish population.[72] The culmination of these atrocious efforts, to be sure, was the systematic concentration of the Jewish population "in a small number of towns in order to achieve complete control over them and to facilitate their removal to death camps"[73] and, then, the crushing operation of those death camps. As noted in the UNWCC report of the Göth proceedings:

> Against this background appeared the person of the accused Amon Göth, whose life career from the early years was inseparably bound with the Nazi movement, and who was responsible for the atrocities committed as part of a general pattern of the German policy aiming at complete extermination of the Jewish population in Europe.[74]

At the time, one important contribution of the Göth trial was to clarify that the pogroms against the Jewish community served no military objective and, hence, constituted something other than the war effort. Decades later, when Rwandan defendants argued that the massacre of all

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70 *Ibid.*

71 First Prosecution attorney, Mieczyslaw Siewierski, for example, submitted that the "full might of these cruel German measures were directed against the Jewish population"; *ibid.* Siewierski was the prosecutor ultimately charged and sentenced by the Communist authorities to five years' imprisonment putatively on account of "fascistization".

72 Law Reports, p. 2, see *supra* note 3.

73 *Ibid*., p. 3.

74 *Ibid*., p. 4.

Tutsi (men, women and children) was undertaken in self-defence against an active military threat, a similar distinction was drawn between genocide and the war effort.

Göth pleaded not guilty. He was represented by two Tribunal-appointed attorneys. His trial was held at Kraków on 27–31 August and 2–5 September 1946.

The evidence against Göth was overwhelming. It included witnesses (mostly former detainees of the ghettos and camps), expert evidence as to the Nazi policies and also expert legal testimony regarding the content of international criminal law.[75] Göth was found guilty of the charged crimes, a "large number [of which] has been committed on the accused's own initiative"; he was also convicted of ordering crimes.[76] For a high level perpetrator, Göth's convictions for homicide and himself personally killing, shooting, maiming and torturing were notable in that they indicate his disposition as an unstable sadist, in contrast to the disposition of other leading Nazis, such as Höss, reputed for mass murder by detached, meticulous and punctilious performance of their administrative and bureaucratic duties.[77]

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75 *Ibid.*

76 *Ibid.*, p. 10. Göth's convictions for directly and personally murdering and torturing massive numbers of prisoners were based on extensive witness testimony. "Göth very often fired through the windows into the barracks, killing prisoners, with his own hands, beating prisoners with his whip, until they were unconscious, as well as systematically sentencing people to be whipped, across a bare back 25 or 50 times, in front of groups of people. Hanging by the arms, detention in bunkers, ravaging by dogs, these were the methods in daily use and application of the accused". Holocaust Education and Archive Research Team, see *supra* note 59.

77 See, for example, Rees, 2011, see *supra* note 56: "There is no record of [Höss] ever hitting – let alone killing – anyone". Also: "According to Whitney Harris, the American prosecutor who interrogated him at the Nuremberg trials, Rudolph Höss appeared 'normal', 'like a grocery clerk'. And former prisoners who encountered him at Auschwitz confirmed this view, adding that Höss always appeared calm and collected". On the other hand, as detailed in his memoirs, in 1923 Höss was imprisoned for six years (sentenced to 10) in Germany for having, after a night of heavy drinking, murdered a man determined to be a traitor by the paramilitary right-wing *Freikorps* (German Free Corps) movement of which Höss was a member. Groups such as the *Freikorps* were responsible for sowing considerable unrest during the Weimar Republic and also for a number of political assassinations. The Tribunal also acquitted Greiser of the charge of personally committing murders or acts of cruelty or infliction of bodily harm. *Law Reports*, p. 104, see *supra* note 3.

The Tribunal rejected Göth's defences (superior orders, military necessity and jurisdictional submissions regarding the applicability of the declared law) and sentenced him to death.[78] The Tribunal additionally "pronounced the loss of public and civic rights, and forfeiture of all [his] property".[79] The President of the State National Council did not grant Göth's appeal for mercy. Remorseless to the end, Göth was executed, by hanging, in Płaszów on 13 September 1946 – roughly within a week of his conviction but two years (to the date) following his arrest by the SS. His body was cremated; his ashes thrown into the Vistula River.[80]

Two aspects of the Göth proceedings are jurisprudentially noteworthy. First, the charges relating to membership in criminal organisations (the Nazi Party and the Waffen-SS), and, second, the explicit evocation of the term genocide in the proceedings and judgment.

At the time Göth's indictment was lodged with the Tribunal, the Nuremberg judgment had not yet been issued. The Polish war crimes legislation, moreover, lacked provisions that related to membership of criminal organisations (these provisions were promulgated for the first time in a Decree of 10 December 1946 that formed part of the multilayered corpus that grounded the Tribunal's activities). The report on the Göth case emphasises that the Polish Prosecution pursued a broad interpretation of the Nazi Party's criminal character.[81] Whereas the Prosecutor implicated the criminal activities of the Nazi party as intending "through violence, aggressive wars and other crimes, at world domination and establishment of the national-socialist regimes", the Nuremberg tribunal declared the Nazi Party and the Waffen-SS to be criminal within the scope of the Nuremberg Charter, that is, "in war crimes and crimes against humanity connected with the war".[82] The Polish Tribunal for its

[78] The Decree of 31 August 1944 eliminated superior orders and duress from ousting criminal responsibility. As to military necessity, it is reported that "the Tribunal […] disregarded this plea. The accused […] had committed acts without any military justification and in flagrant violation of the rights of the inhabitants of the occupied territory as protected by the laws and customs of war and, therefore, the defense of military necessity was neither applicable nor admissible". *Law Reports*, p. 10, see *supra* note 3.

[79] *Ibid*., p. 4.

[80] Holocaust Education and Archive Research Team, see *supra* note 59.

[81] Law Reports, p. 5, see *supra* note 3.

[82] *Ibid*., p. 6, noting also that the Nuremberg Charter additionally referenced crimes against peace.

part opined that the Nazi Party was a criminal organisation based on its commission of war crimes and crimes against humanity, and established the facts of Göth's participation therein. This conclusion was largely congruent with that of the Nuremberg Tribunal (released shortly thereafter). That said, insofar as the Polish Tribunal's sentence was pronounced on 5 September 1946, it lacked a "formal legal basis either in municipal or international law on which it could base a penalty for the membership in a criminal organization".[83] However, even if the legal murkiness is put to the side, the report on the Göth case mentions that it is factually unclear whether the nature of Göth's membership in the Nazi Party was such that penal responsibility should ensue therefrom. Insofar as Göth held "no party office of any kind, did not belong to the Leadership Corps of the Nazi party which alone has been declared criminal by the Nuremberg Judgment, and was merely an ordinary member of the party […] [h]is membership as such in this organization was therefore not criminal".[84] On the other hand, according to the report of the case, there was no doubt that the accused's membership in the Waffen-SS was "definitely criminal".[85]

Similar ambiguities regarding criminal organisation and group membership resurfaced in the Höss case. In short, although the criminal membership provisions were designed to expedite convictions by avoiding sequential litigation, individual trials and repetitive pleadings, these provisions actually proved to be rather controversial and, in this regard, consumed the very judicial resources they were intended to economise.[86] Subsequent developments in international criminal law, however, have not fared much better in grappling with the conundrum of

[83] *Ibid*., noting however that "[t]his declaration was in accordance with the trend of legal thought prevailing at that time and with the already tangible developments in the sphere of international criminal law".

[84] *Ibid.*

[85] *Ibid.*

[86] See discussion in the Höss case, *supra* note 1. See also the Tribunal's 1947 judgment in the Fischer and Leist case and its 1948 judgment in the Bühler case (https://www.legal-tools.org/en/doc/7721bd/), both of which substantively discuss membership in criminal groups. As Lippman notes in his commentary on these cases, "[t]he […] Tribunal explained that the rationale for punishing organizational membership was that the crimes committed by groups were more dangerous than those committed by individuals. The Reich's mass atrocities, for example, could not have occurred absent criminal combinations that were cemented by their commitment to a common goal". Lippman, 1999–2000, p. 97, see *supra* note 19.

organisational criminality. Vivid debates continue to erupt today over joint criminal enterprise and other accessorial modes of liability. The IMT and Polish Tribunal, nonetheless, were ground-breakers in attempting to render collective criminality intelligible to a system of criminal law predicated on individual intent, agency and culpability.

The second jurisprudential novelty stemming from the Göth case involves the application of the crime of genocide. As was the case in Greiser, the underlying law (the Decrees as amended and consolidated) punished war crimes and crimes against humanity as understood at the time. Göth was charged with these offences. The Prosecution, however, "went […] a step further on the road of the development of the international criminal law and described these offences also as the crime of *genocide*".[87] In this regard, as in Greiser, the Polish cases edgily advanced the frame of international law. The report of the Göth case discusses Lemkin's coinage of the genocide neologism,[88] suggesting this Polish scholar's transformative contribution. Similarly to the submissions regarding criminal organisations, the Polish Prosecution endeavoured to surpass the scope of the language deployed at the IMT proceedings, which conceived of the term only in the physical and biological sense. Polish prosecutors instead intended to appreciate its economic, social and cultural connotations. Unlike the case with criminal organisation, however, here the Tribunal explicitly accepted the Prosecution's submissions (this move also can be juxtaposed with the Nuremberg judges, who did not deploy the term genocide in their eventual judgment). The judges in the Göth case explicitly determined that the "wholescale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations".[89] In this vein, the

[87] Law Reports, p. 7, see *supra* note 3 (emphasis in original). Grzebyk notes that overall the Tribunal "did not dedicate much space to the analysis of the notion of crimes against humanity". Grzebyk, 2014, p. 623, see *supra* note 6.

[88] Law Reports, p. 7, see *supra* note 3, albeit limiting it to "the destruction of a nation or of an ethnic group".

[89] *Ibid*., p. 9, judgment cited. See Lippman, 1999–2000, p. 71, *supra* note 19, noting that the concept of genocide as elaborated in the Göth case "encompasses the disintegration of economic, cultural, political, religious, and social institutions, as well as attacks on the personal security, liberty, health, dignity, and lives of individuals. The first phase of genocide, the denationalization or destruction of the national pattern of the oppressed

Göth judgment reinserts the violence against the Polish population as a central concern and posits Poles as the targets of genocidal violence, thereby returning to the narrative circulated in the Greiser case.[90] The Göth judgment, while detailing the industrialisation of genocidal violence against Jews, also – according to the report on the case – wryly noted that this architecture (including the camps) "afforded an excellent opportunity as instruments used for extermination of Poles".[91]

38.4. The Höss Case

The proceedings against *Obersturmbannführer* Rudolf Franz Ferdinand Höss – the notorious first *Kommandant* of the Auschwitz concentration camp – were held in March 1947. The Höss trial post-dated both Greiser and Göth. The Höss case was the Tribunal's fourth. Höss's diary entries were subsequently translated and published in his well-known memoirs, which evoke the mind and mannerisms of an architect of such overwhelming tragedy.[92]

Höss served as Auschwitz *Kommandant* from 1 May 1940 until 1 December 1943; he subsequently served as Head of Department D I (responsible for the concentration camps) of the SS Central Economic and Administrative Office (December 1943–May 1945) and commander of the SS garrison at Auschwitz in the summer of 1944. The Prosecution submitted that after Höss left the post of Auschwitz *Kommandant* he "fulfilled […] the functions of Himmler's special plenipotentiary for

group, typically is accompanied by a second phase that entails the imposition of the national pattern of the dominant group".

90 For the most part, Polish Jews were seen as Jews, while Polish non-Jews were seen as Polish. A level of opacity, however, persisted in the intersectionality of Jewishness and Polish nationality and the resultant group identification.

91 Law Reports, p. 7, see *supra* note 3.

92 Rudolph Höss, *Death Dealer: The Memories of the SS Kommandant at Auschwitz*, Steven Paskuly (ed.), Prometheus Books, Buffalo, 1992. Höss was encouraged to write his memoirs by Jan Sehn, prosecuting attorney for the Polish War Crimes Commission. The memoirs divide into two parts. The first part from 1946 details the development of Auschwitz and is entitled "The Final Solution of the Jewish Question". The second part from 1947 is autobiographical. The memoirs have been published with a foreword by Primo Levi. Also included are Höss's last letters written to his family. Experts generally conclude that Höss's memoirs are accurate and reliable. In part the impetus to draft memoirs derived from Höss's interest in recollecting events for the strategic purpose of his trial. See Paskuly's introduction to Höss's memoirs, p. 19.

extermination of Jews and in that capacity he either sent people to Auschwitz or supervised the extermination on the spot".[93]

At the end of the war Höss went into hiding. He obtained a new identity as a farm labourer in northern Germany. Höss managed to live undetected for eight months, during which time he frequently visited his family which was nearby. He was eventually caught by the British, who tortured him, and then was handed off to the Poles. Höss noted that upon his arrival in Kraków he had to wait at the train station where a crowd spotted Göth as among the group of Germans present; Höss wrote that "[i]f the car had not arrived when it did, we would have been bombarded with stones".[94] Höss also testified at the IMT proceedings: he was called as a defence witness by Ernst Kaltenbrunner (the former head of Reich main security). In a nod to the IMT's iconicity, Höss's cameo appearance as a witness at Nuremberg received as much, if not more, play than his entire trial and conviction before the Tribunal.

While at Auschwitz, Höss "lived with his wife and four children in a house just yards from the crematorium".[95] One of his daughters, now living in the United States, remembers Höss fondly as a father, describing him as "the nicest man in the world […] He was very good to us" and recalling their eating together, playing in the garden at Auschwitz (and the other camps at which he worked) and also reading Hansel and Gretel.[96] Höss spoke and wrote frequently and lovingly of his family, and he was deeply committed to his wife and children. One of his regrets was that

93 Law Reports, p. 13, see *supra* note 3.

94 Höss, 1992, p. 181, see *supra* note 92.

95 Rees, 2011, see *supra* note 56, noting also that: "During his working days, Höss presided over the murder of more than a million people, but once he came home he lived the life of a solid, middle-class German husband and father". See also Thomas Harding, "Hiding in N. Virginia, a daughter of Auschwitz", in *Washington Post*, 7 September 2013: "[T]he Höss family lived in a two-story gray stucco villa on the edge of Auschwitz – so close you could see the prisoner blocks and old crematorium from the upstairs window […] The family decorated their home with furniture and artwork stolen from prisoners as they were selected for the gas chambers. It was a life of luxury taking place only a few short steps from horror and torment". Höss told a psychologist that his sex life suffered once his wife found out "about what he was doing" at the camp, though he was never particularly passionate; Höss also claimed "he never even felt the desire to masturbate and never did". Gustave. M. Gilbert, *Nuremberg Diary*, New American Library, New York, 1961, p. 238. That said, it seems as if Höss saw this more as a work/life conflict rather than a question, at the time, of morality.

96 Harding, 2013, see *supra* note 95.

working so hard to fulfil his genocidal obligations detracted from the time he could spend with his family – an outlandish lament about his frustrations with his particular work/life balance. Höss was motored by duty and obedience – running the camp was an administrative task. He emphasised diligence rather than zeal among his staff.[97] In his forward to Höss's memoirs, noted author and Holocaust survivor Primo Levi identifies as believable Höss's claim that "he never enjoyed inflicting pain or killing: he was no sadist, he had nothing of the Satanist".[98]

Höss's memoirs, burdened by his bland prose, also burgeon with vulgar details as to how and why he ended up playing a catalytic role in the Nazi death machinery. He notes the unstinting obedience demanded of him by his austere and religious father, a trait that Höss internalised and which informed his membership in and promotions within the Nazi hierarchy. Höss describes himself as a loner. Prior to setting up the Auschwitz death camp,[99] Höss had served at the Sachsenhausen camp (as of 1936) and previous to that at Dachau (where he quickly rose from being a guard in 1934 to *Rapportfuehrer*). He had joined the Nazi Party in 1922 and the SS in 1934. Like Greiser, Höss has been described as a "model" Nazi and SS man.[100]

The proceedings against Höss, starting with the indictment, exposed horrific details of the Auschwitz death camp, described in the report on the case as occupying "the most prominent position among the nine greatest concentration camps established by Nazi Germany".[101] In this regard, the Höss proceedings served an expressive function alongside the

[97] Lower reports that Höss's reaction to the appointment of Johanna Langefeld, the first female superintendant of Birkenau (a large women's camp), was negative owing to his sense that Langefeld was "too assertive". Lower, 2013, p. 109, see *supra* note 25.

[98] Levi's foreword, in Höss, 1992, p. 4, see *supra* note 92. Elsewhere, however, Levi discusses how elements of the book are deceitful.

[99] Arriving in Auschwitz in May 1940, Höss "now felt ready to take on his biggest challenge, creating a new concentration camp from a handful of vermin-infested barracks. His experience at Dachau and Sachsenhausen offered a clear blueprint". Rees, 2011, see *supra* note 56. See also Tenenbaum, 1953, p. 211, *supra* note 1: "Himmler gave Höss the job of building and supervising the new camp, and Höss lost no time in taking over his new duties as Commandant of the Concentration Camp Auschwitz". Auschwitz was chosen as a site because of its transportation facilities and its relative isolation.

[100] Rees, 2011, see *supra* note 56; see also, Tenenbaum, 1953, p. 226, *supra* note 1: "Höss was rather intimate with Eichmann and they met frequently in good fellowship and bouts of conviviality".

[101] Law Reports, p. 12, see *supra* note 3.

British Belsen trial, which involved many Auschwitz guards, and subsequent Auschwitz trials held in Frankfurt, West Germany, in the 1960s. In particular, the Höss trial detailed the grisly medical experiments performed at the camp. The Höss trial also laid some groundwork for the Tribunal's subsequent prosecution of 40 members of the Auschwitz camp (including another commandant, Artur Liebehenschel) held in Kraków late in 1947 and following which slightly over half of the defendants received death sentences.

Höss, a German national, was charged with membership of the Nazi Party (in Germany and also in the occupied territory of Poland) and, like Göth, with membership in the Waffen-SS (although in the Höss case, specific allegations were put forth involving the Nazi Party alone).[102] He also was indicted in regards to his role at Auschwitz where he "supervised" the "Nazi system of persecution and extermination of nations in concentration and death camps […] against the Polish and Jewish civilian population and against other nationals of the territories occupied by Germany, as well as to Soviet prisoners of war".[103] The accusations against Höss were staggering in terms of their enormity: depriving 300,000 camp registered inmates of life, along with 4,000,000 people ("mainly Jews") brought to the camp and 12,000 Soviet prisoners of war.[104] It was alleged that these individuals were deprived of life "by asphyxiation in gas-chambers, shooting, hanging, lethal injections of phenol or by medical experiments causing death, systematic starvation, by creating special conditions in the camp which were causing a high rate of mortality, by excessive work of the inmates, and by other methods".[105] The Prosecution noted that while at Auschwitz Höss "perfected" the "system" that "was built on patterns established in other concentration camps".[106] In addition, Höss was indicted with ill-treating and torturing these inmates "physically and morally" and also with supervising "robbery of property, mostly jewels, clothes and other valuable articles taken from people on their arrival to the camp, and of gold teeth and

[102] *Ibid*., p. 18.

[103] *Ibid*., p. 11.

[104] *Ibid*.

[105] *Ibid*.

[106] *Ibid*., p. 13. The report on the case notes that Höss "underwent special training in camp duties and practiced in this respect in the Dachau and Sachsenhausen concentration camps, before he took over the commandant's duties at Auschwitz".

fillings extracted from dead bodies of the victims".[107] Hair was sheared from the corpses of women and used *inter alia* to manufacture felt (deployed for industrial purposes, hats and stockings worn by Reich railway employees "to keep their feet warm").[108] The property crimes officially undertaken by the Nazis against the Jewish inmates were colossal in scale, but were hampered by theft and larceny perpetrated by individual guards and officers for their own personal use.[109] Höss was very concerned that his subordinates were skimming off what the Nazis had stolen for official Reich use.

Höss transformed Auschwitz from a "poorly-resourced but brutal concentration camp for Poles" to "a source of slave labour" and then readied it for Soviet prisoners of war, who began to arrive in July 1941, and who were among the first to be murdered through the use of Zyklon B gas.[110] Höss found that the use of gas and crematoria mitigated the psychological harm to his staff in effecting such massive numbers of killings, and he assiduously expanded this part of the camp's architecture. Höss himself was squeamish about seeing people suffer and die. Acting at the suggestion of his associate, Karl Fritsch, Höss pioneered the use of the cyanide-based insecticide Zyklon B in the camps, which he favoured over exhaust gas which had initially been conceived as the method of choice in the death chambers. The result was a more efficient method of killing.

Höss's trial was held in Warsaw between 11 and 29 March 1947. He was found guilty and was sentenced to death by hanging. The execution took place on 16 April 1947, at a gallows adjacent to the Auschwitz crematorium (in the "Death Block" of the camp where inmates had been executed).

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[107] *Ibid*., p. 12. An order from Himmler (23 September 1940) stipulated that gold be extracted from the teeth of inmates murdered in the concentration camps and then used for the benefit of the Reich.

[108] Tenenbaum, 1953, p. 223, fn. 33, see *supra* note 1.

[109] See Lower, 2013, p. 101, *supra* note 26:

> Personnel in the occupied territories shipped trainloads of plundered items to family in Germany and Austria – crates of eggs, flour, sugar, clothing, and home furnishings. It was the biggest campaign of organized robbery and economic exploitation in history, and German women were among its prime agents and beneficiaries. This indulgence was not condoned by the regime; Jewish belongings were officially Reich property and not meant for personal consumption.

[110] See Rees, 2011, *supra* note 56.

As was also the case with Göth, the Tribunal pronounced the loss of Höss's public/civic rights and the forfeiture of all of his property. Höss was represented at trial by two attorneys. He more or less admitted all the facts alleged in the indictment. Although he denied that he personally committed any acts of ill-treatment or cruelty and questioned the accuracy of the total number of persons alleged to have been killed in Auschwitz, he "recognized his entire responsibility for everything that occurred in the camp whether he personally knew it at the time or not".[111] Höss, however, did not adduce any evidence of his own or call any witnesses on his behalf. The lodestar of his defence was superior orders, in particular, to Himmler. Höss contemplated no space whatsoever to refuse the orders of his superiors.[112] This defence failed, although it is unclear whether Höss intended it as a basis to disclaim responsibility or, rather, whether the defence was merely an indication of how he saw himself, that is, as a crucial cog in the functional apparatus of the state.[113]

Prusin notes that Höss "stunned the court audience with his mild manners, quiet voice, and most important, his admission of guilt".[114] Höss was in fact the first senior official to acknowledge the horrors that occurred at Auschwitz. All told, through his testimony at the IMT,

[111] Law Reports, p. 17, see *supra* note 3: "[H]e admitted that he was a member of the NSDAP and the SS, and that in his capacity as commandant of the concentration camp at Auschwitz and later as chief of the D.I. Department of the Central Economic and Administrative Office of the SS he carried out and supervised the extermination of many million Jews and other people".

[112] Höss, 1992, pp. 153–54, see *supra* note 92: "Outsiders cannot possibly understand that there was not a single SS officer who would refuse to obey orders from Himmler, or perhaps even try to kill him because of a severely harsh order. Whatever the Führer or Himmler ordered was always right".

[113] Höss himself used the term "cog" to describe his place within "the terrible German extermination machine", recognising that he was "totally responsible for everything that happened [at Auschwitz], whether [he] knew about it or not", *ibid.*, p. 189, in a letter to his wife. In an interview with a psychologist while he was at Nuremberg as a witness, Höss stated: "[F]rom our entire training the thought of refusing an order just didn't enter one's head, regardless of what kind of order it was"; Gilbert, 1961, p. 230, see *supra* note 95. In any event, "[a]t Auschwitz […] there is not one recorded case of an SS man being prosecuted for refusing to take part in the killings"; Rees, 2011, see *supra* note 56.

[114] Prusin, 2010, p. 11, see *supra* note 4. See also at p. 16, describing Höss as the only Tribunal defendant who did not "vehemently den[y]" his guilt. Höss saw himself, in his own words as related by a psychologist, as "entirely normal … [e]ven while I was doing this extermination work, I led a normal family life, and so on". Gilbert, 1961, p. 237, see *supra* note 95.

through his memoirs and through his testimony before the Polish Tribunal, "[f]ew witnesses confessed as readily and truthfully" as Höss. In this vein, Höss's candour had great expressive value in authenticating early on the systemic nature of the concentration camps and their vast scale.[115] Several days before his execution, moreover, he declared his "bitter recognition of how deeply [he] transgressed against humanity":

> As commandant of the Extermination Camp Auschwitz, I carried out a part of the horrible extermination plans of human beings by the "Third Reich." I have by that act caused the gravest injury to humanity. Particularly have I caused untold suffering to Polish people. For my own responsibility I pay with my life. May God some day forgive me my conduct. The Polish nation I ask for forgiveness.[116]

Joseph Tenenbaum notes "[t]he omission of any allusion to his Jewish victims" in Höss's final declaration.[117] Höss was, and remained, deeply anti-Semitic to the end; he considered the Jews as the "enemy" of the German nation.[118] He faulted the Third Reich leadership for having caused the war, noting that "the necessary expansion of the German living space could have been attained in a peaceful way".[119] In his memoirs, Höss scathingly wrote:

> Today I realize that the extermination of the Jews was wrong, absolutely wrong. It was exactly because of this mass extermination that Germany earned itself the hatred of the entire world. The cause of anti-Semitism was not served by

[115] Höss's memoirs, in addition, extensively narrate many aspects of camp life that fell outside of judicial accounts at the time. Such aspects include a self-proclaimed typology of the guards at the camps and rivalries among groups of prisoners; and also homosexual activity in prisons and camps, a phenomenon which anguished Höss greatly. See Höss, 1992, pp. 65–66, 106–9, 149, see *supra* note 92.

[116] Höss, *Erklaerung* cited in Tenenbaum, 1953, p. 235, see *supra* note 1.

[117] Tenenbaum, 1953, p. 235, see *supra* note 1.

[118] Höss, 1992, p. 142, see *supra* note 92. By way of example, in his memoirs Höss faulted the Germans for permitting the Jews to discredit the country. Höss opined that "the Jews have a very strong sense of family. They cling to each other like leeches, but from what I observed, they lack a feeling of solidarity. In their situation you would assume that they would protect each other. But no, it was just the opposite. I heard about, and also experienced, Jews who gave the addresses of fellow Jews who were in hiding".

[119] *Ibid.*, p. 182.

> this act at all, in fact, just the opposite. The Jews have come much closer to their final goal.[120]

Relatedly, although the Holocaust of European Jews figured prominently in the trial, the proceedings against Höss also narrated the fate of Soviets, Poles and victims of nearly two dozen other nationalities in Auschwitz.[121] The Prosecution detailed the killing capacity of the camp, the nature of the forced labour and the horrid conditions.[122] The Prosecution also adduced into evidence how Poles were registered as criminals only because of their nationality. The case against the accused, much like that against Göth, was based upon witness testimony, documentary evidence, and statements by experts; it is also noted that a "documentary film was projected in the court, showing the camp buildings and establishments".[123]

The report on the Höss case accorded considerable attention to the charges of "medical war crimes", notably, "numerous medical experiments […] performed on men and women of non-German origin, mostly Jews".[124] Among the experimenters was Dr. Josef Mengele. Specific types of experiments included: castration, sterilisation, premature termination of pregnancy, artificial insemination and cancer research.[125] These procedures led to great pain, debilitation, suffering and death. The discussion of these gruesome experiments is stomach churning. The inclusion of this discussion fulfilled a pedagogic function at a time when information about the activities at the camps was inchoately emerging. But for carefully sourced judgments such as Höss, this information might otherwise be met with stupefied incredulity.

The report on the case included within the category "other experiments" that "[f]ifteen to twenty-one young girls were deprived of

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120 *Ibid*., p. 183.

121 *Ibid*., p. 12. "Soviet prisoners of war were the first victims of this extermination campaign. They were followed by Jews who perished in even larger numbers. Poles constituted the largest group of murdered from among the registered inmates of the camp".

122 Law Reports, p. 12, see *supra* note 3: "Only a small number of individuals survived owing to exceptional powers of endurance or to fortunate accidents".

123 *Ibid*., p. 14.

124 *Ibid*.

125 Lippman, 1999–2000, p. 73, see *supra* note 19: "The experiments involved procedures ranging from massive X-ray treatment, injections of large amounts of fluids into the uterus and fallopian tubes, radical amputations, surgical excisions and transplantations".

their virginity in a brutal manner by SS men".[126] This conduct apparently was not described in the indictment as rape or sexual torture. Although very infrequently prosecuted as such, gender-based sexual violence was recognised at the time as an offence. The work of the *ad hoc* tribunals and the International Criminal Court has gone some way to remedy this painful omission, although greater efforts are still required to adequately respond to and prevent gender-based violence.

Taken as a whole, according to the report on the case, the Tribunal found that these medical experiments "violated all rules which must be observed when medical experiments are performed on human beings"[127] and the "[s]pecial circumstances in which they were performed constitute in addition elements which allow them to be classified as violations of the laws and customs of war and of laws of humanity".[128] These experiments were determined to serve no scientific purpose. In terms of the sources of law, the Tribunal additionally noted that these experiments "violated general principles of criminal law as derived from the criminal laws of all civilized nations".[129]

The Tribunal's judgment did not accept all the charges in the indictment. It eschewed the language of "depriving of life" and instead described these offences as "participation in the murder of".[130] The Tribunal concluded that "at least 2,500,000, mainly Jews" were murdered, thereby departing from the allegation of 4,000,000. In all likelihood both of these numbers are exaggerated, however, as Höss himself claimed in his memoirs; other estimates indicate that slightly over 1 million people, overwhelmingly Jews, were murdered at Auschwitz.[131] In his memoirs, Höss wrote that 1,130,000 people were killed at Auschwitz; the US Holocaust Memorial Museum has accepted the figure of 1,100,000, as have other experts.[132] The Tribunal held that Höss took part in the

[126] Law Reports, p. 16, see *supra* note 3.

[127] *Ibid.*, p. 24.

[128] *Ibid.*, pp. 24–25.

[129] *Ibid.*, p. 25.

[130] *Ibid.*, p. 17.

[131] Rees, 2011, see *supra* note 56. See also Harding, 2013, *supra* note 95: "By the end of the war, 1.1 million Jews had been killed in the camp, along with 20,000 gypsies and tens of thousands of Polish and Russian political prisoners".

[132] In his sworn written affidavit (and oral testimony) at the IMT, Höss stated that 2.5 million people were murdered at Auschwitz, with another half million perishing from starvation or

wholesale robbery of property, rather than supervised it as the indictment had alleged. Finally, as noted in the report on the case, the Tribunal "did not express any explicit view on the question whether the accused did personally ill-treat or tortured any of the inmates […] and in addition brought the corresponding charges within the wording of the relevant provisions in force at the time of the trial".[133]

Like both Göth and Greiser, the Höss judgment identified the heart of the charges as falling within the notion of genocide. The Prosecution posited this argument when it came to the extermination of the Jews; the judgment itself noted "that the Nazi Party had as one of its aims the biological and cultural extermination of subjugated nations, especially of the Jewish and Slav nations, in order to establish finally the German *Lebensraum* and the domination of the German race".[134] The Höss case explored how the grisly medical experiments conducted at Auschwitz helped operationalise this system of extermination. It connected these experiments to the genocidal scheme. According to the notes and report on the case:

> [P]aramount importance should be attached to the political aspect of the crime. The general scheme of the wholesale experiments points out clearly to the real aim. They were obviously devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazi as standing in the way of the fulfillment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide.[135] […]
>
> Thus in view of the political directives, issued by the Supreme German authorities, and the character of the experiments performed in Auschwitz on their orders, it seems obvious that they constituted the preparatory stage of

disease, meaning that 3 million people died there in total. He later repudiated this figure, however.

133 Law Reports, p. 18, see *supra* note 3.

134 *Ibid.*, p. 24.

135 *Ibid.*, p. 25.

> one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.[136]

Specific mention was made of the X-ray experiments aimed at creating conditions in which injured genes could be multiplied and progenated. Other experiments aimed to achieve sterilisation through drug therapy.[137]

The Höss judgment dovetailed with the overarching narrative that in addition to Jews other national groups also were targets of genocide, notably but not exclusively Poles. The report on the case specifically noted that Höss himself "confirmed the existence of plans of wholesale destruction of the Slav nations, and of Poles and Czechs in particular".[138] The Polish Tribunal engaged with a purposive conceptualisation of the term genocide in light of the conventional wisdom that the Nazi genocidal Final Solution (*Endlösung*) was aimed at European Jewry alone. To be sure, other groups were subject to the commission of war crimes and crimes against humanity. The Tribunal's findings were purposive in that it is not generally accepted that genocidal intent accompanied crimes committed against the Polish or Czech populations. The overlap of political motivation with genocide also surpasses the boundaries of the contemporary understanding of the crime, although politically motivated violence may well serve as preparations (as the Polish Tribunal stated) to genocide.

When it came to the intent requirements, the Tribunal innovated insofar as this element was not firmly set out as a requirement under the underlying consolidated Decree. According to Matthew Lippman:

> [For] the Polish Tribunals […] the defendant's intent was demonstrated through their [sic] statements, the nature and

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[136] *Ibid.*, p. 26. Lippman, 1999–2000, see *supra* note 19, p. 77: "The unique contribution of the *Höss* case was the determination that the medical experiments conducted on inmates constituted biological genocide through scientific means, thus extending the definition of genocide to include preparations for the prevention of births".

[137] Law Reports, p. 26, see *supra* note 3, reporting that "periods would continue, internal female genital organs would remain healthy and damage inflicted to the reproductive power of women concerned would remain unobserved. The wholesale application of such a drug, the discovery of which cannot be ruled out, would have paved a way to a demographic policy aiming at a total extinction of nations".

[138] *Ibid.*, p. 25, noting also that: "Höss declared that the experiments of wholesale castration and sterilization were carried out in accordance with Himmler's plans and orders. These aimed at the biological destruction of the Slav nations in such a way that outside appearance of a natural extinction would have been preserved".

> purpose of their criminal activity, awareness of the Reich's genocidal plans, and the presumption that the accused were aware of the connection between their actions and the Reich's ultimate genocidal aspirations.[139]

The Höss judgment – similarly to Göth – also dealt with the tricky issue of membership in criminal organisations. The Tribunal noted that Höss was a member of both the Nazi Party and the Waffen-SS (to be clear, the Prosecution specifically alleged Nazi Party membership, though focused only on Waffen-SS membership in the closing speeches).[140] The Tribunal, however, emphasised the Waffen-SS membership and the criminal nature of the Waffen-SS, despite the pleadings. It did so because it concluded that Höss could not be convicted for membership in the Nazi Party as a criminal organisation insofar as Höss was not held to be in a leading position within that organisation (this being a requirement of a criminal conviction on this count). Nevertheless, the sentence more or less conflated membership in the Waffen-SS with membership in the Nazi party, insofar as the former was considered "a tool" of the latter that was "used for committing war crimes and crimes against humanity".[141]

The report on the Höss case discussed the question of criminal membership in the Nazi Party in some detail. The heart of the legal concerns lies in Article 4(3) of the consolidated 1946 Decree, according to which Nazi Party membership was considered criminal "as regards all leading positions".[142] This phrase predictably became subject to interpretive discussion among Polish judges. Consensus emerged around the proposition that "only such leading ranks and positions of the NSDAP should be considered as criminal as are enumerated in the Nuremberg Judgment, i.e., the Reichsleitung of the Party, the Gauleiters, the Kreisleiters, and the Ortsgruppenleiters, as well as the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and

[139] Lippman, 1999–2000, p. 78, see *supra* note 19 (footnotes omitted).

[140] Law Reports, p. 19, see *supra* note 3.

[141] *Ibid.*

[142] Article 4(1) thereof criminalised membership in "a criminal organization established or recognized by the authorities of the German State or of a State allied with it, or by a political association which acted in the interests of the German State or a State allied with it". Article 4(2) offered a rudimentary definition and article 4(3) non-exhaustively listed several organisations in which membership was considered "especially" criminal (Nazi Party, SS, Gestapo and the Sicherheitsdienst ['SD']).

Kreisleitung".[143] This view was definitively affirmed after the Göth and Höss judgments by a ruling of the Polish Supreme Court of 28 February 1948.[144] Interestingly, among the justifications for proceeding in this fashion was a perceived legislative wish to bring Polish municipal law in line with the substantive developments of international criminal law (specifically the London Charter and Nuremberg judgment), thereby demonstrating how international criminal law may serve as a best-practice benchmark for national frameworks.

Polish courts, however, were not "bound by the fact that certain other group or organisations have not been indicted and adjudicated [at the IMT] as criminal groups within the meaning of the Charter".[145] Hence, the Polish courts were free to go beyond whatever the Nuremberg Tribunal determined.[146] The Tribunal precisely did so in determining that members of the concentration camp staff at Auschwitz constituted a criminal group (the Tribunal eschewed the term "organisation").[147] This determination was not made in the Höss case but in a subsequent case involving 40 camp officials where judgment was issued on 22 December 1947. This judgment held that "the authorities, the administration and members of the garrison of the Auschwitz camp [were] a criminal group, irrespective of whether or not the members of these administrative or military units were at the same time members of the SS or any other organisation pronounced criminal by the Nuremberg Tribunal".[148] In this

[143] Law Reports, p. 19, see *supra* note 3.

[144] *Ibid.*

[145] Law Reports, Annex, Polish Law Concerning Trials of War Criminals, pp. 82, 87, see *supra* note 3.

[146] The Nuremberg Tribunal declared the Leadership Corps of the Nazi Party, Gestapo/SD and SS as criminal organisations. In other instances (the Reich Cabinet, German General Staff, and High Command), the Nuremberg Tribunal issued no declaration; it declared the SA not to be a criminal organisation.

[147] The Nuremberg Tribunal did not explicitly include concentration camps as among the groups determined to be criminal, though was never actually asked to do so. That said, according to the report on the Höss case, "the Tribunal did make in its Judgment many references to the concentration camps which it described as a means for systematic commission of war crimes and crimes against humanity". Law Reports, p. 22, see *supra* note 3, including as a '"factory dealing in death'" (*ibid.*, quotation directly from the Nuremberg judgment). To this end, the approach of the Polish judges was compatible with the ethos of the Nuremberg judgment.

[148] *Ibid.*, p. 20. In the Fischer and Leist case, adjudged in 1947, the Tribunal declared the occupation government of the Government General of Poland to be a criminal group.

regard, then, the domestication of the Nuremberg judgment does not straitjacket national actors (here, international law was described as applying only subsidiarily in that municipal law has priority in municipal jurisdiction). A group explicitly declared not to be criminal by the Nuremberg Tribunal would not be declarable as criminal by Polish national courts, but there "is no legal obstacle in the way of supplementing the legal principles established in [the Nuremberg] Judgment by further principles, if in substance they are not in contradiction". [149] Hence, concentration camps could be declared as criminal groups notwithstanding that the Nuremberg Tribunal did not do so.[150]

The authorities, administrators and personnel of the camp were included within this group in their individual capacities, but the inmates "under compulsion" were not – ostensibly even those inmates who participated in inflicting atrocities upon others. This question was far from academic in light of the extensive use of *Kapos* and the *Sonderkommando* (Jewish Special Squads) in the camps, including in the process of leading inmates to their deaths and subsequently pillaging (for example, by extracting teeth and shearing hair) and disposing of the bodies. [151] These inmates, however, could be responsible "for their

[149] *Ibid*. See also Grzebyk, 2014, p. 626. *supra* note 6: "The […] Tribunal concluded that it was not limited by the list of criminal organizations prepared by the IMT and had the right to extend it save for those organisations which the IMT had clearly defined as non-criminal".

[150] "There is no doubt that the organization of the German concentration camps is a criminal group in the meaning both of the Nuremberg Judgment and of Article 4 of the Decree of 1944, as these camps had been set up with the aim of unlawfully depriving of freedom and health, property and life of individuals and groups of people because of their race (Jews and Gipsies), nationality (Poles and Czechs), religion (Jews) or political convictions (socialists, communists and anti-Nazis). The organization of the German concentration camps thus aimed at committing crimes against humanity, which at the same time were crimes in violation of the penal law of all civilized nations, and also war crimes as regards the acts committed against the Soviet prisoners of war". Law Reports, pp. 20–21, see *supra* note 3.

[151] Höss uncharitably described the *Sonderkommando* as follows:

> They carried their gruesome task with a dumb indifference. Their one goal was to finish the work as quickly as possible so that they could have a longer period of time to search the clothing of the gassed victims for something to eat or smoke. Although they were well-fed and given many additional allowances, they could often be seen shifting corpses with one hand while they chewed on something they

personal deeds".[152] Many of these inmates, in any event, were ultimately murdered by the Nazis.

Elaboration was not forthcoming, however, in terms of the requisite level of individual knowledge of group activities. It is assumed that the Polish court intended the Nuremberg standard to apply, to wit, that persons "became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal [by the Charter], or who were personally implicated as members of the organization in the commission of such crimes".[153] The report on the Höss case assumes that "every member of [the camp's] personnel must have known that these camps were being used for the commission of acts which any ordinary sensible person must have acknowledged as criminal".[154]

38.5. Conclusion

Examining the Tribunal's work refines the epistemology of the historical development of international criminal law. Recovering the Tribunal's role fulfils a valuable function in detailing the diverse hinterland to international criminal law and excavating elements that dominant and

> were holding in the other. Even when they were doing the most revolting work of digging out and burning the corpses buried in the mass graves, they never stopped eating.

Höss, 1992, p. 45, see *supra* note 92.

[152] To elaborate see Law Reports, p. 21, *supra* note 3:

> Those people had no ideological ties with the organization of the concentration camps, but had been simply used as tools for the perpetration of certain crimes. This does not protect them from punishment for their personal acts, but they cannot be declared guilty of membership of a criminal organization as a separate offence.

[153] *Ibid.*, pp. 23–24 (citation from judgment). See generally on criminal organisations, Lippman, 1999–2000, pp. 102–3, *supra* note 19:

> The theory of organizational criminality obviated the requirement that the prosecution demonstrate an explicit or implicit agreement among the defendants to pursue a common design or plan. The scope of liability was circumscribed by the contours of the organization. All of those who were aware of an organization's criminal purpose, who nevertheless remained or entered the organization, were vicariously liable. This was intended to facilitate the prosecution of large numbers without the burden of establishing individual criminality.

[154] Law Reports, p. 24, see *supra* note 3.

often ideologically motivated narrations of history may exclude, overlook, or ignore.

The Tribunal's work forms part of an underappreciated history, eclipsed as it was by the IMT; its pioneering discussion of genocide soon was superseded by the adoption of the Genocide Convention (which paradoxically contained a narrower definition of the crime than what the Tribunal put into play); and its judgments also were overrun, in the case of Höss, by the publication of his memoirs which have had greater expressive value than his trial judgment, suggesting the limits to legal judgment as pedagogic tool. That said, the Tribunal communicated the destruction inflicted on the Polish nation (a particularly important political goal at the time), aired the horrors of the *Ostrausch*, authenticated the terrors of the concentration and forced labour camps, and introduced in juridical terms the eliminationist policies of the Nazis. The scant attention paid to the Tribunal's work belies the didactic importance of its trials.[155] The narrative of Polish victimhood crafted by the Tribunal, however, has been muddled in recent years by the mining – itself a form of recovery – of other trials conducted under the auspices of the 1944 Decree against actual Polish collaborators.

The 1944 Decree, as accreted and consolidated over time, also permitted a large number of trials to be held against putative collaborators who, in actuality, were harassed because they were political opponents of the post-war regime. The underlying statutory framework became deployed to advance other ambitions, in particular, when aimed at targeting dissidents who were characterised as enemies of the state owing to their perceived departures from Communist orthodoxy. Once domesticated, the punitive framework for fascist enemies became elastic – it broadened to encompass more than just the overseers of the Holocaust and *Drang nach Osten* in Poland. Here, the purpose shifted to controlling actual, inchoate, or spectral political enemies: in the language of Judith Shklar, then, trials trended towards the destructive.[156] Eerie parallels arise between prosecutions conducted under the Polish decrees and those

[155] On didactic trials, see generally, Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers, New Brunswick, 1997; Gerry J. Simpson, "Didactic and Dissident Histories in War Crimes Trials", in Gerry J. Simpson (ed.), *War Crimes Law*, vol. 1, Ashgate, Aldershot, 2004, pp. 401–39.

[156] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, MA, 1964, p. 220.

conducted over 50 years later in Rwanda under the *gacaca* legislation, which was also simultaneously used to prosecute both genocide-related offences and persons pretextually alleged to have collaborated in or denied genocide but who were actually hounded for their perceived opposition to the Kagame regime. The domestication of international legal norms, generally perceived as synonymous with justice and widely heralded, may in turn simply add another weapon to the punitive arsenal of the state.

The work of the Tribunal also contributes to the typological study of perpetrators of mass atrocity.[157] Göth and Höss stand as dispositional foils to each other. Göth – rash, riotous, sadistic and impulsive – enjoyed the violence as bacchanal and could not contain himself within the confines of his designated role. Ultimately he was sacked by the SS. His removal from the camp and arrest by the Germans saved many lives. Höss, on the other hand, was the consummate organisation man. He massacred administratively, matter-of-factly (and who described his massacres in such a fashion), and dispassionately, and in this sense epitomises a trait that Hannah Arendt famously described: like Eichmann, Höss simply seemed "terribly and terrifyingly normal".[158] For Höss genocide was about duty; for Göth it was about slaking his avarice, actualising his hedonistic psychopathy and revelling in a grotesque carnival.

[157] On a typology of atrocity perpetrators, see Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations*, Martinus Nijhoff, Leiden, 2011, pp. 318–24.

[158] Hannah Arendt, *Eichmann in Jerusalem*, Penguin, London, 2006, p. 276.

39

The Role of the Polish Supreme National Tribunal in the Development of Principles of International Criminal Law

Patrycja Grzebyk[*]

39.1. Introduction

Poland was essential in bringing German war criminals to justice since the beginning of the Second World War.[1] In fact it was the Polish and the Czechoslovakian governments in exile that initiated the organisation of the international conference at St James's Palace, London in January 1942, where the Inter-Allied Declaration condemning German atrocities in occupied territories and a proposal for the creation of a United Nations Commission for the Investigation of War Crimes were adopted.[2] General Władysław Sikorski, who presided over the conference, stressed that the war criminals would not escape judicial penalty, regardless of the positions they held.[3] Eventually, as agreed by the Allies, "the major war

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1 Franciszek Ryszka, *Norymberga: Prehistoria i ciąg dalszy* [Nuremberg: Prehistory and Aftermath], Spółdzielnia Wydawnicza Czytelnik, Warsaw, 1982, pp. 98 ff.

2 See "Resolution on German War Crimes Signed by Representatives of Nine Occupied Countries", Inter-Allied Review, 15 February 1942 (https://www.legal-tools.org/uploads /tx_ltpdb/Inter-Allied_Resolution_on_German_War_Crimes_1942.pdf), and also "Allied Declarations Condemning German Atrocities in Occupied Territories; Proposal For the Creation of A United nations Commission For the Investigation of War Crimes", 1942.

3 Tadeusz Cyprian and Jerzy Sawicki, *Procesy wielkich zbrodniarzy wojennych w Polsce (Najwyższy Trybunał Narodowy)* [Trials of Major War Criminals in Poland (Supreme

criminals of the European Axis" were to be tried by the International Military Tribunal ('IMT') at Nuremberg,[4] and the remaining war criminals were to be judged on the territory of those countries where they had committed their crimes.[5] Thus, the jurisdictions of both international and national courts hearing the cases of Nazi crimes were supposed to be complementary. The Polish authorities adopted an analogical model for judging Nazi war criminals before the Polish courts – namely, the main perpetrators were to be judged by the Polish Supreme National Tribunal (Najwyższy Trybunał Narodowy, the 'Tribunal'), established specifically for this purpose, while other war criminals were to stand trial before competent district courts.

The task of the Tribunal was, obviously, to administer justice by punishing the guilty and bringing satisfaction to the victims. However, the proceedings before the Tribunal also had other goals, at times of a purely political nature. One of the tasks of the Tribunal was to present documentary evidence supporting the most essential facts from the occupation period[6] in order to demonstrate to other countries the scale of the war crimes. The ascertaining of such facts by the Tribunal was also supposed to prevent German propaganda from falsifying any information, should Germany attempt to diminish the extent of the atrocities and its responsibility. Unfortunately, the Tribunal itself did not manage to avoid minor distortions, as it unnecessarily exaggerated the already grave crimes[7] or echoed Soviet propaganda slogans in praise of the great

National Tribunal)], Seria: Wiedza Powszechna. Z cyklu: Współczesne Prawo Procesowe, Issue 5, Spółdzielnia Wydawnicza-Oświatowa, Czytelnik, Łódź, 1949, p. 2.

4 Charter of the International Military Tribunal, 8 August 1945, Article 1 (https://www.legal-tools.org/uploads/tx_ltpdb/Charter_of_International_Military_Tribunal_1945_03.pdf).

5 See Declaration of the Four Nations on General Security, "Statement on Atrocities", 30 October 1943, according to which "war criminals who had committed crimes in occupied countries would be sent back to those countries and stand trial and be sentenced on the basis of those countries' laws" (https://www.legal-tools.org/uploads/tx_ltpdb/Statement_on_Atrocities_1943_02.pdf).

6 See, for example, Supreme National Tribunal of Poland ('NTN'), *Ludwig Fischer et al.*, Judgment, 3 March 1947, p. 19, published in Tadeusz Cyprian and Jerzy Sawicki, *Siedem wyroków Najwyższego Trybunału Narodowego* [Seven Judgments of the Supreme National Tribunal], Instytut Zachodni, Poznań, 1962, pp. 44 ff. ("Fischer Judgment"); NTN, *Albert Forster*, Judgment, 29 April 1948, p. 14, in *ibid.*, pp. 262 ff. ("Forster Judgment").

7 The Tribunal stated that 3 to 4 million people had been exterminated at the Auschwitz concentration camp. This number was negated by Höss. Nowadays, it is widely agreed that

friendship between Poland and the Soviet Union and the help the latter provided to Poland during the war.[8] Another task set before the Tribunal was to formulate the new principles of responsibility for international crimes, and hence to influence the shape of international criminal law.[9] Polish lawyers and authorities were perfectly aware that from the legal point of view the judgments passed by the Polish courts would have the same significance as the verdicts of the international courts, and thus could be invoked by other tribunals trying Nazi criminals.[10] The trials were also expected to prove that the crimes had been committed by ordinary German citizens who, having been fed National Socialist propaganda, had turned into monsters. This was supposed to draw attention to the fact that this ideology should be eradicated from the public sphere altogether.[11] The courts were also to demonstrate that the German invasion of Poland was not a coincidence but an outcome of growing German hostility, which, in turn, had been a consequence of the too lenient approach shown by the Western countries towards Germany after the First World War. This would mean convincing the Allied countries that after the Second World War Germany should be treated more severely in order to prevent any rebirth of the German imperialist policy.[12] Furthermore, the trials before the Tribunal were supposed to demonstrate the immense role that the industrial corporations, such as IG

the total number of victims was about 1.1 million. See, NTN, *Arthur Liebehenschel et al*., Judgment, 22 December 1947, p. 79, in *ibid.*, pp. 137 ff. ("Auschwitz Judgment"); NTN, *Rudolf Hoess*, Judgment, 2 April 1947, pp. 27 ff., 58, in *ibid.*, pp. 92 ff ("Hoess Judgment"). See also NTN, Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, case no. 38, 11–29 March 1947 (https://www.legal-tools.org/en/go-to-database/record/9e87ed/).

8 See, NTN, *Josef Bühler*, Judgment, 10 July 1948, pp. 11, 19–20, in Cyprian and Sawicki, 1962, pp. 324 ff., *supra* note 6 ("Bühler Judgment"); see also NTN, Trial of Dr. Joseph Buhler, case no. 85, 17 June–10 July 1948 (http://www.legal-tools.org/en/go-to-database/record/7721bd/).

9 See, for example, Fischer Judgment, *supra* note 6.

10 Alfons Klafkowski, *Obozy koncentracyjne hitlerowskie jako zagadnienie prawa międzynarodowego* [Hitlerite Concentration Camps as a Problem of International Law], Państwowe Wydawnictwo Naukowe, Warsaw, 1968, p. 15.

11 See Hoess Judgment, *passim*, *supra* note 7; NTN, *Amon Goeth*, Judgment, 5 September 1946, in Cyprian and Sawicki, 1962, pp. 23 ff., *supra* note 6 ("Goeth Judgment"); see also NTN, Trial of Hauptsturmführer Amon Leopold Goeth, case no. 37, 27–31 August and 2–5 September 1946 (http://www.legal-tools.org/en/go-to-database/record/7ac212/).

12 Cyprian and Sawicki, 1949, pp. 13, 29, see s*upra* note 3. See also Bühler Judgment, pp. 5, 9, *supra* note 8.

Farbenindustrie, Union-Werke, Friedrich Krupp AG and Siemens, had played in German politics, and thus to convince the Western countries that it was necessary to bring the industrialists to justice as well.[13] The Tribunal's efforts to condemn German crimes, it was hoped, would strengthen Poland's position during the peace talks and, as a result, translate into successes while negotiating such issues as disarmament or the borders of post-war Poland.[14] The court proceedings were also to expose the ineffective operation of the pre-war Polish authorities and to discredit the Polish government in exile as a government of, in fact, a fascist nature.[15]

The Polish authorities planned to make the most of the foreign media attention and the presence of officials representing the countries which not long before had been their allies in pursuing those efforts, and therefore provided simultaneous interpretation of the trials in several languages (Polish, German, English, French and Russian).[16] The selection of the lawsuits was very deliberate as well, as each of the seven cases tried before the Tribunal was to send a clear signal and stand as a symbol of a particular type of crime. The choice of the places for holding the proceedings and executing the verdicts was not random either.[17]

The Tribunal did not get to try all major war criminals since some of them were not extradited to Poland, and as for others, the Polish authorities decided to try them later, before district courts. The Tribunal's judgments did not attract as much publicity as had been expected. The main publications on the Tribunal's activity were written by Poles: Tadeusz Cyprian and Jerzy Sawicki, who were both prosecutors at the

[13] See for example, Auschwitz Judgment, pp. 74 ff., *supra* note 7; Hoess Judgment, pp. 17 ff., *supra* note 7. See also Cyprian and Sawicki, 1949 pp. 10–13, 31, s*upra* note 3.

[14] See, for example, statements concerning importance of Pomerania for Poland in Forster Judgment, p. 3, *supra* note 6.

[15] Cyprian and Sawicki, 1949, p. 23, see *supra* note 3. See also Forster Judgment, pp. 37–39, *supra* note 6.

[16] It is worth mentioning that the trials of Fischer *et al*. and of Höss were attended by General Telford Taylor, a principal prosecutor at the Nuremberg war crimes trials.

[17] Trials took place in Poznań (Greiser), Cracow (Göth, Bühler, Auschwitz), Warsaw (Fischer, Höss) and Danzig (Forster). In principle, they were held where the persons concerned had committed their major crimes. In the case of Höss, though he was tried in Warsaw, his execution was carried out in the former concentration camp of Auschwitz. Greiser, on the other hand, was publicly hanged in Poznań, precisely where the Nazis had usually carried out their executions. It was the last public execution in Poland.

Tribunal, as well as Polish representatives at the Nuremberg Trial (*sic*),[18] and by Janusz Gumkowski and Tadeusz Kułakowski.[19] In terms of publications in English, only four out of seven trials held before the Tribunal were discussed in the series *Law Reports of Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission ('UNWCC').[20] Moreover, the works by Mark A. Drumbl[21] and Alexander V. Prusin[22] are also worthy of attention. Therefore, it seems justified to recount the achievements of the Tribunal and, above all, to demonstrate how the Tribunal contributed to the development of the principles of responsibility for international crimes. The first part of this chapter presents briefly the main facts connected with the establishment and work of the Tribunal. The second part then discusses the impact of the Tribunal's sentences on the principles of international criminal law and on the shaping of the definitions of specific crimes.

39.2. Establishment of the Supreme National Tribunal

The Supreme National Tribunal was established by the Decree of 22 January 1946,[23] which was changed by the Decree of 17 October 1946.[24]

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[18] Cyprian and Sawicki, 1949, see *supra* note 3; Cyprian and Sawicki, 1962, see *supra* note 6; Jerzy Sawicki, *Przed polskim prokuratorem: Dokumenty i komentarze* [Before Polish Prosecutor: Documents and Commentaries], Iskry, Warsaw, 1968.

[19] Janusz Gumkowski and Tadeusz Kułakowski, Z*brodniarze hitlerowscy przed Najwyższym Trybunałem Narodowym*, Wydawnictwo Prawnicze, Warsaw, 1961.

[20] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VII ("Law Reports, vol. VII"), His Majesty's Stationery Office, London, 1948, for "Trial of Hauptstrumfuhrer Amon Leopold Goeth" and "Trial of Oberstrumbannfuhrer Rudolf Franz Ferdinand Hoess"; The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XIII ("Law Reports, vol. XIII"), His Majesty's Stationery Office, London 1949, for "Trial of Gauleiter Artur Greiser"; The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XIV ("Law Reports, vol. XIV"), His Majesty's Stationery Office, London, 1949 for "Trial of Dr. Joseph Buhler".

[21] See Mark A. Drumbl, "'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946", in Kevin J. Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013.

[22] Alexander V. Prusin, "Poland's Nuremberg: The Seven Court Cases of the Supreme National Tribunal, 1946–1948", in *Holocaust and Genocide Studies*, 2010, vol. 24, no. 1, pp. 1–25.

[23] *Journal of Law of the Republic of Poland*, 1946, no. 5, item 45.

[24] *Journal of Law of the Republic of Poland*, 1946, no. 59, item 325. Unified version of the decree, see *Journal of Law of the Republic of Poland*, 1946, no. 59, item 327. More on

The Tribunal's jurisdiction covered cases regarding crimes of persons who, under the Moscow Declaration of the three Allied powers – the United States, the Soviet Union and Britain – on the responsibility of the Nazis for the atrocities they committed, were to be surrendered to the prosecuting authorities of the Republic of Poland, and cases regarding crimes covered by the Decree of 22 January 1946 concerning the responsibility for the defeat of Poland in September 1939, and for the fascistisation of public life.[25] Although in the end the Tribunal did not take up any of the cases concerning the fascistisation of public life, since the potentially accused remained abroad, and also for the fear that the Tribunal's importance would be diminished,[26] it did not avoid condemning the Polish pre-war authorities.[27] The Tribunal's *ratione materiae* jurisdiction was based on the Decree of the Polish Committee of National Liberation (Polski Komitet Wyzwolenia Narodowego) of 31 August 1944, concerning the punishment of fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war ('POWs'), and the punishment of traitors to the Polish nation[28] where crimes were defined in very general way (for example, actions against the Polish state, civilians or POWs) in order to cover all possible Nazi and their collaborators' crimes. It must be noted that the same practice was applied in the case of the IMT Charter (Article VI). In

Polish laws, see Law Reports, vol. VII, Annex, see *supra* note 20. Originally the Tribunal's jurisdiction covered crimes committed on the territory of the Polish state during occupation. The October amendments extended the Tribunal's jurisdiction to crimes committed by person rendered to Poland for trial regardless of the place of commission of the crime and regardless of the exact time of commission (hence, not only during the occupation period). However, this amendment deprived the Tribunal of the right to try cases falling within the competence of special criminal courts and passed to the Tribunal by the public prosecutor general, as well as of the competence of a special court as regards cases for exclusion of hostile individuals from the Polish society.

25 *Journal of Law of the Republic of Poland*, 1946, no 5, item 46. See also Jerzy Sawicki and Bogusław Walawski, *Zbiór przepisów specjalnych przeciwko zbrodniarzom hitlerowskim i zdrajcom narodu z komentarzem* [Collection of Special Regulations on Hitlerite Criminals and Traitors of the Nation with Commentaries], Spółdzielnia Wydawnicza Spółdzielnia Wydawnicza Czytelnik, Kraków, 1945.

26 Cyprian and Sawicki, 1962, p. xiv, see *supra* note 6.

27 See, for example, Forster Judgment, pp. 37–38, *supra* note 6.

28 *Journal of Law of the Republic of Poland*, 1944, no. 7, item 29.

October 1946 a Decree was amended to include a crime of participation in a criminal organisation.[29]

Considering the circumstances of the time, the judges' panel was rather unusual. It was composed of both professional judges (three) – appointed by the Presidium of the National Council (Krajowa Rada Narodowa) from among persons with appropriate qualifications proposed by the Minister of Justice – and of lay judges (four), also appointed by the Presidium of the National Council from among the Members of Parliament.[30] The purpose of this composition of the panel was supposed to guarantee that "the justice factor will be combined with the social factor representing the highest qualifications".[31] Whether this was the best solution remains open to doubt. The panel included active politicians and thus there was no true separation of powers, which should be characteristic of a democratic state. This is even more blatant considering that the lay judges were able to outvote the professional ones. The prosecutors had to hold a judge's qualification[32] and they performed their tasks through the Central Commission for Investigation of German Crimes in Poland (Główna Komisja ds. Badania Zbrodni Niemieckich w Polsce). Should the need arise, such judges, lay judges or prosecutors could be dismissed by the President of the National Council.

As for the defence attorneys, theoretically this function could be performed by any Pole but eventually these included the members of the Polish legal community described by the Tribunal's prosecutors as "respectable" or "outstanding".[33] It should, however, be stated that the defence attorneys carried out their functions reluctantly. The defence attorneys for Arthur Greiser even asked to be exempt from this duty as they themselves were his victims.[34] Their request was rejected.

The Tribunal's sentences were final, with no right to appeal, which should be seen as a significant deviation from the basic procedural

[29] See more in Leszek, *Zbrodnie wojenne w świetle prawa polskiego* [War Crimes in the Light of Polish Law], Państwowe Wydawnictwo Naukowe, Warsaw 1963, p. 139.

[30] Articles 3 and 4 of the amended Decree.

[31] Cyprian and Sawicki, 1949, p. 3, see s*upra* note 3.

[32] Articles 2 and 3 of the amended Decree.

[33] Cyprian and Sawicki, 1949, pp. 3, 9, see s*upra* note 3. It is worth mentioning that not only the defence attorneys but also the judges and prosecutors had high qualifications. See more in Prusin, 2010, pp. 4–5, *supra* note 22.

[34] Gumkowski and Kułakowski, 1961, pp. 4–5, see *supra* note 19.

safeguards (even those convicted in the Nuremberg Trial were formally entitled to appeal against the judgment). The sentenced could only ask the National Council for pardon. There was also the possibility of reopening the proceedings envisaged. Although the Tribunal was entitled to try the accused *in absentia*, it did not resolve to make use of such a solution (though this was considered in the case of Erich von dem Bach-Zelewski and Heinrich Reinefarth).[35]

The Tribunal was not a permanently operating institution (only its chief justice, who was also the chief justice of the Supreme Court, was permanently employed). In formal terms, the Tribunal was at the same level as the Supreme Court, and as for its nature, it should be classified as a special court.[36]

There were seven trials in total held before the Tribunal, with 49 persons sentenced as a result (see Annex 39.6. below). Each of the trials focused on a specific type of criminal activity of the Nazis. The first verdict[37] was passed against Arthur Greiser on 9 July 1946. This trial concerned mainly Greiser's activity as the Reich Governor and *Gauleiter* of the National Socialist German Workers' Party ('NSDAP') of Wartheland (Warthegau).[38] The trial was supposed to shed light on the

[35] Cyprian and Sawicki, 1962, p. XVI, see *supra* note 6. See also Jerzy Kirchmayer, "Zbrodnie hitlerowskie dokonane podczas Powstania Warszawskiego" [Hitlerite Crimes Committed during the Warsaw Uprising], in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym. Część I, Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* [Experts' Reports and Judgments of the Supreme National Tribunal. Part I. Aggression of the Third Reich against Poland and Hitlerite Occupation of Poland in the light of International Law], Ministerstwo Sprawiedliwości [Ministry of Justice], Główna Komisja Badania Zbrodni Hitlerowskich w Polsce [Central Commission for Investigation of German Crimes in Poland], Warsaw 1979, pp. 159 ff.

[36] Grzegorz Jakubowski, *Sądownictwo powszechne w Polsce w latach 1944–1950* [Common Courts in Poland 1944–1950], Instytut Pamięci Narodowej, Warsaw, 2002, pp. 35–37. After the war, the practice of establishing special courts was criticised in Poland as their functions could be performed just as well by the district courts.

[37] The very first trial of German war criminals in Poland was held before a special court in Lublin between 27 November and 2 December 1944 (that is even before the Second World War ended), against several members of the staff of the concentration camp in Majdanek near Lublin.

[38] NTN, *Artur Greiser*, Judgment, 9 July 1946, pp. 27 ff., 58, in Cyprian and Sawicki, 1962, pp. 1 ff. ("Greiser Judgment"), see *supra* note 6 (https://www.legal-tools.org/uploads/tx_ltpdb/Greiser_PolandSupremeNationalTribunal_Judgment_report__07-07-1946__E__04.pdf). On Greiser, see Drumbl, 2013, *supra* note 21; Catherine Epstein,

scale of persecutions which had befallen the population of the Greater Poland (Wielkopolska) region, and on the manner in which the Reich had subdued the occupied territories.[39] The next judgment was pronounced on 5 September 1946 against Amon Leopold Göth (Goeth), commandant of the camp in Płaszów.[40] By these proceedings the Tribunal wanted to demonstrate how the Nazi authorities had treated the Jewish population in the General Governorate (*Generalgouvernement*) and the civilian population in the so-called forced labour camps. It is worth emphasising that even though the trials of both Greiser and Göth commenced after the start of the Nuremberg Trial, the verdicts were passed before the final judgment of the IMT. In the next trial Ludwig Fischer (Governor of the Warsaw district), Ludwig Leist (section chief in the Office of the Chief of the Warsaw district, plenipotentiary of the Governor for the city of Warsaw), Josef Meisinger (chief of security police and security service of the Warsaw district) and Max Daume (section chief in the Headquarters of the *Ordnungspolizei*) were tried. The judgment was pronounced on 3 March 1947.[41] This trial aimed at depicting the rule of the occupying forces in Warsaw and the Warsaw district, as well as showing the extent of persecutions the Polish and the Jewish population had suffered. It was underlined that Warsaw had been heavily damaged and in total 790,000 Warsaw inhabitants had been murdered (out of 1,250,000). The trial of Rudolf Höss (Hoess) was held in Warsaw and concerned the organisation of concentration camps, including the death camp in Auschwitz, and the medical experiments conducted there. The judgment was passed on 2 April 1947.[42] The staff of the Auschwitz camp (40 persons, including the successor to Höss as camp commandant, Arthur Liebehenschel) were tried during a separate trial, the so-called "Auschwitz trial". Here, the verdict was passed on 22 December 1947, sentencing 23 persons to the death penalty and 16 to imprisonment, while one person was acquitted.[43] Two of those sentenced to death were later granted a pardon (Johann

Model Nazi: Arthur Greiser and the Occupation of Western Poland, Oxford University Press, Oxford, 2010; Czesław Łuczak, *Arthur Greiser*, PSO Publisher, Poznań, 1997.

39 Greiser did not ask for pardon, well aware that it would not have been granted. See Cyprian and Sawicki, 1949, p. 7, s*upra* note 3.

40 Goeth Judgment, see *supra* note 11.

41 Fischer Judgment, see *supra* note 6.

42 Hoess Judgment, see *supra* note 7.

43 *Ibid.*

Kremer and Arthur Breitwieser) and their penalty was changed to several years' imprisonment. The trial focused on the organisation of the Auschwitz camp and the Tribunal attempted to prove that Auschwitz-Birkenau had been not just another concentration camp but a genuine "death factory" where entire nations had been planned to perish.[44] During the subsequent trial, Albert Forster was tried for his actions aimed at detaching Danzig from Poland and his rule on the territory of the Danzig-West Pomerania province.[45] This verdict was given on 29 April 1948.[46] The last trial held before the Tribunal concerned Josef Bühler, deputy to Hans Frank, and it revealed the criminal activity of the authorities administering the occupied territories of the so-called General Governorate. This trial was also designed to prove that the extermination plans had not been envisaged to be executed solely in Poland. The verdict

[44] Cyprian and Sawicki, 1949, p. 8, see *supra* note 3. See also, *Ekspertyzy i Orzeczenia przed Najwyższym Trybunałem Narodowym. Część VI, Zbrodnie hitlerowskie w obozie koncentracyjnym Oświęcim-Brzezinka* [Experts' Reports and Judgments of the Supreme National Tribunal. Part VI. Hitlerite Crimes in Concentration Camp Auschwitz-Birkenau], Ministerstwo Sprawiedliwości, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce, Warsaw, 1981, pp. 7 ff.

[45] See also Stanisław Kaszyński, "Polityka Forster'a jako 'Gauleitera na terenie Wolnego Miasta Gdańska oraz jako' Reichsstatthaltera Gau Danzig-Westpreussen" [Policy of Forster as Gauleiter in Free City of Danzig] and "Polityka Alberta Forster'a w świetle artykułów prasowych w periodycznej prasie niemieckiej w Bydgoszczy i Gdańsku" [Policy of Albert Forster in the Light of Press Articles in German Periodicals in Bydgoszcz and Danzig], in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym. Część II. Status prawny narodu polskiego w okresie II wojny światowej* [Experts Reports and Judgments of the Supreme National Tribunal. Part II. Legal Status of Polish Nation during Second World War], Ministerstwo Sprawiedliwości [Ministry of Justice], Główna Komisja Badania Zbrodni Hitlerowskich w Polsce [Central Commission for Investigation of German Crimes in Poland], Warsaw, 1979, pp. 73–100; Marcin Spikowski, "O eksterminacji, terrorze i rozstrzeliwaniach zakładników polskich przez reżim hitlerowski na terenie Pomorza, ze szczególnym uwzględnieniem tzw. krwawej niedzieli w Bydgoszczy" [On Extermination, Terror, Gunning of Polish Hostages by the Hitlerite Regime in Pomerania with Particular Focus on so-called Bloody Sunday in Bydgoszcz] and Emil Ogłoza, "Polityka niemiecka na Pomorzu w latach 1939–1945" [German Policy in Pomerania 1939-1945], in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym. Część V. Zbrodnie hitlerowskie na Pomorzu, w Wielkopolsce i na Ziemi Zamojskiej. Różne problemy* [Experts' Reports and Judgments of the Supreme National Tribunal. Part V. Hitlerite Crimes in Pomerania, Greater Poland and Zamojszczyzna. Different Problems], Ministerstwo Sprawiedliwości [Ministry of Justice], Główna Komisja Badania Zbrodni Hitlerowskich w Polsce [Central Commission for Investigation of German Crimes in Poland], Warsaw, 1980, pp. 51 ff.

[46] See *supra* note 6. More on Forster, see Marian Podgóreczny, *Albert Forster gauleiter i oskarżony* [Albert Forster Gauleiter and Accused], Wydawnictwo Morskie, Gdańsk 1977.

was pronounced on 5 August 1948 and was the last one delivered by the Tribunal.[47] It was also planned to organise trials for the destruction of Warsaw and demolition of the Warsaw ghetto. However, the potential accused (von dem Bach-Zelewski, Erich von Manstein, Heinz Guderian, Reinefarth and Erich Koch) were not extradited to Poland.[48] The end of 1948 saw an entirely different political climate than the one in 1945. The Cold War had already started and the Allies were not that keen to hand over war criminals to a country behind the Iron Curtain, especially if such criminals were of military background.[49] Poland managed to have several other prominent war criminals sentenced, including Jürgen Stroop, one of the persons in charge of the bloody suppression of the Warsaw ghetto uprising, Richard Hildebrandt, responsible for war crimes and crimes against humanity in the Pomerania (Pomorze) region, and Jakob Sporrenberg, charged with murdering 40,000 Jews in Lublin.[50] These criminals, however, were tried before the regional courts. The Tribunal ceased to rule after 1948, although the legal provisions under which it had operated were not repealed.[51]

39.3. Tribunal and Principles of Criminal Responsibility for International Crimes

39.3.1. An Order Is Not an Excuse

Many of the accused, including Höss, underlined the fact that they had merely carried out orders and felt obliged to obey them.[52] However, the Tribunal indicated, referring also to the German Criminal Code, that one should refuse to carry out a criminal order, and when such command is obeyed, the responsibility lies with both the one who issued it and the one

47 Forster Judgment, see *supra* note 8.

48 Erich von dem Bach-Zelewski did, however, depose before the Tribunal in the trial of Fischer *et al*.; Cyprian and Sawicki, 1962, p. xi, see *supra* note 6; Sawicki, 1968, pp. 244 ff., see *supra* note 18.

49 See also Kubicki, 1963, p. 54 ff., *supra* note 29.

50 Cyprian and Sawicki, 1949, p. 5, see s*upra* note 3.

51 Jakubowski, 2002, p. 50, see *supra* note 36.

52 Hoess Judgment, p. 58, see *supra* note 7; Goeth Judgment, p. 27, see *supra* note 11. See also Cyprian and Sawicki, 1949, p. 10, see s*upra* note 3; Sawicki, 1968, p. 278, see *supra* note 18; Prusin, 2010, p. 13, see *supra* note 22.

who carried it out.[53] The Tribunal assumed that in the case of a superior–subordinate relationship the notion of blind obedience (*Kadavergehorsam*) did not apply, but rather only obedience to legitimate orders.[54] In the judgment issued against Fischer, the Tribunal stressed that if a person entered a group built on absolute obedience, thereby accepting the worldview adopted within such group, such a person thus accepted responsibility for carrying out the group's orders.[55] Hence, the Tribunal presumed that an order did not absolve anyone of responsibility and, what is more, in the cases it heard a command could not be treated as a mitigating circumstance, especially with regards to high-ranking officials or persons holding important social functions, since it had to be assumed they had been fully aware of the criminal nature of such orders.[56] Moreover, the Tribunal pointed to the fact that the accused had carried out the orders in an eager manner or shown initiative, which it viewed as an aggravating circumstance.[57]

39.3.2. Not Only for Direct Commission

The Tribunal stressed also that responsibility covered not only direct perpetration but also moral aiding and abetting[58] as well as incitement.[59] Yet the most interesting deliberations of the Tribunal seem to concern the issue of responsibility of the superiors and members of a criminal group.

The trials held before the Tribunal were aimed not only at punishing the direct perpetrators of the crimes (as in the case of Göth or those accused in the Auschwitz trial) but were primarily supposed to attribute the liability for the crimes committed within the Tribunal's jurisdiction to the German dignitaries of the highest rank; hence the

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53 Greiser Judgment, p. 19, see *supra* note 38; Bühler Judgment, pp. 75, 91, see *supra* note 8. See also, Sawicki, 1968, p. 270, *supra* note 18.

54 Greiser Judgment, p. 11, see *supra* note 38.

55 Fischer Judgment, p. 22, see *supra* note 6. See also Polish Supreme Court Judgment (Criminal Chamber), 25 June 1949, K. 923/49, Orzecznictwo Sądu Najwyższego [Supreme Court Judgments] 1949/1, item 1, LexPolonica nr 306050.

56 Auschwitz Judgment, p. 202, see *supra* note 7; Bühler Judgment, pp. 75, 78, see *supra* note 8.

57 Hoess Judgment, p. 62, see *supra* note 7; Fischer Judgment, p. 35, see *supra* note 6.

58 Bühler Judgment, pp. 83–85, see *supra* note 8.

59 Fischer Judgment, p. 14, see *supra* note 6; Greiser Judgment, pp. 7–8, 12, see *supra* note 38; Auschwitz Judgment, p. 173, see *supra* note 7.

presence of Forster, Fischer, Greiser and Bühler among the convicted. Some of the accused (as with Greiser or Höss) maintained that they had not committed any crimes themselves and could not be blamed for any excesses perpetrated by persons formally reporting to them, in particular as there had been so many of them.[60] However, the Tribunal responded to this line of argumentation by specifying that in order to attribute a crime the proof of *dolus eventualis* sufficed, that is indicating that the perpetrator, though he had not intended to commit the crime, had foreseen the possibility of committing it and, hence, had accepted that it would happen.[61] At the same time, the Tribunal argued that a superior was responsible for the acts he might have prevented from happening if he had been aware that they would occur,[62] and also for those acts which had come to his attention afterwards and he had approved of them.[63] The Tribunal also stressed that it was unacceptable to claim that the accused had lived in a bubble and had no knowledge about what had been happening in the territories they had administered.[64] Moreover, the Tribunal underlined that in the case of high-ranking officials of the Nazi administration, such as Fischer or Greiser, their responsibility was even graver as they had been the ones issuing orders and organising actions. In response to the argument put forward by Greiser, who demanded he should not have been held responsible for the crimes committed by the forces not directly subordinate to him, the Tribunal stressed that Greiser was liable for all the consequences of his orders as he could be viewed as an "intellectual" instigator.[65] The Tribunal also claimed that a person being a member of a criminal group, where absolute obedience and discipline had been required, had already by becoming a member assumed responsibility for carrying out the orders given by that group. Moreover, in the case of such persons it was the moment of joining the group, rather than the moment of accepting the order, that was crucial.[66]

60 Hoess Judgment, p. 58, see *supra* note 6.

61 Fischer Judgment, pp. 38, 42, see *supra* note 6; Auschwitz Judgment, p. 177, see *supra* note 7.

62 Auschwitz Judgment, p. 98, see *supra* note 7; Bühler Judgment, p. 44, see *supra* note 8.

63 Fischer Judgment, p. 37, see *supra* note 6.

64 Greiser Judgment, p. 9, see *supra* note 38.

65 *Ibid*., pp. 11–12.

66 Fischer Judgment, p. 22, see *supra* note 6.

Another characteristic was that the Tribunal proved that responsibility for the crimes lay also with "regular" officials who had had an impact on the shape of legal provisions entitling the Nazis to persecute specific groups, as for instance in the case of Bühler. The Tribunal stressed that by such actions the accused had delineated the path of conduct for others, had had his share in building the criminal system and had ensured the efficient operation of the criminal machine's components.[67] Hence, it was of no importance that the respective legal acts had been officially signed by someone else; it is those who had drawn them up[68] that were guilty. According to the Tribunal, if Bühler had prepared certain legal standards and established the death penalty for transgressing them, then it was Bühler who had to be held responsible for the murders performed based on such provisions.[69] The Tribunal assumed also that responsibility had to be attributed to those who had only conveyed the orders, as for instance in the case of Daume.[70]

The Tribunal did not draw a clear line between participation in a criminal conspiracy (a form of involvement in a crime)[71] and membership in a criminal team/group (a separate crime category). Therefore, the arguments concerning this area are incoherent and vague, as it is not entirely evident to which of the two categories the Tribunal wanted to refer in the given part of its statement of grounds.

The Tribunal concentrated its reasoning also on the criminal responsibility in the case of sheer participation in a criminal conspiracy aimed against the achievements of general human culture and

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67 Bühler Judgment, p. 33, see *supra* note 8. See also Władysław Wolter, "Sprawa odpowiedzialności karnej Josefa Bühler'a, byłego sekretarza stanu tzw. Rządu Generalnej Gubernii" [Case of Criminal Responsibility of Josef Bühler, Former Secretary of State so-called Government of the General Governorate], in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowy* [Experts' Reports and Judgments of the Supreme National Tribunal], 1979, pp. 163 ff., see *supra* note 45.

68 *Ibid*., pp. 59–61, 71.

69 *Ibid*., p. 79.

70 Fischer Judgment, p. 65, see *supra* note 6.

71 Leszek Kubicki claims that the Tribunal did not have to use a concept of conspiracy as it could apply the same form of participation like in Article 240 of the Polish Criminal Code of 1932 (*Journal of Law of the Republic of Poland*, 1932, no. 60, item 571) which referred to participation in a fight. Kubicki, 1963, p. 101, see *supra* note 29. In my opinion, the Tribunal could also base its analysis on Article 166 of the Polish Criminal Code of 1932 which directly referred to taking part in an association aimed at criminal activity.

civilisation,[72] regardless of whether an individual crime had been proved.[73] The Tribunal pointed out that the aim was not to depart from the basic notion of ascribing personal responsibility to a person within the limits of his or her fault, nor to assume the idea of liability for someone else's fault, but merely to recognise that modern crimes involved more or less numerous groups of perpetrators and communities of various nature and degree of direct complicity.[74] Moreover, the judgment in Fischer's case stressed that by joining a criminal group with a statutory obligation of co-operation, help, obedience and, at the executive level, initiative, the person thus assumed responsibility for everything the group did, and this translated into personal responsibility.[75] The Tribunal analysed whether a given person had joined the organisation voluntarily or had been forced to do so, as well as looked into the functions held by such person.[76] If such a person had carried out executive functions then, according to the Tribunal, they were indisputably responsible for the criminal actions of the group, regardless of who had actually performed them.[77] The Tribunal decided that both the General Governorate and the Nazi camps set up in the territories of Poland had been criminal groups – having asserted that it could attribute the liability for participating in the crimes against humanity, or war crimes, also to persons who had "merely" performed selections, taken away valuable food products, poured the Zyklon B or transported others to the crematoriums.[78] The Tribunal underlined that the twentieth century was a century of collective human activity in every field of community life, and thus the fact that the crime had been committed by a group not only did not diminish the responsibility for it but even augmented it, as these types of crimes were much more dangerous than offences committed by individuals.[79] The Tribunal stressed that the crimes perpetrated within its jurisdiction had been performed by carefully

[72] Greiser Judgment, p. 1a, see *supra* note 38; Goeth Judgment, p. 28, see *supra* note 11.

[73] Hoess Judgment, p. 61, see *supra* note 7. See also Cyprian and Sawicki, 1949, p. 11, s*upra* note 3.

[74] Greiser Judgment, p. 12, see *supra* note 38. See also Cyprian and Sawicki, 1949, p. 19, s*upra* note 3.

[75] Greiser Judgment, p. 18, see *supra* note 38; Fischer Judgment, pp. 21–22, see *supra* note 6.

[76] Bühler Judgment, pp. 93–94, see *supra* note 8.

[77] Greiser Judgment, p. 18, see *supra* note 38; Bühler Judgment, pp. 55–56, see *supra* note 8.

[78] Auschwitz Judgment, *passim*, parts concerning, for example, Koch, Götz, Medefind, Möckel, Mandl, Kraus, Kremer, Büntrock, see *supra* note 7.

[79] Fischer Judgment, pp. 22–23, see *supra* note 6.

selected teams of persons capable of accomplishing the planned objectives.[80] In order to unquestionably determine the responsibility for participation in a criminal organisation, the Tribunal proved that its members had been aware of the nature of the organisation's actions and had been able to influence such actions.[81] The conclusion that a certain person had had sufficient knowledge was at times derived from the position held by them, as in the case of Liebehenschel.[82]

39.4. The Tribunal and the Definitions of International Crimes

39.4.1. Crimes Against Peace

Each trial before the Tribunal involved the issue of the accused's responsibility for participation in a criminal group, given that the defendants were the heads of the NSDAP – a party which had strived to achieve its goals of establishing a national socialist regime, incorporating foreign territories into Germany and gaining power over the world by waging wars of aggression.[83] The issue of individual responsibility for crimes against peace was examined more extensively during the trials of Greiser, Forster, Bühler and Fischer. In the case of Fischer, who was found guilty of the crime against peace, the judgment was based solely on the fact that he had been a member of a group of political leaders, and members of this group must have had a particularly strong grasp of the methods and objectives of the party, and had been expected to demonstrate initiative and leadership skills. Consequently, the Tribunal decided that at this level Fischer had consciously and purposefully participated in the planning, organisation and commission of the crime against peace by the criminal organisation, the NSDAP.[84] In Fischer's

80 *Ibid*., p. 28.

81 *Ibid*., pp. 29–34, 53; Hoess Judgment, p. 5, see *supra* note 7; Forster Judgment, p. 15, see *supra* note 6.

82 Auschwitz Judgment, pp. 96, 98, see *supra* note 7.

83 Greiser Judgment, p. 2, see *supra* note 38; Goeth Judgment, p. 2, see *supra* note 11; Fischer Judgment, p. 2, see *supra* note 6; Hoess Judgment, p. 2, see *supra* note 7; Auschwitz Judgment, p. 13, see *supra* note 7; Forster Judgment, p. 2, see *supra* note 6; Bühler Judgment, p. 2, see *supra* note 8.

84 Fischer Judgment, pp. 21–22, 34–35, see *supra* note 6. The remaining defendants were acquitted, since they had not held positions of power. See more in Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, New York, 2013, pp. 187 ff.

case, therefore, the responsibility for the crime against peace was closely tied to his membership of the NSDAP. The charges against Bühler, accused of the crimes against peace, were of a specific nature. In his case, participation in crimes against peace was connected with his exercise of the occupation power which, according to the Tribunal, was illegitimate (as it was a result of illegal use of force) and thus the occupying forces had had no right to fight the Resistance movement in the General Governorate. Consequently, it followed that this had been a permanent crime as it concerned the entire period when Poland had been lawlessly occupied.[85] According to the Tribunal, as an illegal occupying power, the Nazis had only obligations and no rights in the light of law.[86] Therefore, it may be stated that the Tribunal concluded – which was later confirmed also in numerous documents defining aggression[87] – that the occupation and annexation as a result of lawless aggression had been a separate act of aggression (the so-called *twofold aggression*, *continuous aggression* and *permanent aggression*).[88] Interestingly, although the Tribunal rejected the *debellatio* doctrine, at the same time, as if just in case, it proved that this

[85] Bühler Judgment, pp. 58–61, 63, see *supra* note 8; Compare also with Fischer Judgment, pp. 67–68, see *supra* note 6; Greiser Judgment, p. 6 (where the Tribunal cited the principle "*quod ab initio turpe est non potest tractu temporis convalescere*"), see *supra* note 38. These statements are at variance with the principle which says that application of *jus in bello* (law of war) should not be affected by *jus ad bellum* (law on the use of force). However, this error in the reasoning of the Tribunal was then repeated in the sentences of the Polish Supreme Court, see Polish Supreme Court Judgment (Civil Chamber), 19 March 1949, C. 935/48 (Orzecznictwo Sądu Najwyższego [Supreme Court's Judgments] 1949/I, item 1; LexPolonica no 367450); Polish Supreme Court Judgment (Civil Chamber), 13 April 1948, Wa. C. 18/48 (Orzecznictwo Sądu Najwyższego [Supreme Court's Judgments] 1949/II, item 20, LexPolonica no. 413311); Supreme Court Judgment (Civil Chamber), 20 April 1950, Po. C. 452/49, LexPolonica nr 323581 (Orzecznictwo Sądu Najwyższego [Supreme Court's Judgments] 1950/II, item 48). See also Kubicki, 1963, pp. 83–84, see *supra* note 29.

[86] See also Kubicki, 1963, p. 85, *supra* note 29. See also (Lord) Wright, "Hitlerowska okupacja w Polsce w świetle prawa narodów" [Hitlerite Occupation of Poland in Light of the Law of Nations], in *Państwo i Prawo* [State and Law], 1948, vol. 1, no. 3, pp. 87 ff.

[87] See Article 1 (c) (ii) of the African Union Non-Aggression and Common Defence Pact of 2005; Article 3 (a) and (b) of the General Assembly Resolution no. 3314 (1974); Article 8 bis (2) (a) of the International Criminal Court Statute of 1998.

[88] Grzebyk, 2013, pp. 61, 70, see *supra* note 84. See also Ahmed M. Rifaat, *International Aggression. A Study of the Legal Concept: Its Development and Definition in International Law*, Almqvist & Wiksell International, Stockholm 1979, p. 270; Avra Constantinou, *The Right of Self-defence under Customary International Law and Article 51 of the UN Charter*, Bruylant, Brussels, 2000, pp. 68 ff.

had not taken place, arguing that there had been Polish underground structures, the authorities had operated in exile and Poles had been immensely involved in the war efforts.[89] Furthermore, during the trial of Forster the Tribunal felt obliged to attest that the occupied territories of the Free City of Danzig had prospered better under Polish rule than under German rule.[90]

When pronouncing the verdict against Greiser, who was the first person ever to be found guilty of crimes against peace (*sic*), the Tribunal felt the need to specify the nature of the Polish-German war of 1939. The verdict did not include, however, any thorough analysis of the notion of aggression or crime against peace.[91] The Tribunal stated only that the war of 1939 had constituted a criminal armed invasion (aggression), launched in breach of international agreements (Article 104 of the Treaty of Versailles and of the Polish-Danzig Agreement concluded in Paris on 9 November 1920).[92] The sole fact of incorporating Danzig into the Reich was described by the Tribunal as an act of perfidy.[93] In the verdicts against Fischer or Forster, the Tribunal did not analyse the definition of crime against peace to any further extent, assuming that since aggression had been deemed a crime by the IMT, any further deliberations on this topic were unnecessary, and thus planning, preparing, initiating and waging a war of aggression constituted crimes against peace.[94] The trial

89 Bühler Judgment, p. 26, see *supra* note 8.

90 Forster Judgment, p. 4, see *supra* note 6.

91 However, the issue of legality of German invasion was largely discussed by court's expert, Ludwik Ehrlich; see Ludwik Ehrlich, "Agresja III Rzeszy Niemieckiej na Polskę – pogwałcenie norm prawa międzynarodowego" [Aggression of the Third Reich against Poland – Violation of International Law Norms], Ludwik Ehrlich, "Zagadnienie wojny we współczesnym prawie międzynarodowym" [Concept of War in Contemporary International Law], in *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym. Część I Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* [Experts' Reports and Judgments of the Supreme National Tribunal. Part I. Aggression of the Third Reich against Poland and Hitlerite Occupation of Poland in the light of International Law], Ministerstwo Sprawiedliwości [Ministry of Justice], Główna Komisja Badania Zbrodni Hitlerowskich w Polsce [Central Commission for Investigation of German Crimes in Poland], Warsaw, 197, pp. 11 ff.

92 Greiser Judgment, pp. 2–3, see *supra* note 38.

93 *Ibid*., p. 3.

94 Fischer Judgment, p. 21, see *supra* note 6. Compare also Forster Judgment, p. 13, see *supra* note 6. Compare also with definitions of crime against peace in Article 6 of the IMT Charter, see *supra* note 4.

of Forster fully demonstrated that the Tribunal had difficulties with separating Forster's responsibility for crimes against peace from the responsibility of the countries for their mutual relations. The Tribunal even admitted that the case of Forster went far beyond the issue of guilt or innocence of the accused but concerned in fact the Nazis' long-term and systematic preparations designed for the final separation of Danzig from Poland.[95] The Tribunal analysed Polish–German relations throughout 10 centuries, bringing up such facts as the invitation of the Teutonic Knights to the Polish lands in 1226 or the massacre of the Danzig population in 1308.[96] Although true, these facts bore no significance in terms of the individual responsibility of Forster.

In the case of Greiser, his participation in crimes against peace was that in his capacity of the president of the Senate of the Free City of Danzig as well as the deputy to the *Gauleiter*, he had prepared, led and then – together with Forster and other NSDAP members – waged in the area of the Free City of Danzig the aggression against Poland, as prescribed by the party line. The prosecution argued that the above made Greiser guilty not only of the preparation of an aggressive war against Poland but also of launching its initial stage, i.e. the violation of the statute of the Free City of Danzig and of the internationally granted rights that Poland held in that area. It pointed out that the Senate Resolution of 23 August 1939, creating the position of the mayor of the Free City of Danzig and appointing Forster as the mayor, was signed by Greiser. Both the indictment and the judgment indicated that it was Forster who was primarily responsible for the separation of Danzig from Poland and the conversion of Danzig into a German base for the aggression against Poland. Greiser's fault mostly consisted in remaining in close touch with Forster; this was essentially the reason why he was convicted of the crime against peace, without a further elaboration of the issue.

In the case of Forster, the Tribunal indicated three stages of his engagement in crimes against peace. The first stage included the time from his arrival in Danzig in 1930 to the Nazi surge to power in Germany in 1933. In this period, Forster prepared the Danzig branch of the NSDAP

[95] Forster Judgment, p. 1b, see *supra* note 6.

[96] *Ibid.*, pp. 1b–4. The references to the Teutonic Order were not entirely groundless given some passages in Hitler's *Mein Kampf* and Forster's speeches, where they had both claimed that the National Socialists were the Teutonic Knights of the twentieth century. See *ibid.*, p. 24; Auschwitz Judgment, p. 56, see *supra* note 7.

for a takeover of power; began the preparation for the violation of treaties and international agreements; tried to eliminate opposition; prepared the party for the expected tasks ahead; organised militias such as the *Schutzstaffel* ('SS'); and dismantled the legal regulations in force. The second stage lasted from 1933 to 1 September 1939. Forster's actions in that period aimed at the incorporation of Danzig into the Reich. He worked to undermine the Danzig Senate and pushed for a new election (which the NSDAP won using terror and forgery). From that time on, the international obligations began to be violated openly, and the policy of *Gleichshaltung*, i.e. forcible institutional co-ordination of the Free City with the Reich, was put into effect. Danzig was being incrementally incorporated into the Reich. Forster was responsible for military exercises of the Nazi units stationed in Danzig, as evidenced by the exercises organised for the Nazi Youth, the invitation of military instructors and officers from the Reich, weapon supply mobilisation, facilitation of military services in Germany and the visits of warships (the heavy cruiser *Admiral Scheer* in 1935, the light cruiser *Leipzig* in 1936, and finally the battleship *Schlezwig-Holstein*, which on 1 September 1939 at 4.45 a.m. fired the first shots towards the shore, at targets in Westerplatte and Gdynia). The Decree of 23 August 1939 created a legal framework for the status quo. Danzig was incorporated into the Reich, and Forster's appointment as the mayor of the Free City of Danzig was, in the Tribunal's opinion, a bold international provocation, aiming to push Poland into military actions. Once this plan failed, a different incident was used to justify the attack against Poland. In the third stage, i.e. from the moment when Danzig was incorporated into the Reich, in violation on the Treaty of Versailles and international agreements, until the liberation of the city in April 1945, Forster's part in the crime against peace consisted in his appointment as the head of the civil administration in the Reich's territory after decrees were issued proclaiming the return of Danzig to the Reich. The Tribunal pointed out that Forster had been fully aware of the status of Danzig and that his activities had been in contradiction with international agreements. The Tribunal underlined he was one of the most zealous followers of National Socialism and he was highly valued in the NSDAP. The Tribunal was of the opinion that Forster might even be considered one of the creators of the Nazi policy, as evidenced by his authorisation by Hitler to negotiate with the British representatives.

The cases of Greiser and Forster obviously differ in some respects. For Forster, the Tribunal argued that he had been not merely an ordinary executor but also a co-author of the plan to wrest control over Danzig and attack Poland, while Greiser had only executed the plans agreed by others. Hence, in the light of the modern standards, Greiser would probably not be convicted of the crime against peace since he could not be classified as "a person in a position effectively to exercise control over or to direct the political or military action of a State".[97]

39.4.2. Crimes Against Humanity and Genocide

It should be stressed that, unfortunately, the statements of grounds included in the Tribunal's verdicts are not clear enough to state whether a respective section concerns crimes against humanity or war crimes. Hence the Tribunal's condemnation of the specific acts may be interpreted as pertaining to both types of crime.

The Tribunal did not dedicate much space to the analysis of the notion of crimes against humanity. The Tribunal referred to the definition adopted in the IMT Charter, stating that crimes against humanity covered any persecution of a political, national, racist or religious nature, perpetrated in connection with the crimes against peace or war crimes, even if such crimes against humanity had taken place before the war.[98] The Tribunal focused specifically on the new category of crime – the crime of genocide, seen as a particular kind of crime against humanity. The Tribunal repeatedly used the phrase "genocide"[99] in its verdicts as well as analysed its scale and all manifestations. Already during the first trial before the Tribunal, against Greiser, it was underlined that the significance of the new crime against humanity and the national and international conscience in the form of genocide[100] had to be examined. On the other hand, the verdict against Göth, whose trial may be considered the first trial ever entirely devoted to responsibility for

[97] See Article 8(1), Rome Statute of the International Criminal Court, International Criminal Court, The Hague, 1998

[98] Fischer Judgment, p. 21, see *supra* note 6.

[99] Greiser Judgment, p. 16, see *supra* note 38; Bühler Judgment, p. 8, see *supra* note 8; Forster Judgment, pp. 10, 27, 60, see *supra* note 6.

[100] Greiser Judgment, p. 5c, see *supra* note 38.

genocide,[101] stated straightforwardly that the extermination policy aimed against the Jewish and the Polish nations bore characteristics of genocide, including its biological and cultural dimensions (cultural extermination of the nations).[102] The verdict against Höss underlined that the largest genocide in the history of humankind had taken place in Birkenau.[103]

The Tribunal's verdicts are of high importance since they had been passed even before the Convention on the Prevention and Punishment of the Crime of Genocide of 10 December 1948 ('Genocide Convention')[104] was adopted, and some of them even before the verdict in Nuremberg was pronounced. What is characteristic of the Tribunal's verdicts is the fact that the Tribunal defined genocide in a way similar to how Raphael Lemkin (Rafał Lemkin) described it in his *Axis Rule in Occupied Europe*[105] – that is as a series of acts directed at a specific group in order to annihilate it not only biologically[106] but also culturally.[107] The Tribunal meticulously analysed not only the attacks on the life and health of the given group but also the oppressive acts manifested in such actions as changing the names of the streets, restricting civil rights, and so on. Interestingly, the term "genocide" appears mainly in the context of cultural extermination, thus suggesting that the weeding out of the given group's culture is decisive in determining genocidal intentions.[108] According to the Tribunal, then, genocide meant both biological and spiritual, cultural destruction.[109]

In its verdicts, the Tribunal underlined also that in the case of genocide, selection of the group singled out for extermination had been based on the national, racist or religious criteria.[110] Moreover, certain

[101] Klafkowski, 1968, p. 17, see *supra* note 10.

[102] Goeth Judgment, p. 5, see *supra* note 10.

[103] Hoess Judgment, p. 22, see *supra* note 7; Auschwitz Judgment, p. 70, see *supra* note 7.

[104] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951 (https://www.legal-tools.org/uploads/tx_ltpdb/CONVEN1_5_01.PDF).

[105] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, The Lawbook Exchange, New Jersey, 2005, pp. 79 ff.

[106] Bühler Judgment, pp. 29, 34, see *supra* note 8. See also Cyprian and Sawicki, 1949, p. 28, s*upra* note 3.

[107] Goeth Judgment, pp. 2, 5, see *supra* note 11; Forster Judgment, p. 59, see *supra* note 6.

[108] Greiser Judgment, pp. 1a, 7–8, see *supra* note 38; Bühler Judgment, p. 90, see *supra* note 8; Fischer Judgment, p. 39, see *supra* note 6.

[109] Greiser Judgment, p. 7, see *supra* note 38.

[110] Hoess Judgment, pp. 25, 27, see *supra* note 8.

specific actions were pointed out, which, though not smoothly, eventually fought their way into the definition of genocide adopted in 1948. The Tribunal more than once brought up the German practice of taking children away to the Reich,[111] which would correspond to the act of "forcibly transferring children of the group to another group" included in the Genocide Convention.[112] The Tribunal described also the policy of imposing starvation-level food rations,[113] which might be compared to the section on "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".[114] And, indeed, the majority of the Auschwitz staff were convicted precisely for their actions aimed at making it impossible to survive. The Tribunal also recounted medical experiments which were to lead to artificial infertility and thus facilitate biological annihilation of entire nations,[115] or the policy of restricting food rations for pregnant women and infants, which may be referred to the following phrase from the Genocide Convention: "imposing measures intended to prevent births within the group".[116]

39.4.3. War Crimes

The Tribunal confirmed the findings of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties concerning the specific acts committed during the war – war crimes.[117] The Tribunal stressed that the term war crimes encompassed such acts as murders, harassing civilians, inflicting bodily injuries, restricting liberty, plundering public or private property, and demolition of cities and settlements which were not a result of any military necessity.[118] The

[111] Forster Judgment, pp. 8, 40, 54, see *supra* note 6.

[112] See Article 2(e) Genocide Convention of 1948.

[113] Fischer Judgment, p. 27, see *supra* note 6; Goeth Judgment, pp. 10–11, see *supra* note 11; see also Auschwitz Judgment, *passim*, *supra* note 7 (especially parts concerning Liebehenschel); Bühler Judgment, pp. 48–49, *supra* note 8.

[114] Article 2(c) Genocide Convention of 1948.

[115] Hoess Judgment, p. 53, see *supra* note 7; Greiser Judgment, pp. 15–16, see *supra* note 38. See also Law Reports, vol. VII, pp. 13 ff.

[116] Article 2(d) Genocide Convention of 1948.

[117] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 March 1919, in *American Journal of International Law*, 1920, vol. 14, pp. 114–15.

[118] See for example, Fischer Judgment, pp. 4, 21, *supra* note 6; Goeth Judgment, p. 8, *supra* note 11; Hoess Judgment, p. 45, *supra* note 7.

Tribunal also emphasised that illegal deportations of persons to be used as forced labour could be treated as a form of slavery.[119] Some of the Tribunal's findings were quite innovative, such as the one stating that in the case of persons detained in the concentration camps, the tortures also included psychological harassment, for instance forcing the inmates to sing merry songs.[120] As for physical tortures, various descriptions can be found in the statement of grounds for the judgment against Göth or the files of the Auschwitz trial.[121] The Tribunal decided that desecration of corpses also constituted a crime.[122] Moreover, it also underlined the illegal nature of medical experiments carried out without consent from the patients, even if these had been conducted for the benefit of the whole of humankind.[123] The Tribunal also devoted much attention to the issue of the destruction of cultural achievements.[124]

39.4.4. Participation in a Criminal Organisation/Group

The IMT decided that the top bodies of the NSDAP, Gestapo, Sicherheitsdienst and SS had been criminal organisations, but it was the Tribunal that was first to convict the accused for participation in this type of organisation.[125] However, the sentences were issued, in line with the guidelines from the IMT, only against those who had held executive functions in such groups.[126] Mostly, they were not very severe (several years of imprisonment).

The Tribunal concluded that it was not limited by the list of criminal organisations prepared by the IMT and had the right to extend it, save for those organisations which the IMT had clearly defined as non-criminal.[127] The Tribunal decided to add to this list the General Governorate and the top bodies of the German administration in the

[119] Fischer Judgment, pp. 21, 26, see *supra* note 6.

[120] Auschwitz Judgment, p. 85, see *supra* note 7.

[121] See, for example, Goeth Judgment, pp. 10, 17, 19, *supra* note 11.

[122] Hoess Judgment, p. 55, see *supra* note 7.

[123] Auschwitz Judgment, p. 81, see *supra* note 7.

[124] Forster Judgment, pp. 7–9, 41, 45, see *supra* note 6; Bühler Judgment, pp. 3, 5, see *supra* note 8; Fischer Judgment, p. 26, see *supra* note 6; Greiser Judgment, p. 14, see *supra* note 38.

[125] See, for example, Fischer Judgment, pp. 10 (Fischer), 13 (Meisinger), see *supra* note 6.

[126] *Ibid*., pp. 46 (Leist), 59 (Meisinger), 60 (Daume).

[127] Auschwitz Judgment, p. 188, see *supra* note 7.

General Governorate, from the level of the *Kreis*- or *Stadthauptmann* (rural or urban districts), that is the rank of deputy heads, heads of sections and departments in the governors' and *starosta*s' offices, namely the political factor.[128]

The Tribunal also stated that the bodies responsible for organising the concentration camps had constituted a criminal group as well. It underlined that the IMT had not labelled the administrative authorities of the camps as a criminal organisation only because such authorities were not covered in the indictment. However, as stressed by the Tribunal, the IMT had concluded that such camps had been a means for systematic perpetration of crimes against humanity.[129] The Tribunal also stated that it could not rule on the nature of all camps created by the Germans but only on those set up in the territory of Poland.[130] According to the Tribunal, the bodies responsible for organising the German concentration camps were a criminal group within the meaning of the Nuremberg verdict, since the aim of the camps had been to illegally imprison, deprive of health, property and life specific individuals and groups of populations, on the grounds of their race (Jews, Romanies), nationality (Poles, Czechs), religion (Jews) or political beliefs (socialists, communists, persons opposing the Nazi ideology). The bodies responsible for organising the German concentration camps had been, then, an organisation designed to commit the crimes against humanity (penalised also under the criminal codes of all civilised nations), as well as war crimes in relation to the Soviet prisoners of war.[131] The Tribunal stated that the bodies responsible for organising the concentration camps, being a criminal group, had included German authorities, administration and staff of the camp, excluding the prisoners forced to hold certain administrative functions.[132]

[128] Fischer Judgment, pp. 20, 28, see *supra* note 6. Other Polish courts qualified also the Ukrainian Insurgent Army, Ukrainian SS and Selbstschutz as criminal organisations, thus membership in them was considered as crime. Kubicki, 1963, pp. 149 ff., see *supra* note 29.

[129] Auschwitz Judgment, pp. 189–90, see *supra* note 7.

[130] *Ibid*., p. 194; Klafkowski, 1968, pp. 26–27, see *supra* note 10.

[131] Auschwitz Judgment, p. 191, see *supra* note 7.

[132] *Ibid*., pp. 193–95.

39.5. Conclusions

The former Tribunal prosecutors underlined that the Tribunal constituted a crowning achievement of the Polish judicature.[133] Unquestionably, the efforts expended by Poland to judge Nazi criminals should be recognised, particularly considering that most members of the judiciary had been murdered, whether by the Nazis or by the communists. Despite this, excellent lawyers were engaged to take part in the proceedings (some of them were later persecuted by the communist authorities), if not as Tribunal members then at least as the experts during the trials.

The Tribunal's function was never to be limited solely to pronouncing the defendants guilty and stating their penalties. The Tribunal was supposed to be another instrument in the hands of the Polish authorities of the time. Therefore, the sentences included some misrepresentations or overtly vivid statements,[134] which today may surprise and be used to discredit the Tribunal's work. The sentences lacked a detailed and exhaustive legal analysis of notions derived from international criminal law. However, this field of international legal doctrine was at that time only in the making. The language used by the Tribunal was often imprecise, or even not quite legal, but the same can be said of other tribunals trying war criminals shortly after the Second World War, the IMT included.

Theoretically, the role of the Tribunal in the process of shaping international criminal law could have been immense since it was first to raise and face this issue of genocide. It condemned both the biological and the cultural dimensions of this crime. Even before the Genocide Convention was adopted in 1948, the Tribunal recognised as such the crime of taking away children from one group to another, restricting reproduction or imposing conditions in which it had been impossible to survive. It confirmed criminal liability for many war crimes, adding to those already defined before the Second World War the desecration of corpses, mental torture or medical experiments. The Tribunal drew many interesting conclusions regarding the principles of responsibility, thus laying the foundations for such popular modern theories as joint criminal enterprise or superior responsibility. Despite all these achievements, both

[133] Cyprian and Sawicki, 1962, p. xi, see *supra* note 6.

[134] Greiser Judgment, p. 6, see *supra* note 38; Fischer Judgment, p. 49, see *supra* note 6.

Polish and international courts rarely invoke the Tribunal's sentences.[135] In the case of some of the trials, this could be partly due to the lack of materials in English. However, it is difficult to explain why the cases concerning crimes against peace, especially the cases of Greiser or Bühler discussed in the *Law Reports*, have not been brought up in the discussions on the definition of the crime of aggression in the Statute of the International Criminal Court.

Could we state that the functioning of the Tribunal and its sentences were retroactive? Of course, although to a lesser extent than in the case of the IMT, since the vast majority of the crimes were classified by the Tribunal as based on domestic law and the Polish pre-war Criminal Code of 1932 that even provided for criminal liability for aggressive war.[136] The only problem lay in finding an appropriate legal basis for punishing for participation in legal organisations, but in this case the Tribunal simply referred to the IMT Charter and its judgment.[137] The Tribunal stressed that the legal basis for criminal responsibility for the crimes perpetrated by the Nazis could be sought in "the basic, rudimentary moral regulations and rules of coexistence established by the nations throughout the centuries, binding for all and superior to any laws contravening them implemented by individual countries, and which must not ever be violated".[138] According to the Tribunal, it was not important whether such rules were described as the natural law or, in line with the more modern

[135] See, for example, International Criminal Tribunal for the former Yugoslavia ('ICTY') judgments in which there are references to Greiser's case: *Prosecutor v. Momčilo Krajišnik*, IT-00-39, Trial Chamber, Judgment, 27 September 2006, note 1645 (https://www.legal-tools.org/doc/62a710/); *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34, Appeals Chamber, Separate and Partly Dissenting Opinion of Judge Schomburg, 3 May 2006, para. 12 (https://www.legal-tools.org/doc/94b2f8/); *Prosecutor v. Milomir Stakić*, IT-97-24, Appeals Chamber, Judgment, 22 March 2006, par. 29 (https://www.legal-tools.org/doc/09f75f/); *Prosecutor v. Radislav Krstić*, IT-98-33, Trial Chamber, Judgment, 2 August 2001, note 1132 ("Krstić Judgment") (https://www.legal-tools.org/doc/440d3a/); *Prosecutor v. Drago Josipović et al*., IT-95-16, Trial Chamber, Judgment, 14 January 2000, par. 600 also note 904 (https://www.legal-tools.org/doc/5c6a53/); *Prosecutor v. Tihomir Blaškić*, IT-95-14, Trial Chamber, Judgment, 3 March 2000, par. 223 (https://www.legal-tools.org/doc/e1ae55/); to Göth's case in Krstić Judgment, notes 1132, 1282; and to Höss's case in Krstić Judgment, note 1282.

[136] Article 113, *Journal of Law of the Republic of Poland*, 1932, no. 60, item 571.

[137] Law Reports, vol. VII, pp. 5–6, see supra note 20.

[138] Fischer Judgment, p. 19, see *supra* note 6.

terminology, as "the general principles of law" referred to in Article 38 of the Statute of the International Court of Justice.[139]

[139] *Ibid*.

39.6. Annex: Trials Before the Polish Supreme National Tribunal, 1946–1948

Name(s) of Accused	Dates of Trial ▪ Verdict	Place	Professional judges ▪ Lay judges	Prosecutors	Advocates	Charges	Penalty
Artur Greiser	21 Jun–7 Jul 1946 ▪ 9 Jul 1946	Poznań	Kazimierz Bzowski Emil Stanislaw Rappaport Witold Kutzner ▪ Zygmunt Piękniewski Czeslaw Grajek Jerzy Nowacki Longin Szymański	Stefan Kurowski Jerzy Sawicki Mieczysław Siewierski	Stanisław Hejmowski Jan Kręglewski	Membership of NDSAP (whose aim was to introduce national socialism and to incorporate foreign territories to Germany). Commencing war activities and occupation in violation of international law; deprivation of Poland and Polish citizens' rights towards Danzig. Murdering civilians and POWs; harassment, persecutions, inflicting bodily injuries; destruction of Polish culture (including Polish schools, press etc.); pillaging of Polish cultural and public property; Germanisation of nation; deprivation of private property; destruction of cultural heritage; jeering and degrading Polish population; persecution of Jews (e.g. murdering, gathering in closed areas and then sending them to gas chambers); deprivation of liberty; forced	Death penalty; deprivation of public, civil and honorary rights; confiscation of property.

						deportations; sending children and youths to Germany; deprivation of religious rights; excessive exploitation of human work.	
Amon Leopold Göth (Goeth)	27 Aug–5 Sep 1946 ▪ 5 Sep 1946	Cracow (Kraków)	Alfred Eimer Mieczysław Dobromęski Józef Zembaty ▪ Albin Jura Marian Lityński Pelagia Lewińska Franciszek Żymła	Mieczysław Siewierski Tadeusz Cyprian	Bruno Pokorny Tadeusz Jakubowski	Taking part in criminal conspiracy (NSDAP). Deprivation of liberty; harassment; extermination of individuals and whole groups of people; killing, mutilating, torturing and pillaging.	Death penalty; deprivation of public, civil and honorary rights; confiscation of property.
Ludwig Fischer, Ludwig Leist, Josef Meisinger, Max Daume	17 Dec 1946–24 Feb 1947 ▪ 3 Mar 1947	Warsaw (Warszawa)	Mieczysław Güntner Maurycy Grudziński Stanisław Rybczyński Józef Zembaty ▪ Jan Nepomucen Miller Jerzy Jodłowski Eugeniusz Kembrowski	Mieczysław Siewierski Jerzy Sawicki	Antoni Chmurski Artur Wagner Jerzy Śliwowski Zdzisław Węgliński	Taking part in criminal organisation (NSDAP). Individual and group murders of civilians; deprivation of liberty; harassment; persecutions; inflicting bodily injuries; destruction of Polish culture; pillaging of cultural property; pillaging and destruction of public property; deprivation Polish citizens of private property.	Death penalty (Fischer, Meisinger, Daume); 8 years' imprisonment (Leist).

Rudolf Höss (Hoess)	11 Mar–29 Mar 1947 ▪ 2 Apr 1947	Warsaw (Warszawa)	Alfred Eimer Witold Kutzner Józef Zembaty ▪ Michał Gwiazdowicz Wincenty Kępczyński Aleksander Olchowicz Franciszek Żmijewski	Tadeusz Cyprian Mieczysław Siewierski	Franciszek Umbreit Tadeusz Ostaszewski	Taking part in criminal organisation (NSDAP). As a commander of Auschwitz camp: deprivation of life (civilians, POWs); physical harassment (creation of special conditions of living, tortures, camp penalties) and moral harassment; directing mass pillage.	Death penalty; deprivation of public, civil and honorary rights; confiscation of property.
Artur Liebehenschel, Max Grabner, Hans Aumeier, Karl Möckel, Maria Mandl, Franz Kraus, Johann Kremer, Hans Münch, Erich Muhsfeldt, Hermann Kirschner, Hans Koch, Karl Seufert,	24 Nov–16 Dec 1947 ▪ 22 Dec1947	Cracow (Kraków)	Alfred Eimer Witold Kutzner Józef Zembaty ▪ Albin Jura Edward Dobruś Aleksander Olchowicz Roman Pawełczyk	Stefan Kurowski Tadeusz Cyprian Mieczysław Szewczyk Edward Pęchalski Jan Brandys	Stanisław Druszkowski Kazimierz Ostrowski Stanisław Rymar Czesław Kruh Mieczysław Kossek Stefan Minasowicz Antoni Czerny Bertold Rappaport Szczęsna Wolska-Wolasowa	Membership of NSDAP and SS. Membership of authorities of the camp (creation of living conditions resulting in death or health injuries; abusing prisoners; starvation; forcing to excessive work; inhuman camp penalties; medical experiments; killing prisoners (by torturing, shooting, hanging, strangling, gassing); moral harassment; degrading; mass murdering; work exploitation; mass pillaging; and cutting women's hair.	Death penalty (Liebehenschel, Grabner, Aumeier, Möckel, Mandl, Kraus, Kremer, Muhsfeldt, Kirschner, Josten, Gehring, Müller, Plagg, Lätsche, Buntrock, Bogusch, Götze, Szczurek, Brandl, Kollmer,

Heinrich Josten, Wilhelm Gehring, Kurt Muller, Ludwik Plagg, Edward Lorenz, Otto Lätsche, Fritz Buntrock, August Bogusch, Paul Götze, Paul Szczurek, Richard Schröder, Teresa Brandl, Alice Orlowski, Luiza Danz, Hildegarda Lächert, Hans Hoffmann, Anton Lechner, Józef Kollmer, Detleff Nebbe,							Ludwig, Schumacher, Breitwieser). Life imprisonment (Koch, Seufert, Danz, Lechner, Nebbe, Medefind). 15 years' imprisonment (Lorenz, Orlowski, Lächert, Bülow, Romeikat, Weber, Hoffmann). 10 years' imprisonment (Schröder). 5 years' imprisonment (Dinges). 3 years' imprisonment (Jeschke). Not guilty (Münch).

Herbert Ludwig, Aleksander Bülow, Artur Breitwieser, Hans Schumacher, Adolf Medefind, Franz Romeikat, Erich Dinges, Johannes Weber, Karl Jeschke							
Albert Forster	5 Apr–27 Apr 1948 ▪ 29 Apr 1948	Danzig (Gdańsk)	Stanisław Rybczyński Józef Zembaty Henryk Cieśluk ▪ Stanisław Stasiak Stanisław Stefański Henryk Wójcicki Janusz Wierusz-Kowalski	Stefan Kurowski Tadeusz Cyprian Mieczysław Siewierski	Tadeusz Kuligowski Bolesław Wiącek	Participation in NSDAP which aimed at incorporation of foreign territories (controlling of Senate, taking position of chief of the state, deprivation of Polish state and Poles their rights in the Free City of Danzig, violation of international agreements, preparation of aggressive war activities). As a chief of civil administration and then Danzig-West Pomerania chief: group murders of civilians; starting	Death penalty; deprivation of public, civil and honorary rights; confiscation of property.

						propaganda against Poles; persecution and abusing Poles (deprivation of liberty, mass deportation, forced sending of Polish children to Reich; forcing Poles to sign German national list, restricting civil rights, giving privileges to Germans, destruction of Polish culture, pillaging of public and private property).	
Josef Bühler	17 Jun–5 Jul 1948 ▪ 10 Jul 1948	Cracow (Kraków)	Alfred Eimer Józef Zembaty Henryk Cieśluk ▪ Stanisława Garncarczykowa Władysław Jagiełło Stanisław Stefański	Tadeusz Cyprian Jerzy Sawicki	Bertold Rappaport Stefan Kosiński	Murdering of civilians and POWs. Abusing, persecution and inflicting bodily injuries; destruction of Polish culture; pillaging of cultural property; Germanisation of country and population; pillaging public property; economic exploitation of country and population; systematic deprivation of private property of Polish citizens; individual and mass deprivation of life (executions, concentration camps); jeering at Polish nation; abusing Polish nation on the territory of General Governorate (bodily injuries, sending into concentration camps and prisons, forced deportations,	Death penalty; deprivation of public, civil and honorary rights; confiscation of property.

						sending to slavery work, kidnapping Polish children and sending them to Reich for the purpose of Germanisation Persecution and extermination of Poles and Jews (insulting, deprivation of all rights, murdering, gathering in ghettos, concentration camps, work camps); pillaging and demolishing public and private property (also cultural; economic exploitation); degradation of Poles and giving privileges to Germans; keeping population under terror; making it slaves aiming at its biological extermination; exploitation of human work; destruction of culture and religion of Poles; cleansing native population from the territory of occupied Poland and settling there Germans.	

40

The Concept of Genocide in the Trials of Nazi Criminals before the Polish Supreme National Tribunal

Marcin Marcinko*

40.1. Introduction

The definition of genocide found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[1] ('Genocide Convention') resulted from a compromise among the signatory states. It did not include all elements of the crime as presented by both Raphael Lemkin and the United Nations General Assembly Resolution 96 (I) of 1946. By "genocide" Lemkin meant "the destruction of a nation or of an ethnic group […] intended […] to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves".[2] According to Resolution 96, any acts committed "with intent to destroy, in whole or in part, racial, ethnical, religious, political or other groups" are recognised as genocidal.[3] The Genocide Convention restricted the crime of genocide to such acts as killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, forcibly transferring children or imposing measures intended to prevent

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1 Convention on the Prevention and Punishment of the Crime of Genocide, UN GA Res. 260 (III), Annex, Paris, 9 December 1948 ("Genocide Convention").

2 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, DC, 1944, p. 79.

3 The Crime of Genocide, UN GA Res. 96 (I), 11 December 1946.

births, all aiming at the destruction of the entire or part of national, ethnical, racial or religious groups.[4] Such a definition, therefore, fails to take into account both so-called "cultural genocide" and protected groups other than those mentioned above as possible victims of genocide (i.e. political and social groups are excluded). Included in a legally binding international treaty, the foregoing definition is recognised as standard, well grounded in customary law and having the status of *ius cogens and obligatio erga omnes*.[5] Furthermore, such wording has been repeated *expressis verbis* in the Statutes of both the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR'),[6] and, in addition, in the Rome Statute of the permanent International Criminal Court ('ICC').[7] It is also commonly accepted by a majority of states as confirmed by their domestic penal legislation. Classified as the "crime of crimes",[8] genocide unites all members of the international community and is subject to universal jurisdiction.[9]

Before the Genocide Convention was ratified, however, and an explicit and legally binding definition of genocide coined, a number of countries who suffered as a result of Nazi occupation during the Second World War had to face this new and so far unnamed crime. They did so by preparing charges and conducting criminal proceedings against those from among the Third Reich representatives who perpetrated the greatest

4 Genocide Convention, Article 2, see *supra* note 1.

5 Tomasz Iwanek, "Zbrodnia ludobójstwa w prawie międzynarodowym: Problemy skuteczności i efektywności" [The Crime of Genocide in International Law: The Problems of Efficiency and Effectiveness], in Wiesław Wacławczyk and Krzysztof Żarna (eds.), *Zbrodnia i kara: Ludobójstwo – zbrodnie wojenne – zbrodnie przeciwko ludzkości* [The Crime and the Punishment: Genocide – War Crimes – Crimes against humanity], Wydawnictwo Adam Marszałek, Toruń, 2011, p. 95.

6 Statute of the International Criminal Tribunal for the Former Yugoslavia, UN SC Res. 808, 3 May 1993, Article 4; Statute of the International Criminal Tribunal for Rwanda, UN SC Res. 955, 8 November 1994, Article 2.

7 Rome Statute of the International Criminal Court, Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2187, No. 38544, Article 6.

8 International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 16 (https://www.legal-tools.org/en/go-to-database/record/49a299/).

9 Michał Matyasik and Piotr Domagała, *Międzynarodowe trybunały karne oraz inne instrumenty sprawiedliwości tranzytywnej* [International Criminal Tribunals and Other Instruments of Transitional Justice], Wydawnictwo Difin, Warsaw, 2012, pp. 36–37.

atrocities and demonstrated extreme cruelty, transgressing the limits of the catalogues of prohibited acts. Among those countries was Poland, whose civilian population experienced unspeakable sufferings and humiliation from the Nazi barbarians. It was the enormity of those sufferings that provoked the Polish authorities to refer to the elements of genocide defined by Lemkin, though at that time conceptual rather than legally binding. The Supreme National Tribunal (Najwyższy Trybunał Narodowy, the 'Tribunal'), a special war crimes tribunal with the jurisdiction and powers to judge the top-ranking fascist-Hitlerite criminals, explicitly and on many occasions referred to the activities of three of the accused as acts of physical, biological and cultural genocide. The Tribunal called these acts a "fascist–Hitlerite denial of the right of existence, the right of distinct and individual culture of small and medium nations".[10] Due to the lack of applicable legal provisions, and passing its judgments in the period preceding the adoption of the Genocide Convention (1946–1947), the Tribunal adopted the descriptive definition of genocide formulated by Lemkin, applying it in practice and, at the same time, producing a creative interpretation to suit the court's requirements. Hence, the Tribunal can be perceived as having significantly contributed to the then nondescript concept of genocide by highlighting its practical dimensions and exceptionally grievous nature, and directly addressing it as *crimen laesae humanitatis*.[11]

The purpose of this chapter is to present the judicial *acquis* of the Tribunal with regards to the crime of genocide. In this respect, the trials of three war criminals deserve special attention: Arthur Greiser, governor of Reichsgau Wartheland (western Poland), Amon Göth (Goeth), commander of the Kraków-Płaszów forced labour camp and Rudolf Höss (Hoess), commander of the Auschwitz-Birkenau concentration camp. Each of them was responsible for crimes that nowadays can be classified as genocide. However, due to sheer number of charges and allegations that were formulated, we have decided to concentrate only on selected aspects relating to the indictments, namely in each case on one of the

[10] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XIII ("Law Reports, vol. XIII"), His Majesty's Stationery Office, London, 1949, p. 114.

[11] International Criminal Tribunal for the Former Yugoslavia ('ICTY'), *Prosecutor v. Radislav Krstić*, Case No. 98–33–A, Appeals Judgment, 19 April 2004, para. 36 (https://www.legal-tools.org/en/go-to-database/record/86a108/).

objective elements (*actus reus)* of the crime of genocide as it is understood nowadays. In this way we shall demonstrate that many of the opinions and conclusions issued by the Tribunal coincide with contemporary interpretations of the definition of genocide. That is why we refer from time to time to the jurisprudence of the International Criminal Tribunals due to their impressive *acquis* in this respect. The examples of genocidal acts presented here refer to the physical extermination of Polish and Jewish nations, so-called cultural genocide, and "medical experiments" carried out in concentration camps that resulted in birth prevention among those on whom experiments were conducted. Despite the selective and subjective choice of the issues discussed, a chronological order has been preserved, with an assumption that the process of formulation and interpretation of the concept of genocide occurred gradually, and that each case added to and enriched the previously contemplated issues.

Before we discuss particular cases brought before the Tribunal, it is necessary to describe, in brief, the legislation in force in Poland that governed crimes committed by the Nazis in occupied Poland. In addition, the jurisdiction and the powers of the Tribunal must be clearly defined. Due to the fact that each of the accused criminals tried to defend himself, claiming that he was only following orders of his superiors and had no idea of the atrocities committed by his subordinates, the analysis of objective components of the crime of genocide has been supplemented with its subjective element, namely "genocidal intent", considered from the point of view of responsibility for carrying out and issuing felonious orders.

40.2. Legal Grounds of Adjudication and Jurisdiction of the Supreme National Tribunal

Adopted in 1932, the Polish Criminal Code,[12] created and developed during a period of legal stability, was not sufficient to evaluate common activities of a criminal nature perpetrated by, and in the name of, officials in the service of the Third Reich regime. Polish penal law, effective enough to pursue single crime offenders, proved to be vulnerable when it came to the prosecution of those who stood behind the vastness of Nazi atrocities. Therefore, what was indispensable in the first place was the

[12] Kodeks karny [Criminal Code], in *Official Gazette*, no. 60, item 571, 11 July 1932 ("Criminal Code of 1932").

introduction and implementation into the Polish penal law system of such regulations that would enable a proper judgment of the culprits guilty of crimes perpetrated during the war and the belligerent occupation.[13]

The first Polish act of law designed to be the basis for trying and passing sentences on Nazi criminals after the end of the war was the Decree of the President of Poland of 30 March 1943 on criminal liability for war crimes.[14] Pursuant to Article 1 of this decree, those liable under criminal law were "individuals associated with the Reich or any of the countries allied or corroborating with the Reich", and also "any other persons acting for the benefit of the Reich or any of the above-mentioned countries", guilty of crimes committed after 31 August 1939, regardless of the place where such crimes were committed. The occupied country, however, was not able to provide any means to fulfil the provisions of the decree.[15] Subsequent legislative steps were taken that aimed at the establishment of criminal liability for war crimes during turbulent times when fierce fighting was still going on between German forces and the Red Army, including the People's Troops of Poland formed in the Soviet Union. As a consequence, only a small part of Poland's territory was free from German occupation. A Manifesto proclaimed on 22 July 1944 by the Polish Committee of National Liberation (Polski Komitet Wyzwolenia Narodowego) – which asserted its own legitimacy as the lawful authority of "new" Poland – declared among other things:

> One of the tasks of independent Polish courts shall include steps to ensure immediate administration of justice. No fascist war criminal nor traitor to the Polish Nation will be unpunished.[16]

Measures taken in order to put into practice this Manifesto were aimed at establishing special provisions of substantive criminal law to determine all traits of war crimes and collaboration, and to create a

[13] Państwowe Muzeum na Majdanku, "Procesy zbrodniarzy wojennych" [The Trials of War Criminals].

[14] Dekret Prezydenta Rzeczypospolitej z dnia 30 marca 1943 r. o odpowiedzialności karnej za zbrodnie wojenne, in *Official Gazette*, no. 3, item 6, London, 30 March 1943.

[15] Państwowe Muzeum na Majdanku, see *supra* note 13.

[16] Manifest Polskiego Komitetu Wyzwolenia Narodowego [Manifesto of the Polish Committee of National Liberation], in *Official Gazette*, no. 1, Annex, Chełm, 22 July 1944.

system of judicature to evaluate and judge the new category of crimes.[17] A breakthrough for this procedure was the Moscow Declaration of 30 October 1943, agreed and signed by the United Kingdom, the United States and the Soviet Union, regarding the responsibility of Hitlerite forces for perpetrating atrocities and massacres.[18] The Moscow Declaration went on to state that perpetrators guilty of war crimes would be tried and judged according to the laws of the aggrieved states and before their respective courts. A follow-up to the Declaration was Law No. 10 of 20 December 1945 issued by the Allied Control Council which addressed the issue of prosecution of German war criminals and those guilty of crimes against peace and against humanity.[19] The document imposed procedures and determined the scope of criminal liability of individuals suspected of such crimes, in addition to empowering competent authorities to arrest individuals on the territory of the Allied Occupied Zones in Germany and send them back to countries where they had committed crimes in order to judge them on the spot.

Rules of responsibility resulting from the substantive law were stipulated in a Decree concerning the punishment of fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish nation, promulgated by the Polish Committee of National Liberation on 31 August 1944.[20] This Decree was amended five times. However, the first two amendments caused such significant modifications[21] that it was necessary to announce the new consolidated text of this act of law (in 1946).[22] This Decree was general in principle, and referred to the pursuit

[17] Państwowe Muzeum na Majdanku, see *supra* note 13.

[18] Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities", Moscow, 30 October 1943, in United Nations Information Organisation, *War Crimes and the Punishment of War Criminals*, London, 1945, vol. 1, appendix C, p. 11.

[19] Control Council Law No. 10, 20 December 1945 (http://www.legal-tools.org/doc/ffda62/).

[20] Dekret PKWN o wymiarze kary dla faszystowsko-hitlerowskich zbrodniarzy winnych zabójstw i znęcania się nad ludnością cywilną i jeńcami oraz dla zdrajców Narodu Polskiego, 31 August 1944, in *Official Gazette*, no. 4, item 16, 13 September 1944 ("1944 Decree").

[21] See *Official Gazette*, no. 7, item 29, 16 February 1945; and *Official Gazette*, 10 December 1946, no. 69, item 376.

[22] See *Official Gazette*, no. 69, item 376, 10 December 1946. The provisions of the consolidated text of this Decree were applicable to criminal acts committed between 1 September 1939 and 9 May 1945.

and punishment of war crimes and criminal offences aimed at the civilian population and prisoners of war, and perpetrated in co-operation with the Third Reich authorities or its satellites. The offences that came within the scope of the consolidated text of the Decree (Articles 1 and 2) were the following:

a) murder of civilians, members of the armed forces or prisoners of war, their ill-treatment and persecution;

b) arrest and deportation of persons wanted or persecuted by the occupying authorities for whatever reason it may be (i.e., on political, national, religious or racial grounds, with the exception of prosecution for common law crimes), including such acts committed against persons residing on Polish territory irrespective of their nationality or race;

c) blackmail with intent to profit under threat of arrest or handing over to the occupying authority.[23]

It is worth mentioning that service with the occupying authority, obedience to superior orders or compulsion did not exempt an accused from responsibility.[24]

It should also be noted that Article 2 of the Decree had a very wide application, as within its provisions would come all acts considered as criminal by domestic and international law, other than those listed in Article 1.[25] Obviously, the crime of genocide was not identified and described in this Decree, but it did not exclude the creative interpretation of competent courts towards the determination of certain crimes as genocidal. The provisions of the Decree should, however, be construed in conjunction with the regulations of the Criminal Code of 1932 but only in such circumstances and to such extent as the Decree, as *lex specialis* and *lex posterior*, did not provide otherwise.[26]

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[23] 1944 Decree, see *supra* note 20. Compare The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VII ("Law Reports, vol. VII"), His Majesty's Stationery Office, London, 1948, p. 82, Annex, "Polish Law Concerning Trials of War Criminals".

[24] Law Reports, vol. VII, p. 82, see *supra* note 23.

[25] *Ibid.*, p. 86.

[26] Criminal Code of 1932, Article 92, see *supra* note 12: "The provisions of the general part of the present Code are applicable to crimes and offences, as well as to penalties and protective measures envisaged in other laws, if the latter do not provide otherwise".

What is of utmost importance for the present discussion is the question of membership in a criminal organisation and criminal liability ensuing from it. The Decree on the degree of penalty for fascist-Hitlerite criminals in its wording of 11 December 1946 – with reference to the London Agreement of 8 August 1945 [27] and the sentences of the Nuremberg Tribunal of 30 September and 1 October 1946[28] – gives the following definition of a criminal organisation in Article 4 paragraph 2:

> (a) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity; or
>
> (b) which while having a different aim, tries to attain it through the commission of crimes mentioned under (a).

Providing the description of a criminal organisation as above, Article 4 paragraph 3 of the Decree, by way of example, states that what was principally punishable was participation in:

> (a) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei, NSDAP) as regards all leading positions,
>
> (b) the Security Detachments (Schutzstaffeln, SS),
>
> (c) the State Secret Police (Geheime Staats-Polizei, Gestapo),
>
> (d) the Security Service (Sicherheits Dienst, SD).

Taking into consideration that such organisations as the Nazi Party, SS and Gestapo were declared to be criminal and that membership in such organisations was found to be culpable on the strength of the judgment of the Nuremberg Tribunal, the Polish regulations were not in contravention of the wording of Nuremberg judgment. The Nuremberg Tribunal's verdict was important because from now on each member of these organisations was liable to penal procedure for the sheer fact of membership. Moreover, the Nuremberg judgment sanctioned and recognised as legally binding, with regard to international law, any and all

[27] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945 (https://www.legal-tools.org/en/go-to-database/record/844f64/). On 25 September 1945 Poland announced its access to the London Agreement and its accession was ratified on 25 June 1947; see *Official Gazette*, no. 63, item 367.

[28] International Military Tribunal ('IMT'), The Trial of German Major War Criminals, Judgment of 30 September and 1 October 1946 ("Nuremberg Judgment") (https://www.legal-tools.org/doc/45f18e/).

previous judgments (passed before 1 October 1946) in similar cases in front of courts and tribunals of various countries.[29] Furthermore, as observed by Tadeusz Cyprian, the Supreme National Tribunal's prosecutor, the outcome of the Nuremberg trials did not hamper the Polish legislator who was at freedom to declare as punishable in Poland operations and activities not covered by the Nuremberg judgment, in so far as they had not clearly been found unpunishable. Obviously, the interpretation of the Polish laws could not be in conflict with the express wording of the Nuremberg judgment.[30] Cyprian highlighted the fact that the list of criminal organisations contained in the 1944 Decree was exemplary rather than conclusive as indicated by the term: "what is principally considered to be the crime is participation". Therefore, in order to determine whether a given organisation was criminal, a relevant basis must be applied, such as was provided by Article 4 paragraph 2 from which it appears that an organisation was criminal if it "has as its aims the commission of crimes against peace, war crimes or crimes against humanity".[31] Due to this, the Polish courts, in the practice of issuing rulings, recognised as criminal some other Nazi groups or organisations which displayed particular zeal in occupied Poland, such as the leadership of the German civil administration in the General Government, officials of the administration of the ghetto in Łódź or members of the concentration camp staff at Auschwitz.[32]

It was a common practice during the trials before the Polish courts to meticulously substantiate the criminal activities of concentration camps. They referred in particular *inter alia*, to findings of the Nuremberg Tribunal which stated that since 1934 the SS had been responsible for the administration of such camps and since 1942, when concentration camps went under the administration of the WVHA (*Wirtschafts- und Verwaltungshauptamt*), one of the central and most important SS offices, the primary purpose of which was to exterminate anti-Hitlerite opponents,

[29] Państwowe Muzeum na Majdanku, see *supra* note 13.

[30] "Przemówienie końcowe w procesie oświęcimskim Prokuratora N.T.N. dra Tadeusza Cypriana" [Final Speech of the SNT Prosecutor Dr. Tadeusz Cyprian in the Auschwitz trial], in Michał Królikowski, Paweł Wiliński, Jacek Izydorczyk and Małgorzata Znojek (eds.), *Prawo karne międzynarodowe: Wybór źródeł* [International Criminal Law: A Sourcebook], Wolters Kluwer Polska, Warsaw, 2010, p. 176 ("Cyprian Speech").

[31] *Ibid.*

[32] Law Reports, vol. VII, p. 87, see *supra* note 23.

provide slave labour resources, conduct criminal medical experiments and carry out mass murders of the Jewish population. Hence, the WVHA was recognised as a part of a criminal organisation, with respective concentration camps being instrumental in delivering the criminal goals of the WVHA and in the implementation of extermination of other nations, being the project the SS has been entrusted with.[33]

Consequently, the Polish court rulings recognised the system of concentration camps as criminal not only under the Nuremberg judgment but also in accordance with the 1944 Decree, because the purpose of such camps was to incarcerate masses of people without judicial process, deprive them of health, life and property, and keep them in restraint in inhumane conditions because of racial, religious or political reasons. Thus, it may be defined as an "organization aiming at committing crimes against humanity that could also be qualified as crimes punishable under the penal codes of all civilized nations".[34]

As regards the inherent jurisdiction of the courts of law, initially, on the strength of the Decree of 12 September 1944,[35] special criminal courts were established and appointed, one in each district of a court of appeal, to adjudge in war crimes and collaboration cases. These courts consisted of one professional judge and two lay judges. The judgments of the courts were final and the procedure applied was – with some exceptions – that laid down in the Code of Criminal Procedure. The next step involved the formation of the Supreme National Tribunal,[36] established on the strength of the Decree of 22 January 1946, with the following composition: three professional judges and four lay judges. Its scope of competence included adjudication in criminal cases committed by individuals who, having been found guilty of war crimes perpetrated in Poland during the occupation, were to be extradited, according to the 1943 Moscow Declaration, and judged on the spot by the Polish prosecuting authorities. By the Decree of 17 October 1946,[37] the jurisdiction of the Supreme National Tribunal was extended to all war criminals handed over to Poland for trial, and over all

33 Nuremberg Judgment, p. 94, see *supra* note 28.

34 "Cyprian Speech", p. 177, see *supra* note 30.

35 *Official Gazette*, no. 4, item 21, 12 September 1944.

36 *Official Gazette*, no. 5, item 45, 22 January 1946.

37 *Official Gazette*, no. 59, item 325, 17 October 1946.

war crimes irrespective of the place of their commission.[38] At the same time, the special criminal courts were abolished[39] and the jurisdiction over all crimes committed in connection with the war, except those for the trial of which the Supreme National Tribunal was set up, was entrusted to ordinary criminal courts.[40]

The Supreme National Tribunal was active in Poland from 21 June 1946 (commencement of the trial of Artur Greiser in Poznań) to 5 August 1948 (adjudication ending the trial of Josef Bühler in Kraków). During this period, seven trials of prominent Nazi officials were brought before the Tribunal. The list of the accused runs as follows:

1) Artur Greiser, former head of the Senate of the Free City of Gdańsk (Danzig), later during the German occupation of Poland – the governor of the so-called Reichsgau Wartheland; the trial took place in Poznań[41] from 21 June to 7 July 1946;
2) Amon Leopold Göth (Goeth), commander of the Nazi forced labour camp in Kraków–Płaszów; the trial took place in Kraków from 27 August to 5 September 1946;
3) Ludwig Fischer, former governor of the so–called Warsaw District, Josef Meisinger ("the butcher of Warsaw"), former commander of the State Police in Warsaw, Max Daume, high-ranking officer of the German Police (colonel), former head of the department of Orpo (Order Police) in Warsaw, and Ludwig Leist, former city starost of Warsaw; the trial

[38] According to Article 6, Decree of 17 October 1946, the following crimes were within the jurisdiction of the Tribunal:

(a) crimes envisaged by the Decree of 22 January, 1946, concerning the responsibility for the defeat of Poland in September, 1939, and for fascist activities in public life (*Official Gazette*, No. 5, item 46);

(b) crimes committed by persons, who in accordance with the Moscow Declaration signed by the United States, the USSR and Great Britain, will be surrendered to the Polish authorities.

[39] *Official Gazette*, no. 59, item 325, 17 October 1946.

[40] Law Reports, vol. VII, p. 83, see *supra* note 23.

[41] According to Article 1, Decree of 17 October 1946, the seat of the Tribunal was the same as that of the Supreme Court (i.e. Warsaw), but in fact the Tribunal tried cases in various districts of Poland, thus pursuing the policy that the more notable war criminals should pay for their abominable deeds in places of their commission; *ibid.*, p. 92.

took place in Warsaw from 17 December 1946 to 24 February 1947;

4) Rudolf Höss (Hoess), former commander of the Auschwitz concentration camp; the trial took place in Warsaw from 11 to 29 March 1947;
5) the trial of 41 staff of the Auschwitz-Birkenau concentration camp including one of the commanders, Arthur Liebehenschel; the trial took place in Kraków from 24 November to 16 December 1947;
6) Albert Forster, former governor of the so-called Reichsgau-Danzig, West Prussia; the trial took place in Gdańsk from 5 to 27 April 1948;
7) Josef Bühler, former state secretary and deputy governor to the General Government; the trial took place in Kraków from 17 June to 5 August 1948.[42]

Two more trials were anticipated to take place before the Supreme National Tribunal, namely of Jürgen Stroop and Erich von dem Bach-Zelewski, and Heinrich Friedrich Reinefarth and Paul Otto Geibel, but they were carried out elsewhere. The Tribunal ended its activity after the last trial of Bühler in 1948[43] although it was not rescinded on the strength of any act of law.

40.3. Objective Elements of the Crime of Genocide as Set Out by the Supreme National Tribunal: Selected Examples

Before it was formulated in treaty law and admitted as valid and binding, the definition of the crime of genocide had caused a number of queries and controversies among lawyers, especially among international and domestic judges representing various courts and tribunals and adjudicating in cases on crimes perpetrated during the Second World War. Basically, none of them dared to deny the immensity of perpetrated

[42] See Janusz Gumkowski, Tadeusz Kułakowski, *Zbrodniarze hitlerowscy przed Najwyższym Trybunałem Narodowym* [Hitlerite Criminals Before the Supreme National Tribunal], Wydawnictwa Prawnicze, Warsaw, 1965.

[43] Państwowe Muzeum na Majdanku, see *supra* note 13. At present, all Nazi and Communist crimes as well as any other crimes classified as crimes against peace, humanity and war crimes perpetrated in the period from 1 September 1939 to the end of July 1990 are investigated by the Institute of National Remembrance: Commission for the Prosecution of Crimes against the Polish Nation, which is a research institute with prosecution powers.

crimes. However, they exercised caution when it came to bringing convictions for genocide. It is worth emphasising that Article 6(c) of the International Military Tribunal ('IMT') Charter did not provide for the prosecution of genocide as a crime falling under the jurisdiction of the Tribunal. But as noted by Antonio Cassese:

> [I]n referring to crimes against humanity [the Tribunal] used a wording ('murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' and 'persecutions on political, racial or religious grounds') that encompasses large-scale massacres of ethnic, racial or religious groups. In dealing with the extermination of Jews and other ethnic or religious groups, the IMT referred in its judgment to the crime of persecution.[44]

Generally, at that time these crimes committed on ethnic or religious groups were treated as war crimes or crimes against humanity without posing a requirement on prosecutors to prove "special intent to kill or destroy" (*dolus specialis*)[45] as a characteristic and decisive criterion. That is why Lemkin strived for recognition of genocide, due to its particular objective and subjective elements, as a separate category of crime under international law and, consequently, in his works he put an emphasis on such elements stressing that:

> [G]enocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all member of nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are

[44] Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 127.

[45] *Ibid.*

> directed against individuals, not in their individual capacity, but as members of the national group.[46]

Pointing to differences between genocide and a war crime or a crime against humanity, Lemkin precisely defined that genocide did not merely mean a massacre of the civilian population or mass executions because

> [m]ass murder or extermination wouldn't apply in the case of sterilization because the victims were not murdered, rather a people was killed through delayed action by stopping propagation. Moreover mass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.[47]

Summing up Lemkin's views, we may agree that genocide is "a synthesis of different acts of persecution and destruction".[48] On the one hand, it is true that he distinguished eight forms of genocidal activities (political, social, cultural, economic, biological, physical, religious and moral) aiming at the destruction and disintegration of essential foundations of the life of national groups but he also underlined that what is labelled as genocide most often occurs in the physical ("physical existence"), biological ("biological continuity, through procreation") and cultural ("spiritual or cultural expression") spheres.[49]

"Physical genocide" involves undeniable destruction of a group by killing its members using direct methods (such as mass executions) or indirect ones (such as imposing harsh conditions including limitation on or lack of food). What is meant by "biological genocide" is imposing methods and measures intended to reduce or prevent the birth rate (for example, by forced separation of men and women belonging to such group). "Cultural genocide" is understood as actions which aim at depriving people of their integrity and identity and especially their

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46 Lemkin, 1944, p. 79, see *supra* note 2.

47 Raphael Lemkin, "Genocide as a Crime under International Law", in *American Journal of International Law*, 1947, vol. 41, no. 1, p. 147.

48 Bernard Bruneteau, "The Century of Genocide", in *Pro Memoria: Information Bulletin of the Auschwitz-Birkenau State Museum*, 2007, no. 26, p. 3.

49 See Lemkin, 1944, pp. 82–90, *supra* note 2. Cf. Raphael Lemkin, "Genocide as a Crime under International Law", in *United Nations Bulletin*, 15 January 1948, vol. IV, no. 2, p. 70–71.

language, religion and cultural values which mark them as a distinct people (for example, destruction of their cultural property or the process of denationalisation).[50] Let us once again emphasise that the target of such genocidal actions are whole groups of people, not just individual members of any national, racial, ethnic or religious group. Actions directed against individuals are intended by perpetrators to bring about the destruction of the whole group. Actions aimed at individuals, even if they result in annihilating them because of their membership in a particular group, without, however, a further intent to totally or partially destroy such groups, shall not qualify as genocide but rather shall be labelled as one of the forms of crimes against humanity.[51]

In Lemkin's views on genocide, a great emphasis is put on the so-called genocidal plan. Lemkin took the view that genocide did not necessarily mean the immediate destruction of a nation, ethnic or religious group – genocide was intended rather as a process or co-ordinated plan[52] and the genocidaire would attempt to achieve such a plan by the disintegration of political, social and cultural institutions, of culture, language, national feelings, religion and the economic existence of victimised groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[53] If one accepts such a view, genocide has two phases: one, the destruction of the national pattern of the oppressed group (for which the term "denationalisation" was often used), and the other, the imposition of the national pattern of the oppressor. Lemkin argued, however, that the conception of denationalisation is inadequate because "(1) it does not connote the destruction of the biological structure; (2) in connoting the

[50] David L. Nersessian, *Genocide and Political Groups*, Oxford University Press, Oxford, 2010, p. 7.

[51] Tadeusz Cyprian and Jerzy Sawicki, *Walka o zasady norymberskie 1945–1955* [The Struggle for Nuremberg Principles 1945–1955], Państwowe Wydawnictwo Naukowe, Warsaw, 1956, p. 165, fn. 6. Cf. ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 521 ("Akayesu Judgment") (https://www.legal-tools.org/en/go-to-database/record/b8d7bd/); ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551–553 ("Krstić Judgment") (https://www.legal-tools.org/doc/440d3a/).

[52] Marek Kornat, "Rafał Lemkin i pojęcie ludobójstwa" [Raphael Lemkin and the Notion of Genocide], in Alicja Bartuś and Piotr Trojański (eds.), *Auschwitz a zbrodnie ludobójstwa XX wieku* [Auschwitz and the Crimes of Genocide of 20th Century], Państwowe Muzeum Auschwitz-Birkenau, Fundacja na Rzecz MDSM, Oświęcim, 2012, p. 21.

[53] Cyprian and Sawicki, 1956, p. 165, see *supra* note 51.

destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor, and (3) denationalization is used by some authors to mean only deprivation of citizenship".[54]

In Lemkin's opinion, all elements of genocide as distinguished by him can be found in the Third Reich's dealings and activities, above all in the territories under their occupation. The general plan of the German authorities was based on the underpinning principle to win peace even at the cost of losing the war, and such a goal could be achieved only through the successful changes of political and demographic power structures on the European area to Germany's benefit. The surviving population was to melt into the German political, economic and cultural system. In order to achieve this goal, mass annihilation of entire national groups was planned throughout occupied Europe.[55] In other words, Nazi Europe placed groups in a hierarchy reflecting the order of their planned extermination, from those scheduled for immediate physical destruction (the Jews and Roma) to those whose societal and cultural identity was to be destroyed gradually (the Slavs).[56]

In his publications, and mainly in his monograph *Axis Rule in Occupied Europe* (1944), Lemkin enumerated all the deliberate steps the Nazis took to exterminate peoples, above all the Jewish and Polish peoples, in the national, religious and ethnic dimensions. According to Lemkin:

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54 Lemkin, 1944, p. 80, see *supra* note 2.

55 Raphael Lemkin, "Genocide", in *American Scholar*, 1946, vol. 15, No. 2, p. 227. Compare the judgment of the US Military Tribunal (Subsequent Proceedings) as regards the Nazi programme concerned and implemented "for one primary purpose […] which might be summed up in one phrase: the twofold objective of weakening and eventually destroying other nations (i.e., than Germany) while at the same time strengthening Germany, territorially and biologically at the expense of conquered nations". See Lord Wright of Durley, "Foreword", in Law Reports, vol. XIII, p. ix.

56 Bruneteau, 2007, p. 3, see *supra* note 48. Some authors including Tadeusz Cyprian and Jerzy Sawicki think that planned destruction of the whole nations or racial groups implemented as a predetermined goal is an inherent characteristics of fascism. "Fascism promotes an idea of inequality of races and nations and proclaims the supremacy or exploitation of one state or nation by another. Fascists fail to view certain races and nations as legitimate which they regard as doomed to slavery, death and humiliation as sanctioned by the brutal 'law of nature', whereas other nations are destined to become the rulers of the world, entitled to power and privileges. Fascists' efforts are directed to persuade their opponents that there is no way out from this vicious circle of inequality of human races because it allegedly constitutes an eternal law of nature"; Cyprian and Sawicki, 1956, pp. 161–62, see *supra* note 51.

> The plan of genocide had to be adapted to political considerations in different countries. It could not be implemented in full force in all the conquered states, and hence the plan varies as to subject, modalities, and degree of intensity in each occupied country. Some groups – such as the Jews – are to be destroyed completely. A distinction is made between peoples considered to be related by blood to the German people (such as Dutchmen, Norwegians, Flemings, Luxemburgers), and peoples not thus related by blood (such as the Poles, Slovenes, Serbs). The populations of the first group are deemed worthy of being Germanized. With respect to the Poles particularly, Hitler expressed the view that it is their soil alone which *can and should be profitably Germanized*.[57]

Indeed, on many occasions Hitler recapitulated that "germanisation" could only be applied with regard to land but never to people.[58] This fact was recognised by the Nuremberg Tribunal in its judgment in the following terms:

> In Poland and the Soviet Union these crimes (i.e., war crimes and crimes against humanity) were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonisation by Germans.[59]

Implementation of the genocidal plan by Hitler's acolytes across Europe ran according to a specified schedule, although methods of committing genocide differed. The first tangible repercussions affected the field of politics, which in Poland (in the land incorporated to the Reich) but also in the area of Soviet Ukraine, Belarus, Luxembourg, Alsace and Lorraine led to total disruption of administration of the occupied nations and displacement of huge groups of the population. Not the smallest trace of the existence of "groups subjected to annihilation" was to remain in those areas, first due to social degradation, then

[57] Lemkin, 1944, pp. 81–82, see *supra* note 2.

[58] See Lemkin, 1946, pp. 227–28, *supra* note 55.

[59] Nuremberg Judgment, p. 66, see *supra* note 28. According to Robert Melson, the Nazi extermination policy aimed at Poles and Russians is an example of so-called partial genocide which instead of annihilation of one social group aims at destruction of a considerable part of persecuted group and, as a result, undermining its status. See Robert Melson, *Revolution and Genocide: On the Origins of the Armenian Genocide and the Holocaust*, University of Chicago Press, Chicago, 1992, pp. 26–28.

disintegration of their culture and depriving them of economic foundations. What followed were constant attacks on and persecution of religion in so far as uniform religion constituted one of the binding elements within the group and, last but not least, the persecution of language and morality by liquidation of churches, schools, opening brothels and the mass production of alcohol which was to be available in bulk. The final stage included deliberately inflicting on the group conditions of life calculated to deteriorate their physical health by decreasing food provisions, forcing them to live in a confined area without the possibility of free movement, holding them in concentration camps without trial or judicial process, and arresting them without the universally acknowledged legal basis, which, in the end, led to mass extermination. The Nazi plan was even more long term and far-reaching – as mentioned above, it involved colonisation of the former Polish lands with Germans.[60]

Taking in account that the crime of genocide was unheard of and not mentioned in the IMT Charter, Nazi criminals were not charged with genocide at Nuremberg but with three other crimes: crimes against peace, war crimes and crimes against humanity. However, during the trials, the term "genocide" was frequently used, including in the indictment against the major war criminals where there is a statement to the effect that defendants

> conducted deliberate and systematic genocide, *viz.*, the extermination of racial and national groups, against the civilian populations of certain occupied territories, in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gypsies, and others.[61]

[60] Cyprian and Sawicki, 1956, p. 166, see *supra* note 51. It must be emphasised that great credit must be given to the Polish government in exile whose effort to provide evidence of the Nazi crimes committed on the Polish areas was tremendous. Subsequent volumes of documents showing criminal policy of the Nazi occupants on the Polish lands, printed and edited in London, ensured information and gave insight into the unprecedented scale of crimes perpetrated by the Nazis; in addition, they contributed to defining the elements of the crime of genocide. See Republic of Poland, Ministry of Foreign Affairs, *Polish White Book: German Occupation in Poland. Extracts of Note Addressed to the Allied and Neutral Powers*, The Greystone Press, New York, 1942.

[61] International Military Tribunal, "Indictment: Count Three", in *Nuremberg Trial Proceedings*, vol. 1.

In the course of the trials before the IMT, prosecutors, on many occasions, referred to the crime of genocide and supported their accusations with uncontested evidence. The indictment included, *inter alia*, descriptions of the torment of civilian population, extermination of entire nations, and the persecution and murdering of Jews in Germany as well as in other occupied countries. Eventually, however, the Nuremberg Tribunal, although it dealt at great length with the substance of the charge of genocide, did not use this term or make any reference to the conception of genocide.[62] It seems that the reason for this particular attitude was the lack of a proper definition of genocide differentiating this crime from crimes against humanity, on the one hand, and war crimes, on the other. Therefore, the Nuremberg Tribunal preferred not to take a position in this matter.[63]

The extraordinarily brutal and economically exploitative policy put into practice by German occupiers spread terror across the whole civilian population – killing prominent Polish citizens and individuals who could offer leadership, bringing about physical destruction and suppressing the nation's biological growth, expelling people from their homeland and, finally, exterminating Jews and the Romani people – created new circumstances. As previously mentioned, no extant Polish laws offered an adequate legal and penal response to the actual situation.[64] Even after the adoption of special penal legislation concerning crimes committed during the war – crimes against peace, war crimes and crimes against humanity – no detailed definition was coined and, instead, they were being referred to in general terms in those provisions of the 1944 Decree which governed

[62] Law Reports, vol. VII, p. 7. See also Edyta Gawron, "Proces Amona Goetha i pierwszy wyrok w sprawie zbrodni ludobójstwa" [The Trial of Amon Goeth and the First Sentence in Case Concerning the Crime of Genocide], in Bartuś and Trojański 2012, p. 135, see *supra* note 52; and Karolina Kosińska, *Zbrodnia ludobójstwa w prawie międzynarodowym* [The Crime of Genocide in International Law], Dom Wydawniczy DUET, Toruń, 2008, p. 52.

[63] Cyprian and Sawicki, 1956, p. 170, see *supra* note 51. This thesis is supported by opinions presented in the course of discussion on the project of the consolidation of the Nuremberg rules within the framework of works of the Committee on the Progressive Development of International Law and its Codification; one of the Committee members, the representative of France, stated that genocide was new and audacious notion and that is why the Nuremberg Tribunal abstained even from admitting genocide as the crime recognized by international law. UN Doc. A/AC. 10/SR.19, 7 June 1947.

[64] Państwowe Muzeum na Majdanku, see *supra* note 13.

the procedure regarding criminal institutions.[65] Regardless, the notion of crimes against humanity which could be derived from the provisions of the Polish war crimes legislation seems to be much wider than that implied in the IMT Charter.[66] Furthermore, though none of the Polish laws used the term genocide, they still provided for conviction of crimes against humanity perpetrated on a single person on condition, however, that the crime was committed because the victim concerned belonged to a particular national, racial or religious group, or because of the victim's political convictions. In other words, the existence of the *dolus specialis* on the part of the offender had to be established.[67]

Obviously, the Supreme National Tribunal passed verdicts on the basis of the entire binding post-war penal legislation, including the 1944 Decree and other acts of law. However, with the cases before the Tribunal being legal precedents and the Tribunal having special status, one can assume that it could have affected the application of Lemkin's proposals in the verdicts passed by the court. Lawyers who were entrusted with the task of developing procedural materials must have followed closely the progress of various proceedings, especially the Nuremberg trials, but also the discussions and controversies over the elaboration of adequate nomenclature to be applied in the indictments. They might also have had an opportunity of consulting a copy of *Axis Rule in Occupied Europe* that Lemkin offered as a gift to the Jagiellonian Library in Kraków.[68] Furthermore, the Tribunal hinted more than once that the crimes it was investigating were of an international dimension because they violated laws and customs of war as incorporated *inter alia* in the 1907 Hague Regulations.

Consequently, in both the indictments and judgments of the Supreme National Tribunal the crime of genocide was mentioned among the perpetrated atrocities. The Tribunal used the term genocide in the first two trials of Greiser and Göth even before the IMT delivered its verdict on 30 September 1946. On two other occasions, the Tribunal also made the accusation of genocide, namely during the trials of Höss and Bühler, but in this latter case the findings of the Tribunal concerning the question

65 Law Reports, vol. VII, p. 91, see *supra* note 23.

66 *Ibid.*, p. 89.

67 *Ibid.*

68 Gawron, 2012, pp. 136–37, see *supra* note 62.

of genocide did not elucidate any new points of interest.[69] It must be stressed that the charge of perpetrating genocide faced by the defendants covered a wide spectrum of genocidal activities and included physical, biological and cultural genocide. The present discussion focuses only on selected objective elements of genocide, specific to particular cases, preserving the chronological order of the proceedings. Here the following will be discussed: cultural genocide in the trial of Greiser; physical genocide, both direct and indirect, in the trial of Göth; and biological genocide (having the form of "medical experiments") in the trial of Höss.

40.3.1. Artur Greiser and the Cultural Genocide of the Polish Nation

In the trial of Greiser, among numerous charges presented by the Prosecution were those concerning physical genocide. What deserves special attention here is the charge of cultural genocide, a term used for describing the planned and deliberate destruction of the cultural, national and ethnic heritage and integrity of certain groups, with the aim or effect of forcing them to abandon their own culture (beliefs, language and art), depriving them of their lifestyle and imposing on them another identity. The purpose of such actions was to deprive people of their integrity and cause the extinction of any such group. These were exactly the charges brought against Greiser who was accused of actions to the detriment of the Polish state and nation by taking part in, abetting, aiding and carrying out "systematic destruction of Polish culture, plunder of Polish cultural heritage, germanization of the country and the Polish people, illegal appropriation of public property", and, last but not least, insulting and deriding the Polish nation by propagating its cultural inferiority and low social worth.[70]

Cultural genocide as a crime and charge was first mentioned during the court trial of Greiser before the Supreme National Tribunal of Poland. At that time, genocide did not qualify as a crime either in international or national legislation. In a proposal to the Fifth International Conference for the Unification of Criminal Law held in Madrid in 1933, Lemkin

[69] The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XIV, His Majesty's Stationery Office, London, 1948, p. 40 ("Law Reports, vol. XIV").

[70] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Akta w sprawie karnej Artura Greisera [Records of Criminal Proceedings in the Case of Artur Greiser], vol. I, archival file no. IPN GK 196/34, p. 11 ("Greiser case, vol. I").

envisaged the creation of the new international crime, i.e. the crime of vandalism consisting in the wilful destruction of cultural or artistic property of other racial, religious or social groups, but his proposal was not accepted. The cultural aspect of genocide was also considered during the preparatory work for the Genocide Convention,[71] but eventually the treaty definition of genocide did not cover this aspect. Due to the above, the analysis of the crime of cultural genocide as perpetrated by Greiser presented here includes references to those elements of the crime that had been formulated by Lemkin. Thus the conception of cultural genocide broadly covers the prohibition on the use of a group's language and the restriction of education of the targeted group, systematic destruction of religious objects, together with persecution or killing of clergy, systematic destruction or confiscation of national treasures, libraries archives, museums, artefacts and art galleries, and restriction or prohibition on artistic, literary and cultural activities.[72] In brief, cultural genocide means the educational, linguistic, religious, cultural and scientific dimensions of destruction.

The criminal liability of Greiser for cultural genocide committed on the Polish nation first of all resulted from his function and power associated with the positions he held. During the Second World War, Greiser was appointed the Reich Governor (*Reichsstatthalter*) and *Gauleiter* (party leader of a regional branch of the NSDAP) for the province of Posen and a part of Łódź and Pomerania incorporated into the Reich on the strength of Hitler's 1939 decree and named Reichsgau Posen. In 1940 the region was renamed Wartheland (Kraj Warty). As declared in the indictment presented to the Supreme National Tribunal, being vested with powers resulting from holding these positions, Greiser acted to the detriment of the Polish state and nation (either of his own initiative or carrying out the criminal orders of German civilian or military authorities) by taking part in, abetting, aiding and carrying out the systematic destruction of Polish culture, plunder of Polish cultural heritage, germanisation of the country and the Polish people, illegal appropriation of public property and depriving Poles of freedom of

[71] See Ana Filipa Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law", in Orna Ben–Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 294.

[72] Lemkin, 1944, pp. 84–85, 89, see *supra* note 2.

religious practices. In addition, Greiser, supervising the activities aimed at the destruction of cultural values and property of the Polish nation:

> 1) systematically suppressed or destroyed all Polish research, scientific and academic institutions, including radio, film, theatre and the press;
> 2) abolished the education system by shutting down schools (elementary and high) as well as universities, and plundered Polish galleries, archives, libraries, etc.
> 3) destroyed numerous historical and cultural monuments or reshaped them in such a way so that they no longer served the Polish culture, abolished the Polish language from life and education and restricted its use only to private relations.[73]

Acting as the high Nazi official and *Gauleiter* of Wartheland, Greiser violated specific treaty regulations with regard to war occupation, including Article 56 of the 1907 Hague Regulations forbidding seizure or destruction of historic monuments and works of science and art, and of religious, charitable, scientific and artistic institutions.[74]

The Prosecutors' Council of the Supreme National Tribunal collected a massive amount of evidence against Greiser, quoting in the course of the trial particular decisions and activities undertaken by the accused in order to destroy Polish culture and science, the system of education, religion and language, and to persecute members of the clergy. The first step in the planned annihilation of the Polish culture and science was elimination of the intelligentsia and the clergy. The whole area of Wartheland was cleared of Polish academics, professors, judges, lawyers, doctors, engineers and other representatives of this social class of people who might have been an impediment to the process of germanisation.[75] The University of Poznań, as a renowned cultural centre, was closed

[73] Greiser case, vol. I, pp. 9–11, see *supra* note 70.

[74] Hague Regulations Concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

[75] These activities are sometimes referred to in reference books as elite genocide which means "deliberate acts committed with an intent to physically destroy leaders of the group, either directly or indirectly, pursued despite their surrender or even lack of real threat on their part". See Lech M. Nijakowski, "Pojęcie ludobójstwa: definicje, propaganda i walki symboliczne" [The Notion of Genocide: Definitions, Propaganda and Symbolic Struggles], in Bartuś and Trojański 2012, p. 41, see *supra* note 52.

down immediately after the German invasion and the majority of professors were arrested or sent to concentration camps or prisons; some of them were treated as hostages or deported to the General Government.[76] The buildings that previously housed the University of Poznań were occupied by the German administration and served various purposes, for example the Department of Anatomy was transformed into a crematorium where a total of 8,000 corpses of Poles and Jews, shot or hanged and painstakingly catalogued by the secret police, were burned. Gradually, the whole system of higher education ceased to exist in Poznań and was substituted by German institutions. In April 1941 a German university, subordinated to Greiser as its president, was opened in Poznań. The same happened to all other cultural institutions.[77]

As regards the system of rudimentary education, the occupation authorities in Wartheland implemented a special education project called *Polenschule*. The purpose of this schooling system was to teach certain skills such as speaking, reading and writing in German, to such a degree, however, as was necessary for understanding oral instructions given in the workplace, or possibly for reading brief information regarding the manner of work, operation of machines and so on. Learning the German language was to be limited only to achieving pure communication skills at a basic level, whereas striving for fluent command of the language by means of systematic practice of orthography, grammar and reading was forbidden. As for mathematics, it was considered enough to get acquainted with four elementary arithmetic operations and the knowledge of coins, the system of weights and measures, their written representation, as well as vulgar and decimal fractions. In the final school years education was enriched with studies of Europe with a particular focus on Germany as the heart of continent, with handling domestic animals, cultivation of plants, pest control, and last but not least, the anatomy of the human body and keeping the environment in a clean and orderly condition. The purpose of drawing classes was only to train students to simply depict a subject. Moreover, the use of German coursebooks was forbidden. The prescribed system of education also incorporated obligatory exercises meant to develop discipline and a sense of order, such as sitting in upright

[76] One of the arrested academics was Bohdan Winiarski, then Dean of the Faculty of Law and later Judge of the International Court of Justice. Greiser case, vol. I, p. 21, see *supra* note 70.

[77] *Ibid.*, p. 22.

positions, getting up quickly, speaking loudly and employing schoolchildren in various useful works such as mending socks for the army, picking blueberries and offering assistance during harvest. Education amounted to two hours daily, and the time spent at school spanned the ages from seven to 12 years, and from 1942 from seven to 14 years of age; however, 12-year-old children were assigned a non-pupil status due to labour requirements. Still, many children did not take advantage of even such limited access to education due to a great number of schools being closed and designated for other purposes.[78]

Greiser vested the members of the *Hitlerjugend* (Hitler Youth) with special prerogatives, authorising them to destroy all libraries belonging to the People's Libraries Society. Those prerogatives included burning books and demolishing premises. Similarly, school libraries fell prey to *Hitlerjugend* members who were also specially trained in retrieving and demolishing private libraries and collections. In St. Michael's Church in Poznań a *Buchsammelstelle* (book collecting point) was set up where about two million confiscated volumes from both private and public libraries over the whole of Wartheland were amassed (among others, books confiscated from the University of Poznań, Poznań Diocese Library and a significant portion of the Poznań Society of Learning collection). Through the *Buchsammelstelle* system, books were sorted and afterwards either granted to German institutions or processed by paper mills. Apart from libraries, both state and church archives were confiscated and wrecked; some files were destroyed, others were transported, either partially or in whole, to Germany.[79]

The ruthless Nazi policy of destroying Polish culture also included the plundering and looting of numerous museum collections and works of art. This happened to almost 30 public museums, including the Ethnographic Museum, City Museum, Archdiocese Museum and Military Museum of Poznań, Kórnik Castle with its unique collections, the collections of Gołuchów Palace and Rogalin Palace, as well as church and cathedral treasures from Gniezno and Poznań. The target of looting was

[78] Karol M. Pospieszalski, "Statut prawny narodu polskiego pod okupacją niemiecką na ziemiach zachodnich Rzeczpospolitej 1939–1945" [The Legal Status of the Polish Nation under German Occupation in the Western Territories of the Republic of Poland 1939–1945], in Najwyższy Trybunał Narodowy [Supreme National Tribunal], Proces Artura Greisera, vol. IV, archival file No. IPN GK 196/30, pp. 130–31 ("Greiser case, vol. IV").

[79] Greiser case, vol. I, p. 23, see *supra* note 70.

mostly works of art including paintings, graphics, craftwork and numismatics. In addition, more than 300 private collections, boasting many examples of masterpieces, were looted by the *Grenzschutz* (border defence) and the army. Some of those pieces of art were shipped to various German institutions, but others simply passed into the hands of private owners. At the same time, all Poles were forbidden to benefit from any collections, museums and similar institutions.[80]

Special attention was paid to the destruction of Polish memorials and monuments to national heroes. In Poznań alone, the Nazis demolished statues of Fryderyk Chopin, Stanisław Moniuszko, Adam Mickiewicz and Juliusz Słowacki, the statue of Woodrow Wilson, the most Holy Heart of Jesus monument, the monument dedicated to the 15th Poznań Uhlans Regiment; in Gniezno, the King Bolesław I the Great monument; and in Łódź the Tadeusz Kościuszko statue.[81] Crosses and roadside shrines were also deliberately torn down. More than 10,000 objects of religious cults fell prey to devastating orders and directives. Furthermore, following administrative rulings of the occupiers, some 35 architectural monuments dating back to the fifteenth century were either demolished or blown up. Another 289 architectural monuments were devastated due to churches and other historical buildings being turned into workshops or warehouses where explosives and other flammables were stored, and which at the time of the Germans' withdrawal before the Red Army offensive were often set on fire to prevent Soviets from requisitioning them.[82]

The Nazi plan for the destruction of the Polish identity necessarily required attacks on the Polish Catholic Church because, over the centuries, Polish priests had been perceived as instrumental in sustaining national identity and, especially in the countryside, as intellectual leaders. After the 1939 invasion of Poland, it became evident that what the Nazis were driving at was the complete annihilation of the Church, persecution of the clergy and appropriation of their property. What followed were mass arrests of the clergy who were either shot or taken off to

[80] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Proces Artura Greisera. Materiały dowodowe: zestawienie strat województwa poznańskiego w dziedzinie kultury i sztuki [The Trial of Artur Greiser. The Evidence: Report on the Losses of Poznań Voivodship concerning Culture and Arts], archival file no. IPN GK 196/20, p. 7–8 ("Greiser case, Report on Losses").

[81] Greiser case, vol. I, p. 24, see *supra* note 70.

[82] Greiser case, Report on Losses, p. 7, see *supra* note 80.

concentration camps, gross damage to chapels and crosses, the shutting down of churches and a furious devastation of church property. All religious orders were dissolved and their members either detained in camps or sentenced to forced labour. Systematic anti-church campaigns were launched soon after the Gestapo appeared and Greiser assumed his duties. As an almighty Lord of War of Wartheland, Greiser had a vision to create a "*Mustergau*", a model area providing an example of how to quickly colonise the terrains of the east while cleansing them of unwanted Polish elements and the Catholic Church.[83] Following Greiser's directive, church property was taken over by the local council established on lands annexed to the Reich (*Gauselbstverwaltung*),[84] but Greiser reserved the right to settle matters related to church assets on a case-by-case basis.[85]

Overall, around 1,200 to 1,300 churches were shut down in Wartheland. According to statistics, out of 387 churches within the Poznań region, only 20 remained available to Polish Catholics, as other churches were either shut down or turned into storage houses or served lay purposes. Other dioceses of Wartheland suffered similarly: closed churches were completely plundered, while confiscated property was melted down or taken to Germany (for example, church treasures, including outstanding cathedral treasures of Gniezno, Poznań and Wrocław). Further to Greiser's orders, many church artefacts of gold, silver, tin, bronze, lead, nickel and brass kept in Poznań Cathedral were disposed of to base metal collecting points with only single items to be donated to the museum. As a result, many invaluable examples of goldwork dating back to the medieval period fell victim to these ravages. For the purpose of fabric collection, thousands of historic textiles and tapestries, mostly of church origin, were unlawfully confiscated. Furthermore, 891 bells were melted down, of which 95 deemed the most precious were removed to the Reich. Church interiors were destroyed, as in the case of the Baroque church of the Bernardine Fathers in Poznań

[83] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Proces Artura Greisera. Materiały dowodowe: walka z polską kulturą, szkolnictwem i Kościołem – zestawienie strat 1940–1946 [The Trial of Artur Greiser. The Evidence: Fight Against Polish Culture, System of Education and the Church – A Report on the Losses 1940–1946], archival file no. IPN GK 196/19, pp. 190–91 ("Greiser case, Polish Culture").

[84] The Polish Catholic Church was effectively outlawed in the Wartheland and refused to be considered a legal person of public law.

[85] Greiser case, vol. I, pp. 18–19, see *supra* note 70.

from which the eighteenth-century main altar was removed and burned. Gniezno Cathedral was intended for use as a concert hall and a venue hosting other entertainment events; its interior, however, was stripped of any elements considered Polish. Brass roofs from many historical buildings were detached, thus distorting their artistic dimension and exposing them to the atmospheric conditions. In addition, a great number of wooden churches, so deeply rooted in Polish folk culture, were burned down and the material thus recovered contributed to the construction of estates for German colonists.[86]

Polish culture suffered irreparable losses due to the removal or devastation of the contents of archives and church libraries. An unprecedented act of vandalism was committed to the archives of the Archdiocese Museum in Poznań, which owned valuable collections of sacred works of art and rich book collections. The evacuation of collections from the remarkable Renaissance-style building lasted several weeks in order to clear it out completely and enable the relocation of German newcomers from the Baltic states. These collections were dispersed negligently and became an object of partial devastation or looting.[87]

The Polish press and publishing industry faced a similar fate during the Nazi regime. The major dailies edited in particular cities were immediately shut down and no Polish newspaper was released in the area of Wartheland (even the purely scientific periodical, *Archaeological News*, was confiscated).[88] Similarly, the printing of Polish books was strictly forbidden and all Polish bookshops in the territory annexed to the Reich were closed, with any books in stock being sequestered. The restrictions also included a ban on selling the sheet music of Chopin and other Polish composers. Lending libraries were closed, and at the end of 1940 the *Propagandaamt* (Propaganda Office) announced a list of prohibited Polish books that covered approximately 3,000 titles.[89]

All Polish theatres in Poznań, Łódź and Kalisz were ordered to be closed, their buildings being claimed by German theatres. Further, Polish

[86] *Ibid.*, pp. 18–19, see *supra* note 70. See also Greiser case, Report on Losses, pp. 6–8, see *supra* note 80.

[87] Greiser case, Polish Culture, p. 193, see *supra* note 83.

[88] Greiser case, vol. I, p. 24, see *supra* note 70.

[89] *Ibid.*, pp. 24–25.

cinemas were turned into German-language cinemas, while opera houses in Poznań and conservatories were taken over by German institutions. Radio stations based in Poznań and Łódź now broadcast in German and all radio receivers owned by Poles were requisitioned. Being caught in the act of listening to foreign radio stations, especially those broadcasting from London, was punishable by death.[90]

Further, war was declared on the Polish banners and signs, not only those posted at the street corners, inside the trams, in front of shops or generally in the public domain but also signs on mailboxes, toilets or breadboxes found inside private apartments. A decree of April 1940 proclaimed by Greiser ordered all Polish signs to be removed within one month. The authorities of Wartheland subject to Greiser commands made every effort to eradicate all traces of Polishness remaining in the area.[91]

The prosecutors of the Supreme National Tribunal, in bringing their charges against Greiser of unprecedented destruction of Polish cultural assets in the occupied area of Wartheland, relied heavily on documentary evidence and could have easily proved his legal and moral responsibility owing to the many documents acquired after the Nazi occupiers had evacuated. For example, according to the draft order on the protection of monuments, full powers in all matters regarding the protection and destruction of historical monuments were vested with the *Reichsstatthalter* who took all crucial decisions after seeking the opinion of a historic preservation officer; his permission was also required in each case of demolition or change of designation of a cultural monument. Importantly, as appears from the preservation officer's reports, Greiser was in no way obligated to exercise his power over historic and cultural heritage in accordance with the strict Nazi regulations or enactments simply because there were no clear and binding guidelines on the treatment of Polish culture at that time in the Reich.[92] Therefore, the

[90] *Ibid.*, p. 25.

[91] *Ibid.*

[92] Greiser case, Report on Losses, p. 5, see *supra* note 80. As elucidated by Karol Estreicher Jr. in his report on the losses suffered by the Polish culture under the German occupation:

> [C]entral and eastern European countries have been treated by the Third Reich leaders and authors of the 'new order' as territory open to Teutonic colonisation and expansionism where every act of violence or plunder would be justified. Whereas in the western European states Germans tried to create an impression that they respected certain laws, in Poland all laws delivered served not only the purpose of the nations'

Tribunal found Greiser guilty of all the charges, highlighting the fact that a number of documents and witnesses proved, beyond doubt, the creation and implementation of a special (discriminatory) legal state for Poles with regard to the education system and language rights, with the religion of the people within the occupied territory which had traces of genocide, and equally genocidal measures implemented to obliterate Polish culture and science.

The Tribunal pointed to the accused as one of the first and most ardent acolytes of Hitler, "fanatically given over to the idea of German supremacy in central-eastern Europe by means of waging a war of terror, biological aggression and cultural genocide of neighbouring countries, and the Polish nation in particular".[93] When it came to analysing crimes perpetrated by Greiser in his capacity as *Reichstatthalter* and *Gauleiter* of Wartheland, the Supreme National Tribunal had to consider the legal nature and a proper meaning of "a new crime against interests of human race and requirements of both national and international conscience having the form of genocide".[94] The Tribunal referenced the efforts made by the accused to create a *Mustergau*, i.e. "a model state" in Wartheland, and at the same time criminally to turn it into a parade ground (*Exerzierplatz*) for trying out methods of germanising the country, in the absolute sense of what he himself called *Eindeutschung*. There were three ways of arriving at such a germanisation of the territory:

> extermination but also eradication of each and every trace of their culture [...] A flock of ravens dressed in uniforms and boasting academic titles swarmed over Poland allegedly to reorganise Polish scientific institutions but in truth what they had been driving at was systematic and planned destruction. This purported German administration of libraries, archives and museums, those offices to assist education and propaganda were, as a matter of fact, sanctum of pseudo-scientific gangsters unheard of in this world.

"Raport Karola Estreichera jr. z 1944 r. o stratach kultury polskiej pod okupacją niemiecką (1939–1944)" [1944 Report of Karol Estreicher Jr. on the Losses of Polish Culture During the German Occupation (1939–1944)], in Dariusz Matelski, *Grabież i restytucja polskich dóbr kultury od czasów nowożytnych do współczesnych* [The Pillage and Restitution of Polish Cultural Objects in Modern Times], vol. II, Towarzystwo Przyjaciół Sztuk Pięknych w Krakowie, Kraków, 2006, p. 839–40.

93 Najwyższy Trybunał Narodowy [Supreme National Tribunal], Wyrok w sprawie Artura Greisera [The Sentence in the Artur Greiser Case], archival file no. IPN GK 196/38, p. 179 ("Greiser case, Sentence").

94 *Ibid.*, p. 185.

> [B]y deportation of adult Poles and Jews, germanization of Polish children racially suited to it, the new method of mass extermination of the Polish and Jewish population, and complete destruction of Polish culture and political thought, in other words by physical and spiritual genocide.[95]

The facts concerning this genocide brought to light during the trial proved that Greiser by no means simply blindly carried out the orders of Hitler, but was an independent, ambitious and cunning instigator and organiser of the cruel methods which led to the mass extermination of the local population and to the destruction of Polish cultural, religious and national objects. Thus, the accused as the supreme authority in Wartheland, acting with full powers granted to him by Hitler, in the Tribunal's opinion, committed crimes both from the perspective of Polish national law and international law. Among other things, he was concerned in bringing about in Wartheland "the general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture on their own".[96]

Based on evidence revealed in the course of the trial (including numerous documents, testimony of witnesses and experts' opinions) the Supreme National Tribunal admitted in full the charges brought against the accused, including Greiser's furious oppression of the local religion, bearing all the traits of genocide (depriving people of all the ways to practise religious cults, shutting down churches and seizure of church property) and the equally brutal fight with Polish cultural heritage and science. The Tribunal found that as a result of his direct or indirect orders, Catholic and Protestant churches were desecrated, libraries and research

[95] *Ibid.*, p. 186.

[96] *Ibid.*, p. 187. Lack of cultural aspects in the definition of genocide contained in the Genocide Convention makes the case of Greiser exceptional with regard to the practical application of the purely theoretical concept (thus not legally binding) of cultural genocide. International courts have made *ad hoc* references to the above concept, though in a rather limited scope. According to the ICTY, "[t]he physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community", Krstić Judgment, para. 574, see *supra* note 51. The ICTY also underlined that "where there is physical or biological destruction there are often simultaneous attacks on cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group"; Krstić Judgment, para. 580, see *supra* note 51.

centres were ruined, schools and teaching centres shut down.[97] Finding Greiser guilty of these crimes as well as other crimes, and acting pursuant to the provisions of the 1944 Decree, the Supreme National Tribunal sentenced Greiser to death. He was executed publicly by hanging at the Citadel in Poznań on 21 July 1946.

40.3.2. Amon Göth and the Physical Extermination of the Jewish and Polish Population

Göth was one of the most brutal and ruthless Nazi officers operating in the southern areas of occupied Poland, incorporated into the General Government. At the age of 22 he joined the Austrian branch of the Nazi Party and also joined the Waffen-SS. In February 1943 he was entrusted with the task of overseeing the construction of the Kraków-Płaszów forced labour camp which he was to command. In the course of performing his duties, in March 1943 he started with the liquidation of Jewish ghettos of Kraków during which hundreds were killed on the streets, those not deemed fit for work were sent to extermination camps while those fit for work were sent to the camp at Płaszów. In subsequent months, Göth was in charge of the liquidation of the ghetto at Tarnów and liquidation of Szebnie forced labour camp. According to the testimony of witnesses, in all these activities he displayed enormous cruelty and toughness.[98]

In Göth's case, the atrocities perpetrated by him satisfied the criteria of physical genocide, which was performed within the genocidal system masterminded and implemented by the Third Reich. As underlined by Mieczysław Siewierski, Prosecutor of the Supreme National Tribunal,

> the accused Goeth is charged with committing crimes within the wider murderous action referred to as "genocide". This genocide has been carried out with the collaboration of the majority of German society most of which have joined the highly rigorous and disciplined Nazi party. This party

[97] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Akta w sprawie karnej Artura Greisera [Records of Criminal Proceedings in the Case of Artur Greiser], vol. V, archival file no. IPN GK 196/38, pp. 194–95 ("Greiser case, vol. V").

[98] Gawron, 2012, pp. 133–34, see *supra* note 62.

> succeeded in instigating the German nation to sanction genocidal actions.[99]

Charges brought against Göth by prosecutors included membership of the Nazi Party (which had been declared a criminal organisation) that

> under the command of Adolf Hitler aimed at assuming control of the world and forcing upon it National Socialism by means of waging the wars of terror and resorting to other crimes, including but not limited to mass murder of Polish and Jewish populations and in this Amon Goeth was responsible for ordering the imprisonment, maiming and extermination of small groups and the whole communities as well as was found guilty of personally killing, maiming and torturing substantial albeit unidentified number of people, including Jews, Poles and other nationals.[100]

In particular, the prosecutors highlighted four specific charges:

> 1) The accused Goeth as a commander of a forced labour camp in Kraków Płaszów from 1st February 1943 to the 13th September 1944, caused the death of approximately 8,000 persons who were interned. In addition to the above, on many occasions he ordered the killing of various groups of prisoners, probably considerably greater in numbers than the original 8,000, personally with his hands killing or ordering for prisoners to be savaged by dogs, he beat, tortured, subjected prisoners to various carefully thought out methods of torture, resulting in prisoners dying or becoming crippled;
>
> 2) as SS-Sturmführer, he conducted, on directives of SS-Sturmbannführer Willi Haase, the final liquidation of the Ghetto in Krakow, which commenced on the 13th March 1943 and lasted several days and which resulted in deprivation of freedom by detention in the

[99] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Proces ludobójcy Amona Goetha przed Najwyższym Trybunałem Narodowym [The Trial of Genocidaire Amon Goeth (Göth) before the Supreme National Tribunal], Wydawnictwo Centralnej Żydowskiej Komisji Historycznej w Polsce, vol. 35, Warszawa–Łódź–Kraków, 1947, pp. 11–12 ("Göth case, Trial").

[100] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Proces Amona Goetha – Wyrok w sprawie Amona Goetha [The trial of Amon Goeth (Göth) – The Sentence in the Case of Amon Goeth"), archival file no. IPN GK 196/46, p. 6 ("Göth case, Sentence").

camp of approximately 10,000 people. Another 2,000 people lost their lives and Goeth due to personal orders was not only responsible for killing and maiming an unidentified number of people but also was guilty of personally killing, maiming and torturing great numbers of people, displaying an unprecedented degree of cruelty;

3) as SS-Hauptsturmführer he conducted on the 3rd of September 1943 the liquidation of the Ghetto in Tarnów, ordering for approximately 8,000 inhabitants, against whom this action was directed, to be deprived of their freedom, life or health; during these operations, an unknown number of people were killed on the spot in the Ghetto, others suffocated during the journeys in the transports, and yet others died on arrival in the concentration camps, especially in Auschwitz as result of the extermination policy. At all times during this action, Goeth personally participated in killing, beating, tormenting many inhabitants and instructing his assistants to kill likewise;

4) during the period of September 1943 to the 3rd of February 1944, Goeth conducted the progressive liquidation of the forced labour camp in Szebnie near Jasło giving orders to kill a great many inmates on the spot, transporting the remnants to other camps as a result of which several thousand persons lost their lives.[101]

The statement of reason of the indictment covered the details and chronology of these actions. Taking into consideration the charges, including genocide, it is worth reporting them in brief, illustrating them with examples which, in my opinion, satisfy the definition of the crime of genocide, namely, "killing members of the group", "causing serious bodily or mental harm to members of the group", and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction".

[101] *Ibid.*, pp. 6–7, see *supra* note 100. The Prosecution also submitted that these crimes violated the laws and customs of war (in particular, the law of belligerent occupation) and constituted crimes against humanity; see Law Reports, vol. VII, p. 6, *supra* note 62.

If we allow an assumption that physical genocide encompasses both direct actions (for example, mass executions) and indirect ones (such as deliberately inflicting conditions of life calculated to bring about physical destruction), then the forced labour camp in Kraków-Płaszów supervised and commanded by Göth no doubt satisfied these criteria. Moreover, as indicated by the Supreme National Tribunal, evidence submitted was sufficient to charge Göth with many other crimes, apart from those mentioned in the indictment. These were committed by him personally, on his behalf or on his command, either express or implied, not only aiming at Jewish or Polish individuals but also aiming at the destruction of the whole groups at the time of his tenure as a commandant of the forced labour camp at Płaszów.[102] These camps also served the purposes of the depopulation and extermination policy as they housed the so-called convict settlements for Poles who had trespassed the administrative law (for example, the violation of curfew, avoiding work or sitting in a train or tram compartment reserved for Germans) or who were simply regarded as politically unreliable or suspicious (for example, members of the Resistance movement).[103]

In February 1943, when Göth was assigned as a commandant of the camp at Płaszów, about 2,000 inmates were detained there. After the Jewish ghetto of Kraków was liquidated and those "fit for work" were sent to Płaszów, the number increased to 10,000. The number of Poles detained at Płaszów at that time did not exceed 1,000 but in August 1944, when Kraków witnessed mass arrests, the number increased to a few thousand. Polish internees did not remain there for long because after

[102] Göth case, Sentence, p. 8, see *supra* note 100.

[103] *Ibid.*, p. 9, see *supra* note 100. Convict settlements and death/extermination camps were intended as the places of detention of people undesirable for the Nazi government and this criterion was applied to all Poles. It is noticeable that statistics of death cases, maintained in all concentration camps, from among 10 types of "criminals" detained in the camps distinguish, apart from political or professional criminals, Poles (*Polen*) as a separate group of criminals classified as such due to their membership of the Polish nation. Hence, a number of Poles detained in camps or prisons who had not been in any way involved in political activity were ambushed and captured at random during "round-ups"; see Najwyższy Trybunał Narodowy [Supreme National Tribunal], Akt oskarżenia Rudolfa Hoessa [The indictment of Rudolf Hoess [Höss], archival file No. IPN GK 196/104, pp. 11–12 ("Höss case, Indictment"). For example, according to occupation authorities, even high school pupils might constitute "potential threat" as undesirable elements, possibly members of the Resistance; see Edmund Gajewski, "Numer 39 – relacja Czesława Marcinko" [Number 39 – Coverage of Czesław Marcinko], in *Nowiny*, 1983, no. 89, p. 3.

several weeks of segregation, they were released, deported or taken to transit camps. Göth did not maintain a central register or a record of inmates held there, whose number was constantly fluctuating with, however, a continuous upward tendency.[104]

Topographically, the camp at Płaszów was erected, at the beginning, on the grounds of two former Jewish cemeteries. After the liquidation of the Kraków ghetto, the camp was expanded to cover over 800,000 square metres. The terrain was mainly rocky, limy and boggy and thus infested with malaria. In addition, the area was uneven and hilly, and it was with great difficulty that it was made habitable by the prisoners. It was bordered by the city's lime kilns and quarries. Initially, the camp was divided into a Jewish sector and a rather small and enclosed part for Poles. Over time, however, this separation of Poles and Jews was abolished.[105]

In his capacity as camp commandant, Göth was not restricted by any controls or interventions of his superiors, since the camp at Płaszów, until January, 1944 when it was recognised as concentration camp, was not subject to central SS administration but remained under the exclusive control of local occupation authorities. Therefore, Göth's efforts to lay blame on his superiors (or his subordinates and their unauthorised activities) were futile and, in the Tribunal's opinion, could not have released him of responsibility or diminished his guilt.[106]

According to the evidence presented during Göth's trial, work in the camp started early in the morning and lasted till late at night, with only one miserable meal a day to which inmates were entitled. Labour assignments included crushing gravestones and marble tomb slabs at the Jewish cemeteries, laying camp roads, carrying stones and bricks, which was not easy in this kind of terrain. The camp also supplied manpower to a stone quarry (excavated stone was a useful building material) which was

[104] Göth case, Sentence, p. 11, see *supra* note 100.

[105] *Ibid.*, p. 11. In the course of the trial, Mieczysław Siewierski, Prosecutor of the Supreme National Tribunal, emphasised the Polish nationality of many victims of Jewish descent, highlighting that in Göth's attacks against Jews "those people have been treated as Jews although they considered themselves members of the Polish nation with whom they felt cultural connection in terms of tradition and way of thinking despite their Jewish origin"; see Göth case, Trial, p. 13, *supra* note 99.

[106] Göth case, Sentence, pp. 11–12, 28, see *supra* note 100.

yet another instrument used in the physical destruction of inmates.[107] Harsh work did not go hand in hand with sufficient nutrition. Inmates were supposed to be provided with 2,200 to 2,500 calories per day but in reality the energy value offered in daily food rations did not exceed 1,000 calories, which in no way prevented Göth from the application of the most severe penalties if any food sources were found inside the camp. Göth was especially devoted to applying heavy penalties for any contraband food in the camp. Since inmates left the camp area on their way to various labour destinations, they often encountered opportunities to bring extra food back to the camp, exposing themselves to life-threatening situations. One such incident involved a team of inmates employed in Bonarka. When, on returning to the camp, a search revealed a lot of food hidden in rucksacks, Göth did not hesitate to order the whole team consisting of several people to be shot.[108]

Brutal mistreatment of inmates was commonplace in the camp. Göth personally murdered prisoners on a daily basis. If, for example, a prisoner failed to take off a cap in his presence, it was enough to shoot him in cold blood. Another tactic was provoking inmates. When annoyed, Göth asked who did not like his ways during a roll call. When no response was given, he chose at random a prisoner standing nearby and shot him. Göth also shot his servant/orderly – a Jewish prisoner, who was unfortunate enough to harness the wrong horse.[109] He also took special liking to shooting people from his car window, purporting to "improve" his shooting skills. According to the testimonies of witnesses, Göth is said to have personally killed approximately 500 internees in Płaszów camp.

Everyday discipline in the camp degenerated into beastly cruelty through the use of unspeakable harassment. A public whipping was a common sight for any minor shortcoming or misconduct at work (which was considered a sign of sabotage) in which culprits, including women, had to undress and the beating continued until their bodies dripped with blood. Göth believed in collective responsibility, therefore if one prisoner escaped then 10 innocent persons were shot, with the number increasing later depending each time on Göth's instructions. Frequently, these executions were preceded by investigations with torture as a crucial

[107] *Ibid.*, pp. 12–13.

[108] *Ibid.*, p. 14.

[109] *Ibid.*, p. 17.

element. Göth carried out interrogation personally in a Gestapo-type inquisition. Victims had their hands and legs twisted and tied and fixed to hooks mounted to the walls of the commandant's room. Hanging, prisoners had to answer questions. Those subjected to interrogation were beaten with a leather braid over the face and body; if any of them fainted, water was poured over them. Another practice was to place a prisoner for a period of 24 hours or longer in a sort of bunker. This bunker was a special tiny cement cell resembling a barrel. The cell was large enough for only one person and the dimensions of the cell were such that a person could only remain in a cramped position. This kind of punishment was especially hard to endure because of confinement, lack of food and drink, the sensation of suffocating from the lack of fresh air accessed only through a very small opening, and the length of exposure.[110]

Apart from individual executions, Göth performed more wide-ranging actions aimed at destroying prisoners. Victims of such actions were usually weak, ill, emaciated or otherwise physically exhausted prisoners who, in Göth's opinion, were no longer fit for work. Such actions were many and each of them cost the lives of many people. Apart from this, Göth implemented a close scrutiny and selection of prisoners transported from the Gestapo prison in Kraków. The only criterion that mattered during selection was fitness for work. More than 1,000 persons lost their lives during the selection procedure. One such murderous action was the so-called Auschwitz action. In May 1944 "a health check-up" was arranged in the camp during which all inmates were forced to march naked in front of the commission presided over by Göth and Dr. Blanke, a camp doctor. All those who had been selected, including hospital patients and children from the camp kindergarten (a total of 1,400), were sent the next week to Auschwitz and ordered to be exterminated.[111]

Thus conditions at Płaszów camp could be compared to those of the most severe concentration camps, bearing in mind that sanitary conditions were dreadful and the lack of medication was the reason for epidemics and contagious diseases. In addition, Płaszów camp was not only a place of forced labour and execution site but also a transit camp through which

[110] *Ibid.*, pp. 17, 20–21.

[111] *Ibid.*, pp. 21–22.

people passed on their way to other concentration camps such as Auschwitz.[112]

Yet another example of physical and direct genocidal action undertaken by Göth was supervision of the liquidation of Jewish ghettos in Kraków and Tarnów. This criminal activity in the Kraków district was just a fragment of the wider action which aimed at the extermination of the Jewish population of Europe. Murderous extermination of the Jewish population had all the characteristics of genocide in the physical, biological and even the cultural meanings of the term.[113] One of the proofs of this murderous action was a letter (*Schnellbrief*) dated 21 September 1939 from the chief of the Security Police headquartered in Berlin addressed to all *Einsatzgruppen der Polizei*, which contained guidelines on how to proceed with Jews, and referred to *Endziel* – the "final target" – to be kept in secret but which is known to have alluded to

[112] *Ibid.*, pp. 17, 23. The way Göth treated inmates in the forced labour camp would alone fulfil all the characteristics attributable to the crime of genocide according to the contemporary judicature of international criminal tribunals. For example, according to the Trial Chamber of the ICTY, the notion "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" means "the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion"; ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 691 (https://www.legal-tools.org/doc/4c3228/). And according to the Trial Chamber of the ICTR, this notion means "deliberate deprivation of resources indispensable for survival, such as food or medical services"; ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR–95–1–T, Judgment, 21 May 1999, para. 115 ff. ("Kayishema Judgment") (https://www.legal-tools.org/doc/0811c9/). With regard to "causing serious bodily or mental harm", both the ICTY and ICTR held that this expression includes, among other things, inhuman treatment, torture, deportation, slavery, starvation, and threat of death during interrogations; see Akayesu Judgment, paras. 711–712, see *supra* note 51; Krstić Judgment, para. 513, see *supra* note 51; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 645 ("Blagojević Judgment") (https://www.legal-tools.org/doc/7483f2/).

[113] It is worth emphasising that "the Nazi idea of Jewish race not only encompassed the believers of Judaism and members of the Jewish community but also Jews who have been baptized and thus melted into Christian society for generations [...] Therefore, a final definition of a Jew was coined mixing a religious and racial perspective [...] Consequently, Jews were considered as a specific phenomenon resulting from a conflicting process with differing opinions of various Nazi racial ideologists, lawyers and officials rather that a natural and obvious category"; Nijakowski, 2012, pp. 37–38, see *supra* note 75.

total extermination of Jewish population. This target was to be achieved step by step.[114]

During Göth's trial, the Tribunal established that in order to achieve that aim, a whole series of special orders and regulations had been issued by the German authorities in the General Government. On the strength of the guidelines, Jews were banned from leaving designated residential quarters which were referred to as ghettos and which separated the Jewish population from the rest of the world, and thus facilitated the process of expulsion and deportation to death camps. The liquidation of the Kraków ghetto started on 13 March 1943 under the Göth's command. The ghetto in Kraków, like any other ghetto, was divided into two sections: a residential part where a number of Jews fit for work lived in barracks and another part inhabited by Jews unemployed and thus living in constant fear of their lives.[115] Those who were deemed fit for work were placed in the labour camp at Płaszów, others were killed or deported to surrounding extermination camps. Göth was also extremely active in these actions, killing a number of people including children. Assisted by guards assigned to complete the task, Göth carried out a terrible massacre of hospital patients, elderly people, children and parents who did not want to leave and thus chose to remain inside the ghetto walls.[116]

It was just as bad when it came to liquidation of the ghetto in Tarnów. The final liquidation was preceded by three resettlement actions. At its onset, in 1942, the Tarnów ghetto housed about 40,000 people. In June 1942 approximately 3,000 were executed on the spot, about 7,000 were shot in the surrounding forests and the remaining 10,000 inmates were mostly sent to Bełżec death camp from where none returned. When this action was completed, the Jewish population was diminished by some 20,000 people. In September 1942 the Tarnów ghetto was subjected to a second action of the same type which resulted in two transports sent to Bełżec totalling about 6,500 people. The third action was organised in

[114] Göth case, Sentence, pp. 8–9, see *supra* note 100.

[115] As Lemkin noticed: "In Poland, which has been made the principal Nazi slaughterhouse, the ghettos established by the German invader are being systematically emptied of all Jews except a few highly skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labor camps. The infirm are left to die of exposure and starvation or are deliberately massacred in mass executions"; Lemkin, 1944, p. 89, fn. 45, see *supra* note 2.

[116] Göth case, Sentence, pp. 9–10, see *supra* note 100.

November 1942 when another 2,500 people were segregated, with the final destination Bełżec. The final action occurred in September 1943, personally commanded by Göth. A group of about 3,000 people was selected and later taken to Płaszów camp, while a further 6,000 were sent to Auschwitz.[117]

Taking into consideration the findings of the Prosecution Council of the Supreme National Tribunal, it may be argued that they did more in defining genocidal activity in which Göth was engaged than just determining the physical and biological aspects of the crime of genocide. By presenting undeniable proof to the Tribunal of the murderous Nazi machine in action, aimed at the destruction of the subjugated Slavic nations and extermination policy of the Jewish nation, of which Göth was a devout enthusiast and supporter, prosecutors also succeeded in determining other elements of genocide associated with its economic, social and cultural dimensions. Moreover, prosecutors pointed to the fact that the crime of genocide was incorporated into the scope of crimes encompassed by the terms of the 1944 Decree, as it provided punishment for murder and ill-treatment not only of individuals but also for large groups of people persecuted on specific grounds.[118]

The verdict delivered on 5 September 1946 by the Supreme National Tribunal was based to a great extent on the indictment and approved the Prosecutors' statement of reason. Thus the Tribunal found Göth guilty on all counts, including the death of about 8,000 inmates of Płaszów labour camp, liquidation of Jewish ghettos in Kraków and Tarnów and liquidation in the labour camp in Szebnie. The Tribunal highlighted the fact that Göth was not only a commandant of the forced labour camp but also an active participant and officer in charge of the liquidation of a number of ghettos, deporting people to other camps or simply sending people to their death. According to the Tribunal:

> The activities of the accused are of a character of prolonged criminality of a degenerate criminal but [...] are a fragment of the wider action undertaken by the Nazi party that, as a criminal organization under the command of Adolf Hitler, aimed at assuming control of the world and extermination of whole groups or nations [...] Hence, individual and mass

[117] *Ibid.*, pp. 23–24.

[118] Law Reports, vol. VII, p. 8, see *supra* note 23.

> murders, appropriation and plunder of property both on an individual and mass scale, vesting an individual with unlimited and uncontrolled power over people. In the name of goals clearly defined by Hitler and with Himmler as their exponent, the Jewish nation was to be purged [...] Only the most reliable and trustworthy associates were entrusted with this mission. One of them was Amon Goeth [...] Within the system of extermination of Jews the camp at Płaszów managed by the accused Goeth was only one of those numerous torture chambers where murder was the ultimate goal.[119]

Therefore, in the Tribunal's opinion, Göth's responsibility for the deaths of thousands of people did not rouse any doubts since it fitted well as an element of the global Nazi policy aiming at the total extermination of the Jewish population in Europe. From the perspective of Polish law, the acts committed by the accused were crimes in violation of Article 1 paragraphs 1 (a) and (b) of the 1944 Decree. These acts were also in violation of the corresponding provisions of the Polish Criminal Code of 1932, concerning, among others, murder, grievous bodily harm, torture and ill-treatment, and infringement of personal liberty. In view of the perpetrated crimes, Göth was sentenced to death and executed on 13 September 1946 in Kraków.

40.3.3. Rudolf Höss and Genocidal Medical Experiments

Similar to the Greiser and Göth cases, the charges brought against Höss by the prosecutors of the Supreme National Tribunal were many, considering the fact that he was the commandant of Auschwitz concentration camp, which alone was enough to accuse him of membership in the criminal organisation and of criminal activity within the framework of that organisation. Here we focus on one particular aspect of genocidal activity: medical experiments resulting in birth prevention within the groups which had to endure them. The discussion of "biological genocide" based on the example of medical experiments carried out in concentration camps will therefore complement the earlier aspects, namely physical and cultural genocide as distinguished by Lemkin.

[119] Göth case, Sentence, pp. 28–29, see *supra* note 100.

Höss joined the Nazi Party in 1922 and in 1933 was called to join the ranks of SS and promoted to SS-*Obersturmbannführer*. Before he was appointed a commandant of Auschwitz he gained a great deal of experience as a *Blockführer* at Dachau concentration camp and later at Sachsenhausen concentration camp. However, his indictment before the Supreme National Tribunal covered only his operations as the commandant of the complex that was established and expanded by him at Auschwitz (in the period from 1 May 1940 to the end of October 1943) on the occupied territory of Poland. Höss was also in charge of the SS garrison at Auschwitz. As stated in the indictment, he was one of the creators of the Hitlerite system of harassment, oppression and persecution of nations which were meant for extermination in both concentration and death camps. Höss oversaw the implementation of this system at Auschwitz. His activities affected not only Polish and Jewish civilians and Soviet POWs but also representatives of many other nations captured in the area occupied and controlled by the Germans. Assisted by the camp staff, he deliberately deprived prisoners of life and health through, *inter alia*, medical experiments resulting in death or prevention of reproductive capabilities.[120]

Out of the nine biggest Nazi concentration camps, Auschwitz, which was intended as a central concentration camp for Europe and equipped with the most efficient gassing facility, gained the greatest notoriety due to the unbearable regime inevitably leading to the loss of life of almost every prisoner (*Vernichtungsandtalt*). Auschwitz is said to have been the world's biggest "death factory" where people were brought directly for the purpose of extermination. And all this activity was initiated and developed under the personal command of Höss.[121]

Evidence collected and presented by the prosecutors of the Supreme National Tribunal (including an expert opinion submitted by Dr. E. Kowalski, Assistant Professor at Jagiellonian University, Kraków) explicitly demonstrated that numerous medical experiments were performed on men and women of non-German origin, mostly Jews, at Auschwitz. Sanctioned by the Nazi authorities and ordered by Höss himself, the experiments included castration, those intended to produce sterilisation, and those causing premature termination of pregnancies and

[120] Höss case, Indictment, pp. 8–9, see *supra* note 103.

[121] *Ibid.*, pp. 11, 13.

carried out on pregnant and child-bearing women.[122] It must be noted that performing a variety of medical experiments on prisoners was a common practice at Nazi concentration camps. Prisoners were coerced into participating and the terror present in the camps precluded any voluntary and freely expressed consent to undergo such experiments. In addition, those who undertook the experiments mainly focused on testing and could not prove any experience or expertise, which inevitably resulted in a high death toll. Physicians who ran SS medical institutions and conducted medical experiments were never concerned with the health of patients undergoing operations, and after testing certain methods they were not interested in their subjects any more. On the contrary, on many occasions, they sent patients who had been operated on straight to the gas chambers.[123]

This practice of criminal medical experiments was glaringly inconsistent with universally acknowledged (including in Germany) medical ethics and medicinal science. In the famous doctors' trial (the trial of Karl Brandt and others),[124] the American Military Tribunal in Nuremberg had already clarified what was meant by "permissible medical experiments" and formulated 10 basic principles which had to be observed in order to satisfy moral, ethical and legal concepts. In brief, these principles were as follows:

> 1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent […] and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision […]

[122] Law Reports, vol. VII, p. 14, see *supra* note 23.

[123] Höss case, Indictment, p. 56, see *supra* note 103. According to Dr. Olbrycht's testimony, who was called as an expert during the trial of Höss, what characterised the camp doctors in general was a complete lack of respect for human life as exemplified by the following incident. When, as a prisoner, Olbrycht was compelled to perform a post-mortem, he asked where the corpse was. He was answered with the macabre cynicism: "Die Leichen spazieren noch" (the corpse is still taking a walk); Końcowe przemówienie Prokuratora NTN dra Tadeusza Cypriana w procesie Rudolfa Hoessa [The Final Speech of the SNT Prosecutor Dr. Tadeusz Cyprian in the Trial of Rudolf Hoess (Höss)], in Michał Królikowski *et al.* 2010, p. 169, see *supra* note 30.

[124] US Military Tribunal Nuremberg, *The United States of America v. Karl Brandt et al.*, Judgment of 19 July 1947 ("Brandt case").

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.
3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.
4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.
5. No experiment should be conducted where there is an *a prior* reason to believe that death or disabling injury will occur […]
6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.
7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.
8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.
9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.
10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.[125]

[125] *Ibid.*, pp. 12–13.

With regards to medical experiments conducted at Auschwitz, none of these rules were observed. SS camp doctors, Wehrmacht doctors as well as German civilian doctors were involved in experiments on those stigmatised as elderly or ill but also on relatively healthy prisoners, without any restrictions, without the subject's consent and, surely, without sparing a single thought about their condition. Young untrained German doctors or even students of medicine performed various hazardous operations only in order to advance their skills.[126] Experiments, therefore, were carried out at the doctor's own behest and for their own professional development.

Another category of experiments were those of utmost importance carried out on a large scale aiming at elaborating methods of extermination. These experiments were practised "in order to develop techniques for outright killings and abortions, on one hand, and sterilisations and castrations, on the other hand".[127] According to Lemkin, the first method may be called "ktonotechnics" (from the Greek *ktonos*, meaning murder) and the second "sterotechnics" (from the Greek *steiros*, meaning infertility). Both ktonotechnics and sterotechnics were considered by the Nazis as essential and served the purposes of genocide in its physical and biological aspects.[128]

These experiments were inspired by and had the characteristics of the genocidal intent. In order to illustrate this aspect of genocide, the following instances of medical experiments conducted at Auschwitz are presented, each of which aimed at "imposing measures intended to prevent birth within a particular group", because of race (Jews), nationality (Poles, Czechs) or religion (Jews).

Castration experiments were performed on healthy individuals of both sexes and of different ages and nationalities (mostly Jews) without their voluntary consent. During these experiments, women and men who were subjected to them had their ovaries and testicles exposed to X-ray radiation. Different X-ray dosages were applied, but usually very large. Next, radiated ovaries and testicles were removed surgically for

[126] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Wyrok w sprawie Rudolfa Franza Ferdinanda Hoessa [The Sentence in the Case of Rudolf Franz Ferdinand Hoess (Höss)], archival file no. IPN GK 196/114/2, p. 63 ("Höss case, Sentence").

[127] Lemkin, 1947, p. 147, fn. 6, see *supra* note 47.

[128] *Ibid*.

laboratory examination and in order to obtain histological samples. These experiments caused undue suffering, permanent injuries or even death. The large dosage of X-rays caused not only complete castration but also burns and necrosis of parts of the body. Several dozen women and men were permanently harmed as a result of the experiments. Men who were subjected to intensive X-ray treatment often died and even if they survived, they were in constant danger of death. They were temporarily or permanently deprived of their fertility and even of their potency. Women subjected to intense X-rays showed climacteric symptoms related to the atrophy of the ovaries. They soon showed senile changes and died. Even if they survived, a temporary or permanent loss of fertility followed.[129] Castration of women was also carried out by short waves, causing coagulation of the deeper layers of the tissue, severe burns and even death.[130]

Karl Clauberg, a professor of gynaecology at Koenigsberg University, conducted sterilisation experiments at Auschwitz on many people. He was especially dedicated to the treatment of sterile women whom he was able to make fertile. According to Clauberg's observation, in most cases infertility was caused by fallopian tubes being blocked. In order to cure this defect, Clauberg introduced into the female reproductive organs a specially prepared liquid which produced the effect of loosening clumps and restoration of potency. Clauberg's treatment was successful and women who had previously been sterile could become pregnant. As a result, Clauberg received a great deal of attention in Germany.[131] When Heinrich Himmler was informed about Clauberg's achievements, he asked him whether it would be possible to get a reverse effect, namely to develop sterility in fertile women. Himmler emphasised that he was looking for a "cheap, quick and efficient" method to sterilise women on a large scale and without undue publicity. In the course of his trial, Höss explained that Himmler intended to use Clauberg's sterilisation method in

[129] According to Kowalski, who gave expert evidence at the trial, X-rays applied in a certain dosage to germinate cells causing hereditary injuries to the latter. Progeny born from such cells either could not survive or would carry congenital anomalies. Also X-ray treatment of female genital organs and in particular of the uterus caused injuries, owing to which pregnancy ended in about 42 per cent of cases in miscarriage or premature delivery; Law Reports, vol. VII, p. 25, see *supra* note 23.

[130] *Ibid.*, pp. 14–15.

[131] Höss case, Indictment, p. 59, see *supra* note 103.

order to exterminate and biologically eradicate the Polish and Czech nations. Himmler held the view that both nations should be expelled from their territories so that they would never again threaten or limit Germany's drive for *Lebensraum*. Before the outbreak of the war, Himmler planned to expel Poles and Czechs to the east. However, in view of the latent configuration of powers, he reconsidered this idea and admitted Poles and Czechs as remaining within the German living space as vassal states totally dependent on the Reich. As an absolute requirement, Himmler saw the elimination of all those elements who opposed German supremacy. This purpose was to be achieved by, among other methods, forced sterilisation, and the methods were to be researched by Clauberg during experiments on hundreds of Jewish women at Auschwitz.[132]

As soon as Clauberg undertook the task commissioned by Himmler, he was transferred to Auschwitz where Block No. 10 was put at his disposal, along with women prisoners selected personally by Clauberg and aged between 20 and 30 years who had regular periods and who had borne at least one child. They were placed in Block No. 10 as hospital patients and labelled in camp files as "female prisoners for experimental purposes". After conducting a thorough medical history, a woman was placed in a gynaecological chair and under X-ray control had a contract agent injected to her fallopian tubes to check their permeability. After permeability was confirmed, and upon a lapse of a few moments, Clauberg again injected a specially prepared liquid into the fallopian tubes, with an admixture of a contrast agent. In all cases, the effect produced within six weeks included the fallopian tubes being blocked. After six weeks, Clauberg performed medical check-ups using X-ray and injected contrast agents into the fallopian tubes. In case of any doubts, Clauberg did not hesitate to repeat the whole procedure, again injecting the chemical agent, this time of a higher concentration. These experiments, as well as the agents used, were kept strictly confidential. All victims of Clauberg's experiments were to be killed after the final result had been obtained. Witnesses estimated the total number of sterilisation experiments at about 1,000.[133] According to the testimony of

[132] *Ibid*., pp. 59–60.

[133] *Ibid*., pp. 60–61. Men were also sterilized through suture of the *vas deferens*. The total number of victims of all sterilisation experiments was estimated at about 3,000; Law Reports, vol. VII, p. 15, see *supra* note 23.

one witness, "Professor Clauberg admitted that his experiments were of no scientific value. Identical results were previously obtained on animals and were well known to the medical profession".[134] Thus his experiments at Auschwitz could not serve any scientific purposes. In addition, they were performed in terrible conditions, which often led to chronic illness, permanent injury or even death. Neither the doctors nor the assistant personnel were properly trained for those experiments.[135]

With regard to the premature termination of pregnancy and other experiments on pregnant or child-bearing women, these were carried out by the emptying of the uterus, injections of Abortus Bangserum or by laparotomy and extirpation of the uterus. Women were ill for several weeks after these experiments. Delivery was provoked by artificially causing contracture of the uterus musculature or by the use of a balloon. About 50 pregnant women were subjected to such experiments. Frequently, the blood of people suffering from typhus was injected before labour, in order to verify whether or not a typhoid fever would be transmitted to the new-born baby.[136] As a rule, however, all pregnant women who were placed in the camp hospital were assigned the SB (*Sonderbehandlung*) special treatment category, which was a euphemism for gassing. Until 1943 women who arrived in the camp already pregnant or those who became pregnant in the camp were denied the right to live. Even after successful delivery, both child and mother were killed with an injection of phenol.[137]

The Supreme National Tribunal, after considering the evidence collected, the testimonies of surviving witnesses and detailed expert opinions submitted by Dr. Olbrycht and Dr. Kowalski, recognised the trial of Höss as another example where the crimes had all the characteristics of genocide. The Tribunal distinctly emphasised that the NSDAP aimed at biological and cultural destruction of subdued nations, in particular the Jewish and Slavic nations, in order to acquire territory as propagated by the Nazi programme for *Lebensraum* and to ensure the superior position of the German race in the world while the systematic extermination programme of prisoners proceeded. The Tribunal defined genocide as

[134] Law Reports, vol. VII, p. 15, see *supra* note 23.

[135] *Ibid.*

[136] *Ibid.*

[137] Höss case, Indictment, pp. 57–58, see *supra* note 103.

"acts attempted and committed as a part of policy to destroy or violate the most fundamental human rights, the right to exist and the right to live".[138] Therefore, the guilt of the accused encompassed the whole evil of the murderous system implemented in the camp, not only at the time when Höss was in charge but also throughout the entire span of the camp's operation, including all liquidation actions and medical experiments. Further, the Tribunal adjudicated that these experiments, according to the experts' opinion, having no importance for medicine and of no significance for medical progress, were meant as the preliminary phase in the Nazi genocidal policy, leading to their global hegemony. In short, they were intended to elaborate methods of destruction of the reproductive capabilities of subdued nations.[139]

Even if it could be assumed that these experiments were not expected to serve any definite political aims, their criminal character is beyond any doubt. They violated all rules which must be observed when medical experiments are performed on human beings. Thus all these experiments violated the general principles of criminal law as derived from the criminal laws of all civilised nations.[140] However, taking into account the political directives issued by the supreme German authorities, and the character of the experiments performed at Auschwitz on their orders, it seems obvious that they constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.[141]

With regard to Polish law, the Tribunal based its judgment on Articles 1 and 2 of the 1944 Decree in conjunction with applicable provisions of the Criminal Code of 1932. Höss was found guilty on all counts and sentenced to death by a judgment which had the force of *res judicata*. The sentence was carried out by hanging in the area of the

[138] Höss case, Sentence, pp. 70–71, see *supra* note 126.

[139] *Ibid.*, p. 73.

[140] Law Reports, vol. VII, p. 25–26, see *supra* note 23.

[141] *Ibid.*, p. 26, see *supra* note 122. It should be noted that nowadays, according to the jurisprudence of the ICTR, the crime of genocide in the form of "imposing measures intended to prevent births within the group" comprises not only the practice of sterilization, castration and sexual mutilation, but also forced birth control, separation of the sexes, prohibition of marriages and even rape as an act directed to prevent births when the woman raped refuses subsequently to procreate; see Akayesu Judgment, paras. 507–8, *supra* note 51.

former Auschwitz concentration camp, adjacent to the crematorium and the location of the Gestapo camp.

40.4. Subjective Element of Genocide versus Superior Orders and Crimes of Subordinates

With reference to each case we have discussed, aside from presentation of objective components of the crime of genocide, the subjective element of the crime – genocidal intent – has to be analysed. It must be stressed that all the accused referred to superior orders which they had to obey or pleaded ignorance with regard to their subordinates' actions. However, as indicated by the Supreme National Tribunal, neither the criminal acts nor criminal orders released the accused from liability for crimes such as genocide. Fulfilling the Nazi extermination policy, the accused assumed responsibility both for Hitler's orders and the orders of their immediate superiors, as well as any consequences of their criminal activities in their capacity as a superior, that is for all orders issued directly or indirectly to party, administrative or military officials.

The definition of the crime of genocide was based upon that of the crime against humanity and encompassed the conception of "extermination and persecution on political, racial or religious grounds" and was intended to cover "the systematic destruction of all or substantial part of a racial, ethnic, religious or national group". Genocide, however, is different from other crimes against humanity. The essential difference is the presence of genocidal *intent* (specific intent to exterminate a protected group in whole or in part) whereas a crime against humanity requires the civilian population to be targeted as part of a widespread or systematic armed attack.[142] The presence of *dolus specialis*, that is special intent to kill or destroy, precludes such categories of mental states as recklessness or gross negligence.[143] A perpetrator must, therefore, aim at destruction in whole or in part of a specific protected group. The knowledge of a perpetrator that intended acts may result in genocide is not sufficient; what is required is that his actions be governed by the intent to destroy the group.[144]

[142] See Kayishema Judgment, para. 89, *supra* note 112.

[143] Cassese, 2008, p. 137, see *supra* note 44.

[144] Blagojević Judgment, para. 656, *supra* note 112.

Dolus specialis, however, is not tantamount to a perpetrator's motive. "Intent to destroy a group as such" must, therefore, be distinguished from a motive or incentive that need not be ignited by hatred, but may be related to political, economic, racial or other reasons, resulting from prejudices, retaliation or a desire to control a given territory and its resources.[145] The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.[146] Such a motive may thus serve as an additional proof of the existence of genocidal intent.[147]

In light of contemporary case law, "a genocidal plan" is not required to commit genocide. Thus, it is not deemed to be a legal element of genocide, although the presence of a premeditated plan or policy may prejudge the evidence of the crime.[148] However, as Cassese rightly notes, "genocidal acts […] are hardly conceivable as isolated or sporadic events. Normally they are in fact part of a pattern of conduct tolerated, approved, or condoned by governmental authorities".[149]

In the cases examined here, the Supreme National Tribunal had no doubts as regards the participation of the accused in the crime of genocide, that there was a clear genocidal intent on their part and that they were personally guilty of genocidal acts. Hence the Tribunal satisfied Lemkin's proposal according to which

> [t]he liability for genocide should rest on those who gave and executed the orders, as well as on those who incited to the commission of the crime by whatever means, including formulation and teaching of the criminal philosophy of genocide. Members of government and political bodies which organized or tolerated genocide will be equally responsible.[150]

[145] Matyasik and Domagała, 2012, p. 38, see *supra* note 9.

[146] ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeal Judgment, 5 July 2001, para. 49 ("Jelisić Appeal Judgment") (https://www.legal-tools.org/doc/477a30/).

[147] Nersessian, 2010, p. 36, see *supra* note 50.

[148] Jelisić Appeal Judgment, para. 48, see *supra* note 146.

[149] Cassese, 2008, p. 141, see *supra* note 44.

[150] Lemkin, 1946, p. 230, see *supra* note 55.

In the Supreme National Tribunal's opinion, each of the accused – Greiser, Göth and Höss – were responsible for the crime of genocide in the physical, biological and cultural meanings of the term due to voluntary participation in the criminal conspiracy aimed at planned extermination of Jewish and Slavic nations. In each of the trials, the Tribunal emphasised the genocidal intent behind the activities of the accused, paying attention to the collected evidence. In addition, the Tribunal highlighted the fact that neither superior orders nor crimes committed by their civilian or military subordinates released the accused from criminal responsibility.

During his trial, Greiser persistently tried to lay blame on third parties, including Hitler and Himmler in particular, both dead at that time. Then, with equal determination and disregarding the submitted evidence against him, he apportioned responsibility to lower-ranking officials, especially SS and Gestapo officers, purportedly enjoying autonomy, as well as the chiefs of administrative departments who received instructions straight from Berlin.[151] In the light of Greiser's statements, as one of the leaders of the NSDAP and *Gauleiter* of Wartheland, he claimed he knew nothing of the extermination plan and pursued his administrative duties as if he had been shut from reality, "sitting in a golden cage" of a "castle, vehicle or official saloon car".[152] He allegedly had no knowledge about the special methods in force aiming at the total destruction of the Polish culture, religion, schooling system, science and books, brutal atrocities committed on the representatives of this culture, cultural centres and premises. However, even if we take into consideration his strict disciplinarian attitude and blind obedience in fulfilling Hitler's orders, his plea could still not diminish his guilt for perpetrated crimes as not every single "order from a superior" deserves to be carried out by a subordinate. In the Tribunal's opinion, only lawful orders should be followed, whereas those inciting to crime and ruthless acts must be ignored. Parties who stood behind the issuing and fulfilling of criminal orders, namely the perpetrator and commander, were equally guilty. Hence, Greiser had to face charges relating to "all criminal features symptomatic of his

[151] However, as Lemkin underlined, "when Germany occupied the various European countries, Hitler considered their administration so important that he ordered the Reich Commissioners and governors to be responsible directly to him"; Lemkin, 1944, p. 81, see *supra* note 2.

[152] Greiser case, vol. V, p. 188, see *supra* note 97.

unconditional obedience as a subordinate and collaborator of the *Führer*" as well as "all criminal features symptomatic of his strict disciplinarian attitude as a superior, i.e. all orders, dispositions and instructions given by him, directly or indirectly, and addressed to subordinate party and administrative officials of the former Wartheland".[153]

The Tribunal dismissed as absolutely ungrounded, in light of the submitted evidence, statements by Göth claiming that he was only fulfilling duties arising from the commandant's position held by him and was only carrying out orders and instructions he received from his superiors; that he did not order executions which were ordered and enforced mostly by the Gestapo or Ukrainian troops delegated to the camp; that he never deprived anyone of life without just cause and, if he did, it was within his disciplinary jurisdiction as commandant of the camp and was necessitated by the harsh law of war in cases such as possessing weapons by inmates or cases of sabotage, and so on. Such incidents also justified the use of temporary measures such as caning (which, however, was not connected with undue harassment of prisoners).[154] Laying blame on his superiors or otherwise apportioning responsibility to his subordinates and their wilful conduct could not have released Göth of responsibility or diminished or rescinded his guilt. Göth's actions resulted from his own voluntary participation in a large-scale programme of extermination of whole groups and nations, the Jewish nation in particular. The fact that he consented to such actions and regarded them as a part of his own beliefs and philosophy allowed the assumption that he approved of the methods applied, thus accepting full responsibility for his actions.[155].

Similarly to Greiser and Göth, as witnesses delivered testimony regarding dreadful living conditions and beastly cruelty displayed towards prisoners at Auschwitz, Höss raised his defence by laying blame on his subordinates who allegedly transgressed his orders and committed crimes of their own initiative.[156] Likewise, he tried to depreciate his guilt and diminish the gravity of the crimes alleged by saying that he was only carrying out orders received from his superiors. The Tribunal, however,

[153] *Ibid.*, pp. 188, 190–191.

[154] Göth case, Sentence, pp. 27–28, see *supra* note 100.

[155] *Ibid.*, pp. 28–29.

[156] See Cyprian Speech, p. 174, *supra* note 30.

disregarded this plea and stated that accepting a criminal order requires also taking responsibility for it, as acting upon an order alone does not exempt one from criminal responsibility. The accused might have escaped responsibility provided only that he had distanced himself from participation in the fascist-Hitlerite conspiracy. The accused, however, not only remained among its members but also, owing to his activity, multiplied the final effects.[157] Therefore, Höss was far from being merely a blind supporter and executor of Himmler's instructions as the camp's commandant but offered his own initiative in zealous performance of his duties, seeking to anticipate orders and instructions and, in an excess of diligence, fulfilling them conscientiously. Thus, he might be described as "a paragon of all virtues the murderous regime could possibly expect from devoted servants".[158] Significantly, Höss continued to be in control of the genocidal activity even after he left the post of the camp's commandant and fulfilled the function of Himmler's special plenipotentiary in the extermination of Jews, proving his unspeakable cruelty in that capacity resulting either from his own initiative or sanctioned by his express or tacit permission.[159]

In all these cases, the Tribunal dismissed the statements of the accused, relying on Article 5 paragraph 1 of the 1944 Decree, according to which:

> The fact that any of the crimes envisaged in Articles 1 and 2 of the Decree was committed while in service of the enemy authority of occupation or on its orders, or under duress, does not exempt from criminal responsibility.

The Tribunal expressly clarified its position with regards to the matters in question during the trial of Ludwig Fischer, summarising points concerning responsibility for participation in criminal organisations and institutions of the Third Reich. According to the Tribunal, everybody who had specific knowledge of the criminal purposes of an organisation declared intent to be a part of such an organisation or scheme and was deemed capable of anticipating the goals and intentions of the organisation which he accepted. Such a person was considered legally bound by the statutory obligation to obedience, assistance and

[157] Höss case, Sentence, p. 74, see *supra* note 126.

[158] *Ibid.*, p. 73, see *supra* note 126.

[159] Höss case, Indictment, p. 13, see *supra* note 103.

participation, and, on the executive level, to initiative and active encouragement. Thus membership in a group or organisation entailed assuming full responsibility for the group or organisation's activity. While the collective responsibility represented higher order responsibility, several liabilities for one's own guilt still remained.[160]

As regards an order as a circumstance excluding criminal prosecution, the Tribunal maintained the stance that if a person joined a scheme or organisation which required discipline and strict obedience, and accepted their methods and means as his own, the person must consequently assume responsibility for fulfilling the organisation's orders. What was important was not the time when an order was received but "the moment when membership in the party or other criminal organisation originated because this is when an individual consented to the group's rules compelling him to demonstrate obedience and observance of all instructions",[161] including those regarding genocide.

40.5. Conclusions

Crimes committed during the Second World War and the whole period of occupation by the fascist-Hitlerite regime, and in particular the carefully planned and systematic scheme of total extermination of the Jews and destruction of the Slav population, including the Polish nation, could not carry on with impunity and deserved justice to be administered, although the scale of crimes committed extended far beyond both national and international legal regulations. Concentration camps and so-called forced labour camps, which were in fact death factories, did not serve preventative functions and definitely were not places of confinement of people considered as dangerous to the occupation authorities. Medical experiments conducted there certainly did not serve any medical or scientific purpose. Acts aimed at the destruction of culture, religion or other intellectual assets of suppressed nations were not mere acts of vandalism, war robbery or a form of retaliation. All these acts were elements of genocide with the physical, biological and cultural aspect planned to the last detail by the Nazis.

[160] Najwyższy Trybunał Narodowy [Supreme National Tribunal], Wyrok w sprawie Ludwiga Fischera [The Sentence in the Case of Ludwig Fischer], in Kr ó dikowski *et al.*, 2010, p. 118, see *supra* note 30.

[161] *Ibid.*, p. 119.

A substantial part of those atrocities was carried out in the occupied territory of Poland. Mass executions, slave labour, unspeakable suffering, exploitation and death (resulting from, among others, medical experimentation), as well as wholesale robbery, destruction of cultural property and germanisation of Polish civilians were everyday practices during the Nazi occupation. The Supreme National Tribunal faced a tremendous task in delivering justice in crimes that had not so far been determined and recognised by law. Lawyers and prosecutors of the Tribunal were aware of the burden imposed on them in connection with the serious nature of the trials. In addition, they were provided with an opportunity to improve the legal system that was to judge Nazi criminals. To satisfy all requirements resulting from these challenges, the Tribunal heard from Ludwik Ehrlich, Professor of International Law at the Jagiellonian University, Kraków, along with many other prominent experts.[162] Lawyers involved in the task of developing procedural materials must have closely followed the progress of the proceedings, especially the Nuremberg trials, but also discussions and controversies over the elaboration of adequate nomenclature, including, in particular, the conception of the crime of genocide as coined by Lemkin.

The Supreme National Tribunal had no doubts as to the responsibility of Greiser, Göth and Höss – they were accused of the crime of genocide as reflected in the procedural files and preparatory records. Taking special notice of this crime, describing it in detail and, finally, delivering justice significantly supported efforts that culminated in the definition of genocide and the adoption of the Genocide Convention. But the Supreme National Tribunal went a step further and presented a broader view on the definition of genocide as also embodying its cultural aspect, i.e. the planned and deliberate destruction of cultural, national and religious heritage and the integrity of identified groups. Thus the sentences passed in the three cases constitute proof of the efficacy of pursuing and punishing the crimes of genocide, as well as an undisputed contribution towards a proper understanding of a crime that posed a threat for the whole of humankind. Indeed, many aspects of genocide – which in part overlaps with war crimes and crimes against humanity, and in part is different in scope and detail – could only be sufficiently dealt with by

[162] Cf. Gawron, 2012, p. 139, see *supra* note 62.

particular extensions of the national law and jurisprudence.[163] Therefore, the trial of Nazi criminals before the Supreme National Tribunal must be seen as innovative and a step ahead of international law arrangements and decisions at that time.[164]

[163] See Wright in Law Reports, vol. XIII, p. x, *supra* note 55.

[164] Gawron, 2012, p. 142, see *supra* note 62.

41

Post-Second World War Trials in Central and Eastern Europe

Veronika Bílková*

41.1. Introduction

In the aftermath of the Second World War, a wave of trials against persons accused of having committed war crimes, crimes against humanity and other serious crimes under international or national law in the course of the war swept through Europe and the Far East. In addition to the two International Military Tribunals established in Nuremberg and Tokyo, a range of national courts participated in this unprecedented legal enterprise which laid the foundations of modern international criminal law. While some instances of national practice – for example, trials under Control Council Law No. 10 – are relatively well known, others have so far escaped close scrutiny. Seeking to fill in one of these blank spots, this chapter focuses on trials of Second World War criminals that were held in Central and Eastern Europe. More specifically, it discusses the situation in three countries of the region – Czechoslovakia, Yugoslavia and the Soviet Union. This chapter does not aim at putting forward a detailed account of all post-war trials held in these countries, although the presentation of basic facts is necessary to set the scene. The main purpose is to identify certain trends that these trials demonstrated and to assess the compatibility of their course and outcomes with the then emerging principles of international criminal law.

41.2. Post-Second World War Trials in Czechoslovakia, Yugoslavia and the Soviet Union

The geographical scope of this chapter − Czechoslovakia, Yugoslavia and the Soviet Union − is not accidental. The choice was made on the basis of many similarities but also certain differences these countries reveal, which make their comparison interesting. The similarities relate first to the legal tradition – all the three countries belonged to the civil law

tradition,[1] characterised by an emphasis upon written sources of law and by a limited role assigned to case law. Another shared feature is the position of the three countries during the Second World War – they all belonged to the anti-Nazi camp, and they were all attacked and occupied by Nazi Germany. All of them had strong Resistance movements formed in the occupied territory. That also means that after the war, Czechoslovakia, Yugoslavia and the Soviet Union were all part of the victorious Allied bloc. However, they paid a high price for this victory, having suffered heavy casualties[2] and had their economies seriously damaged during the war. Finally, the three countries were all multiethnic in nature, with the predominance of a Slavonic element and the co-existence of various minorities.[3] To complete the picture, it should be recalled that none of the three countries survived the fall of communism: all dissolved after 1990 into several independent states.

Despite these similarities, the three countries also exhibit certain differences. The obvious one relates to their political system: while the Soviet Union had been a totalitarian country since the October Revolution of 1917, Yugoslavia and, especially, Czechoslovakia knew a period of democracy between the First and Second World Wars which continued − albeit for a short period and with certain modifications − in the aftermath of the Second World War when most of the trials took place. The differences in the political systems also had an effect on the legal and

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1 Patrick H. Glenn, *Legal Traditions of the World*, 3rd ed., Oxford University Press, Oxford, 2007, pp. 125–70.

2 The Soviet Union lost 20 million people, Yugoslavia 1 million and Czechoslovakia 350,000, mostly civilians. The countries ranked first, seventh and thirteenth respectively among countries with the highest number of victims.

3 During the Second World War, several of these minorities joined the Nazi camp, often in an attempt to liberate themselves from the dominant nation's influence. This, however, was not only the case with non-Slavonic minorities, as in all the three cases, Slavonic nations (Slovaks in Czechoslovakia, Croats in Yugoslavia and Ukrainians in the Soviet Union) also originally allied with Nazi Germany.

judicial systems of the three countries which, though all belonged to the civil law tradition, were not identical. The domestic legal order of the Soviet Union was already shaped by the communist ideology, which saw law primarily as an instrument in the hands of the working class (or, rather, of the Communist Party of the Soviet Union) aimed at serving the needs of the communist society.[4] By contrast, the domestic legal orders of Czechoslovakia and, to a lesser extent, Yugoslavia in place after 1945 still adhered to the main principles of the continental legal culture, with its emphasis on the protection of individual rights and the standards of fair trial. The situation changed in the second half of the 1940s, when Yugoslavia and later Czechoslovakia passed into the socialist camp, embracing the communist ideology as well. By then, however, most of the Second World War trials had already been completed.

Trials of persons responsible for crimes committed during the Second World War started in all the three countries shortly after, or even prior to, the end of the war. The wave of prosecutions reached its peak in 1945 to 1948. In this period, Czechoslovakia, Yugoslavia and the Soviet Union all actively supported and participated in the activities of the International Military Tribunal ('IMT') in Nuremberg and, in case of the Soviet Union, also in the International Military Tribunal for the Far East ('IMTFE'). All three also voted in favour of the United Nations General Assembly Resolution 95 (I)[5] affirming the principles of international law recognised by the IMT Charter. Since many of the war criminals went into hiding after the end of the Second World War and were only gradually, and often accidentally, discovered in the following decades, the trials continued, occasionally and at irregular intervals, throughout the period of the Cold War. After the end of the Cold War and the subsequent dissolution of the three multiethnic states (the Soviet Union and Yugoslavia in 1991, Czechoslovakia in 1993), the prosecution of Nazi and pro-Nazi criminals was, albeit only in some of the newly established or restored post-communist countries, complemented by the prosecution of war criminals from the victorious camp. Although these later stages are beyond the scope of this chapter, they will be occasionally invoked so as to complete the picture of the post-Second World War trials.

4 See John Quigley, "Socialist Law and the Civil Law Tradition", in *American Journal of Comparative Law*, 1989, vol. 37, no. 4, pp. 781–808.

5 Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, 11 December 1946, UN Doc. A/RES/95(I).

41.2.1. Post-Second World War Trials in Czechoslovakia

Czechoslovakia was among the first victims of the expansive plans of Nazi Germany. In the autumn of 1938, as a consequence of the Munich Agreement,[6] Czechoslovakia lost its border regions largely inhabited by an ethnic German minority. In March 1939 the Slovak part of Czechoslovakia declared itself to be an independent pro-fascist Slovak State (Slovenský štát), while the Czech part was occupied by Nazi Germany and transformed into the Protectorate of Bohemia and Moravia (Protektorát Čechy a Morava, the 'Protectorate').[7] The occupation lasted until May 1945 and cost the lives of 350,000 Czechoslovak citizens (25,000 soldiers, 340,000 civilians including 280,000 people of Jewish origin murdered in the Holocaust).[8] In January 1942 the leaders of the Provisional Government of Czechoslovakia residing in London signed the St. James's Agreement in which the representatives of several governments in exile set the punishment, through organised war crimes trials, of acts perpetrated by German occupiers against civilian populations in Europe as one of their main aims. The drafts of acts that were intended to serve as the legal basis for such punishment were prepared by the Provisional Government in 1943 to 1945 and adopted, in the form of decrees of the President of the Republic,[9] after the liberation of Czechoslovakia in May 1945.

The process of criminal punishment of persons responsible for atrocities committed during the Second World War, and for other misdeeds related to the occupation, was so unprecedented in the history of

6 See Quincy Wright, "The Munich Settlement and International Law", in *American Journal of International Law*, 1939, no. 33, pp. 12–32.

7 Certain parts of Czechoslovakia were occupied by Hungary (southern Slovakia) and by Poland (Silesia).

8 See Grzegorz Frumkin, *Population Changes in Europe Since 1939: A Study of Population Changes in Europe during World War II as shown by the Balance Sheets of Twenty-four European Countries*, A.M. Kelly, New York, 1951, pp. 48–49.

9 The decrees of the president of the Republic were an exceptional type of legal act introduced in 1940 when the Czechoslovak parliament could not reconvene. The decrees had the same legal force as laws (decrees) or as constitutional laws (constitutional decrees). To remain in force after the Second World War, they needed to be confirmed by the newly established Parliament. This happened en bloc, for all the decrees, in 1946; Ústavní zákon č. 57/1946 Sb., kterým se schvalují a prohlašují za zákon dekrety presidenta, 28. března 1946 [Constitutional Law No. 57/1946 Coll. Confirming and Promulgating into Law the Decrees of the President, 28 March 1946].

Czechoslovakia that it earned a special title of "retribution" (*retribuce*), which is only used in the Czech language in this context. The retribution relied on three main legal acts. The first act, Decree No. 16/1945 Coll. of 19 June 1945 on the Punishment of Nazi Criminals, Traitors and their Accomplices, and on Extraordinary People's Tribunals (the 'Great Retribution Decree')[10] introduced three categories of war-related crimes – crimes against the state, crimes against people and informing – and established extraordinary people's tribunals to prosecute persons suspected of having committed these crimes. The second act, Decree No. 17/1945 Coll. of 19 June 1945 on the National Court (the 'National Court Decree'),[11] created a special court – the National Court (*Národní soud*) – tasked to prosecute leading pro-Nazi collaborators. The third act, Decree No. 138/1945 Coll. of 27 October 1945 on the Punishment of Certain Offences against National Honour (the 'Small Retribution Decree')[12] conferred upon the municipalities (national committees) the power to prosecute Czechoslovak citizens for non-criminal offences against national honour.[13]

Originally, the three decrees were supposed to apply throughout the whole territory of Czechoslovakia but, in the end, they only applied in the Czech part. The Slovak part adopted its own retributive legislation in the form of the Regulation of the Slovak National Council No. 33/1945 Coll. ('Regulation No. 33').[14] The Regulation differed from the Czech decrees in two respects. First, while the Czech decrees largely took over criminal offences enshrined in the pre-war Criminal Code and the 1923 Law on the

[10] Dekret č. 16/1945 Sb. o potrestání nacistických zločinců, zrádců a jejich pomahačů a o mimořádných lidových soudech, 19. června 1945 [Decree No. 16/1945 Coll. on the Punishment of Nazi Criminals, Traitors and their Accomplices, and on Extraordinary People's Tribunals, 19 June 1945].

[11] Dekret č. 17/1945 Sb. o Národním soudu, 19. června 1945 [Decree No. 17/1945 Coll. on the National Court, 19 June 1945].

[12] Dekret č. 138/1945 Sb. o trestání některých provinění proti národní cti, 27. října 1945 [Decree No. 138/1945 Coll. on the Punishment of Certain Offences against National Honour, 27 October 1945].

[13] See also Jan Kuklík, *Mýty a realita tzv. Benešových dekretů* [*Myths and Reality of so-called Beneš Decrees*] Linde, Prague, 2002.

[14] Nařízení Slovenské národní rady č. 33/1945 Sb. SNR, o potrestání fašistických zločinců, okupantů, zrádců a kolaborantů a o zřízení lidového soudnictví, 15. května 1945. [Regulation of the Slovak National Council No. 33/1945 Coll. on the Punishment of Fascist Criminals, Traitors and Collaborators and on Establishing the People's Judiciary, 15 May 1945].

Protection of the Republic,[15] Regulation No. 33 introduced several new offences not previously known in the legal order. Second, although both the Czech decrees and Regulation No. 33 established extraordinary people's tribunals, the organisation of these tribunals was not identical. In the Czech part, the tribunals only existed at the regional level and had to include members with a degree in law. In the Slovak part, the tribunals were created at several levels, including locally, and the presence of lawyers was not required.

The procedure before the extraordinary people's tribunals and the overall account of their activities in the two parts of Czechoslovakia were, however, largely similar. The tribunals were extraordinary organs established to ensure that "the severe justice called for by unprecedented crimes committed against Czechoslovakia by the Nazis and their perfidious collaborators" (Preamble of the Great Retribution Decree) be served. They were expected to deal with large numbers of people, mostly citizens of Czechoslovakia, who had betrayed their country and worked for, or collaborated with, Nazi Germany (and, in Slovakia, also fascist Hungary). The "leading traitors" were prosecuted by the special National Court, which had its seat in Prague (Czech part) and in Bratislava (Slovakia). Whereas people's tribunals sentenced 30,142 people, the National Court only looked into 36 cases involving 80 persons, out of whom 65 were found guilty. The jurisdiction of the people's tribunals and the National Court encompassed crimes against the state, such as betrayal and participation in the National Socialist German Workers' Party ('NSDAP') and the *Schutzstaffel* ('SS'), and crimes against individuals, such as murder, public violence, hostage taking and slavery. These offences could be used to prosecute individuals having committed crimes under international law, i.e. crimes again humanity and war crimes. The category of crimes under international law itself was not known to the Czechoslovak legal order at the time and was not used during the retribution trials.

Crimes in the jurisdiction of people's tribunals and the National Court were punishable by sentences ranging from the loss of civil honour and the forfeiture of property up to the deprivation of liberty and the death penalty. Capital punishment was imposed in 760 cases by the tribunals

[15] Zákon č. 50/1923 Sb, na ochranu republiky, 19. března 1923 [Law No. 50/1023 Coll. on the Protection of the Republic, 23 March 1923].

and in 18 cases by the National Court. Under Section 31 of the Great Retribution Decree and Section 15 of the National Court Decree, no appeal was allowed against the decisions of the tribunals or the National Court. Convicted persons could plead for a presidential pardon but the plea did not have a suspensory effect. This was particularly problematic in the case of the death penalty since under Section 31 of the Great Retribution Decree and Section 16 of the National Court Decree this penalty had to be executed within two hours after the proclamation of the sentence. At the request of the convicted person, this period could be extended by one hour. Originally, the executions – carried out by means of hanging – took place in public. This gave rise to criticism both in Czechoslovakia and abroad, as the audience often included children and adolescents. In reaction to one particularly scandalous execution, that of the former Nazi vice-mayor of Prague Josef Pfitzner, the government issued a regulation in September 1945 limiting access to executions to those with special permits, and barring access to persons under 18 years of age.[16]

The most important trials were those of the Secretary of State of the Protectorate of Bohemia and Moravia Karl Hermann Frank, members of the Protectorate Government, and the leaders of the fascist Slovak State. Frank was a Czech German who actively worked for the destruction of Czechoslovakia and later became one of the leading figures of the Protectorate. He was responsible for the terror after the assassination of the Reich Protector Reinhard Heydrich. The terror cost the lives of many civilians, including the destruction of whole villages (for example, Lidice and Ležáky). In 1945 Frank surrendered to the US Army but was passed over to Czechoslovakia. He was tried by the people's tribunal in Prague, sentenced to death and publicly executed on 22 May 1946. Frank was the highest German official tried in Czechoslovakia.[17] The Reich Protector for Bohemia and Moravia, Konstantin von Neurath, who preceded Heydrich, was prosecuted by the IMT in Nuremberg and sentenced to 15

[16] Benjamin Frommer, *National Cleansing: Retribution against Nazi Collaborators in Postwar Czechoslovakia*, Cambridge University Press, Cambridge, 2005 [in Czech: *Národní očista. Retribuce v poválečném Československu,* Academia, Prague, 2010].

[17] See Jakub Vozdek, "Proces s K.H. Frankem před mimořádným lidovým soudem" [Trial of K.H. Frank before the Extraordinary People ś Tribunal], Diploma Thesis, Faculty of Law, Charles University, Prague, 2012.

years' imprisonment for crimes against peace, crimes against humanity and war crimes committed, among others, in and against Czechoslovakia.

The trial of the members of the Protectorate Government, and especially the Protectorate President Emil Hácha, was more delicately handled.[18] Unlike Frank, Hácha was popular among the people, who saw this old man not as a criminal but as someone who had sacrificed himself to spare the nation from a bigger evil. There were also interventions in support of Hácha from abroad, including a memorandum sent by the former US ambassador to Czechoslovakia George F. Kennan.[19] When Hácha died in detention in June 1945, the dilemmas involved in the prosecution of the Protectorate Government became less acute. The trial of the five remaining members of the Government (Richard Bienert, Adolf Hrubý, Josef Kalfus, Jindřich Kamenický and Jaroslav Krejčí) started in April 1946, before the National Court, and ended in July 1946. One of the accused (Kalfus) was released due to his participation in the Resistance movement. The others received prison sentences (Hrubý, life imprisonment; Krejčí, 25 years; Kamenický, 10 years; Bienert, 3 years). Despite the effort of the Communist Party of Czechoslovakia (Komunistická strana Československa, CPC) to have the sentences revised (and made tougher), the decision remained in force.

Even more controversial was the trial of the former President of the Slovak State, Jozef Tiso.[20] The trial gave rise to bad blood between Czechs and Slovaks, which sometimes makes itself felt even today. Tiso was a Slovak Catholic priest who was already actively involved in politics during the first Czechoslovak Republic (1918–1938). In March 1939 he was one of those initiating the proclamation of an independent Slovak State of which he became the first (and only) President. In 1945 he was arrested by the US Army and later passed over to Czechoslovakia. He was tried by the National Court in Bratislava and sentenced to death for high treason and crimes directed against persons (especially participation in Holocaust). He was publicly hanged on 18 April 1947.

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18 See Tomáš Pasák, *JUDr. Emil Hácha: 1938–1945*, Horizont, Prague, 1997.

19 See Frommer, 2005, pp. 267–314, *supra* note 16.

20 Bradley Abrams, "The Politics of Retribution: The Trial of Josef Tiso in the Czechoslovak Environment", in István Deák, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and its Aftermath*, Princeton University Press, Princeton, NJ, 2000, pp. 252–90.

Retributions were not the only means of dealing with crimes committed during the Second World War. Another legally and morally highly problematic means consisted of acts of summary justice (or summary injustice). It is estimated that during the first months after the liberation of Czechoslovakia, thousands of people, especially from the German minority, were killed. Although this practice took place spontaneously, the Czechoslovak authorities did not do much to stop it. Moreover, in May 1946 the President issued Decree No. 115/1946 Coll. on the Legality of Acts Related to the Fight for Regaining Freedom of the Czechs and Slovaks,[21] in which he declared as lawful "all acts done between 30 September 1938 and 28 October 1945 and aimed at contributing to the fight for regaining freedom of the Czechs and Slovaks or at just revenge for acts of the occupiers and their collaborators" (Section 1). This Decree pardoned not only many of the acts of summary (in)justice carried out after the Second World War[22] but also virtually all acts of resistance against Nazi Germany, regardless of their legality under national or international law. This obviously had an impact on the retribution trials, which were limited to crimes committed against (and not by) Czechoslovakia.

Another way of dealing with the legacy of the Second World War was the organised transfer from Czechoslovakia of the German and, to a lesser extent, Hungarian minorities. The Allied countries in Potsdam agreed on the transfer. At the domestic level, it was facilitated by Constitutional Decree No. 33/1945 on the Regulation of Citizenship of Persons of German and Hungarian Nationality[23] and Constitutional Decree No. 137/1945 on the Internment of Unreliable Persons in

[21] Zákon č. 115/1946 Sb. o právnosti jednání souvisících s bojem o znovunabytí svobody Čechů a Slováků, 8. května 1946 [Decree No. 115/1946 Coll. on the Legality of Acts Related to the Fight for Regaining Freedom of the Czechs and Slovaks, 8 May 1946].

[22] The Decree did not prevent the prosecution in all cases of summary (in)justice. The sentences imposed upon persons convicted in such cases were however often reduced after the communist takeover of 1948. This happened, for instance, in case of Colonel Karol Pazúr, who had ordered the summary execution of 265 Slovak Germans in June 1945. Pazúr was sentenced by the Supreme Military Court to 25 years' imprisonment but after 1948 his sentence was reduced to 10 years and, in the end, he was released even before serving his term.

[23] Ústavní dekret presidenta republiky č. 33/1945 Sb. o úpravě československého státního občanství osob národnosti německé a maďarské, 2. srpna 1945 [Constitutional Decree No. 33/1945 on the Regulation of Citizenship of Persons of German and Hungarian Nationality, 2 August 1945].

Revolutionary Times.[24] The transfer that concerned more than three million people was based on the principle of the collective betrayal of Czechoslovakia. This betrayal also served as an argument in favour of retribution trials against non-reliable citizens of Czechoslovakia. At the same time, the transfer became a *de facto* alternative to the trials, especially in the case of low-level Nazi agents who would face prison sentences. Out of the fear that once released from prison, persons of German and Hungarian origin would stay in Czechoslovakia, the Czechoslovak authorities often preferred to have such persons, even when suspected of crimes, transferred to Germany or Hungary rather than prosecuted in Czechoslovakia.

The retribution trials formally ended on 4 May 1947. Whereas the trials usually resulted in harsh sentences in the first months after the Second World War, with the passing of time, the people's tribunals and the National Court became more moderate. Trials that had not been completed by 4 May 1947 were passed over to ordinary courts which also took a rather moderate stance. The decrease in the retribution zeal gave rise to criticism by the CPC, which sought to have some of the trials reopened and revised. After the CPC came to power in February 1948, it had two new legal acts enacted in the Parliament. The first act brought the Great Retribution Decree and the Slovak Regulation No. 33 into effect again.[25] The second act made it possible for regional national committees to review the decisions relating to offences against the national honour reached by virtue of the Small Retribution Decree.[26] Despite these efforts, no new wave of retribution trials started after 1948 and the two acts of 1948 were only rarely applied. Most people imprisoned in retribution trials were released by 1956.

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[24] Ústavní dekret presidenta republiky č. 137/1945 Sb. o zajištění osob, které byly považovány za státně nespolehlivé, v době revoluční, 27. října 1945 [Constitutional Decree No. 137/1945 on the Internment of Unreliable Persons in Revolutionary Times, 27 October 1945].

[25] Zákon č. 33/1948 Sb., jímž se obnovuje účinnost retribučního dekretu a nařízení o lidovém soudnictví a mění některá jejich ustanovení, 25. března 1948 [Law No. 33/1948 Coll. which Reactivates the Retribution Decree and the Regulation on People's Judiciary, 25 March 1948].

[26] Zákon č. 34/1948 Sb., o revisi trestního řízení v některých případech provinění proti národní cti, 25. března 1948 [Law No. 34/1948 Coll. on the Revision of Criminal Procedures in Case of Certain Offences against National Honour, 25 March 1948].

In the following decades Czechoslovakia sought to apprehend war criminals who had fled the country at the end of the Second World War. In the mid-1960s the government established a special Czechoslovak Governmental Commission which was tasked to work in the area. The Commission filed about 90 requests for extradition, mostly addressed to the Federal Republic of Germany, but virtually all were rejected. The Commission was abolished in 1990 after the fall of communism. The search for war criminals has nonetheless continued and, in the post-Cold War atmosphere, has finally provided some results. One example is that of Anton Malloth, who served as a guard in the concentration camp of Terezín situated in the territory of Czechoslovakia. After the war he fled to Austria which refused to extradite him, as did Italy, where he lived from 1948 to 1988, and the Federal Republic of Germany, his home since 1988. In 1948 he was sentenced *in absentia* to death for crimes committed against persons, mostly Jews, in Terezín. In 2000, after repeated requests from the Czech Republic, Malloth was arrested in Germany and sentenced to life imprisonment. He was released from prison for health reasons in 2002 and died shortly afterwards.

41.2.2. Post-Second World War Trials in Yugoslavia

Yugoslavia was another European country that suffered a lot during the Second World War. The country, established as the Kingdom of Serbs, Croats and Slovenes in 1918 and renamed the Kingdom of Yugoslavia in 1929, was invaded by Nazi Germany, fascist Italy and fascist Hungary in April 1941. After a rapid defeat, the country was divided into several parts. Most were annexed by neighbouring countries (Albania, Bulgaria, Germany, Hungary and Italy). The territory of Serbia was directly occupied by Germany and placed under military administration. Croatia declared a pro-fascist Independent State of Croatia (Nezavisna Država Hrvatska), also encompassing Bosnia and Herzegovina. This state was ruled by the fascist Ustashe (Ustaše) movement, led by Ante Pavelić. All these regimes adopted drastic measures against Jews and against other nations, especially the Serbs. Soon after the occupation, a strong Resistance movement was formed in Yugoslavia, which included both communist pro-Yugoslav partisans and royalist pro-Serbian Chetniks (Četnici). In 1945 the movement, by then dominated by the communists led by Josep Broz Tito, managed, with the help of the Allies, to expel the

occupiers from Yugoslavia. In 1946 a communist government led by Tito came to power in the country.

Yugoslavia suffered enormous casualties during the Second World War, losing more than one million of its inhabitants (about 7 per cent of the population), mostly civilians;[27] material damage was assessed at US$47 billion.[28] There was also a lot of hatred and unsettled accounts among the various nations. The measures adopted in Yugoslavia after the war to deal with war criminals and pro-Nazi collaborators took thus a more radical turn than those resorted to in Czechoslovakia. The plan to punish war criminals and collaborators was announced during the second meeting of the Anti-Fascist Council for the National Liberation of Yugoslavia (Antifašističko Vijeće Narodnog Oslobođenja Jugoslavije) on 30 November 1943, when a special body, the State Commission for the Punishment of the Crimes of the Occupiers and their Assistants was established within the provisional government, the National Committee on the Liberation of Yugoslavia (Nacionalni komitet oslobođenja Jugoslavije). Similar commissions were established in the republics. The acts issued by these commissions spoke explicitly about war crimes. The term, however, was used in a general meaning, encompassing not only the category later enshrined in the IMT Charter, but also various other misdeeds committed during the war and the occupation (collaboration with the enemy, participation in fascist organisations and so on).

The first trials of war criminals started shortly after the liberation and the restoration of the unity of the country in 1944. Unlike Czechoslovakia, Yugoslavia did not use the pre-war criminal codes,[29] but adopted a new Act on Criminal Offences Against People and the State ('Criminal Offences Act') on 15 August 1945, which was amended on 16 July 1946 and 4 December 1947.[30] The Act broke with the pre-war

[27] Jozo Tomasevich, *War and Revolution in Yugoslavia, 1941–1945: Occupation and Collaboration*, Stanford University Press, Stanford, 2001, chap. 17, "Alleged and True Population Losses".

[28] Matjaž Klemenčič, "The Rise and Fall of Yugoslavia: from King Aleksandar to Marshall Tito, 1918–1980", in Ann K. Isaacs (ed.), *Empires and Nation States in European Perspective*, Edizione Plus, Pisa, 2002, p. 227.

[29] The "Law of 3 February 1945 on the nullity of legal acts issued during the time of the occupation" declared the nullity of acts issued during the Second World War and also the invalidity of acts applicable in Yugoslavia prior to 6 April 1941.

[30] Zakon o krivičnim delima protiv naroda i države od 15 Augusta 1945 godine [Law on Criminal Offences Against People and the State, 15 August 1945].

regulation in that it introduced new crimes, including those of the collaboration with the enemy and of the fight against the Resistance movement. It also recognised the category of war crimes which encompassed "the commission, organisation or participation, in times of war or enemy occupation, of/in murder, torture, forced removal of population, forced prostitution, measure of terror and other acts" (Article 3[3]). This definition is more precise than the one used in Yugoslavia during the Second World War and, although it does not fully overlap with the definition of the IMT Charter, it is rather progressive (for instance when including sexual crimes). The sentences ranged from the deprivation of civil and political rights and the forfeiture of property up to imprisonment and the death penalty.

Again in contradistinction to Czechoslovakia, no people's tribunals were established in Yugoslavia. Crimes under the Criminal Offences Act were prosecuted by ordinary criminal courts and by military courts. The latter had, by virtue of the Regulation on Military Courts ('Military Courts Regulation') adopted in May 1944,[31] the jurisdiction over crimes committed by military personnel as well as crimes directed against the national liberation struggle of Yugoslavia. Somewhat surprisingly, the Military Courts Regulation, though adopted during the Second World War, was in several ways more moderate than the Great Retribution Decree issued in Czechoslovakia after the war. For instance, while the military courts were entitled to impose the death penalty, the sentence was to be reviewed by a higher instance (Article 30). However, the executions – carried out by means of shooting or, in case of the most serious crimes, hanging – also took place in public. The Military Courts Regulation made it possible for Tito to pardon persons sentenced by military courts or to lower their sentences.[32]

Most trials took place in 1944 to 1946. They served both to settle the account for the atrocities committed during the war and to bolster the power of the Communist Party of Yugoslavia (Komunistička partija Jugoslavije) led by Tito. With the passing of time, the latter element rose

[31] Uredba o vojnim sudovima, Vrhovni štab NOV i POJ, maj 1944 [Regulation on Military Courts, May 1944].

[32] See also Josip Jurčević, "Osnovne značajke presuda jugoslavenskih komunističkih vojnih sudova u _Hrvatskoj 1944. i 1945. godine" [Main Features of the Decisions of Yugoslav Communist Military Courts in Croatia in 1944 and 1945], in *Društvena istraživanja*, 2012, vol. 21, pp. 1007–26.

to prominence, which is what made the US President Harry S. Truman conclude in 1948 that Tito had allegedly "murdered more than 400,000 of the opposition in Yugoslavia before he got himself firmly established there as a dictator".[33] The most prominent defendants in the trials were leaders of pro-fascist regimes in the Yugoslav republics, members of the Serbian non-communist Resistance movement and representatives of the Catholic Church. Their trials were closely related to each other. For example, the leaders of the Catholic Church in Slovenia and Croatia played an important role during the Second World War supporting pro-fascist or occupational regimes and they were therefore prosecuted both as collaborators with the enemy and as ideological competitors of the Communist Party of Yugoslavia.

The first major trial in Yugoslavia was that of Draža Mihailović, the leader of the non-communist Chetnik Resistance movement. Mihailović was arrested in March 1946 and his trial, before the Military Council of the Supreme Court, opened on 10 June and lasted until 15 July. He was tried together with several other leaders of the Chetnik movement, members of the Yugoslav government in exile and pro-Nazi collaborators.[34] Mihailović was accused of war crimes and other crimes committed during the Second World War against Allied forces, communist partisans and civilians, as well as of collaboration with the occupier.[35] Found guilty of most of the 47 counts, he was sentenced to death and executed on 17 July 1946. The trial stirred harsh criticism among historians and lawyers. For instance, Walter Roberts called the trial "anything but a model justice", claiming that it was clear that "Mihailović was not guilty of all, or even many, of the charges brought

[33] Cited in Lorraine M. Lees, *Keeping Tito Afloat: The United States, Yugoslavia, and the Cold War*, Pennsylvania State University Press, University Park, PA, 1997, pp. 46–47.

[34] See Tea Sindbæk, "The Fall and Rise of a National Hero: Interpretations of Draža Mihailović and the Chetniks in Yugoslavia and Serbia since 1945", in *Journal of Contemporary European Studies*, 2009, vol. 17, no. 1, pp. 47–45; and Jozo Tomasevich, *The Chetniks: War and Revolution in Yugoslavia, 1941–1945*, Stanford University Press, Stanford, CA, 1975.

[35] David Martin, *Patriot or Traitor: The Case of General Mihailović: Proceedings and Report of the Commission of Inquiry of the Committee for a Fair Trial for Draja Mihailović*, Hoover Archival Documentaries, Hoover Institution Publication, vol. 191, Stanford University, Stanford, 1978.

against him".[36] In 2006 a proceeding for the rehabilitation of Mihailović was put in motion under the Law on Rehabilitation adopted in Serbia of 15 May 2006. The request is under consideration by the High Court of Belgrade which has not yet reached a decision.[37] Several other persons sentenced in the same trial as Mihailović have already been rehabilitated.[38]

The Mihailović trial was followed by a series of trials against leaders of pro-fascist regimes in the Yugoslav republics and representatives of the Catholic Church. The first of these trials, the so-called Rupnik trial, concerned the Slovene General, Leon (Lav) Rupnik, who had occupied high positions within the pro-Nazi collaborationist structures in Slovenia (President of the Provincial Government of the province of Ljubljana, Chief Inspector of the Slovenian Home Guard). At the end of the war, Rupnik fled to Austria, where he was arrested by the British Army and later returned to Yugoslavia. He was put on trial before the Military Court of Ljubljana, together with other Slovenian collaborators and the German leader of the SS in Slovenia, Erwin Friedrich Karl Rösener. They were all accused of war crimes and other crimes, while the Slovenians were also accused of high treason and collaboration with the enemy. The trial ended on 30 August 1946, when Rupnik, Rösener and several others were sentenced to death. They were executed by firing squad on 6 September 1946. Rösener was placed posthumously in the indictment of the International Military Tribunal for war crimes committed against Slovenian civilians.

In addition to politicians, the Rupnik trial also involved representatives of the Slovene Catholic Church, including the Bishop of Ljubljana, Gregorij Rožman. Rožman was a fervent anti-communist, who preferred co-operation with the Italian and German occupiers to that with the communist Resistance movement. In 1945 he fled to Austria together

[36] William Roberts, *Tito, Mihailović, and the Allies, 1941–1945*, Rutgers University Press, New Brunswick, 1973, p. 307.

[37] "High Court in Belgrade postpones decision on rehabilitation of Draza Mihailovic", *InSerbia Network Foundation, 23 December 2013.*

[38] "Rehabilitacija Slobodana Jovanovića" [Rehabilitation of Slobodan Jovanović], *Vreme*, 1 November 2007. Jovanović was a member of the Yugoslav government in exile. He was tried *in absentia* in the Mihailović trial and sentenced to 20 years' imprisonment, the forfeiture of property and the deprivation of civil and political rights. He died in 1958 in exile in Britain and was rehabilitated in 2007.

with Rupnik but, unlike Rupnik, due to the pressure from the Vatican, he was not surrendered to the Yugoslav authorities. He moved to the US, where he died in 1959. Yugoslavia tried him *in abstentia* and sentenced him to 18 years in prison for high treason and collaboration with the enemy. After Slovenia became independent in 1991 the Catholic Church initiated proceedings for the rehabilitation of Rožman. At the request of the Public Prosecutor, a historical account which was later on published as a book was prepared by two historians, Tamara Griesser Pečar and France M. Dolinar.[39] The historical account revealed various procedural shortcomings which made the Supreme Court of Slovenia annul the 1946 conviction in 2007. The case was sent to the court of the first instance, which suspended the prosecution in 2009.[40]

Similar trials took place in Croatia, against the leaders and members of the pro-Nazi Ustashe movement and those supporting them, again including representatives of the Catholic Church. The main leader of the Ustashe movement, Pavelić, escaped after the war to South America and later to Spain, where he died in 1959.[41] Due to the unavailability of the leader, the trials in Croatia were somewhat less spectacular than those in Slovenia and focused mainly on lower-profile Ustashe members. One of these trials related to the infamous Prebilovci massacre, in which 650 inhabitants of the Serbian village of Prebilovci in Bosnia and Herzegovina were massacred. Of 550 known participants in the massacre, only 14 were brought to justice, of whom six were sentenced to death.

Such trials attracted less attention than politically more sensitive cases, for instance that of the Archbishop of Zagreb Alojzije Stepinać. Stepinać supported the Ustashe regime in Croatia during the war. He was briefly arrested at the end of the war, then released and arrested again in September 1946, when he was charged with collaboration with the occupation forces, support of the Ustashe movement and high treason. His trial, in which he stood alongside several former officials of the Ustashe government, started on 30 September and ended on 11 October 1946. Stepinać was found guilty and sentenced to 16 years in prison. The trial

[39] See France M. Dolinar and Tamara Griesser Pečar, *Rožmanov proces* [Rožman's Trial], Družina, Ljubljana, 1996.

[40] See also Gregor J. Kranj, *To Walk with the Devil: Slovene Collaboration and Axis Occupation, 1941–1945*, University of Toronto Press, Toronto, 2013.

[41] The Yugoslav intelligence service sought to kill him in Argentina but failed and Pavelić, although injured in the accident, finally died of natural causes.

was condemned by the Vatican and several Western states. Stepinać served five years in prison and was released in 1951 by Tito. After the dissolution of Yugoslavia, the parliament of the newly independent Croatia adopted a declaration in 1992 condemning the trial.[42] The judgment has however never been formally annulled.

As in Czechoslovakia, criminal trials were not the only means adopted by Yugoslavia to deal with crimes committed during the Second World War. They were again preceded and accompanied by acts of summary (in)justice. Some of the acts were isolated cases of individual revenge, while others had an organised character. Probably the best-known incident of the latter type was the so-called Bleiburg tragedy, in which thousands of mostly Croatian nationalists were murdered after the end of the war, when returning from Austria to Yugoslavia. Acts of summary (in)justice were partly aimed at settling accounts linked to the war's legacy and partly at preparing the ground for communist rule in the country. Thus, people belonging to organisations potentially inimical to the communists, such as members of other political currents or representatives of the Church, became the preferred targets of purges. Moreover, the end of the war was again followed by transfers of populations, for instance of the Danube Swabians (Germans) to Germany and Austria.

In spite of the attempts of Yugoslavia to deal with war criminals in the aftermath of the Second World War, some of the criminals escaped the country and settled in Western Europe, the US or South America. Yugoslavia sought extradition of these persons, but partly for political reasons and partly due to concerns that the persons would be denied a fair trial, the requests were usually denied. One successful story was that of the Ustashe leader Andrija Artuković, who served as the Minister of Interior, Minister of Justice and Religion and State Secretary in the pro-fascist Independent State of Croatia. After the war, he fled to Austria and was detained by British forces. Yugoslavia requested his surrender but the request was not granted. Artuković was released and later moved to the US. In July 1945 the State Commission for the Punishment of the Crimes of the Occupiers and their Assistants proclaimed him a war criminal. In 1951 Yugoslavia requested his extradition from the US but the request

[42] See Šimun Šito Ćorić, *Cardinal Alojzije Stepinać: Basic Facts about His Person and Work*, Croatian Information Centre, Zagreb, n.d.

was again rejected. After a change in US policy towards Second World War criminals, Yugoslavia renewed the request in the 1980s and, this time, it was successful. Artuković was arrested in 1984 and extradited to Yugoslavia in 1986. He was tried and sentenced to death but, due to his poor health, the sentence was not executed and Artuković died of natural causes in 1988.

The break-up of Yugoslavia marked an important historical and legal turning point. On the one hand, attempts to capture war criminals have not been totally abandoned. On the other hand, in the new states created in the territory of the former Yugoslavia (Croatia, Slovenia, Serbia and so on), there has been a move towards revisiting the course of verdicts declared in post-Second World War trials as well as rehabilitating those found guilty in these trials. The move came at a moment when, after 40 years of communist rule, it was finally possible to freely discuss the irregularities of post-war "justice" and the political nature of some of the trials. At the same time, this move reflects changes in the views that newly established states may hold regarding the acts done during the Second World War. One state (Serbia) adopted a formal legal act on rehabilitation, while others have used usual judicial proceedings (Slovenia) or political means (Croatia) to reach the same goal. Since the horrors of the Second World War were brought back into the public memory during the civil war in Yugoslavia in the 1990s, the prosecution of war criminals from that former period remains both more topical and more sensitive than in other regions in Europe.

41.2.3. Post-Second World War Trials in the Soviet Union

The Soviet Union suffered enormous harm during the Second World War. Although it was drawn into the war relatively late, in June 1941, it lost between 18 and 23 million people, about 14 per cent of its population. The western part of the country, in which most industry had been concentrated before the war, was devastated. Although this was partly compensated by territories gained in 1945, the country took a long time to get over the damage. The Soviet Union originally sought to avoid participating in the war, and for this purpose signed the Molotov-Ribbentrop Pact with Germany in 1939 and took part in the occupation of Poland and the Baltic states. But two years later, in June 1941, the Soviet Union itself was invaded by Nazi Germany. Large parts of its territory, including some of those recently annexed, were occupied and local pro-

Nazi regimes were established (for example in the Baltic countries, Ukraine and Bessarabia). These areas were later liberated by the Red Army and reintegrated, often against the will of their population, into the Soviet Union.

Information on crimes committed in the territory of the Soviet Union started to be published in 1941.[43] Trials of persons accused of war crimes, collaborators and other groups of people (for example, Soviet prisoners of war [POWs] considered as traitors after their return to the Soviet Union) began during the war and continued well into the late 1940s. Unlike in Czechoslovakia and Yugoslavia, the trials in the Soviet Union focused both on crimes committed in Europe and in the Far East. The legal basis encompassed pre-war regulations and extraordinary legal acts, adopted to deal with the Second World War cases. The main example is the Decree of the Presidium of the USSR Supreme Soviet on Measures of Punishment for German-Fascist Villains Guilty of Killing and Torturing the Soviet Civilian Population and Captive Prisoners of War, for Spies, Traitors to the Motherland from among Soviet Citizens and their Accomplices ('Punishment Decree'),[44] adopted on 19 April 1943.

The 1943 Punishment Decree solely dealt with the situation in Europe, focusing on crimes committed by "the German, Italian, Romanian, Hungarian and Finish Fascist outcasts, Hitlerian agents as well as spies and traitors of the homeland from among the Soviet citizens against the Soviet population and Red Army prisoners" (Preamble). Those falling into one of the categories who had directly taken part in murders

[43] See the note of the Ministry of Foreign Affairs of the Soviet Union, 27 April 1942: О чудовищных злодеяниях, зверствах и насилиях немецко-фашистских захватчиков в оккупированных советских районах и об ответственности германского правительства и командования за эти преступления. [On Hideous Crimes, Atrocities and Violence Committed by German-Fascist Aggressors in Occupied Soviet Regions and on the Responsibility of the German Government and Commanders for these Crimes].

[44] Указ от 19 апреля 1943 г. О мерах наказания для немецко-фашистских злодеев, виновных в убийствах и истязаниях советского гражданского населения и пленных красноармейцев, для шпионов, изменников родины из числа советских граждан и для их пособников [Decree of 19 April 1943 on Measures of Punishment for German-Fascist Villains Guilty of Killing and Torturing the Soviet Civilian Population and Captive Prisoners of War, for Spies, Traitors to the Motherland from among Soviet Citizens and their Accomplices]. For the English translation, see Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 886.

or violent acts against Soviet citizens and prisoners were to be sentenced to death by hanging. Those having helped them were to be sentenced to forced labour in internment camps (*katorga*) for 15 to 20 years. The jurisdiction over the crimes was conferred upon military field courts (военно-полевые суды) established within Army divisions. Each court had three members, who were all officers, and a military prosecutor. The presence of a defence counsel was not foreseen, but in practice defence representatives were sometimes allowed to take part in the trial. The decisions of military field courts were to be confirmed by the commander of the division and executed immediately. Executions by hanging were to take place in public and the bodies were to remain exhibited for several days "for everyone to know, how anyone, who commits violence against civilian population and who betrays his/her homeland, is to be punished and what punishment such a person will get" (Article 4).

By virtue of the Ordinance No. 283 of 19 April 1943, issued by Stalin, with a note "without publishing in the press", the Punishment Decree was passed over to the Red Army with the order of establishing military field courts before 10 May 1943. On 4 September 1943 the obligation to establish military courts was extended to the cavalry and tank units. On 25 November 1943 the Supreme Court of the Soviet Union specified conditions of the application of the Punishment Decree. It stressed the difference between traitors and accomplices and introduced exceptions for certain categories of people (medical staff, teachers and so on.). By virtue of the Decrees of the Supreme Soviet issued on 8 September 1943 and 24 May 1944, the jurisdiction over the crimes foreseen by the Punishment Decree was passed over to ordinary courts, first solely in cases when the military field courts were not able to handle the case, and later generally. At the same time, the death penalty by hanging was replaced by shooting, although the change was not always respected in practice. On 5 December 1944 the jurisdiction over members of nationalist pro-fascist groups in Ukraine, Belarus and the Baltic states was entrusted to the Military Chamber of the Supreme Court of the Soviet Union. The Decree of 26 May 1947 abolished the death penalty in the Soviet Union[45] and reduced the maximum penalty for any crime to 25 years of forced labour.

[45] Указ Президиума Верховного Совета СССР от 26 мая 1947 года Об отмене смертной казни [Decree of the Supreme Council of the USSR of 26 May 1947 on the Abolition of the Death Penalty].

According to the available sources, the total number of persons tried under the Punishment Decree amounted to 81,780 individuals, including 25,209 foreigners.[46] Formally, only citizens of the Soviet Union, Germany, Italy, Romania, Hungary and Finland were subject to the Punishment Decree. Yet, in reality, citizens of other states (for example, Austria, Belgium, Denmark, Japan and Poland) and persons deprived of nationality (the Cossack chieftains, *Kozak ataman*) were tried under the Punishment Decree as well. Although the Punishment Decree was only adopted on 19 April 1943 and had no provisions on retroactivity, it was applied invariable to events prior to and after that date. This practice was confirmed by the decisions of the commander of the military courts of 18 May 1943, which declared that crimes listed in the Punishment Decree were subject to the jurisdiction of military field courts regardless of the date of their commission. Since the trials resulted in thousands of people sentenced to forced labour, 11 new labour camps had to be established to accommodate them. The camps were subject to a strict regime, involving absolute isolation, a 10-hour working day, and no right to correspondence in the first year. Most of those sentenced to forced labour were released in the amnesty declared in September 1955.[47] The amnesty did not extend to those having committed murder and torture of Soviet citizens. Foreign citizens were virtually all repatriated to their home countries on the basis of international agreements by 1955.[48]

[46] Aleksandr E. Epifanov, Ответственность за военные преступления, совершенные на территории СССР в период Великой Отечественной войны 1941–1956 [Responsibility for War Crimes Committed in the territory of the USSR During the Great Patriotic War 1941–1956], VA MVD Russia, Volgograd, 2005.

[47] Указ Президиума Верховного Совета СССР от 17 сентября 1955 года Об амнистии советских граждан, сотрудничавших с оккупантами в период Великой Отечественной войны 1941–1945 гг [Decree of the Presidium of the Supreme Council of the USSR of 17 September 1955 on the Amnesty of Soviet Citizens Collaborating with the Ocupiers in the Period of the Great Patriotic War, 1941–1945].

[48] Указ Президиума Верховного Совета СССР от 28 сентября 1955 года О досрочном освобождении германских граждан, осуждённых судебными органами СССР за совершенные ими преступления против народов Советского Союза в период войны [Decree of the Presidium of the Supreme Council of the USSR of 28 September 1955 on the Early Release of German Citizens, Sentenced by Judicial Organs of the Soviet Union for having Committed Crimes against the Nations of the Soviet Union during the War].

The Punishment Decree gave rise to many trials held in various parts of the Soviet Union.[49] As with Yugoslavia, they served the double function of settling accounts from the Second World War and liquidating political opponents of the communist regime. The first, the Krasnodar trial, took place on 14–17 July 1943 and solely concerned a group of Soviet collaborators with the occupiers. Out of 11 defendants, mostly accused of having voluntary engaged in the services of the German police or army, eight were sentenced to death and three to 20 years of forced labour. The first trial involving Nazi criminals was held on 15–18 December 1943 in Kharkov. The defendants were three German officers and one Soviet collaborator. All were accused of crimes against Soviet civilians and POWs, sentenced to death and hanged on 19 December 1943. These trials took place during the war. Numerous other trials followed after the end of the war. For instance, in the Smolensk trial, held on 15–19 December 1945, 10 Germans were accused of various crimes against Soviet civilians, including murder and rape. They were sentenced to either death by hanging or long terms of forced labour. Some days later, on 25–29 December 1945, a similar trial took place in Bryansk, where four Germans were sentenced to either death by hanging or forced labour. Such trials were held in many other places mostly located in the Western part of the Soviet Union.

Similarly as in Czechoslovakia and Yugoslavia, certain high-profile trials took place in the Soviet Union. One of them was that of the former Cossack leader Grigory Semyonov, who had taken part in the fight against the Bolsheviks in the Russian civil war in 1918–1921 and later on supported the Japanese effort to conquer the Soviet Union in the Second World War. Semyonov was arrested in China in September 1945 and tried, together with other persons (including Generals L.F. Vlasyevski and A.P. Baksheev, the leader of the All-Russian Fascist Party in Manchuria Konstantin Rodzaevski, and Prince Nikolay A. Ukhtomski) in Moscow by the Military Collegium of the Supreme Court of the Soviet Union. On 30 August 1946 Semyonov was sentenced to death by hanging and executed on the same day. Other defendants were sentenced to death by shooting (Rodzaevski, Vlasyevski, Baksheev) or to forced labour (Ukhtomski, sentenced to 20 years, he died in a camp in 1953). In the following years,

[49] Dmitry Nikolaevitch Minaev, Суды над военными преступниками в СССР [Trials with War Criminals in the Soviet Union], *Журнал "Самиздат"* [Journal "Samizdat"], 17 August 2013.

family members of some of the defendants were accused of high treason and sentenced as well, mostly to forced labour.

Other high-profile cases were those of the leaders of collaborationist armies, especially the Russian Liberation Army (Русская Освободительная Армия, 'RLA') and the so-called Krasnovtsi (Красновцы). The RLA was a pro-Nazi unit fighting under German command and composed predominantly of Russian émigrés. At the end of the Second World War, its members and leaders, including General Andrey Andreyevich Vlasov, sought to flee to the West but were mostly either captured by the Red Army or surrendered by the Allies to the Soviet Union. Vlasov and several other leaders were tried in Moscow in July 1946, sentenced to death and hanged on 1 August 1946.[50] The Krasnovtsi were a unit composed primarily of Cossacks who had fled from Russia at the end of the civil war in the 1920s. They fought alongside the Nazis and were either captured or surrendered to the Soviet Union after 1945. Their main leaders, Pyotr Krasnov, Andrei Shkuro and Timofey Domanov, together with the German general assigned to the Cossacks, Helmuth von Pannwitz, were sentenced to death and hanged on 17 January 1947.

Whereas the major trials were over by 1947 in Czechoslovakia and Yugoslavia, in the Soviet Union these trials went on into the 1950s. The most interesting of these later trials is the Khabarovsk trial of 12 Japanese officers accused of the preparation and use of biological weapons. The trial took place from 25 to 30 December 1949 in Khabarovsk, in the Far East and it focused on the activities of the Japanese Units 731 and 100. These units had worked to develop new biological weapons, experimenting on arrested Russian and Chinese civilians and POWs. In at least three instances, biological weapons were used in the territory of China (1940–1942). Although the Punishment Decree did not formally apply to Japanese citizens, it served as the legal basis of the trial. All the defendants were found guilty and sentenced to two to 25 years of imprisonment (the death penalty was abolished at the time). The Khabarovsk trial is unique, as it was the only post-war trial dealing with the production and use of weapons of mass destruction. After the trial, the

[50] See Wilfried Strik-Strikfeldt, *Against Stalin and Hitler: Memoir of the Russian Liberation Movement 1941–1945*, Macmillan, London, 1970; and Kirill M. Alexandrov, *Армия генерала Власова 1944–45* [Army of General Vlasov 1944–45], Exmo, Moscow, 2006.

Soviet Union sent a note to Britain, the US and China suggesting the establishment of a new international tribunal which would prosecute Japanese war criminals, including Emperor Hirohito, who were responsible for the biological weapons programme. The note remained without answer.[51]

Identical to those trials in other countries, the trials in the Soviet Union were preceded and accompanied by acts of summary (in)justice and transfers of the population. These in fact started already during the war and even prior to it. In 1940, about 250,000 Poles were moved from the occupied Polish territories to the northern and eastern parts of the Soviet Union. In 1940–1941, they were followed by about 8,000 foreigners (mostly from the Baltic countries and Scandinavia) and some 100,000 "nationalists" (mostly from the Baltic states, Ukraine and Belarus). During the war, in 1941–1945, a forced transfer was imposed upon German, Finnish and Romanian minorities and many "unreliable" nationalities living within the territory of the Soviet Union. These minorities were relocated to Siberia and Central Asia. After the war, the transfer mainly concerned the German population of Eastern Prussia, which was annexed by the Soviet Union (Kaliningrad region). There is no exact data as to how many people died as a result of the acts of summary (in)justice, yet spontaneous revenge was frequent in the Soviet Union.

After the end of the Cold War, the Soviet Union collapsed and dissolved into 15 independent states. This had an impact upon the assessment of post-Second World War trials. First, there have been initiatives aimed at rehabilitating those condemned and executed or sent to the labour camps. In 1991 laws on the rehabilitation of victims of political repression were adopted in several republic of the former Soviet Union, including the Russian Federation.[52] Under these laws, thousands of requests for rehabilitation have been submitted. Although the laws do not focus specifically on post-war trials, but deal with any instance of political

[51] Vladimir Baryshev, "Хабаровский судебный процесс над японскими военными преступниками (к 60-летию события)" [Khabarovsk Trial with the Japanese War Criminals (on the Occasion of the 60th Anniversary of the Event)], in *Журнал международного права и международных отношений* [*Journal of International Law and International Relations*], 2009, no. 3, pp. 3–9.

[52] See Закон О реабилитации жертв политических репрессий, No. 1761–1, 18 октября 1991 [Law No. 1761–1 on the Rehabilitation of Victims of Political Repressions, 18 October 1991]; See also Law On Rehabilitation of Victims of Political Repressions in Ukraine, N 962-XII, 17 April 1991.

repression, they may apply to cases of politically motivated condemnations and to trials which seriously violated the standards of a fair trial. The practice relating to rehabilitation laws[53] differs among the countries of the former Soviet Union. Some of them (the Baltic states, Ukraine) apply the laws liberally, others (the Russian Federation) are more cautious. For instance, the requests for the rehabilitation of Vlasov, Semyonov or Ukhtomski have all been rejected. Even in Russia, however, dozens of thousands of people have been granted rehabilitation since 1991, including some of those tried in the course of or after the Second World War.

At the same time, the dissolution of the Soviet Union opened up the question of the prosecution of crimes committed by the Soviet Union itself. This question remained a taboo throughout the period of the Cold War. The fall of communism and the break-up of the Soviet Union brought it to the forefront, as part of the process of dealing with the communist past. Probably the best-known case is that of Vassily Makarovich Kononov, a Soviet partisan who led a counter-operation against the Latvian village Mazie Bati resulting in the murder of nine villagers and the destruction of the village in 1944. In 1998 Kononov was charged with war crimes in Latvia. In 1999 he was found guilty and sentenced to six years in prison. In 2000 the conviction was overturned by the Supreme Court of Latvia and he was set free. In 2001 he was charged again and, three years later, found guilty of war crimes and sentenced to 20 months in jail which he had served by then. In 2004 Kononov filed a complaint to the European Court of Human Rights ('ECtHR'), claiming violation of Article 7 of the European Convention on Human Rights (prohibition of retroactivity). In 2010 the Grand Chamber of the ECtHR ruled, by 14 votes to three, that no violation of the European Convention had taken place, because war crimes had already been prohibited by international law during the Second World War.[54]

[53] On rehabilitation under international law in general, see Clara Sandoval Villalba, *Rehabilitation As A Form of Reparation Under International Law*, Redress, London, 2009.

[54] See *Kononov v. Latvia*, Application No. 36376/04, European Court of Human Rights, 17 May 2010.

41.3. Post-Second World War Trials in Czechoslovakia, Yugoslavia and the Soviet Union and International Criminal Law

The previous section sketched the history of post-Second World War trials in Czechoslovakia, Yugoslavia and the Soviet Union. This overview revealed certain common features that the trials in all the three countries shared. At the same time, it is clear that there were important differences in the approaches taken. These common and distinct features of the post-war trials are identified in the first part of this section. The second part focuses on the relationship between the post-war trials in Central and Eastern Europe and developments in the area of international criminal law and, especially, on the main differences between the national trials and the trials taking place before the IMT in Nuremberg and the IMTFE in Tokyo.

41.3.1. Shared and Distinctive Features

Czechoslovakia, Yugoslavia and the Soviet Union all resorted, after the end of the Second World War and exceptionally during the war, to criminal trials of persons who had committed crimes during the war period. Such trials, moreover, did not end in the 1940s and went on for many decades. In fact, they have continued until now and will only end due to "natural causes": the death of the last Second World War criminal. All three countries suffered heavy human and material losses during the war and witnessed horrendous crimes. Some of those crimes were committed by foreign occupiers, mostly Nazi Germans (but also Italians in Yugoslavia and Japanese in the Soviet Union). Others were committed by inhabitants of the occupied countries, especially by members of pro-fascist nations or minorities (for instance Germans and Slovaks in Czechoslovakia). The post-war trials in all the three countries primarily focused on this latter group, because its participation in the crimes, and also its mere support of the enemy occupiers, was seen as unpardonable (high) treason.

The war criminals trials in Czechoslovakia, Yugoslavia and the Soviet Union therefore had a disproportionate impact upon members of certain national groups. This impact was further strengthened by other measures adopted against war criminals and collaborators (and also people belonging to the same national groups as most criminals and collaborators), such as acts of summary (in)justice and forced population

transfers. Whereas the trials sought to take into account individual guilt, other measures were mostly based on the principle of collective guilt and collective punishment. The application of this principle gave rise to feelings of grievance in the targeted communities, which have often survived into the post-Cold War period and have manifested themselves in the attempts to revisit and reassess these post-Second World War measures (rehabilitations, discussions about the transfers of populations and so on). Another group specifically targeted in the post-Second World War criminal trials were political opponents of the communist parties, such as Chetniks in Yugoslavia or Cossacks in the Soviet Union. While in Czechoslovakia the surviving democratic culture and the legal traditions of the pre-war period prevented to a large extent the instrumentalisation of retribution trials, in Yugoslavia and the Soviet Union the trials became an opportunity for the communists to either strengthen their rule and liquidate old enemies (in the Soviet Union, émigrés and participants in the civil war) or to secure power and do away with political or ideological competitors (in Yugoslavia, non-communist Chetnik partisans and the Catholic Church).

The post-war trials in Central and Eastern Europe focused almost exclusively on crimes committed by the defeated countries (Germany, Japan and Italy) and their sympathisers. This can partly be explained by the fact that the majority of defendants were charged with treason and collaboration with the enemy, which obviously could only be committed by the opponents of the victorious states. Yet the attempt to distinguish between the two sides also manifested itself with respect to crimes committed against civilians and POWs. Whereas crimes attributable to Nazi or pro-Nazi forces were prosecuted (and rightly so), those attributable to the Allies were usually passed over in silence. This, again, can partly be accounted for by the unprecedented nature (and geographical scope) of Nazi crimes, yet this certainly was not the only factor. Crimes committed by the Allies and their supporters were often trivialised or justified as legitimate and understandable. This is visible in the case of Czechoslovakia with its 1946 law granting *ex post* amnesty to acts committed with the aim of liberating the country from the Nazi occupation. Yugoslavia and the Soviet Union did not adopt such a law, but in practice the same attitude was adopted with respect to crimes committed by the Resistance movement or the national army.

Such a selective approach was not reserved only to Czechoslovakia, Yugoslavia and the Soviet Union. It was adopted by virtually all countries involved in the Second World War as well as, in fact, by the IMT and IMTFE. The situation was, however, somewhat specific in Czechoslovakia, Yugoslavia and the Soviet Union, because during the communist period, i.e. for almost half a century after 1945, it was not possible to start an open public discussion about the appropriateness of the selective approach. The taboo nature of this topic, together with the grievances surviving among their constitutive nations, are among the factors accounting for the post-Cold War initiatives aimed at reassessing the recent history. While this, again, is not specific to Central and Eastern European countries, the events of the Second World War have a particular relevance, and also sensitivity, in this region, also due to the inter-national (rather than international in the classical meaning of this term) elements involved in them.

The post-war trials in Czechoslovakia, Yugoslavia and the Soviet Union were regulated by domestic legislation. Yugoslavia adopted a wholly new legal act (Criminal Offences Act), whereas Czechoslovakia and the Soviet Union resorted to a combination of pre-war legislation (Criminal Codes, Criminal Procedural Codes) and special laws (the Great Retribution Decree in Czechoslovakia, the Punishment Decree in the Soviet Union). These differences were largely downplayed in practice, as in all the three states the new legislation played a crucial role in the criminal trials. The special regulations primarily drew on the criminal law traditions of the countries, while introducing certain new crimes and new penalties.

The crimes were often defined in vague terms (that is especially the case under the Soviet Punishment Decree), which would make them hardly compatible with the principle of legality as known today. They encompassed various forms of treason and collaboration with the enemy, on which special emphasis was placed, as well as crimes committed against civilian populations and POWs. Only the Yugoslavian law referred specifically to the category of "war crimes". Issued prior to the adoption of the IMT Charter, the law had its own definition of war crimes. This definition differs in some ways from that of the IMT Charter yet, at the same time, it was in many respects progressive (for example, by explicitly recognising rape and other forms of sexual violence as war

crimes).[55] The decrees adopted in Czechoslovakia and the Soviet Union did not recognise war crimes but used offences drawn from domestic legislation (such as murder or hostage taking). Some crimes were only included in the national legal orders at the end of or after the Second World War that is posterior to the commission of acts qualified by them. This could be seen as problematic from the perspective of the principle of legality (*nullum crimen sine lege*) but no extensive discussion of this principle took place in the three countries.

Sentences imposed upon those guilty of war crimes or treason/ collaboration with the enemy were quite harsh. The main sentence was the death penalty, which was imposed in thousands of cases, mostly with regard to high-level collaborators and persons guilty of very serious crimes (murders of civilians or of POWs). The use of the death penalty was frequent, especially in the immediate aftermath of the war when guarantees of fair trial were at the lowest level. Death penalties were executed publicly, although there were attempts, most notably in Czechoslovakia, to exclude certain groups of people (children) from attending executions. Czechoslovakia also witnessed the progressive move to avoid the death penalty in cases of defendants not directly responsible for violent crimes, such as the members of the Protectorate Government. The legislation in the three countries also recognised other penalties, for instance forced labour in camps in the Soviet Union, the forfeiture of property and the loss of civil and political rights. Some of these penalties were not part of the national legal orders prior to the enactment of the new legislation (i.e. they were absent from the legal orders at the moment of the commission of the crimes) which could again be seen as colliding with the principle of legality (*nulla poena sine lege*).

In all the three countries, special (extraordinary) courts were established to deal, partly or fully, with the Second World War-related trials. Czechoslovakia used people's tribunals composed of members of the general public. There was a difference between the Czech part of the country, in which presence of professional lawyers in retribution trials was required, and Slovakia, where people's tribunals were constituted by laypersons. Yugoslavia and the Soviet Union established military courts/ tribunals, sometimes operating directly in the field, which were composed

[55] Cf. Theodor Meron, "Rape as a Crime Under International Humanitarian Law", in *American Journal of International Law*, 1993, vol. 87, no. 3, pp. 424–28.

of military commanders and, occasionally, military lawyers.[56] The right to defence was in some instances *de jure* accorded but *de facto* denied (Czechoslovakia in the early period) and in other instances exactly the opposite (the Soviet Union). Defendants did not enjoy many procedural rights and even the right to appeal was often absent. That, together with the number of trials resulting in the death penalty and the prompt execution of such penalty, most probably led to judicial errors which were only occasionally revisited later. In addition to ensuring justice, trials were aimed at demonstrating disdain towards war criminals, traitors and collaborators and at giving satisfaction not only to direct victims but also to the general public. This was reflected in the spectacular nature of some especially high-profile trials and in the public execution of the defendants.

As already noted, the post-war trials that took place in the Czechoslovakia, Yugoslavia and the Soviet Union were not radically different from trials organised in other countries, especially those belonging to the Allied camp (for example, China, France, Greece and Poland).[57] All these countries resorted to retribution trials, often using new rules and newly established tribunals; all combined these trials with extra-judicial means of dealing with the past, more or less sanctioned by the official authorities; and all used exemplary sanctions. Moreover, all saw the trials not only as an exercise of law enforcement but also as a political act aimed at breaking from the past and sending a clear signal that certain crimes (crimes against civilians and POWs) and certain behaviour (treason, collaboration with the occupier) were outrageous and inacceptable.[58]

Despite these features shared with other countries in the Allied camp, post-war legal developments in Czechoslovakia, Yugoslavia and the Soviet Union also exhibited certain particularities. Most of them were linked to the political regime or political forces asserting themselves in

[56] In Yugoslavia, military courts only had jurisdiction over military persons and persons responsible for crimes directed against the national liberation struggle of Yugoslavia. In all other instances, regular criminal courts, already established prior to the Second World War, were competent.

[57] See chapters on Hungary, Poland, Belgium, the Netherlands, France and Greece, in Deák, Gross and Judt 2000, *supra* note 20.

[58] Luc Huyse, *Transitional Justice after War and Dictatorship Learning from European Experiences (1945–2010)*, Final Report, Centre for Historical Research and Documentation on War and Contemporary Society, Brussels, January 2013.

Central and Eastern Europe, dominated by national communist parties. This context helps explain why in the three countries, and especially in the Soviet Union and Yugoslavia, more than in other states, the post-war trials served the double purpose of dealing with the past, on the one hand, and getting rid of political or ideological opposition, on the other. Another important factor to consider is the multinational character of the three countries, in which settling accounts with the Second World War legacy was often tantamount to taking revenge against certain "disloyal" national or ethnic groups, an element which did not necessarily exist in other countries.

41.3.2. International Criminal Law

The post-war trials in Central and Eastern Europe took place at the same time when the foundations of modern international criminal law were being laid out. The legislation which provided the basis of the national trials was adopted in the period from 1943 to 1945. The Statute of the IMT at Nuremberg[59] was adopted shortly afterwards on 8 August 1945 and the Statute of the IMTFE at Tokyo on 19 January 1946.[60] Whereas the Nuremberg Charter was annexed to an international treaty between the Allied countries (France, Britain, the US and the Soviet Union),[61] the Tokyo Charter was a unilateral decree issued by the Supreme Commander for the Allied Powers in the Pacific, General Douglas McArthur. The plan to establish IMTs had already been conceived, and made known, during the war. On 7 October 1942 the Allies announced the intention to establish a United Nations War Crimes Commission ('UNWCC') tasked to investigate war crimes. The UNWCC was finally established on 20 October 1943, and 10 days later the three Allied powers (Britain, the US and the Soviet Union) issued a joint statement declaring that German war criminals should be judged and punished in the countries in which they committed their crimes, but "the major criminals, whose offences have no

[59] See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945.

[60] See International Military Tribunal for the Far East Charter, Tokyo, 19 January 1946.

[61] See George A. Finch, "The Nuremberg Trial and International Law", in *American Journal of International Law*, 1947, vol. 41, no. 1, pp. 20–37; and Quincy Wright, "The Law of the Nuremberg Trial", in *American Journal of International Law*, 1947, vol. 41, no. 1, pp. 38–72.

particular geographical localization" would be punished "by the joint decision of the Governments of the Allies".[62]

The statement was important for the post-war "division of labour" between the two international courts, tasked to try the major war criminals from Germany and Japan, and national courts, expected to deal with all other war criminals, including the major war criminals from their own nations. No strict formal hierarchy was established between the international tribunals and their national counterparts, though it was largely accepted that the international tribunals should enjoy priority in dealing with high-level defendants. In practice, however, national courts sometimes worked so quickly that a person could be sentenced and executed at the domestic level even before the international tribunals had time to indict him or her. This happened, for instance, with the German leader of the SS in Slovenia, Rösener, who was sentenced to death and executed in Yugoslavia prior to the issuance of the official indictment by the IMT.

The two international tribunals differed from their national counterparts in Czechoslovakia, Yugoslavia and the Soviet Union in several aspects. The first aspect relates to the range of crimes in the jurisdiction of the tribunals/courts (jurisdiction *ratione materiae*). The two international tribunals had jurisdiction over three crimes under international law – crimes against peace, war crimes and crimes against humanity. Domestic courts, by contrast, primarily had jurisdiction over the crimes of (high) treason and collaboration with the enemy and over various ordinary crimes (murder, hostage taking, rape and so on). The category of crimes under international law as such was not known at the domestic level. Yugoslavia, as we saw above, was the only state to recognise the category of war crimes. This category was however defined somewhat differently than in the Nuremberg and Tokyo Charters. Under Article 6(b) of the IMT Charter, war crimes were

> violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing

[62] Cited in Howard Ball, *Genocide: A Reference Handbook*, ABC-CLIO, Santa Barbara, 2011, p. 139.

> of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The IMTFE Charter simply stated that war crimes were "violations of the laws or customs of war" (Article 5[b]). The Yugoslavian 1945 Criminal Offences Act had a complex definition of war crimes which encompassed various acts committed in time of war or enemy occupation. Such acts were

> murders, condemnation to or execution of the death penalty, apprehension, torture, forced deportation in concentration camps, […] forced denationalization, forced mobilization, forced prostitution, rape, forced conversion to another faith; measures aimed at terrorising or at destroying public or private property; serving as an officer of the terrorist apparatus or police formation or of […] a concentration camp; inhuman treatment of Yugoslav detainees or war prisoners, or any other war crimes (Article 3 Paragraph 3).

The three definitions largely overlap. Furthermore, they are all open-ended, leaving space for "other war crimes". Yet, the Yugoslavian definition is more detailed and it includes certain acts that are missing from the international definition and were only recognised as war crimes in the 1990s. This included, for instance, rape and forced prostitution. At the same time, the Yugoslavian definition includes certain acts which would not necessarily be qualified as war crimes at the international level, such as forced conversion to another faith, or which are defined in vague terms, such as serving as an officer of a terrorist apparatus or police formation. There are no indications suggesting that the Yugoslavian definition of war crimes would have had an impact upon the IMT Charter or Nuremberg case law. Similarly, the IMT Charter and case law did not have any profound impact upon the criminal law of Czechoslovakia, Yugoslavia and the Soviet Union in the immediate aftermath of the Second World War. If these countries had incorporated into their domestic legal orders crimes under international law, most prominently genocide and war crimes, they did so only at the end of the 1940s and in the early 1950s, largely to implement international treaties adopted after the Second World War (the Genocide Convention of 1948 and the four Geneva Conventions of 1949).

The second difference, albeit a less radical one, between the domestic and international trials relates to the sentencing policy. The two international tribunals were entitled to impose upon defendants, by virtue of their Statutes, "death or such other punishment as shall be determined by [them] to be just" (Article 27 of the IMT Charter, Article 16 of the IMTFE Charter). In practice, the two tribunals imposed either the death penalty (12 defendants in Nuremberg, seven in Tokyo) or imprisonment ranging from two years up to life imprisonment (seven defendants in Nuremberg and 17 in Tokyo).[63] At the domestic level in the three countries of Central and Eastern Europe, the death penalty was used as well but it was, proportionally speaking, applied in a lesser number of cases. This can easily be explained by the fact that while the two international tribunals focused on the major war criminals, the domestic courts dealt with thousands of defendants charged with crimes of lesser gravity. The penalty of imprisonment was frequently used at the domestic level as well, although the condemned, more often than those prosecuted in Nuremberg and Tokyo, did not always serve their penalty in total but were either granted amnesty or repatriated to their country of origin, usually before the mid-1950s.[64]

Moreover, Czechoslovakia, Yugoslavia and the Soviet Union all used other penalties in addition to death and imprisonment. In the Soviet Union, forced labour in internment camps was introduced as a new penalty in 1943 (though *de facto* it had been used in the Soviet Union prior to the Second World War). Czechoslovakia and Yugoslavia resorted to various penalties relating to individual honour and property, such as the forfeiture of property and the deprivation of civil and political rights. The defendants sentenced to death by the international tribunals were executed by hanging in the premises of the tribunals (the gymnasium of the court building in Nuremberg and Sugamo Prison in Tokyo). The executions did not take place in public. In Japan, afraid of the reaction of the Japanese public, MacArthur prohibited photography and filming during executions. This differed from the practice in the three countries of Central and Eastern Europe, where executions took place in public and were used both as public shows and as a tool to deter political enemies. The international

63 Some defendants were also acquitted or died during the trial from natural causes or suicide.

64 The sentence was commuted for some of those condemned to imprisonment in Nuremberg or Tokyo.

and national courts and tribunals faced the same doubts as to whether the principle of legality (*nullum crimen sine lege, nulla poena sine lege*) was respected. Yet, while the question was openly discussed at the international level, it remained largely unaddressed in the three countries.

The third difference between the national and international levels is that of the judicial bodies. The tribunals in Nuremberg and Tokyo were the first judicial bodies ever created at the international level. The international element was *prima facie* more obvious in the IMT because the IMT was established by an international treaty and its judges were recruited from nationals of four Allied states (France, Britain, the US and the Soviet Union). The IMTFE was established by a unilateral act of the US administration, but its composition was also international, with judges representing 11 countries of Europe, Asia and North America. Although called "military", the two tribunals were in fact of a mixed nature, as both military and civilian components were present. Thus, for instance, selected judges were partly military lawyers and partly civilian lawyers. At the national level, various models were used: people's courts with or without the obligatory participation of professional lawyers (Czechoslovakia), special military and regular courts (Yugoslavia) and military courts (the Soviet Union). What the international and national trials had in common was the conviction that crimes committed during the Second World War were so outrageous and exceptional that new judicial bodies, and also judicial bodies of new types, had to be established to deal with the perpetrators of such crimes.

The final and probably the most radical difference pertains to the judicial guarantees granted (or denied) to the defendants. At the international level, both the Nuremberg and the Tokyo Charters contained a list of such guarantees, encompassing, among others, the right of the accused to give explanations relevant to the charges made against him, the right to translation/interpretation, the right to defence or the right to present evidence during the trial (Article 16 of the IMT Charter, Article 9 of the IMTFE Charter). Whereas these provisions would certainly not be considered adequate today,[65] they were far better than those available at the national level in the three countries of Central and Eastern Europe. At

[65] It suffices to compare the guarantees of the fair trial provided for in the Nuremberg and Tokyo Charters with those granted by the Rome Statute of the International Criminal Court to see how important the evolution in this area has been over the past 60 years.

the same time, it would be unjust to claim that the national trials were merely kangaroo courts and that no guarantees of fair trial applied. Once the first zeal for revenge was over, the trials started taking on a more regular course, with increasing emphasis placed upon the respect of fundamental guarantees of fair trial. This evolution was especially evident in Czechoslovakia, where the post-war trials were never instrumentalised to such a degree as in Yugoslavia and the Soviet Union.

41.4. Conclusion

The post-Second World War trials that took place in Czechoslovakia, Yugoslavia and the Soviet Union have so far largely escaped scholarly scrutiny. This can be explained by the lack of sources and the difficulties in dealing with them,[66] the political sensitivity of the topic in the countries of Central and Eastern Europe and the limited contribution of the post-war national trials to the development of international criminal law. In the recent years, however, all these factors have gradually started to lose their weight. With the opening of the archives and the publication of previously inaccessible documents, it has become easier to study the post-war trials in Czechoslovakia, Yugoslavia and the Soviet Union, and to make a comparison between them. Moreover, there is now a renewed interest in a topic that for several decades remained largely undiscussed.

In all the three countries or, more exactly, in the 24 successor states created after the dissolution of Czechoslovakia, Yugoslavia and the Soviet Union, the post-war trials are still a sensitive issue. Yet, for this very reason, studying the trials might be very useful: in addition to casting light on the historical events of the 1940s, it may also help the countries in the region to overcome the heavy burden of the past. Due to the taboos surrounding post-Second World War events during the Cold War period, people in Central and Eastern Europe have not yet been given an opportunity to learn the truth about the past and to get over this past. Their collective memories adhere either to the official narrative that they were told during the communist period or to the counter-narrative propounded by political forces seeking to link up with those prosecuted in the post-war trials. In both cases, the accounts tend to be oversimplified, portraying the trials (and wartime events) in black and white terms. Such

[66] Most sources are available only in the national languages, some materials have not been published at all and the archives remained closed.

accounts contribute to fostering the feeling of historical grievances and animosity among nations in the region, which could have very dangerous consequences, as the civil war in Yugoslavia in the 1990s clearly demonstrated.

Finally, it is true that the trials in Central and Eastern Europe took place more in parallel than in co-operation with the trials at the international level, before the IMT in Nuremberg and the IMTFE in Tokyo. It is also true that the influence of these domestic trials over the developments of international criminal law was, probably fortunately, quite limited. Despite that, it is still interesting to study the post-Second World War legal developments in Czechoslovakia, Yugoslavia and the Soviet Union (and other countries as well). This allows us to see in which context, and against what national legal background, the foundations of modern international criminal law were laid out. The context may also serve as a benchmark against which the successes and failures of international criminal law of the post-war period and of today can be measured. It shows us quite realistically where we come from and how far, in less than a century, we have (or have not) actually got.

42

Post-Second World War Hungarian Criminal Justice and International Law: The Legacy of the People's Tribunals

Tamás Hoffmann[*]

42.1. Introduction

Ákos Major, the Presiding Judge of the first Hungarian People's Tribunal recounts in his memoirs the emotional scenes of the very first trial in February 1945. It was a case of two guards at a forced labour battalion, who were accused of participating in the killing, torturing and looting of more than 100 Jewish persons. The relatives of the victims did not remain silent throughout the proceedings. Some were calling for retribution, others were weeping and on their knees begging the defendants to reveal what happened to their loved ones. When witnesses' testimonies graphically described inhumane acts of torture and murder many spectators lost consciousness. Yet, the President did not attempt to maintain order in the courtroom. He readily admitted letting "free flow of passion, so grief, despair and hatred could freely mingle at the people's court – that's why we were a people's tribunal".[1]

Maybe Judge Major was right. When a war-torn Hungary was just about to come to terms with the shock of hundreds of thousands dying on the battlefield or as a result of mass aerial bombardments, other hundreds of thousands had been deported and exterminated in concentration camps and forced labour battalions with the active support or tacit approval of a significant part of the population. All this happened in the midst of a

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[1] Ákos Major, *Népbíráskodás: Forradalmi Törvényesség* [People's Judging: Revolutionary Legality], Minerva, Budapest, 1988, p. 123.

fundamental change of the political system, with the supervision of a hitherto feared and despised power, the Soviet Union, and it would have been hypocritical to pretend a return to normality in abnormal times.

However, this is exactly what the establishment of the People's Tribunals attempted to achieve. In Hungary, unlike in many other European countries where widespread lynchings and other forms of summary justice followed the end of Nazi rule,[2] the purge of those responsible for the war and the crimes committed against the population was to be administered by the courts. Similar to Bulgaria and Romania, the Soviet leadership regarded public war crimes trials in special courts as a powerful demonstration of justice as opposed to the spirit of lawlessness of the previous regime, thus contributing to the consolidation of Soviet control.[3]

The application of war crimes law was not completely alien to Hungarian criminal law since the extant Military Criminal Code had already codified certain violations of the laws and customs of war.[4] The newly emerging norms of crime of aggression and crimes against humanity were, on the other hand, completely unknown in the Hungarian legal system. Therefore this chapter aims to examine whether these new international offences found their way into Hungarian domestic law and whether the People's Tribunals were directly or indirectly influenced by them.

42.2. Historical Background and Legal Regulation of the People's Tribunals

The operation of the People's Tribunals cannot be fully grasped divorced from their historical context. The defeat in the First World War led to cataclysmic changes in Hungary. In 1919 the Hungarian People's Republic was declared, only to be taken over shortly after by the Hungarian Soviet Republic that attempted to violently introduce communism to Hungary. The widespread atrocities of the "red terror" of the communist regime were followed by the "white terror" of the new

2 István Deák, "Post-World War II Political Justice in a Historical Perspective", in *Military Law Review*, 1995. vol. 149, pp. 140–41.

3 Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 52.

4 Act II of 1930 on the Hungarian Military Criminal Code.

counter-revolutionary regime led by Governor István Horthy, who later granted a general amnesty to those who committed crimes out of "patriotic fervor".[5] The regime's ideology was based on fervent anti-communism and territorial revisionism, since the Trianon Peace Treaty caused Hungary to lose two-thirds of its territory and more than three million ethnic Hungarians became minorities in neighbouring countries. Consequently, Horthy strove to build strong ties with Germany and Italy during the 1930s, and entered Second World War as an ally of the Axis Powers in 1941, joining the military operation against the Soviet Union.[6]

On 19 March 1944, following a botched attempt by Horthy to withdraw from the Axis side, the German Army occupied Hungary. The Hungarian Jewish population, which at the time was the largest Jewish population remaining in a Central European country, had until then been subjected to discriminatory racial laws based on German legislation, but they were not physically threatened. After the occupation, however, the small German contingent led by Adolf Eichmann, which enjoyed the enthusiastic support of the Döme Sztójay government and thus the co-operation of the Hungarian public administration, deported more than 400,000 people to extermination camps in a matter of a few months. The last chapter of the Holocaust was predominantly written in the blood of Hungarian Jews.[7]

On 2 December 1944 five Hungarian opposition parties formed a coalition in the town of Szeged and created the National Independence Front with the aim of shepherding the country to a democratic transition.[8] Already at this time the creation of a special court system was envisaged. The programme of the National Independence Front pronounced that "traitors and war criminals shall be arrested and transferred for prosecution to people's tribunals created for this purpose".[9] The coalition

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5 István Rév, *Retroactive Justice: Prehistory of Post-Communism*, Stanford University Press, Stanford, 2005, p. 203.

6 Deborah S. Cornelius, *Hungary in World War II: Caught in the Cauldron*, Fordham University Press, New York, 2011.

7 Randolph L. Braham, *The Politics of Genocide: The Holocaust in Hungary*, Wayne State University Press, Detroit, 2000.

8 The five parties were the Bourgeois Democratic Party, the Independent Smallholders Party, the Communist Party, the National Peasant Party and the Social Democratic Party.

9 Kálmán Kovács, "A Magyarországi Népbíróságok Történetének Egyes Kérdései" [Certain Questions of the History of Hungarian People's Tribunals], in Andor Csizmadia (ed.), *Jogtörténeti Tanulmányok I.* [Studies in Legal History I.], KJK, Budapest, 1966, p. 152.

parties, on 22 December 1944, established a Provisional National Government led by Miklós Béla Dálnoki that issued a declaration on the very day of its establishment emphasising the need to prosecute or extradite those who committed war crimes or crimes against the people.[10] This resolution became an international obligation by the signing of the Moscow Armistice Agreement on 20 January 1945. Article 14 stipulated that "Hungary will cooperate in arresting the persons charged with having committed war crimes. It will either extradite them to the governments concerned or will pass judgment on them".[11] The agreement created an international legal obligation for the government of Hungary to create the material conditions for the prosecution of the perpetrators of international crimes.[12]

Henceforth, the establishment of the system of people's courts gained considerable momentum. On 25 January 1945 Prime Minister Miklós Béla Dálnoki issued the Premier's Decree (*Minisztereln öki rendelet*, 'MER') No. 81/1945 On People's Judiciary, with the stated goal that "all those, who caused the historic catastrophe of the Hungarian people or participated in it should be punished as soon as possible". This Decree and other subsequent laws[13] created a system of People's Tribunals, defined their organisational structure and scope of jurisdiction.

People's Tribunals were created as two-tier extraordinary courts representing the desire of the Hungarian people to punish the perpetrators of crimes committed against the people. The five parties of the National Independence Front nominated its members. The People's Tribunals

[10] Attila Papp, "Néptörvényszék, Népbíróság és Népbírósági Jog Magyarországon" [People's Tribunal, People's Court and People's Tribunals' Law in Hungary], in *E-Tudomány*, 2011, vol. 4, p. 10. The Szeged National Committee had already made a decision on 13 December 1944 concerning the creation of a people's tribunal but eventually it did not become operational. Tibor Lukács, *A Magyar Népbíróságí Jog és a Népbíróságok (1945–50)* [The Hungarian People's Tribunals' Law and the People's Tribunals (1945–1950)], KJK, Budapest, 1979, p. 76.

[11] The Armistice Agreement was implemented in Hungarian Law Act V of 1945 on 13 September 1945 with retroactive effect to the date of the signature.

[12] A Magyar Köztársaság Alkotmánybíróság a [Constitutional Court of the Republic of Hungary], No. 2/1994, Section II. B, 14 January 1994.

[13] Three further Premier's Decrees – MER No. 1440/1945 (27 April 1945), MER No. 5900/1945 (1 August 1945) and MER No. 6750/1945 (16 August 1945) amended the original Decree. Finally, Act VII of 1945 (16 September 1945) subsumed these Decrees into a consolidated text. The legal regulation was further amended by Act XXXIV of 1947 (31 December 1947).

made their decisions based on the majority principle, thus appeals were possible only if the majority of the people's judges found the defendant worthy of mercy. If the appeal was turned down, the prisoner was executed within two hours. If the accused was sentenced to imprisonment of less than five years, neither the condemned person nor his/her counsel had the right of appeal – only the prosecutor. The National Council of People's Tribunals (Népbíróságok Országos Tanácsa) with a similarly partisan composition served as the court of appeals.[14] The importance attributed to the prosecution of war criminals and perpetrators of crimes against the Hungarian people is highlighted by the fact that such proceedings had already started before the official establishment of the People's Tribunals.[15]

After February 1945 more than 50 People's Tribunals were established within a short time frame.[16] However, these exceptional courts were not simply tasked to prosecute perpetrators of horrendous crimes but also to demonstrate that the governmental policies of the past quarter century ineluctably led to disaster[17] and thus helped to eliminate potential opposition to the new order.[18] Justice Minister István Ries, in the official commentary of MER No. 81/1945, emphasised that:

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[14] László Karsai, "Crime and Punishment: People's Courts, Revolutionary Legality, and the Hungarian Holocaust", in *Intermarium*, 2000–2001, vol. 4, no. 1, p. 3.

[15] On 28 January 1945, the Budapest National Committee issued a decree setting up the Budapest People's Tribunal that already on 3 February conducted its first trial and sentenced to death two defendants for murder based on existing Hungarian criminal law. The convicted persons were publicly executed the following day.

[16] The exact number is uncertain but the most reliable estimate is between 50 and 60 courts. Papp, 2011, p. 33, see *supra* note 10.

[17] Péter Sipos, "Imrédy Béla Pere a Népbíróság Előtt" [Béla Imrédy's Trial in Front of the People's Tribunal], in Péter Sipos (ed.), *Imrédy Béla a Vádlottak Padján* [Béla Imrédy on the Defendants' Bench], Osiris/Budapest Főváros Levéltára, Budapest, 1999, p. 68.

[18] Andrea Pető points out that a decisive step in the direction to use courts as instruments in the elimination of anti-communist opposition was the adoption of Act VII of 1946 on the Criminal Law Protection of the Democratic Order of the State and the Republic, which included a rather broad definition of "anti-democratic statements and actions" as major crimes. Andrea Pető, "Historicizing Hate: Testimonies and Photos about the Holocaust Trauma during the Hungarian Post-WWII Trials", in Nanci Adler and Selma Leydesdorff (eds.). *Tapestry of Memory: Evidence and Testimony in Life-Story Narratives*, Transaction Publishers, New Brunswick, NJ, 2013, pp. 3–18, 9. On the Application of Act VII of 1946 see Frigyes Kahler, *Joghalál Magyarországon 1945–1989* [*The Death of Justice in Hungary 1945–1989*], Zrínyi, Budapest, 1993, p. 197–201.

> The victorious Red Army has liberated Hungary. This has realised the first stage of the Allied Power's programme to build a democratic people's state in place of a feudal, fascist Hungary […] Grave crimes were committed against the Hungarian people but a part of the people is also infected […] Therefore the retribution of crimes and punishment of the guilty is an instrument of the cure as well.[19]

Consequently, the judgments of the People's Tribunals – especially in the cases of major war criminals – strove to make a direct link between the Horthy regime and Nazism. One ruling in this vein emphasised that

> [i]t is a commonly known historical fact that following the fall of the Dictatorship of the Proletariat of 1919 […] which made a heroic, revolutionary attempt to liberate Hungary's oppressed working classes and other social strata and to establish a Socialist economic and political system, our homeland fell into a dark age of counterrevolution and white terror, followed by the Horthy-type reactionary system of consolidation, that logically – that is, with unavoidable consistency and as if by law – led to the servile affiliation with Italian-Germanic policies, which eventually led to the evil and insane intervention in World War II, and finally, in 1944 poured the filthy, murderous flood of Arrow-Cross rule onto our people and our nation, a rule whose terrible acts and destruction of human lives and material goods were in proportion, scale, and methods beyond human comprehension.[20]

Accordingly, it is hardly surprising that from the very first moments of the establishment of the tribunals, it was deemed paramount to prosecute members of the former elite. A list containing the names of 106 major war

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[19] István Ries, *A Népbíráskodásról Szóló 81/1945. M.E. számú és az ezt Kiegészítő 1440/1945. M.E. számú Rendelet Szövege és Magyarázata* [Text and Commentary of Premier's Decree No. 81/1945 and MER No. 1440/1945], Politzer Zsigmond és Fia Könyvkereskedés, Budapest, 1945, p. 5.

[20] National Council of People's Tribunals ('NOT') II. 727/1949/9, 4, cited in Rév, 2005. p. 203, see *supra* note 5. The Szálasi Trial judgment, in a similarly straightforward manner pronounced: "The fall of the right is over, the future belongs to the left […] the ruins left behind by the right have to be rebuilt […] but on the road to progress we go once and for all towards socialism". Ferenc Ábrahám and Endre Kussinszky (eds.), *Itél a Történelem: A Szálasi-per* [History is in Session: The Szálasi Trial], Hiradó Könyvtár, Budapest, 1945, p. 32.

criminals was compiled[21] that included almost every former Prime Minister as well as government officials. In the following years, five former Prime Ministers and dozens of wartime cabinet members and generals were executed.[22]

To further highlight the historical and political context of the cases, MER No. 81/1945 introduced the institution of the political prosecutors. Political prosecutors were laypersons without legal education who assisted the professional people's prosecutors. The exact role of the people's prosecutor was somewhat uncertain. He represented the "universal victim", the Hungarian people, during the legal proceedings hence his status was equal to the victims. Nevertheless, he had the right to cross-examine the witnesses and the accused and make a closing speech, though he could not raise or drop charges or appeal a verdict.[23] As the National Council of People's Tribunals explained, his task was "to uncover those historical, societal, strategic, legal, political, individual and psychological reasons that caused the death of hundreds of thousands of Hungarians, the misery of millions, destruction of our homeland and its shame. Finally, based on the morale of these historical trials, he has to show a way to the future".[24]

Trial proceedings were not the sole instruments for purging those allegedly responsible for the miseries of the Hungarian people. In line with the infamous declaration of the Potsdam Agreement[25] in Hungary, just as in Poland and Czechoslovakia,[26] ethnic Germans were deemed collectively responsible for the war and almost 200,000 were deported to Germany.[27] Moreover, about 40,000 people were interned by 1949 for

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[21] Prime Minister Miklós Béla Dálnoki signed the document on 16 February 1945. László Karsai and Judit Molnár (eds.), *A Magyar Quisling-kormány: Sztójay Döme és Társai a Népbíróság Előtt* [The Hungarian Quisling Government: Döme Sztójay and Company in Front of the People's Tribunal], 1956, os Kht., Budapest, 2004, p. 13.

[22] Deák, 1995, pp. 140–41, see *supra* note 2.

[23] Even though some of the political prosecutors apparently attempted to effectively take over the functions of the people's prosecutors. Papp, 2011, p. 57, see *supra* note 10.

[24] NOT. I. 365/6/1946 (1 February 1946).

[25] The agreement called for "the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken".

[26] Alfred-Maurice de Zayas, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans, 1944–1950*, St. Martin's Press, New York, 1993.

[27] Frey Dóra, "Büntetés Bűn Nélkül? A Kollektív Bűnösség Koncepciója a Jogforrásokban a Mai Németek Vonatkozásában a Második Világháború után" [Punishment without Crime?

suspected affiliation with the previous regime[28] and 103,000 people were placed on the so-called B List that contained the names of unreliable state employees whose earlier conduct could result in their dismissal.[29]

Nevertheless, the trials of war criminals remained the centre of public attention. Newspapers regularly reported on the proceedings of major war criminals and there was an often expressed hope that the victorious powers might display a more lenient attitude towards Hungary if justice was duly served.[30] Members of the Allied Control Commission and prominent politicians frequently attended the trials and sometimes even tried to intimidate the judges.[31] Yet, even under such circumstances, recourse to the apparently neutral rules of international law could serve as a potent tool for legitimising the introduction and application of new substantive criminal law norms thus camouflaging the resort to political justice. In the subsequent sections, I will attempt to analyse whether the newly emerging norms of international criminal justice – the crime of aggression and crimes against humanity – found their way into the jurisprudence of the People's Tribunals.

42.3. Crimes Against Peace

42.3.1. The International Regulation of the Criminality of War

Until the twentieth century, the right to wage war was a sovereign prerogative and the notion of war played a central role in the doctrine of international law. Classical international law was based on a strict

The Concept of Collective Guilt in Legal Sources concerning Contemporary Germans after the Second World War], in Máthé Gábor, Révész T. Mihály and Gosztonyi Gergely (eds.), *Jogtörténeti Parerga: Ünnepi Tanulmányok Mezey Barna 60. Születésnapja Tiszteletére* [Legal History Parerga: Festschrift in Celebration of the 60th Birthday of Barna Mezey], Eötvös, Budapest, 2013.

28 Tibor Zinner, "Háborús Bűnösök Perei. Internálások, Kitelepítések és Igazoló Eljárások 1945–1949" [Trials of War Criminals. Internments, Deportations and Justificatory Proceedings between 1945–1949], in *Történelmi Szemle*, 1985, vol. 28, p. 125. The Secret Security Department of the Ministry of Interior oversaw this investigation.

29 Karsai, 2000, p. 5, see *supra* note 14.

30 Karsai and Molnár, 2004, p. 31, see *supra* note 21.

31 Judge Ákos Major recalls that during the first major war crimes trial, the trial of former Prime Minister László Bárdossy, he was reprimanded by Mátyás Rákosi, the leader of the Communist Party, and also by a British colonel. Major, 1988, pp. 215–24, see *supra* note 1.

distinction between the law of peace and the law of war, the realm of war pertaining only to armed hostilities between nations. However, the cornerstone of the legal framework of war was the application of formalistic criteria, such as issuing a declaration of war[32] or ultimatum expressing the requisite *animus belligerendi*,[33] and the conclusion of a peace treaty signalling the end of the state of war between the belligerent states. As a result, actual hostilities and the existence of a state of war could be separated.[34] Nevertheless, apart from the beginning and termination of war in a technical sense, a state of war could also be acknowledged with the commencement of actual hostilities between states troops acting under the authority of their respective state[35] – termed as

[32] Grotius already stated that for a just war "it is not enough to that it be made between Sovereigns, but it must be undertaken by public Declaration, and so that one of the Parties declare it to the other". Hugo Grotius, *De Jure Belli ac Pacis*, printed for W. Innys and R. Manby, J. and P. Knapton, D. Brown, T. Osborn, and E. Wicksteed, London, 1738. Formally, however, it became obligatory only by the adoption of Article 1 of the Hague Convention (III) Relative to the Opening of Hostilities which stipulates that: "The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war". Clyde Eagleton explained that "[D]eclarations of war have usually served to notify non-participating powers of the status of the issuing sovereign, prepare the political structure and the populace for war, and place blame upon the other party by appropriate wording of the declaration". Clyde Eagleton, "The Form and Function of the Declaration of War", in *American Journal of International Law*, 1938, vol. 32, pp. 32–34.

[33] Arnold McNair summarised this doctrine by stating that "[w]hether a state of war in a legal sense exists between nations is largely a question of intent". Arnold D. McNair, "The Legal Meaning of War and the Relation of War to Reprisals", in *Transactions of the Grotius Society*, 1926, vol. 11, p. 45. Accordingly, the essential function of the declaration of war was to furnish conclusive evidence that the declarant intended a state of war to exist between the nations specified.

[34] For instance, President Harry S. Truman proclaimed on 31 December 1946 that "although a state of war still exists [...] hostilities have terminated"; cited in Fred K. Green, "The Concept of 'War' and the Concept of 'Combatant' in Modern Conflicts", in *Military Law and Law of War Review*, 1971, vol. 10, p. 270.

[35] See the statement of the British Prime Minister in June 1900, acknowledging that the clashes between Chinese troops and international forces in Taku only brought about the existence of a state of war between China and Britain if the Chinese troops acted with state authority. Fritz Grob, *The Relativity of War and Peace*, Yale University Press, New Haven, 1949, p. 202. The Kansas Federal District Court held that the Boxer Rebellion did not amount to a state of war. *Hamilton v. McClaughry*, 136 F. 445, 450 (C.C.D. Kan. 1900). Similarly, the US Supreme Court defined war as "every contention by force between two nations in external matters under the authority of their respective government", in *Bas v. Tingy*, 4 U.S. 37, 1980. (4 Dall., 1800).

war in the material sense or *de facto* state of war[36] – unless all the belligerent states denied its existence.[37]

After the First World War, however, the victorious Allied Powers attempted to introduce the concept of criminality of waging war. The Commission on the Responsibility of the Authors of the War and on Enforcement concluded that Germany, Austria-Hungary, Turkey and Bulgaria had declared war "in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe".[38] Subsequently, Article 227 of the 1919 Treaty of Versailles provided for the establishment of a special tribunal to try Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties", a somewhat cryptic but still recognisable allusion to the crime of aggression. Nevertheless, this article was never operationalised and the ex-Emperor was never extradited from the Netherlands where he took refuge.

In the interwar period, codification in the framework of the League of Nations attempted to outlaw aggressive war. Article 1 of the Draft Treaty of Mutual Assistance of 1923 stipulated that "aggressive war is an

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[36] See, for example, the Teutonia case, where the Privy Council pronounced "a war may exist *de facto* without a declaration of war, yet it appears […] that this can only be affected by an actual commencement of hostilities". (1872) LR, 4 PC, 179.

[37] Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 2001, pp. 29–32. Typically, not even the extensive naval operations between the USA and France between 1798 and 1801 were regarded to have constituted war even though the Secretary of State, Timothy Pickering, openly declared on 16 October 1799 that: "This conduct of the French Republic would well have justified an immediate declaration of war on the part of the United States, but desirous of maintaining peace, and still willing to leave open the door of reconciliation with France, the United States contented themselves with preparations for defense, and measures calculated to protect their commerce". Quoted in Grob, 1949, p. 51, see *supra* note 35. Another example was the 1827 naval battle between Britain and Turkey at Navarino, in which 60 Turkish ships were sunk and 4,000 men perished. That was officially termed by the British as an "accident". See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p. 151. The doctrinal uncertainty is evident in Quincy Wright's argument, who submitted: "Suppose, however, that a state commits acts of war on a large scale, but with repeated assertions that it is not intending to make war, is it possible for its acts to speak louder than its words? It is *believed* that such a situation *may become* a state of war, but only if recognized as such by the victim or by third states". Quincy Wright, "When Does War Exist", in *American Journal of International Law*, 1932, vol. 26, p. 365 (emphasis by the author).

[38] Carnegie Endowment, *German White Book Concerning the Responsibility of the Authors of the War*, Oxford University Press, New York, 1924, p. 18.

international crime" and that no party could be "guilty of its commission".[39] Similarly, the Preamble of the Geneva Protocol for the Pacific Settlement of International Disputes of 1924 asserted that "a war of aggression constitutes […] an international crime".[40] The Assembly of the League of Nations also unanimously adopted a Declaration Concerning Aggressive Wars on 24 September 1927 that emphasised that "a war of aggression can never serve as a means of settling disputes and is, in consequence, an international crime". The use of criminal law terms such as "crime" and "guilty" could possibly suggest that these and other similar instruments[41] envisaged individual criminal responsibility in cases of aggressive war. However, given the general context of adoption of these documents and the absence of definition of the crime of aggression, it can be concluded that these labels were used to emphasise the gravity of aggressive war as opposed to its criminal law ramifications.[42]

The campaign to outlaw war reached a crucial milestone in 1928 when the General Treaty for the Renunciation of War as an Instrument of National Policy, commonly referred to as the Kellogg-Briand Pact, was adopted.[43] However, the Pact that was ratified by the overwhelming majority of the international community and renounced war as an instrument of national policy failed to establish any responsibility – state or individual – in case of the breach of its provisions.[44]

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[39] Records of the Fourth Assembly, Minutes of the Third Committee, *League of Nations Official Journal, Special Supplement*, 1923, vol. 16, p. 203.

[40] Geneva Protocol on the Pacific Settlement of International Disputes, adopted by the Fifth Assembly on October 2, 1924. Records of the Fifth Assembly (1924), Meetings of Committees, Minutes of the First Committee, *League of Nations Official Journal, Special Supplement*, 1924, vol. 17, pp. 136–140.

[41] For a thorough overview of the legal documents of the interwar period concerning aggression see Benjamin B. Ferencz, *Defining Aggression: The Search for World Peace. A Documentary History and Analysis*, vol. I, Oceania Publications, New York, 1975, pp. 4–36 and 61–284.

[42] Carl Schmitt, *Writings on War*, Polity Press, Cambridge, 2011, p. 146. The contemporary legal view was generally reluctant to accept individual criminal responsibility for involvement in aggressive war. See Sellars, 2013, pp. 1–46, *supra* note 3.

[43] General Treaty for Renunciation of War as an Instrument of National Policy, signed in Paris, 27 August 1928, No. 796, 94 LNTS 57 (entered into force on 24 July 1929).

[44] Interwar Hungarian international law literature agreed that the breach of the Kellogg-Briand Pact did not incur any sanctions. László Buza, *A Nemzetközi Jog Tankönyve* [Textbook of International Law], Politzer Zsigmond és Fia, Budapest, 1935, p. 357; Ferenc Faluhelyi, *Államközi Jog* [Interstate Law], vol. I, Karl Könyvesbolt, Pécs, 1935, p. 42.

Somewhat surprisingly, the international criminalisation of aggressive war found its staunchest supporters in Soviet jurisprudence. By the late 1930s Andrei Vishinsky, who became the foremost Soviet jurist after the demise of Evgeny Pashukanis, came to the conclusion that criminal law could defend the interests of the Soviet state even from imperialist powers. In 1937 he declared that "criminal law must be put on guard over the cause of peace and must be mobilized against war and against those who incite war".[45] In the same year, together with Vishinsky's support, another Soviet lawyer Aron Trainin published a book-length treatment of the topic entitled *Zashchita mira i ugolovnyi zakon* [Defence of Peace and Criminal Law], which advanced the proposition that individuals should be held liable for the initiation of aggressive war.[46] However, these views did not have much influence on the Western legal debates until the end of the war, when another of Trainin's books was translated into English and widely disseminated in diplomatic circles.[47] Embryonic forms of the crimes against peace charge were already beginning to emerge in Western Europe in mid-1943.[48]

Despite its contested nature, with the adoption of the London Charter of the International Military Tribunal ('IMT'), it became clear that the United Nations regarded aggressive war not simply as an international crime that incurs individual criminal responsibility but the supreme international crime, "the crime which comprehends all lesser crimes".[49] Article 6(a) of the London Charter defined "aggressive warfare" under the heading of "crimes against peace" as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of

[45] Aron Naumovich Trainin, *Hitlerite Responsibility under Criminal Law*, Hutchinson, London, 1945, p. 12.

[46] George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial*, Martinus Nijhoff, Leiden, 1996, p. 19.

[47] Trainin, 1945, see *supra* note 45.

[48] Sellars, 2013, pp. 49–50, see *supra* note 3. Dan Plesch and Shanti Sattler point out that the United Nations War Crimes Commission debated the issue of the crime of aggression since the beginning of its operation. See Dan Plesch and Shanti Sattler, "A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943–1948 and Its Associated Courts and Tribunals", in *Criminal Law Forum*, 2014, vol. 25, p. 32.

[49] Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, 6 June 1945, US Government Printing Office, Washington, DC, 1949.

international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".[50] The fact that the commission of the other two crimes within the jurisdiction of the Nuremberg Tribunal, war crimes and crimes against humanity, was tied to the context of war highlights the fundamental importance of the aggression charge for the drafters.

The IMT's judgment sought to dispel any doubts concerning the retrospective nature of the crime of aggression by attempting to prove that it had customary law status by 1939. It cited the various documents in the interwar period addressing the issue and placed special emphasis on the Kellogg-Briand Pact. The IMT concluded that "the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing".[51] The International Military Tribunal for the Far East ('IMTFE') in Tokyo unsurprisingly concurred with this reasoning.[52]

The London Charter and the IMTFE Charter failed to define the concept of aggressive war and left it to the judges to define this. However, since the Third Reich clearly engaged in a policy of territorial expansion, the judges did not need to precisely draw the contours of this crime. Nevertheless, a close study of the factual findings of the respective judgments reveals that the term "war of aggression" includes:

i) war with the object of the occupation or conquest of the territory of another State or part thereof;

ii) war declared in support of a third party's war of aggression; and

iii) war with the object of disabling another State's capacity to provide assistance to (a) third State(s)

[50] Almost identical definitions were adopted in the Charter for the IMTFE and in Article II(a) of Council Control Law No. 10.

[51] International Military Tribunal, Judgment and Sentences, reprinted in *American Journal of International Law*, 1947, vol. 41, p. 218 ("Nuremberg Judgment").

[52] See Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, p. 527.

> victim of a war of aggression initiated by the aggressor.[53]

The personal scope of application of crimes against peace was similarly uncertain. While it obviously included the political and military leadership of Germany, it did not specify the level of involvement of an individual that gives rise to criminal responsibility. The IMT accepted that crimes against peace were committed with the assistance of individuals who were not formally part of the state[54] and "assumed that anyone who either participated in the Nazi conspiracy to commit aggression or knew about the conspiracy and intentionally furthered it was guilty of the crime".[55] Accordingly, Hjalmar Schacht, a prominent figure in the rearmament of Germany as President of the Reichsbank from 1933 to 1939, Minister of Economics from 1934 to 1937 and Plenipotentiary General for War Economy from 1935 to 1937, was acquitted of the charge of participating in a common plan to wage aggressive war since the Prosecution could not prove beyond a reasonable doubt that he had knowledge about the plan.[56] Kevin Heller convincingly argues that a perusal of the post-Second World War jurisprudence of the subsequent Nuremberg military trials and the IMTFE demonstrates that beyond mere knowledge of planned aggression, the accused had to be in a position to shape and influence the policy of aggressive war and then act in furtherance of that policy.[57] Thus, irrespective of formal rank or

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53 Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2013, p. 139.

54 The IMT judgment emphasises that "Hitler could not make aggressive war by himself. He had to have co-operation of statesmen, military leaders, diplomats, and business men". Nuremberg Judgment, p. 223, see *supra* note 51.

55 Kevin J. Heller, "Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression", in *European Journal of International Law*, 2007, vol. 18, no. 3, p. 482.

56 Nuremberg Judgment, pp. 309–10, see *supra* note 51.

57 Heller, 2007, pp. 482–88, see *supra* note 56. See, for example, the High Command case where the IMT asserted that "mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition, that the possessor of such knowledge, after he acquires it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy". *United States v. von Leeb et al.*, Military Tribunal XII, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. 11, United States Government Printing Office, Washington, DC, 1950, p. 488.

position, active participation in the planning or waging of an aggressive war with the possibility to influence the war effort established criminal responsibility.

42.3.2. Hungarian Application of the Crime of Aggression

The notion of criminal proceedings in relation to participation in a war was not completely foreign to Hungarian legal tradition. After the First World War the revolutionary government promulgated on 2 March 1919 People's Act XXIII on the Preparation of Legal Proceedings concerning Persons Responsible for the War. Even though quite possibly this law was the first ever normative formulation of the criminality of the initiation of war,[58] the takeover of Horthy prevented any actual criminal trials.

The crime of aggression only returned with the adoption of MER No. 81/1945. Article 11 of the Decree stipulated that a war criminal is one:

> 1) who contributed to the involvement of Hungary in the 1939 war in a leadership position or failed to prevent it even though he could have had the opportunity due to prominent position in public administration, or political, economic or intellectual position.
> 2) who, as a the member of the cabinet or the parliament, or as a prominent public official, initiated, or even though he could have foreseen the consequences, participated in adopting a resolution that led the Hungarian people to war.
> 3) who attempted to prevent the conclusion of the armistice agreement by violence or by using his influence.

Even though the Decree preceded the London Charter by eight months, its content is remarkably close to the London Charter's definition of crimes against peace and in many respects presages the jurisprudence of post-Second World War criminal fora. It makes clear that any conduct that contributed to Hungary's participation in the war or a potential failure to prevent it could be deemed a criminal act. However, it might be argued that even though the notion of criminalising participation in the war was based on the pressure of the victorious Allied Powers, its actual implementation took the form of a *sui generis* Hungarian domestic regulation that was independent from the emerging international criminal

[58] Lukács, 1979, p. 42, see *supra* note 10.

law regulation pertaining to aggressive war. Yet, an overview of the first major war crimes trial, the trial of Prime Minister László Bárdossy, proves that the People's Tribunals were aware of the international legal developments and made efforts to apply the Hungarian legislation in the spirit of international law.

Bárdossy was a distinguished diplomat in the 1930s and was appointed as Foreign Minister in February 1941 and shortly afterwards – after the suicide of Prime Minister Pál Teleki – on 3 April 1941 he became Prime Minister, a position that he held for only 11 months. Still, even in this short time frame, he oversaw the Hungarian military's participation in the attack against Yugoslavia, in the military operation against the Soviet Union and the recognition of a state of war with the US.[59] During the trial, the Prosecution sought to prove that the accused was aware of the illegality of aggressive war under international law and knowingly engaged in illegal actions, while the accused chose a sophisticated defence that was mainly based on international legal arguments.

On the very first day of the trial, the Prosecution asked Bárdossy whether he knew that "aggressive war is deemed as an international crime due to developments since the last world war". Bárdossy retorted that such a determination was conspicuously missing in numerous conflicts following the conclusion of the Kellogg-Briand Pact and the reservations attached to the treaty clearly proved that the States Parties reserved the right to wage war under their own terms.[60] Bárdossy claimed that all the Hungarian actions were in conformity with international law. Hungary had not attacked Yugoslavia in breach of the Hungarian-Yugoslav Treaty of Eternal Amity and Friendship since the German military action started on 6 April 1941. Hungarian troops did not cross the border until 10 April 1941, when Croatia declared its independence. In the Hungarian view, the independence of Croatia resulted in the dissolution of the Yugoslav

[59] For a thorough – and overwhelmingly sympathetic – description of the life and trial of Bárdossy see Pál Pritz, *The War Crimes Trial of Hungarian Prime Minister László Bárdossy*, Center for Hungarian Studies and Publications, Boulder, 2004, pp. 3–74.

[60] Bárdossy underlined that "reservations made by the English government to the Kellogg Pact convinced me that England reserved the right to initiate a war anytime according to its interests". Pál Pritz (ed.), *Bárdossy László a Népbíróság Előtt* [László Bárdossy in Front of the People's Tribunal], Maecenas, Budapest, 1991, p. 147.

Kingdom and thus Hungary had the right to occupy and annex Voivodina, where a substantial Hungarian minority lived.[61]

As for the attack against the Soviet Union, Bárdossy stressed that Hungary has not joined the German forces on 22 June 1941 when Operation Barbarossa was launched but simply severed diplomatic relations with the Soviet Union. Contrary to the charges, no declaration of war was issued against the Soviet Union, but on 26 June 1941 three Soviet fighter planes fired machine guns at an express train on its way to Budapest between Tiszaborkút and Rahó, and one hour later unidentified planes dropped 29 bombs on Kassa (Košice).[62] The next day Bárdossy announced in the Lower House of the Parliament that "due to the inexcusable attack of the Soviet Union, completely contrary to the Law of Nations, the royal Hungarian government states that consequent to the attack a state of war exists between Hungary and the Soviet Union".[63] Bárdossy was keen to point out the difference between a declaration of war and recognition of an existing state of war that was the consequence of an unlawful armed attack.[64] However, this distinction seems to have been lost for the Prosecution and the Tribunal.

The 2 November 1945 judgment of the Budapest People's Tribunal rejected the defence arguments. It stated that "in the case of war crimes the collective legal object is the peaceful coexistence of humankind, that is fundamentally shattered and destroyed by the horrible destruction of aggressive war. Aggressive war amounts to an international crime due to certain international treaties created since the First World War".[65] It expressly referred to the Kellogg-Briand Pact, the 1924 Geneva Protocol for the Pacific Settlement of International Disputes and the 1927 League of Nation's Assembly Declaration Concerning Aggressive Wars as evidence of the criminal nature of aggression. It concluded that:

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61 *Ibid*., pp. 123–26.

62 It is still subject to debate whether the airplanes were indeed Soviet fighters or German – maybe even Hungarian – airplanes that wanted to create an appropriate *casus belli*. See Loránd Dombrády, *Katonapolitika és Hadsereg 1938–1944* [Military Policy and Army 1938–1944], Ister, Budapest, 2000, p. 144.

63 Hungary, Parliament, House of Representatives, Napló [Minutes], vol. 10, Athenaeum, 1941, p. 305.

64 Pritz, 1991, p. 135, see *supra* note 60.

65 *Ibid*., p. 287.

> According to the position of international law already before the Second World War aggressive war amounted to an international crime. The aggressor nation is guilty in front of the community of nations. Therefore the accused, who was a diplomat with knowledge of international law, cannot claim that he, who directly caused the involvement of Hungary in an aggressive war as a prime minister and a foreign minister, is simply responsible but not guilty, as in countries guilty of the initiation of aggressive war the politician or politicians are also guilty that led their country to aggressive war without its will.[66]

While the judgment did not address the distinction between a declaration of war and recognition of state of war with the Soviet Union, it did reject the argument concerning the dissolution of Yugoslavia. The Tribunal pointed out that the Croatian government was just a German proxy and the Yugoslav Army was still fighting at the time of the commencement of the Hungarian military operations. Consequently, the military operation participated in an aggressive war.[67]

This judgment authoritatively affirmed that the Hungarian criminalisation of involvement in the Second World War was a reflection of the international crime of aggressive war. It followed exactly the same logic as the later IMT judgment, which is hardly surprising since it refers to the report of Justice Robert H. Jackson that was available for the Hungarian authorities too.[68] This approach was shared by a considerable part of the Hungarian lawyers as well. On the day of the judgment the Criminal Law Committee of the Free Cooperative of Hungarian Jurists issued a resolution declaring that:

> The people's tribunal is the delegated forum of international criminal jurisdiction. With reference to the agreements of the Crimean and Potsdam conferences and the Moscow Armistice Agreement, it can be concluded that even though the people's tribunal is obviously a Hungarian court, in discharging its international obligations it acts as the delegated forum of interstate criminal jurisdiction […] War crimes are crimes of international character, whose collective legal object is the

66 *Ibid*., pp. 288–89.

67 *Ibid*., p. 301.

68 *Ibid*., p. 290.

> order of the peaceful coexistence of humankind that is fundamentally shattered by aggressive war.[69]

In a similar vein, the Budapest People's Tribunal in the judgment of Béla Imrédy, another former Prime Minister, held that "[p]erpetrators of war crimes and crimes against the people don't simply attack and endanger their own country's constitution and political system but the international legal order, the peace of culture and humanism".[70] Just like in Nuremberg, aggressive war was regarded as the root of all evil. The Tribunal in the case of former Prime Minister Sztójay and his cabinet members accordingly found that

> [t]he accused were part of the government established in 22 March 1944 that aimed at increased engagement of Hungary in the war. Every other act, the suppression of the left, the extermination of the Jews, making of public speeches that significantly influenced the public opinion, support to the Arrow-Cross movement, hindering the conclusion of an armistice agreement, support of crimes against the people were part of this common goal.[71]

Yet, even though the content of the crime of aggressive war could be identified to a high degree of certainty, the personal scope of application of the crime – not unlike in the international proceedings – remained vague. The reference to "intellectual position" in Article 11(1) could have covered a large number of people not wielding real influence over the planning and waging of war. Indeed, in 1945 the President of the National Council of People's Tribunals, István Ries, stated that he would even "include those eminent publicists that supported these measures instead of criticising them".[72] Fortunately, the crime of aggression was not applied in such a sweeping manner although certain contentious issues remained to be solved in the jurisprudence of the People's Tribunals, especially with regard to the criminal responsibility of Members of Parliament.

In the first major trial of a legislator, Zoltán Meskó was found guilty of failure to prevent Hungarian participation in the war. The National Council of People's Tribunals explained that

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69 *Népbírósági Közlöny*, vol. I. no. 1, 8 November 1945, pp. 13–15.

70 *Népbírósági rendelet* [Decree on People's Judiciary] Nbr. 3953/1945-11, Judgment of 23 November 1945.

71 NOT. I. 3846/1946, 1 July 1946.

72 Ries, 1945, p. 28, see *supra* note 19.

> the role of the legislator obliges the representative to attempt to prevent every action that offends the Hungarian people's interests, sentiments or moral. The accused failed to do so […] and it is indifferent whether accused could have possibly prevented the increased engagement of Hungary in the war. He cannot rely on the fact that his fellow MPs also failed to do something or that he was hindered by the depressing atmosphere of government terror.[73]

This decision implied that theoretically every single Member of Parliament who did not vote against legislation that contributed to the war effort was guilty of aggressive war. However, it must be added that Meskó was not an ordinary MP but an enthusiastic supporter of Nazism who – among others – founded the National Socialist Agricultural Labourers' and Workers' Party (Magyar Nemzeti Szocialista Földmunkás és Munkáspárt) in 1932.[74] This might help to explain the arguably excessive approach of the Council. In a later judgment, the National Council of People's Tribunals came to a much more nuanced conclusion. In a judgment exonerating a former Member of Parliament for not voting against the determination of the state of war against the Soviet Union it emphasised that

> in the given circumstances it would have been the patriotic and moral duty of every legislator to valiantly fight for the idea of liberty and humanity. However, such a heroic conduct in everyday life is only a moral duty and those who did not choose captivity instead of individual freedom or death instead of life cannot be found criminally liable.[75]

Thus, the People's Tribunals, just like their international counterparts, focused on the question of the extent the accused was able to influence the war policy as opposed to his formal position. László Temesváry, the President of the Hungarian National Bank, for instance, was found guilty in October 1944 since he approved of the transfer of the

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73 Cited by Major, 1988, p. 178, see *supra* note 1.

74 On Meskó's role in the organisation of Hungarian far-right movements see Randolph L. Braham, *A Népirtás Politikája: A Holokauszt Magyarországon* [The Politics of Genocide: The Holocaust in Hungary], Belvárosi Könyvkiadó, Budapest, 1997, pp. 57–59.

75 NOT. I. 175/1945, Judgment of 8 December 1945.

National Bank's gold and currency reserve to Germany which "contributed to the increased engagement of Hungary in the war".[76]

42.4. Crimes Against Humanity

42.4.1. The International Regulation of Crimes Against Humanity

The first attempt to introduce a category of international crimes that could cover atrocities committed against the civilian population was in 1915, when a joint declaration was issued by the British, French and Russian governments, condemning the massive and widespread deportation and extermination of hundreds of thousands of Armenians by the Ottoman government, stating:

> In view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.[77]

The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties reported to the 1919 Preliminary Peace Conference that Germany and its Allies had committed numerous acts in violation of established laws and customs of war "and the elementary laws of humanity", the latter reference being identified as offences committed by the Central Powers against their own nationals.[78] However, the Versailles and the Lausanne Peace Treaties eventually did not include reference to criminal proceedings for crimes committed against a country's own civilian population.[79]

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[76] *Népbíróság* [People's Tribunals], Nb. XII. 4832/1945/4, Judgment of 8 February 1946.

[77] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948 ("History of the UNWCC"), p. 35.

[78] Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, Antwerp, 2002, p. 458.

[79] Article 230 of the Sèvres Peace Treaty between Turkey and the Allied Powers stipulated that "The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on the territory which formed part of the Turkish Empire on August 1, 1914". However, the Treaty of Sèvres was not ratified, and the final Peace Treaty between Turkey and the Allied Powers omitted any reference

The tragic events of the Second World War resurrected the notion of accountability for such crimes. On 17 December 1942 the United Nations issued a declaration about the German intention to exterminate Jews and emphasised that those responsible will not escape retribution. The United Nations War Crimes Commission ('UNWCC') also at an early time suggested the extension of punishment beyond war crimes.[80] The actual formulation of the crime, however, remained undetermined until the adoption of the London Charter.[81] The modern usage of the words "crimes against humanity" dates from the Nuremberg Charter, Article 6(c) of which reads as follows:

> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This new category of crimes against humanity was introduced to ensure that inhumane acts committed against the civilian population in connection with war are punished; hence, it served as an "accompanying" or "accessory" crime to either crimes against peace or war crimes.[82] In effect, the Nuremberg IMT treated the concept as an extension of war crimes.[83]

There is general agreement that crimes against humanity require "widespread or systematic" commission in which "the hallmark of

criminal prosecution. Still, an Ottoman State Special Military Tribunal did initiate criminal proceedings against some of the perpetrators. Jennifer Balint, "The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'", in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, pp. 77–100.

80 Egon Schwelb, "Crimes against Humanity", in *British Yearbook of International Law*, 1946, vol. 23, pp. 183–85.

81 Roger S. Clark, "Crimes against Humanity at Nuremberg", in George Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff, Dordrecht, 1990, pp. 189–90.

82 Schwelb, 1946, p. 181, see *supra* note 80.

83 Cherif M. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011, pp. 136–44.

'systematic' is the high degree of organization, and that features such as patterns, continuous commission, use of resources, planning, and political objectives are important factors".[84] Widespread commission, on the other hand, is the quantitative aspect of crimes against humanity which typically denotes numerous inhumane acts[85] but might also be satisfied by a singular massive act of extraordinary magnitude.[86] In the Alstötter case, the US Military Tribunal thus pronounced that "crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority".[87] The UNWCC similarly concluded that:

> Isolated offences did not fall within the notion of crimes against humanity. As a rule, systematic mass action, particularly if it was authoritative, was necessary to transfer a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by states other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[88]

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84 Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010, p. 237.

85 Cassese points out that "[c]rimes against humanity have always been conceived, from the beginning, as crimes on an enormous scale. While early codifications of CAH did not explicitly contain a requirement that the attack on the civilian population be on a large scale, it was understood that this law was intended to address massive attacks". Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases & Commentary*, Oxford University Press, Oxford, 2011, p. 180.

86 International Criminal Tribunal for the Former Yugoslavia ('ICTY'), *Prosecutor v. Tohomir Blaškić*, IT-94-15-T, Trial Chamber, Judgment, 3 March 2000, para. 206 (https://www.legal-tools.org/doc/e1ae55/); *Prosecutor v. Dario Kordić and Mario Cerkez*, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 176 (https://www.legal-tools.org/doc/d4fedd/).

87 *USA v. Alstötter et al.*, Military Tribunal III, Judgment, 3–4 December 1947, in *International Law Reporter*, 1948, vol. 14, p. 320.

88 History of the UNWCC, p. 178, see *supra* note 77.

42.4.2. Crimes Against Humanity: Crimes Against the People in Hungarian Jurisprudence

The creation of the category of crimes against the people was based on the same rationale as the drafting of crimes against humanity – to criminalise certain acts committed against the civilian population. However, as we have already seen, since the category of crimes against humanity was still just an emerging concept on 5 February 1945, the time of the adoption of MER No. 81/1945, the category of crimes against people applies to a much broader scope of conducts. Article 15 establishes the criminal responsibility of

1) public officials in ministries, Members of the Parliament or high ranking state officials that initiated a law seriously infringing the interests of the people, or knowingly participated in its adoption,
2) public officials that after 1 September 1939 engaged in activities going beyond the confines of the execution of laws and decrees aimed against certain groups of the people that threatened or infringed personal liberty or causes bodily harm or resulted in financial loss,
3) public officials with jurisdiction, whose activities were categorically hostile to the people and fascist-friendly,
4) anybody who in print, in public or through radio transmission for a longer period of time engaged in permanent and continuous activity that was capable of significantly influencing the public opinion and distort it in a manner harmful to the country in order to spread fascist or anti-democratic views or incite and maintain racial and religious hatred,
5) anybody who served as an informant for official organs, parties, or societies with fascist and anti-democratic proclivities or persecuting certain groups of the society,
6) anybody who using the fascist and anti-democratic regime's powers for their own goals committed sexual assault or crime against personal freedom.

Article 17 complemented these prohibited acts with the crime of voluntarily joining the ethnic German organisation, the Volksbund, or holding a position or being an active member in a fascist or anti-democratic party, organisation or movement and support or failure to prevent acts enumerated in Article 15.

One of the fundamental elements of crimes against the people was the violation of human dignity, the inhumane nature of the prohibited conduct. This is very similar to crimes against humanity where the natural law concept of "laws of humanity" provided a convenient starting point for those seeking to justify punishing the perpetrators of large-scale human rights violations within state borders. It was a short step from "laws of humanity" to "crimes against humanity".[89] Indeed, in the judgment of István Antal, who was Minister of Justice and Secretary of State in numerous Hungarian governments, and in his position participated in the adoption of legal regulations seriously restricting the fundamental rights of Hungarian citizens, the National Council of People's Tribunals highlighted the moral core of crimes against the people. The Council claimed that "the legislature cannot pass a law that infringes our fundamental laws, the basic human rights" and "the responsibility of the accused can be determined based on both divine and human laws".[90]

Similarly, the Bárdossy judgment emphasised the inhuman nature of the deportation of about 20,000 Jewish persons in the summer of 1941 to Kamenets-Podolski where they were executed by German troops. The National Council of People's Tribunals stated: "The expulsion of innocent people to certain and horrible destruction was the first procedure that created a precedent for future procedures that resulted in the killing of hundreds of thousands of Hungarians in gas chambers and other torture chambers. The accused had the obligation to prevent this procedure that debased all European culture and human feelings".[91]

Another corresponding element to crimes against humanity was the existence of a targeted group. Mistreatment of soldiers[92] or youth squad members[93] by their commanders did not amount to crimes against the people since the subordinates did not belong to a persecuted group.

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89 Margaret M. deGuzman, "Crimes against Humanity", in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, Routledge, New York, 2011, p. 122.

90 NOT. I. 3678/1946/11, Judgment of 31 August 1946.

91 Pritz, 1991, p. 369, see *supra* note 60.

92 NOT. 764/1947.

93 NOT. VII. 7177/1946.

Finally, just like crimes against humanity, crimes against the people also constituted an ancillary category to other crimes. Thus, the accused were charged for acts that fundamentally contravened the interests of the people without directly contributing to the war effort or infringing the laws of war.[94] Still, in spite of the undeniable similarities between the two categories, it would be mistaken to regard crimes against the people as essentially identical to crimes against humanity.[95]

The commission of crimes against the people did not necessarily require, as a result, any actual harmful consequence against the targeted group. Miklós Serényi, a Member of Parliament, for instance, was convicted of crimes against the people for his speeches in Parliament in which he proposed, among other things, the summary execution of Jewish people in cases of aerial bombardments and further restrictions of the medical work of Jewish doctors even though his rants never resulted in any actual legislation.[96] The idiosyncratic feature of crimes against the people was a focus on the entirety of the Hungarian people as victim. The National Council of People's Tribunals underlined that "the victim is the Hungarian people itself, even if the aggression was directed against a certain group or certain individuals. Consequently the crime is committed even if it was not directed against an individual persecuted on ethnic, racial or political grounds […] but against any Hungarian citizen".[97]

This explains why any involvement in the activities of "fascist or anti-democratic parties, organisations or movements" was generally judged as a crime against the people even without any causal link between the accused's conduct and any violent or discriminatory action. Mrs. József Trenkula, for instance, was indicted on charges that she had been involved in the distribution of clothes taken from Jews, and she had seen people shot dead on the streets, and "thus, by her activity, which was not of a leading character, she aided the Arrow-Cross movement in gaining and remaining in power".[98] Membership in such groups was generally regarded as a crime against the people even if the accused's activities were

94 Lukács, 1979, p. 258, see *supra* note 11.

95 A view submitted in contemporary literature. Szűcs János, "Politikai bűntett" [Political Crime], in *Ítél a Nép!*, 4 May 1945.

96 *Népbíróság* [People's Tribunals], Nb. VII. 488/1946/6, Judgment of 13 March 1946.

97 NOT. I. 2859/1946/9, Judgment of 29 May 1946.

98 *Népbíróság* [People's Tribunals], BFL-Nb. 2.450/1945, Budapesti Fővárosi Levéltár (Budapest Metropolitan Archive).

restricted to genuine law enforcement.[99] Nevertheless, the jurisprudence of the National Council of People's Tribunals was far from settled on this point as in other cases non-active membership was a ground for acquittal.[100]

42.5. Conclusion

The creation and operation of the system of People's Tribunals was obviously inspired by the Allied determination to punish people responsible for the war. Yet, in the absence of any access to preparatory materials which could have guided the codifiers about the particular details of this newly emerging field of international law, the drafters of the Decree on the establishment of the People's Tribunals were essentially left on their own.[101]

The operation of the People's Tribunals was affected by political expectations to quickly and harshly punish the perpetrators and show the Hungarian people the continuity between the Horthy regime and Nazism and uphold "revolutionary legality" without unnecessary "legalistic entangledness".[102] Justice Minister István Ries encapsulated this anticipation when he pronounced that "[a]djudication in these cases is primarily not a legal but a political question".[103]

Yet, even though there was a clear demand for the People's Tribunals to become the instruments of a "quick and thorough purge" since "the defendants of these trials are not human criminals but beasts concerning whom the public cannot understand humanism",[104] the revisionist approach[105] that views the People's Tribunals as simple political tools used

99 NOT. III. 384/1945.

100 NOT. IV. 330/11/1945, Judgment of 19 June 1946.

101 Imre Szabó, *A Nürnbergi Per és a Nemzetközi Büntetőjog* [The Nuremberg Trial and International Criminal Law], Officina, Budapest, 1946, p. 54. Kálmán Kovács, who participated in the drafting, emphasises that only the illegal Allied radio broadcast gave them any guidance concerning the prosecution of war criminals. Kovács, 1966, p. 155, see *supra* note 9.

102 Karsai, 2000, p. 12, see *supra* note 14.

103 István Ries, "A Népbíróságok Védelmében" [In Defence of the People's Tribunals], in *Népbírósági Közlöny*, 1945, vol. I, no. 1, p. 2.

104 *Ibid.*, pp. 8–9.

105 Mária Schmidt, "Politikai Igazságszolgáltatás a Háború Utáni Európában" [Political Justice in Post-War Europe], in Mária Schmidt, *Diktatúrák Ördögszekerén* [On the

to legitimise the communist political takeover and to eliminate anybody who might obstruct the hegemonic aspirations of the Communist Party is hardly adequate. It is certainly true

> that a great number of minor Arrow-Cross members and minor *Volksbundists* fell victim to prejudiced investigations and showcase trials. A great many political detectives, people's prosecutors and people's judges behaved like the Jacobins of old, who had regarded the country as divided in three parts: policemen, denouncers, and suspects.[106]

The judges of the People's Tribunals generally endeavoured to observe due process standards. "Defendants had their say in court, and even though judicial irregularities were legion, no one was forced to plead guilty and none begged to be executed as had been customary during the Stalinist Great Terror and would again become customary in Eastern Europe in the late 1940s and early 1950s".[107] The purely ideological trials where defendants were charged with "conduct endangering the work of the democratic government" based on Act VII of 1946 were less than 20 per cent of the total number until 1949.[108]

The jurisprudence of the People's Tribunals was often contradictory and failed to establish a single standard, and its judges were "divided by ideology stemming from the conflicts between the political parties".[109] However, that is hardly surprising from an essentially transitional justice mechanism. As Andrea Pető reminds us, "it is difficult to imagine in that extraordinary, apocalyptic situation charged with all kinds of aspirations and emotions that any court could have worked 'efficiently'".[110] Nonetheless, as I

Tumbleweed of Dictatorships], Magvető, Budapest, 1998, pp. 11–53; and Mária Schmidt, "Az Első Kiratkatper" [The First Show Trial] in Schmidt, *ibid.*, pp. 217–30.

106 Karsai, 2000, p. 13, see *supra* note 14.

107 István Deák, Jan T. Gross and Tony Judt (eds.), *The Politics of Retribution in Europe: World War II and Its Aftermath*, Princeton University Press, Princeton, 2000, p. 10.

108 Ildikó Barna and Andrea Pető, *A Politikai Igazságszolgáltatás a II. Világháború Utáni Budapesten* [Political Justice in Post-World War II. Budapest], Gondolat, Budapest, 2012, p. 58.

109 Pető points out that "[i]n the cases I have examined, the Smallholders' delegates always spoke in favour of more lenient sentences". Andrea Pető, "Problems of Transitional Justice in Hungary: An Analysis of the People's Tribunals in Post-War Hungary and the Treatment of Female Perpetrators" in *Zeitgeschichte*, 2007, vol. 34, p. 339.

110 Andrea Pető, "Népbíróság és Vérvád az 1945 utáni Budapesten" [People's Tribunals and Blood Libel in Post-1945 Budapest], in *Múltunk*, 2006, vol. 1, p. 42.

have tried to illustrate in this chapter, the emerging norms of international criminal law did have an actual influence on the prosecution of perpetrators of international crimes. Maybe it is too much to say that the principles of the people's adjudication were corresponding with the Nuremberg principles as suggested in contemporary literature.[111] Nonetheless it is undeniable that not only scholarly articles[112] but also actual judgments reflected on international legal questions employing legal argumentation that often closely followed the jurisprudence of the international military tribunals.

This is particularly important since the prevalence of the belief that the People's Tribunals operated merely as political tools could fundamentally change our perceptions about war criminality as well. As Immi Tallgren reminds us: "A deficient trial may by its trauma engender taboos and martyrs. It may endanger open analysis of acts and responsibilities, thereby cementing a period in history under its protective cover. In a bedtime story turning into a nightmare, a trial becomes a damaged nuclear reactor that maintains its toxicity for interminable periods, slowly leaking emissions into its environment".[113] This chapter aimed to show that despite the many flaws of the People's Tribunals their jurisprudence concerning the prosecution of war criminals was hardly deficient.

[111] Sándor Szalai, *Ítél a Magyar Nép! A Magyar Háborús Bűnperek Tanulságai* [The Hungarian People Will Judge! The Morale of the Hungarian War Crime Trials], Athenaeum Irodalmi, Budapest, 1946, p. 29.

[112] See *inter alia* Andrei Trainin, "A Nürnbergi Per" [The Nuremberg Trial], in *Jogtudományi Közlöny*, 1946, vol. 1, pp. 171–72; László Stux, "Háborús Perek és a Nemzetközi Jog" [War Crime Trials and International Law], in *Jogtudományi Közlöny*, 1946, vol. 1, pp. 103–4; Imre Szabó, "A Jog a Béke Szolgálatában" [Law in the Service of Peace], in *Jogtudományi Közlöny*, 1947, vol. 2, pp. 100–3; Béla Hajdu, "A Genocídium Kérdéséhez" [About the Question of Genocide], in *Jogtudományi Közlöny*, 1948, vol. 3, pp. 378–79.

[113] Immi Tallgren, "The Finnish War-Responsibility Trial in 1945–6: The Limits of Ad Hoc Criminal Justice?", in Heller and Simpson 2013, pp. 453–54, see *supra* note 79. This might be contrasted with Mark Drumbl's observation that the "[l]egal process can narrate history and thereby express shared understandings of the provenance, particulars, and effects of mass violence; punishing the offender contributes yet another layer of authenticity to this narration". Mark Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 174.

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The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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