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IN THE SHADOW OF NUREMBERG: TRIALS OF
JAPANESE IN THE EAST, 1945-1951

by

PHILIP R. PICCIGALLO

A dissertation submitted to the Graduate
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INTRODUCTION

Between 1945-1951, Allied military commissions assembled throughout the Far East condemned 920 Japanese to death and sentenced 5,472 others to prison terms. The accused had been found guilty, in varying degrees, of having committed war crimes. In addition, an International Military Tribunal sitting at Tokyo from 1946-1948 tried and sentenced 25 'major' Japanese war criminals--Tojo and company--for plotting and waging the Pacific war. Only for their contribution to the field of international law these trials warrant serious study. Yet they have been relatively overlooked, except perhaps in passing, by scholars and jurists alike. The time is long overdue for their emergence from behind the shadow of Nuremberg.

Granted, one cannot realistically expect phrases such as Rape of Nanking, Bataan Death March, Thai-Burma Death Railway or Sack of Manila to elicit the same kind of responses usually associated with mention of Nazi horrors. Phrases such as Concentration Camps, Genocide, Holocaust and Final Solution immediately focus attention upon one outstanding event of the past three decades: the proceedings of the International Military Tribunal at Nuremberg, held from 1945-1946. So, too, with war crimes trials. The overwhelming number of studies--and they are countless--that deal with the subject concentrate solely on those related to Germany. Doubtless, the register of atrocities perpetrated by Nazis between 1933-1945 stands unchallenged as a monument to evil, and will forever endure disquietingly in the hearts and minds of men. Nazis, however, possessed

no monopoly over the commission of war crimes during World War II.

Throughout the East Japanese waged an equally, though not as designedly, ruthless and inhuman campaign against opposing military forces and local civilian population. After 1931, and to an increasing degree after 1937, members of the Japanese army, navy, police and government had beaten, tortured, burned and massacred Chinese by the thousands. American airmen captured over the mainland, Burma, the Pacific Islands or Japan proper were humiliated, bayoneted and executed without trial. Whole populations of villages of Java, Rabaul, Kuala Lumpur and the Southwest Pacific Islands were slaughtered outright. Japanese military police, the notorious Kempeitai, specialized in devising novel methods of eliciting information from captives and causing unimaginable suffering. And they practiced their trade generously. Prisoners of War (POWs), the Japanese felt, did not deserve treatment befitting the soldier, as they had shamefully surrendered or allowed themselves to be captured. Often the captors worked them until they died.

Immediately prior to and after the American invasion of the Philippines in late 1944, Japanese naval personnel in Manila and dispersed army contingents in Batangas province launched a sanguinary assault on local inhabitants. Insensate carnage ensued, resulting in the wanton massacre of thousands of Filipinos. Manila, as so many other cities, towns and villages which had stood in the path of the rampaging Japanese Imperial Army, was razed.

Was this type of behavior attributable to Japanese unyielding adherence to strict discipline or blind obedience to orders? Did it stem from Japanese reliance upon samurai values or obsessive belief in the need to establish an Empire? Perhaps blame rests with Japanese unique moral codes or just the infinite madness of war itself. In any event, actions such as these defy simple explanation as surely as they numb the consciousness. Nor will any attempt to explain them be made in the present study. In fact, but for the preceding mise en scene direct reference to atrocities will hereafter occupy merely passing status, and will serve one basic function: to awaken readers to the reality that Japanese, too, perpetrated war crimes and that, not surprisingly, Allied nations held them accountable. This is a study, not of Japanese war crimes, but of the trials of those who committed them.

Additional, perhaps more important reasons necessitate further examination of Japanese war crimes trials. First of all, eleven Allied nations participated. Principal burden for investigating, locating, apprehending and prosecuting of war criminals fell to the governments of America, Britain, Australia, the Netherlands, China, the Philippines, France, Russia and, to a lesser extent, those of Canada, New Zealand and India. Trials were conducted, occasionally jointly, by Allied military courts at Batavia, Canton, Guam, Hong Kong, Khabarovsk, Kuala Lumpur, Labuan, Manila, Manus Island, the Marshall Islands, Morotai, Nanking, Fort Darwin, Rabaul, Shanghai, Yokohama and, of course, Tokyo.

In all respects, then, the Allied war crimes operation in the

East was an international effort. Each nation, viewing the trials within its own domestic and international political, economic and social context, outlined and followed, within practical limitations, its own war crimes policy. Put simply, Japanese war crimes trials did not to any great extent determine the course of any Allied nation's major policies; rather, major policies and relative factors determined the course of the trials in each nation. This is another way of saying that Japanese war crimes trials were made to fit into the overall national and foreign policy objectives of each Allied country.

Inasmuch as this is true, the trials assume new meaning. Not only is study of them important for a comparison of legal procedures and principles. Nor does significance lie exclusively in the contribution, particularly that of the International Military Tribunal for the Far East (IMTFE), to international law. Even such questions as whether the Allies afforded Japanese accused fair and impartial trials or whether, as Richard H. Minear and others have suggested, they practiced "victor's justice," are but part of a much larger and meaningful consideration.¹

Greater relevance, to wit, may be found in a comprehensive and comparative examination of each Allied nation's policies toward, and treatment of, Japanese war criminal suspects. From that, it is believed, a clearer and more accurate understanding of how and why postwar international relations in the East developed or degenerated as they did in succeeding years will emerge. An attempt to accomplish the preceding

¹Richard H. Minear, Victors' Justice: The Tokyo War Crimes Trial (Princeton, N. J., 1971).

follows.

Each chapter contains a separate section dealing with the position of the trials in each respective nation's international relations, except where the United States is concerned. American foreign policy relative to war crimes trials will be interspersed throughout the entire study, while receiving special attention in Chapters 1 and 2.

CHAPTER I

THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: WARNING, OCCUPATION, TRIAL

A. The Warning

Barely had air raid sirens subsided at Pearl Harbor when reports of widespread Japanese atrocities being perpetrated against Allied servicemen and civilians in the East began to filter into the homelands. By early 1942, Allied leaders understood all too well the shocking truthfulness of such accounts; so, too, their foreboding potential. Through Parliamentary addresses, press statements and official pronouncements, government spokesmen apprised their constituents and the world of such Japanese "acts of barbarism and violence."¹ They also warned the Japanese of the consequences of their behavior.

Initially, Allied statements underscored expectations that Tokyo would observe, voluntarily, generally accepted norms of civilized behavior and principles of international law. Washington and London, for example, expected Tokyo to abide by the provisions of the Geneva Convention of July 27, 1929, relative to the Red Cross and the protection of POWs. So explained Secretary of State Hull to the Japanese Foreign Ministry in a note of December 18, 1941.² Shortly thereafter,

¹Punishment for War Crimes: The Inter-Allied Declaration signed at St. James' Palace, London, on Jan. 13, 1942 and Relative Documents. (London 1942), p. 15; Britain, Parliamentary Debates. H. of Commons, Mar. 10, 1942. v. 378, p. 930.

²IMTFE, Judgment, p. 1099.

however, the need for more incisive and assertive Allied statements-- actually, warnings--was evident.

The first formal warning to Japan followed the signing of the Inter-Allied Declaration on "Punishment for War Criminals" in London in January 1942. While the conference dealt primarily with events then taking place in Europe, the Chinese observer directed his message to Tokyo. In "solemnly condemning" the inhuman treatment afforded his countrymen by Japanese, Wuns King pledged China's unswerving commitment to "vindicate" the "elementary principles of justice and morality." All "guilty persons" would be "equally dealt with according to law," assured King; and the "authors" of war crimes would be "held accountable therefor. . . ." ³

On August 21, 1942, Franklin D. Roosevelt delivered his hitherto most explicit admonition to Tokyo. For "some time," he said, the United States had "been aware" of war crimes committed by the Axis powers. " . . . (A)ppropriate use of . . . information and evidence in respect to these barbaric crimes of the invaders, in Europe and in Asia," the President, too, assured, would be made in future prosecutions. In fairness, he concluded, "they should have this warning that the time will come when they shall have to stand in the courts of law in the very countries which they are now oppressing and answer for their acts." In September, Winston Churchill expressed his desire "most particularly to identify the British Government . . . with the solemn words" of the President. Later that year, in December, Vice President Henry Wallace

³Punishment for War Crimes, p. 15.

urgently proposed that the United Nations "make absolutely sure that the guilty leaders (of Germany and Japan) are punished. . . ."⁴

The warning implicit in the Cairo Declaration of December 1, 1943, mainly applied to Japan as a nation rather than to the individuals responsible for its aggression. China, Britain and America, the three co-signers, therefore emphasized national punishment, to wit, the stripping from Japan of all territory which it had seized by force. It would be difficult to argue, then, as some have, that the Cairo Declaration represented a distinct warning to Japanese in re punishment for war crimes.⁵

Forthcoming, though, was an abundance of official Allied pronouncements, each spelled out with greater clarity. Particularly did this pertain in later years, as the European war neared its end. Consequently, Allied participants found increasing opportunity to focus needed attention on pressing matters in the Pacific. Immediately upon learning the details of the Bataan Death March in late January 1944, Secretary Hull and British Foreign Minister Anthony Eden issued simultaneous warnings to Japan. Neither government, they promised, would "forget these acts" or relent in their determination to mete out "just punishment." Eastern war crimes concerned, too, General Charles DeGaulle, the universally recognized head of the French resistance. "Any" Japanese who mistreated French or Indochinese citizens, he pointedly notified Tokyo in May 1945,

⁴United Nations Information Organization. Info. Paper No. 1, 1946, pp. 7-8. Emphasis mine. Solis Horwitz, "The Tokyo Trial," International Conciliation, v. 465, 1950, pp. 477-78.

⁵U.S. Dept. of State Bulletin, v. ix, 1943, p. 393. See e.g., Joseph B. Keenan and Brendan F. Brown, Crimes Against International Law (Wash. D.C., 1950), p. 25.

would later be held accountable as a "war criminal."⁶

Through the Swiss Minister, Tokyo learned in June 1945 that the United States possessed a substantial number of Japanese documents "authorizing cold-blooded murder of captured prisoners." The United States "firmly intended to bring to judgment anyone who had any part in these acts," warned the Swiss representative. Moreover, indisputable evidence adduced at the Tokyo Trial revealed that the Allied powers had lodged with the appropriate Japanese authorities during the Pacific war a host of "formal and informal protests and warnings against violations of the laws of war. . . ."⁷

Finally, and most important, the Potsdam Declaration of July 26, 1945, set down "basic policy for the trial and punishment of Japanese war criminals." Issued jointly by America, Britain and China, and subsequently subscribed to by Russia, the proclamation stated,

- 6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest. . . .
-
- 10) We do not intend that the Japanese 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. . . .⁸

Thus had the Allied powers warned the Japanese government and military that those responsible for war crimes would be held accountable

⁶Supreme Commander for the Allied Powers. Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. (Tokyo, 1952), Monograph 5, pp. 38-39; The New York Times, May 13, 1945.

⁷SCAP. Trials of "B" and "C" Criminals, p. 38; IMTFE, Judgment, pp. 1117-26.

⁸Horwitz, "Tokyo Trial," p. 479; U.S. Dept. of State Bulletin, xiii, 1945, pp. 137-38.

for their acts.

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In the meantime, the Allies undertook more practical steps. By virtue of an Anglo-American agreement cemented in December 1942, a United Nations War Crimes Commission (UNWCC) came into being in October 1943. The Commission comprised 16 members. The Soviet Union refused to join. "Primarily a fact-finding body," the UNWCC dispatched scores of investigation teams to areas in Europe and Asia recently liberated by Allied forces. There, they scoured hundreds of miles, unearthing evidence, locating eyewitnesses, interviewing local inhabitants and taking depositions from released POWs. In this manner, lists of European and Eastern war criminals against whom prima facie cases might be made were drawn up and forwarded to prosecuting Allied nations. Established in May 1944, a Chungking "Sub-Commission" concentrated exclusively on preparing lists of Japanese suspects.⁹ Such procedure, as well as UNWCC functions, however, generally applied to the trials of lesser Japanese war criminals--not, however, to the forthcoming trial of "major" war criminals at Tokyo.

B. The Occupation of Japan

By signing the Instrument of Surrender on September 2, 1945, Japanese authorities, on behalf of the Emperor and government of Japan, accepted the provisions of the Potsdam Declaration. Yet while the Japanese proclaimed their surrender to "the Allied Powers," there should be no misunderstanding American predominance in the postwar adjustment of Japan. The United States had shouldered the overwhelming

⁹The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1948), pp. 2, 120, 127-31; M. E. Bathurst, "The United Nations War Crimes Commission," Amer. Jrnl. of Int. Law, v. 39, 1945, pp. 566-70.

burden in the Allied war effort against Japan. Equally important, the long and destructive war had resulted in the palpable weakening of the traditionally influential powers in the East; only the United States and Russia emerged strengthened from the conflict. Well before the official Japanese surrender, American leaders harbored grave distrust of Soviet motives vis-à-vis postwar Japan. To fill the Pacific power vacuum caused by the war, to forestall potential Soviet aggression aimed at Japan and to restore regional stability, then, United States officials felt strongly the need for decisive action.¹⁰

For these reasons, President Truman determined at the time of the Potsdam conference that the United States must supervise the occupation of Japan; also, that General Douglas MacArthur, designated Supreme Commander for the Allied Powers (S.C.A.P.) on August 14, 1945, "would be given complete command and control" there. Indeed, "all occupation policies were based on the 'United States Initial Post-Surrender Policy for Japan'" of August 29, 1945. And while American officials assured their Allies that they would seek to cooperate with them in the formulation of occupation policies, where differences existed, stated the aforementioned document, "the policies of the United States will govern."¹¹

"To formulate the policies, principles and standards" by which the Japanese Surrender Instrument might be effected, the Far Eastern

¹⁰At Potsdam, Pres. Truman decided that he "would not allow the Russians any part in the control of Japan. . . ." Also, "The Russians were planning world conquest." Harry S. Truman, Year of Decision. (N.Y., 1955), p. 412.

¹¹Ibid., Edwin O. Reischauer, The United States and Japan. 3rd ed. (N.Y., 1965), p. 47. SCAP. "United States Initial Post-Surrender Policy for Japan," Aug. 29, 1945, Pt. II, art. 1.

Commission (F.E.C.) was founded in late 1945-early 1946 as the "supreme policy-making body" in the occupation. Here too American influence weighed heavily. "The F.E.C.," observed its official historian, "generally recognized, respected and followed the lead of the United States."¹² In short, the United States directed and dominated the occupation of Japan.

America's principal role in the organizing and conducting of Japanese war crimes trials ran parallel to its leading role in the occupation. Not only did it spearhead the Eastern war crimes operation, prosecuting more Japanese than any other nation, but it also exercised considerable sway over its Allies' war crimes policies. That particularly included the Tokyo Trial of major Japanese war criminals, which functioned throughout under the all-pervading shadow of the S.C.A.P. Owing to its "predominant contribution" to the defeat of Japan, contended prosecutors at Tokyo, "it was the universally admitted right and duty of the United States" to oversee Eastern war crimes trials. Nor, would it seem, did the Allies object: It had been "obvious from the beginning," noted the China Press, "that Americans would run the Tokyo Trial."¹³

Occupation policy aimed initially at the demilitarization and democratization of Japan. It sought to "eliminate for all time" militaristic elements from Japanese government and society, while simultane-

¹²Reischauer, U.S. and Japan, p. 47; Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888 (Wash., D.C., 1947), pp. 2-3; George H. Blakeslee, The Far Eastern Commission: A Study in International Cooperation 1945-1952. Pub. 5138 (Wash., D.C., 1953), p. 237.

¹³Keenan and Brown, Crimes Against International Law, pp. 176-77; China Press, Sept. 5, 1948.

ously encouraging moderate elements and inculcating democratic principles among the population. From the start, American occupation authorities envisaged war crimes trials as contributing to both these objectives. Thus went the reasoning: trials, combined with other measures (most notably, political purges and dissolution of the large industrial combines), would remove those militaristic and reactionary forces which in the 1930s had side-tracked and eventually overtaken progressive forces in Japan. Now the way would be cleared for the re-emergence of the latter.¹⁴

At the same time, the causes of justice and democracy would be served. Those guilty of committing war crimes would be punished. And, furthermore, the Japanese public would witness first-hand democratic principles in action. Remarkable alone was it, said S.C.A.P. officials,

that so soon after the cessation of hostilities . . . the victors set up military commissions, not for the purpose of meting out sentences in revenge . . . but for the purpose of ascertaining the guilt or innocence of the accused after a fair and impartial trial. . . .

The entire trial records, they concluded, would stand as "monuments to the fair manner in which the war crimes program in the Far East was handled."¹⁵

In the meantime more idealistic motives surfaced. Never before in the history of mankind had the reality of global interdependence appeared so marked as with the outbreak of World War II. Vast oceans

¹⁴See references in Potsdam Declaration, arts. 6 and 10, and "Initial U.S. Post-Surrender Policy," Pts. 1 and 2. Also, see Reischauer, U.S. and Japan, pp. 286-88; Kazuo Kawai, Japan's American Interlude (Chicago, 1960), p. 22.

¹⁵SCAP. Trials of "B" and "C" Criminals, pp. 3-4.

and land spaces no longer isolated nations from the rest of the world; aerial bombardment made traditional protective measures obsolete. Events which occurred thousands of miles away affected, with hitherto inconceivable rapidity and directness, formerly detached populations. "We are all in the same boat now," President Roosevelt had responded to Winston Churchill's query concerning initial reports of the Japanese assault on Pearl Harbor.¹⁶

Such sentiments persisted throughout and immediately after the war. By then, American statesmen had become convinced of the essential need to maintain after 1945 that Allied unity which the war had necessitated and fostered. Only through realization of the concept of "One World," admonished Wendell Wilkie, the Republican candidate for president in 1940, could the United States "win the peace" as well as the war.¹⁷ Other statesmen echoed this theme. Moreover, they viewed favorably prospects for its fulfillment.

Harry Hopkins, FDR's personal adviser, left the Yalta conference of February 1945 convinced that the Allies--" . . . all of us, the whole civilized human race"--"could live peacefully" indefinitely. Secretary Hull believed that a new age of international relations had dawned, one freed of traditional power struggles and based upon an identity of interests.¹⁸

Of greatest importance was the "vision" of world peace espoused by Franklin Roosevelt. As Franz Schurman, a noted expert on interna-

¹⁶Winston Churchill, The Grand Alliance (Boston, 1950), p. 605.

¹⁷Wendell Wilkie, One World (N.Y., 1943), pp. 202-06.

¹⁸Robert E. Sherwood, Roosevelt and Hopkins (N.Y., 1948), p. 870; Cordell Hull, The Memoirs of Cordell Hull (N.Y., 1948), v. 2, pp. 1314-15.

tional affairs, has commented, "When the President of the United States talks of 'one world', all listen because he (alone) has the power to attempt to bring it about." To be sure, FDR's championing of such causes as atomic power, the United Nations and a revised international economic system reflected this vision. Buried with him, it is true, were many of these hopes; some, however, lived on.¹⁹

To many, postwar trials, and particularly those conducted at Nuremberg and Tokyo, represented "the powerful confirmation of the world's faith in justice as the foundation of peace." Certainly, not everyone agreed.²⁰ Undoubtedly, though, those who created and supported the Charters of the International Military Tribunals at Nuremberg and Tokyo believed that they acted in the best interests of the whole of civilized humanity. Accordingly, the prosecution at Tokyo strove foremost "to advance the cause of peace and right notions of international law." In this manner, it hoped to further enable "men in their international associations, to fashion one world. . . ."²¹ That was 1945-1946.

With these factors in mind, we may now examine the most publicized and controversial of all Japanese war crimes trials, that of Hideki Tojo et. al.

¹⁹Franz Schurman, The Logic of World Power (N.Y., 1974), pp. 13-17.

²⁰C. A. Pompe, Aggressive War; An International Crime (The Hague, 1953), Intro., pp. xii-xiii; for contemporary criticism of the trials, see statements by Robert Taft, The New York Times, Oct. 6, 1946; also, Stars & Stripes (Tokyo), Aug. 9, 1946.

²¹See Robert H. Jackson, The Case Against the Nazi War Criminals (N.Y., 1946), p. 3; U.S. Dept. of State. "Occupation of Japan: Policy and Progress." Pub. 2671 (Wash., D.C., 1947), p. 28; Keenan and Brown, Crimes Against International Law, p. 155.

C. The Trial

At Nuremberg, major Nazi leaders stood before a Military Tribunal composed of representatives of the Big Four, America, Britain, France and Russia. This was not the first time that victors in a war had tried members of the losing side on war crimes charges. What rendered this a truly unique historical and international event, however, was the Allies' expanded definition and application of the term "war crimes." No longer, as in the past, did the term solely refer to violations of the laws and usages of war or, perhaps more broadly, to offenses against civilian populations. Instead after some initial disagreement, the Allies determined that any definition of war crimes must include and underscore the "greatest" crime against world civilization: the plotting and waging of an aggressive war. Moreover, they added, individuals and not merely states or governments, could and would be held responsible for this crime.²²

As many authors have commented on the general similarities shared by the Tokyo and Nuremberg Tribunals as have stressed their basic distinctions.²³ Some have discovered substantial significance in the Tokyo Trial, designating it the "Far Eastern counterpart" of the Nuremberg hearing. Not so with others. "The war crimes trials conducted

²²UNIO, Infor. Paper No. 1, 1946, p. 10. On initial Allied disagreement, consider that some Americans (Treasury Secretary Henry Morgenthau, notably) and many Britons objected to the notion of international trials, favoring instead summary execution of major Nazi war criminals. See James F. Byrnes, Speaking Frankly (N.Y., 1947), p. 182; Henry Stimson, On Active Service (N.Y., 1948), pp. 584-88.

²³On comparisons between the Tokyo and Nuremberg Tribunals, see, e.g., Horwitz, "Tokyo Trials," pp. 475, 486; Robert K. Woetzel, The Nuremberg Trials in International Law (N.Y., 1960), pp. 226-32.

at Tokyo," observed a recent study, "were little more than an echo of the far more famous proceedings held at Nuremberg." Whatever else may be said, one truth cannot be denied: the "objectives" of the IMFFE, in the words of one of the participants, "closely parallel(ed) those of the German trial." Accordingly, the indictment lodged against major Japanese war criminal suspects "followed the general pattern of the Nuremberg document."²⁴

* * *

Steps toward creating an International Military Tribunal for the trial of major Japanese war criminals began almost immediately after surrender. A United States Joint Chiefs of Staff (JCS) directive forwarded to the Supreme Commander, General MacArthur, on September 22, 1945, included detailed instructions regarding the prosecution of Japanese war criminal suspects and establishment of such a Tribunal.²⁵

Within a fortnight of Japan's surrender, S.C.A.P.'s Legal Section began the process of apprehending major war criminals throughout the archipelago.²⁶ Responsibility for the investigation and prosecution of cases against these individuals devolved upon the International Prosecution Section of S.C.A.P., established on December 8, 1945. From the outset this proved a formidable task, as Allied war crimes teams struggled confusedly in their attempt to identify, locate and arrest suspects. The fact that many Japanese, in panic and self-defense, had

²⁴Horwitz, "Tokyo Trial," p. 475; Dorothy Borg and Shumpei Okamoto, eds., Pearl Harbor As History (N.Y., 1973), Intro., p. xii; A. Frederick Mignone, "After Nuremberg, Tokyo," Texas Law Review, v. 25, 1947, p. 483.

²⁵History of UNWCC, p. 383.

²⁶See, e.g., The New York Times, Sept. 6, 9, 12, 13, 22, 1945.

"destroyed, altered or secreted" incriminating documents just prior to the American landing compounded prosecution difficulties, and made the construction of tenable cases that much harder.²⁷

President Truman appointed Joseph B. Keenan, a former assistant to the Attorney General, as Chief Prosecutor at Tokyo on November 30, 1945. Keenan, an ardent New Dealer, had earned the label, 'Joe the Key', in Washington circles. His talent for 'getting things done' had been instrumental in Truman's appointment. Under his guidance, it was hoped, a coherent prosecution staff and case would emerge. In accordance with the JCS directive (above), which demanded that trials of major war criminals be held before an international tribunal, the Supreme Commander promulgated on January 19, 1946, the establishment of the International Military Tribunal for the Far East.²⁸

American predominance in the organizing of the IMTFE notwithstanding, an attempt was made to include the other Allied nations in the policy-making process. For one, the initial directive to MacArthur had been previously "approved by all nations taking part in the occupation of Japan." For another, Allied action taken at the Moscow Conference in December 1945 led to the founding of the Far Eastern Commission. On April 3, 1946, the F.E.C. approved a policy decision on the "Apprehension, Trial and Punishment of War Criminals in the Far East." This decision embodied substantially the instructions laid down in the JCS

²⁷On the destruction of documents and evidence by Japanese, see New York Herald Tribune, Dec. 12, 26, 1946.

²⁸Horwitz, "Tokyo Trial," p. 482; For MacArthur's "special proclamation", see Gen. Orders No. 1, GHQ, SCAP, Jan. 19, 1946, U. S. Dept. of State Pub. 2675, pp. 5-10.

directive. Furthermore, it provided a definition of the term war crimes which, inter alia, embraced the interpretation of class "A" or major offenses which had been applied at Nuremberg. In accordance with F.E.C. procedure, this policy decision was transmitted, on April 23, to the Supreme Commander through a JCS directive.²⁹

The Supreme Commander's "special proclamation" of January 19, 1946 also established the Charter of the IMTFE. As that of Nuremberg, the Tokyo instrument defined the jurisdiction of the Tribunal as well as the legal procedure to be followed at the forthcoming trial. Initially drawn up "in its entirety" by American personnel within the International Prosecution Section, the Charter was later amended to accommodate suggestions offered by Allied prosecutors and the changes "necessitated" by the F.E.C. policy decision. Nevertheless, the amended Charter, issued April 26, 1946, contained minor revisions only. Most notable in this regard was an amendment which enabled each member of the F.E.C. to nominate a justice and an associate prosecutor to the Tribunal. Thus might non-signers of the Instrument of Surrender, particularly India and the Philippines, be represented.³⁰

" . . . (F)or the just and prompt trial and punishment of the major war criminals in the Far East," read the opening article of the

²⁹History of UNWCC, p. 383; F.E.C., Activities of the, p. 2, Append. 39, p. 97ff; F.E.C. Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945 (Wash., D.C., 1950), pp. 4-5

³⁰Horwitz, "Tokyo Trial," p. 483. For the original and amended Charters, see "International Military Tribunal for the Far East," U.S. State Dept. Pub. 2765 (Wash., D.C., 1947), pp. 5-16; "Trial of Japanese War Criminals," U.S. State Dept. Pub. 2613 (Wash., D.C., 1946), pp. 39-46

Charter, the Allied powers created the IMTFE. Its bench would consist "of not less than six members nor more than eleven members," appointed by the Supreme Commander. He would select his appointees from names "submitted by the Signatories of the Instrument of Surrender," namely, America, Britain, China, Russia, Australia, Canada, France, the Netherlands, and New Zealand, plus India and the Philippines. The Supreme Commander, in addition, would appoint one member to preside over the Tribunal, a Secretariat, and all necessary "assistant secretaries, clerks, interpreters, and other personnel. . . ."31

Six members of the Tribunal constituted a quorum. Majority vote "of those members of the Tribunal present" would be required for all decisions, "including convictions and sentences." Absence of a judge, even for a prolonged period, did not disqualify him from subsequent proceedings, unless he declared openly an "insufficient familiarity" with events which took place in his absence.³²

Article 5 of the Charter empowered the Tribunal to try and punish Japanese charged with war crimes, including the following:

a. Crimes against Peace: Namely, 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;

The IMTFE also had jurisdiction over so-called class "B" and "C" offenses: that is, conventional war crimes or "violations of the laws or

³¹Arts. 1-3.

³²Art. 4.

customs of war;" and crimes against humanity or "inhuman acts committed before or during the war "mainly against civilian populations other than the Japanese. In adopting this definition of war crimes the IMTFE closely hewed to lines drawn by its Nuremberg predecessor. The IMTFE, however, insisted that only persons "charged with offenses which include(d) crimes against peace" stand before it; all others were to be tried by national or other courts. The Nuremberg Charter contained "no such exclusive provision."³³

That he acted in accordance with his "official position" or "pursuant to order of his government or of a superior" would not by themselves free an accused from responsibility for crimes alleged. Yet "such circumstances," stated article 6, might "be considered in mitigation of punishment" if so determined as just by the Tribunal.

A separate section of the Charter outlined provisions designed "to insure fair trial for the accused." Guaranteed those on trial would be the presentation, "in adequate time for defense," of a clearly worded public indictment listing each offense charged; trial proceedings conducted in English and Japanese; translation of all necessary documents and evidence; "the right to be represented by counsel of his own selection" subject to approval by the Tribunal, or of court-appointed counsel; and the right "to conduct his defense," including freedom to

³³Unlike the Nuremberg Charter, which included crimes perpetrated against the German population, the Tokyo Charter was "restricted to offenses committed against persons other than Japanese nationals." See History of UNWCC, p. 205. See, e.g., Walter L. Riley, "The International Military Tribunal for the Far East and the Law of the Tribunal As Revealed By the Judgment and the Concurring and Dissenting Opinions," Ph.D. Dissert. unpublished, U. of Wash., 1957, p. 40; Horwitz, "Tokyo Trial," p. 487.

examine and call witnesses and to request the production of evidence.³⁴

While subsequent events proved this to be impracticable, article 12a directed the Tribunal to "Confine the trial strictly to an expeditious hearing of the issues raised by the charges." Article 13 dealt at length with the question of evidence. At Tokyo as at Nuremberg, the Allies recognized the unique character of war crimes trials and the need, consequently, to relax the ordinarily strict rules of evidence. Thereupon, the IMTFE would "not be bound by technical rules of evidence." Rather, it would "adopt and apply to the greatest possible extent expeditious and non-technical procedure and (would) admit any evidence which it deem(ed) to have probative value." In brief, if it served in any way to prove or disprove the charges, such information would be admitted. This included any government document or report by the International Red Cross which "appeared" genuine to the Tribunal; any affidavit, deposition or signed statement; any diary, letter or statement, sworn or unsworn; copies of the above; and hearsay.³⁵

It is true that this basic position toward admission of evidence first received expression in a special proclamation by President Roosevelt, in July 1942. Military commissions for the trial of war criminals, FDR said at that time, should admit evidence "as would, in the opinion of the President of the Commission, have probative value to a reasonable man."³⁶ By no means, though, should one conclude that Americans forced

³⁴Section III, Art. 9a-e.

³⁵Art. 13a-d.

³⁶See Law Reports of the Trials of War Criminals, 15 vols. Selected and prepared by the UNWCC (London, 1947-49), v. I, Annex II, p. 117.

or pressured their Allies into accepting this philosophy of admissibility. The utter reality of the situation obviated external persuasion.

Rapid demobilization and repatriation of ex-POWs, witnesses and evidence scattered literally throughout the world, wholesale destruction of key documents by Japanese, the incredible difficulties in identifying, locating and apprehending suspects in Japan proper and East Asia and other factors, combined to render nearly impossible the tasks given to Allied prosecutors. Any attempt to abide meticulously by strict evidentiary rules applicable to municipal courts would have precluded the lion's share of war crimes trials, and delayed interminably those deemed triable. Englishmen perceived this fact. It was one thing to adhere to strict rules of evidence in civil courts, maintained Lord Maugham, an expert on international law; "but quite another thing . . . when you have got to get eyewitnesses from all over the Continent who are subject to entirely different ideas of law. . . ." Lord Roche agreed with his parliamentary colleague that war crimes trials should "be bound simply by ordinary opinions of fairness and justice. . . ." Other Allied officials expressed similar views.³⁷

But most resounding and far-reaching in this, and other, respects is an indisputable element usually disregarded by critics of

³⁷Britain, Parl. Deb. H. of Lords (5th Series), 1945, pp. 663, 678. Also, war crimes trials presented "circumstances beyond one's control;" it was "not feasible" to bring forward "all eyewitnesses" to crimes committed years before, concluded the Philippine Judge Advocate General's Office. See Adamin A. Tallow, Command Responsibility: Its Legal Aspect (Manila, 1965), pp. 200-01. See also comments by an American trial reviewer, Paul A. Spurlock, "The Yokohama War Crimes Trials: The Truth About A Misunderstood Subject," Amer. Bar Assn. Jrnl., v. 36, 1950, pp. 388-89.

American predominance over Eastern war crimes trials. Each Allied nation included in its war crimes regulations, and applied at its own trials, similar standards on admission of evidence. Indeed, save for the IMTFE's adoption of a broad definition of war crimes--specifically, its inclusion of crimes against peace--the trials conducted by Allied nations followed on the whole and with remarkable consistency the model set down by the Tokyo Charter. The fact that certain Allied governments staunchly refused to go along with the American example and try Japanese for other than conventional war crimes, indicated that when they disagreed fundamentally with United States policies, Allied leaders could and would stand firm. Therefore, their adoption of practices employed at Tokyo may as readily be interpreted as agreement with, rather than acquiescence in, American policy.

Finally, a section of the Charter referred to "Judgment and Sentences." Following a reasoned judgment read aloud in open court, the IMTFE could impose, upon conviction, penalties of death or any other punishment determined just. For a final review, the trial record was transmitted to the Supreme Commander, who might "at any time reduce or otherwise alter the sentence, except to increase its severity."³⁸

* * *

On February 15, 1946, the Supreme Commander appointed the members of the IMTFE from "among the names designated by the participating nations." The original eleven judges were:³⁹

³⁸Section V, arts. 16, 17.

³⁹Horwitz, "Tokyo Trial," pp. 488-89.

Australia:	Sir William F. Webb, Chief Justice Supreme Court of Queensland.
Britain:	Lord Patrick, Senator, His Majesty's College of Justice in Scotland.
Canada:	Stuart E. McDougall, Puisne Judge, Quebec Court of King's Bench (Appeal).
China:	Mei Ju-Ao, Acting Chairman, Foreign Affairs Committee, Legislative Yuan.
France:	Judge Henri Bernard.
India:	Radhabinod Pal, Judge, High Court of Calcutta.
Netherlands:	Bernard V.A. Roling, Judge, Court of Utrecht.
New Zealand:	E. H. Northcroft, Justice, Supreme Court.
Philippines:	Delphin Jaranilla, Justice, Supreme Court.
Soviet Union:	I. M. Zaryanov, Major General of Justice, Supreme Court.
United States:	John P. Higgins, Chief Justice, Superior Court of Massachusetts.

In June 1946, the American member resigned for personal reasons. Succeeding him was Major General Myron H. Cramer, former Judge Advocate General of the United States Army. At the same time, Sir William Webb, member from Australia, was named President of the Tribunal. Each F.L.C. member dispatched to Tokyo an associate prosecutor, until in all a total of 72 lawyers served in the International Prosecution Section.⁴⁰

A word on the International Defense Staff is in order. From the outset, all concerned assumed that the Japanese defendants would choose to be defended by distinguished lawyers from their own country. For the most part, this proved true. However, unfamiliarity with basic Western legal concepts, Americans felt, would place Japanese lawyers at a definite disadvantage in a trial decidedly Western in procedure and style. To offset this, the United States provided a panel of attorneys "to assist Japanese counsel." Six of the American lawyers resigned in

⁴⁰Ibid., pp. 489-90; David N. Sutton, "The Trial of Tojo: The Most Important Trial in All History?" Amer. Bar Assn. Jnl., v. 36, 1950, p. 94.

June 1946 because, noted reports, "they had been unable to set up a workable defense organization." Thereafter each American attorney represented one or more defendants.⁴¹ Nevertheless, Japanese and American lawyers at Tokyo furnished the accused extraordinarily sound and forceful defenses.

After much deliberation and preparation, the Allies lodged an indictment against 28 Japanese on April 29, 1946. The document consisted of 55 counts, divided into three sections: under the heading "Crimes Against Peace" stood counts 1-36; under the title "Murder" were counts 37-52; and under the title "Other Conventional War Crimes and Crimes Against Humanity" fell counts 53-55.⁴²

Though "largely a British document," the indictment, an American attorney realistically observed, "had to be a compromise between the eleven legal systems represented." "The result," he continued, was not a document of which an American lawyer would be proud; still, in the end "it fairly apprised the accused of the offenses with which they were charged."⁴³

Count 1, "the basic count," touched upon "the entire scope of Japanese aggression." Between 1924-1945, it maintained, the defendants had partaken in a single common plan--a conspiracy--designed to secure

⁴¹Horwitz, "Tokyo Trial," pp. 490-92; The New York Times, Apr. 11, 1946; Stars & Stripes (Tokyo), June 18, 1946.

⁴²For the Indictment, see "Trials of Japanese War Criminals," pp. 45-63. Also, The New York Times, Apr. 29, 1946.

⁴³Horwitz, "Tokyo Trial," p. 498; Walter I. McKenzie, "The Japanese War Trials," Jrnl. of the Natl. Assn. of Referees in Bankruptcy, v. 21, 1947, p. 104.

for Japan "the military, naval, political and economic domination of East Asia and the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon. . . ." From their dominant seat within the Tokyo government, this "criminal, militaristic clique" "intended to and did plan, prepare, initiate or wage aggressive war" against the prosecuting "and other peaceful nations, in violation of international law, as well as in violation of sacred treaty commitments, obligations, and assurances."⁴⁴

Subsequent counts charged smaller, more specific, conspiracies within the broad scheme. For example, count 2 charged a conspiracy to wage aggressive war against China to gain control of Manchuria. Count 4 charged a conspiracy to wage aggressive war against the individual Allied nations, in an attempt to secure world domination. Counts 6 through 17 charged the accused with having plotted wars of aggression against the eleven prosecuting countries, individually, and Thailand.

Counts 37-52 charged the defendants, in varying instances, with having committed or having conspired to commit murder. Certain of the accused, for example, had committed murder at Pearl Harbor, Kota Bahru and Hong Kong on December 7 and 8, 1941, according to counts 39-43. Some of the defendants, alleged counts 45-50, had partaken in the murder of unarmed Chinese soldiers and civilians at Nanking, Canton, Hankow and elsewhere on the mainland; all, charged count 44, shared responsibility for "procuring or permitting murder" of countless POWs

⁴⁴"Trial of Far Eastern War Criminals," U.S. Dept. of State Bulletin, 14, May 19, 1946, pp. 846-47. See also A. S. Comyns-Carr (the British prosecutor), "The Tokyo War Crimes Trial," Far Eastern Survey, v. 18, no. 10, 1949, p. 110.

and civilians in the authority of Japan. While it may have seemed "strange to include charges of murder in an indictment before an international trial," commented Chief Prosecutor Keenan, it was "high time" that "the promoters of aggressive and ruthless war" be revealed "as what they really are--plain, ordinary murderers."⁴⁵

Counts 53-55 covered conventional war crimes and crimes against humanity. Particularly important were the latter two. Count 54 charged the ordering, authorizing or permitting of atrocities; and 55 charged the disregarding of duty to secure observance of and prevent breaches the laws of war.

Indicted were 28 Japanese, all, with two exceptions, who had occupied the highest government and military posts at some time between 1928-1945. Included among the defendants were, formerly, four Prime Ministers, four Foreign Ministers, five War Ministers, two Navy Ministers, a Lord Keeper of the Privy Seal, and four Ambassadors, among others. The 28 indicted were: Sadao Araki; Kenji Doihara; Kingoro Hashimoto; Shunroku Hata; Kiichiro Hiranuma; Koki Hirota; Naoki Hoshino; Seishiro Itagaki; Okinori Kaya; Koichi Kido; Heitaro Kimura; Kuniaki Koiso; Iwane Matsui; Yosuke Matsuoka; Jiro Minami; Akira Muto; Osami Nagano; Takasumi Oka; Shumei Okawa; Hiroshi Oshima; Kenryo Sato; Mamoru Shigemitsu; Shigetaro Shimada; Foshio Shiratori; Teiichi Suzuki; Shigenori Togo;

⁴⁵"Trial of Far Eastern War Criminals," U.S. Department of State Bulletin, 14, May 19, 1946, pp. 846-47.

See also A. S. Comyns-Carr (British Prosecutor), "The Tokyo War Crimes Trial," Far Eastern Survey, v. 18, no. 10, 1949, p. 110.

Hideki Tojo; and Yoshijiro Umezu.⁴⁶

The Allies had spent long hours deciding which Japanese should be prosecuted. Patently, they perceived, only a symbolic handful could be brought at one time before the International Tribunal. Too many defendants would render the trial unwieldy, if not impossible, by necessitating additional lawyers, testimony and evidence. Also, such practice would prolong the trial, perhaps indefinitely. War crimes trials policy constituted an integral element of the Allied objective to demilitarize and democratize Japan and to restore stability to East Asia as soon as possible. Swift prosecution and disposition of trials, therefore, were essential.⁴⁷

Furthermore, of far greater significance than the individuals who stood on trial was the IMTFE itself, what it stood for and what its creators hoped to achieve through it. From the start, the prosecution focused, not merely on punishing the guilty, but upon "the grander and wider aim" of advancing "the cause of peace and right notions of international law." Indeed, said President Truman, "For the first time in history, the legal culpability of war-makers" would be determined at Tokyo as at Nuremberg.⁴⁸ Throughout the trial itself, references to

⁴⁶"Trial of Far Eastern War Criminals," pp. 847-48, 853. For brief biographical sketches of each accused, see Horwitz, "Tokyo Trial," pp. 578-83.

⁴⁷See e.g., Potsdam Declaration, art. 10. Australia. Current Notes On International Affairs. Sydney. Jan., 1946, v. 17, no. 1, pp. 19, 23, March 1946, v. 17, no. 3, pp. 134, 136. On the Allied emphasis on expediting war crimes trials operation, see e.g., The New York Times, Nov. 16, Dec. 1, 1945; New York Herald Tribune, Nov. 8, 24, 1945. Indeed, no one originally expected the IMTFE to last beyond 6 months, in H. A. Hauxhurst et. al., "Forum On War Crimes Trials," Amer. Bar Assn. Comp. and Int. Law Sect., 1948, p. 31.

⁴⁸Keenan and Brown, Crimes Against International Law, p. 155; The New York Times, Jan. 22, 1946.

the historical and legal importance of the IMTFE emanated from the bench, and defense and prosecution staffs. Nor was the potential deterrent effect of the trial overlooked.⁴⁹

The trial, noted others, served additional purposes. As the most publicized Eastern war crimes trial, the IMTFE would effectively, if shockingly, "bare" to the Japanese public for the first time the deeds perpetrated by their soldiers and leaders. Such exposure, insisted the Tokyo Shimbun, was necessary to "dispel militarism from the minds of the people." S.C.A.P. officials, too, discerned the urgent need to "educate" in this regard a Japanese public hitherto screened from such unpalatable information by more than a decade of official censorship.⁵⁰ Beyond this, the London Times believed that the IMTFE "should place on unchallengeable record the facts required by history for a moral judgment on the origin and conduct of the war. . . ." To The New York Times, the Tokyo Trial transcended in significance the guilt or innocence of any individual. "Actually," it observed, "it is a way of life--the Japanese way--that will go on trial. . . ."⁵¹

Influenced by such sentiments, the Executive Committee of the International Prosecution Section selected defendants on the following bases: one, that they could be charged with crimes against peace;

⁴⁹Said Pres. Webb: "There has been no more important trial in all history." See Keenan and Brown, Crimes Against International Law, p. 7. On the IMTFE's deterrent potential, see prosecutors' views, in ibid., pp. 5-7; McKenzie, "Japanese War Trials," p. 105; Hauxhurst, "Forum," pp. 33-34.

⁵⁰As quoted in the China Press, Nov. 25, 1945. See The New York Times, Sept. 6, 15, 1945. London Times, Sept. 18, 1945.

⁵¹Ibid., edit., Feb. 5, 1946; The New York Times, edit., Apr. 30, 1946.

two, that they were representative," both of various organs of the Japanese government (e.g., the Cabinet, General Staff) and of different chronological "phases" in the "conspiracy;" three, that they had assumed positions of "principal" leadership and had had "primary" responsibility for violations charged; and four, that only "negligible" chances of their being acquitted existed.⁵² This last point may be regarded as caution and not prejudgment, as some have intimated, on the part of the Allies. An early S.C.A.P. policy instructed prosecutors to be "absolutely sure" that they had a tenable case before going to trial.⁵³ And, moreover, such practice coincided generally with that employed in criminal court systems: did not State prosecutors, after obtaining indictments from grand juries, only prosecute those cases they believed certain of winning?

No charges were brought against any representative of the Japanese industrial group, or zaibatsu. As no crimes against peace could be attributed to the zaibatsu ("[N]o evidence has been found of . . . [their] being responsible for the war," Keenan said at the trial.), the Executive Committee forwent their indictment despite evidence that certain industrialists had participated in other violations.⁵⁴

⁵²Horwitz, "Tokyo Trial," pp. 495-96.

⁵³See, e.g., Richard H. Minear, Victors' Justice: The Tokyo War Crimes Trial (Princeton, 1971), pp. 18, 37; The New York Times, Dec. 6, 1945.

⁵⁴Also, "the indictment of an industrialist" could "not be undertaken unless his conviction was almost a certainty" lest an acquittal be regarded in Japan "as a blanket approval of all Japanese industry and industrialists," in Horwitz, "Tokyo Trial," pp. 497-98; Keenan's statement at trial, Oct. 10, 1947, in Australia. Current Notes, May 1948, v. 19, no. 5, p. 238.

Nor was Emperor Hirohito indicted. Announced June 18, 1946, this strictly American decision caused perhaps more furor in Allied circles than any other relative to war crimes policy.⁵⁵ Immediately after Japan's surrender a multitude of demands that Hirohito be tried as a war criminal inundated, often to the point of embarrassment, S.C.A.P. HQs and Washington. Their sources embraced a wide and often disparate spectrum: government officials in Canberra, Wellington, Chungking, Moscow, Manila and Washington, itself;⁵⁶ newspapers, such as The New York Times, Straits (Singapore) Times, and Stars & Stripes (Shanghai);⁵⁷ private organization, as the Institute of Pacific Relations; and the Japanese Communist Party.⁵⁸

Some American officials sought to explain or justify this decision by exculpating Hirohito from war guilt: A military clique had "seized the power of Japan and defrauded the Japanese people into believing that the Emperor was behind the war," argued Chief Prosecutor Keenan at the trial. The Emperor had been merely a "figurehead," contended an associate prosecutor years later.⁵⁹ More forthright, however,

⁵⁵The New York Times, June 18, 1946.

⁵⁶Moscow Radio Broadcast, in ibid., May 5, 1946; for the "politically explosive" war criminal list naming Hirohito the "No. 1 war criminal" submitted by Australia, New Zealand and China, see New York Herald Tribune, Nov. 6, 11, 1945, Jan. 17, 1946; for Filipino response, see Stars & Stripes (Shanghai), Oct. 23, 1945; Senator Richard Russell introduced legislation calling for the Emperor's trial, in Straits Times, Sept. 20, 1945.

⁵⁷See editorials, The New York Times, Sept. 13, 20, 1945; Straits Times, Oct. 22, 1945; Stars & Stripes (Shanghai), Nov. 1, 2, 1945.

⁵⁸London Times, Jan. 12, 1945; China Press, Oct. 15, 1945; New York Herald Tribune, Nov. 13, 1945.

⁵⁹Keenan statements in London Times, Sept. 26, 1947; Horwitz, "Tokyo Trial," p. 497.

was Keenan in an interview given in 1950. He then conceded that, "strictly legally," Hirohito could have been tried and convicted as a war criminal.⁶⁰

In fact, the granting of immunity to Hirohito was a calculated political decision based upon, Americans believed, the best interests of the Allied powers. The initial directive ordering the S.C.A.P. to set up the IMTFE, The New York Times disclosed for the first time in 1949, had "specifically prohibited prosecution of Hirohito." That decision had originated in the highest government levels and "was taken in line with the course advised by United States experts on Japanese affairs" to Presidents Roosevelt and Truman. General MacArthur, according to this report, had not been consulted "prior to issuance of the order."⁶¹ Still, MacArthur's view of the subject was clear and recorded: "Destroy" the Emperor, he asserted forcefully on January 25, 1946, "and the (Japanese) nation will disintegrate."⁶²

Abolition of the sacred (to Japanese) institution of Emperor, American policy-makers reasoned, would have provoked chaos, even violence, among the population. Such reaction would have made a Japanese surrender "impossible" and would have "multipl(ied) the difficulties of the occupation." Necessitated then, said MacArthur, would be a larger occupation force for a longer--perhaps "indefinite--period of time."⁶³

⁶⁰"Joseph Keenan Meets the Press," American Mercury, v. 70, 1950, p. 459.

⁶¹The New York Times, Jan. 14, 15, 1949.

⁶²MacArthur to Chief of Staff, U.S. Army (Eisenhower), U.S. Dept. of State. Foreign Relations of the United States 1946, pp. 395-97.

⁶³Ibid., The New York Times, Jan. 15, 1949.

More important, United States occupation policy intended to "use the existing form of Government in Japan," albeit not supporting it. That is, the Japanese government was to serve as "executor" of American policy.⁶⁴

But in the immediate postwar period, what legitimate Japanese government existed? Apprehension of war criminal suspects and the purging of thousands of former government officials and employees, bureaucrats and industrialists had stripped Japan of much of its leadership. Occupation authorities, indeed, had experienced ample difficulty in finding an acceptable individual, untainted by past militaristic or reactionary ties, to head the first postwar government. Remove the Emperor and not even a symbolic Japanese government around which the people could unite, remained; consequently, occupation policy would have been severely crippled from the start.

Ostensibly, Allied leaders recognized and accepted this reality. For The New York Times reported that "all eleven Allies, including Russia, (had in 1946) agreed to exempt Hirohito from prosecution." Alas, it took three years for this "secret" decision to come to light.⁶⁵ The Japanese government, noteworthy, at the time and years after, praised the American-sponsored action. The "respect and understanding shown" by General MacArthur "towards the Throne" and the granting of immunity to the Emperor, said Yoshida Shigeru, Japan's first outstanding postwar Prime Minister, "did more than anything else to lessen the fears of the

⁶⁴"Initial U.S. Post-Surrender Policy," Pt. II, 2. Edwin O. Reischauer, Japan: The Story of a Nation (N.Y., 1970), p. 265.

⁶⁵The New York Times, Jan. 15, 1949.

majority of the Japanese people in regard to the Occupation. . . ."⁶⁶
 MacArthur's "wisdom" and foresight in refusing to prosecute the Emperor, declared Winston Churchill in late 1951, vitally contributed to Japan's pro-Western, pro-democratic outlook.⁶⁷

And how, in Allied eyes, did Hirohito's immunity affect the status of those Japanese on trial at Tokyo? Arthur S. Comyns-Carr, the British prosecutor and principal author of the indictment, found "it difficult to understand . . . how the Emperor's absence from the dock can have any bearing upon the cases of those who were there." Beyond that, assessed the London Times, "Both Japanese and Allied observers" felt that the group arraigned at Tokyo "could scarcely have included a more typical selection of the men who are held responsible for the Pacific war."⁶⁸

In any event, thus composed were the dock, bench, defense and prosecution staffs at the IMTFE. On May 3, 1946, the 28 defendants, looking frail and worn, "shuffled into the renovated auditorium of the War Ministry Building for their arraignment." A courtroom packed with 100 Allied and Japanese correspondents and 500 Allied officers of high rank and spectators observed intently. "To our great task we bring open minds both on the facts and on the law," announced President Webb.

⁶⁶The Allied attitude toward the Emperor won "applause" in the Japanese House of Representatives, in *ibid.*, June 25, 1946; Yoshida Shigeru, The Yoshida Memoirs. Trans. by Kenichi Yoshida (Bost., 1962), p. 51.

⁶⁷The New York Times, Aug. 16, 1951.

⁶⁸A. S. Comyns-Carr, "The Judgment of the International Military Tribunal for the Far East," Transactions of the Grotious Society, v. 34, 1948, p. 145; London Times, Apr. 30, 1946.

"The onus will be on the prosecution to establish guilt beyond a reasonable doubt." All the accused pleaded not guilty, and the trial was scheduled to begin on June 3.⁶⁹

Clearly, at this embryonic stage, the IMTFE attracted global attention. " . . . (H)istory," cautioned The New York Times,⁷⁰

will judge these trials wholly by whether the victors themselves adhere to the standards and the laws they impose upon the vanquished. In judging the vanquished, the victors also judge themselves.

Justice demanded, averred the London Times, "a full hearing, whose absolute fairness neither (those on trial) nor their countrymen can dispute." The "defendants must be considered innocent" until proven guilty, insisted the China (Shanghai) Press; "every opportunity to clear themselves, if they can do so," must be afforded.⁷¹ Doubtless, the prospect of contemporary and future international scrutiny weighed heavily on the consciousness of all concerned with the IMTFE, whether they be members of the prosecution, defense or bench.

Preliminary motions filed by the defendants challenged the jurisdiction of the IMTFE under the Potsdam Declaration and the Instrument of Surrender. Thus raised were "the most fundamental issues of the trial--whether aggressive war was a crime in international law; whether killing in the course of an aggressive war constituted murder; whether there was individual responsibility for international crimes." The

⁶⁹IMTFE, Proceedings, pp. 21-22; also, see L. F. Allen, "Japan's Militarists Face the Music," American Foreign Service Journal, v. 24, 1947, p. 15; The New York Times, May 3, 1946.

⁷⁰Ibid., edit., May 14, 1946.

⁷¹London Times, edit., Feb. 5, 1946; China Press, edit., June 6, 1946.

Tribunal denied the motions, reserving explanation for its final judgment.⁷²

Following presentation of its opening statement on May 3, the prosecution began its evidence on June 3, 1946, and closed on January 24, 1947. Brought forth were 102 witnesses, affidavits from another 1,200 witnesses, and an additional 1,100 documents. "Because of the difficulty with Japanese witnesses, the prosecution tried to keep its case as far as possible a documented case on the theory that such a case is best." In fact, the diary of one of the defendants, Marquis Kido, Lord keeper of the Privy Seal, "became the working bible of the prosecution" throughout the trial.⁷³

From the very outset, language difficulties prolonged the proceedings. A language and clerical staff of 104 Allied nationals and 154 Japanese and special preparation notwithstanding, simultaneous translation proved impossible. Authorities estimated that "it required at least eight man hours of work to prepare a creditable translation of a single page of material." Thereupon counsel posed only short, simple questions to witnesses. Later, the court approved written presentations prepared in advance.⁷⁴ Obviously, such practices severely limited the scope and effectiveness of cross-examination for both

⁷²Horwitz, "Tokyo Trial," pp. 503-04.

⁷³Australia, Current Notes, May 1948, p. 235; Sutton, "Trial of Tojo," p. 95; Horwitz, "Tokyo Trial," pp. 494, 535.

⁷⁴Ibid., pp. 538-39; Australia, Current Notes, May 1948, p. 235; New York Herald Tribune, Jan. 17, 1946.

prosecution and defense.⁷⁵

The prosecution case, which took 192 days to present, can be but succinctly presented here. The Tokyo Trial, according to the prosecution, was "no ordinary trial" but rather "a part of the determined battle of civilization to preserve the entire world from destruction." The accused had taken "the law into their own hands . . . to force their will upon mankind. They declared war on civilization." That their "design" to secure "domination and control of East Asia" and "ultimately the world" "meant murder and the subjugation and enslavement of millions was of no moment to them."⁷⁶

Between 1928-1941, contended the prosecution, the accused and others conspired to gain control of the Japanese government. Through this control they prepared and indoctrinated the Japanese people "for a program of aggressive warfare." Evidence adduced at the trial, prosecutors submitted, disclosed irrefutably that "from 1928 to 1941 each change in (the Japanese) government was brought about either to further the common plan or to meet a situation created by some act furthering the plan."⁷⁷ Subsequent and concurrent aggressions aimed at China, and later at the other Allies, represented the implementation of the accused's "conspiracy." Detailedly, the prosecution examined in separate "phases," Inter alia, aggressions committed against China; the attack on Pearl Harbor; planned warfare against the Soviet Union; and "the total mobilization of Japan's economy for war and the increase of her armed

⁷⁵For examples of how cross-examination was limited, see IMTFE, Proceedings, pp. 886; 38,480; 38,487.

⁷⁶Ibid., pp. 384-86.

⁷⁷Horwitz, "Tokyo Trial," pp. 507-08.

forces beyond the requirements of legitimate national defense."⁷⁸

Long established in international law, asserted the prosecution, was the right of a belligerent to try members of the armed forces of the losing side for conventional war crimes. In fact, the defense basically conceded this point.⁷⁹ However, acknowledged the prosecutor, "for the first time in history" individuals were being charged with personal responsibility for offenses "Committed while acting in official capacity as chiefs of state." Nonetheless, he argued, the time had come to free civilized society from the "straitjacket" of precedent and expand the concept of individual responsibility from conventional war crimes to crimes against peace and humanity.⁸⁰ Inability to punish persons who had "already . . . brought civilization to the brink of disaster," would render justice "a mockery."⁸¹

Never before "in the history of civilization," pressed the defense, had war been declared illegal; nor had individuals ever been held criminally responsible for plotting or waging one. Always, war

⁷⁸Ibid., pp. 505ff, 515ff. Australia. Current Notes, May 1948, pp. 234-39.

⁷⁹Keenan and Brown, Crimes Against International Law, p. 15. Hereafter, extended reliance will be placed upon this work in presenting the prosecution argument. The work "constitutes . . . the position taken" by the U.S. at the IMTFE, and is "based on statements" by the authors who served as Chief Prosecutor and his immediate assistant. See p.v. See Takayanagi Kenzo, "The Tokio Trials and International Law. Answer to the Prosecution's Argument . . . at IMTFE," (Tokyo, 1948), p. 81.

⁸⁰IMTFE, Proceedings, pp. 459-61, 463-64; also, Keenan and Brown, Crimes Against International Law, pp. 123-25.

⁸¹IMTFE, Proceedings, p. 391. "The world had to get on with justice," said a contemporary. See Robert B. Walknshaw, "The Nuremberg and Tokyo Trials: Another Step Toward International Justice," Amer. Bar Assn. Jnl. v. 35, 1949, p. 363.

had been considered an act of state.⁸² To hold defendants responsible for such unprecedented offenses would be a palpable example of ex post fact violation, that is, enactment and enforcement of a law retroactively.⁸³ Further along these lines, said the defense, the defendants had not been forewarned of Allied intentions. The Potsdam Declaration had referred only to "war criminals;" the obvious assumption, went the argument, had been that such allusion embraced exclusively conventional war crimes. The accused, contended defense counsel, must be tried "by the law of nations actually in force." Any "fundamental changes" in international law required the unanimous approval of all nations of the world, not merely the "ipse dixit" of a charter drawn up by victorious nations after a war.⁸⁴

International law, countered the prosecution, existed partially in written form and partially in unwritten form. The former consisted of treaties, agreements, assurances, etc., while the latter derived, mostly, from custom: that is, from the "natural law, or the practice based thereupon, which has not yet been reduced to writing." In the decades prior to World War II "express" and "implied" "recognitions of the illegality and criminality of aggressive or unjust war on the part of nations" had "accumulated." This, said the prosecution,

resulted in such a well-established international legal custom as to put the defendants on sufficient notice that their actions were in violation of a norm of conduct which

⁸²See, e.g., IMTFE, Proceedings, pp. 120ff; also, Ben B. Flakeney (defense counsel for Tojo), "International Military Tribunal," Amer. Bar Assn. Jrnl. v. 32, 1946, pp. 475-77.

⁸³See, e. g., IMTFE, Proceedings, p. 188, Takayanagi, "Tokio Trial," p. 12.

⁸⁴Ibid., pp. 79-81, 108-09.

the society of nations might enforce by criminal punishment.

To the effect that the "society of nations" had recognized the illegality of aggressive war, the prosecution cited the Hague Conventions of 1907, the Geneva Conventions of 1925 and 1929, and especially the Kellogg-Briand Pact of 1928. In plotting and waging an aggressive war, the prosecution therefore reasoned, the defendants violated international law, "contractual obligations" and treaties. And as the war had been illegal, any deaths attributable thereto constituted "murder."⁸⁵

Furthermore, the prosecution believed, no ex post facto principle was being contravened. The laws and customs of war, peace and humanity existed well before the Charter of the IMTFE and were "incorporated" into it. The Charter, that is, expressed existing law; it did not make new law. Though "non-statutory" (unwritten), the crimes of the defendants were violations of "customary" international law and treaties.⁸⁶ Moreover, article 10 of the Potsdam Declaration referred to "all war criminals," not just those who violated the laws and customs of war. Beyond this, explained the prosecution, the jurisdiction of the IMTFE to try and punish war criminals sprang not from the Potsdam Declaration, but from a "body of international criminal law which existed before the acts of the defendants."⁸⁷

The prosecution also assailed the accused for their part in the commission or, more accurately, the allowance of conventional war crimes. Atrocities perpetrated against POWs and civilian populations by Japanese

⁸⁵Keenan and Brown, Crimes Against International Law, pp. 73, 75, 120.

⁸⁶Ibid., pp. 55, 47-48.

⁸⁷pp. 22, 18-19; IMTFE, Proceedings, pp. 139-40.

armed forces had occurred on such a wide-scale and regular basis that, prosecution argued, the defendants must have or should have known of them. Prosecution evidence disclosed that "the protecting powers frequently brought to Japan's attention the numerous cases of mistreatment." While it had not ratified the Geneva Prisoner of War Convention of 1929, Japan, prosecutors pointed out, had agreed in 1942 to apply its provisions mutatis mutandis. Although "none of the defendants had personally committed" atrocities, their failure or refusal to take adequate preventative or halting measures or to issue official protests against such behavior, rendered them guilty of criminal negligence.⁸⁸

In its summation, the prosecution piercingly re-addressed a major element of the defense case, the claim that Japan had gone to war in self defense:

While there has been much talk by the accused of their having acted in self defense, (said Chief Prosecutor Keenan,) it is significant that no one has claimed a threat from any power to attack or invade the Empire of Japan. In these many long months of trial there has been not a single scrap of evidence tendered worthy of the name in support of any such defense. . . . We reject the contention that it is self-defense for a nation to attack another because the latter refuses to supply materials of war to be used against it and its allies.

In addition, he reemphasized the magnitude of the defendants' conspiratorial action: It was "vitally important" for the court to understand the significance of the fact "that none of the events which took place" between 1928-1941 "occurred by accident." "The truth is that from beginning to end there was never a change in the policy of Japan."

Keenan thereupon urged the judges to mete out "the sternest punishment known to law" to all 25 Japanese on trial (Two defendants,

⁸⁸Horwitz, "Tokyo Trial," pp. 521-25.

Matsuoka and Nagano, had died during the trial; one, Okawa, had been determined mentally unfit.) Repeatedly, he reminded the court of the long-range potential of their verdict in deterring further war. Then, the prosecution rested.⁸⁹

On February 4, 1947, the defense commenced its case. It lasted, uninterrupted, until June 23 of that year. To avoid repetitious evidence "on behalf of two or more defendants and at the same time to preserve the individual interest of each defendant, defense counsel adopted a joint plan of presentation." Such practice, though, buttressed and did not exclude individual presentation.⁹⁰

From beginning to end, much which unfolded in the Tokyo courtroom displeased counsel for defense. Ichiro Kiyose, representing Tojo, for instance, challenged at the outset each member of the Tribunal. The members from Australia, the Philippines and the United States, he insisted, had had first-hand experience in observing or investigating Eastern war crimes; they should be replaced by more detached individuals. The court disagreed.⁹¹ Defense counsel on several occasions requested, but were refused, additional time to prepare their case.⁹² A fair trial was "being deprived" the defendants "because of the undue restrictions on cross-examination," complained defense

⁸⁹Reported in full, in The New York Times, Feb. 11, 1948. See Stars & Stripes (Tokyo), June 28, 1946, Apr. 10, 1947.

⁹⁰Horwitz, "Tokyo Trial," p. 525.

⁹¹IMTFE, Proceedings, pp. 93-98. Webb had headed Australia's War Crimes Commission in 1944, which had thoroughly investigated Japanese atrocities. Jaranilla, of the Philippines, was a survivor of the "Bataan Death March." Gen. Cramer of the U.S. had researched, from a legal viewpoint, the attack on Pearl Harbor. See Minear, Victors' Justice, pp. 82-83, n. 19.

⁹²E.G., IMTFE, Proceedings, p. 115.

attorney David F. Smith.⁹³ Heated disagreements with President Webb became commonplace. Indeed, Webb's conduct toward defense often bordered on the insulting. While perhaps not as curt, his behavior toward the prosecution frequently betrayed "antipathy."⁹⁴

Existing international law, argued defense counsel Kenzo Takayanagi, "one of the most brilliant minds in Japan," recognized only conventional war crimes." The punishment of crimes against peace in violation of treaties," he asserted, "has never been known to the laws of nations." Nor had war ever been held illegal. The "thesis that an aggressive war involves criminality either on the part of a responsible State or on the part of responsible individual members of a State" contradicted the "practice of nations." What of the invasion of Ethiopia by Italy, or of Finland by Russia, he pointedly inquired? Did they not constitute "aggressive wars?" Yet, no demands for punishment arose at the time of their occurrence. In wars, Takayanagi reasoned, each side invariably labeled the other the "aggressor." The epithet, however, stuck to the defeated nation: " . . . will the victor ever

⁹³Stars & Stripes (Tokyo), Nov. 22, 1946. Such pertinacity eventually resulted in Webb's "expelling" of counsel Smith from the courtroom. See ibid., March 6, 1947.

⁹⁴On one occasion, after defense counsel had legitimately pressed a certain point, Webb flared up, and called counsel "very impertinent." "Your observations," Webb continued, "are gratuitous, and we will deal with you if necessary." IMTFE, Proceedings, p. 2155; later, Webb charged the defense with "organized interruption, . . . and I shall know how to deal with it." In ibid., p. 6091. A "mutual antipathy" between Webb and prosecutor Keenan "was evident from the start," in Courtney Browne, Tojo: The Last Banzai (N.Y., 1967), p. 225.

admit that it was the aggressor?"⁹⁵

The notion of personal criminal responsibility for the plotting and waging of war in violation of international law constituted, said the defense, "a perfectly revolutionary doctrine." Such interpretation had "been expressly denied by the consensus of international jurists as well as by the customs of nations. . . ." And doubtless, war crimes did "not comprise any acts" committed prior to the outbreak of a war.⁹⁶ Certainly, then, the prosecution's attempt to expand after the fact the "natural and universally accepted meaning" of the term war crimes violated ex post facto doctrine as well as all reasonable definitions of justice. Especially did this criticism pertain to the prosecution's introduction of a so-called "criminal conspiracy:" Such a concept rested firmly (and uniquely) in Anglo-Saxon, not international, legal tradition, defense counsel purposefully reminded; and clearly "was not law at the time of the commission of the alleged acts. . . ."⁹⁷

Also, Japan had not surrendered unconditionally, contended Kiyose, but "under the terms of the Potsdam Declaration." Therefore, he proceeded, Japan's leaders warranted different treatment from that afforded German leaders after World War I. For the latter had signed the Versailles Treaty which specified that the Kaiser would stand

⁹⁵The assessment of Takayanagi is that of James T. C. Liu, "The Tokio Trial," China Monthly, v. 8, 1947, pp. 242, 245. Takayanagi, "Tokio Trials," pp. 42, 50, 73-74.

⁹⁶Ibid., pp. 59, 65, 4-5; IMTFE, Proceedings, pp. 187, 221-22.

⁹⁷Ibid., p. 188; Takayanagi, "Tokio Trial," pp. 12, 14, 72, 79-80, 87, 89.

trial.⁹⁸ Moreover, stressed Takayanagi, the Potsdam Declaration had alluded to "war crimes," which to the accused had "meant the criminal breach of the accepted rules" governing warfare. Only "after prolonged negotiations," he cleverly--if somewhat inaccurately--noted, had the Allies agreed at the London Conference on August 8, 1945, that the phrase war crimes should include creators of an aggressive war. How could "such an extension," he asked, "be read into the Potsdam Declaration of July 26, 1945?"⁹⁹

Defense counsel rejected outright the prosecution's submission that Japan's leaders understood that they would be tried as war criminals; particularly since, they held, the submission rested substantially on a certain "ambiguous" reference in Marquis Kido's diary.¹⁰⁰

A "major theme" of the defense case revolved around the contention that Japan had acted in self-defense. Basically, Kiyose in this matter "repeated the arguments of the Japanese leaders of the 1930s and 1940s." That is,

that all of the acts committed by the defendants and the government of Japan were acts of self-defense against provocative acts of other nations threatening and interfering with Japan's recognized and legitimate rights in Asia and her right of national existence.

⁹⁸IMTFE, Proceedings, p. 186; also, Stars & Stripes (Tokyo), May 3, 1946.

⁹⁹Takayanagi, "Tokio Trials," pp. 8, 78-79. Actually, the American decision to include crimes against peace in the Allied definition of war crimes had been made clear in Jan. 1945. After that, it was basically a matter of persuading the British to concur. See Minear, Victors' Justice, pp. 10ff.

¹⁰⁰Takayanagi, "Tokio Trials," p. 80. Palpably, the majority of the IMTFE placed considerable weight on this diary entry, quoting it in its Judgment. For the entry and the quote, see Chapter 12, p. 355.

Generally, ran this argument, the United States had acted the part of the aggressor, in its insistence that Japan withdraw militarily from China, in its supplying of aid to China and in its fortification of Pearl Harbor.¹⁰¹

No one at the trial expressed these sentiments clearer, or more earnestly, than former Prime Minister Tojo. In a 50,000 word written statement and, impressively, under cross-examination, Tojo accepted full responsibility for his and Japan's actions. In fact, to use The New York Times' phrase, he "indicted" the Allied nations for their economic blockade and encirclement of Japan. Such economic and other pressure, Tojo stated accusingly, had brought Japan in 1941 "to the point of annihilation." Consequently, Japan fired the first shot "in self-defense," so as to preserve its "national existence."¹⁰²

Defense claims that the Allied nations had committed "economic aggression" against Japan and that Japan had acted justifiably in China in its attempt to curtail the spread of Communism there, drew rebuke from the court. On one occasion, Webb labeled the latter "enemy propaganda."¹⁰³

¹⁰¹Liu, "Tokyo Trial," pp. 244-45; Horwitz, "Tokyo Trial," pp. 527-33.

¹⁰²For Tojo's testimony, see The New York Times, Dec. 26, 1947. For his written statement, see "Affidavit of Hideki Tojo, Individual Defense." Tokyo, IMTFE, Dec. 19, 1947.

¹⁰³When defense counsel suggested that American and British economic penetration in China may have justified Japan's "defensive measures," Webb said: "Economic aggression is not a crime." Months later, when the prosecution detailed Japan's economic aggression against China, Webb overruled defense objection, saying that economic aggression was a crime "if it is an adjunction of an aggressive war." See Australia. Current Notes, May 1948, p. 235. Stars & Stripes (Tokyo), Mar. 14, 1947; Malay Mail, Apr. 25, 1947.

Along similar lines, American defense counsel sought to demonstrate that Allied behavior in the prewar period had not departed fundamentally from that of Japan. Repeated disregard by a number of nations of treaties and international agreements, particularly the Kellogg Pact, had rendered these documents practically "worthless." Indeed, "Pacts may fall into desuetude by repeated violation," emphasized Major Ben Blakeney. Furthermore, explained Takayanagi, the Kellogg Pact had recognized the right of sovereign nations to act as necessary in self-defense; also that each country was the "sole judge of what constituted self-defense."¹⁰⁴

Prosecution's notion of a 14 year criminal conspiracy, countered the defense, stood on absurd assumptions and was riddled with inconsistencies. Not only had the accused not always agreed with one another, went this contention, but many had vigorously opposed certain acts or the war itself. Many events coincidental to the collapse of 15 different Japanese cabinets between 1928-1941, underscored defense counsel, were totally unforeseen or unrelated. Concerned were innumerable persons with broadly divergent interests, dispersed throughout the East. To theorize about an "organized plan," challenged the defense, defied all semblance of reason. Tojo concurred.¹⁰⁵

So, too, with charges centering about conventional war crimes. Atrocities, maintained Takayanagi, "were the sporadic acts of local officers of inferior rank." "Had such a central or overall Japanese

¹⁰⁴The New York Times, Apr. 1, 1947; Takayanagi, "Tokio Trial," p. 36.

¹⁰⁵IMTFE, Proceedings, p. 231; also, see summary of Mr. Logan's remarks in Liu, "Tokyo Trial," p. 247. The New York Times, Dec. 26, 1947.

policy existed," as the prosecution suggested, "it would have been applied uniformly and always everywhere" instead of "merely in a few isolated places."¹⁰⁶ Other defenses presented at Tokyo included that of superior orders, which held that obedience to lawful orders did not constitute a crime; and that it was beyond the capacity of victor nations to afford the vanquished a fair trial.¹⁰⁷

If the acts of Japan's political leaders "constitute criminal offenses" under international law, then, advised Takayanagi, "American, British and Soviet leaders in similar situations should also be subjected to penalties. . . ." "(U)nless it is proved beyond a reasonable doubt that they committed some criminal offense known to the established law of nations," he continued, the accused "must be declared innocent." Thus, basically, comprised the defense case. On April 16, 1948, "the last word was said . . . in history's longest trial." Indeed, the transcript of the record by then consumed over 48,000 pages. The IMTFE adjourned for deliberation.¹⁰⁸ Not for seven months, until November, would the world learn the Judgment at Tokyo.

* * *

Meanwhile, a massive Allied war crimes effort--exceeding, by far, in scope and in ambition that of the IMTFE, pursued in part independently and in part jointly--was underway throughout the East. . . .

¹⁰⁶Takayanagi, "Tokio Trial," pp. 96-99.

¹⁰⁷IMTFE, Proceedings, pp. 41, 701-02, 196ff.

¹⁰⁸Takayanagi, "Tokio Trials," p. 2. Stars & Stripes (Tokyo), Apr. 18, 1948.

CHAPTER II

UNITED STATES: PROCEDURE AND MACHINERY

The United States spearheaded the investigation, apprehension and trial of Japanese war criminals in the East. Considering America's predominant role in the recently fought Pacific war, as well as its unchallenged position in the postwar Pacific, this was to be expected.

American statesmen were among the first to warn specifically and explicitly the Japanese that perpetrators of war crimes would be punished after the war. " . . . (T)he time will come," proclaimed President Roosevelt in August 1942, when guilty Japanese "will have to stand in the courts of law in the very countries which they are now oppressing and answer for their acts." A similar warning followed the uncovering of details relative to the infamous Bataan Death March in January 1944. Forthwith, Secretary of State Cordell Hull and British Foreign Minister Anthony Eden informed Tokyo that Washington and London "would not forget these acts and would seek" just retribution.¹

Through the Swiss Minister in Tokyo, Japanese officials learned that Americans possessed large quantities of Japanese documents

¹United Nations Information Organization. Info. Paper No. 1, 1945 (UNIO), p. 8. FDR referred, in his warning, to the "invaders . . . in Asia." Also, SCAP, Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. (Tokyo, 1952), Monograph 5, pp. 38-39.

"authorizing" the commission of war crimes. Using these as prima facie evidence, the Swiss representative "solemnly" warned, the United States firmly intended "to bring to judgment anyone who had any part in these acts." The Potsdam Declaration (July, 1945), issued jointly by America, Britain and China, and subsequently subscribed to by the Soviet Union, contained the last and perhaps most significant warnings: " . . . stern justice shall be meted out to all war criminals," read article 10, "including those who have visited cruelties upon our prisoners."²

Meanwhile, the United States joined in the creation of the United Nations War Crimes Commission in October 1943. Later, Americans actively engaged in the founding and subsequent activities of the Chungking-based Far Eastern sub-Committee on war crimes. Under United States direction, the Far Eastern Advisory Committee (F.E.A.C.) convened in Washington in October 1945. "Recommendations" emanating from this body were to result in the "formulation of policies, principles and standards" by which Japan would be made to fulfill its obligations of surrender.³

In December, the F.E.A.C. was reconstituted as the Far Eastern Commission (F.E.C.). Among its varied purposes, the F.E.C. imparted

²Swiss Min., Tokyo, to Ministry of For. Affrs., Tokyo, Note, cc. June 1, 1945, in ibid., p. 38. Potsdam Declaration, July 26, 1945. For complete text, see Far Eastern Commission, Second Report by the Sec. Gen. July 10, 1947-Dec. 23, 1948. Pub. 3420. F. E. Series 29 (Wash., D.C., 1949), Append. 14, pp. 44-45.

³The History of the United Nations War Crimes Commission and the Development of the Laws of War. (London, 1948), pp. 105, 2, 127, 129-31: for the accomplishments of the Sub-Committee, see pp. 151-52. FEC. Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888. F. E. Series 24 (Wash., D.C., 1947)p. 2.

due concern for the question of war crimes. A special "Committee No. 5: War Criminals" embraced all elements of the subject for consideration: identification, apprehension and trial of Japanese suspects as well as punishment for those convicted.

Later on, in April 1946, the F.E.C. issued a "Policy Decision" designed, ostensibly, to outline if not direct Allied war crimes policy in the East. Not only did it grant the Supreme Commander for the Allied Powers (S.C.A.P.) and "the military command of any" Allied nation the power to convene military courts for the trials of war criminals; but the F.E.C. policy decision also offered a broad definition of "war crimes" which included reference to violations generally known as "crimes against peace" and "crimes against humanity."⁴

While nominally an international agency--comprising representatives of Australia, Britain, Canada, China, France, the Netherlands, New Zealand, the Philippines, Russia and America--the F.E.C. "generally recognized, respected, and followed the lead of the United States."⁵ Still, F.E.C. directives did not always prevail. Allied nations, in a notable example, agreed to apply the Commission's broad definition of war crimes at the international proceedings at Tokyo.⁶ Some, however, as

⁴Ibid., p. 8, also Append. 39, pp. 97-100.

⁵The Far Eastern Commission: A Study in International Cooperation: 1945-1952. By Dr. George H. Blakeslee, Dept. of State Pub. 5183 (Wash., D.C., 1953), p. 237.

⁶The Charter of the IMTFE, issued Apr. 26, 1946, followed very closely the definition of "war crimes" set down in the F.E.C. policy decision of Apr. 8, 1946. See Charter, Art. 5, U.S. Dept. of State. Trials of Japanese War Criminals. Pub.2613. F. E. Series 12 (Wash. D.C., 1946).

will be shown, refused to abide by the American-sponsored definition at their own war crimes trials.

Unlike their Allies, Americans based their jurisdiction to create military commissions for trying war criminals on statute law. Such commissions had long existed in American law; they even preceded the Constitution.⁷ Their legality had recently been upheld by the Supreme Court in the so-called Saboteur case, ex parte Quirin (1942). The Court's decision in this case laid the foundation upon which future American military commissions--and their decisions--rested.

The Court began by reaffirming that all Congressional and Presidential powers derived from the Constitution. This included the Congressional authority to "define and punish . . . offenses against the Law of Nations," of which the law of war constituted a part. Furthermore, said the Court, Congress had by statute--the Articles of War--acknowledged the military commission as a legal tribunal for the trial and punishment of violations against the law of war.

Also, determined the Court, the Executive power of the President provided authority to conduct such commissions. The President, as Commander-in-Chief of the Armed Forces, or any Field Commander competent to appoint a General Court-Martial, could convene a military commission.⁸ President Roosevelt even declared in July 1942, by special

⁷Law Reports of the Trials of War Criminals. Selected and prepared by the UNWCC. 15 vols. (London, 1947-49), v. 1, Annex II, p. 111.

⁸Ex parte Quirin 317 U.S. 1, 63 Sup. Ct., 87 L. Ed. 3; also, see James J. A. Daly, "The Yamashita Case and Martial Courts," Conn. Bar Journal, v. 21, 1947, pp. 218-19.

proclamation, that any perpetrators of war crimes against the United States or its citizens, "shall be subject to the law of war and the jurisdiction of military tribunals."⁹

United States authorities drew up different regulations governing war crimes trials for different theatres. Distinct provisions, that is, applied to the Mediterranean, European and Pacific territories. To further complicate the matter, American Pacific regulations were often amended or superseded by additional or later regulations.

Under the auspices of General MacArthur, the United States Armed Forces, Pacific, issued initial regulations on September 24, 1945. These rules prevailed at two of the earliest American trials, and particularly that of General Yamashita. Shortly after, however, on December 5, 1945, a new set of "SCAP Regulations" supplanted those of September.

Close examination of both sets of rules revealed their basic similarity. Only in their respective definitions of "war crimes" and in the time periods covered by their respective jurisdictions did they differ significantly--and these differences were, mainly, in form not substance. Regulation 5 of the September rules provided a broad definition of war crimes. It lumped into a single definition a long list of offenses which embraced many aspects of international law, namely, crimes against peace, crimes against humanity and violations of the laws and usages of war. It gave no time limits for the crimes covered under its

⁹Law Reports, v. 1, Annex II, pp. 112-13.

jurisdiction.¹⁰

Obviously, these rules had been drawn up in haste. American officials, like their British and Australian counterparts, had sought to initiate their war crimes operation as soon as possible. The December SCAP Regulations thus benefited from additional time and thought. In what became the basis for all future United States trials in the East, these regulations defined war crimes more specifically, and in language nearly exact to that used in the F.E.C. policy decision of April 1946 and in Article 5 of the Charter of the IMTFE:

(a) The 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.

(b) Violations of the laws or customs of war. . . .

(c) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war. . . .

It may be seen, then, that United States military commissions tried Japanese for crimes against peace, conventional war crimes and crimes against humanity. Moreover, American tribunals had jurisdiction over "but not limited to" the above offenses.¹¹

" . . . (A)ll persons charged with war crimes who (were) in the custody of the convening authority at the time of the trial" were subject to United States military jurisdiction under the December regulations. As regarded the time period for war crimes subject to

¹⁰Ibid., p. 114.

¹¹SCAP. Trials of "B" and "C" Criminals, Append. II, pp. 215-16.

American jurisdiction, the following prevailed: An¹²

offense need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of September 18, 1931.

In most other respects, the regulations of September and December 1945 resembled one another. Primary concentration, therefore, will be focused on the later set of rules.

Power to convene military commissions devolved upon General MacArthur, the S.C.A.P., or any field or military commander so authorized by him. Similarly, power to appoint members to such commissions fell to MacArthur or his delegates.¹³

United States military commissions consisted of at least three members. Required qualifications for appointment to a commission included, inter alia, professional competency and strict impartiality. Members of any of the service branches, as well as civilians, could sit on a commission. S.C.A.P. rules prescribed, furthermore, that "one specially qualified member" be designated "law member;" his ruling was "final" as concerned all matters relating to the admissibility of evidence. He need not be, and seldom was, a lawyer.¹⁴

Majority vote decided all rulings and findings, save those relating to admissibility of evidence and conviction and sentence. The latter required "the affirmative votes of not less than two-thirds of

¹²Ibid., pp. 215-16.

¹³Ibid.

¹⁴Ibid., pp. 216 -17. Robert Miller, "War Crimes Trials at Yokohama," Brooklyn Law Review, v. 15, no. 2, 1949, p. 194, n. 12.

the members present." All commissions had presiding members, either appointed by the convening authority or assuming the position by virtue of superior rank. Allowance was made for the establishment of "international military commissions consisting of representatives of several nations or of each nation concerned;" such commissions could try cases involving violations against one or more nations.¹⁵

In order to guarantee all accused a fair trial, the United States regulations permitted public sessions, "except when otherwise decided by the commission." Also, a complete and clear record of the proceedings was to be made by the commission for presentation after the trial to the convening authority. All accused were entitled to: a copy, clear and complete, of all charges and specifications preferred against him well in advance of the trial; the right to be represented, "prior to and during the trial," by Court-appointed counsel, counsel of his own choice or himself; testify in his own behalf, present evidence, rebut prosecution evidence and cross-examine "each adverse witness" at the trial; and "require the production of documents and other evidentiary material." From the start, the regulations emphasized that each commission should "confine each trial to a fair, expeditious hearing" on the germane issues only.

United States military commissions could award, upon conviction, the following punishments: "death by hanging or shooting, imprisonment for life or any less term, fine or such other punishment" determined proper. This included confiscation of any property of a convicted accused.¹⁶

¹⁵SCAP, Trials of "B" and "C" Criminals, Append. II, pp. 215, 217.

¹⁶*Ibid.*, pp. 217-18, 221-22.

All sentences required approval by the convening authority prior to execution. First, though, an initial appellate review of every case took place. A special staff of reviewers, "all mature lawyers of extensive experience," and about equally divided between military and civilian personnel, examined the trial records. After making certain that "no error prejudicial to the accused (whether claimed by the accused or not) had been committed," they forwarded their reports and recommendations to the Staff Advocate General.

This officer then analyzed the trial record, offered further recommendations and sent the entire record to the Commanding General, or convening authority. Whereupon this individual could "approve, mitigate, remit in whole or in part, commute, suspend, reduce or otherwise alter the sentence imposed;" if he so chose, he could "remand the case for rehearing before a new military commission." Under no circumstances, significantly, could he "increase the severity of the sentence." All death sentences demanded confirmation by the S.C.A.P.--General MacArthur himself--before being carried out.¹⁷

Like their Allies, American authorities recognized the unique character and necessities of war crimes trials. Consequently, they decided to relax the ordinarily strict rules of evidence applicable in criminal courts. Presented elsewhere in this study, the merits of this matter need not detain us here. Adhering to the same principle which governed

¹⁷For the reviewing procedure, see *ibid.*, pp. 205-07, 222; and articles by two reviewers, Albert Lyman, "Yokohama War Crimes Trials: A Review," *Journal of Bar Assn. Wash., D.C.*, v. 17, 1950, pp. 268-69, and Paul E. Spurlock, "The Yokohama War Crimes Trials: The Truth About A Misunderstood Subject," *Amer. Bar Assn. Jrnl.*, v. 36, 1950, pp. 388-89, 436-37.

the admissibility of evidence at the IMTFE, United States commissions admitted "such evidence . . . as in the commission's opinion would have probative value in the mind of a reasonable man." Military courts implemented the rules of evidence, accordingly, "with the greatest liberality to achieve expeditious procedure."

In this manner, American tribunals permitted the introduction as evidence of a wide range of documents, reports (official and unofficial), "affidavits, depositions or other signed statements," letters, sworn or unsworn statements, copies of the above, "facts of common knowledge" and hearsay.¹⁸

Supplementing the preceding regulations were additional "Rules of Procedure," promulgated February 5, 1946. Basically, these elaborated and specified official trial procedure. In minute detail they outlined, for example, the types of questions ("short, simple") to be asked, and those ("long," "complicated") to be avoided; the precise seating arrangements for all Court personnel; and the oaths to be administered.¹⁹

Further amendments to United States war crimes regulations were announced in December 1946. Of special note was the deletion of reference to war crimes committed by "units and organizations." The original September regulations had authorized American courts to try criminal

¹⁸SCAP. Trials of "B" and "C" Criminals, Append. II, pp. 218-20. FDR's proclamation of July 2, 1942, included the provision that: "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The influence on the SCAP regulations is obvious.

¹⁹Ibid., Append. III, pp. 227-34.

groups--as units, not individuals--for specific offenses. By December 1946, apparently, American officials realized that such provisions, which would prove so effective in European war crimes trials (against members of the Gestapo, S.S., e.g.), had no similar application in the East.²⁰

In none of the Allied nations' war crimes regulations did the defense plea of "superior orders" absolve completely an accused from guilt. Those of the Commonwealth nations, it will be shown, contained provisions similar to the following American principle: while such a plea in itself "shall not constitute a defense," it "may be considered in mitigation of punishment if the commission determines that justice so requires."²¹

American war crimes courts did not, as a practice, deliver reasoned judgments. In fact, only Chinese, French and Dutch military tribunals regularly adopted this practice. American and British commissions, however, were not prohibited from doing so, and on rare occasions--e.g., in the Yamashita (Chapter 3) and Gozawa (Chapter 5) cases, respectively--explained succinctly the reasons for their decisions. Still, noted the UNWCC, in many United States cases, it was impossible "to determine with certainty on what ground" the Court based its²² judgment.

²⁰Ibid., Append. III, p. 223; see also Law Reports, v. 1, Annex II, pp. 118-19. In actual practice, only the Netherlands prosecuted criminal groups and organizations" in the East. See chapter 9.

²¹SCAP. Trials of "B" and "C" Criminals, Append. II, p. 220.

²²A U.S. commission "may state the reasons on which the judgment is based," in ibid., p. 221. Also, see Law Reports, v. 15, pp. x-xi, 2, 20.

The role of the Judge Advocate in United States military courts differed fundamentally from that of the Judge Advocate in Commonwealth trials. The British Judge Advocate, that is, served as an impartial adviser to the court, "whereas his United States counterpart prosecute(d) in the name of the United States and prepare(d) the record of the trial."²³

Finally, American officials issued another set of regulations exclusively for the China theater on January 21, 1946. These resembled closely the September regulations, aside from a few notable distinctions: for one, American commissions operating in China could try Japanese for crimes against humanity and conventional war crimes, but not for crimes against peace--i.e., for "planning, preparation, initiation or waging of a war of aggression. . .;" for another, the China regulations made no allowance for creation of inter-Allied mixed military tribunals.²⁴

* * *

Little time was wasted by any of the Allied nations in getting their war crimes operations underway. Particularly so did this apply to the United States.

A central agency to deal with Eastern war crimes, the War Crimes Office of the United States War Department in Washington, was created on October 7, 1944. Under the supervision of the Judge Advo-

²³See *ibid.*, v. 1, Annex II, p. 116; also, G. W. Paton, "The War Trials and International Law," *Res Judicatae*, v. 3, 1947, p. 129.

²⁴*Law Reports*, v. 3, Annex III, pp. 105, 107-08. For China regulations, see pp. 105-12.

cate General, the agency collected "evidence concerning cruelties, atrocities and acts of oppression committed" by Japanese "in violation of the laws of war." American investigation teams explored all avenues in search of possible evidence; then they analyzed, sifted and arranged all accumulated material.

A Pacific War Crimes Branch, with purposes similar to those of the War Crimes Office, was established in April 1945. Further investigations produced huge files of evidence and records against suspected Japanese. All information was forwarded to the central agency in Washington for additional collation.²⁵

In September 1945, under a directive of the United States Joint Chiefs of Staff, the principal American war crimes agency for the Far East was constituted at S.C.A.P. Headquarters in Tokyo. Direct responsibility devolved upon the Supreme Commander, General MacArthur. The directive, approved by all nations participating in the occupation of Japan, ordered the investigation and arrest of all suspected war criminals. Moreover, it enabled the S.C.A.P. "to appoint special international courts and to prescribe rules of procedure for them." It also gave the military commander of any Allied nation authority to create special military courts for the trial of war criminals.²⁶

Soon after, MacArthur formed two offices for the prosecution of war criminals. The International Prosecution Section (see Chapter 2).

²⁵SCAP. Trials of "B" and "C" Criminals, p. 41.

²⁶History of UNWCC, p. 383; see also F. E. C., Report by Sec. Gen. Feb. 26, 1946-July 10, 1947, Append. 39, pp. 97-100. This F.E.C. policy decision contained the major suggestions of the JCS' directive.

dealt exclusively with major war criminals to be tried at the IMTFE. Another office handled all matters concerning the apprehension and trial of other Japanese suspects. Before long, this latter office passed under the control of the Legal Section of S.C.A.P.

S.C.A.P.'s Legal Section set up two branches. The first, in Yokohama, took charge of trials of Japanese in the Japanese mainland itself. The second, at Manila, dealt with Japanese accused of committing crimes against American forces in the Philippines. When Legal Section, Manila Branch, closed on January 1, 1947, Philippine authorities assumed responsibility for the disposition of all remaining cases against Japanese.²⁷

By virtue of orders issued in October and December 1945, S.C.A.P. established Legal Section, Yokohama, as a Special Staff Section of General Headquarters. Responsibility for "advising" General MacArthur on general policies and procedures relative to war crimes fell to Section Chief, Colonel Alva C. Carpenter. Assigned to this section were a variety of functions, including: further investigation of war crimes and collection of evidence; preparation of cases; establishment and maintenance of a central registry of war criminal suspects and making recommendations concerning their apprehension and trial; and recommending appointments to war crimes commissions.

Besides the one at S.C.A.P. HQs, three additional regional war crimes agencies were established in China, India and the Pacific Ocean Islands. A Shanghai War Crimes Branch operated at the headquarters of

²⁷History of UNWCC, p. 383; also, SCAP, Trials of "B" and "C" Criminals, pp. 41-42.

United States Force, China Theatre. Another, located at New Delhi, operated at the headquarters of United States Force, India-Burma Theatre. The third, established at Guam, operated at the headquarters of United States Navy, Pacific Ocean Area. Direct supervision of all three branches emanated from the Central War Crimes Branch in Washington.²⁸

Throughout the Allied war crimes effort in the East, cooperation among the participating nations (except Russia, see Chapter 7) was encouraged and, in many aspects, realized. The governments of Australia, Britain, Canada and China thus dispatched special divisions to S.C.A.P.'s war crimes agency. A French liaison officer remained there during 1947. Such war crimes teams, working both independently and in concert with the Legal Section's investigation teams, built up cases against Japanese involving their own nationals.

In turn, the United States maintained its own war crimes section at the headquarters of South East Asian Command's (S.E.A.C.) Central War Crimes Branch, in Singapore. Here, cases concerning American personnel were tried by British military courts, a United States officer assisting in the prosecution.²⁹ Similarly, American authorities left "primary responsibility" for war crimes trials in the India-Burma Theatre to S.E.A.C. America limited its participation there to "furnishing members for commissions and prosecution staffs" in cases involving United States nationals. Concerning crimes perpetrated against Americans in Java, Thailand, French Indochina, the Celebes, Malaya and Sumatra, United States authorities relied heavily on "joint American,

²⁸Ibid., p. 43; History of UNWCC, p. 384.

²⁹Ibid., pp. 382-84.

Dutch and Australian evidence" to construct tenable cases.³⁰

Whence came the personnel to implement this vast undertaking? Rapid demobilization immediately after the war, one may assume, depleted significantly human sources from which the United States might have manned its war crimes operation. Manpower shortages, then, from time to time and in certain theatres, were to be expected. Still the fact stands that, throughout its existence, the operation remained a function of the military. As such, it always had a substantial, if severely reduced, source of manpower to draw upon. And it had the financial backing of the United States government. While obstacles to providing qualified legal personnel at the trials often cropped up, rarely did such hindrances prove insurmountable.

Only qualified and experienced American lawyers served at Eastern war crimes trials. While military personnel--officers and career men--frequently acted as prosecution and defense counsel, most cases were tried by civilian attorneys in the employ of the United States government. Particularly did this apply to the trials conducted at Yokohama: of some 40 lawyers employed by the defense division there, only five were military men.³¹ Cases heard in places as Guam or Shanghai, however, where it proved more difficult to attract civilian personnel, featured qualified Navy and Army officers as prosecution and

³⁰U.S. Dept. of State. Foreign Relations of the United States 1946. V. VIII. The Far East (Wash. D.C., 1971), July 22, p. 439. History of UNWCC, pp. 385-86.

³¹Lyman, "Yokohama Trials," p. 272; Spurlock, "Yokohama Trials," p. 388. There were also some 100 Army lawyers working in the background at Yokohama. See Stars and Strips (Tokyo), Dec. 14, 1945.

defense counsel. In fact, transported to overseas locations, such as Guam, were entire war crimes staffs: several career officers, all legal specialists, to coordinate the program and serve on military commissions; trial lawyers; administrative personnel; interpreters; security guards; and court stenographers and reporters. Authority for all assignments emanated from Washington.³²

American personnel usually "handled entirely" the prosecution of trials. Frequently, Japanese lawyers, paid by the Japanese government, assisted American defense counsel. Should an accused so request, these positions were obligingly reversed: that is, the American served in an "advisory" capacity. In most cases, though, especially those in Yokohama, American counsel "handled the bulk" of the defense duties. Not infrequently, Japanese civilian attorneys volunteered their services to an accused countryman, working without financial compensation. Finally, a special body of Reviewers, all "seasoned and experienced lawyers" and mostly civilians were provided from throughout Far Eastern outposts or from the United States.³³

American authorities, as noted, brooked few delays in commencing their war crimes operation. Like their Allied counterparts, their motivation derived, partly at least, from increasing revelations of "grim tales, yet unfinished," of Japanese tortures, beatings, inhuman conditions and "atrocious campaigns" perpetrated upon American servicemen. "Aroused by the pitiable condition of many" recently released

³²George E. Erickson, Jr., "United States Navy War Crimes Trials (1945-1949)," Washburn Law Journal, v. 5, 1965, pp. 96-97.

³³*Ibid.*, pp. 97-98; Lyman, "Yokohama Trials," pp. 268-70.

American and Allied POWs, observed the London Times, four American teams "systematically" scoured the Yokohama and Kawasaki districts in search of evidence against Japanese suspects.³⁴

Americans, however, did not view so-called minor war crimes trials, any more than they did the IMTFE, as a means of exacting vengeance upon a fallen foe. Rather, they perceived as a principal responsibility, commented editorially The New York Times, the removal of Japan's "ability to do any more evil." Arrest and punishment of Japanese war criminals, they reasoned, would contribute well to the demilitarization of Japan.³⁵

Furthermore, the trials had to serve to "educate" the Japanese public. For nearly a decade, Japan's ruling military clique had screened the public from an impartial reporting of facts and world crises by way of an overbearing system of censorship. Therefore, General MacArthur directed that the "stark facts of Japanese atrocities be told to the Japanese people." At S.C.A.P.'s suggestion, several representatives of Japanese newspapers agreed to publish explicit reports of the wartime behavior of their countrymen.³⁶

Above all, Americans conducted war crimes trials "not for the purpose of meting out sentences in revenge . . . but for the purpose

³⁴The New York Times, Sept. 6, 1945. London Times, Sept. 4, 1945.

³⁵The New York Times, Edit., Sept. 6, 1945. SCAP. Trials of "B" and "C" Criminals, pp. 3-4. Also, all political parties in Japan were "carefully scrutinized to see that Japanese war criminals (did) not hide behind a facade of legality and rise to power again," said Brig. Gen. E. R. Thorpe, chief of Allied Intelligence, Tokyo. Stars and Stripes (Shanghai), Nov. 21, 1945.

³⁶The New York Times, Sept. 15, 1945.

of ascertaining the guilt or innocence of the accused after a fair and impartial trial. . . ." In this fashion, the entire trial records would stand as "monuments to the fair manner in which the war crimes program in the Far East was handled."³⁷ Whether they successfully accomplished this commendable goal will be the subject of the following pages.

The actual process of rounding up Japanese suspects began on the day of Japan's surrender, September 2, 1945. S.C.A.P. headquarters ordered the Japanese government "to furnish complete information" regarding the location of POW camps; names of all Allied POWs; all Japanese military and civilian POW personnel; and all other "relevant" data. Japanese authorities generally cooperated with the S.C.A.P. directives.

Much incriminating evidence and many documents had been "deliberately" destroyed by panicky Japanese (civilian and military personnel) soon after the surrender.³⁸ But enough had escaped destruction to enable the apprehension and arrest of suspects by S.C.A.P. forces. The initial order, listing former Premier Tojo as the first to be arrested, went out on September 10. A deluge of arrest orders--for members of the "Pearl Harbor Cabinet," former Foreign and other governmental ministers, leading military and civilian figures, and thousands of "small fry"--ensued shortly. Many Japanese, as elsewhere in the East, commit-

³⁷SCAP. Trials of "B" and "C" Criminals, pp. 3-4.

³⁸Ibid., pp. 46-49, 67-68. London Times, Sept. 11, 1945; New York Herald Tribune, Dec. 5, 1945.

ted suicide upon learning of their imminent seizure.³⁹

By the end of 1945, some 600 Japanese had been charged with war crimes. A list of approximately 2,000 additional suspects had been drawn up, but no action had yet been taken. Such caution, not delay, stemmed from MacArthur's instructions to Army prosecutors: before they began to prepare a case for trial, they should be "absolutely sure" that a tenable case existed. " . . . (E)very suspect," he therefore ordered, should receive a "thorough screening" prior to arrest and thereby "reduce the possibility of an acquittal once the trial begins."⁴⁰ Efficiency became a keynote of the United States operation: as of July 1, 1948, S.C.A.P. had ordered 2,636 Japanese arrested, of whom all but 34 were apprehended or otherwise accounted for.⁴¹

* * *

Much occurred between 1945 and 1949 to alter American leaders' view of the world situation. Hopes for broader and deeper Soviet-American friendship and cooperation vanished amidst burgeoning Cold War frictions. "Mutual trust," a by-product of wartime unity, had degenerated into "mutual terror," a by-product of Washington-Moscow rivalry.⁴²

³⁹The New York Times, Sept. 12, 13, Nov. 19, 1945. Stars & Stripes (Shanghai), Oct. 19, Nov. 21, Dec. 1, 1945; Stars & Stripes (Tokyo), Nov. 10, Dec. 4, 7, 11, 1945, Jan. 19, Feb. 7, 8, 1946. SCAP. Trials of "B" and "C" Criminals, pp. 47ff.

⁴⁰U.S. Dept. of State. "Occupation of Japan: Policy and Progress." Pub. 2671, F. E. Series 17 (Wash. D.C., 1947), p. 27. MacArthur's instructions as reported in a speech by Hugh Baillie, president of the United Press. The New York Times, Dec. 6, 1945.

⁴¹SCAP. Trials of "B" and "C" Criminals, p. 49.

⁴²The phrase belongs to Herbert Fels, From Trust To Terror (N.Y., 1970), see p. ix.

So, too, had visions of "one world" dissolved. In May 1947 James F. Byrnes, Secretary of State, noted the Soviets' firm determination to see the world divided into two fixed spheres of influence. Subsequent events which unfolded in Europe, the Middle East and Asia furthered this Russian objective. Indeed, by early 1949, observed perceptively Associated Press journalist William L. Ryan, "The one world dream . . . ha(d) faded before a new concept which may mean two worlds and perhaps someday a third."⁴³

These, and other, factors caused a reshaping of American attitudes and policies toward Japan. These changes were as significant as they were radical. In September 1945, for instance, General MacArthur promised that Japan would never again be a world power and that its punishment, "just beginning, will be long and bitter." Yet, a year and a half later MacArthur, acclaiming the remarkable achievements of the occupation, declared Japan ready for an early peace treaty.⁴⁴

A Fortune magazine survey of December 1945 disclosed that 63% of Americans polled believed that Japan still posed a future threat in Asia. A The New York Times editorial of January 1947, in contrast, found a "broad assumption" among Americans that Japan was "so thoroughly subdued" that never again would it provoke trouble.⁴⁵ Whereas Senator

⁴³James F. Byrnes, Speaking Frankly (N.Y., 1947), p. 105 China Press, Mar. 20, 1949.

⁴⁴For the two statements, see The New York Times, Sept. 22, 1945; Mac Arthur Memo, Mar. 21, 1947, U.S. Foreign Relations 1947 (Wash. D.C. 1972) VI, pp. 454-56.

⁴⁵Fortune poll as reported in China Press, Dec. 8, 1945. The New York Times, edit., Jan. 26, 1947.

Owen Brewster, in October 1946, could demand harsh, swift treatment for major Japanese war criminals, Representative Walter Judd, in November 1947, called on the United States to "protect" Japan against threats of Soviet aggression.⁴⁶

Japan had undergone pervasive "transformation," asserted publicly General Robert Eichelberger in late 1947. It had become a "reservoir of friendship which might, in future years, deter any enemy who considered striking at the United States." Japan's future loomed particularly important to United States security as Communist forces pushed inexorably toward victory on the Chinese mainland throughout 1948. Thereupon, George F. Kennan, director of the State Department's policy planning staff, recommended in February 1948 that the United States concentrate on securing Japan against Communist "penetration and domination."⁴⁷

As a result, autumn of 1948 witnessed the "focus" of occupation interest begin "to shift from reform to economic recovery." Many occupation reforms had already proved, or were proving potentially, successful. American authorities therefore reasoned that the time had come to promote Japan's economic rehabilitation, as a means of both relieving pressure on American coffers and of strengthening Japan against external and/or internal threats.⁴⁸

⁴⁶Stars & Stripes (Tokyo), Oct. 10, 1946. China Press, Nov. 6, 1947.

⁴⁷Eichelberger's remarks in ibid., Nov. 12, Dec. 3, 1947. George F. Kennan, Memoirs, 1925-1950 (N.Y., 1967), p. 381.

⁴⁸On this point, see Edwin O. Reischauer, Japan: The Story of A Nation (N.Y., 1970), pp. 233-35.

War crimes trials policy, in this as in other instances, ran parallel to occupation policy. Demilitarization and democratization, the original occupation objectives, had for the most part been or were in the process of being realized. Many war criminals had already been tried and convicted. In virtually every Allied nation by 1948, public and private discontent over the prolongation of war crimes trials, especially the IMTFE, mounted as steadily as interest in them declined.⁴⁹

United States authorities, in accordance with Kennan's advice, recognized the need to stabilize Japan, politically and economically, and to "win" that nation to its side in the Cold War. An early and moderate peace treaty with Japan, they discerned, would be most constructive in this respect. However, the State Department had become convinced, as of October 1948, that disposition of the issue of war crimes trials must precede "any discussion of a peace treaty with Japan." Later, treaty negotiations held in January 1951 between John F. Dulles and Prime Minister Yoshida indicated the validity of such a view. At that time, the parties agreed that any peace settlement should exclude "further additions to the list of war criminals."⁵⁰

⁴⁹As of Mar. 1, 1948, the U.S. had tried 574 Japanese, convicting 2,379; the Allies, overall, had tried 2,794, convicting 2,379. See History of UNWCC, Append. IV, p. 518. On impatience with war crimes trials, see, e.g., Kennan conversation with MacArthur, Mar. 21, 1948. U.S. Foreign Relations 1948 (Wash.D.C., 1974) VI, p. 718; Sydney Morning Herald, May 7 and edit. June 16, 1948; Straits Times, edit. Feb. 6, 1947. On disinterest in the trials, see, e.g., The New York Times, edit. Jan. 26, 1947, and A. Frederick Mignone, "After Nuremberg, Tokyo," Texas Law Review, v. 25, 1947, p. 490.

⁵⁰Kennan, Memoirs, p. 391. State Dept. decision as reported in Stars & Stripes (Tokyo), Oct. 5, 1948, See Shigeru Yoshida. The Yoshida Memoirs (Bost., 1962), Trans. by Kenichi Yoshida, p. 251.

Pursuant, then, to its revised goals of strengthening Japan, politically and economically, and securing that nation's alliance, the United States pressed its Allies to accept the following measures: an early end to Japanese reparations payments; rapid conclusion of a peace treaty; and, after 1948, swift disposition of all remaining war crimes trials.

As to the latter point, S.C.A.P. HQs began to "wind down" its own operations in March 1948, and urged upon its Allies the "expedition" of trials in November of that year.⁵¹ Shortly after the IMTFE, in December 1948, S.C.A.P. released all remaining Class "A" Japanese war criminal suspects held since autumn 1945 who had not been tried at Tokyo. A "unanimous" F.E.C. Policy Decision of February 24, 1949, sanctioned, somewhat belatedly, the unilateral American action of the preceding December: it stated that "no further trials should be initiated" against Class "A" suspects. Finally, a F.E.C. "recommendation" of March 31, 1949, rang down the curtain on Eastern war crimes trials. By it, Allied nations were encouraged to conclude, "if possible," all Japanese trials by September 30 of that year.⁵² How each of the Allied countries reacted to such United States 'suggestions' and "recom-

⁵¹U.S. Foreign Relations 1948, Mar. 1, p. 675; New York Herald Tribune, Nov. 14, 1948.

⁵²SCAP released class "A" suspects, explained Alva C. Carpenter, chief of SCAP HQs legal section, because by judging certain of the accused "not guilty" of committing conventional war crimes and/or crimes against peace, the IMTFE had "made it highly improbable that guilt could be established in additional cases." The New York Times, Dec. 24, 1948. Also, *ibid.*, Mar. 16, 1949; F.E.C., Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945 (Wash. D.C., 1950), pp. 4-5.

mendations" fills much of the following pages.

While, it is believed, the preceding background on changing American attitudes and policies toward Japan and Eastern war crimes trials has been necessary, nevertheless we have run well ahead of our basic story. To that, we now return.

* * *

United States military courts sitting in the Philippines, China, the Pacific Islands and Japan conducted 452 trials, involving 1402 Japanese accused. Obviously, no comprehensive study of the trials can be attempted here. Rather, a sweeping overview of American-held trials will be the objective of the following two chapters. Trials embracing special personages, legal principles, occurrences or outcomes will receive proportionate attention. Featured, above all, will be the most remarkable trials in each theatre.

CHAPTER III

UNITED STATES TRIALS "YAMASHITA AND HOMMA: THE PHILIPPINES"

Undoubtedly, the most celebrated and controversial war crimes trial in the East, aside from the IMTFE in Tokyo, was that of General Tomoyuki Yamashita. Not accidentally, it was also the first Japanese war crimes trial conducted by any Allied power. Everything about the Yamashita trial reflected its uniqueness: from the legal principle upon which the prosecution rested its case to the moving defense of the accused by court-appointed counsel; from the seemingly endless listing of charges and testimony disclosing the treatment of Filipinos by battle-crazed Japanese troops to the composed, dignified deportment of the defendant; from General MacArthur's confirmation of the death sentence and his personal condemnation of Yamashita to the resounding opinions of a divided United States Supreme Court.

Of the substantial amount of material which has been written on the Yamashita trial, the preponderance fits neatly into two general categories: that which argues that Yamashita received a fair trial, and that which contends that he was denied a fair trial. Controversy abounds. An impartial examiner must, therefore, be careful to survey all sides before attempting a factual presentation of the case.

* * *

Yamashita attained the title "The Tiger of Malaya" in February

1942 when troops under his command conquered the long-established British bastion of Singapore. In a remarkable occurrence, 100,000 British troops surrendered to Japanese forces numbering less than a third that amount. But that was the hey-day of the Japanese Imperial Forces. By 1944 the tide had clearly turned. Throughout the Southwest Pacific and Southeast Asia Japanese forces steadily retreated before continual American advances. In July and September, 1944, Saipan and Pelilieu, respectively, fell to Americans. Next on the United States' invasion list stood the Philippines.

Supreme Command over the Japanese 14th Army Group, and all Kempeitai (military police), in the Philippines devolved upon General Yamashita on October 7, 1944. Count Terauchi, the Supreme Southern Commander, maintained control over all forces in the Philippines. This included the 14th Army Group, as well as the 4th Air Army and Army Maritime Transport Command. Navy forces there operated under a completely separate command. Any joint Army-Navy operations required Terauchi's supervision.¹

On October 18, 1944, ten days after Yamashita arrived in Manila, American forces invaded Leyte, in the central Philippines. In November, Terauchi transferred his headquarters to Saigon. This further complicated any joint Army-Navy operations, which still had to be channeled

¹Brig. Gen. Courtney Whitney, "The Case of General Yamashita, A Memorandum." Nov. 22, 1949. GHQ, SCAP, Govt. Sect., p. 16; J. Gordon Feldhaus, "The Trial of Yamashita," Current Legal Thought, v. 13, 1947, p. 253; Frank Reel, The Case of General Yamashita. Reprint (N.Y., 1971), p. 62, Note: Feldhaus and Reel served as defense counsel for Yamashita.

through Terauchi.² Gradually, between December 1944 and February 1945 command over all Japanese fighting forces in the Philippines passed to Yamashita. This included "at least technical command" over some 20,000 naval land forces in the Manila area which had been "assigned to the army for tactical command only during land fighting."³

Yamashita meanwhile had been forced to retreat into the mountains of northern Luzon. Japanese troops spread throughout the islands, at the same time, prepared to confront overwhelmingly powerful American forces as they advanced northward from Leyte. In a fit of either rage, desperation, insanity or a combination of all three, Japanese troops waged a systematic campaign of brutality, terrorism and murder against the Filipino population. Untold thousands were bayoneted, burned, beheaded, clubbed, hanged, starved, shot and raped. No one was safe; women, children, even infants, the elderly, sick and wounded, priests and nuns--all fell victim. Property damage everywhere in the Philippines was immeasurable. Manila was razed.⁴

Yamashita surrendered to American forces on September 3, 1945. He was charged as a war criminal on September 25, and arraigned October 8. His trial commenced three weeks later. The indictment against him read that he⁵

between 9, October, 1944 and 2, September, 1945, at Manila and at other places in the Philippine Islands, while commander of

²Feldhaus, "Yamashita Trial," p. 254; Reel, Yamashita Case, p. 63.

³Whitney, "Yamashita Memorandum," pp. 16-17; Feldhaus, "Yamashita Trial," p. 254.

⁴For description of the violence and damage, see, e.g., Reel, Yamashita Case, pp. 91, 101ff., 112ff.; Whitney, "Yamashita Memorandum," pp. 5-16; Stars & Stripes (Shanghai), Oct. 31, 1945.

⁵Law Reports of the Trials of War Criminals. Selected and prepared by the UNWCC (London, 1947-49) 15 vls., Vol. 4, Case no. 21, pp. 3-4.

armed forces of Japan at war with the United States of America and its allies, 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 and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.

At the arraignment, the prosecution submitted a list of 64 sets of crimes that Japanese troops had committed at various locations in the Philippines. Yamashita was charged with responsibility for all the violations included in this "bill of particulars." Yet, as defense counsel pointed out, "at no place (in the bill of particulars) was it alleged that the accused ordered, condoned, or actually knew anything about these things, or in any manner sanctioned their commission. . . ."⁶ On October 27 the prosecution introduced another bill of particulars charging the commission of 59 further violations. Now there were 123 specifications lodged against Yamashita.

Lieutenant General Wilhelm D. Styer, the commander of Army Forces, Western Pacific, appointed the five-man military commission to try Yamashita. He designated three major generals and two brigadier generals. None was a lawyer by training; not even the President, also named "law member," had civilian legal experience. Still, as an Army spokesman later observed, all the members of the commission "had broad legal experience in that throughout their service they had participated on innumerable occasions in the trial of military offenders as prosecutor, counsel and member of the court."⁷ Lt. Gen. Styer also

⁶Reel, Yamashita Case, pp. 32-33. Feldhaus, "Yamashita Trial," p. 256.

⁷Ibid., p. 255; Whitney, "Yamashita Memorandum," p. 19. George Guy, "The Defense of Yamashita," Wyoming Law Jnl., v. 4, 1949, p. 161.

appointed a battery of six men, all lawyers, to defend Yamashita. Harder working, more dedicated, counsel Yamashita could not have found had he chosen them himself.

Upon being served the supplemental bill of particulars on October 27, two days before the trial, the defense moved the court for a "reasonable continuance."⁸ Motion was denied, and "the first major war crime trial of World War II" opened as scheduled before a courtroom packed with notables: high-ranking officers and civilians; Filipinos, Chinese, Americans and Europeans; and international newspaper correspondents. Kleig lights burned, cameras rolled and flash bulbs flashed.⁹ According to one critic, "the courtroom atmosphere had a grotesquely carnival air."¹⁰

In his opening address, chief prosecutor Robert M. Kerr branded Yamashita as a "common criminal." The prosecution then set the pattern which it followed throughout the trial: it proceeded to introduce witness after witness (mostly Filipinos) who, in simple, sometimes dramatic but always deeply moving, fashion described the horrors perpetrated upon them, their families and neighbors by troops under Yamashita's command.

Women wept uncontrollably as they described how their infants had been tossed into the air and caught on Japanese bayonettes; nuns told

⁸Reel, Yamashita Case, pp. 83-84, Feldhaus, "Yamashita Trial," p. 259.

⁹Paul Katona, "Japanese War Crimes Trials," Free World, v. 12, 1946, p. 38; Stars & Stripes (Shanghai), Oct. 30, 31, 1945; Straits Times, Oct. 30, 31, 1945; Feldhaus, "Yamashita Trial," pp. 255-56.

¹⁰John Deane Potter, A Soldier Must Hang. The Biography of an Oriental General (London, 1963), p. 170.

how they had been raped and bayoneted; young children recalled how their parents had been bludgeoned or burned to death in their presence; witnesses recounted mass executions by decapitation. On it went, interminably it seemed, consuming some 2,900 pages of trial evidence.¹¹

Newspaper coverage of the trial was as sensational as it was extensive. Reputable newspapers frequently overstepped the bounds of objective reporting. They not only emphasized the macabre and sanguinary aspects of testimony and evidence, but often offered unwarranted conclusions as well. "Like the lurid details of a much publicized murder case," wrote the Stars & Stripes, "Yamashita's moral guilt is a matter of general information. . . ."¹² It was one thing for a military newspaper to make such a prejudicial statement during a trial. It was quite another for the New York Herald Tribune to feature such misleading headlines as, "Yamashita Men Sacked Manila At His Orders," or "Yamashita Rule Gave Internees Starvation Diet." In both instances, the reader had to proceed further into the story to learn that such headlines merely referred to allegations made by witnesses, not proven facts.¹³

Day after day, for more than a month, some of the world's leading newspapers featured lurid and melodramatic coverage of the trial. Typical lead stories were headed: "Girl, 11, Stirs Yamashita Hearing By Stories of Stabs, Parents' Slaying" (The New York Times); "Convent Girl's Ordeal. More Evidence At Yamashita Trial" (London Times);

¹¹Straits Times, Oct. 31, Nov. 5, 1945; Stars & Stripes (Shanghai), Oct. 31, Nov. 1, 2, 3, 5, 7, 13, 14, 16, 21; China Press, The New York Times, New York Herald Tribune, Oct. 31 - Nov. 21, 1945, passim.

¹²Stars & Stripes (Shanghai), Nov. 1, 1945.

¹³New York Herald Tribune, Nov. 6, 8, 1945.

"Killing Said Ordered By Yamashita" (China Press); "Screams At Yamashita, 'You Dirty Jap'" (Straits Times, Singapore).¹⁴ Time Magazine erroneously linked Yamashita to the infamous "Bataan Death March" by dubbing him "The Beast of Bataan."¹⁵ In fact, Yamashita was stationed in Manchuria at the time of that incident.

The prosecution case may be summarized as follows: various elements, individuals, units, organization and officers" under the command of Yamashita committed "a wide pattern of widespread, notorious, repeated, constant atrocities of the most violent character;" these violations occurred throughout the Philippines. Due to the excessive notoriety and flagrancy of these offenses, as regarded both their "scope" and "inhumanity," Yamashita "must have" known of them "if he were making any effort whatever to meet the responsibilities of his command. . . ." If he did not know of these acts, "notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know." "That," concluded chief prosecutor Kerr, "is our case."¹⁶

Counsel for the defense countered with a basic argument. After an initial unsuccessful challenge to the jurisdiction of the military commission, the defense centered its case on Yamashita--his character, the precarious and desperate military conditions he confronted in the Philippines, and his genuine efforts to control the behavior of troops

¹⁴The New York Times, Nov. 6, 1945; London Times, Nov. 8, 1945; China Press, No. 4, 1945; Straits Times, Nov. 5, 1945.

¹⁵As reported in Feldhaus, "Yamashita Trial," pp. 252-53.

¹⁶Law Reports, v. 4, Case no. 21, Opening and closing prosecution statements, pp. 17, 29-33; The New York Times, Nov. 20, 21, 1945; see also Whitney, "Yamashita Memorandum," pp. 1619.

under his command. No attempt was made to disprove charges of atrocities by Japanese forces in the archipelago; the defense sought only to extricate their client from responsibility for those misdeeds.

Defense counsel stressed Yamashita's dignified character and sought to "disassociate" him, in the minds of the Court, from the "extreme Japanese Military Class." Witnesses testified to his lack of political affiliations and to his "reputation for fairness" and strong disciplinary habits.¹⁷ Most significantly, defense counsel underscored the "insurmountable difficulties (Yamashita) faced upon his arrival" in the Philippines: divided command existed, thereby precluding direct military control over all army, marine, air and naval forces in the Islands; the "low" morale and discipline of the troops; the poor state of supplies and ammunition; and a communications system so inferior and devastated by American pre-invasion bombing, that he "could not" have known or learned of atrocities committed by Japanese troops.

Furthermore, between October 7, the date of his arrival in Manila, and October 18, the date of a massive American invasion at Leyte, Yamashita had not had time for training or even inspecting troops under his command. In fact, he never came into physical contact with most of the units; they merely passed under his "tactical command" as the battle proceeded.¹⁸ The overwhelming American onslaught exacerbated greatly Yamashita's difficulties, particularly logistical and

¹⁷Guy, "Defense of Yamashita," pp. 158-61.

¹⁸Ibid., pp. 163-66; Heel, Yamashita Case, pp. 24-25; Feldhaus, "Trial of Yamashita," pp. 253-54; Law Reports, v. 4, pp. 21-23. Whitney, "Yamashita Memorandum," pp. 16-17.

communications. He retreated into the mountains of northern Luzon preparing to mount a last-ditch defense, thereby further weakening the lines of communication between himself and his already scattered command.

Buttressed by the testimony of witnesses, most notably that of Lt. Gen. Shizuo Yokohara and Yamashita's personal aide, Lt. Gen. Akira Muto, the defense argued that the accused "was too busy with the details of combat supply and reorganization of Japanese forces . . . to know what was going on outside his own headquarters." Moreover, these witnesses swore, Yamashita had "forbade mistreatment of Filipinos;" Japanese troops, he had instructed, should "be fair in all dealings with them." Muto said that no reports of atrocities ever reached his, or Yamashita's office.¹⁹

Naval troops in Manila and dispersed Army regiments in Batangas Province committed "practically all the atrocities" in those places. The former had completely ignored Yamashita's orders to withdraw from the city, defense counsel contended; similarly, Yamashita wielded "no power" over the latter. Responsibility for most of the violations descended upon "war-crazed and drunken soldiers who were facing almost certain death in the very near future."²⁰

Yamashita proved the most impressive and, in his own manner,

¹⁹New York Herald Tribune, Nov. 18, 22, 1945; Guy, "Defense of Yamashita," pp. 163-64; see also Muto's remarks in Aubrey S. Kenworthy, The Tiger of Malaya (N.Y., 1953), pp. 15-16, 67.

²⁰Reel, Yamashita Case, pp. 102-04. Feldhaus, "Yamashita Trial," p. 258.

eloquent, speaker at the trial.²¹ On the witness stand, Yamashita basically repeated the defense argument: he had confronted "constant" and mounting American attack forces; he was "unfamiliar" with the Philippines; he had suffered poor communications and a system of divided command, which rendered it "impossible to unify" his command. He concluded by saying²²

I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation, and if these things happened, they were absolutely unavoidable.

He "absolutely did not order" any atrocities;

nor did I receive the order to do this from any superior authority, nor did I ever permit such a thing, or if I had known of it would I have condoned such a thing, and I will swear to heaven and earth concerning these points. That is all I have to say.

"Although subjected" to intense and "rapid-fire cross-examination," reported the press, Yamashita "clung tenaciously to his story. . . ."²³

In short, concluded the defense, "Yamashita did all in his power to control his troops, but . . . the effectiveness of American military operations against him was so great that he was prevented by those operations, and those operations alone, from effectively controlling his troops."²⁴ Great stress was given the fact that, "of the hun-

²¹Everyone, it seemed, who came into prolonged contact with Yamashita was impressed by his deportment and sincerity. See, e.g., Guy, "Yamashita Defense," pp. 156-57; Potter, A Soldier Must Hang, pp. 170-72, 196-97; Kenworthy, Tiger of Malaya, pp. 55-56, 64-65.

²²Reel, Yamashita Case, pp. 147-50.

²³Stars & Stripes (Shanghai), Nov. 30, 1945.

²⁴Guy, "Yamashita Defense," p. 167; Feldhaus, "Yamashita Trial," pp. 254, 258; Reel, Yamashita Case, pp. 24-25, 143-153.

dreds of thousands of Japanese military documents adduced by the prosecution," no evidence was uncovered proving that Yamashita ordered, condoned, sanctioned or even knew of the atrocities.²⁵

On December 7, 1945, the military commission found Yamashita guilty and sentenced him to hang. "The crimes were so extensive and widespread," it ruled, "that they must either have been wilfully permitted . . . or secretly ordered by the accused." A Military Review Board of the Judge Advocate's Office shortly after confirmed the commission's findings.²⁶

Obviously discontent with the judgment, counsel for defense took extraordinary action. They filed an appeal, first with the Philippines Supreme Court (the Philippines was still a territorial possession of America) and then, after that Court refused to hear the case, with the United States Supreme Court.²⁷ The latter, however, "desired to hear argument." The defense based their application for writ of habeas corpus and prohibition on, inter alia, the following grounds: "That the military commission which tried and convicted petitioner was not lawfully created. . .;" "That the charge preferred against petitioner fails to charge him with a violation of the law of war;" That procedure at the trial permitting the admission in evidence of "depositions,

²⁵The New York Times, Nov. 27, 1945; Law Reports, v. 4, pp. 21-29; Reel, Yamashita Case, p. 143; Feldhaus, "Yamashita Trial," p. 256.

²⁶Law Reports, v. 4, pp. 33-35. Whitney, "Yamashita Memorandum," pp. 76-82.

²⁷Reel, Yamashita Case, pp. 197-203. The Philippines Court ruled that it lacked jurisdiction, and that the military commission had been "legally constitute." See The New York Times, Nov. 28, 1945.

affidavits, and hearsay and opinion evidence" "deprived petitioner of a fair trial in violation in the due process clause of the Fifth Amendment."²⁸

Before the United States Supreme Court, attorneys for Yamashita emphasized that, at Nuremberg, charges against German accused alleged "knowledge and participation" in atrocities in every case; whereas charges against Yamashita specified only that troops under his command had perpetrated atrocities. Prosecutors conceded the lack of direct proof of Yamashita's guilt. But, they argued, Yamashita had failed to perform a universally recognized duty. Therefore, as in criminal law, he was liable on grounds of "criminal negligence," similar to the offense of "manslaughter."²⁹

The Court, read the majority opinion, was "not concerned with the guilt or innocence" of General Yamashita. It could consider "only the lawful power of the Commission" to try him for the crime charged. Military tribunals, stated Chief Justice Stone, "are not courts whose rulings and judgments are made subject to review by this Court." Military authorities "alone," not the courts, are "authorized to review their (the military commission's) decisions."³⁰ By a 6-2 vote,

²⁸Feldhaus, "Yamashita Trial," pp. 259-60; Stars & Stripes (Shanghai), Dec. 5, 1945; Reel, Yamashita Case, pp. 202ff.

²⁹New York Herald Tribune, Jan. 9, 1946. Also, The New York Times, Dec. 7, 1945.

³⁰In re Yamashita, 327 U.S. 1 (1946). Aside from Justices Murphy and Rutledge and defense counsel, most authorities have agreed with the Court's ruling, i.e., that "the matter was one for review by higher military authority rather than the Supreme Court." See, e.g., George E. Erickson, "United States Navy War Crimes Trials (1945-1949)," Washburn Law Journal, v. 5, 1965, p. 99, n. 40; John T. Gano, "The Yamashita Case and the Constitution," Oregon Law Review, v. 25, 1946, pp. 151-53;

the Court denied Yamashita's appeal; the military commission's ruling stood.

General MacArthur confirmed the commission's finding and sentence of death on February 4, 1946. He had "reviewed the proceedings in vain search for some mitigating circumstances" on Yamashita's behalf, but could "find none." Yamashita, MacArthur added, had "failed his duty" as a soldier, and "to his country, to his enemy, (and) to mankind" as well. "No new or retroactive principles of law, either national or international," were involved in the case, declared MacArthur; rather, it was "founded upon basic fundamentals and practices," "immutable" and "standardized." "The results," he concluded, "are beyond challenge." A final plea for commutation of sentence was rejected on February 8.³¹ General Yamashita was hanged on February 23, 1946

* * *

If, as MacArthur averred, the results of the Yamashita trial were "beyond challenge," why then did so many people disagree or feel uneasy with the final judgment? And was the judgment, as he also said, truly devoid of any "new or retroactive principles of law, either national or international?" Let us begin with the second assertion.

Army prosecutors, and most international jurists, believed that the legal principle upon which the Yamashita decision was based--i.e., command responsibility--rested "on a just and sound foundation." The Military Review Board held that, "The doctrine that it is the duty of a

Daly, "Yamashita Case," pp. 218-19; Quincy Wright, "Due Process and International Law," Amer. Jrnl. of Int. Law, v. 40, no. 2, 1946, pp. 399, 405-06.

³¹For the complete statement, see Douglas MacArthur, Reminiscences (N.Y., 1964), pp. 295-96. New York Herald Tribune, Feb. 9, 1946.

commander to control his troops is as old as military organization itself. . . ." An eminent international jurist, Quincy Wright, agreed that "it would appear that international law holds commanders to a high degree of responsibility for the actions of their forces." Even critics of the decision conceded the existence of the principle in military law.³²

Nevertheless, there can be no gainsaying the fact that this "marked the first time in history that the United States as a sovereign power had tried a General of a defeated enemy nation for alleged war crimes." Put simply, never before had a victorious nation actually applied the principle of command responsibility against a defeated officer of such high rank. Clearly then, and universally recognized, the Yamashita case was "unprecedented" in military or international law.³³

On this basis, therefore, criticism has been registered. Besides counsel for defense, some individuals suggested "that those who were responsible for this trial felt that the eyes of the world were upon them and that a precedent should be established." American prosecutors perceived, insisted these critics, that the Yamashita decision

³²Whitney, "Yamashita Memorandum," p. 76; Q. Wright, "Due Process," p. 404; Kenneth A. Howard, "Command Responsibility for War Crimes," Journal of Public Law, v. 21, 1972, pp. 16-17. Others who have agreed include Charles Fairman, "The Supreme Court On Military Jurisdiction: Martial Law In Hawaii and The Yamashita Case," Harvard Law Review, v. 59, no. 6, 1946, p. 869; Adam A. Tallow, Command Responsibility: Its Legal Aspect (Manila, 1965), p. 3.

³³Guy, "Yamashita Defense," p. 157. For a mere sampling of those who recognized the unprecedented nature of the Yamashita decision, see The New York Times, edit., March 5, 1946; New York Herald Tribune, edit., Dec. 8, 1945; F. E. Meek, "War Crimes Trials in the Pacific," Idaho State Bar, v. 21, 1947, p. 41; Bernard V. A. Roling, "The Law of War and the National Jurisdiction Since 1945," Recueil Des Cours. Academie De Droit International, v. 100, 1961, pp. 379-80.

would "determine the precedent for future war criminal prosecutions."³⁴

Others, too, and for a variety of reasons, deemed aspects of the trial challengeable. Attorneys for the defense, for example, repeatedly complained that the trial was being "rushed" by the prosecution or by superior forces behind it (General MacArthur, reports disclosed, had urged "haste" upon the military commission.); that they were deprived of ample time to prepare an able defense and, specifically, to counteract effectively the introduction of 59 additional offenses on the eve of trial.³⁵

Several notables concurred with the defense contentions. Most notable were Mr. Justices Rutledge and Murphy of the United States Supreme Court. "In view of all the facts," Justice Rutledge stated in his dissent, the burden placed upon the defense, "in the short time allowed for preparation," rendered their task "an impossible one." Such action, combined with other violations, declared the Justice, "deprived the proceeding of any semblance of trial as we know that institution." Justice Murphy's dissent included reference to the "needless and unseemly haste" of the proceedings. An American prosecutor at Nuremberg later observed, relievedly, that "nothing remotely resembling the speed" of the Yamashita trial occurred in Germany.³⁶

³⁴Kenworthy, Tiger of Malaya, p. 44; Potter, A Soldier Must Hang, p. 172. One author has suggested that the Supreme Court, too, by its decision to deny Yamashita's appeal, "was interested in setting a precedent." See, Gance, "Yamashita Case," p. 157.

³⁵Reel, Yamashita Case, pp. 84-86; Feldhaus, "Yamashita Trial," pp. 255-56, 259.

³⁶In re Yamashita, 327 U.S. 1 (1946). Charles S. Lyon, "Book Review: The Case of General Yamashita. By A.F. Reel," Columbia Law

To this censure, one might respond that the sheer enormity of the task confronting S.C.A.P. dictated a policy of speed: already by November 1945, 2,000 Japanese awaited trial before United States military commissions. Faced with rapid demobilization, and the government's desire to re-establish stability in the post-war Pacific, S.C.A.P., it could be argued, had to rush the trials if it expected to complete them within a reasonable time.³⁷

Criticism even more substantive in nature alleged that Yamashita had been deprived, procedurally, of a fair trial. Defense counsel consistently charged that the admission as evidence of depositions, statements (some unsigned), documents (frequently copies) and hearsay (occasionally three times removed) violated the due process clause of the Fifth Amendment and divested the trial of any semblance of fairness.

Many agreed. Courtroom observers, especially British and Australian newsmen covering the trial, expressed "shock" at the "loose interpretation of the evidence." Some even doubted whether an actual trial was taking place. So, too, did American reporters question the trial procedure. Newsweek magazine described ordinary American soldiers, spectators at the trial, as being "scandalized" by the "break with Anglo-Saxon Justice."³⁸ But louder, more influential voices asserted themselves. Justice Perfecto, of the Philippine Supreme Court, registered a fiery dissent against the procedure followed at the trial. He also

Review, v. 50, 1950, p. 398; also, see Q. Wright, "Due Process," p. 406, Fairman, "Supreme Court," pp. 870-71.

³⁷New York Herald Tribune, Nov. 8, 1945.

³⁸Ibid., Nov. 27, 1945; see report of London Daily Express, cited in Potter, A Soldier Must Hang, pp. 180-81; quoted in Reel, Yamashita Case, p. 94.

believed that such behavior constituted a "denial of the due process of law."³⁹ United States Justices Murphy and Rutledge, in piercing and eloquent dissents, reached similar conclusions. The protection of the individual's rights, opined the former, "including those secured by the due process clause of the Fifth Amendment," "belong to every person in the world, victor or vanquished. . . ." The subjection of a fallen foe to an "unfair trial," he added, was "unworthy of the tradition of our people. . . ."⁴⁰

Others maintained that Yamashita had been "prejudged" before the trial; that the members of the military commission entered the courtroom with "closed minds;" that Yamashita, as the first Eastern war criminal to be tried, and as an admired hero of the Japanese, "had to" be convicted in the minds of the Allied leaders; that he had been tried, not for war crimes, but for his crushing victory over Occidental forces in Singapore in 1942; that the trial actually proved Yamashita innocent, but he was condemned nonetheless. These critics pointed to the results of a poll taken at the conclusion of the trial by twelve international correspondents: they voted, then, 12-0 in favor of Yamashita's acquittal.⁴¹

³⁹Tallow, Command Responsibility, pp. 201-02; see Perfecto's later criticism, in China Press, June 14, 1948.

⁴⁰In re Yamashita, 327 U.S. 1 (1946).

⁴¹Guy, "Yamashita Defense," pp. 158-59, 163; New York Herald Tribune, Nov. 24, 1945; Reel, Yamashita Case, pp. 87, 91-92, 94, 211; Katona, "Japanese Trials," p. 38. One author felt the trial constituted "a horrible display of racial discrimination" against a member of the "Yellow Race." See F.J.P. Veale, Advance Toward Barbarism, 3rd ed. (London, 1960), pp. 307-08.

On the other side of the ledger, however, stood the proponents of the trial. Concerning trial procedure, these persons simply pointed to the fact that the military commission which tried Yamashita was just that: a military commission--whose constitutionality, they stressed, had recently been upheld by the Supreme Court in ex parte Quirin (1942). Accordingly, the supporters said, military procedure and discipline prevailed, legally, at military trials. Those who complained of improper evidentiary and other procedure "seemed to confuse the difference between domestic civil courts and military commissions."⁴²

One observation warrants special attention in light of the quintessentially important principle involved in this instance. Far more, it cannot be overestimated, was at stake in the Yamashita case than the fate of one man. Acceptance of the critics' views concerning improper procedure would open to question the validity of every Allied war crimes trial conducted in the East or in Europe; for all such trials were heard by similar military courts and according to similar military procedure.

Appropriately, Justice Robert H. Jackson, Chief Prosecutor at Nuremberg, provided the definitive voice. In the Eisentrager case, argued in 1950, Jackson noted that: "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." "If this Amendment invests enemy aliens in unlawful hos-

⁴²Erickson, "Navy War Crimes Trials," p. 343; Q. Wright, "Due Process," pp. 399, 406. Also, see Majority Opinion, In re Yamashita, 327 U.S. 1 (1946).

tile action against us with immunity from military trial," he proceeded logically, "it puts them in a more protected position than our own soldiers." Concluding, Jackson captured truly the gist of the matter: "It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."⁴³

Moreover, a substantial number of reputable legal authorities and newspapers supported the trial's findings, and deemed the proceedings "fair." Included in this grouping were The New York Times and New York Herald Tribune, as well as the Nippon Times, the Yomiuri Hochi, and the Mainichi. Typical of these newspapers, the Tribune later added that, through a "meticulous legal process," "all the avenues of American and international law had been explored in his (Yamashita's) behalf."⁴⁴ Also, a host of United States Army and Naval officers attested to the trial's "fairness and legality," as did some legal scholars.⁴⁵ Moreover, while from the day of the surrender he clearly expected to be convicted and executed, Yamashita nonetheless in December 1945 "thanked" the commission for granting him a "fair trial." So, too, did Mrs. Yamashita

⁴³Johnson v. Eisentrager, 339 U.S. 763 (1950), 70 Sup. Ct. 936 at pp. 946-47, 94 L.Ed. 1255. Interestingly, defending the accused and opposing Jackson's view in this case was A. Frank Reel, one of Yamashita's lawyers.

⁴⁴The New York Times, edita., Dec. 8, 1945, Mar. 5, 1946; New York Herald Tribune, edita., Dec. 8, 1945, Feb. 24, 1946; Nippon Times, edit. Feb. 10, 1946; Yomiuri Hochi and Mainichi, as quoted in Straits Times, Feb. 11, 1946.

⁴⁵See e.g., statements by U.S. Navy Capt. J. J. Robinson, Nov. 1, 1949, and the ruling of the 5-man Military Review Board, in Whitney, "Yamashita Memorandum," pp. 20, 76-81. Meek, "Pacific Trials," pp. 37-38; Arthur H. Kuhn, "International Law and National Legislation in the Trial of War Criminals: The Yamashita Case," Amer. Jrnl. of Int. Law, v. 44, 1950, pp. 561-62; Appleman, Military Tribunals, pp. 339-44.

express gratitude for the "admirably fair" method of American justice afforded her husband.⁴⁶

Two important points remain. Most disquieting of all the criticism leveled at the Yamashita decision was that which centered about the practical wisdom--not legality--of the ruling. The trial results, submitted an Army colonel and lawyer, Kenneth A. Howard, "rests uneasily upon the international conscience." For, he continued, it "assumes the fact that the actual war crime was committed by the subordinate but would not have been committed had appropriate restraining action been taken by the commander."⁴⁷ Such an assumption, discerned Justice Murphy, implied that "no one in a position of command in an army, from sergeant to general," could escape responsibility for the actions of his subordinates. Conceivably, "the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision." Judge Bernard V. A. Roling, the Dutch representative at the IMTFE, drew similar conclusions as regarded the possible fate of European leaders.⁴⁸

Finally, in postscript fashion, one observation remains. The next American war crimes trial in the East was that of General Masaharu Homma. In recommending that the death sentence awarded Homma be executed,

⁴⁶Yamashita expected to be found guilty in Kenworthy, Tiger of Malaya, p. 30. Nippon Times, Dec. 9, 1945; China Press, Dec. 8, 1945.

⁴⁷Howard, "Command Responsibility," pp. 16-17, 20.

⁴⁸In re Yamashita, 327 U.S. 1 (1946); Roling, "Law of War," pp. 380-82. See also "Two Japanese War Criminals," New Republic, v. 114, Feb. 25, 1946; China Press, edit., "Justice and Vengeance," Feb. 13, 1946.

a S.C.A.P. Review Board reasoned as follows:

During the commission of the gravest of these atrocities, accused was not a vanquished commander of a defeated army whose mind was filled with operational details, whose communications were shattered by rapid retreat or enemy activity, or whose troops were disorganized and spurred to excesses by disruption. He was rather riding the crest of victory. . . .⁴⁹

Might not this review, by implication, be construed as belated recognition that extraordinarily difficult and precarious conditions somewhat mitigated the culpability of commanders--Yanashita--whose troops committed atrocities?

* * *

"The second major war crimes trial in the Pacific" opened in Manila in late December 1945. Again, the legal principle of command responsibility was involved. Charges against the accused, Lieutenant General Masaharu Homma, included, inter alia, responsibility for the "bombing of Manila after it was declared an open city;" the infamous "Bataan Death March" of 1942; POW camp "abuses;" and "refusal to grant quarter to Major General (Jonathan M.) Wainwright's troops on Corregidor" in 1942.⁵⁰ Homma had been Commander-in-Chief in the Philippines from December 8, 1941 to August 15, 1942. After his recall by Tojo in 1942, Homma basically sat out the war in semiretirement.

Through the testimony of witnesses, circumstantial and other evidence and, ultimately, a partial admission by the accused, prosecutors established the fact that Homma had known of some of these violations at

⁴⁹SCAP. Trials of Class "B" and "C" War Criminals, History of the Non-Military Activities of the Occupation. Monograph 5. (Tokyo, 1952), pp. 94-95.

⁵⁰The New York Times, Dec. 15, 1945; Jan. 22, 1946.

the time of their occurrence. Homma's headquarters, for example, stood less than 500 yards from the "Death March" road. Under intense cross-examination, Homma conceded that he had "witnessed part" of the Bataan march and had even driven along the route on occasion. But, he insisted, he had seen there "nothing of concern," that is, he saw no bodies or dying men; only men who "looked tired and haggard." As for the bombing of Manila in December 1942, Homma testified that "poor communications" had prevented him from learning of MacArthur's proclaiming it an "open city."⁵¹

A battery of six attorneys defended Homma. One, Harvard-trained George A. Furness, challenged the jurisdiction of the military tribunal. Furness stressed the fact that General MacArthur had convened the court, appointed defense and prosecution counsel and would eventually have to confirm any death sentence. Since the alleged offenses had taken place "in a campaign in which Homma had defeated forces under MacArthur's command," Furness argued, an impartial trial was impossible.⁵²

Basically, the prosecution charged Homma "with responsibility for the actions of his troops. . .," and that "he knew or should have known" of the commission of widespread and brutal atrocities by them. Homma accepted "moral responsibility for anything that happened." Nevertheless, he maintained, Japanese commanders operated under severe handicaps, most notably the system of divided command and tenuous communications. He swore that he had not learned of the Death March and other

⁵¹Ibid., Jan. 10, 13, 16, 22, Feb. 6, 1946; New York Herald Tribune, Feb. 6, 1946; Straits Times, Jan. 6, 1946. SCAP. Trials of "B" and "C" Criminals, pp. 93-94.

⁵²Notes of Speech by G. A. Furness, Asiatic Society of Japan (Tokyo), Bulletin no. 6, June 1976.

atrocities until after their occurrence. In a moving plea, counsel for defense appealed to the five man military commission "not to judge this Accused by the standards of our own army," but--in all fairness--"by the standards established by the Japanese Army." Furthermore, defense counsel urged that special significance be accorded the character of the accused: his testimony "had the ring of truth;" his "sincerity and integrity" rendered the battery of defense lawyers "proud to have represented him."⁵³

The commission found Homma guilty on February 11, 1946, of failure "to control the operations of the members of his command, (and) permitting them to commit brutal atrocities and other high crimes" against American and Filipino people. It sentenced him to be shot.⁵⁴ A.S.C.A.P. Review Board confirmed the verdict and sentence (see above). Again, as in the Yamashita case, counsel for defense petitioned the United States Supreme Court for a rehearing on the grounds that their client's Fifth Amendment rights had been abridged; again, the Court upheld the decision with Justices Murphy and Rutledge registering equally stinging dissents; and again, MacArthur validated the proceedings and punishment, issuing a personal condemnation of the accused. On April 3, 1946, reported The New York Times, the "originator" of the Bataan Death March, "which killed 17,200 American and Filipino captives," was executed.⁵⁵

⁵³Concluding arguments by defense and prosecution, in Tallow, Command Responsibility, pp. 451-53. The New York Times, Feb. 5, 6, 7, 1946.

⁵⁴New York Herald Tribune, Feb. 12, 1946.

⁵⁵U.S. Supreme Court. "Judicial Decisions in re Homma," Amer. Jrnl. of Int. Law, v. 40, no. 2, 1946; MacArthur, Reminiscences, pp. 296-98; The New York Times, Apr. 3, 1946.

Two additional factors deserve mention. One, this trial attracted far less criticism than that of Yamashita. This may be attributed to the prosecution's success in establishing some direct connection between Homma and the actual commission--in this case knowledge--of war crimes. Many, particularly Filipinos, lauded the ruling. Second, apparently General MacArthur viewed this and Yamashita's as 'major' war crimes trials. "As our forces were being demobilized in the Philippines," he later wrote, "the remaining United States cases of this kind were tried by the International Tribunal in Tokyo."⁵⁶

Limitations of space, previously noted, preclude any specific coverage of United States trials in the Philippines. Several general conclusions, however, may be offered.

American military authorities in the archipelago concentrated on bringing to trial Japanese accused of serious crimes, usually those which carried a penalty of death upon conviction. For instance, in two separate Manila trials, American commissions convicted 18 Japanese of "murdering" by "beheading and bayoneting" United States fliers shot down over the Islands. Sentences awarded ranged from 5 years' imprisonment to death; most, though, were from 30 years' and up.⁵⁷ Another trial saw a Japanese civilian, a former interpreter, sentenced to hang for partici-

⁵⁶John H. Skeen, Jr., Homma's Chief defense counsel, labeled the hearing "a highly irregular trial, conducted in an atmosphere that left no doubt as to what the ultimate outcome would be." Quoted in John Toland, The Rising Sun (N.Y., 1970), p. 320, n. Also, see "Two Japanese War Criminals," New Republic, p. 269. Some, though, criticized the critics: see J. Keenan's response to Murphy's and Rutledge's dissents, in New York Herald Tribune, Feb. 14, 1946. For praise, see China Press, Apr. 14, 1946. MacArthur, Reminiscences, p. 298, emphasis mine.

⁵⁷Stars & Stripes (Tokyo), Feb. 3, 20, 1946.

pation in the "raping, torturing and killing of civilians" in Cebu city, in March 1945.⁵⁸

American prosecutors relied, significantly, upon the precedent established in the Yamashita and Homma cases. Most notable in this regard was the trial of Lieutenant Colonel Seichi Ohta, former commander of military police in the Philippines. Despite a strong effort by court-appointed defense counsel, the United States commission adjudged Ohta guilty "for a systematic series of crimes committed over a period which became definite." The court rejected defense pleas that Ohta had not actually committed the offenses, as well as the plea of "superior orders." Specifically, the commission ruled that he had "unlawfully disregarded and failed to discharge his duties as a commander to control the operations" of troops under him. Involved in this case, the press correctly observed, were "the same legal points" as in the Yamashita case.⁵⁹

The United States War Crimes Branch, Manila, closed on January 1, 1947. Americans assisted in the preparation of remaining trials until, at least, June 1947. Responsibility for the disposition of remaining trials, involving non-American victims, thereafter devolved upon Filipino authorities. Final statistics for U.S. trials held in the Philippines are as follows: Cases held, 97; Defendants tried, 215; Convictions, 195 (90.7%); Acquittals, 20 (9.3%); Death sentences, 92

⁵⁸Straits Times, Jan. 11, 1946.

⁵⁹For trial coverage, see *ibid.*, Jan. 6, 1946, and *China Press*, Dec. 18, 1945, Jan. 4, 6, 1946; also, Law Reports, v. 4, p. 86.

(47.4% of total accused convicted).⁶⁰

⁶⁰See China Press, June 10, 1947. For statistics, see Appleman, Military Tribunals, p. 267; cf. these figures with those given by Capt. Mariano A. Yenke, of the Philippines National War Crimes Office: 87 cases; 203 accused; 186 convictions; 17 acquittals; 79 death sentences, in Malay Mail, Dec. 16, 1949. The former must be regarded as more accurate.

CHAPTER IV

OTHER UNITED STATES TRIALS, CHINA, THE PACIFIC ISLANDS AND YOKOHAMA

A. "The Doolittle Fliers Trial: Shanghai"

Unlike in the Philippines, which until July 1946 remained a territory of the United States, Americans did not maintain an independent War Crimes Branch in China. All investigative and prosecution activities of personnel attached to the United States Branch in Shanghai required the prior "acquiescence of the Chinese (Central) Government," so stated a Joint Chiefs of Staff directive in July 1946. In fact, Americans received the "go ahead" from Chungking authorities to arrest Japanese suspects in China in late October 1945.¹

United States war crimes teams "rushed through the preparations" for trials. By January 21, 1946, a separate set of war crimes regulations had been drawn up for the China Theatre (see Chapter 2). Already at that time cases against "more than 100" Japanese suspects awaited prosecution in Shanghai. Nearly all of the early trials conducted by United States authorities in China dealt with Americans shot down over the mainland during the war. Once captured, these fliers had invariably been "tried" by makeshift Japanese field courts-martial

¹U.S. Dept. of State. Foreign Relations of the United States 1946. VIII (Wash. D.C., 1971). July 22, p. 410. China Press, October 29, 1945.

under the "Enemy Airmen's Act" of 1942. This "law" held "that anyone who took part in raids against non-military targets or violated international law would be sentenced to death."² Its enactment had come in response to the famous Tokyo air raid of April 1942 conducted by Lt. Col. James H. Doolittle.

The "Hankow Airmen" trial opened in Shanghai in January 1946. Charged with the humiliation, beating, torturing and, ultimately, "cremation" of three American fliers were 18 members of the Japanese gendarmerie. A defense plea for "additional time" to prepare its case was granted by the President of the five-man military commission, who adjourned the trial until February 7. The prosecution did not oppose. Such behavior did not go unnoticed. "In direct contrast from Japanese mock courts-martials (sic) and trials committed during the war," perceived the China Press, the present court "observed all the rules of democratic justice."³

In final argument, defense attorney Major Maurice Levin asked the commission to acquit his clients on the grounds of superior orders-- "illegal though those orders were." He stressed the fact that, in the Japanese military code, orders were "sacred," and regarded as emanating from the emperor himself. Besides this "moral compulsion," pressed Levin, over the head of every Japanese soldier hung the threat of "physical compulsion:" that is, failure to carry out orders might

²Ibid., Dec. 15, 1945, Jan. 4, 1946. Law Reports of the Trials of war Criminals. 15 vols. (London, 1947-49). Selected and Prepared by the UNWCC. v. 5, Case no. 25, pp. 2-3.

³For trial preparation and coverage, see China Press, Oct. 30, Nov. 26, Dec. 15, 1945, Jan. 25, 1946.

mean "death or punishment." Another defense counsel, Lt. Col. E. M. Hudgins, insisted that "those really responsible"--five unlocated high-ranking officers--"were missing."

In his rejoinder, the prosecutor held all accused "to be implicated and guilty and cognizant" of their violations of the "accepted rules of land warfare governing POWs." "Not one," he added, had "lifted a finger" to help any of the American airmen. Responsibility for the deaths, he charged, belonged to all involved, "directly or indirectly." After two weeks of "intense hearings" the trial closed on February 27th.⁴

On March 1 the Commission presented its findings. All accused, save one (a sergeant), it stated, were guilty as charged. Awarded were five death sentences, and twelve sentences of imprisonment ranging from 18 months to life. Without a reasoned judgment there is no way of ascertaining exactly why the court ruled as it did. However, all United States war crimes trials, as noted, were subject to review by higher military authorities to determine whether they conformed to the appropriate rules and regulations and to assure that the evidence supported the conclusions of the court. The Theatre Commander had final say over all verdicts and sentences.

Lt.Gen. A. C. Wedemeyer, Theatre Commander for China, administered the final review in the "Hankow Airmen" trial. "That the commission carefully weighed the sentences adjudged" was "abundantly clear" to him. He had "searched in vain" for reasons to grant clemency; but guilt "had been shown beyond a reasonable doubt." The trial had been

⁴Ibid., Feb. 27, 1946.

conducted, and the opportunity afforded defendants to secure a just trial, "conscientiously and fairly." Indeed, the defendants had expressed their gratitude to the court for granting them a "fair trial." Wedemeyer approved the sentences.⁵

"What may yet prove to be the most sensational war crimes trial in Shanghai," predicted the China Press, commenced February 27, 1946, at the Ward Road Jail Courtroom. There, allegations against four Japanese officers centered about the execution of eight United States airmen of the famed Doolittle raid, shot down over China in 1942. So significantly did American officials view this trial, that Joseph Keenan, Chief Prosecutor at the IMTFE, and five assistants sat as "observers" during its opening sessions. This "test case," such officials thought, might later prove useful "as a precedent" at the Tokyo Trial. The notion of "attaching liability to the highest levels of the Japanese government and army" for "this barbarous treatment" of American POWs concerned them most.⁶

Charges against Major General Shigeru Sawada, former commanding general of the Japanese Imperial 13th Army in China, read, inter alia, as follows: in August 1942 he did "at or near Shanghai . . . knowingly, unlawfully and wilfully and by his official acts cause" eight members of American forces "to be denied the status of POWs and to be tried and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war." Two other accused had sat as members of the military tribunal. They were charged with "knowingly, unlawfully

⁵Ibid., Mar. 1, 9, 1946. For Wedemeyer's review, see Apr. 5, 1946.

⁶Ibid., Mar. 18, 19 1946.

and wilfully" trying to "prosecute and adjudge" the eight men "to be put to death in violation of the laws and customs of war." The fourth accused had commanded and carried out the execution of three of the airmen. Charges against him included unlawfully causing their deaths "in violation of the laws and customs of war." All accused pleaded not guilty.⁷

On the witness stand, Sawada testified that he had carried out all executions "in accordance with direct orders from Prime Minister Tojo" in Tokyo. The American fliers, he insisted, had received a fair trial; all evidence adduced against them had been "fair and accurate," and proved, for example, the Americans had indeed "bombed" school children at Nagoya. Refusal to grant the Americans defense counsel at the trial, Sawada explained, "accorded with (Japanese) military regulations."⁸

Court-appointed American counsel for defense demonstrated in this case an energy, a competence and a sense of dedication every bit as equal to those of lawyers for Yamashita and Homma. Despite prosecution objections (overruled), the defense introduced, and the court admitted, as evidence affidavits by General Shonruko Hata (Commanding Officer, Chinese Expeditionary Force; IMTFE Defendant) and Prime Minister Tojo. According to these documents, Sawada had "acted in accordance with military regulations and law:" "full responsibility for the trial and its outcome lay with the War Ministry." Tojo stated emphatically that Sawada had "no choice" but to obey. Defense counsel went even further.

⁷Law Reports, v. 5, p. 1.

⁸China Press, Mar. 26, 1946.

They introduced affidavits by American and Japanese personnel of primary schools in Nagoya which sought to establish that the Doolittle fliers had, "contrary to international law," bombed innocent civilians.⁹

The findings of the United States military commission, delivered April 16, 1946, surprised many people. All accused were guilty, it held, but extenuating circumstances existed in each instance. Sentences thus ranged from five (Sawada) to nine years' imprisonment at "hard labor." To be sure, as the press observed, the "comparatively light sentences . . . indicated a reversal" by the commission of the prosecution argument that the accused "had exercised direct responsibility." In a rare departure, the United States commission pronounced, albeit in brief, a reasoned judgment:

The offenses of each of the accused (it stated) resulted largely from obedience to laws and instructions of their Government and their Military Superiors. They exercised no initiative to any marked degree. (Others, not they, were responsible for) the enactment of the Ex Post Facto 'Enemy Airmen Law'. These circumstances . . . do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating consideration. . . .¹⁰

Several points regarding this trial are noteworthy. First, concerning the defense plea of superior orders: no plea was raised more frequently in Eastern war crimes trials, as the UNWCC remarked. Few better examples may be found of the substantial weight given this plea by a military commission than the decision in the "Doolittle Fliers Trial." Second, the Yamashita precedent exerted discreet influence in the decision. While Sawada's "wrongful acts or omissions" may have been

⁹Ibid., Apr. 2, 1946.

¹⁰Ibid., Apr. 16, 1946; Law Reports, v. 5, pp. 7-8.

due to "negligence rather than design," the commission still judged him guilty. For, noted the UNWCC, the Yamashita trial had established "that a Commanding General has the affirmative duty to take such measures as are within his powers to protect POWs from violations of the laws of war." Third, after the trial, a Japanese civilian lawyer, who had assisted the American defense team, thanked the court for the "fair and sympathetic treatment" accorded the defendants.¹¹

Trials involving similar issues--in this case, "denial of a fair trial during a war"--sometimes resulted differently. Considering that the composition of military commissions, the accused concerned and the specific facts and circumstances varied from case to case, this was to be expected. Analogous patterns, indeed, often appeared in civil criminal trials. In this respect, two trials deserve attention.

A United States military commission at Shanghai tried Lt. Gen. Harukei Isayama and seven other officers from July 1 - 25, 1946. Each accused, read the indictment, did

at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offenses against certain (14) American POWs, by permitting and participating in an illegal and false trial and unlawful killings of said POWs, in violation of the laws and customs of war.¹²

All of the accused, who pleaded not guilty, partook in the 'trial,' either as chief judge, judges or prosecutors.

Evidence adduced at the hearing revealed that the American POWs had been denied the opportunity to obtain evidence or witnesses on their behalf; that no documents, besides the charges, had been interpreted to

¹¹Ibid., pp. 11, 13; China Press, Apr. 16, 1946.

¹²Law Reports, v. 5, Case no. 32, p. 60.

them; that they had not been provided defense counsel. Trials of all 14 Americans had been completed in one day. Counsel for defense argued, fruitlessly, that such trials constituted "normal" procedure according to the Japanese military code. The commission found all accused guilty, sentencing two to death, two (including Isayama) to life imprisonment, and the rest to 40, 30, and 20 years', respectively. Reviewing authorities later commuted one of the death sentences to life.¹³

Although the charges in the preceding case resembled closely those in the "Doolittle Fliers Trial," sentences awarded Lt. Gen. Isayama et. al. were palpably more severe. This discrepancy may be attributed, indirectly, to the political importance imparted the Doolittle raid by the Japanese themselves. Tokyo obviously considered the trial of the captured Doolittle "miscreants" so important that it issued to subordinates in China--Sawada and company--direct orders pertaining to its performance and disposition. Evidence of direct governmental influence upon Sawada et. al. came to the attention of the military commission, whereas no similar mitigating evidence appeared in the case against Isayama et. al.

Similar circumstances surrounded the trial of General Tanaka Hisakasu and five other officers. Charges against the accused were nearly identical to those preferred in the Isayama case, except here the crimes occurred in Hong Kong. A United States military commission convicted five of the defendants. Again, it pronounced harsh sentences: two (including Tanaka) received death, two received life imprisonment and one 50 years' confinement. (The Confirming Authority, however, later

¹³Ibid., pp. 61-65; China Press, July 26, 1946.

commuted the death sentences to life, approved one life sentence, and reduced the two remaining sentences to 10 years' respectively.)¹⁴

Several additional aspects of United States conducted trials in China deserve mention. Many trials, for example, concerned mistreatment of Americans in POW camps. One hearing witnessed a Japanese major sentenced to 30 years' imprisonment at hard labor for torturing an American naval officer in a prison camp. The trial lasted one day. In another case, a Japanese senior civilian interpreter, employed by the Japanese Army at two POW camps, was charged with "maltreating" American POWs. And a former superintendant of a POW camp in Mukden received 25 years' confinement at hard labor after being convicted of "brutal and inhuman" atrocities against American captives. His actions, said the court, caused over 200 deaths and incalculable suffering.¹⁵

As in other theatres, cases in China frequently hinged almost solely on documentary evidence, that is, affidavits and depositions. This leads to a final observation: court-appointed defense counsel on numerous occasions contended forcefully and creatively on behalf of their clients. Besides those defense strategies described above, others included the assailing of court procedure, which admitted documents as evidence, and thereby precluded cross-examination--a practice one attorney called in court "grossly unfair;" the insistence that there existed "insufficient proof" to convict; and outright challenge of the "right" of United States commissions to try cases on Chinese soil.¹⁶

¹⁴Law Reports, v. 5, Case no. 33, pp. 66-71.

¹⁵China Press, May 11, Mar. 5, 12, 25, 1946.

¹⁶Ibid., Mar. 5, 12, Sept. 17, 1946.

Final statistics for trials held in China are as follows: Cases tried, 11; Defendants involved, 75; Convictions, 67 (89.3%); Acquittals, 8 (10.7%); Death Sentences, 10 (14.9% of total accused convicted).¹⁷

B. "U.S. Naval Trials: the Pacific Islands"

Naval authorities supervised all United States war crimes trials in the Pacific. The Secretary of the Navy had made known the Navy Department's intention to participate in such trials as early as January 1945. In April of that year, following a proposal by the Judge Advocate General of the Navy, Guam became the administrative headquarters of the program.

Under the program, the National War Crimes Office and its Navy Division assisted local commanders, who were urged to "prosecute their own programs." Thus encouraged, area commanders executed massive investigations of war crimes throughout the Marianas Islands, Marshall and Gilbert Islands, Palau Islands, Bonin Islands and Caroline Islands. As in other theatres, a war crimes staff in Guam sifted, collated and analyzed mountains of documents and other evidentiary material gathered by investigation teams. Slowly but surely, legal personnel molded this amorphous matter into tenable, coherent cases. Moreover, a co-operative effort soon developed, "involving Army, Navy, British, Australian, Indonesian, and native authorities, in the exchange of information, extradition of prisoners, and even the trial of prisoners accused of war crimes against the nationals of other governments."¹⁸

¹⁷John A. Appleman, Military Tribunals and International Crimes (Indianapolis, 1954), p. 267.

¹⁸George Erickson, Jr., "United States Navy War Crimes Trials (1945-1949)," Washburn Law Journal, v. 5, 1965, pp. 106-07.

As Convening Authority, the commander of the Marshalls-Gilberts region established a military commission at the United States Naval Air Base at Kwajalein Island for the trial of war criminals. On December 7, 1945, the commission heard its first case. Rear-Admiral Nisuke Masuda and four lesser officers of the Japanese Imperial Navy were charged with "murder." Specifically, the prosecution alleged that

on or about 10th March 1944, on the Island of Aineman, Jaluit Atoll, Marshall Islands . . . (they did) wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill . . . three (captured and unarmed) American fliers . . . in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilized society.¹⁹

Actually, Masuda did not attend the trial, having committed suicide before its commencement. Prior to his death, however, he had written a statement in which he confessed having ordered the execution of the aviators.

In the main, the defendants did not dispute the reporting of facts; they admitted their participation in the execution. Nonetheless they pleaded not guilty. To begin, the defense challenged the jurisdiction of the commission, but was overruled by the latter. Upon the plea of superior orders, then, defense counsel predicated their entire argument.

To one defense attorney, himself a former Lieutenant-Commander in the Japanese Imperial Navy, fell the task of explaining how each Japanese soldier had been taught to adhere to "absolute discipline and obedience." To this effect, he quoted from an Imperial Rescript:

¹⁹Law Reports, v. 1, Case no. 6, pp. 71-72.

"Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." Furthermore, he stressed, failure to obey an order could have resulted in punishment, even death, for a Japanese soldier. Pointedly, a co-counsel noted that each of the accused had asked to be relieved of the execution duty; but how could they--a Lieutenant, two Ensigns and a Warrant Officer--refuse, "when emphatically ordered by Masuda, a man of strong character," and a Rear-Admiral?

One of the two prosecutors began his rebuttal by citing "the universally recognized and accepted rule" contained in Article 23c of the 1907 Hague Convention: "It is particularly forbidden," it stated, "to kill or wound an enemy who, having laid down his arms, . . . has surrendered at discretion." Buttreassing this contention, his colleague quoted from the Geneva Convention of 1929 (Article 2, Part I). All prisoners of war, it provided, "shall at all times be humanely treated and protected, particularly against acts of violence. . . ." As regarded, specifically, the plea of superior orders, the prosecution referred to a dictum in a case contained in Court Martial Orders 212-1919: "Soldier is bound to obey only the lawful orders of his superiors;" orders to execute "unlawful acts, he is bound neither by his duty nor by his oath" to obey.

On December 13, the commission found all accused guilty. Three received the death penalty. One, named Tasaki, a custodian of the POWs who had handed the American fliers over to the executioners, received 10 years' imprisonment. Partially acknowledging that Tasaki had merely acted

in accordance with Masuda's commands, the court showed mercy because of the "brief, passive and mechanical participation of the accused."²⁰

Evidence brought forth at the trial of Lt. Gen. Joshio Tachibana and eleven others clearly supported prosecution charges of "murder." Additional offenses, however, were alleged which combined to render this one of the more noteworthy Pacific trials. Specifications preferred against Tachibana (et. al.) included that, in February 1945, on Chichi Jima, Bonin Islands, he had wilfully, premeditatedly and unlawfully beheaded an American POW; furthermore, after the killing, read the charges, he did "eat the flesh and viscera of the body" of said POW. Charges preferred against other accused comprised, variously, murder, unlawful mistreatment, neglect of duty in violation of the laws of war, and prevention of honorable burial.²¹

The Tachibana case highlighted the significance of accurately worded charges. Notwithstanding admission by the accused that they had engaged in acts of cannibalism--it "makes me strong," said one--the prosecution did not rely substantially or specifically on that charge; instead, it alleged cannibalism merely as an aggravating factor, basing its case on other more universally recognized and long-held offenses. No precedents existed in modern international law to deal with such a primitive violation. Rather than risk an adverse verdict by some future student of the trial records, United States Naval authorities in Guam chose to forego charging cannibalism as a "war crime."²²

²⁰Ibid., pp. 72-80, passim. also, China Press, Dec. 11, 1945.

²¹Erickson, "Navy War Crimes Trials," pp. 106-07.

²²Ibid., pp. 107-08; Stars & Stripes (Tokyo), Sept. 27, 1947.

Interestingly, Australian authorities in Wewak, New Guinea handled a similar situation differently: a supplemental list of "war crimes" drawn up by their own War Crimes Commission had included reference to the violation of "cannibalism," thereby enabling prosecution on that ground (see Chapter 6).

Notable, too, in the Tachibana trial was the decisive influence exerted by the Yamashita precedent. As mentioned, lodged against various of the accused was a diversity of charges. However, the naval commission adjudged all guilty on, inter alia, one count, that is, "Neglect of Duty in Violation of the laws and Customs of War." All the defendants, it ruled, had "neglected and failed to discharge" their duties as superior officers "to control members of their commands" Thus, this decision reinforced the thesis that a higher officer's failure to restrain troops under his control rendered him accountable for war crimes "when his omission" led to the "commission" of such crimes.²³

"The "most spectacular" trial "ever conducted by the Navy in the Pacific," so termed by Rear-Admiral Arthur G. Robinson, ended in Guam in September 1947. Evidence and testimony introduced at the two month trial, presided over by Admiral Robinson, related a tale of diabolical sadism. Captain Hiroshi Iwanami, former fleet surgeon and commanding officer of a naval hospital on Truk Atoll, and 18 co-defendants, were charged with torturing to death ten American POWs at Truk in 1944. Iwanami, witnesses testified, had "devised and ordered" the executions, carried out "by inhuman experimental use of bacteria, dynamite,

²³Law Reports, v. 4, pp. 86-87.

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strangulation, bayonets and bamboo spears." Featured at the trial were several remarkable twists--the committing of hara kiri by three Japanese witnesses who chose death over testifying against their former commanders, for one. In the end, the five-man commission convicted Iwanami of "murder" and "violating the laws of war," and condemned him to be shot. Sentence was duly executed. The remaining 18 accused received sentences ranging from 10 years' imprisonment to life (only one).²⁵

Particular interest is deserving those Pacific trials which presented unusual happenings or characteristics. For example, the largest group to face a war crimes court in Guam comprised 20 Japanese servicemen. The accused, of whom 18 were later convicted, were charged with the "atrocious slaying" of ten civilians on Babelthaup Island in the Palau Island group during the war.²⁶ In another notable instance, a naval court condemned eleven Japanese to hang, including Rear-Admiral Shigematsu Saikaibara, and sentenced five others to prison terms extending from ten years' to life. They had been found guilty of the mass execution of 98 Pan American Airways civilian employees on Wake Island in 1943. Prior to delivery of verdict, Saikaibara reproached the court, suggesting that those "who planned" and employed atomic bombs "should be regarded in the same light as we." Finally, in August 1948 Japanese

²⁴China Press, Sept. 4, 1947; Stars & Stripes (Tokyo), Sept. 5, 1947. Descriptions in this case of Japanese use of bacteria or of germ-related war crimes resembles closely those brought forth by Soviet prosecutors at trials at Khabarovsk. See Chapter 7.

²⁵China Press, Sept. 4, 6, 1947, Jan. 20, 1949.

²⁶Ibid., Feb. 18, 1948; The New York Times, Mar. 26, 1948.

and American authorities in Tokyo concluded successfully a two and a half year search for a Japanese medical corpsman suspected of war crimes. Allegedly, Tadashi Teraki had dissected the bodies of three American POWs and removed their livers for experimental use. The accused, later tried by a joint Navy-Marine-Army military court on Guam, had eluded investigators by authoring a spurious suicide note in 1946.²⁷

Trial operations in the Pacific Islands terminated May 21, 1949. While "virtually nothing has been published" concerning the Pacific trials, one authority who has studied them concluded that the "procedures adopted on Guam followed the same high standard of justice as prevailed at Nuremberg."²⁸ Final statistics for trials held in the Pacific Islands are as follows: Cases tried, 25; Defendants involved, 116; Convictions, 108 (93%); Acquittals, 8 (7%); Death sentences, 28 (25.9% of total accused convicted).²⁹

C. "U.S. Eighth Army Trials: Yokohama"

S.C.A.P. orders "to establish facilities for the confinement, interrogation, and safekeeping of war crimes suspects (and) unfriendly witnesses" were received December 6, 1945, by Commanding General, Eighth U.S. Army, Yokohama, Lt. Gen. Robert L. Eichelberger. Also, the measure directed Eichelberger "to appoint military commissions for the conduct of trials" soon to begin. Duties were to be divided among Legal Section, Yokohama, and members of the Eighth Army. The former, that is, "would

²⁷Stars & Stripes (Shanghai), Dec. 28, 1945; London Times, Dec. 27, 1945. China Press, Aug. 8, 1948.

²⁸Erickson, "Navy War Crimes Trials," pp. 89, 99.

²⁹Appleman, Military Tribunals, p. 267.

provide personnel for investigation and prosecution of cases;" while the latter "would appoint" members of military commissions, defense counsel, court reporters, interpreters, translators and court orderlies.³⁰

United States-conducted trials in Yokohama, it should be indicated from the outset, are of special significance for at least two reasons. First, they comprised the bulk of American war crimes trials in the East: of 452 trials, 319 took place in Yokohama. Second, and of greater weight, Yokohama trials were technically international in their nature, as opposed to, say, national trials conducted by the British in Singapore or by the Dutch in Java. As the official S.C.A.P. historian put it, Yokohama military commissions were "appointed by authority delegated through normal army channels from and by the Supreme Commander for the Allied Powers who represents all the occupying nations" While American Army authorities of the occupation appointed commissions, he continued, "they are nonetheless International Tribunals since the prime authority for their creation stems from S.C.A.P." Others, too, have commented on the "International character" of the Yokohama trials.³¹

In the words, again, of the official S.C.A.P. historian, Yokohama trials "covered every type of war crime," from "misuse of Red Cross gift parcels to the most brutal atrocities." "No less spectacular were the personages involved: . . ." professional soldiers, from privates to

³⁰SCAP. Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. Monograph 5. (Tokyo, 1952), p. 44.

³¹Ibid., pp. 73-74; Albert Lyman, "Yokohama War Crimes Trials: A Review," Journal of Wash. D.C. Bar Association, v. 17, 1950, p. 267.

commanding generals, sailors to admirals, interpreters, farmers, teachers, doctors, nurses, government officials, priests (Shinto), college professors and women.³² By late 1945 S.C.A.P. personnel had drawn up a list of some 2,000 Japanese suspects. To manage this enormous burden, Eighth Army authorities classified Yokohama trials into separate categories, depending on the crime involved. Seven groupings were devised: "POW Command Responsibility Trials;" "POW Camp Trials;" "Trials For Ceremonial Murders;" "Airmen Atrocity Cases;" "Denial Of A Fair Trial;" "Trial For Acts of Revenge;" and "Trials For Medical Experiments on POWs."

As suggested by these categories headings, many Yokohama trials involved offenses or legal principles previously dealt with in the present study. Those trials in the "POW Command Responsibility" grouping, for instance, followed closely the outline, procedure and outcome of the Yamashita and Homma trials. In such cases, S.C.A.P. prosecutors usually charged former area commanders of Tokyo POW camps with "violating the laws and customs of war" by "unlawfully disregarding and failing to discharge their duties." Often, prosecutors lodged hundreds of specifications against an accused, alleging specific offenses, such as failure to provide POWs with sufficient food and sanitary conditions, or participation or acquiescence in the torture and beating of POWs. Mainly, however, POW camp commanders were held responsible for the misdeeds of personnel under their control.

Defense counsel at these trials invariably sought to prove that "camp commanders could not help reflect the higher command's"—i.e., Tokyo's—attitude toward treatment of POWs; or that prison guards, not their clients, perpetrated and were responsible for atrocities. On

³²SCAP. Trials of "B" and "C" Criminals, p. 2.

the other hand, prosecutors generally attempted to demonstrate that accused either knew of, or partook in the commission of war crimes. Often, as in the Homma case, prosecutors stressed the proximity and visibility of an accused's headquarters vis-à-vis the actual site of prison camp atrocities. More often than not trials of this nature resulted in conviction of, and awarding of heavy sentences to, the accused.³³

A typical "POW Camp Trial" concerned a Japanese major and former commander of Kokura prison camp No. 3 in the Tokyo area. Charges preferred against Yaichi Rikitake included, inter alia, abuse, torture, starvation and improper medical care of POWs, resulting in the deaths of approximately 150 of them. At the hearing, Rikitake testified that he "had not abused" any POWs; he had merely "slapped some," a procedure, he quickly pointed out, quite common in the Japanese Army. Of course, he said, he had clearly ordered all camp personnel to "protect" POWs. Living conditions for the prisoners, he insisted, "were as good or better" than those for the Japanese guards and officers.

A seven-man military commission adjudged Rikitake guilty and sentenced him to 15 years' imprisonment at hard labor. However, some members, revealed the president of the court, "favored suspension of sentence," believing the prosecution had failed to prove sufficiently Rikitake responsible for "personally committing atrocities." Moved by the recommendation, Rikitake waxed emotional in praise of a system which would seemingly exonerate him for the excesses of his underlings. "I would like to spend the rest of my life educating the Jap-

³³ibid., see, e.g., pp. 95-109.

anese people in the American ways of democracy and justice," he said immediately after the trial. Perhaps he later altered his views. In this case, as in so many others, the reviewing authority wielded decisive power. After a meticulous examination of the proceedings, the reviewer concluded that evidence at the trial, indeed, substantiated the accused's guilt: Mikitake "had personally struck POWs, witnessed beatings" and refused to arrest or alleviate mistreatment. Presently, a Staff Judge Advocate concurred with this opinion, submitting further that, in all justice, the sentence should have been "harsher." Sentence, needless to say, was approved.³⁴ All early trials, the first eight at least, conducted at Yokohama pertained to POW camp atrocities and to direct or indirect responsibility for such misdeeds by camp commanders.³⁵

At the outset, some Eighth Army officials apparently misconceived the sheer immensity of their assignment. One, Colonel Robert V. Laughlin, a Judge Advocate, formed unwarranted conclusions when, in December 1945, he "expected all the (Yokohama) trials to be over within six months." The stark realities of the situation soon disabused individuals of notions as these. To Colonel Carpenter and others it soon became obvious that the only realistic hope of disposing of all the trials within a reasonable length of time rested in conducting "common" or "mass" trials. Such proceedings combined into one the trials of several or many accused charged either "collectively" or individually

³⁴Ibid., pp. 113-15; for other examples, see pp. 110-12, 116-25; Stars & Stripes (Tokyo), Mar. 23, 1946.

³⁵See, e.g., ibid., Dec. 18, 19, 28, 1945, Jan. 8, 26, Feb. 3, 7, Mar. 14, 23, 25, 1946.

with identical or similar offenses. Evidence, like the accusations, introduced at these trials usually "overlapped considerably;" prosecution and defense efforts, respectively, were joint. Some criticism had been leveled against "mass trials," which presented defense counsel with formidable difficulties. Further examination of this matter will be found in a general survey at the close of the present chapter. For now leave it be said that S.C.A.P. and Eighth Army officials--not to mention all the Allied nations which also adopted their use--held mass hearings because they expedited war crimes trial operations and spared military commissions the burden of evaluating endless streams of repetitious and superfluous evidence and testimony.³⁶

Common trials, in any event, began in late February 1946 and quickly became a normal mode of procedure. Military commissions, in such cases, judged accused according to their specific involvement in the crimes alleged. Not unusual was it, for example, to find cases where a subordinate, say a corporal, received a heavier sentence for his part in brutalities committed against POWs than several of his immediate superiors at the same prison camp. A typical case saw nine Japanese charged, in varying degrees, with responsibility for the deaths of 1,300 Allied POWs. All "alleged crimes had occurred on the hell-ship," Oryoko Maru, en route from the Philippines to Japan in 1944. Death penalties were meted out to Lt. Junsaburo Ioshino, commander of the guards aboard the prison ship, and his second in command and interpreter,

³⁶Ibid., Dec. 18, 1945, Feb. 14, 1946; The New York Times, Oct. 19, 1946. Another measure aimed at "speeding up" trials, which never materialized, proposed to offer Japanese accused "lesser sentences should they plead guilty." This would somewhat relieve the burden of "over-worked" military commissions. See ibid.

Shusuke Wada. Four others received prison terms ranging from 10-25 years; and two, both army privates in the ship guard, were acquitted. Notably, during the trial the Eighth Army commission dropped the charges against, and acquitted, the Captain of the ship, Shin Kajiyama. It based its actions on the grounds "that it was not in his power to have prevented the atrocities. . . ."37

Cases centering about the issue "denial of a fair trial" reproduced, basically, scenarios akin to those heard in the China "Airmen" trials. In one instance, Major Notuo Ito and three other officers were charged with "violations of the laws and customs of war." Specifications preferred against them alleged that, in July 1945, "during the course of illegal, unfair, false and null proceedings" before a military tribunal accused "did wilfully and unlawfully sentence to death" eleven American POWs. The Americans, fliers returning from a bombing raid on Nagoya, had crashed over Japan in May 1945.

Ito, evidence revealed, had "pre-instructed" the interpreter at the POWs' "trial" to falsify the translation. When the Americans testified, for example, that they had bombed "military installations," he was to add "and adjacent areas." The makeshift Japanese trial lasted about an hour and a half. Only partial translation (and the veracity of that, obviously, is questionable) was afforded the defendants. They had no defense counsel. No witnesses appeared on their behalf. That they were on trial for their lives the Americans did not learn until after the verdict had been given. Ito testified to the

³⁷See, e.g., Stars & Stripes (Tokyo), Mar. 14, 1946; Mar. 10, 1947.

"accuracy" of the facts, but remonstrated that execution of the eleven airmen by beheading was legal, as it had been carried out "by order of the Army Commander."

Ito, as organizer of the trial and execution, was sentenced to death. The remaining three accused, as judges at the 'trial', received 20, 20 and 15 years' imprisonment, respectively. Relevant factors stressed by an C.C.A.P. Review Board comprised: Ito's "failure to permit review of trial sentences, as dictated by Japanese (military) law;" the brevity of the trial; and "failure to protect the rights of accused." "As far as the record discloses," stated the Board, "the three judges read no documents and heard no evidence, but sentenced eleven men to die upon the statements and arguments made by Ito." It upheld the sentences. The trial, however, did not end there. A Staff Judge Advocate, in an "addenda review," concluded that Ito had carried out "the indicated desires of his superiors." This "slight element of compulsion," he therefore decided, justified "a sentence less than death." Commutation of Ito's punishment to life imprisonment ensued shortly.³⁸

Yokohama trials frequently featured larger, and at times unwieldy, numbers of accused tried simultaneously. A military commission in one case, convicted and sentenced 20 of 22 Japanese to confinement ranging from 1 - 30 years at hard labor for crimes perpetrated against Allied POWs at Narumi prison camp. Interestingly, a civilian received the hardest penalty for "beating, burning, mistreating and abusing" the POWs. In another, charges of "violations of the laws and

³⁸SCAP. Trials of "B" and "C" Criminals, pp. 164-77.

customs of war" as set forth in 184 specifications were brought against 27 members, including the Chief for all Japan, of the Kempeitai (military police). Through beheading, shooting, or poisoning, assailed the prosecutor, the accused had killed 55 American fliers at Kempeitai Headquarters in Osaka. After a long trial (over five months), the sentences awarded reflected the military commission's attribution of widely varying degrees of guilt to each accused: of the 15 convicted, 5 got life imprisonment; 1, 40 years'; 7, from 2 - 7 years'; and 2, 1 year. The two accused sentenced to 1 year's confinement each were later acquitted by a review Board.³⁹

The largest United States mass trial also witnessed, observed the Sydney Morning Herald, "the highest number sentenced to death at any one time since the war crimes trials began in the Far East." Forty-six Japanese were charged with involvement in the torture, bayonetting and decapitation of three United States Navy airmen in 1945. Death sentences were meted out to 41 of the accused. "After painstaking review of thousands of words of testimony," the commanding general, Eighth Army, approved the findings one year after the trial's end. However, he commuted 28 of the death sentences to prison terms ranging from 5 years to life. Presently, a final S.C.A.P. reviewer commuted 6 of the remaining 13 death penalties to prison terms.⁴⁰

Bared at the Yokohama trials were certain types of war crimes hitherto unconsidered in other United States theatres. Japanese, that

³⁹Ibid., pp. 137-50; Stars & Stripes (Tokyo), Oct. 30, 1947.

⁴⁰Ibid., Apr. 7, 1950; Sydney Morning Herald, Mar. 17, 1948, U.S. Foreign Relations 1948, Oct. 17, 1948, p. 873.

is, occasionally executed captured Americans strictly for purposes of revenge. A typical trial of this nature concerned five Japanese seamen charged with the "wilful and unlawful" murder of five Americans aboard the vessel, Nitta Maru, in 1942. The victims were among a group of approximately 1,200 American POWs being transported to safer areas for incarceration following the Japanese conquest of Wake Island. Having chosen the five Americans at random, the accused then informed them that, for "killing many Japanese soldiers on Wake Island . . . you are now going to be killed for revenge." So testified several former Japanese personnel aboard the ship. A reviewing authority, shortly after the trial, deemed "excessive" the life sentence meted out to the accused by a military commission. "Mitigating circumstances"--accused had been ordered by superiors to carry out the execution--existed; the reviewer commuted the sentences to 10 years' imprisonment. Strongly disagreeing with this view, a Staff Judge Advocate later recommended that the life sentences be validated. "Said killings aboard the Nitta Maru, he emphasized, "were ceremonial" and pervaded entirely by "an overtone of deadly revenge." The convening authority approved the original sentences.⁴¹

Unique, too, to Yokohama courtrooms, were other, even more diabolical types of crime. Several trials witnessed large numbers of highly trained Japanese medical and scientific personnel accused of performing medical experiments, often resulting in death, on American POWs. Principal charges preferred against 30 former servicemen and faculty members of the Medical School Kyushu Imperial

⁴¹SCAP. Trials of "B" and "C" Criminals, pp. 175-82.

University, for instance, read thus that:

accused, acting jointly and in pursuance of a common intent, did, in conjunction with others . . . wilfully and unlawfully kill approximately 8 of 12 American POWs . . . by vivisectioning them, mutilating and dissecting and removing parts from and otherwise desecrating the bodies of said prisoners.⁴²

Necessary at this point is mention of some final remarkable aspects of the Yokohama trials. The "briefest" trial where the defendant pleaded not guilty occupied less than one day; on the other hand, complicated, multi-issued, mass trials frequently persisted beyond five months (not counting the reviewing procedure). In April 1948, an Eighth Army commission tried its first woman accused, Shigeko Tsutsui, a former army nurse. Charges brought against her included that she had participated in "merciless medical experiments" upon captured American fliers in 1945.⁴³

Noteworthy, in conclusion, are the details of a truly unique case-- for it commenced in Yokohama as a war crimes trial and wound up in Los Angeles as a hearing for treason.

Originally, in May 1948, a Yokohama commission instituted war crimes charges against an America-born Nisei, Tomoya Kawakita. Kawakita, it was alleged, had mistreated American and Canadian POWs at a Japanese mine near Osaka during the war. Presently, a former POW in Los Angeles recognized him. Subsequently he was arrested and brought back to Japan for trial. During a hotly disputed hearing, a Yokohama military commission finally conceded Kawakita's point that he had maintained "dual

⁴²Ibid., pp. 183-93; also, 194-201.

⁴³Stars and Stripes (Tokyo), Mar. 25, 1946, Feb. 18, 1948.

citizenship" during the war. As an American "national," therefore, he had the right to an American trial. Kawakita fared no better at his Los Angeles hearing. A Federal judge found him guilty of "treason" in October 1948 and sentenced him to hang.⁴⁴ Yokohama trials ended October 19, 1949.

Final statistics for trials held in Yokohama are as follows: Cases tried, 319; Defendants involved, 996; Convictions, 854 (85.7%); Acquittals, 142 (14.3%); Death sentences awarded, 124 (14.5% of total accused convicted); Death sentences confirmed and executed, 51 (6. % of total accused convicted). Of the remaining death sentences, the following action was taken by the Confirming Authority: 3 were reversed and acquitted; 34 commuted to life, 17 reduced to 12-45 years'; 12 reduced to 10 years'; 5 reduced to 5 years; 2 retried and sentenced to a term of years.⁴⁵

D. United States Trials: A General Survey

What general conclusions respecting American war crimes trials in the East may be drawn from, and in addition to, the preceding material? First, as shown in Chapter 2, United States officials in Washington and Tokyo determined the course of American and, to a lesser extent, Allied trials in light of prevailing national and international realities. American authorities thus brought to a halt, and urged the same upon their Allies, all war crimes trials by the close of 1949.

Next, United States trials in the Philippines differed, in one respect, from those held elsewhere. That is, Philippines trials featured generous testimony by live witnesses, mostly native inhabitants.

⁴⁴China Press, May 29, June 26, July 15, Oct. 7, 1948.

⁴⁵SCAP. Trials of "B" and "C" Criminals, Chapter III, "Statistics," pp. 202ff.

As for trials conducted in China, the Pacific Islands and Japan, explained Col. Alva C. Carpenter, "most of the witnesses (had) returned home;" authorities therefore had "to rely on documents which were prepared after these men had been interrogated and their stories investigated." Witnesses, when practicable, were occasionally flown from various parts of the globe to testify at trials in Shanghai, Guam and Yokohama. For the most part, though, cases heard at these locations rested heavily-- and usually hinged--upon evidence documentary in nature. Not unusually, prosecutors presented military commissions with upwards of 400 affidavits, records, depositions and other materials. As one Reviewing Authority expounded: "It was necessary to use affidavit evidence because more than 23,000 (former POWs) were processed and started on their way to the United States during the first three weeks of the occupation. . . ."⁴⁶

This brings us to, perhaps, the most important single element of the United States war crimes operation in the East. Some individuals have criticized America's conduct of Japanese war crimes trials. The preponderance of this criticism, significantly, has been focused on the procedure followed at the trials--specifically, the admission as evidence of documentary material and the reliance upon military procedure. Most notable in this regard was the censure leveled by dissenters in the Yamashita and Homma decisions. (See Chapter 3 above). To Justices Murphy and Rutledge of the United States Supreme Court, the military hearings before which the two Japanese generals stood lacked any sem-

⁴⁶See e.g., *ibid.*, p. 96. Stars & Stripes (Tokyo), Dec. 14, 1945. Paul E. Spurlock, "The Yokohama War Crimes Trials: The Truth About A Misunderstood Subject," Amer. Bar Assn. Jnl., v. 36, 1950, pp. 388-89.

blance of constitutionally valid trials. Justice Perfecto of the Philippines high court, and others, agreed with their distinguished colleagues that Yamashita and Hotta were denied due protection under the universal and inalienable application of the Fifth Amendment and were therefore deprived of fair trials.

As previously indicated, such verbal assaults attracted no paucity of equally forceful, cogent rejoinders. Therefore, the reader is referred to the appropriate section, above, for further examination into this matter.⁴⁷

What of other aspects relating to the (un)fairness of the trials? Did Japanese accused, it may be asked, receive genuinely competent defenses? While the author has uncovered no published allegations or suspicions of the kind, surely there must have been (are) those who felt (feel) that court-appointed defense counsel merely 'went through the motions'; that such individuals approached and executed their palpably distasteful duty reluctantly, unenthusiastically and, perhaps, even disgustedly.

Nothing, relevant observations would indicate, could be farther from the truth. Understandably, any human being might experience second thoughts when asked to defend according to law one who, short months before, represented a deadly foe. But, freed of this initial doubt, American lawyers presently rose to the task at hand, employing all the energy, talent and dedication they commanded. While covered briefly elsewhere in this study (See above, Chapter 2), this matter is deserving of additional mention. First of all, only "experienced" American lawyers,

⁴⁷See supra, Chapter 3, pp. 92-93.

civilian and military, served as defense counsel. Often, Americans acted in "advisory" capacities to Japanese lawyers, chosen by the accused. Hopefully, an indication of the superb quality and commendable devotion characteristic of most American defense lawyers at Japanese war crimes trials may be found in various places throughout the preceding pages. For example, defense efforts put forth in the Yamashita, Homma and Doolittle Fliers cases speak for themselves.

Beyond this, however, consider the conspicuous absence of any published criticism aimed at American court-appointed attorneys; and, moreover, the consensus of opinion, offered by contemporary observers and authorities who have studied the subject, that the quality of American defense counsel was "excellent." These individuals determined that American defense teams tried cases, zealously, "just like 'the boys back home'." Characterized frequently by "much bickering and discussion between prosecution and defense counsel," Eastern war crimes trials "were regular 'knock-em down and drag-em out' affairs."⁴⁸ Commonly, prosecution and defense exchanged "heated" words, attacks and accusations. And often, spirited defense counsel "made the prosecutor's lot a miserable one." To one authority, such behavior demonstrated "how seriously defense counsel took their duties, and how intensely they represented the interests of their former enemies."⁴⁹ Notwithstanding a score of obstacles confronting them--the most formidable being the ubiquitous language barrier--American lawyers performed admirably, concluded a professor of

⁴⁸Lyman, "Yokohama Trials," pp. 268, 272.

⁴⁹Appleman, Military Tribunals, pp. 330-31.

law, Robert W. Miller; upon further study, he believed, "the legal profession will say of defense counsel--"well done."⁵⁰ Joining his colleagues in praise, one Reviewer at the Yokohama trials, Paul A. Spurlock, pointedly referred to the virtually unanimous expression of gratitude from the accused to defense counsel, "irrespective of the verdict." A host of others concurred with these sentiments.⁵¹

In evaluating the overall fairness of United States-conducted trials in the East one must, again, bear in mind the absence of any published dissent, except for that which applied to procedure. On the other hand, those who have judged positively the achievements of defense counsel at the trials, abetted by additional voices, have also viewed favorably the trials themselves. Some supporters underlined the unquestioned impartiality of a system which provided an elaborate review process in every case. The Yokohama Review Branch, they remarked, at its peak comprised 28 lawyers, mostly civilians and each a member of his own state Bar. The legal experience of this group ranged from 10 to 37 years. Reviewers, said one, Albert Lyman, tended to be lenient.⁵² His allusion obviously applied to the fact that S.C.A.P. Reviewers at Yokohama confirmed only 51 of 124 death penalties meted out, and reduced sentences

⁵⁰Robert W. Miller, "War Crimes Trials at Yokohama," Brooklyn Law Review, v. 15, no. 2, 1949, pp. 208-09.

⁵¹Spurlock, "Yokohama Trials," p. 436. See, e.g.: Japanese were "given the best defense possible," said an American officer of the Judge Advocate General's Office, in China Press, Dec. 19, 1946; Erickson, "Navy War Crimes Trials," pp. 97-99; F. E. Meek, "War Crimes Trials in the Pacific," Idaho State Bar, v. 21, 1947, p. 37.

⁵²Spurlock, "Yokohama Trials," p. 436; Lyman, "Yokohama Trials," pp. 269-70.

in 48 other cases.

Advocates submitted that United States military courts "were all composed of human beings, who acted in a conscientious and fair-minded manner, striving earnestly to do their best." Perhaps the most balanced opinion came from John A. Appleman, a renowned expert on military tribunals. To him, "an examination of the trial records themselves disclose(d), with a few exceptions, remarkable consistency in procedure and fairness in the rulings" of American tribunals. Despite occasional "slight slips from the high standards of justice sought," Appleman concluded, "upon the whole," the trials were "exceedingly fair." Other eminent individuals--diplomat and statesman, George F. Kennan, and constitutional historian Charles Fairman, among others--attested to the fairness of the trials.⁵³

Final total statistics for United States-conducted Trials in the East reveal the following:

	<u>Yokohama</u>	<u>China</u>	<u>Manila</u>	<u>Pacific Islands</u>	<u>Total</u>
No. of Cases	319	11	97	25	452
Defendants Tried	996	75	215	116	1,402
Convictions	854	67	195	108	1,224
Acquittals	142	8	20	8	178
Death Sentences	51	10	92	28	181

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⁵³Ibid., p. 270; Appleman, Military Tribunals, pp. 269, 322, 331. Kennan to MacArthur, Mar. 21, 1948, in U.S. Foreign Relations 1948, p. 717; Charles Fairman, "The Supreme Court On Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," Harv. Law Rev., v. 59, no. 6, 1946, pp. 881--82, 879. Also, see Erickson, "Navy War Crimes Trials," p. 99, and Spurlock, "Yokohama Trials," p. 437.

⁵⁴Figures have been determined from Chart in Appleman, Military Tribunals, p. 267, after amendment of Yokohama figures according to those in SCAP, Trials of "B" and "C" Criminals, pp. 202-04.

American commissions convicted 87.3% of Japanese accused, compared, for example, with (future chapters will disclose) 89.5% for Britain, 69.5% for Australia, 75.9% for China and 99% for the Netherlands. Yet Americans executed only 14.7% of the total number of accused convicted, compared with 30% for Britain, 23% for Australia, 32.9% for China and 33% for the Netherlands. Partially valid at least, then, were assertions by Japanese who, while not applauding then, deemed Americans "more lenient" than their Allies.⁵⁵

"The greatest legitimate criticism which can be made" of the United States trials in the East centered about the conducting of mass trials. Censure in this regard was quite general, even among supporters of the trials. Such practice, contended critics, prevented even capable and earnest defense counsel from adequately representing their clients. Frequently, a lawyer defending several Japanese simultaneously "was forced to attack one defendant in order to exculpate another"--particularly in cases involving the plea of superior orders. Certainly, "Inconsistent defenses resulted." American military authorities, charged some observers, occasionally denied accused justice by adhering to this procedure.⁵⁶ In mitigation, it might be offered that, first, all of the Allied nations--barring none--regularly held joint trials; and second, S.C.A.P. offi-

⁵⁵See, e.g., Yoshio Kodama, Sugamo Diary. Trans. by Taro Fukuda (Tokyo, 1960), p. 129, and London Times, Apr. 16, 1952. In both cases Japanese compared American treatment with that of the British.

⁵⁶See, e.g., Appleman, Military Tribunals, pp. 318-19, 322, 333; Miller, "Yokohama Trials," pp. 198-200.

cials discerned relatively early that only through expedition of the trials might they ever hope to dispose of their enormous burden within a reasonable time. And particularly relevant to Americans was the factor of expedition--the State Department had decided that an end to Eastern war crimes trials must precede "any discussion of a peace treaty with Japan."⁵⁷

⁵⁷ Stars & Stripes (Tokyo), Oct. 5, 1948.

CHAPTER V

BRITAIN

I. "Procedure and Machinery"

While Britain, along with the other Allied nations, basically followed America's lead at the international proceedings in Tokyo, the same did not apply to its part in the locating, apprehending and prosecuting of suspected Japanese war criminals elsewhere. There Britain maintained a position more befitting its reputation, as it stood in 1945, as a great global power--albeit a reputation already in question and soon to enter a period of steady decline.

Early in the course of the war British officials assumed an active role in the investigating and reporting of Japanese atrocities committed against Commonwealth citizens.¹ Such concern led to British association, beginning in September 1942, with official American warnings that, after the war, perpetrators of war crimes in the East would receive just punishment. Britain joined in the establishment of the United Nations War Crimes Commission (hereafter UNWCC) in October 1943, and London became the organization's headquarters.²

¹See, e.g., For. Min. Eden's report, March 10, 1942, in Britain, Parliamentary Debates (Hansard). Fifth Series. House of Commons, v. 378, p. 390.

²Churchill "associated" the British government with a previous FDR "warning" on Sept. 8, 1942. The History of the United Nations War Crimes Commission and the Development of the Laws of War (London HMSO, 1949), pp. 93-94, 127.

As the war neared its conclusion, the subject of war crimes trials increased in importance. The time would soon be at hand, government leaders realized, when official declarations and proposals would be rendered obsolete; the need for specific and operable solutions would soon grow urgent. Lively public debate ensued, covering all major aspects of the problem: apprehension of suspects, location of the trials, composition and jurisdiction of the courts, and who and what types of crimes to prosecute. Above all, British officials were determined to see embodied in the Eastern war crimes trials the highest traditions of British justice. At stake stood "much more than mere retaliation," declared the Lord Chancellor (Lord Simon) in a House of Lords debate in March 1945. Civilization could not advance, he argued, unless the application of law, especially international law, remained equitable and impartial for everyone, friend and foe alike.³

Indeed, high and often meticulous regard for justice according to law and, particularly, for the maintenance of "British standards of justice," is a dominant theme in the story of British-conducted war crimes trials in the East.⁴ More on this point will be found throughout the following pages. For now it is significant to note that the sentiments expressed by some leading British figures in the immediate postwar

³Parl. Deb., H. of Lords, 1945, pp. 663, 678; 1946, p. 2163; M. E. Bathurst, "The United Nations War Crimes Commission," American Journal of International Law, v. 39, 1945, p. 568.

⁴For a mere sampling of British concern, official and private, that justice be steadfastly upheld at the Eastern war crimes trials, see London Times, "Far Eastern War Crimes," July 31, 1946; May 20, 1949; Straits Times, Sept. 30, 1945, May 15, July 7, Aug. 1, 1946.

period--demanding outright military executions of major war criminals--were absent completely in the trials of "minor" Japanese war criminal suspects.⁵ The clearest and most convincing testimony to this fact, aside from the actual trial records themselves, is the document upon which the British based the jurisdiction of their military courts to try war criminals.

On June 14, 1945, the War Office, by "Special Army Order," issued the Royal Warrant. Based on the Royal Prerogative, which, in English law, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown," the Royal Warrant established regulations governing the trials of war criminals. His Majesty, stated the Warrant, "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September 1939."⁶

The Royal Warrant defined "war crime" as a violation of the laws and usages of war committed during any war in which Britain participated after September 1939. As "these regulations applied to all British Military Courts in all theatres and territories under British control and occupation," the Warrant therefore circumscribed the scope of crimes

⁵For the initial British position, see Chapter I, note 22.

⁶Britain. Royal Warrant, 14th June 1945, Army Order 81/1945, with Amendments, HMSO, 1945. Also, see Law Reports of Trials of War Criminals, Selected and prepared by the UNWCC, 15 vols. (London: HMSO, 1947-49), v. I, Annex I, "British Law Concerning Trials of War Criminals By Military Courts," p. 105.

subject to British military jurisdiction. Thus "leaps to light," in the words of Viscount Maugham, a noted authority on international law, the glaring omission of any mention of jurisdiction to punish "crimes against peace" or "crimes against humanity." Britain, then, departed from the list and definition of war crimes laid down by the IMTFF, as well as those by the United States, in its regulations governing war crimes trials. Only those Japanese believed guilty of actually perpetrating war crimes, stricto sensu, were prosecuted. In choosing a narrower jurisdiction, the British, wrote Maugham, based their prosecutions and convictions squarely on the "well-established laws and usages of war" and rules of international law.⁷

Other sections of the Warrant dealt with the convening and composition of British Military Courts. One regulation conferred upon certain senior officers the power to convene Military Courts for the trials of suspected war criminals.⁸ Another held that Military Courts were to consist of not fewer than two officers in addition to the President. Of these members, at least one should have "legal qualifications." If practicable, the President was to appoint "as many officers as possible of equal or superior relative rank to the accused;" similar rules applied to the appointing of officers of the same service branch, for example, naval or air force, of the accused.⁹

Provisions were included for the creation of mixed Inter-Allied

⁷Royal Warrant, Reg. 1; Frederick H. Maugham, U.N.O. And War Crimes (London, 1951), pp. 98-99.

⁸Royal Warrant, Reg. 2.

⁹Ibid., Reg. 5.

Military Courts. Where deemed "desirable," the Convening Officer could appoint as a member of the Court, "but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose," provided that at least half the Court, including the President, be comprised of British officers. A mixed court remained, under the Warrant, a British municipal court.¹⁰

An outstanding feature of the British (and other Commonwealth) Military Court system revolved around the functions of the Judge Advocate. The Warrant permitted his deputation to assist a military court, if deemed necessary or desirable by the Convening Officer. As the legally qualified member of the tribunal, the Judge Advocate mainly "advised the Court on matters of substantive and procedural law." Unless he and the Court thought it unnecessary, his duties included the summing up of evidence prior to the Court's deliberation. Above all, the Judge Advocate was to "be careful to maintain an entirely impartial position." He had no voting powers. Nor were the members of the Court obliged to accept his advice. If the Convening Officer decided against appointing a Judge Advocate he was under orders to appoint at least one officer having legal qualifications, "unless in his opinion no such officer is necessary."¹¹ The Judge Advocate's contribution to the securing of justice in war crimes trials in the East should not be underestimated. More courts than not had Judge Advocates. In most instances he represented the sole legal authority on an otherwise lay tribunal.

¹⁰Ibid.; see also, Law Reports, v. I, Annex I, p. 106.

¹¹Ibid., p. 107; Royal Warrant, Reg. 5.

And as one British author and the UNWCC noted, his was often the essential role of a balancer--the impartial presenter and, indirectly, weigher of evidence.¹²

Under the Royal Warrant, British Military Courts for the trial of war criminals adhered to the Rules of Procedure found in the British Army Act, and applicable in a Field General Court Martial of the British Army.¹³

The Royal Warrant also extended to British Military Courts the rules of evidence relating to Court Martials. Contained in Section 128 of the Army Act, these were the rules applicable in English Civil Courts, that is, Courts of ordinary criminal jurisdiction in England. Among others, the rules included the generally accepted principle that the accused is innocent until proven guilty, and the English practice of affording the accused the option of testifying on his own behalf as a witness under oath.¹⁴

Britain and most of its Allied counterparts sought to secure suspected Japanese war criminals the highest degree of traditional judicial protections and safeguards as practicable. The unique character of the war crimes trials and the many organizational difficulties involved, however, required "a certain relaxation of the rules of evidence otherwise applied in English Courts."¹⁵ Therefore, the Royal Warrant

¹²L. C. Green, "The Trials of Some Minor War Criminals," Indian Law Review, v. 4, 1950, p. 250; Law Reports, v. 15, p. 165, n. 3.

¹³Royal Warrant, Reg. 3.

¹⁴Law Reports, v. I, Annex I, pp. 107-08.

¹⁵Ibid., p. 108.

departed from the normally strict rules of evidence applicable in English Courts and made allowance for the admission of certain types of evidence hitherto excluded: "any oral statement or any document appearing on the face of it to be authentic;" affidavits or written statements made under oath; any report of the International Committee of the Red Cross; "any depositions or any record of any Military Court of Inquiry;" information contained in diaries or letters; and secondary evidence of statements made (commonly known as hearsay) or secondary documentary evidence (copies of original documents). The sole determining factor in the Court's decision to admit or exclude was the probative value of the evidence: if it appeared "to the Court to be of assistance in proving or disproving the charge," it was admissible; if not, rejected.¹⁶

Enough has already been said in the previous two chapters about the reasoning behind, and the general opinion toward, the decision to relax traditional rules of evidence in war crimes trials. It may be said in fairness that Britain, America and other Allied nations that followed suit, did so for reasons identical to those which resulted in the adoption of such procedure at the IMTFE.¹⁷ Said one contemporary British jurist: the British actions represented "an attempt to secure" a fair trial for the accused "while ensuring that the guilty shall not escape punishment because of legal technicalities." In short, contended a Member of Parliament, any attempt to gather witnesses and original documents scattered throughout the world and then to organize coherent

¹⁶Royal Warrant, Reg. 8, a-f.

¹⁷See Chapter I, p. pp. 22-24.

trials, would most likely prove unmanageable; at the least, it would delay the trials interminably.¹⁸

The Royal Warrant afforded additional legal safeguards to the accused. Suspected Japanese war criminals had the right to British legal counsel, as well as the right to select other legally qualified attorneys from their own or other countries.¹⁹ British Military Courts were open to the public "so far as accommodations permit(ted);" the same applied to the Court's presentation of verdict and sentence. All guilty verdicts and subsequent sentences were subject, should the accused so request, to further review by a Confirming Officer. This officer either agreed with the finding or referred the case to the Judge Advocate General or his deputy for further consideration and final disposition. All acquittals were final.²⁰ Punishments for convicted war criminals consisted of death (either by hanging or shooting), imprisonment for life or any less term, confiscation, a fine.²¹

Several other factors concerning procedure and practice in British Military Courts, though not contained in the Royal Warrant, deserve mention. British Military Courts trying war crimes cases did not deliver reasoned judgments, explaining how and why a verdict was reached.

¹⁸G. Brand, "The War Crimes Trials and the Laws of War," The British Yearbook of International Law, (London, 1949), p. 416; see statements by Lord Maugham and Lord Roche, Parl. Deb., H. of Lords, 1945, pp. 663, 678.

¹⁹Royal Warrant, Reg. 7.

²⁰Ibid., Reg. 8, IV-VI; Law Reports, v. I, Annex I, pp. 109-10.

²¹Royal Warrant, Reg. 9.

In this they acted in accordance with procedure followed by U.S. Military Commissions, and contrary to that of Dutch, French, and Chinese Military Courts. The latter provided "in various degrees of fullness, the reasons for decisions arrived at." Unlike, the U.S. system, however, British Military Courts often included the Judge Advocate's final "reading of the facts and law to the court," thus furnishing "some clue" to the reasons for the decision.²²

British and Commonwealth trials frequently "relied heavily" upon municipal laws for their legal terminology and for their definition of punishable war crimes. For example, and soon to be demonstrated, British Courts repeatedly found Japanese accused guilty of "murder" or "manslaughter."²³ Also distinctive to Commonwealth war crimes trials was the obvious dependence placed by Courts and Judge Advocates on treatises by such renowned jurists as Oppenheim and Lauterpacnt, and official publications such as the British Manual of Military Law. Many Courts accepted these works as "authoritative" or "persuasive" statements of law, and while not binding upon, often influenced, their decisions.²⁴ Finally, the British made certain that shortly after the conclusion of every Japanese

²²Law Reports, v. 15, pp. x-xi, 20. Britain and America, on rare occasions, departed from this rule. See below, text, British action in the Gozawa trial, p. 153, and above for U.S. action in the Yamashita trial, p. 89. On differences between U.S. and British Military Court procedure, see G. W. Paton, "The War Trials and International Law," Res Judicatae, v. 3, 1947, p. 129.

²³E. G., see British action in trial of Yamamoto Chusaburo, Law Reports, v. 3, Case No. 20, pp. 79-80; also, v. 15, p. 8.

²⁴Ibid., p. 21.

war crime trial in the East, "a complete record of every word" said at them would be "available in London." For this monumental task, they employed large numbers of shorthand writers, who diligently copied verbatim daily trial records.²⁵

Having set down operable and equitable regulations for the governing of war crimes trials, the British then proceeded to cooperate with their Allies in creating a capable and effective machinery for the locating, apprehending and prosecution of Japanese war criminal suspects. Britain joined in May 1944 in the establishment of a UNWCC-founded Far Eastern Sub-Committee, based at Chungking. Chief among the sub-committee's duties stood the collection of evidence of war crimes committed by Japanese in the China and nearby theatres.²⁶

The sub-committee's focus of activity, almost exclusively China, soon proved too narrow. Under UNWCC auspices, two types of war crimes agencies were formed to meet the exigencies of the situation. One type, created by the national governments whose territories were the area of war crimes, applied to nations such as China, the Dutch East Indies, and later, the Philippines. Other Allied nations, whose troops fought against Japanese forces outside their own national boundaries and China, created another type of agency.

To British and American military authorities fell the major responsibility for investigating Japanese war crimes committed during the war throughout Japanese territory and all other parts of the East.

²⁵Straits Times, Sept. 1, 1946.

²⁶History of UNWCC, p. 380.

Singapore and Tokyo became the principal headquarters for the identifying, locating and apprehending of Japanese war criminals for the whole of Southeast Asia, and for the entire South-West Pacific area, respectively. While each centre gave first priority to investigation of war crimes perpetrated against its own nationals, each nonetheless placed the machinery at the disposal of its wartime Allies. British and Americans maintained liaison teams, exchanged investigative sections, and accommodated and attached to their headquarters similar teams of the other nations concerned in Japanese war crimes.²⁷

Shortly after Japan officially surrendered in September 1945, public pressure began to mount in England calling for the swift adjudication of war crimes trials and for the swift punishment of those found guilty.²⁸ Stories of brutal atrocities committed by Japanese forces against helpless British nationals overseas, military and civilian, reached ever-widening audiences as large numbers of former prisoners of war returned from their captivity. Nearly all the ex-POWs had gruesome experiences to relate.

Despite these pressures, British officials stood firm. Secretary of State for War, Jack Lawson, assured the public that trials would proceed "as expeditiously as possible." More important, he added, was it to see that justice prevailed at all the trials.²⁹ Lord Mountbatten, the

²⁷Ibid., pp. 380-81.

²⁸"Mounting indignation" in England was accompanied by "angry protest." Straits Times, Sept. 22, 1945.

²⁹Ibid., Sept. 30, 1945.

Supreme Allied Commander, chastised publicly a British officer who had permitted men in his command to humiliate Japanese commanders in custody in Singapore as war criminal suspects. No guilty Japanese, said Mountbatten, "shall escape justice, but this justice must follow upon their conviction and must conform to the accepted civilized code."³⁰

By October 1945, Britain's war crimes operation was well under way. Overseas commanders had been instructed to "apprehend and detain" all Japanese suspects. Investigators collected statements from all British Commonwealth POWs, civilian internees, and others "in order to obtain evidence and permit the preparation of cases for trial."³¹ In November, the British operation expanded. The number of Japanese suspects arrested multiplied. Responsibility for the investigation and trial of war crimes perpetrated by Japanese against British nationals passed to General Headquarters, Allied Land Forces, South East Asia, commonly known as South East Asian Command (S.E.A.C.). It dealt with war crimes committed throughout a vast area: Burma, Siam (Thailand), Malaya, Andaman Islands, French Indo-China, the Netherlands East Indies, Hong Kong, Shanghai, Tientsin, British North Borneo, the Nicobars, and Singapore.³²

A War Crimes Branch in Singapore coordinated the entire operation. It included 17 war crimes investigation teams, a War Crimes Registry Section, a War Crimes Co-ordinating Section and a War Crimes

³⁰Ibid., Sept. 19, 1945.

³¹See statement by Sec. of State for War, Mr. Lawson, in Parl. Deb., H. of Lords, Oct. 25, 1945, v. 414, p. 2163.

³²Straits Times, Nov. 13, 15, 1945; The New York Times, Dec. 28, 1945; London Times, July 31, 1946; History of UNRCC, p. 381.

Legal Section. Administrative duties, such as investigation and registration of cases, rested with the Judge Adjutant General's Branch; legal matters, with the Judge Advocate General's Branch.³³

Cases were built up and handled in the following manner : Investigation teams "scoured" wide areas, even hundreds of miles of jungle to round up any suspects that might have escaped capture after Japan's surrender. All captured Japanese were photographed and fingerprinted. This enabled many ex-POWs who had made statements or had given affidavits to identify guilty individuals. A "deponent" would then be asked to identify the person he had named in his statement from a selection of approximately six nameless photographs. If the ex-POW correctly identified his assailant from the small photographic "identification parade," the original statement or affidavit was forwarded, with attached photo, to the War Crimes Registry Section at Singapore.

The Registry then registered the information. Additional investigation teams reinforced the case with other affidavits, evidence from local inhabitants, and from voluntary statements from the accused. The complete case was then returned to the Registry for scrutinization and collation, before being sent to the Legal Section. Responsibility for prosecution of the case, and for producing "live witnesses" at the trial, devolved upon the Legal Section.³⁴

Due to the enormity of the undertaking, British investigation teams experienced throughout the war crimes operation great difficulty

³³Ibid.; London Times, July 31, 1946.

³⁴Ibid.

in obtaining evidence and locating suspects. Officials frequently solicited public assistance and, early in 1946, established a War Crimes Complaint Bureau in Singapore to facilitate the reporting of wartime atrocities.³⁵

S.E.A.C.'s headquarters maintained close liaison with the Allied governments. American, Australian, Dutch and French war crimes sections and investigation teams established offices in Singapore and worked closely with the British. Likewise, S.E.A.C.'s War Crimes Branch dispatched its own war crimes teams to Tokyo (liaison section), Tientsin and Shanghai (investigation teams) and Saigon (a liaison officer).³⁶

Japanese accused of committing war crimes against British nationals were tried before British, Australian, Dutch, French or American courts. Britain constituted a total of twelve military courts in Singapore, Rangoon, Hong Kong, Malaya and British North Borneo. Any trials that could not be held elsewhere, for whatever reasons, were transferred to Singapore. Courts in Malaya and British North Borneo traveled the circuit. The Australians, Dutch and French conducted their own cases in their own courts, while British military courts, the prosecution assisted by an American officer, tried American cases.³⁷

II. "The Trials"

Britain conducted trials of thousands of Japanese war criminal suspects in the years 1945-1949. No attempt will, or can, be made here

³⁵Straits Times, Dec. 28, 1945; Jan. 25, 27, 1946; Malay Mail, July 29, 21, 1947.

³⁶London Times, July 31, 1946; History of UNWCC, p. 382.

³⁷Ibid.; London Times, July 31, 1946; Parl. Deb., H. of Lords, v. 415, Nov. 2, 1945, p. 783.

to examine them comprehensively. Rather, a broad overview, spotlighting certain trials of special significance--due to the persons, legal principles or precedents involved, outcome, location, or other reasons--will be the goal. Hopefully, from a study of this kind, a lucid, sober and representative portrayal of the British trials will emerge.

* * *

Even prior to his setting up headquarters at Singapore in October 1945, Lord Mountbatten had forcefully clarified official British policy toward war crimes trials. Military authorities, he had announced, would "have nothing to do with trials of a purely political nature." Japanese would be tried "on criminal charges only," for example, for brutality or murder. Only when there existed virtually "irrefutable" prima facie evidence would charges be brought ~~against~~ an individual. For "nothing would diminish" Britain's prestige more, he had concluded, than the appearance of "investigating vindictive trials" against a fallen enemy.³⁸

The first trial held in Southeast Asia opened in Singapore, on January 21, 1946, and lasted eleven days. On trial were former Captain Gozawa Sadaichi and nine subordinates. Charges against them included, in varying degrees of complicity, the brutal maltreatment of Indian prisoners of war and the murder by execution of one between April 1943 and September 1945.³⁹ The British chose to commence with this particular

³⁸London Times, Oct. 6, 1945; see Mountbatten's "Foreword" to Colin Sleeman, ed., Trial of Gozawa Sadaichi and Nine Others (London, 1948), pp. xiii-xiv.

³⁹Sleeman, Gozawa Trial, p. 4; Straits Times, Jan. 22, 1946.

trial for several reasons. Chief among them was the desire to demonstrate the "absolute equality" and impartiality of British justice by redressing first the injustices done to non-British, even non-white, victims. Not all have accepted this view.⁴⁰

Concern over maintaining the highest standards of justice ran throughout the proceedings. "Vengeance and retaliation in kind find no place here," stated the President of the Court in his opening remarks. Only if and when allegations are proved "without a reasonable doubt as in a British Criminal Court," he added, will stern and just punishment be awarded: "If evidence falls short of this, this Court must, and will, fearlessly say so."⁴¹

All members of the Court were acutely aware of the unprecedented nature of the proceedings and of the active public interest deriving therefrom.⁴² The prosecutor, in his opening speech, reminded the Court of its responsibility to "demonstrate to the world . . . that great distinction" between British and Japanese notions of justice: "We do not punish men without just trial." Therefore, he pressed, it was vital "that these proceedings be a model" for those to follow.⁴³ Counsel for

⁴⁰Such was the opinion of the defense counsel at the trial, Col. Sleeman, in ibid., p. xlii. Cf. Green's assertion that the trial was intended to cast dishonor on so-called "Indian patriots," currently on trial in Delhi, by demonstrating their "collaboration" with Japanese, in "Minor War Criminals," pp. 249-50.

⁴¹Sleeman, Gozawa Trial, p. 3.

⁴²Public interest was active in Southeast Asia, not in England. The "opening of British Far Eastern War Crimes Trials was totally ignored by the British Press," in ibid., p. xlii. See Straits Times, Jan. 22 - Feb. 2, 1946.

⁴³Sleeman, Gozawa Trial, p. 5.

the defense, a British colonel and lawyer, added remarks similar in nature.⁴⁴ Even further went the President of the Court, acknowledging that "not only the accused persons . . . will be judged in times to come," but the entire proceedings and all participants.⁴⁵ To be sure, the British did not take this, or any other, trial lightly.

The defense based its case on several factors, among them Japan's failure to ratify the Geneva Convention of 1929 concerning proper treatment of captured POWs; that the accused had acted under superior military orders; that the Indian POWs had received as good, or better, food, care and medical treatment as the Japanese themselves. Principally, the defense contended that the Indians, shortly before commission of the alleged incidents, had voluntarily joined the Japanese forces. As collaborators, these heiho, as they were known to the Japanese, became subject to Japanese military discipline. This placed them outside the definition of POWs and beyond the scope of any Court restricted to try war crimes only. In a final plea, defense counsel stressed Japan's precipitous thrust over recent decades into the "customs and manners of occidental civilization;" Japan lacked worldly sophistication, he reasoned, and its nationals all too often became blind "slaves to discipline" and superior orders.⁴⁶

Under oath, the accused repeatedly swore that they believed the Indians had, indeed, joined Japanese ranks; they had treated the Indians

⁴⁴Ibid., p. 86.

⁴⁵Ibid., p. 3.

⁴⁶Ibid., pp. 57, 73, 81-84, 87-88, 132, 148, 184, 218, 221-22, 226.

⁴⁷E.G., ibid., pp. 46, 57, 62, 73, 118-19.

the same as members of their own forces;⁴⁸ they had acted under superior military orders.⁴⁹ Typical in this regard was the response of a Japanese elicited by defense counsel: "I had to obey my superiors without question. Privates must observe absolute obedience."⁵⁰

The prosecutor effectively refuted the defense contentions. Japanese, he argued, remained bound to "observe International Law," despite Japan's refusal to ratify the Geneva Convention. Did the accused possess any documentary proof of Indian collaboration? They did not. If the Indian POWs received such good treatment, he inquired, what accounted for their poor condition at the time of liberation? He rejected as without foundation in law, municipal or international, the defense of superior orders.⁵¹

On February 4, 1946, after approximately two hours of deliberation, the Court delivered its verdict. All the accused, with the exception of one, were found guilty of the respective preferred charges against them. Acquitted was a Sergeant-Major, the Court having been convinced by defense counsel's argument that no prima facie case against him existed.⁵² Lieut. Nakamura, Gozawa's subordinate and the individual who actually organized and supervised the Indian victim's execution, re-

⁴⁸E.g., ibid., pp. 50, 57, 73, 81-84, 85, 185.

⁴⁹E.g., ibid., pp. 145, 154, 188, 190.

⁵⁰Ibid., p. 145.

⁵¹Ibid., pp. 198, lxiv.

⁵²Ibid., pp. 81-85.

ceived the death penalty. Gozawa, meanwhile, was given 12 years' imprisonment. Other sentences ranged from 2 to 7 years' imprisonment. Sentences were confirmed on March 4, 1946.⁵³

Unfortunately, this first of British war crimes trials in the East lacked the presence of a Judge Advocate General. Without his customary summation of the facts and clarification of the law, it would normally be extremely difficult to ascertain why the Court found as it did. However, in this case the Court took extraordinary action as revealed by procedure followed in subsequent trials. Along with the verdict and sentences, the Court read brief explanatory statements to the convicted. It explained, for example, its unusual action in meting out the death penalty to a subordinate, while taking a "merciful view" of his superior's behavior. Believing Gozawa had been "led to acquiescence" by his "more powerful adjutant," the Court spared his life. In statements to two other accused, the Court reinforced the general attitude towards the defense plea of superior orders. That is, while not constituting an absolute defense, the Court may determine to treat it as a mitigating factor.⁵⁴

Several concluding remarks are warranted. This being the first British war crimes trial in Southeast Asia, Nakamura thus became the first Japanese sentenced to death by a British Court. The trial received ample press coverage and attracted wide public interest in Singapore, but not in England, where it was practically ignored.⁵⁵ Procedure at the

⁵³Straits Times, Feb. 2, 1946.

⁵⁴Sleeman, Gozawa Trial, pp. 230-31; Law Reports, v. 15, pp. 158-59, 175.

⁵⁵See note 42, supra. Ironically, the trial was covered in the American press. See The New York Times, Feb. 2, 1946.

Gozawa trial evoked criticism in some circles, but generally, the trial was considered fair and representative of British justice. In his closing statement, counsel for the defense thanked the personnel of the Court for a trial "conducted throughout" with "scrupulous fairness and impartiality."⁵⁶ One final note: the British went to such extremes and took great care to ensure a meticulously fair trial in a case of relatively minor importance. To be sure, the Gozawa trial was to become a "model" for all future proceedings.

A torrent of trials followed. In 1946, British trials opened in Perak, Car Nicobar, Penang, British North Borneo, Rangoon, and Singapore. Preparations for others in Hong Kong and Rabaul, New Britain⁵⁷ began.

In the trial of a Japanese Army Sergeant, held at Kuala Lumpur, a British Military Court found the accused guilty of murdering a Malayan civilian at Kuala Lumpur in September 1945. The accused testified that he had acted in self-defense and while under the influence of alcohol. The Court took these factors into consideration, but the reviewing authorities overrode its recommendation for mercy and confirmed the death penalty. The decision in this case, representative of many in British trials, exemplified "the introduction of Municipal (in this case English) Law concepts" into war crimes trials.⁵⁸

⁵⁶See e.g., Green, who, while conceding the existence of criticism, deems the trial report clear proof "that the accused received a fair trial," in "Minor War Criminals," p. 252; for a positive evaluation of the early trials, see London Times, July 31, 1946; Sleeman, Gozawa Trial, p. 205.

⁵⁷Straits Times, Jan. 20, Feb. 3, Apr. 27, July 17, 1946; Stars & Stripes (Shanghai), Mar. 9, 1946; China Press, Jan. 1, 1946. For Burmese trials, see Chapter 6.

⁵⁸Law Reports, v. 3, Case No. 20, pp. 76, 79-80.

Trials varied in length and character. Some required minimal preparation and time. In a Car Nicobar case, a Court sentenced a Japanese officer to two years in prison for "being concerned" in the ill-treatment and killing of 152 civilian inhabitants of the Andaman Islands. The trial took one day.⁵⁹ Perak's first war crime trial lasted less than two days. It resulted in the passing of the death sentence upon a member of the notorious Kempeitai (Japanese military police) for his brutal maltreatment of civilian inhabitants between 1943 and 1945.⁶⁰

Other trials demanded long, painstaking preparation, and often dragged on interminably. For example, civilian inhabitants of Penang awaited anxiously the commencement of the "biggest war crimes trial in the Malayan Union." Scheduled, in April 1946, to open shortly, the trial did not start until the final day of August. Charged with executing a veritable "reign of terror and promiscuous slaughter" against the local population were 35 former Kempeitai. The trial was conducted with impeccable care and fairness. On several occasions, the President of the Court delayed the proceedings in order to explain clearly to the accused their rights under British law. A month later the trial ended. Issued were twenty-one death penalties, three acquittals, and eleven prison terms ranging from five to fifteen years.⁶¹

Due to the sheer enormity of the task which confronted them, the British, as did their Allies, regularly held "mass trials." In addition

⁵⁹Straits Times, Mar. 12, 1946.

⁶⁰Ibid., Feb. 20, 22, 1946.

⁶¹Ibid., Apr. 27, July 2, Aug. 31, Sept. 25, 29, 1946.

to the one noted above, the so-called "double Tenth Trial," of 21 Kempeitai, and the "Outram Road Military Prison Case," of 44 Japanese, deserve mention.

The first trial opened in Singapore on March 18, 1946. The charges against the 21 accused included the beating and torturing of British POWs in an attempt to exact information and confessions from them. Many POWs, the charge alleged, died as a result of this maltreatment.⁶² The defense, composed of British military personnel with legal qualifications, based nearly its entire case on the plea of superior orders. To counter this argument, the prosecution cited the opinion of the German Supreme Court in the famous Llandovery Castle case of 1922 that "members of the armed forces are bound to obey lawful orders only." Apparently, the Court agreed with the prosecution: eight accused were sentenced to death, six given prison terms, and seven were acquitted.⁶³

The second trial focused on the diabolical events which had taken place during the Japanese occupation of Singapore at the Outram Road Military Prison, or, as its inhabitants came to call it, the "Eastern Belsen." The Court began its hearings in Kuala Lumpur in August 1947. The indictment charged 44 Japanese "concerned" in the administration of the former POW Camp, in varying degrees of guilt, with causing unconscionable tortures and suffering upon thousands of British Commonwealth

⁶²London Times, Mar. 29, 1946.

⁶³Colin Sleeman and S. C. Silkin, eds., Trial of Sumido Haruzo and Twenty Others (London, 1951), pp. xxxi, 258; Straits Times, Apr. 16, 1946.

and other POWs. Press coverage of the trial was widespread, as many witnesses, British and Chinese, testified to the ghoulis going on at Outram.

At the close of the prosecution's case, the entire War Crime Court traveled to and inspected for itself the Outram Road prison, scene of the alleged atrocities. Counsel for the defense implored the Court to judge the accused "by standards they are used to." He reminded the Court that not only Japanese were on trial "but also the British system of justice." Found guilty were 39 of the 44 Japanese. Five received the death penalty, five others got life imprisonment, and the rest got prison terms ranging from 1-18 years.⁶⁴

While most trials conformed to a discernible pattern--former Japanese military personnel were charged with murder or other atrocities, received strong defenses, then were judged, the Court having maintained throughout strict military discipline and legal decorum--some strayed from the norm. In a Kuala Lumpur trial the defense conducted a rice-cooking demonstration in Court to demonstrate that 300 grammes of rice, the basic daily rice ration for certain POWs, was a substantial amount when cooked.⁶⁵ Spectator reaction, for instance clapping, to trial motions or outcomes was not uncommon.⁶⁶ Courts experienced considerable difficulties with Japanese interpreters, and frequently chided them against holding sustained conversations with witnesses.⁶⁷

⁶⁴Ibid., Aug. 10, 16, 20, Sept. 1, Oct. 6, 10, 11, 1946.

⁶⁵Ibid., Aug. 20, 1946.

⁶⁶Ibid., Aug. 22, 1946.

⁶⁷Ibid., Feb. 9, 1946.

Occasionally, Courts tried Japanese civilians, usually interpreters, for "being concerned" in the commission of war crimes.⁶⁸

Courts sometimes meted out unusual punishments. In a unique instance, the wife of a convicted war criminal was ordered to pay a \$2,000 fine to Indian and Chinese residents of Bangkok who had suffered ill-treatment at the hands of her husband.⁶⁹ Another concerned a Japanese sergeant who had been ordered to beat a British POW. After his superior had threatened to punish him severely should he refuse, he reluctantly obeyed. The sergeant received "a nominal sentence of one day's imprisonment."⁷⁰

One characteristic of the trials stood unchanged throughout. Invariably, Japanese accused pleaded "not guilty" to the charges preferred against them. An experienced reporter, for example, wrote of a "dramatic ending" to a Kuala Lumpur trial of two Kempeitai: suddenly, both accused "decided to plead guilty to the charges against them." To his knowledge, this was the "first occasion" in which Japanese on trial in Malaya "admitted the ill-treatment of Malayan residents."⁷¹ Perhaps this was not the only instance of its kind. Nevertheless Japanese rarely admitted their guilt.

British courts cooperated closely with Allied war crimes teams

⁶⁸Ibid., Feb. 6, 1946; Malay Mail, Nov. 5, 1947; China Press, Aug. 12, 1947.

⁶⁹Malay Mail, Oct. 9, 1947.

⁷⁰Straits Times, Feb. 6, 1946.

⁷¹Malay Mail, June 25, 1947.

and often sat as mixed inter-Allied tribunals. An American prosecutor, acting on behalf of American victims, first appeared in a British Court in April 1947. His performance later won the congratulations of the Court's President.⁷² Courts composed exclusively of British personnel frequently prosecuted Japanese accused of committing violations against American, or French POWs.⁷³ Chinese legal representatives assisted British prosecutors and the Chinese Consul attended several trials involving Chinese victims. A British war crimes team, sent to Ipoh, Northern Malaya, worked closely with official and private Chinese in building cases against Japanese.⁷⁴ British prosecutors assisted Americans in cases at Yokohama.⁷⁵ More than once, British Courts relied on legal principles established by Allied Courts--most notably, the Yamashita precedent of "command responsibility."⁷⁶

Certain trials immediately became cause célèbre. Those related to the infamous Burma-Siam "death railway," or "Bridge On the River Kwai" if one is a Hollywood fan, attracted widespread interest. Involved were the deaths and sufferings of literally thousands of British Commonwealth POWs. Bringing to justice all those responsible thus required several separate trials. The first ended in June 1946 with the

⁷²Straits Times, Apr. 4, 1946.

⁷³The appointment of Allied members to Military Courts was not compulsory, even in cases where Allied Nationals had been the victims. See Royal Warrant, Reg. 5; Law Reports, v 2, pp. 127-28.

⁷⁴Straits Times, May 30, Oct. 17, 1946; Malay Mail, Oct. 14, 1947.

⁷⁵Straits Times, Feb. 8, 1946.

⁷⁶Malay Mail, June 10, 1947; China Press, Oct. 26, 1948.

condemnation of a Japanese major found guilty of "brutalities resulting in the deaths of 570 of 2,000 POWs under him in 1943."⁷⁷

Claims that the "Ishida 'Death Railway' trial" would be ranked "second only to the Tokyo trial" in importance fell short. Still, the trial of Lt. Gen. Ishida and four of his senior officers created sensation in Singapore. Charges against the Japanese included, inter alia, the "inhuman treatment of POWs resulting in many deaths and much physical suffering;" employment of POW labor in connection with operations of war; employment of POWs in excessive work; and internment of POWs in conditions unhygienic and unhealthy.

The British prosecutor took care to describe pointedly POW life under Japanese captivity and why the appropriate label 'death railway' had been given. Employment of POWs in work of this kind, he asserted, was in itself "a monstrous international crime." Astutely, the British defense attorney countered this argument. As the issue of whether employment of POWs on a railway constituted a crime was currently before the IMTFE, he reasoned, the Court should defer its finding until that Tribunal's decision was known.

Daily, ex-POWs testified to the horrible, and often unbearable, conditions under which they had toiled. One, now a Singapore lawyer, compared Japanese treatment of POWs to slave labor in times of the pyramids or of galley slaves. Witnesses commonly described Japanese guards as "sadistic." The trial lasted nearly six weeks. All five accused were found guilty, with two sentenced to hang, one sentenced to twenty years' imprisonment, and the remaining two, Ishida included,

⁷⁷London Times, June 7, 1940.

sentenced to ten years' imprisonment.⁷⁸

One particular trial received remarkably extensive press coverage and quickly became the most celebrated and controversial trial in Southeast Asia. It involved atrocities perpetrated at the Sime Road Internment Camp during the Japanese occupation of Singapore. Excitement surrounding the trial was due to the personages involved: British, Australian, Dutch and American civilians and officials, men and women, who had been wartime 'guests' of the Japanese at Sime Road Camp. Anxiously, the public awaited their testimony.

A special war crimes court was set up in Victoria Memorial Hall in Singapore to hear the case. The indictment charged five Japanese with "being concerned" in the ill-treatment of said civilian internees as well as the death of one, a former Malayan Government official. Two Japanese lawyers, assisted by a British captain, defended the accused, who pleaded not guilty.

One after another, former internees of the camp--government officials, judges, lawyers, doctors and distinguished citizens--marched to the witness stand and repeated stories of "incredibly bad" conditions in the camp. Widespread sickness, nutritional deficiencies, beatings by Japanese guards, they testified, had all been common. The trial lasted eleven days. On September 12, 1946, the Court, after a mere 40 minutes of deliberation, rendered its verdicts and sentences. A packed, and then shocked, audience heard the Court sentence three of the accused to death, one to life imprisonment, and one to seven years

⁷⁸ For coverage of the trial, see passim., Straits Times, Oct. 22, 29, 31, Nov. 1, 8, 19, 20, Dec. 3, 4, 1946.

⁷⁹imprisonment. In relation to sentences pronounced in other trials--often involving crimes colossal in nature--the sentences meted out in this case seemed unusually harsh. Controversy surrounded the trial for some time to come. But more on this matter will be said shortly. For now, other facets of the trials demand attention.

Not all British war crimes trials, of course, resulted in convictions. In numerous cases, British Courts refused to find Japanese guilty on the grounds that the charges against them had not been proven "beyond a reasonable doubt." One extraordinary case involved a British woman who had fallen one hundred feet to her death from a window in Kuala Lumpur in 1943. The crux of the case centered on whether the woman had fallen from the window accidentally, jumped voluntarily, or been pushed out by the Japanese officer who, alone with her in the room, had beaten and abused her. A "surprised" audience heard the Court acquit the accused on the ground of insufficient proof.⁸⁰

Japanese were also acquitted in cases where "doubt in the identification" or "discrepancies in the evidence" existed.⁸¹ A court sitting in Rabaul, New Britain, freed an accused upon his immediate superior's full acceptance of responsibility for the crimes charged.⁸² Strict adherence to legal principles did not always come easy. One case

⁷⁹For coverage of the trial, see passim., ibid., Aug. 23, 28-31. Sept. 3-5, 11-12, 1946.

⁸⁰Ibid., July 3, 1946.

⁸¹Malay Mail, May 6, 1947.

⁸²Ibid., May 1, 1947.

involved four Kempeitai accused of torturing to death three Chinese. Three of the accused were convicted outright, but witnesses had difficulty identifying with absolute certainty the fourth. "Though there is no doubt that you were a member of this devils' gang," a rueful Court President addressed the fourth accused, "There is no evidence to justify a conviction in your case." He went free.⁸³ Many other similar examples may be found.⁸⁴

British Courts occasionally "amended charges" upon the introduction of additional evidence. Leniency was shown for a variety of reasons, including the youthful age or distinguished record of the accused, or for other "extraordinary" reasons.⁸⁵

Hopefully, the preceding pages have provided a reasonably clear, if incomplete, picture of the high caliber of men commissioned by the British to serve as defense lawyers at the trials. Still, more should be said of the conscientious, energetic and, often enterprising efforts put forth by these men.

Defense pleas and arguments covered a nearly boundless spectrum of rhetoric, emotion and legal reasoning. One defense attorney urged the Court to inter the hatreds of the recent war and to make certain that "the next war--a race war . . . is not started in this room right in front of the blindfolded figure of Justice." Another British officer, himself a former POW on the Burma-Siam railway, argued that it was

⁸³Straits Times, Feb. 27, 1946.

⁸⁴See, e. g., China Press, Mar. 18, 1947, Straits Times, Feb. 20, 1946, Mar. 18, 1947.

⁸⁵Ibid., May 3, Mar. 1, 8, Aug. 1, 1946.

"illogical" to prosecute military men for crimes against civilians in an era of "total War," citing Hiroshima as an example of the latter.⁸⁶ The peculiar traditions of the Japanese military system, with its emphasis on strict discipline and Spartan values, was frequently cited as a mitigating factor. One lawyer stressed in his defense argument Japanese ignorance of international law.⁸⁷ The most commonly used defense plea in war crimes trials in the East, British trials being no exception, was that of "superior orders."⁸⁸

Apparently, British defense lawyers did not complain publicly about the treatment afforded them or their clients in war crimes trials, for the press is silent in this regard. On the other hand, examples of defense counsel thanking the Court "for affording a most impartial and considerate trial to the accused"--following a conviction, no less--may be found.⁸⁹ There were even instances where convicted Japanese acknowledged their appreciation to the Court for granting them a fair trial.⁹⁰

Much has already been said about the British preoccupation with maintaining the highest principle of justice at the trials. The final

⁸⁶Ibid., Oct. 5, 1946; London Times, Apr. 3, 1947.

⁸⁷Straits Times, Feb. 2, Oct. 18, 1946.

⁸⁸See Law Reports, v. 15, pp. 156-57; also, Straits Times, February 22, Apr. 4, June 13, Aug. 28, Oct. 5, 18, Nov. 19, 1946; Malay Mail, Oct. 14, 1947.

⁸⁹Straits Times, June 7, 1946; also, Sleeman, Trial of Gozawa Sadaichi, p. 205.

⁹⁰Ibid., lxviii; Straits Times, June 7, 1946.

proof of whether these principles were strictly adhered to may be found in the actual behavior of the Courts themselves--examined above--and in that of their spokesmen, the Presidents. A brief analysis of their contribution follows.

When they chose to make public statements, Presidents frequently reaffirmed the Court's intention to secure the highest standards of British justice. Typical in this regard was the assertion by a British colonel that "It is one of the fundamental principles of British justice that the accused person be afforded a fair trial." Situations sometimes arose, however, which necessitated action, not words. At a Singapore trial, the President brought to the attention of the Court the fact that a local newspaper had incorrectly referred to the accused as "chief" of a wartime POW camp; actually the accused had merely been a guard. Press reports of trials were important, he noted, but they "should be careful, accurate and free from tendentious content." He had the error rectified. In another instance, the President shifted the location of a trial that had been constantly interfered with by "extraneous noises," such as passing traffic. "An atmosphere of quiet and calm," he said, "is an integral part of a British Court of justice. . . ." All subsequent trials were similarly relocated.⁹¹ Court Presidents, then, not only spoke in behalf of justice, they acted in kind.

* * *

Though conducted with admirable seriousness and care, British war crimes trials in the East were not flawless. And while the trials received "very little publicity . . . in the home Press," they engen-

⁹¹May 15, July 24, Aug. 1, 1946.

dered considerable controversy and criticism throughout Southeast Asia.⁹²

A major dispute, for example, centered about the question of the treatment afforded Japanese war criminals. Shortly after commencement of the trials, some persons--newspaper editors, former POWs, local residents--charged British officials with treating Japanese war criminals "too leniently--in fact almost indulgently." Under the control of such "softies," went the accusations, Japanese POWs awaiting trial had "regained their swagger."⁹³ Reports that two notorious Japanese war criminals had been released without trial or punishment for lack of sufficient evidence caused prolonged and sharply-worded debate in Parliament, resulting in the reopening of the case.⁹⁴ The Singapore Malay Tribune denounced the entire system of war crimes trials in Southeast Asia. Inexcusable "inefficiency," it charged, was resulting in the release of some 90% of war criminal suspects: unable to cope with the sizable task at hand, British authorities were prosecuting only major criminals.⁹⁵

Some, on the other hand, argued that British treatment of Japanese war criminals was too harsh, and should be amended. Included in

⁹²See e.g., letter from ex-POW to editor, London Times, Jan. 1, 1947.

⁹³See editorial, Straits Times, Jan. 13; also letters to editor, Sept. 7, 9, 1946.

⁹⁴See reports of debate in London Times, June 30, July 12, 27, 1948.

⁹⁵As reported in the China Press, Dec. 29, 1946.

this category were arguments predicated on philosophical or moral reasoning--that the "time had come for a general amnesty" for all war-connected "political crimes," or that to treat Japanese as harshly as they treated Allied POWs would be "to lower ourselves to their beastly levels."⁹⁶ Lord Hankey's dissent, noted above, in Chapter 2, focused mainly on the IMTFE, but could fairly be interpreted as an attack against "all Japanese war crimes trials."⁹⁷

By far, the most intensive controversy concentrated on the issue of sentencing of convicted Japanese. In all Eastern war crimes trials, no set rules or pattern for sentencing existed. Military courts, therefore, maintained sole discretion over the handing out of punishments. With myriad factors influencing each case, sentences inevitably manifested from time to time wide disparities. No better example of this may be found than the Sime Road Camp trial, referred to above.

Public protests against the inordinately severe punishments meted out in that case inundated the editorial desk of a leading Singapore newspaper, the Straits Times. The Times itself had editorially questioned the wisdom and fairness of the sentences, finding them disproportionate to the charges proved. "A British civil court does not sentence the most brutal of hooligans" to death unless he actually kills someone," wrote the Times. Why, then, it asked--in a case where no accused had been proven guilty of murder--"should a British military court do so?"⁹⁸ Incoming mail, most of it from former internees at Sime

⁹⁶London Times, Dec. 16, 1946; Straits Times, Dec. 20, 1946.

⁹⁷London Times, May 20, 1949.

⁹⁸Straits Times, Sept. 13, 1946.

Road, overwhelmingly supported the newspaper's position. While none who wrote held a "single grain of sympathy for the Nips," nearly all expressed "the strongest disapproval over the severity of the sentences." One feared that such action would be "looked upon by many as a retrograde step in the administration of British justice."⁹⁹

To some, the Court's behavior in the trial represented but part of a larger, more serious, matrix of problems. Were Japanese, asked several Britons, of the "humblest" rank--for example, POW camp guards with little education and "primitive" backgrounds, who, in most instances, acted under orders--receiving the most severe punishments?¹⁰⁰ Some doubted the correctness of all convictions.¹⁰¹

Most significant were allegations that British Courts had taken a different view toward trials involving all white, European, or Allied victims, and "that only a few adequately severe sentences had been passed in cases of atrocities committed on Asiatics."¹⁰² To be sure, unexplainable discrepancies in sentences may be found. In a Car Nicobar case, for example, a Japanese received a sentence of two years imprisonment for "being concerned" in the ill-treatment and killing of over 150 natives. One need only to compare this with sentences awarded in the Sime Road Camp trial. Also, why the press dubbed certain trials as, say, "one of the more important war crimes trials in Hong Kong,"

⁹⁹For letters, see ibid., Sept. 14, 16, 17, 19, 1946.

¹⁰⁰See letters to editor, London Times, Jan. 1, 9, 1947.

¹⁰¹Ibid., Jan. 10, 1947.

¹⁰²Straits Times, Sept. 7, 1946.

remains unanswered. Might it have been due to the victims concerned in the case--all white, and representatives of three different European countries?¹⁰³

Any comprehensive examination of sentencing trends in British war crimes trials would require an enormous amount of time and space. For now, we will have to be satisfied with two general, though not insignificant, conclusions: The first applies to nearly all Eastern war crimes operations, regardless of the supervising nation. Sentences meted out in the earlier trials were more severe than those in the later ones. With the passage of time, wartime memories "recede(d) farther and farther;" in accordance, later Courts exhibited "markedly more" moderation in their sentences.¹⁰⁴ Secondly, one merely has to take into account the remarkable demonstration by ex-POWs in relation to the Sime Road Camp trial, to understand the pervasiveness of British concern for justice and fair play. Unfair sentences may have been the occasional exception, but British public opinion would never have tolerated them as the norm.

III. "The Trials and Britain's International Relations"

Eastern war crimes trials constituted an intimate part, rather than an isolated aspect, of overall postwar British policy. As noted in the introduction to this study, the trials did not themselves serve as determining factors in the formulation of national

¹⁰³Ibid., Mar. 12, 1946; China Press, Oct. 18, 1946.

¹⁰⁴See editorial, Straits Times, Feb. 6, 1947.

policy. Rather, they were influenced and their course determined by factors, both domestic and international in nature, relevant to that policy.

* * *

Participation in World War II cost Britain greatly. In addition to immeasurable domestic destruction, "Britain's credit relationship to the rest of the world had disastrously changed." Over 25% of its overseas investment had been wiped away. External debts mounted alarmingly. With British shipping resources reduced by 30%, trade activity, and profits therefrom, declined rapidly.¹⁰⁵

The emergence of strong nationalist movements in many of its Southeast Asian colonial territories compounded Britain's financial ills. With Japan's defeat, these movements now rallied against those headed by S.A.A.C., who sought to restore Western colonial rule. Political and social instability and civil disorder became, in some areas, the order of the day. Any attempt to readminister the former enemy territories, British authorities conceded, would exact great economic and political costs from a nation already strained to the limits of its resources.¹⁰⁶

Perhaps most disconcerting to Englishmen was Britain's palpably weakened defense posture immediately after the war. Doubtless, the

¹⁰⁵M. A. Fitzsimons, The Foreign Policy of the British Labour Government: 1945-1951. (Indiana, 1953), p. 28; A.S.B. Oliver, "Outline of British Policy in East and Southeast Asia, 1945-May 1950," London: Royal Institute of International Affairs, 1950, p. 35.

¹⁰⁶For the rise of nationalist movements in Southeast Asia, see Russell H. Fifield, Americans In Southeast Asia, (New York, 1973), pp. 62-63.

spectre of a powerful, unpredictable and potentially hostile Soviet Union threatened many in England.¹⁰⁷ The proliferation of Communist-led insurgencies throughout Southeast Asia exacerbated these fears. Soon, the Western world's preoccupation with "international Communism" would become a dynamic of international affairs.

Accordingly, Foreign Secretary Ernest Bevin put aside the "pursuit of ideals" and concentrated on handling immediate postwar difficulties. Britain's weakened state, its leaders decided, "necessitated" a "careful reduction" of its overseas commitments and an "adjustment" of its relations with Asia and elsewhere. Toward these ends, Britain tried to settle its conflicts with "Asiatic nationalism by granting sovereignty to most of its major Asiatic possessions." It also sought to contribute adequately to a system of Allied collective security. Britain continued conscription and organized several Commonwealth conferences concentrating on future security arrangements in the Pacific. Moreover, as a British historian pointed out, it willingly accepted "United States political and military leadership. . . ."¹⁰⁸

Britain's financial dependence on America had been sealed with the latter's cessation of Lend Lease in August 1945. "Shocked" at first by this act, the British government from then on relied increasingly on its ability to acquire large dollar loans and to purchase food

¹⁰⁷The state of Anglo-Soviet relations was "causing much heart-searching concern in London," in Straits Times, Oct. 25, 1945.

¹⁰⁸Fitzsimons, Foreign Policy, pp. 35, 86; for the conferences, see New York Herald Tribune, Apr. 23, 26, 1946; W. N. Medlicott, British Foreign Policy Since Versailles, 1919-1963. (London, 1968), p. 270.

and raw materials on credit. In a phrase, economic, political and social weakness "prevented Britain from embarking on a strong and independent foreign policy."¹⁰⁹ Consequently, in several vital matters, Britain hewed to lines drawn by the United States: a solid block of opposition notwithstanding, Britain participated in international war crimes trials at both Nuremberg and Tokyo; it reluctantly began to dismantle its colonial empire; and it accepted "the fact that the occupation of Japan was to be an American show."¹¹⁰

It is against the preceding backdrop, then, that the British war crimes effort in the East must be viewed. No one can doubt London's sincere effort--successful in the end--to afford Japanese suspects careful and fair trials in the highest traditions of Anglo-Saxon justice. In this regard, Britain even demonstrated considerable independence. It chose, in one instance, to prosecute only those charged with committing war crimes, stricto sensu, and not, as did the Americans, those charged with "crimes against peace" or "crimes against humanity." In another, London informed the State Department in late 1947 of its determination not "to participate in any further international war crimes trials in the Far East" after the IMTFE.¹¹¹

Still, certain factors influenced, if not determined, Britain's

¹⁰⁹Harry S. Truman, Year of Decisions. (New York, 1955), p. 75; Fitzsimons, Foreign Policy, p. 35.

¹¹⁰See, e.g., Henry L. Stimson, On Active Service. (New York, 1947), p. 587 Lord Hankey, "Postscript" to Maugham, U.N.O. and War Crimes, pp. 113-14; Parl. Deb., H. of Lords, v. 142, 1946, pp. 1065-67; Fitzsimons, Foreign Policy, p. 38.

¹¹¹U.S. Dept. of State. Foreign Relations of the United States, 1947. vol. VI. The Far East. (Wash. D.C., 1972), Aug. 6, Oct. 9, pp. 270, 304-05.

Eastern war crimes policy. One was the decided lack of interest among Englishmen in the trials. Whether war weariness, the wish to bury past hatreds and all-too-recent memories, or the need to concentrate on national reconstruction accounted for this attitude, it is difficult to say. But, certainly, a general apathy toward the subject existed. The Times of London covered scantily the trials conducted in Southeast Asia and only moderately the IMTFE in Tokyo. Even in Southeast Asia, British public interest in the trials waned by 1947. Such attitudes were not lost on British officials.¹¹²

Another determining factor was England's substantial dependence, financially and in the matter of national defense, on the United States. By December 1945, the Chicago Sun reported, London had recognized that the lines of the Cold War in Asia--centering on the future of Japan--had been drawn between America and Russia.¹¹³ Aligning itself with its traditional ally, Britain therefore sought to conform its Eastern war crimes policy with that of the United States.

A third determining factor lay in Britain's devastated economic condition. Historically a great seafaring and trading nation, Britain sought in its postwar policy to resuscitate energetically its commercial past. War crimes policy was to be made compatible with this overriding goal.¹¹⁴

¹¹²See, supra, note 42; e.g., between July-Sept. 1946, the London Times contained but one brief reference to the IMTFE; for dying interest in Southeast Asia, see editorial, Straits Times, Feb. 6, 1947; see statement by Sec. of State for War Bellenger, London Times, Jan. 30, 1947.

¹¹³As reported in the Straits Times, Dec. 3, 1945.

¹¹⁴Olver, "Outline of British Policy," pp. 1-2.

Thus was the course of Britain's Eastern war crimes trials outlined: With wartime memories fresh and vivid, and with its people waxing indignant, demanding just retribution for unspeakable atrocities, the British government commenced its trials of Japanese war criminals in January 1946. By March 1947, British Military Courts had tried 701 Japanese, sentencing 181 to death, 450 to varying terms of imprisonment, and acquitting 70.¹¹⁵

But British interest soon turned to other matters, most notably economic recovery. In February 1947, a major Singapore newspaper could write that many Britons "are conscious of a growing longing for the day when it will be possible to have done with the whole business" of war crimes trials.¹¹⁶ Soon after, London began to wind down the extent of its overseas operations, war crimes and other. Penang trials were closed out in May. The Malay Mail reported in October that all British service personnel were being withdrawn from Japan due to manpower and dollar shortages. India and Burma received their independence in 1947 and 1948, respectively. Plans to end shortly trials in Hong Kong were revealed, under a cloud of controversy, in April 1948. Rumor had it, said a Member of Parliament, that the phasing out of trials and premature release of suspects in Hong Kong was the result of "an economy measure," whereby the government had "fixed a time limit," now "expired," for the disposition of all trials. Government officials denied the allegations.¹¹⁷

¹¹⁵London Times, Mar. 24, 1947.

¹¹⁶Straits Times, Feb. 6, 1947.

¹¹⁷Malay Mail, May 9, Oct. 8, 1947; also, see London Times, Jan. 15, 1947, July 12, 27, 1948; The New York Times, Apr. 2, 1948.

Autumn 1948 witnessed, for reasons explained in Chapters 2 and 3, the "focus of interest" of the American occupation in Japan begin "to shift from reform to economic recovery." United States officials accordingly recommended an end to Japan's reparations payments and pressed their Allies for speedy conclusion of a peace treaty with Japan. SCAP's headquarters urged the "expedition" of Eastern war crimes trials and released all remaining "Class A" war criminals held since autumn 1945.¹¹⁸

London found the new American direction to be harmonious with its own intentions. Alone among the Commonwealth nations, Britain did not contest the scaling down and eventual termination of Japanese reparations payments. It favored an early peace treaty with the former enemy. Nor did it fear Japanese rearmament. Once Britain recognized that "the primary motivation" of American global strategy in the Pacific--that is, "to align Japan with the United States in world affairs," the objective being "security against the USSR--represented its best interests, too, it sought to cooperate. Britain's debilitated defense posture, especially in light of British fears of "Russian preparedness," left London few alternatives but to associate itself with the American position.¹¹⁹

Moreover, Japan's postwar economic recovery was nearly as important to Britain as to the United States. With an economy "entirely dependent" on world-wide trading interests, Britain's first priority cent-

¹¹⁸Edwin O. Reischauer, Japan: The Story of A Nation (New York, 1970), p. 233; Frederick S. Dunn, Peacemaking and the Settlement With Japan. (Princeton, 1963), pp. 72, 76-77, 84; U.S. Dept. of State, Foreign Relations, 1948, June 12, p. 822; New York Herald Tribune, Nov. 14, 1948; The New York Times, Dec. 24, 1948.

¹¹⁹Dunn, Peacemaking, pp. 84, 89, 121; Olver, "Outline of British Policy", p. 11. British fears of the USSR were reported by a Staff Correspondent in London, Sydney Morning Herald, Sept. 27, 1948.

ered on creating and maintaining "conditions all over the world" in which trade would "flourish." In this regard Britain attempted to promote in postwar Southeast Asia "first reconstruction and then economic development." It's "primary interest" in China during these years, too, was trade. Similarly, wrote a British historian, its principal interest towards Japan "since the war has been economic." Indeed questions of mutual trade (particularly in textiles), Japanese shipping, Japanese whaling industry, and the like dominated Anglo-Japanese relations in the period shortly after World War II.¹²⁰

Above all, Britain sought to develop and expand its commercial ties with Japan. English representatives attended and energetically participated in organizational activities at the Yokohama trade fair in spring 1949. Japan's economic recovery, asserted the British member of the Allied Council for Japan "was clearly linked with sterling trade and sterling finance;" responsible Japanese trading circles, he insisted, should seek to cultivate "future economic relations with the sterling area."¹²¹ Regular negotiations toward a new and enlarged trade agreement between sterling area countries and Japan followed.¹²²

Britain, then, seeking to strengthen and widen commercial relations with Japan, had no desire to keep alive an issue--such as war crimes trials--which could only strain and weaken Anglo-Japanese relations. Nor did it wish to interfere with American global strategy in

¹²⁰Olver, "Outline of British Policy", pp. 1-2, 8, 11, 15.

¹²¹Malay Mail, May 27, 1949.

¹²²Ibid., June 27, Oct. 11, 1949.

the Pacific. British officials believed, besides, that their original aim of bringing to justice as many guilty Japanese as possible had been fulfilled. Finally, the fact remained that upon conclusion of a peace treaty, Japan would shortly become an ally of the non-communist world. Britain, therefore found no difficulty in concurring with the Far Eastern Commission's "recommendations" that no new class "A," or "B" and "C" trials be initiated after February 24 and June 30, 1949, respectively; also, London agreed to bring all remaining trials to an end by September 30, 1949.¹²³ In December of that year the Japanese Foreign Office announced that Britain, along with the United States, China and Burma had "finished the war crimes trials of Japanese."¹²⁴

Precise and final statistics on British Eastern war crimes trials are not available at this time.¹²⁵ The latest are those provided by the UNWCC, as of March 1, 1948. At that time, Britain had tried 388 cases, involving 1,143 accused. 305 of those had received the death penalty, 718 had been sentenced to varying terms of imprisonment and 120 were acquitted.¹²⁶

Simple arithmetic, therefore, demonstrates that, as of March

¹²³Far Eastern Commission. Third Report by the Secretary General. Dec. 24, 1948-June 30, 1950. Pub. 3945, F. E. Series 35 (Wash. D.C. 1950), pp. 4-5; also, The New York Times, Mar. 16, 1949.

¹²⁴Malay Mail, Dec. 6, 1949.

¹²⁵"These records are closed to the general public for a period of thirty years and . . . are not available for . . . study until 1980/81." Letter, May 18, 1976, from the Judge Advocate General's Office, London, to author.

¹²⁶History of UNWCC, Appendic IV, p. 518.

1948, British Military Courts had found approximately 89.5% of those Japanese they had tried guilty; 10.5% not guilty. 26% of the total number of accused and 30% of the convicted had been sentenced to death; 63.5% of the accused and 70% of the convicted to prison terms.

Press coverage of the trials continued up to, but did not include--for whatever reason--1949. Reports are to be found of two trials completed during this period, involving five Japanese: all were convicted, one sentenced to death, the others to prison.¹²⁷

In spite of the incomplete records, two general, though reasonably safe conclusions may be offered: first, the number of trials conducted by the British between January and September, 1949, were relatively few in number, as indicated by the press silence; and second, the statistical percentages relating to acquittals, convictions, death penalties, etc., probably held consistent, with perhaps a slight decline in the harshness of sentences (especially death) meted out.

¹²⁷See London Times, Aug. 25, Nov. 30, 1948; China Press, Oct. 23, 26, Nov. 30, 1948.

CHAPTER VI

PART I. AUSTRALIA

I. "Procedure and Machinery"

After that of the United States and Britain, the third heaviest burden for the handling and disposing of Eastern war crimes trials fell upon Australia. Like their Allies, Australian officials showed profound concern during the war for the haunting issue of Japanese atrocities. Australia participated in the founding of the UNWCC in October 1943 and, in November 1944, extended its war crimes investigations by joining the Far Eastern Sub-Committee of the UNWCC.¹

As more and more increasingly explicit reports of inhumane Japanese wartime treatment toward Australian soldiers and civilians filtered into the homeland, public indignation mounted.² Perhaps in none of the Allied nations was there greater determination to apprehend and punish all guilty Japanese. Everything possible would be done, assured Minister of External Affairs Herbert V. Evatt, to "ensure the punishment of all culpable persons;" no Japanese war criminal would receive immunity. Toward this aim the government established in June 1944 (and enlarged in September 1945) its own War Crimes Commission,

¹The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1949), pp. 120, 127, 144.

²See reports in Straits Times, Sept. 22, 1945 and New York Herald Tribune, Oct. 29, 1945.

headed by Sir William Webb, to delve exclusively into violations perpetrated against Australian nationals, and "to obtain first-hand accounts of Japanese war crimes." Australian representatives also served conscientiously at the IMTFE in Tokyo, presided over by their own Sir William Webb.³

Publication of parts of the Webb report heightened emotions in Australia. Questions and demands relating to the "immediate and effective" apprehension and punishment of Japanese war criminals inundated government authorities. Officials responded by repeating assurances that no war crime would go unanswered. Such "outrages," they noted, shook the very foundations of civilization; their redress was necessary unless "the grossest defeat of justice and a travesty of principles for which the war was fought" be the result.⁴

That "justice" not be "defeated" in the Eastern war crimes trials became a primary goal of Australian authorities. Accused persons should be brought to trial in a "spirit of justice," not revenge, said Minister Evatt. Members of Parliament asserted that all arrests and trials would take place before "properly constituted tribunals" and through appropriate "channels." To be sure, the government would not brook "kid-glove treatment of the Japanese," Australia's "most ruthless

³See speech, Sept. 10, 1945, in Herbert V. Evatt, Australia In World Affairs (Sydney, 1946), p. 66; also, Australia. Dept. of External Affairs. Current Notes On International Affairs, 1945, v. 16, pp. 219-20. For Webb Commission, see Australia. Parliamentary Debates. Senate and House of Representatives. Sydney. Oct. 4, 1945, p. 6510; Apr. 10, 1946, pp. 1294-97. For Australia's role at the IMTFE, see, supra. Chapter 1.

⁴Evatt, Australia, pp. 65-66; Parl. Deb., 1945, see, e.g., Sept. 18, 20, 21, 25, 27-28, Oct. 4, 5, 1945, v. 185, pp. 5485, 5765, 5681, 5778-9, 5811, 6109, 6642-3.

and barbarous enemy" ever; they "should be treated with the utmost severity," but "justly," nonetheless.⁵

The Australians based their jurisdiction and outlined regulations for the governing of war crimes trials upon the Commonwealth of Australia War Crimes Act, 1945. Validated by "Royal Assent" on October 11 of that year, the bill followed "generally the lines" drawn by Britain's Royal Warrant of June 14, 1945.⁶ Yet, distinctions between the two documents may be found.

The most notable difference, of course, rested in the fact that the Australian provisions were created by Act of Parliament, while those of Britain were made by a Royal Warrant issued under the Royal Prerogative. Another difference lay in the Australian Act's definition of "war crime." Section 3 of the Act defined war crime as "a violation of the laws and usages of war" or as "any war crime" so defined by a Board of Inquiry (i.e., the Australian War Crimes Commission), "committed in any place whatsoever, whether within or beyond Australia, during any war."

A list of 35 separate violations followed, which the Board of Inquiry had included in its definition. First on the list stood "crimes against peace," expressed in words similar to those used in Section II,

⁵Evatt, Australia, p. 66; Parl. Deb., v. 185, Sept. 18, 20, 26, 1945, pp. 5485, 5681, 5929.

⁶Australia. War Crimes Act 1945. Canberra, 1945. See discussion of the War Crimes Act in Parl. Deb., Oct. 4, 1945, pp. 6510-12. Also, see "Australian Law Concerning Trials of War Criminals By Military Courts," in Law Reports of Trials of War Criminals, compiled by UNWCC, 15 vols., (London, 1947-49), v. 6, Annex, pp. 94ff. For the Royal Warrant, see Chapter 5, pp. 137ff.

article 5a. of the Charter of the IMTFE.⁷ Violations 2-35 comprised crimes enumerated specifically by Australia, but which by any general definition fell also under the rubric "violations of the laws and usages of war." For example: "murder and massacre" (2), "torture of civilians" (4), "rape" (6), "confiscation of property" (15), and "cannibalism" (34). No allowance was made for "crimes against humanity," excepting such crimes as also fell under the phrase "violations of the laws and customs of war." Australia's War Crimes Act, then, provided a broader definition of war crimes than the Royal Warrant, but not as broad as those of the United States or the IMTFE.⁸

Under the Act, Australian Military Courts had jurisdiction in all cases where the victim had "been either resident in Australia or a British or an allied subject."⁹ Power to convene military courts, "appoint officers to constitute the courts," and to award, carry out and, if need be, "mitigate or remit" sentences, devolved upon the Governor-General or his delegate(s).¹⁰

Regulations relating to the composition of an Australian Military Court and to the appointment of Judge Advocates closely adhered to those followed in British Military Courts. Courts were to "consist of not less than two officers in addition to the President." Where prac-

⁷No. 1 read: "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." Law Reports, v. 6, Annex, p. 95.

⁸Ibid., pp. 95-97.

⁹War Crimes Act. Section 12; Law Reports, v. 6, Annex, p. 98.

¹⁰War Crimes Act. Sections 5, 6; also, Parl. Deb., Oct. 4, 1945, pp. 6510-11.

ticable, the measure directed, "the Convening officer should . . . appoint as many officers as possible of equal or superior relative rank to the accused." The same principle applied in the matter of service branch: where practicable, "at least one officer" of the same service branch as the accused should be appointed to the Court.

Australia, as Britain, adopted the institution of mixed Military Courts. The War Crimes Act permitted appointment to courts, "other than the President," of "one or more officers of any allied or associated Power," provided that at least half the Court, including the President, be comprised of Australian officers. Australian Military Courts could, however, appoint as President officers from England or "any other part of his Majesty's Dominions."¹¹

Judge Advocates might be appointed to Military Courts, if the Convening Officer so decided. Following the British precedent, the role of the Judge Advocate consisted "mainly in advising the Court on matters of substantive and procedural law." He had no voting powers. Nor were the members of the Court obliged to accept his advice. Nevertheless, his advice "carried great weight."¹²

Australian Courts, again like those of Britain, were not bound by the ordinary rules of evidence. "Any oral statement" or "document appearing on the face of it to be authentic," might be taken into consideration by a military court. The sole factor determining the admissibility of evidence rested with its probative value: that is, whether it appeared to the Court "to be of assistance in proving

¹¹Law Reports, v. 6, Annex, pp. 98-99.

¹²Ibid., p. 99; on the Judge Advocate, see ibid., v. 15, p. 165, n. 3.

or disproving the charge." Military courts followed procedure as set down in the Imperial Army Acts and Rules of Procedure relating to field general courts-martial.¹³

Accused persons were guaranteed the right to "properly qualified" counsel, either British or from any other country, including their own. Australian Courts that found an accused guilty could award any of the following punishments: death (either by shooting or hanging), imprisonment for life, or any less term, confiscation of property or a fine of any amount, or both. Here another principal distinction between Australian and British war crimes trial procedure may be found. The War Crimes Act provided that no death sentence could be passed "without the concurrence of all those serving on the court if the court consists" of three members, "or without the concurrence of at least two thirds of those serving on the court" if the court has more than three members. No similar provision was contained in the Royal Warrant.¹⁴

Convicted persons could submit a petition to the Confirming Officer against the finding or the sentence or both. Should the Confirming Officer agree with the decision or sentence, the case ended there. If not, he referred it to the Australian Judge Advocate-General or his deputy for final disposition.¹⁵

All commonwealth nations, Australia included, relied heavily and regularly on municipal law in their war crimes operation. Charges,

¹³War Crimes Act. Sections 9 (1), 10.

¹⁴Ibid., Sections 11 (1) (3); Law Reports, v. 6, pp. 100-01.

¹⁵Ibid., p. 101.

accordingly, often consisted of "murder" or "manslaughter."¹⁶ Similarly, all Commonwealth nations frequently introduced as evidence, or as "authoritative statements of the law," official manuals on international or military law and treatises by distinguished jurists. In one case, for example, an Australian Judge Advocate "urged" the Court to refer to Oppenheim, a noted authority on international law, as well as the British Manual of Military Law, before reaching their decision.¹⁷

* * *

Australians wasted little time organizing their war crimes operation. Through wide-scale investigations begun as early as 1942, and later accelerated by the War Crimes Commission, Australian authorities amassed a tremendous amount of evidence against Japanese war criminal suspects by 1945.¹⁸

In October 1945, the Governor-General in Council delegated, under the War Crimes Act, the power to convene military courts to certain staff officers and field commanders of the Australian Military Forces. Shortly after, full responsibility for "exercising and administering" pivotal control and supervision over all investigations and prosecutions of war criminals devolved upon these military authorities. The Adjutant-General appointed an Australian officer, in civilian life a barrister, to head the operation. Army Headquarters, Melbourne, became the coordinating center.¹⁹

¹⁶See, e.g., Australian cases at Rabaul, in Law Reports, v. 15, Supplemental Cases, p. 8; also, Straits Times, Oct. 2, 1946.

¹⁷Law Reports, v. 5, p. 27, v. 15, pp. 20-21.

¹⁸History of UNWCC, pp. 386-87.

¹⁹Ibid., p. 387.

Under the direction of this central war crimes agency, Australian military authorities established "proper organs" to conduct investigations and to apprehend suspects. These "War Crimes Sections" were set up in Singapore in December 1945 and in Tokyo in February 1946.

The Australian Section worked "in the closest possible liaison" with the British war crimes investigation authorities in Singapore, as well as with Dutch military authorities in Java. Trials involving Australian victims were tried by Australian Military Courts constituted in Singapore or by British Military Courts, upon which an Australian member sat.

Attached to G.H.Q., S.C.A.P., Tokyo, was the Australian War Crimes Section (S.C.A.P.). Its duties were similar to those of its Singapore counterpart, except that no Australian Military Court convened in Japan. This branch concentrated on investigating war crimes committed against Australian POWs while in captivity in Japan. Cases sufficiently built up by the Australian Section were turned over to American Military Commissions, with an Australian officer sitting as a member, for trial. Frequently, Australian officers served as prosecutors in these cases.²⁰

Australian military forces also "actively participated" in the investigating and trying of war crimes outside the scope of these two centres. Australians, for example, performed admirably in the South-West Pacific Area. In the New Guinea-New Britain regions, Australian military personnel assisted in the investigation and preparation of

²⁰Ibid., pp. 387-88. For cooperation with Dutch authorities, see Current Notes, Jan. 1946, v. 17, no. 1, p. 4.

many cases against Japanese suspects. And while no individual war crimes sections were set up there, Australian Military Courts convened in New Guinea and Rabaul.

Australian Military Courts assembled in these places tried Japanese for war crimes committed against "local British and European residents, Chinese and Dutch nationals, both military and civilian, Indian soldiers, . . . and Australian personnel." Accordingly, in cases involving their nationals, British, Chinese and Indian officers joined Australian Military Courts as members.²¹

Army Headquarters, Melbourne, also maintained direct communication with Australian investigation teams in the Celebes Island, Halmahera Island group, Timor, the Ceram Islands (including Amboina), Talaud Islands, and British and Dutch Borneo. Two specific Australian Divisions, one in Morotai, the other in Labuan, British North Borneo, coordinated these investigations and, later, conducted trials in these areas.²²

Australian war crimes teams relied, basically, on the same methods for building up cases as the British: namely, broad, pervasive, first-hand investigations, interviews with large numbers of ex-POWs and other witnesses, and cooperation with Allied investigation teams. Most Australian war crimes trials hinged upon evidence documentary in nature, that is, statements and affidavits.²³

²¹History of UNWCC, p. 388. See, e.g., London Times, Jan. 4, 8, 18, 1946, Mar. 22, Apr. 9, May 17, 1947.

²²History of UNWCC, p. 389.

²³Ibid., pp. 387-90; Law Reports, v. 11, pp. 60, 62; Parl. Deb., v. 186, Apr. 10, 1946, pp. 1295-96.

II. "The Trials"

Australia conducted nearly 300 Japanese war crimes trials, involving over 900 accused, in the years 1945-1951. As in the cases of the United States and Britain, no attempt will be made here to examine them comprehensively. Rather, certain trials, involving important legal principles, noteworthy personages, or any other aspects special in nature, will be highlighted.

* * *

Not by chance, the initial Australian war crimes trial in the East involved a crime hitherto unprecedented in modern international law. At Wewak, New Guinea, Australian military authorities wrestled with the problem of how to deal with a Japanese officer accused of "cannibalism" against local inhabitants during the war. Twentieth century international law contained no provisions to accommodate such a "primitive" violation.²⁴

Australians, however, had anticipated the situation. In its definition of war crimes, the Board of Inquiry had included two additional violations: "cannibalism" and "mutilation of a dead body." Either charge, then, would serve well in this case--obviously selected as the first Australian war crimes trial in order to establish a precedent for future trials.

At the trial, the accused admitted eating part of an Australian POW's body. He pleaded innocent nonetheless, explaining that his starving condition had caused him to lose temporarily his senses. On December 4, 1945, after deliberating two days, the Court found him guilty

²⁴The New York Times, Nov. 5, 1945.

and sentenced him to hang.²⁵

Trials commenced in Morotai on November 29, 1945, and in Labuan on December 3, 1945. Australian officials had, prior to the start of trials, emphasized in their war crimes policy that primary attention would be shown to cases involving the "commission of serious crimes," for example, mass murder, starvation, savage unprovoked attacks and the like.²⁶ The opening trials in both these places reflected this policy. A military court at Labuan convicted a Japanese sergeant major of wantonly massacring 51 POWs at Miri, Sarawak, in June 1945, and sentenced him to death by shooting.²⁷ At Morotai, another military court found 10 of 11 Japanese guilty of "crucifixion and murder" of three Australian and one American airmen on the Talaud Islands, near Celebes, in February 1945.²⁸

Australian Military Courts commonly held "mass trials." There was nothing unique about this. All the prosecuting nations did likewise. However, whereas the largest American or British trials might comprise 30 or 40 accused--in itself, a considerable and unwieldy task--Australian courts occasionally featured more than twice that number. One, "the biggest mass trial so far held in the Pacific area," the press called it, opened in Labuan in December 1945. There, 70 Japanese were "jointly" charged with ill-treatment of hundreds of civilian internees

²⁵For trial coverage, see ibid.; also, New York Herald Tribune, Dec. 2, 1945; Stars & Stripes, Shanghai, Dec. 4, 1945.

²⁶History of the United Nations War Crimes Commission, pp. 389-90.

²⁷The New York Times, Dec. 6, 1945.

²⁸China Press, Dec. 15, 1945.

at Kuching, Sarawak.²⁹ Another, held in Amboina, saw 93 Japanese officers and POW camp guards "charged collectively" with "calculated cruelty" and other ill-treatment of Australian, Dutch and American POWs.³⁰

Trials conducted at Morotai and Labuan ended on February 28, 1946, and January 31, 1946, respectively. Between March 1 and April 29, 1946, trials took place at Darwin, these being the only war crimes trials held on Australian soil.³¹ The center of activity then shifted to Rabaul, New Britain, where between March 1946 and December 1947 some of the most interesting trials occurred.

Denial of a fair trial during a war constituted a war crime. So ruled an Australian Military Court at Rabaul in a case heard March 28-29, 1946. Early in the trial, the accused admitted having beheaded a Chinese prisoner in 1944. While there had been "no court-martial or other formal trial," defense counsel argued nonetheless that the victim had been adequately investigated and proved guilty of war crimes. Furthermore, he averred, the "serious" war situation "justified" his client's act: under such circumstances, the execution constituted a "summary trial" which was legal under Japanese military law. The Court rejected the plea and sentenced the accused to death. Not in vain, though, was the superb defense effort put forth. A higher military authority later commuted the punishment to seven years' imprisonment.³²

²⁹London Times, Dec. 12, 1945.

³⁰Ibid., Jan. 4, 1946. For other mass trials, see Dec. 15, 1945; Stars & Stripes, Shanghai, Jan. 23, 1946; Straits Times, Sept. 17, 1946.

³¹History of UNWCC, p. 389; Australian Encyclopaedia (Sydney, 1958, p. 156.

³²Law Reports, v. 5, p. 76, n. 4.

The Court's ruling in the preceding case did not render the issue--denial of a fair trial--a closed matter. Variations arose in defense claims that victims of wartime executions had, indeed, received fair trials from Japanese, thereby preventing courts from establishing any set rule.³³

One case involved seven Japanese charged with "unlawfully killing" 18 natives of the Rabaul area, in September 1944. The victims had been proven and self-confessed members of an underground movement against the Japanese Army. Their functions included the concealing and stealing of weapons and rations, destruction of petrol and supplies, and harassment, even killing, of Japanese soldiers--all acts defined in the Japanese military code as "war crimes."

The accused tried the natives before a summary trial. It lasted 50 minutes, 4 minutes being devoted to testimony, 20 minutes to deliberation over verdicts and sentences. No defending officer was provided for the accused. The Japanese justified the brevity of the trial "in view of the time element;" that is, Rabaul, they said, had been declared an emergency area in April 1944. Finally, counsel for defense argued, "summary trials in the field for war criminals had been authorized by the Japanese Government. . . ."³⁴

The Court found the two accused who had served as judges at the summary court guilty and sentenced them to life imprisonment. The rest were acquitted. The Judge Advocate advised the Court that had the

³³See, e.g., *ibid.*, Cases Nos. 27, pp. 32-36, and 28, pp. 37-38.

³⁴*Ibid.*, Case No. 26, p. 25.

"deceased had a fair and reasonable trial"--even by Japanese standards--then the accused would be "entitled to an acquittal." But, again, the matter was left unsettled: a Confirming Officer, obviously viewing the relevant facts in a different light, shortly after commuted the life terms to imprisonment for two years.³⁵

A good number of trials at Rabaul, and elsewhere, dealt with the legal principle of "command responsibility." One typical case charged that the accused, Lt. Gen. Baba Masao,

while commander of armed forces of Japan . . . unlawfully disregarded and failed to discharge his duty as a . . . commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes. . . .³⁶

Evidence adduced at the trial revealed that Masao, in late 1944 and early 1945, had ordered the evacuation of about a thousand British and American POWs from a camp at Sandakan, Borneo, so as to escape an anticipated allied landing nearby. Though beset by widespread illness, meagre rations, and inadequate clothing, the POWs were nonetheless marched 165 miles "over extremely difficult country" to Ranau. The journey proved a monumental disaster: unthinkable hardships, illness, ill-treatment and outright murder of those who could not keep up by Japanese guards resulted in the deaths of hundreds. Only 183 POWs reached Ranau and of these 150 died shortly after arrival. The 33 survivors were later shot on the orders of an officer under the command of the accused.³⁷

The march to Ranau, contended the defense, was an "operational

³⁵Ibid., pp. 26, 30-31.

³⁶Ibid., v. 11, Case No. 60, p. 56.

³⁷Ibid.

necessity," due to the exigencies of the war situation. In fact, Allied troops did land in Sandakan in July 1945. Moreover, the defense noted, Japanese soldiers had marched along side the POWs and had suffered "the same hardships" as they. Masao testified that he "had done his best" to provide for the prisoners, that he had taken measures to secure provisions and medical supplies, and that he did not learn of the murders until after their commission.³⁸

Still, countered the prosecutor, "the accused had an undoubted duty to ensure that prisoners of war were treated in accordance with the requirements of international law." His failure to control the conduct of the members of his command, he alleged, whether deliberate, "or though culpable negligence," made him "guilty of a violation of the laws and usages of war."³⁹

In his summation of the evidence and the law, the Judge Advocate advised the Court as to "the duties of a commander" under international law. He cited, for example, the Hague Convention, 1907 (Armed forces "must be commanded by a person responsible for his subordinates."), the Geneva Convention, 1927 (POWs "shall at all times be humanely treated and protected. . . ."), and the majority judgment of the U.S. Supreme Court In re Yamashita (The "law of war presupposes that its violations are to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.")⁴⁰

³⁸Ibid., pp. 56-57.

³⁹Ibid., p. 58.

⁴⁰Ibid., pp. 58-59.

On June 2, 1947, the Court judged Masao guilty and sentenced him to hang. The sentence was carried out. Without a reasoned judgment, there is no way to ascertain exactly why the Court ruled as it did. Nevertheless, in light of the prosecution's argument and the passages quoted by the Judge Advocate in his summation, it appears that the conclusion reached by the UNWCC is sound. In this case, it wrote, "as in other cases before Australian courts, the existence of the duty of a commander as outlined in In re Yamashita was looked upon as well established in international law, and the failure to discharge this duty as a war crime."⁴¹

To be sure, Australian courts almost always convicted Japanese in cases concerning the principle of command responsibility. Yet, as "no hard and fast rule" existed with regard to the "extent" of a commander's duty, unique circumstances made each case different. Sentences hence varied, sometimes ranging from death, as in the above case, to as little as five years' imprisonment.⁴²

No defense plea, as previously pointed out, was offered more often at Eastern war crimes trials than that of "superior orders." Indeed, Japanese accused and their counsel frequently emphasized in their defense arguments the nearly sacred quality of the twin virtues of "inflexible discipline" and obedience to orders as defined in the Japanese military code.

In one instance, a Japanese Major accepted total responsibility

⁴¹Ibid., p. 59.

⁴²Ibid., pp. 59-60; London Times, Apr. 9, 15, 24, May 17, 1947, The New York Times, Apr. 15, 1945.

for having ordered the bayonetting of three Australian airmen. He said that his order for the execution "was regarded (by his subordinates) as an order from the Emperor" and that the Soldiers' Manual declared that no matter what the nature of such an order, it must be done. Japanese on trial commonly responded in the affirmative to questions such as, "If you were ordered by your General to shoot your Colonel, would you carry out the order without question?"⁴³

Australian Military Courts, in a considerable number of cases, demonstrated a merciful view towards accused who pleaded superior orders. Lenient sentences or recommendations for mercy were not uncommon.⁴⁴ Nor were acquittals. One such Singapore case caused a furor whose reverberations reached all the way back to Canberra. It involved six Java Kempeitai who pleaded "obedience to superior orders" in answer to charges of "being concerned" in the unlawful killing of three Allied POWs and a Dutch woman. Upon the acquittal of the accused, representatives of the Australian war crimes section in Singapore signaled the Judge Advocate-General in Melbourne, asking for a ruling on the judgment. While the decision was left unchanged, war crimes legal circles in Singapore decided to treat the case as extraordinary and agreed unanimously that this judgment was "not binding on all future cases where 'obedience to superior orders' was pleaded."⁴⁵ Still, it did not stop Japanese accused in "almost every" subsequent trial from

⁴³London Times, Dec. 15, 1945. George Dickinson, "Mamus Island Trials," Royal Australian Historical Society, v. 38, 1952, p. 67.

⁴⁴See, e.g., Stars & Stripes, Shanghai, Jan. 23, 1946; London Times, Jan. 15, 1946, May 17, 1947.

⁴⁵Ibid., Oct. 2, 1946; Straits Times, Oct. 2, 1946.

basing their defense on these same grounds.⁴⁶

Press coverage of the Australian trials seemed to stress the uniqueness and cogency of prosecution arguments and efforts, rather than those of the defense.⁴⁷ In a celebrated Labuan case, for example, an Australian prosecutor cleverly elicited from an ex-POW Camp Commandant admissions--yes, accused had tortured POWs; yes, he had "gouged" their eyes, and so on--devastating to the defense. By dubbing the accused the "Beast of Belsen" in his closing remarks, the prosecutor provided the public--and the Court--with a pointed reminder of the subject's sadistic past.⁴⁸

Australian prosecutors often devised novel methods of winning convictions. One, at a Singapore trial, asked an accused to show the Court how hard a Kempeitai officer could hit a person with a belt. The accused's "enthusiastic demonstration" helped convict him on charges of beating a sick Australian POW.⁴⁹ Another case saw a Japanese corporal sentenced to five years' "rigorous imprisonment" for beating and kicking an Australian POW, after the prosecutor had requested a demonstration of "how he kicked." The accused had insisted that his kicks were harmless, but the deep dents in the wooden table legs fol-

⁴⁶The Pres. of the Court had based his judgment on an amendment in the Manual of Military Law (Australian ed.) which held that such a defense applies only when a superior order is not "obviously unlawful." See *ibid.*; also, see George Dickinson, "Japanese War Trials," Australian Quarterly, v. 24, 1952, p. 72.

⁴⁷See, e.g., *ibid.*, p. 75.

⁴⁸Straits Times, Jan. 12, 1946.

⁴⁹*Ibid.*, June 28, July 2, 1946.

lowing his courtroom demonstration bespoke otherwise.⁵⁰

Since early 1946, Australian military authorities had tried Japanese for war crimes at Singapore. In November 1947, this war crimes court was transferred to Hong Kong. Trials heard here covered "happenings in many parts of Southeast Asia and South West Pacific areas." War Crimes teams prepared most of the cases slated for trial here in Tokyo, although about a dozen were built up locally.⁵¹ Repeated at the Hong Kong trials were the same, now old, stories of inhumane Japanese treatment of Allied POWs and civilians, which had resulted in the deaths of hundreds and sufferings of countless more. Trials ended in Hong Kong in December 1948.⁵²

For reasons which will be explained in the next section, Australian authorities began to "wind down" Eastern war trials by summer 1948. Indeed, while investigations continued, no trials took place in 1949. The matter, though, did not go uncontested. While Australian Military Courts had tried close to 800 Japanese war criminals as of March 1948, several hundred still awaited trial.⁵³ Members of the Australian government expressed loud and persistent protests insisting that "all" Japanese suspects be tried. The relation of additional eastern war

⁵⁰Ibid., July 2, 1946.

⁵¹China Press, Nov. 16, 1947.

⁵²See, e.g., Sydney Morning Herald, Jan. 15, 26, 1948; The New York Times, Mar. 17, 1948.

⁵³See Parl. Deb., v. 207, Feb. 24, 1950, p. 100. Australia had tried 259 cases, involving 769 Japanese as of Mar. 1, 1948, in History of UNWCC, Append. IV, p. 518.

crimes trials to national or international political realities-- also to be explored in depth in the following section--meant little or nothing to these individuals. "Appeasement" of war criminals or of any nation, shouted the political opposition, would not be tolerated.⁵⁴

Consequently, the Australian government failed to meet the Far Eastern Commission's (but United States sponsored) "recommendation" that all Eastern war crimes trials be brought to an end by September 30, 1949.⁵⁵ In December 1949, the Minister for the Army announced that nearly 100 Japanese charged with war crimes would be tried on Manus Island.⁵⁶ Further government assurances, that the trials would be held forthwith, "as soon as necessary arrangements" had been completed, followed.⁵⁷ In fact, the Australians tried 92 Japanese at Manus Island between June 1950 and May 1951, thus constituting the last of all Japanese war crimes trials in the East.⁵⁸

Members of the Australian government commonly responded to various aspects of official war crimes policy in a fashion similar to that indicated above. Indeed, public interest in and concern for factual information on the trials, from their start to their finish,

⁵⁴Parl. Deb., v. 207 Mar. 16, 1950, pp. 882-83. See below, text, pp.

⁵⁵Far Eastern Commission. Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945, F.E. Series 35 (Wash.D.C., 1950), pp. 4-5.

⁵⁶London Times, Dec. 5, 1949.

⁵⁷Current Notes, v. 20, no. 1, Jan. 1950, p. 4.

⁵⁸Ibid., v. 21, no. 3, Mar. 1950, p. 229; Dickinson, "Manus Island", pp. 67 ff.

was a keynote of Australia's entire war crimes operation. Throughout the operation, for instance, Members of Parliament complained that they were receiving too little information concerning the trials. Was such "secrey," they asked, by government design?⁵⁹ Often, they registered strong protests against the "outrageous" judgments and sentences awarded by military courts, charging them with excessive leniency; or they accused them of permitting guilty Japanese to go free without justification for, perhaps, reasons of "political expediency."⁶⁰

Concern over whether such allegations, invariably denied by the government, contained any truth misses the fundamental point: that is, Australian public and official interest in the trials, that they be properly, sternly and justly administered, remained intact from 1945 to 1951. The trials in Australia, then, were not relegated to a level of minor importance.⁶¹

As early as September, 1945, Minister of External Affairs Evatt had declared the purpose of war crimes trials to be the attaining of justice, not the exacting of vengeance.⁶² Official policy never, and actual execution of the trials rarely, departed from this admirable position. Australia's "conduct in victory," asserted Prime Minister

⁵⁹See, e.g., Parl. Deb., v. 189, Dec. 4, 1946, p. 971, v. 198, Oct. 5, 1948, p. 1113.

⁶⁰Ibid., v. 186, Mar. 20, 1946, p. 415, v. 207, Mar. 16, 1950, pp. 882-88. See, also, Harold Wakefield, New Paths For Japan (N.Y., 1948), pp. 173-74.

⁶¹In this regard, note the frequent government reports on the status of the trials, E.g., Current Notes, 1945, v. 16, pp. 219-20; 1947, v. 17, p. 124; 1948, v. 19, no. 5, p. 267; Parl. Deb. v. 186, Mar. 20, 1946, p. 415; v. 189, Dec. 5, 6, 1946, p. 1173; v. 207, Feb. 24, 1950, pp. 100-01; v. 208, June 6, 1950, pp. 3711-12, June 7, p. 3839.

⁶²See supra, note 5.

Robert Menzies in 1950, "should be marked by an adherence to those great principles . . . which have characterized the whole development of what we call, in simple but proud terms, British justice." Even those whose profound hatred of the Japanese was of the most vicious and deplorable kind, racial, conceded that Australians, "as British people" had to mete out to enemies "the same measure of justice" that they granted their own people; in this way they would "maintain" their "standards of justice."⁶³

One particular incident is instructive in this regard. In June 1950, rumors circulated in Canberra alleging that the government had appointed a "hangman" and had authorized construction of a gallows at Manus Island before scheduled war crimes trials even began. A barrage of scathing Parliamentary attacks against the government ensued. Would the premature appointment of an executioner, inquired a critic, serve to "gain the respect of the peoples of Asia for our ideas of justice?" Such rumors were unfounded, replied the Minister for External Territories, and he further reassured all concerned of the government's steadfast intention to "ensure" all Japanese suspects "even-handed justice."⁶⁴

In short, Australian war crimes trials in the East were devoid of any "attempt to exact an eye for an eye. . . ."⁶⁵ A Japanese colonel, for example, who served as a defense counsel at Labuan, called a trial

⁶³Parl. Deb., v. 207, Feb. 24, 1950, p. 100; also, Mar. 16, 1950, pp. 889-90.

⁶⁴Ibid., v. 208, June 6, 7, 1950, pp. 3711-12, 3839.

⁶⁵Wakefield, New Paths For Japan, p. 173.

in which his client had been convicted and sentenced to death "very fair," and thanked the Court for its impartiality.⁶⁶ And while the conduct of the trials was not totally free from criticism, most of this criticism centered on the legal procedure applied at the trials--that is, the relaxation of customary rules of evidence thereby permitting the admission as evidence of affidavits, statements, documents and the like.⁶⁷ To these critics, one might offer the same admonition as that offered to critics of the legal procedure followed in the Yamashita case (see Chapter 3): they "seemed to confuse the difference between domestic civil courts and military commissions." Even critics of Australian trials admitted, however, that all Courts were presided over by "fair and able jurists."⁶⁸

Final trial statistics for Australia are summarized in the following table:

Place	Trials By Australian Military Courts			Convictions
	No. of Trials	No. of Accsd.	Acquitted	
Singapore	23	62	11	51
Morotai	25	148	67	81
Lanuan	16	145	17	128
Wewak	2	2	1	1
Rabaul	188	390	124	266
Darwin	3	22	12	10
HongKong	13	42	4	38
Manus	26	113	44	69
Total	296	924	280	644

Of the 644 (69.5% of total number of accused) prisoner convic-

⁶⁶The New York Times, Dec. 6, 1945.

⁶⁷Dickinson, "Japanese War Crimes Trials," pp. 69-71.

⁶⁸George E. Erickson, Jr., "United States Navy War Crimes Trials (1945-1949)," Washburn Law Journal, v. 5, 1965, p. 99, n. 40 Dickinson, "Japanese War Crimes Trials," p. 71.

ted, 148 (23%) were sentenced to death and executed; and 496 (77%) were sentenced to imprisonment. The prison sentences consisted of: Life, 39; 25 years, 2; 11 to 24 years, 152; 10 years, 82; under 10 years, 22.⁶⁹

III. "The Trials and Australia's International Relations"

Australians harbored a profound enmity toward the Japanese immediately after the war. The Webb Report, the first judicial investigation into alleged Japanese war crimes, confirmed stories by returning war veterans describing the horrible sufferings of Australians at the hands of Japanese. These stories enraged Australians. Many considered the Japanese their most detestable foes ever. Consequently, "all those" found responsible for atrocities and criminal conduct, declared Minister of External Affairs Evatt in Autumn 1945, would be called "to full account;" there would be no exceptions.⁷⁰

Certainly, Australians wanted just retribution for Japanese war crimes. Guilty Japanese, said one Member of Parliament, "must be treated justly, but ruthlessly." The "Potsdam principle of punishing war criminals," asserted Evatt, "should be rigorously applied." This, "not for the sake of revenge but in the cause of justice. . . ."⁷¹ Not surprisingly, shortly after the Pacific War's conclusion, a chorus of Parliamentary demands arose calling for the expeditious and stern

⁶⁹Australian Encyclopaedia, Table 2, p. 156.

⁷⁰Evatt, Australia, pp. 66-67, 76; Parl. Deb., v. 185. Sept. 26, 1945, p. 5929.

⁷¹Ibid., Herbert V. Evatt, "Has The Menace of Japan Been Removed?" The New York Times Magazine, Feb. 3, 1946; Current Notes, Mar. 1946, v. 17, no. 3, p. 134.

disposition of war criminals.⁷² Other factors, however, beyond an understandable desire to redress injustices, influenced--if not determined--Australia's war crimes policy.

"Security," wrote an Australian historian, N. D. Harper, was "Australia's basic interest in the postwar as in the prewar Pacific."⁷³ To be sure, Australian officials had their doubts as regarded the matter of national security. The heavy human and material costs of World War II has resulted in the palpable weakening of every participant, save the United States and the U.S.S.R. As Britain sought to reduce its overseas commitments, particularly those in the Pacific, a mounting sense of isolation settled upon Australians. "Additional responsibilities," which concerned the "maintenance" of their own and the entire British Commonwealth position in Southeast Asia and the Pacific, devolved upon Australians.⁷⁴

Accentuating this feeling of isolation was Australia's fear of a resurgent Japan. Indeed, it would be difficult to over-estimate the extent of this fear as it existed in Australia in the immediate postwar years. For example, it far surpassed any apprehensions that Canberra had vis-à-vis a Russian threat.⁷⁵ Australians remembered well the cruel,

⁷²See, e. g., Parl. Deb., v. 185, Sept. 18, 20, 21, 25, 27-28, 30, 1945, pp. 5485, 5765, 5681, 5778-79, 5811, 6642-43.

⁷³N. D. Harper, "Australia and the Peace Settlement With Japan." Australian Institute of International Affairs, Sydney, 1950, p. 22.

⁷⁴Parl. Deb., v. 192, June 5, 6, 1947, p. 3687.

⁷⁵See, e.g., Parl. Deb., v. 189, Nov. 14, 1946, p. 269; v. 196, Apr. 8, 1948, p. 747. Sydney Morning Herald, Oct. 1, 1948. Australia was "less concerned" with Russia, feeling that the U.S. would protect it, in Frederick S. Dunn, Peacemaking and the Settlement With Japan (Princeton, 1963), p. 128; as late as June 24, 1949, Australians feared a renewed "war" with Japan, in Malay Mail.

often inhuman, treatment afforded them by their Japanese foes; and they recalled vividly that, but for a signal American victory at Midway Island in June 1942, Australia might have become the next invasion target for the Japanese Imperial Army.

Government officials did not hesitate to express, clearly and frankly, the overriding objectives of Australian foreign policy: from its point of view, "the problem of a European settlement (could) never be regarded as so important or immediate as that of the settlement with Japan." Its "constant concern," explained Evatt, was that Japan would "not a second time rise as an aggressor. . . . (W)e must strive for security against further aggression."⁷⁶

Toward this end, Australia adopted a two-fold policy. The first dealt with its role in postwar Japan. From the moment of Japan's surrender, Australia "consistently demanded full participation at the highest level in the final settlement with Japan." Because of its "all-out effort in the war, Australia signed the Instrument of Surrender, and took part in the control of Japan, both as a member of the Far Eastern Commission and within the Japanese Islands themselves."⁷⁷

While Australians supported the FEC proposals that stressed the "importance of bringing about the establishment of a truly democratic and peaceful government in Japan," doubts always cropped up. "I am not moved at all by the statements made about the democratization of Japan," revealed one Member of Parliament. Defeat had "not changed the Japanese character one iota," warned another, and he urged

⁷⁶Current Notes, Mar. 1946, v. 17, no. 3, p. 134.

⁷⁷Ibid., Feb. 1947, v. 18, no. 2, p. 122.

his countrymen not to "be misled by the present apparent submission of the Japanese," who, might very well be masking hopes for a future revival of national power.⁷⁸

Guided by such deep-rooted suspicion and enmity, Australian authorities thus became convinced that "the terms of the peace settlement with Japan must be carried out with firmness." The economic bases of Japan's military strength, they insisted, had to be destroyed. Moreover, declared Evatt, a "firm" policy could only be achieved "if due account is taken of the atrocious conduct of the enemy."⁷⁹ In other words, Australia's war crimes policy--that is, to administer stern justice to all guilty Japanese--was an integral part of its overall foreign policy objectives.

The second aspect of Australia's twofold policy centered about its relations with the United States. If Australians learned anything from their war experience it was, as one put it, "that the greater the interest of the United States in the Southwest Pacific the better it will be for us."⁸⁰ Accordingly, Australian officials acknowledged, even encouraged, American predominance in the Pacific.⁸¹ But the fact of overwhelming American political and military power in the Pacific, Canberra soon realized, represented a mixed blessing for Australia.

⁷⁸Ibid., Mar. 1946, v. 17, no. 3, p. 136; Parl. Deb., v. 189, Nov. 14, 1946, p. 269.

⁷⁹Evatt, "Menace of Japan," p. 86; also, Current Notes, Mar. 1946, v. 17, no. 3, pp. 134, 136.

⁸⁰Parl. Deb., v. 193, Nov. 13, 1946, p. 162.

⁸¹New York Herald Tribune, Apr. 22, 1946.

For, while America assumed much of the defense burden for many Pacific nations, including Australia, it also sought to wield political influence proportionate to its military role in that region and, indeed, the world. Australia's relations with the United States would proceed smoothly, then, providing its major objectives coincided with those of America. In fact, there was a great deal of truth in the conclusion reached by a realistic member of Parliament that Australia "needed" the United States, while Australia had "nothing to offer it."⁸²

Australia's commitment to a system of collective security through the United Nations organization was sincere.⁸³ Nevertheless, several international events combined to render Australia, in the early postwar years at least, inordinately dependent on the United States: inter alia, the "curtailment" of British commitments in the Pacific; the "release of new nationalist forces in Southeast Asia," thereby "menacing" Australian security; and Australia's weakened military posture following the war.⁸⁴ In the final analysis, contended an Australian official, the United States was "the only nation that we can logically expect assistance from" in the case of an emergency.⁸⁵

⁸²See, e.g., The New York Times' assertion, Sept. 17, 1945, that Allied policy in the Far East "means American policy in the Far East." Parl. Deb., v. 204, Oct. 5, 1949, p. 947.

⁸³Indeed, in a speech outlining the "basic policies" of Australian foreign policy, support for the U.N. was listed first, in ibid., v. 196, Apr. 8, 1948; also, see Harper, "Australia and Peace Settlement," p. 22.

⁸⁴Parl. Deb., v. 192, June 5, 6 1947, pp. 3687-88; Sydney Morning Herald, editorials, July 19, Sept. 18, 23, 1948.

⁸⁵Parl. Deb., v. 204, Oct. 5, 1949, p. 947.

Hence, Australia--as did Britain and other Allied nations--on some occasions hewed to lines in its national and foreign policy drawn or suggested by the United States. There were also times, however, when the policies of the two nations conflicted so as to preclude total agreement. These realities affected in several instances, either directly or indirectly, Australia's policy towards war crimes trials.

Few nations, for example, demanded with more persistence and urgency than Australia that the Japanese Emperor be tried as a war criminal. Shortly after the war's end, it named Hirohito as its "number one war criminal." Calls for "Hirohito's scalp" sprang from all over Australia and grew in their intensity.⁸⁶ But American policy-makers had decided otherwise. For decidedly political reasons, described elsewhere in this study, they chose to grant immunity to Emperor Hirohito.⁸⁷ Their policy to try every guilty Japanese notwithstanding, Australians conceded, said Justice William Webb, that the Emperor's "immunity was, no doubt, decided upon in the best interests of all the Allied Powers."⁸⁸

American supervision of the Allied occupation of Japan, with

⁸⁶New York Herald Tribune, Jan. 17, 1946; see also, e.g., Evatt, Australia, p. 141; U.S. Dept. of State. Foreign Relations of the United States, 1946, v. VIII. The Far East (Wash. D.C., 1971), pp. 384, 386-87.

⁸⁷See, e.g., ibid., pp. 395-97; The New York Times, Jan. 18, 1946; "Joseph Keenan Meets The Press," American Mercury, v. 76, 1950, pp. 456-58. Also, see supra, Chapter 1, pp. 32-35.

⁸⁸Webb's Judgment, IMTFE, p. 19.

its early stress upon the "demilitarization" of Japan, initially pleased Australia. However, the occupation's shift in emphasis from reform to economic recovery, by autumn 1948, worried Australian authorities. American proposals to lift economic restrictions from Japan, they argued, could result in "the restoration of industries which might enable" rearmament. America's "increasingly soft attitude" toward Japan, wrote an Australian staff correspondent in New York, "is Australia's greatest problem today."⁸⁹ Government authorities feared that the United States in its desire to win Japan over to its side in the Cold War with Russia, might permit Japan to exploit its situation--i.e., by "playing off one nation against another"--and grant them an easy peace or freedom to rearm.⁹⁰ Australians, unlike the British, opposed American plans to phase out Japanese reparations payments.⁹¹

Along with this shift in its occupation policy, the United States altered somewhat its policy towards war crimes trials. Keeping in mind its ultimate goal of an early and non-punitive peace treaty with Japan, SCAP HQs pressed, in mid-1948, for the expedition of Eastern war crimes trials. Release of all of its remaining class "A" criminals followed shortly.⁹² At about the same time London notified Canberra of

⁸⁹Parl. Deb., v. 196, Apr. 8, 1948, p. 747, Sydney Morning Herald, Oct. 1, 1948.

⁹⁰Parl. Deb., v. 193, Oct. 1, 1947, p. 375.

⁹¹Frederick S. Dunn, Peacemaking, p. 109.

⁹²U.S. Dept. of State. Foreign Relations of the United States, 1948, p. 822; New York Herald Tribune, Nov. 14, 1948, The New York Times, Dec. 24, 1948.

its desire that Australian courts complete all war crimes trials within one year's time.⁹³ And in February and June 1949, the FEC recommended that all remaining trials be concluded by September 30 of that year.⁹⁴

Through SCAP, London authorities, and the FEC, then, the United States strongly 'suggested' to Australia and other Allied nations that they 'wrap up' their war crimes operations before the start of 1950. This placed Australian officials in a dilemma. Granted, some Australians had grown "impatient" with war trials and had called for their termination by mid-1948.⁹⁵ Most, though, still demanded prosecution of "all" guilty persons. There remained at this time nearly 200 Japanese suspects awaiting trial. No Australian government could realistically be expected to release prematurely or rush through the trials of these individuals without suffering the political consequences at home.

No incident involving Australian war crimes trials generated more controversy, home and abroad, than this one. The details are as follows: Australian officials "promised" General MacArthur, in 1948, that they would complete all trials by September 1949. With the closing down of the war crimes court in Hong Kong in December 1948, however, Australians lacked a suitable location in which to hold the remaining trials. MacArthur "absolutely refused" to allow them to be conducted

⁹³London Times, June 16, 1948.

⁹⁴Far Eastern Commission. Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945, F.E. Series 35 (Wash. D.C., 1950). pp. 4-5.

⁹⁵See, e.g., Current Notes, v. 19, no. 5, May 1948, p. 267, Sydney Morning Herald, May 7, and editorial, June 16, 1948.

in Hong Kong or Japan, even after "repeated entreaties." Australia's war crimes operation consequently stalled completely: despite SCAP's threats to release all Japanese suspects then being held in Tokyo, Canberra conducted no trials in 1949. Government spokesmen claimed lack of the "proper accommodations and other essentials" needed for the trials. "Dilly-dallying," charged the opposition.⁹⁶

When, in late 1949, the government expressed its concern that a good number of Japanese had been detained for four years without trial, thereby violating a standard of British justice, Parliamentary opposition fulminated. In no way, asserted these individuals, would American pressure, "international politics" or "political expediency" be permitted as an excuse not to finish the trials.⁹⁷ Of course all trials would be held, just speeded up, insisted the government: meanwhile, it underlined the fundamental correctness of SCAP's position: "suspects could not be held without trial forever."⁹⁸

In the end, a compromise was reached which attempted to reconcile the respective positions of the Australian government, Parliamentary opposition and SCAP: Canberra announced that trials would proceed only against Japanese who faced capital charges, that is, where the crimes alleged carried a penalty of death upon conviction. They would be

⁹⁶Parl. Deb., 207, Mar. 16, 1950, pp. 882-99, passim. London Times, Feb. 25, 1950.

⁹⁷Parl. Deb., v. 207, Feb. 24, 1950, pp. 100-01; Mar. 16, 1950, pp. 882-83, 888, 890, 893. There were also those who agreed with American policy. Consider the remarks of one: "As an ally of the U.S.A. in the occupation of Japan, surely we should coordinate our policy with theirs," in ibid., v. 204, Oct. 2, 1949, p. 947.

⁹⁸ibid., v. 207, Mar. 16, 1950, pp. 884-85, 894-95; London Times, Dec. 5, 1949.

held at Manus Island, the Australian territory nearest to Japan . . . available" for the purpose, and with all due "speed and decision."⁹⁹

This matter, however, influenced significantly other important developments in the Far East. Soon after the war, Australian authorities had declared strong support for negotiation of "an early peace treaty with Japan."¹⁰⁰ They never wavered from this position.¹⁰¹ Whether they did so in an attempt to prevent conclusion "by unilateral American action" of a "defacto peace" with Japan along "strictly American lines," as some historians have suggested, the fact stands that their policy coincided with that of the United States in this regard.¹⁰²

American officials, though, believed that the termination of all Eastern war crimes trials must precede any truly lasting, non-punitive peace treaty with Japan. It would appear that they were correct in this view. During treaty negotiations held in January 1951, between John Foster Dulles and Prime Minister Shigeru Yoshida, the United States and Japan reached "a basic agreement," inter alia, "that there should be no further additions to the list of war criminals."¹⁰³ Doubtless, other

⁹⁹Ibid., Feb. 25, 1950; Parl. Deb., v. 207, Feb. 24, 1950, p. 101.

¹⁰⁰See, e.g., Current Notes, Mar. 1946, v. 17, no. 3, pp. 134, 136; June 16, 1947, v. 18, no. 6, p. 396.

¹⁰¹See, e. g., Sydney Morning Herald, Apr. 30, July 30, 1948, editorials.

¹⁰²See, e.g., Harper, "Australia and Peace Settlement," p. 36, and Dunn, Peacemaking, p. 91.

¹⁰³Shigeru Yoshida, The Yoshida Memoirs, trans. by Kenichi Yoshida (Boston, 1962), p. 251. Another indication that Americans felt this way may be found in the scant--virtually negligible--coverage afforded the Manus Island trials by the U.S. press. See The New York Times and New York Herald Tribune, June 1950-May 1951.

factors contributed to the delay in the conclusion of the peace treaty--the Russian refusal to participate, for one.¹⁰⁴ Yet, it seems hardly a coincidence that not until July 1951 was the final draft of the treaty prepared and not until September was it signed:¹⁰⁵ Australian war crimes trials at Manus Island ended in May 1951.

PART II. CANADA

Canada based its jurisdiction for military courts for the trial of war criminals on the "Act respecting War Crimes" of August 31, 1946.¹ Canadian regulations resembled closely those contained in the British Royal Warrant of June 14, 1945. For example, they defined the term "war crime" narrowly, as "a violation of the laws or usages of war" committed during any war engaged in by Canada after September 9, 1939.² Other provisions permitted the convening of military courts, both Canadian and mixed inter-Allied.³ The duties of a Canadian Judge Advocate consisted "mainly in advising the Court on matters of substantive and procedural law." Military courts followed procedure applicable to field general courts martial; and "a certain relaxation in the rules regarding the admissibility of evidence" was allowed for.⁴

¹⁰⁴On Soviet intransigence, see below, Chapter 6, pp. .

¹⁰⁵Dunn, Peacemaking, pp. 174, 178ff.

¹This legislation re-enacted the War Crimes regulations (Canada) which were made by Order in Council on Aug. 30, 1945. See Law Reports, v. 4, Annex, "Canadian Law Concerning Trials of War Criminals by Military Courts," p. 125.

²*Ibid.*, Reg. 2.

³*Ibid.*, Reg. 4 (1), 7 (4), pp. 125, 126.

⁴*Ibid.*, Reg. 5, 10, pp. 126-27.

Canadian regulations included certain features not found in the Royal Warrant. Most notable in this regard was the provision that held that no death sentence could be passed "without the concurrence of all those serving on the court" if it consisted of three members, or without the concurrence "of at least two-thirds of those serving on the court" if it consisted of more than three members. In this respect Canadian regulations coincided with those of Australia.⁵

During the war, Canadians expressed their intentions to participate in postwar efforts to demilitarize and democratize Japan.⁶ As a member of the Far Eastern Commission, Canada, after arranging matters with Washington in November 1945, dispatched representatives to the IMTFE in Tokyo. There, Justice E. S. McDougall on the bench, and Brigadier H. G. Nolan on the prosecution staff, ably represented Canada throughout the entire proceedings.⁷

Contrary to some misconceptions, Canada was not "concerned only in the trial of major Japanese war criminals."⁸ As early as January 1946 the Canadian Embassy had sent word to the State Department of its

⁵Ibid., Reg. 11 (3), p. 130. See, supra, for Australia. War Crimes Act, 1945.

⁶Alexander Brady and F. R. Scott, eds., Canada After the War (Toronto, 1944), p. 146.

⁷Canada. Report of the Dept. of National Defense. For the Fiscal Year Ending Mar. 31, 1946 (Ottawa, 1946), p. 65; Canada, Report of the Dept. of External Affairs, 1948 (Ottawa, 1948), p. 55.

⁸See, e. g., Ian Brownlie, International Law and the Use of Force By States (Oxford, 1963), p. 175.

desire to participate in the trials of minor Eastern war criminals.⁹ Canada, however, found itself in somewhat of a bind as regarded this matter. Under Canadian war crimes regulations, explained W. L. MacKenzie King, Secretary of State for External Affairs, military courts for minor trials could only be "convened by states" then "in occupation of areas formerly dominated by Japan." Moreover, he added, Canadian military courts could "only be convened by senior officers in command of 'Canadian forces';" as Canada had had no occupation forces in the Far East, it could not convene courts in that area.¹⁰

In order to prosecute war criminals, then, Canadians cooperated with British and American war crimes teams in the East. Eight Canadian officers, all with legal experience, arrived in Tokyo and Hong Kong in 1946. The officers, two of whom were ex-Hong Kong POWs, assisted "in the collection and collation of further evidence of atrocities against Canadians" and in the prosecution of cases where the victims had been Canadians. Furthermore, they acted in "general liaison" with British and American war crimes teams, and occasionally provided them with evidence available from Canadian sources.¹¹

A war crimes section at Canadian National Defense headquarters provided these officers and their Allies with substantial evidence of atrocities committed against Canadians in Hong Kong and Japan proper.

⁹U. S. Dept. of State. Foreign Relations of the United States, 1946. v. VIII. The Far East (Wash. D.C., 1971), pp. 394-95. The U.S. approved the Canadian proposals in February. See ibid., p. 416.

¹⁰Ibid., pp. 394-95; Parliamentary Debates, House of Commons, v. 1, 1946 (Ottawa, 1947), Apr. 12, 1946, p. 809.

¹¹Ibid.; also, see China Press, Apr. 25, 1946.

At the request of United States authorities, a Canadian officer was made available "to sit as judge on any joint military court" for the trial of lesser war criminals whether the victims had been Canadians or nationals of other countries.¹²

Canada's contribution to the Eastern war crimes operation, while not large, was efficient: a Canadian subdetachment in Hong Kong obtained ~~eleven~~ convictions for crimes against Canadian POWs; while its counterpart in Tokyo partook in the prosecution of eleven cases involving 23 defendants accused of war crimes against Canadian and Allied POWs. Canadian overseas war crimes operations closed in May 1947.¹³

Canada assumed a limited role in postwar international relations in the Far East. Its forces did not share in the occupation of Japan. Security in that region became its chief concern, having recognized and accepted Britain's reduced responsibility and the rise of Communist-led or inspired movements throughout Asia. Consequently, Canada encouraged and supported strong American military presence--even domination--in the Pacific.¹⁴ And, as indicated above, it accepted Anglo-American supervision of Eastern war crimes trials.

¹²Parl. Deb., v. 1, Apr. 12, 1946, pp. 809-10.

¹³D. H. Gardner, "Canadian Interests and Policies in the Far East Since World War II." Canadian Institute of International Affairs (Toronto, 1950), p. 5; Stars & Stripes, Tokyo, May 25, 1947.

¹⁴See Brady and Scott, eds., Canada After The War, p. 151; Gardner, "Canadian Interests," pp. 1-5, 9.

New Zealand

New Zealanders, like their Commonwealth brethren, suffered greatly while under Japanese captivity. In fact, the British POW experience is often used to describe that of New Zealand.¹⁵ For this reason, New Zealanders retained a deep hostility toward and fear of Japan for many years after the war.¹⁶

New Zealand, a member of both the UNWCC and FEC, also participated in the proceedings of the IMTFE at Tokyo. Its representatives, Mr. Justice Northcroft on the bench, and Mr. R. H. Quilliam on the prosecution staff, symbolized the New Zealand government's "special interest in the settlement in Japan and in the maintenance of peace and security in the Pacific." Its representation at Tokyo, reported the Dominion, "identified" the government "in a special way with the punishment of war criminals."¹⁷

Elsewhere, New Zealand's role in Eastern war crimes operations seems to have been that of "a passive observer."¹⁸ Indeed, New Zealander interest in the IMTFE waned by 1947. Records of the Debates of Parliament for the years 1945-1947 are conspicuously deficient as

¹⁵New Zealand. War History Branch. Dept. of Internal Affairs. Prisoners of War. Official History of New Zealand in the Second World War (Wellington, 1954), pp. x, 188-89, 522.

¹⁶Samuel Leatham, "New Zealand's Interests and Policies in the Far East." New Zealand Institute of International Affairs. (Wellington, 1950), pp. 7, 11-12.

¹⁷New Zealand. Dept. of External Affairs. Annual Report of the Year ended 31 March 1949. (Wellington, 1949), p. 19; Dominion (Wellington), Jan. 18, 1946.

¹⁸Letter, Apr. 12, 1976, from National Archives, Dept. of Internal Affairs, to author.

regards discussions of Eastern war crimes trials. There appeared to be greater concern for the costs of the trials, rather than for their proper disposition. One Parliamentary critic decried the lack of coverage, noting that "some information about . . . (these) trials . . . would remind the people that New Zealand still had responsibilities and duties in Japan."¹⁹

This behavior may be attributed to three factors. First, New Zealanders, as did people in other Allied nations, experienced a growing impatience by 1947 with the length and immensity of the war crimes operation.²⁰ Second, security matters dominated Wellington's interests in the early postwar period. As with Australians, the spectre of Japanese rearmament haunted New Zealanders--"our memories of recent dangers are too bitter and too poignant," said one--as did the threat of Communist expansion in Asia.²¹ Third, and in response to the preceding factor, Wellington willingly accepted the overwhelming American presence in the Pacific.²² New Zealand thus left the matter of Eastern

¹⁹New Zealand. Parliamentary Debates. Legislative Council and House of Representatives. (Wellington, 1948), v. 278, Sept. 26, 1947, pp. 649-50.

²⁰The IMTFE, said one critic, in process over two years, "had become a complete farce," in ibid., p. 649.

²¹Leatham, "New Zealand's Interests," pp. 3-7, 11-12, 21. New Zealanders "were still, in February, 1951, more afraid of Japan than of Russia," in Frederick S. Dunn, Peacemaking and the Settlement With Japan (Princeton, 1963), pp. 123-25, 128.

²²New Zealanders, as did Australians, often heatedly contested certain aspects of U.S. Pacific policy--its plans to revive the Japanese economy, for one. But, in general, they found a sense of great security in the American presence and policies in the Far East. See ibid., pp. 81-82, 109-10, 115, 128, 150-51, 156.

war crimes trials to American, British and Australian authorities.

Burma

British military forces liberated Burma from its Japanese captors in May 1945. Shortly after, London announced that, while it would readminister Burma in the interim, "full self-government within the Commonwealth" would be granted before too long. London endorsed the appropriate legislation in late 1947 and, on January 4, 1948, "the republic of the Union of Burma" became independent.²³

War crimes trials in Burma, then, were conducted under British jurisdiction and according to regulations outlined in the Royal Warrant of June 14, 1945.²⁴ A British war crimes team constituted a military court at the Civic Hall in Rangoon in early 1946.²⁵ Also established in Rangoon at this time was an American war crimes branch, then operating under the supervision of the India-Burma Theatre headquarters. Preliminary investigations by United States authorities disclosed that the most likely types of crimes involving American victims "would be those connected with combat activities," that is, murder and torture of aliers shot down over Burma. These authorities turned all information over to British personnel for use in trials conducted by British military courts with an American "observer in attendance."²⁶

²³Hugh Tinker, The Union of Burma. A Study in the First Years of Independence. 2nd. ed. (London, 1959), pp. 15, 17-18, 27-28, 31-32.

²⁴For specifications in re the Royal Warrant, see supra, Chapter 4.

²⁵Straits Times, Feb. 19, 1946.

²⁶History of UNWCC, pp. 384-85; Straits Times, Feb. 19, 1946.

British and American investigation teams in Burma experienced considerable difficulties in obtaining evidence and in identifying and apprehending perpetrators. The destruction of nearly all Japanese records prior to or immediately after the surrender rendered it "impossible to trace war crimes suspects from one unit to another." Other methods of identification, especially the photographic "identity parade," were subsequently devised. Still, several cases in Burma were dropped due to insufficient information.²⁷ British authorities constantly expanded their investigations, adding personnel and extending the areas covered, in their effort to snare all guilty culprits.²⁸ In 1947 they transferred two Singapore war crimes courts to Burma in an attempt to "speed" Burmese trials.²⁹

The British especially concentrated on trying those Japanese accused of serious crimes: of the 113 "known war criminals" and 40 suspects in custody at Rangoon in February 1946, all were charged with murder, rape, beating and torture.³⁰ Rangoon's first war crimes trial, for example, saw a Japanese major sentenced to hang for "killing" and "torturing" 637 inhabitants of the Indian village of Kalagon.³¹ Charges

²⁷History of UNWCC, pp. 384-86.

²⁸Straits Times, Aug. 16, 1946.

²⁹Ibid., Mar. 23, 1947.

³⁰Ibid., Feb. 19, 1946.

³¹China Press, Apr. 12, 1946.

preferred in other trials resembled these.³²

No published reports exist of trials conducted exclusively by Burmese authorities following independence. (It should be noted that a Burmese assisted the Allied prosecution staff at the IMTFE from 1946-1948.)³³ Civil war broke out in the Union of Burma in early 1948, as Communist-led forces sought to overthrow the British-supported government. Bloodshed and anarchy abounded.³⁴ It is not surprising, then, that war crimes trials were not held during this time or, if they were, that no records are available. What is surprising--and remarkably so--is the fact that British authorities were able to conduct in Burma a war crimes operation of considerable size, and meticulously directed by the provisions of the Royal Warrant, in an atmosphere of confusion and unrest, even as it prevailed in the years 1945-1948.³⁵

Final statistics, as well as the exact date of termination of Japanese war crimes trials in Burma are unavailable. However, when the Japanese Foreign Office announced, in December 1949, that several nations had "finished" war crimes trials, Burma was included among them.³⁶

³²See, e.g., Straits Times, July 17, 1946, Mar. 23, 1947; Malay Mail, May 2, June 11, 28, 1947. Also, see the American-associated "Ragoon Jail Cases," in History of UNWCC, p. 385.

³³On the appointment to the IMTFE, see U Ba U, My Burma: The Autobiography of a President (N.Y., 1959), p. 187.

³⁴Russell H. Piffeld, Americans In Southeast Asia. (N.Y., 1973), pp. 1-1-02; Sydney Morning Herald, June 15, 16, 1948; China Press, June 8, 1948.

³⁵On this point, see, e.g., editorial, China Press, Oct. 1, 1946: "Strikes all over the country, and anti-British demonstrations, lead one to the conclusion that Burma is on the Brink of a wave of violence."

³⁶Malay Mail, Dec. 6, 1949.

CHAPTER VII

RUSSIA

I. "Procedure and Machinery"

The Soviet Union's approach and contribution to the prosecution of Japanese war criminals differed totally from that of the other Allied nations. Nearly every act planned or undertaken by Russia during and after the second world war reflected, to some degree, political considerations. The matter of war crimes trials proved to be no exception.

Russia suffered horribly during World War II; millions of its people were killed. Yet, for the most part, that suffering was not caused, directly at least, by Japan, but by Germany. In fact, Russia did not enter the war in the East until August 9, 1945.¹ That the Soviets assumed a relatively minor role in the disposition of Japanese war crimes trials in the East, then, was determined by this reality.

Early in the war, Russia associated itself with Allied war crimes policy. A Soviet representative sat as a guest at the signing in London, on January 13, 1942, of an Inter-Allied Declaration on Punishment for War Crimes.² On December 17, 1942, London, Moscow and

¹See Robert J. C. Butow, Japan's Decision To Surrender (Stanford, 1954), pp. 154-59.

²Punishment for War Crimes: The Inter-Allied Declaration signed at St. James' Palace, London on January 13, 1942, and Relative Documents, (London, 1942), p. 15.

Washington promulgated simultaneously declarations reaffirming "their solemn resolution that those responsible (for wartime atrocities) should not escape retribution."³ In November 1943 Premier Stalin joined President Roosevelt and Prime Minister Churchill in the signing of the Moscow Declaration. The United Nations War Crimes Commission (UNWCC) called this the "most important pronouncement made by Allied statesmen on the subject of war crimes, and one which set the pattern for the trial, not only of minor criminals, but also of those responsible for atrocities in occupied countries."⁴ Like the preceding declarations, however, the Moscow statement dealt exclusively with German war criminals.

Such verbal cooperation notwithstanding, all major Soviet decisions hinged on political factors. Undoubtedly, the most significant Allied organization--as concerned war crimes and war crimes trials--was the UNWCC. Agreement for the creation of this official body had been cemented by an Anglo-American understanding and joint statement of October 7, 1942.⁵ At that time the Allies recognized the importance of Russian participation in the organization, and urged the Soviets to join.

But Moscow insisted that the seven Soviet Republics (the

³M. E. Bathurst, "The United Nations War Crimes Commission," Amer. Jrnl. of Intl. Law, v. 39, 1945, pp. 567-68.

⁴For the Moscow Declaration, see The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1949), pp. 107-08.

⁵See "War Crimes: Work of the United Nations Commission," by a Legal Correspondent, in London Times, Dec. 18, 1946; Bathurst, "UNWCC," pp. 567-68.

Ukraine, Byelo-Russia, Moldavia, Lithuania, Latvia, Estonia and Karelo-Finland), "on whose territory the war had actually been fought," be represented individually in the UNWCC. The members of the Commission believed otherwise. Soviet representation should be the same, they felt, as that in the United Nations; that is, the Russian government and those of Byelo-Russia and the Ukraine.⁶

And so, observed a legal correspondent for the London Times at the end of 1946, "Unfortunately, the U.S.S.R. did not take part in the inaugural meeting and has not joined the Commission since." Indeed, Russia never joined, and never wavered in its insistence on its terms of representation.⁷ Instead, the Soviet Union established its own organization, the Russian Extraordinary War Crimes Commission. A Soviet Military Tribunal tried and convicted German war criminals as early as December 1943.⁸ Lord Wright, Chairman of the UNWCC, stressed in an interview in 1945 the strong desire for "close cooperation between the two commissions," as well as the compatability of "their approaches to the common problem."⁹ Still, Russia's refusal to participate in the UNWCC for reasons strictly political in nature served as a model for future Soviet intransigent behavior.

Having entered the war in the East in August 1945, the Soviet

⁶History of UNWCC, p. 158.

⁷London Times, Dec. 18, 1946. History of UNWCC, p. 159.

⁸United Nations Information Organization. Information Paper No. 1. 1946, p. 10.

⁹Bathurst, "UNWCC," p. 570.

Union presently subscribed--in word, at least--to Allied policy regarding the surrender and postwar settlement of Japan. Russia, that is, agreed to the provisions set forth in the Potsdam Declaration of July 26, 1945. Issued jointly by the leaders of the United States, Britain and the Republic of China, the document contained the Allies' offer of surrender terms to Japan. Most significant to the study at hand was article 10, which provided that "stern justice shall be meted out to all war criminals. . . ." ¹⁰ A Soviet representative accepted and signed, along with his Allied counterparts, the Instrument of Surrender (Japan) of September 2, 1945. Also, Moscow joined London, Washington and other Allies in the creation of the Far Eastern Commission in late 1945/early 1946. ¹¹ Finally, two Russians, Major General I.M. Zaryanov on the bench, and A. N. Vasilyev on the prosecution staff, partook in the proceedings of the IMTFE in Tokyo between April 1946 and November 1948.

Explicit materials relative to Soviet regulations governing Japanese war crimes trials are unavailable. Nevertheless, an indication of such rules which applied at Soviet-conducted trials in the East may be found through an examination of actual trial proceedings, which is included in the following.

¹⁰Potsdam Declaration, July 26, 1945. For USSR's part in preceding, see Adam B. Ulam, Expansion and Coexistence: Soviet Foreign Policy 1917-73, 2nd ed. (N.Y., 1974), pp. 378-88, 390-94.

¹¹Instrument of Surrender, Sept. 2, 1945. Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946 - July 10, 1947. Pub. 2888. F. E. Series 24 (Wash. D.C., 1947), p. 2.

II. "The Trials and Russia's International Relations"

Unlike previous chapters, the present one will seek to combine into one the sections on "The Trials" and their part in the respective nation's international relations. This is due to the prevailing political overtones, already mentioned, of Russia's postwar national and foreign policy. Indeed, it would be impossible to extricate the trials--how the Russians viewed them, what the Russians conceived to be their objectives, and their outcomes--from the overall matrix of Soviet postwar international politics. For this reason, too, despite considerable coverage elsewhere in this study, the Russian experience vis-à-vis the IMTFE will receive more than mere passing attention.

* * *

A. The IMTFE

The occupation of Japan, though labeled Allied, was almost completely an 'American show'. Russia even refused to put troops under the command of S.C.A.P. "The Soviet Union well understood" America's dominant interest in postwar Japan. And "while it made feeble protests from time to time against America's monopoly of power" there, wrote historian Akira Iriye, "it did little to obstruct MacArthur's policy."¹²

In the matter of organizing and prosecuting trials of major Japanese war criminals, hence, the Russians, like everyone else, took a back seat to the United States. In fact, in January 1946 the State Department instructed its Chargé in the Soviet Union, George F. Kennan,

¹² See The New York Times, Sept. 17, 30, 1945; Edwin O. Reischauer, Japan: The Story of a Nation (N.Y., 1970), pp. 221-22. Akira Iriye, The Cold War in Asia (Englewood-Cliffs, N.J., 1974), p. 126.

to "reiterate to the Foreign Office this Government's hope that the Soviet Government will participate" in the IMTFE in Tokyo.¹³ Up to that point, the Russians had adopted a policy of "official silence" in regard to their postwar intentions in the Far East.¹⁴ The official response to Kennan's invitation revealed the surprising extent to which the Soviets had accepted American supervision in this affair.

"The Soviet Government was not adequately informed about this trial," a Russian representative told Kennan. Would the Americans, he inquired, provide them with "a copy of the indictment and also a list of leading criminals"? Other questions followed. "Who, exactly," was Joseph Keenan? What functions were included in his role as Chief of the International Section of Prosecuting Attorneys? and, "What body was this?"¹⁵ Would the Charter of the Tribunal be "identical with that of the Nuremberg trial? If not, in what respects would it differ?"¹⁶

The Russians, though, assured the Soviet representative, were not taking the matter lightly; their "interest was more than formal," and they wanted to know much more about the role of Russia in the proposed trial.¹⁷ To be sure, Moscow did not view the IMTFE and related affairs aloofly. Stalin had made known early his desire to "participate in the occupation of Japan proper." Moscow's relatively subdued

¹³U.S. Dept. of State. Foreign Relations of the United States. 1946. v. VIII. The Far East. (Wash. D.C., 1971), Jan. 8, p. 386.

¹⁴This "official silence" in the USSR in re the Far East was "rapidly approaching the point where it will resemble a loud noise." See New York Herald Tribune, Nov. 16, 1945.

¹⁵U.S. Dept. of State, Foreign Relations, Jan. 13, 1946, pp. 388-89.

¹⁶*Ibid.*, Jan. 26, 1946, pp. 397-99.

¹⁷*Ibid.*, Jan. 13, 30, 1946, pp. 388-89, 399.

behavior, rather, was attributable to expressed American resolution to control the occupation of Japan, and implied American determination to exclude Russia from all but a minimal role there.¹⁸

Still, the Russians distrusted American motives vis-à-vis post-war Japan. Why, they asked, had the United States failed to "liquidate" entirely the Japanese General Staff and armed forces immediately upon capitulation? For what purposes would Japan need military officers? These sentiments, and others like them, must of course be viewed in light of the burgeoning Russo-American cold war strains and divisions. That the Soviets genuinely feared a possible future remilitarization of Japan cannot be denied.¹⁹

Nor can it be denied that the Russians sought to portray the Allied war crimes trials in Tokyo as being, in general, detrimental to world peace and, specifically, as anti-Soviet. Through a persistent campaign of political propaganda and polemics, the Soviet Union attempted to undermine that which it could not control: the IMTFE.

From the very beginning of the Allied war crimes operation, the Soviets challenged its effectiveness. Initially, these doubts were aimed at "the Japanese ruling circles," who, declared the Soviet newspaper, Red Star, did "not want to carry out the provisions of the Potsdam Declaration." The present Shidehara government, it charged, "obstructed," not assisted, Allied attempts to apprehend Japanese war criminals.²⁰

¹⁸See Harry S. Truman, Year of Decision (N.Y., 1955), pp. 440-44, also, Ulan, Expansion and Coexistence, pp. 396-97.

¹⁹Ibid., pp. 397-98; also, Frederick S. Dunn, Peacemaking and the Settlement With Japan (Princeton, 1963), pp. xi-xii.

²⁰As reported in the Straits Times and Stars & Stripes (Shanghai), Oct. 27, 1945.

But soon Soviet barbs found additional, broader targets.

Many in Japan, contended M. Markov in the Russian foreign affairs weekly, New Times, sought to exonerate or mitigate the guilt of Japanese. Certain Japanese newspapers, he wrote, insisted that since the war, "Japan has changed and cleansed herself." The Shidehara government, Markov charged, "has displayed extraordinary zeal" in its efforts to "save . . . war criminals from responsibility." Furthermore--and here lay the gist of the Russian attack--"the occupation authorities permitted the Japanese reactionaries to develop an open campaign in defense of these criminals."

Also, "carelessness" on the part of occupation authorities, went the allegations, had resulted in the escape of some guilty Japanese and the destruction of much evidentiary material. Above all, Markov argued, the list of major war criminals slated to be tried by the IMTFE was "far from complete:" conspicuously and unjustifiably absent were Japan's leading industrialists, the Zaibatsu. These 'greedy capitalists', he maintained, had worked hand in hand with the militarists and had furnished them the means to effect their imperialistic plans. Absent, too, was the "kimonoed Hitler," Emperor Hirohito. Markov cited demands that the Emperor be tried as a war criminal emanating from official circles in Australia, New Zealand, China, the Philippines and Japan, itself. "World opinion," he concluded, "insists that Hirohito be brought to trial."

Only in this manner, Markov asserted, could "the demand of the nations for the just and speedy punishment of the war criminals be

headed." The Tokyo trial, he believed, "is destined to play an important role in strengthening the position of the progressive forces." Always at the core of the Soviet message, however, rested political considerations: The IMTFE "must expose the connections between the present leaders of Japanese reaction and the top-rank militarists who are now in the dock. . . ." ²¹

Considerable attention has been given the preceding article because, published as it was by a system regulated by censorship, it may be regarded as expressive of the official Kremlin view. The words of an East European Communist diplomat to an American journalist in re all publications within Soviet controlled countries is instructive in this regard: "It must be the official line, because otherwise it could not be published." ²²

Similar publications, equally representative of the official line, steadily revealed the true target of Russia's attacks: United States occupation policy in Japan, and the men who formulated, supervised and executed it. "Organized on substantially different lines from the Nuremberg Trial," wrote S. Golunsky, the IMTFE was not established by "international agreement, but by orders of General MacArthur."

MacArthur's appointments and policies, insisted Golunsky, dominated the

²¹"The Approaching Trial of the Major Japanese War Criminals," by M. Markov. USSR. New Times, Apr. 15, 1946, No. 8, pp. 7-10. Emphasis mine.

²²Also, said the diplomat: "The Soviet Union has never had a free or independent-minded press. When something is published in Pravda or Izvestia or a provincial newspaper or even a scientific weekly, everybody assumes that it is the official pronouncement of the Party or government." See Tad Szulc, Czechoslovakia Since World War II (N.Y., 1971), p. 348.

whole proceedings. Other publications reiterated these assertions.²³

"Staged by the Americans," the Tokyo trials, declared one propagandist, "virtually abandoned" the "struggle against war criminals" and adhered to the "imperialist policy" currently espoused by Washington and London.²⁴ A constant theme in the assaults centered about America's "protection of Japanese reactionaries, especially important industrialists."²⁵ The "leaders of the giant Japanese monopolies, . . . known as the Zaibatsu," who favored and "were the real instigators" of "predatory war," had not been brought to trial. This was "no accident," alleged the Communist Party daily, Pravda, but the result of a carefully calculated plot engineered by the Zaibatsu's capitalist brethren on "Wall Street."²⁶

The Russians could not conceive how "American lawyers acting as defense counsel" could depict Japan "as a victim" of global circumstances. These Americans, said the Soviets, repeated "hackneyed arguments of Japanese wartime propaganda and (were) lavish in libellous attacks on the Soviet Union" Often, Pravda asserted, American lawyers in Tokyo "abandoned professional ethics" and used "shyster methods." And American witnesses, Pravda added, sometimes "lied."²⁷

²³"Trial of the Japanese War Criminals," by S. Golunsky, USSR. New Times, May 1, 1947, No. 18, p. 6. Also, "From Nuremberg To Tokyo," by A. Trainin, New Times, Mar. 17, 1948, No. 12, pp. 11-13; "The Tokyo Trial," by V. Berezhev, New Times, Jan. 28, 1948, No. 5, p. 6.

²⁴New Times, "From Nuremberg To Tokyo," p. 14.

²⁵See, e. g., ibid., p. 12; New Times, Golunsky, "Japanese War Criminals," pp. 6-7.

²⁶"What People Expect of the IMT in Tokyo," from Pravda. Soviet Press Translations, June 2, 1948, p. 421.

²⁷New Times, Golunsky, "Japanese War Criminals," p. 7. Sov. Pr. Trans., "What People Expect of IMT," pp. 421-24.

By far, the most significant aspects of the Soviet propaganda attack focused on what were depicted as the motives behind American behavior at the IMTFE. By saving "from merited punishment arrant Japanese militarists" guilty of heinous crimes, the Russians charged, the occupation authorities were merely following the orders of their government in Washington. In this continued the accusations,

They are doing their utmost to whitewash and justify the aggressive policy of the Japanese imperialists. Wall Street and its agents, who direct U.S. policy, are resurrecting militarism in Japan and converting the country into a base for the promotion of their insensate plans of world domination.²⁸

"Falsification of history at the Tokyo Trial," declared another critic, was the means by which the United States sought "to perpetuate the MacArthur policy in Japan." And "that policy . . . is (one) . . . of reviving Japanese imperialism and making it a satellite of the American expansionists."²⁹

In short, the Russians perceived--or so they said--the IMTFE as an American attempt to cover up the guilt of those Japanese whom they insisted were most responsible for the war--namely, the Emperor, major industrialists and capitalists and militarists. And they openly accused the United States of obstructing the process of democratization, while encouraging remilitarization, in Japan.³⁰

In April 1946, less than a fortnight before the opening of the

²⁸New Times, Berezhkov, "Tokyo Trial," p. 9.

²⁹"Falsification of History at the Tokyo Trial," by M. Markov. New Times, Apr. 21, 1948, No. 17, p. 10.

³⁰See, e.g., "Remilitarization of Japan," by M. Marinin, Current Digest of the Soviet Press (CDSPP), II, No. 48, Jan. 13, 1951, p. 26; Max Beloff, Soviet Policy in the Far East, 1944-1951 (London, 1953). pp. 122-25.

IMTFE, Chief Prosecutor Joseph Keenan offered his perception of how the Russians viewed the forthcoming trial. They saw it, he suggested, "as far more important than the Nuremberg proceedings" since it involved the participation and close cooperation of more nations. As such, he concluded, the Russians deemed the trial "a landmark in international relations and international justice."³¹

A decade later, Keenan's immediate assistant in the prosecution at the IMTFE, Brendan F. Brown, drew different conclusions. The "Russian attitude" toward that tribunal, said Brown, had become "obvious" in the revealing light of retrospect: "The Soviet Union regarded" the IMTFE "merely as a means for furthering political objectives;" specifically, "to advance the hegemony of the Communist party" in Asia (particularly China) and the world. Keenan, in a work published jointly with Brown in 1950, voiced nearly the exact opinion.³²

In any event, it was in this international political milieu that the curtain rose, in December 1949, on the first and only exclusively Russian-held Japanese war crimes trials.

* * *

B. Khabarovsk

By late 1949, the United States had made known its willingness to sign a peace treaty with Japan without the Soviet Union. "Russian intransigence," as displayed in negotiations up to then, discerned

³¹New York Herald Tribune, Apr. 22, 1946.

³²Brendan F. Brown, "Red China, the Tokyo Trial, and Aggressive War," Louisiana Bar Journal, v. 3, 1956, pp. 152-53; Brown and Joseph B. Keenan, Crimes Against International Law (Wash. D.C., 1950), p. vii.

Secretary of State Dean Acheson, "would tie up a Japanese treaty" indefinitely if permitted to continue.³³ That such unilateral action portended an even wider role for the United States in East Asia did not go unnoticed by the Russians.

In normally hostile terms, a Moscow Radio commentator castigated "the American instigators of a new world war" who, in their boundless ignorance, speeded "revival of Japan's industrial (and other) war potential." The Americans hoped, continued the declaration, to forge a Pacific military alliance with Japan as the military and economic foundation; and they eventually planned to use Japan in their "war for United States world domination."³⁴

Another significant matter, left simmering up to 1949, neared the explosion point. Almost four years after the war's end, the Soviets still retained in captivity several hundred thousand Japanese prisoners of war. While figures varied, most estimates hovered between 400,000 and 500,000 POWs. Throughout 1949 a spate of demands that these POWs be repatriated--emanating from Allied Headquarters, the Japanese government, people and Communist Party, and others--inundated the Kremlin.³⁵ The Soviets, said observers, had initially hoped to "indoctrinate" the POWs and to convert them to Communism before releasing them. When these plans failed to develop, it was contended, the Russians clamped down, and re-

³³Dean Acheson, Present At The Creation (N.Y., 1969), p. 429; also, see Dunn, Peacemaking, p. 91.

³⁴Malay Mail, May 9, 1949.

³⁵See, e. g., ibid., May 9, 23, June 21, Aug. 15, Nov. 22, 1949; also, Russell Brines, MacArthur's Japan (Phila., 1948), p. 260.

fused to repatriate the Japanese. Those still in retention, countered the Soviets, were "war criminals."³⁶

Apparently, the Russians discerned the need, in late 1949, for a political issue which would divert interest from the repatriation question, cast infamy on nurturing Japanese-American ties, and "strengthen anti-American feeling in China." For these reasons, they completely disregarded F.P. "recommendations" that all minor war crimes trials be terminate . by September 30, 1949.³⁷ Instead, they held war crimes trials at Khabarovsk during December 25-30 of that year.

At Khabarovsk, twelve former members of the Japanese armed forces were charged with "manufacturing and employing bacteriological weapons. i.e., with a crime punishable under Article 1 of the Decree of the Presidium of the Supreme Soviet of the U.S.S.R. of April 19, 1943."³⁸ Included among the accused were General Yamada Otozoo, formerly Commander-in-Chief of the Japanese Kwantung Army, and several high-ranking officers of the Medical Services.

The case was tried in "open court sessions," reported the Soviets, by the Military Tribunal of the Primorye Military Area. Yet, on the whole, there was no Western press coverage.³⁹ On the bench sat high-ranking

³⁶See, e.g., China Press, Dec. 2, 1947; articles by Lindsay Parrott in The New York Times, June 28, 29, Dec. 4, 1949, June 15, 1951. Also, see The New York Times, June 28, 1949.

³⁷On Soviet motives at this time, see London Times, Feb. 3, 1950; The New York Times, June 29, 1949; Malay Mail, Dec. 31, 1949; Peter Calvo-coressi, Survey of International Affairs, 1949-50 (London, 1953), pp. 454-55. F.E.C. Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945. F.E. Series 35 (Wash. D.C., 1950), pp. 4-5.

³⁸USSR. Materials on The Trial of Former Servicemen of the Japanese Army Charged With Manufacturing and Employing Bacteriological Weapons (Moscow, 1950), Indictment, p. 7.

³⁹Ibid., p. 5. See, e.g., brief notation that there was to be such a trial, in The New York Times, Dec. 24, 1949.

military officers of jurisprudence. The President of the Court was Major General of Jurisprudence, Chertkov, D.D. A State Counsellor of Jurisprudence had "upheld" the indictment.

Defending the accused were members of the Moscow Bar Association, the Khabarovsk Territory Bar Association and the President of the Primorye Territory Bar Association. All findings on matters of bacteriology and medicine had been "submitted to the Court by a commission of experts" comprised of members of prestigious institutions, such as the Academy of Medical Sciences of the U.S.S.R., Department of Microbiology in the Khabarovsk Medical Institute, and the like.⁴⁰

As the President of the Court explained, accused persons had 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." Also, he added, they could call further witnesses and experts, or call for other "proofs and documents."⁴¹ Five Russian interpreters were provided. The Court warned them of their "duties" and "of their liability to criminal prosecution for deliberately false interpretation."⁴² In a similar vein, the Court warned the 16 witnesses (all Japanese) summoned to appear of their responsibilities under the Russian criminal code to testify and to do so "truthfully."⁴³

Besides the specific charge of "manufacturing and employing bac-

⁴⁰USSR. Materials, pp. 5-6.

⁴¹Ibid., p. 244.

⁴²Ibid., pp. 38, 239.

⁴³Ibid., pp. 243-44.

teriological weapons," the indictment against the twelve accused virtually repeated the charges recently aired and decided upon at the IMTFE: Japan had "entered into a criminal conspiracy with Hitler Germany and fascist Italy;" it had "planned, launched and waged aggressive wars against peaceable nations;" it had undertaken "aggression against the Soviet Union," and so on.

Moreover, read the indictment,

acting upon secret instructions from Emperor Hirohito, the Japanese General Staff and Ministry for War already in 1935 and 1936 formed in Manchuria two top-secret units for preparing and conducting bacteriological warfare.⁴⁴

In subsequent years, continued the allegations, Japanese built special laboratories and "carried on systematic biological research." They intended, stated the indictment, to ascertain "which types of germs" were most pernicious and lethal, and best suited to "breeding on a mass scale." Then, the Japanese planned "to exterminate large masses of people and cause economic damage by infecting cattle and crops. . . ."⁴⁵ Finally, the Soviets charged, in their "criminal" bacteriological experiments, the Japanese "monsters" conducted "inhuman" tests on living people.⁴⁶

The decidedly political and opportunistic essence of the Khabarovsk trials soon shone clearly through the facade. Defense counsel typically, "while not defending" the accused's crimes, stressed the Japanese' "social and political environment:" that is, "the influence

⁴⁴Ibid., pp. 7-9.

⁴⁵Ibid., pp. 9-12

⁴⁶Ibid., pp. 15-22; also, 426, 437.

which social, state-political and ideological factors played in forming his will and character."⁴⁷ These benighted individuals, ran the Soviet 'defense' arguments, failed to develop properly, as did thosefortunates "under the Sun of the Stalin Constitution."⁴⁸ Taught to obey blindly, Japanese soldiers unquestioningly followed those, the Zaibatsu, who "hatched" and "waged" World War II. Tojo and others convicted at Tokyo, professed Soviet lawyers, "were merely . . . ideological brothers" of the true instigators of the war: i.e., those capitalists who "shipped guns, shells, bombs and planes to battlefields," and who "willed" the preparation and use of bacteriological warfare.⁴⁹

And, why, asked the Soviet defense counsel--as if it had even the remotest connection to the trial then being heard--did the IMTFE exclude from trial any representative of the Zaibatsu, as well as "their head, Emperor Hirohito?" Because, he answered, "ties that bound, and bind, the American monopolists with their Japanese colleagues are too strong." That is why the American prosecutor (Joseph Keenan) barred the role of the "industrial and financial magnates in planning and organizing the second world war."⁵⁰

But there was more to come. A State Prosecutor, pointing to the evidence adduced from testimony of the accused and witnesses, from captured Japanese documents, and from Soviet medical experts, suggested

⁴⁷Ibid., p. 469.

⁴⁸Ibid., pp. 475-76.

⁴⁹Ibid., p. 471.

⁵⁰Ibid., pp. 477-78.

that the charge of preparing bacteriological warfare had been proven beyond doubt. Why then, he pressed, had not similar revelations been made at the IMTFE? Indeed, he noted, mention of preparation of bacteriological warfare by Japan had been introduced to the Tokyo Tribunal, and by an American prosecutor no less. President Webb, however, not knowing what to do with the "entirely new" evidence, left disposition of the matter in the hands of the American-dominated prosecution staff. There, alleged the Soviet prosecutor, the issue was squashed by "certain influential persons . . . who were evidently interested in preventing the exposure of the monstrous crimes of the Japanese militarists."⁵¹

Often, as in the above instance, Soviet prosecutors seemed to be prosecuting anyone but those in the dock at Khabarovsk. " . . . In condemning aggressive war in general" and having always fought "undeviatingly and consistently for lasting, democratic peace," the U.S.S.R., declared the State Prosecutor, "emphatically repudiates the employment of inhuman means of mass extermination." For these reasons, he asserted, "despite all the efforts of the instigators of a new war in the Anglo-American bloc," the Soviet Union consistently strove in the U.N. "to secure the absolute prohibition of atomic weapons."⁵²

Soviet lawyers frequently noted that the Japanese planned to use bacteriological warfare as "part of a general conspiracy of aggression

⁵¹Ibid., pp. 220, 311, 406-08, 443. Cf. Keenan's assertion that, as regarded evidence bearing on bacteriological warfare, "none whatever" was introduced at the IMTFE. He labeled as "false" any Soviet claims that he had offered or been offered any such evidence. See "Joseph Keenan Meets The Press," American Mercury, v. 70, 1950, pp. 457-58. Also, the Tokyo Shimbun called Soviet allegations a "Ruse by Moscow," as reported in Malay Mail, Dec. 31, 1949.

⁵²USSR, Materials, pp. 409-10, 466.

against the peaceful nations." In other words, "only the crushing blow of the Soviet armed forces" against the Kwantung Army in Manchuria "saved mankind from the horrors of bacteriological warfare."⁵³

Another principal indication of the political nature of the Khabarovsk trials may be found in the docility, repentance and even conversion of the accused. Not once during the entire proceedings did any of those on trial object to any aspect of Court procedure--although the right to do so had supposedly been afforded them.⁵⁴ Ostensibly, these were the most cooperative and content Japanese accused of all those tried after World War II.

Even more remarkable--and in stark contrast to Japanese behavior in war crimes trials held by other nations--was the fact that all the accused pleaded "guilty" to charges preferred against them.⁵⁵ Furthermore, their behavior on the witness stand was rote, almost robot-like: they made no attempt to explain, excuse or mitigate their guilt; rather, they mechanically and factually detailed their hideous wrong-doing.⁵⁶

All the accused repented. Before the Court rendered judgment, defense counsel asked each Japanese, "How do you look upon your actions now?" The response given by one may be regarded as typical: "I repent having

⁵³Ibid., pp. 276, 405, 411-12, 415, 447, 466. It is interesting to note that historians have generally regarded the Kwantung Army at the time the Soviet invasion, as "nothing more than an empty shell." See Butow, Japanese Surrender, p. 154.

⁵⁴See, e.g., USSR, Materials, pp. 242, 244, 247, 359, 390-93.

⁵⁵Ibid., pp. 245-47.

⁵⁶See, e.g., *ibid.*, pp. 263ff.

taken part in these inhuman experiments on living people, in bacteriological sabotage and in the preparations for bacteriological warfare against the Soviet Union."⁵⁷

Next came the accused's "Final Pleas." Eleven of the twelve confessed, again, to their guilt and expressed their repentance. Seven thanked the Court for having provided them competent counsel. Several disclosed their revised views of the Soviet Union and its people:

" . . . the Soviet Union is a democratic country which cares for the welfare of the people and stands on guard for peace." One accused waxed philosophical: "Stern punishment of us . . . will be a warning and a lesson for those criminals who are now trying to prepare to conduct a second bacteriological war."⁵⁸

The Court found all accused guilty as charged. Surprisingly, though, the sentences awarded these "Japanese monsters" were relatively lenient: four received 25 years' "confinement in a labour correction camp;" two received 20 years', and the rest got 18, 15, 12, 10, 3 and 2, respectively.⁵⁹ Considering the enormity of the accused's evil-doing, as depicted by the Soviets, one might have expected harsher penalties. Of eight Russians convicted of "spying" for the Japanese in 1946, for example, five were executed.⁶⁰

⁵⁷See, e.g., ibid., pp. 272, 284, 292, 307, 321, 325, 334, 345.

⁵⁸Ibid., pp. 515-22.

⁵⁹In this matter, see the Findings of the Soviet medical experts, in ibid., pp. 396-404. For verdict and sentences, see ibid., pp. 525-30, 534-35.

⁶⁰U.S.S.R. Information Bulletin. Pub. by the Embassy of the USSR in the U.S.A. vol. 6, No. 60, Sept. 11, 1946, p. 23.

Soon it became obvious that the Khabarovsk trials, and the ideas espoused there, were but part of a renewed propaganda assault against United States policy in East Asia. The Khabarovsk trials, said the Soviets, bared "conclusive and incontrovertible evidence" of "monstrous" atrocities committed and planned by "Japanese militarists." Yet, only a few of the guilty had been punished. Today, charged M. Raginsky, "the real initiators and organizers of bacteriological warfare flourish under the wing of U.S. General Douglas MacArthur." MacArthur, he continued, nurtured and reared these felons "with a view to using them in another world war." By denying having ever encountered evidence of germ warfare at the IMTFE, Americans hoped to "camouflage their own brigand plans."⁶¹

Americans were not only presently planning the future use of bacteriological warfare, according to V. Mayevsky, they were putting in power in Japan "people belonging to the same camp as the war criminals" tried in Khabarovsk.⁶² One Soviet "Observer" labeled Joseph Keenan an "advocate of plague" for his recent defense of Emperor Hirohito against Communist attacks.⁶³ Again, the Russians demanded that Hirohito and other 'guilty' Japanese be tried as war criminals before a special International Military Court.⁶⁴

⁶¹"Monstrous Atrocities of the Japanese Imperialists," by M. Raginsky. New Times, No. 2, Jan. 8, 1950, pp. 3-7.

⁶²"Monstrous Crimes Committed by Japanese Barbarians," by V. Mayevsky. CDSP, v. I, Feb. 18, 1950, pp. 21-27.

⁶³"Advocate of Plague," by Observer, CDSP, v. II, No. 9, Apr. 15, 1950, pp. 28-29.

⁶⁴"Bring the War Criminals To Justice!" No author. New Times, No. 6, Feb. 8, 1950, pp. 3-5; "Ill-Starred Defenders of War Criminals," by Observer, CDSP, v. II, No. 11, Apr. 29, 1950, pp. 22-23.

Russian propagandists concocted a seemingly endless list of charges aimed at undermining American policy in East Asia: American occupation authorities "protected" Japanese war criminals; "MacArthur Publicize(d) War Criminal Hirohito;" the United States steadily "remilitarized" Japan for overtly aggressive purposes; as a means of strengthening "its control and domination over Japan," America sought to release prematurely convicted Japanese war criminals. In this way, the United States furthered its aggressive and reactionary goals.⁶⁵ And so on.

Soviet verbal assaults particularly stressed "American plans for a separate peace with Japan." Such designs, they argued, were "intimately associated" with the project to convert Japan "into the chief operational base for aggressive war against the Soviet Union and the Chinese People's Republic. . . ."⁶⁶ Such misgivings, though "unfounded," led to the conclusion in February 1950 of a thirty year alliance between Russia and Communist China. The treaty "was directed against Japan or any ally of Japan's, meaning the United States."⁶⁷ Not surprisingly, the

⁶⁵See ibid.; also, "American Occupation Authorities Protect Japanese War Criminals," CDSP, v. III, No. 23, July 21, 1951, p. 14, "MacArthur Publicizes War Criminal Hirohito," CDSP, v. II, No. 52, Feb. 10, 1951, p. 25; "Remilitarization of Japan," CDSP, v. II, No. 48, Jan. 13, 1951, p. 26; "Mamoru Shigemitsu and His Patrons," CDSP, v. III, No. 24, July 28, 1951, pp. 11-12; "Note of Soviet Government To U.S. Government," CDSP, v. II, No. 20, July 1, 1950, p. 33; "Soviet Government's Note To U.S. Government," CDSP, v. II, No. 35, Oct. 14, 1950, p. 20; "Note of Soviet Government To the Government of U.S.A.," USSR Info. Bull., v. 11, No. 5, Mar. 8, 1951, p. 153.

⁶⁶"America's 'New Policy' In the Far East," by M. Markov. New Times, No. 12, Apr. 3, 1950, pp.6-9.

⁶⁷Harold C. Hinton, China's Turbulent Quest (N.Y., 1970), p. 39.

Chinese Communists repeated nearly all the charges against the "American imperialists," and in equally vitriolic terms.⁶⁸

* * *

Several concluding remarks concerning Russian war crimes operations in the East are needed. To begin with, obviously the Soviet conception of a trial differed substantially from that of the West. Said one British authority on international law, Viscount Maughan: " . . . the U.S.S.R. regards a trial as one of the organs of Government power, a weapon in the hands of the rulers of the State for safeguarding its interests."⁶⁹

The "fatal mistake" of the IMTFE, said the Russian prosecutor, A. N. Vasilyev, was the Tribunal's choice to adopt "mechanically . . . Anglo-American court procedure." He had no use for the Anglo-American legal "fetish" of reading aloud in court every word of every document or piece of evidence. This, he contended, prolonged trials interminably. And western defense lawyers had too much leeway. Here, Vasilyev cited Engels' view of the English Court system: "the clever lawyer can always find a loophole in favor of the accused." Other Russians agreed with him.⁷⁰

⁶⁸See, e.g., Soviet Press Translations, "Chinese Public Demands Punishment of Japanese War Criminals," v. 5, No. 8, Apr. 3, 15, 1950; "The Chinese People Protest the Illegal Acts of the American Authorities in Japan," v. 5, No. 13, July 1, 1950; "Declaration of Chou En-lai. . .," v. 5, No. 22, Dec. 15, 1950; London Times, May 18, 1950; The New York Times, Feb. 9, Nov. 28, 1950.

⁶⁹Frederick H. Maughan, U.N.O. And War Crimes (London, 1951), p. 28.

⁷⁰"On the Results of the Tokio War Crimes Trials," by A.N. Vasilyev. CDSP, v. I, No. 25, July 19, 1949, pp. 11-15. See, e.g., "From Nuremberg to Tokyo," Trainin, New Times, pp. 12-14.

Indeed, between the Russian trials at Khabarovsk and the Allied trials elsewhere, there appeared to be only one legal principle completely agreed upon: that in regard to the defense plea of "superior orders." Generally, Soviet military tribunals, like their Allied counterparts, rejected it. "No pleading with reference to orders from superiors or to the status of servicemen," averred the State Prosecutor at Khabarovsk, "can serve as justification" for criminal acts.⁷¹

Aside from official Soviet statements, little has been written on the Khabarovsk trials. Whatever comments may be found, however, are negative in their appraisal. Consider, for instance, the following: "An example of the sinister purposes a Government may have with a judicial proceeding can be found in the Khabarovsk Trial," wrote Justice Bernard V.A. Roling, the Dutch representative on the bench at the IMTFE. "No question of the use of bacteriological weapons," he assured, ever came before the Tokyo Tribunal. Furthermore, Roling concluded, the charge against the twelve Japanese at Khabarovsk had not been proved, as there had been not "a grain of evidence to support it."⁷²

Another noted scholar examined carefully the scope and gravity of the charges, as well as the 'momentous revelations,' unveiled at Khabarovsk. "Why all this had only just come to light," he reasoned, "over four years after the accused had been taken prisoner, and more than three years since the Russian troops had left Manchuria, was not

⁷¹USSR. Materials, p. 447.

⁷²Bernard V. A. Roling, "The Law of War and the National Jurisdiction Since 1945," Recueil Des Cours. Academie De Droit International. v. 100 (Leyde, the Netherlands, 1961) p. 431, n. 6.

explained."⁷³ His thoughts are well taken. Other criticism, concentrating on Soviet motives behind the trials, was leveled by a Japanese newspaper, the Tokyo Shimbun.⁷⁴

Finally, certain elements of Russia's war crimes operations in the East had, or have had, long-range significance on the unfolding of international relations in that part of the world. Two notable examples stand out. First, Soviet charges that its adversaries--"Japan and its American allies," at Khabarovsk--planned to use bacteriological warfare against Russia and other peace-loving nations have proven a useful and convenient Communist propaganda weapon since 1949.

The Soviets and their Communist allies, for instance, 'revealed' to the world that Americans fighting in Korea were employing bacteriological weapons. " . . . These bandits in generals' uniforms, the butchers in white gloves," alleged Pravda, "have unleashed the most inhuman carnage in history, warfare with the assistance of microbes, fleas, lice and spiders. . . ." Communist accusers pointed to the "voluntary confessions" of wrong-doing by American POWs in Korea as proof of the validity of such charges.⁷⁵

Second, Moscow's refusal to repatriate upwards of 400,000 Japanese POWs after World War II created quite a stir in international circles. Sharp protests against the Soviet action were lodged by a wide and often disparate, spectrum of sources: the Japanese Communist Party,

⁷³Calvocoressi, Survey of International Affairs, 1949-1950, pp. 454-55.

⁷⁴As reported in Malay Mail, Dec. 31, 1949.

⁷⁵As quoted in David Rees, Korea: The Limited War (N.Y., 1964), pp. 338, 352-54ff., 361-62.

the Japanese public and government, the U.N., S.C.A.P. Headquarters and the Australian government.⁷⁶ In October 1951, in response to a U.N. questionnaire on the repatriation of POWs, Moscow announced that the process had been completed. Only those "persons who have been sentenced or are being prosecuted for war crimes" would not be returned, said the Soviets.⁷⁷ Several days later the Voice of America reported that Russia had failed to account for some 370,000 Japanese captives.⁷⁸

This reality could not help but serve as an obstacle, in the succeeding years, to improved Russo-Japanese relations. Indeed, attempts to achieve a "normalization" of relations with Moscow in October 1956 proved that much more difficult because, as Edwin O. Reischauer put it, "there were real bones of contention between the two countries, and Japanese resentment against the Russians ran high." "For one thing," continued Reischauer, "large numbers of war prisoners had never returned from Siberia and had to be considered the victims of conditions in Soviet prison camps."⁷⁹

Nor has the situation changed much of late. A recent American Ambassador to Japan, Armin H. Meyer, noted in his diplomatic memoirs that the lingering distrust between Tokyo and Moscow was attributable at least in part, to the POW repatriation issue.⁸⁰ And consider, in

⁷⁶See Malay Mail, May 9, 23, June 21, Aug. 15, 1949; The New York Times, June 15, Oct. 17, 1951; Brines, MacArthur's Japan, p. 260; Australia. Current Notes On International Affairs. Sydney, v. 23, no. 1, Jan. 1952, p. 48; London Times, July 30, 1952.

⁷⁷The New York Times, Oct. 17, 1951.

⁷⁸Ibid., Oct. 22, 1951.

⁷⁹Reischauer, Story of A Nation, p. 277.

⁸⁰Armin H. Meyer, Assignment: Tokyo (Indianapolis, 1974) pp. 145-46.

conclusion, the report filed by a diplomatic correspondent for The New York Times in January 1976: Japanese-Russian relations, he observed, inter alia, "are at odds over . . . the continuing detention of 400 Japanese prisoners of war in the Soviet Union. . . ." ⁸¹

⁸¹The New York Times, Jan. 11, 1976.

CHAPTER VIII

CHINA

I. "Procedure and Machinery"

No nation sustained more victims of Japanese war crimes than China. Sino-Japanese hostilities began in July 1937--Chinese and some others said September 1931--and lasted, technically, until the Japanese surrender in September 1945. Actually, large, heavily armed Japanese contingents remained active in parts of China up until, at least, November 1946.¹ There, on Chinese soil, Japanese forces had perpetrated some of the most heinous and massive violations of the entire war. Property damage and loss to human life was incalculable.

Not surprisingly, then, the Chinese government expressed at an early date its firm determination to assist actively in the prosecution of Japanese war criminals. The surprise, however, rested in the fact that it was able at this time, amidst virtually nation-wide chaotic and precarious conditions, to take action commensurate with its intentions.

A Chinese Minister attended the signing of the Allied Declaration of St. James, concerned with the future disposition of war crimi-

¹The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1949), p. 380. F.F.Liu, A Military History of Modern China, 1924-1949 (Princeton, 1956), pp. 226-27. The Chinese government was trying "to negotiate a surrender" with 100,000 Japanese troops in Manchuria as of Nov. 27, 1946, in China Press.

nals, in London in January 1942, and subscribed to its principles. All perpetrators and "authors" of war crimes, said the Minister, would "be held accountable" and "equally dealt with according to law."² China joined in the establishment of the United Nations War Crimes Commission in October 1943, and led the way in the creation of an additional "branch," a Far Eastern Sub-Committee, in May 1944. Based in Chungking, the Sub-Committee's functions consisted chiefly in investigating war crimes committed in the China theatre. Chinese representatives sat on the Far Eastern Advisory Committee and, later, on the Far Eastern Commission. In fact, a Chinese presided over the latter's Committee number five, "War Criminals," throughout its existence.³ Also, a Chinese judge sat on the bench and Chinese lawyer assisted the prosecution staff at the IMTFE in Tokyo, while a local fact-finding group scoured China for evidence and witnesses to be used at the Tribunal.⁴

Under UNWCC auspices, China founded in late 1943 a war crimes agency suited to its particular situation. Unlike, say, the cases of the United States or Britain, Chinese territory had been the actual scene of Japanese war crimes. Therefore, China created a National Office,

²Walter L. Riley, "The International Military Tribunal for the Far East and the Law of the Tribunal As Revealed By the Judgment and the Concurring and Dissenting Opinions," Ph.D. Dissertation, Unpublished. U. of Washington, 1957, pp. 11-12.

³The Sub-Committee's creation followed the UNWCC's "adoption" of a Chinese proposal. History of UNWCC, pp. 127, 129-31. Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888, F.E. Series 24 (Wash. D.C., 1947), pp. 2, 8. Also, Far Eastern Commission. Second Report by the Sec. Gen. July 10, 1947-Dec. 23, 1948. Pub. 3420, F.E. Series 29 (Wash. D.C., 1949), p. 51.

⁴China Press, Jan. 8, May 28, 1946.

"charged with the duties of investigating the crimes which fell within its sphere, apprehending the accused, . . . and conducting the trials in its own courts."⁵

Chinese law concerning war crimes trials differed fundamentally from that of most other nations. A "Law Governing the Trial of War Criminals" of October 24, 1946, provided Chinese courts with a very broad legal basis, as it included, "simultaneously and in a given order of precedence, international law, special war crimes rules, and provisions of Chinese common penal law." In other words, Chinese courts recognized international law as the principal source for the trial of war criminals. The "special provisions" of the Law of October 24, 1946, supplemented the rules of international law. Finally, in cases not covered by the October 1946 Law or international law, a "subsidiary source," that is, the provisions of the Chinese Penal Code, applied.⁶

Chinese regulations for war crimes trials reflected, noted the UNWCC, an acute awareness of circumstances "peculiar to China and the events she (had) gone through during the (previous) two decades."⁷ No where is this more clearly demonstrated than in the manner in which China defined war criminals and war crimes.

The Law of October 24, 1946, contained a listing of four major

⁵History of UNWCC, pp. 5, 121-22, 380.

⁶Law Reports of the Trials of War Criminals. Selected and prepared by the UNWCC, (London 1947-49) 15 vols. v. II, Annex, "Chinese Law Concerning Trials of War Criminals, " p. 152.

⁷Ibid.

offenses for which Chinese courts could try Japanese war criminal suspects. First on the list stood a field of offenses commonly known as crimes against peace. In language similar to that used in the Nuremberg and Tokyo Charters, Chinese law defined as a war crime the "planning, conspiring or preparing," of an aggressive and, therefore, unlawful war; or "doing the same" in "an aggression against the Republic of China."⁸

Category two covered the field of "war crimes" in the more conventional sense, that is, of violations of the laws and customs of war. Adopting the practice of some other nations (e.g., Australia and the Netherlands), the Chinese Law of October 24, 1946, included in its third category an additional list of offenses regarded as constituting war crimes "in the narrower sense." Of the 38 specific offenses enumerated, many easily fitted under the heading of conventional war crimes or even that of "crimes against humanity:" for example, "planned slaughter, murder or other terrorist action;" "killing hostages;" "starvation;" "rape;" and "enforced collective torture."

Other listed offenses, however, dealt with crimes peculiar to China's or, in a broader sense, the Orient's past. Special emphasis, was assigned to offenses involving narcotic drugs or poisons: "distributing, spreading, or forcing people to consume, narcotic drugs," or "forcing people to consume or be inoculated with poison." One notable violation, "stupefying the mind and controlling the thought" of the Chinese people, apparently pertained to psychological warfare, listed as it was separately from drugs and poisons.⁹

⁸Ibid., pp. 152-53.

⁹Ibid., pp. 153-55.

Category four listed offenses as defined in the Chinese common penal law which had been "committed during the war . . . or a period of hostilities against China." For all practical purposes, this grouping included all or any crimes committed by Japanese against Chinese nationals or property left uncovered by the previous three listings. It may be seen, then, that Chinese legislation "adopted the concept of war crimes in a wider, non-technical sense" than did that of most of its Allies.¹⁰

Under the Law of October 24, 1946, each different type of offense provided a relevant time period for which Japanese could be held guilty. That is, for crimes against peace the period noted was that running "prior to or during the war." This recognized the fact that "planning, conspiring or preparing" a war of aggression could precede indefinitely the start of actual war. Therefore, the relevant time period varied according to the case.¹¹

For conventional war crimes, the relevant time period covered was that which ran "during the war or a period of hostilities against the Republic of China." Reference to the "period of hostilities," as distinct from the war itself, was made so as to take into account all crimes committed during a state of Sino-Japanese de facto belligerency that existed prior to the war. According to the Chinese, this state commenced with the Japanese invasion of Manchuria in September 1931. The same relevant time period applied to crimes punishable under the

¹⁰Ibid., p. 155. Also, see Ian Brownlie, International Law and the Use of Force By States (Oxford, 1963), p. 182.

¹¹Law Reports, v. 14, Annex, p. 155.

Chinese Penal Code.¹²

Finally, the period relevant for crimes against humanity was that which ran "during the war or a period of hostilities . . . or prior to the occurrence of such circumstances." According to the latter portion of the provision, then, crimes against humanity were punishable even when committed before the invasion of Manchuria by Japan.¹³

China tried Japanese war criminal suspects before Military Tribunals, convened and supervised by the Chinese War Crimes Commission following approval by the Ministries of Defense and Justice. While the Law of October 1946 directed that Military Tribunals should be composed of five military judges and one to three prosecutors, it allowed for the increase of both "when necessary."¹⁴ In fact, Chinese Courts rarely exceeded five judges.¹⁵

Crimes committed by order of superior officers did not in themselves "relieve the perpetrator from penal liability for war crimes." So directed Chinese war crimes regulations. In this respect, China acted in accordance with policy adhered to by most of its Allies. But, unlike its Allies, China did not specifically provide for mitigation of punishment upon the plea of superior orders if the court so deemed. These same provisions applied, under the Chinese law, to crimes committed as a result of official duty or, in pursuance of the policy of the offender's government or out of political necessity. Moreover, Chinese law expressly

¹²Ibid., pp. 155-56.

¹³Ibid., p. 156.

¹⁴Ibid., p. 159.

¹⁵See, e. g., China Press, Mar. 3, 16, 1946.

referred to the legal principle of command responsibility: not only superiors who issued orders, "but also those who tolerate(d) criminal acts of their subordinates" without taking appropriate preventative measures, were held penally responsible.¹⁶

Chinese war crimes regulations also differed considerably from those of other Allied nations in the area of punishments. Chinese law, that is, prescribed mandatory sentences upon conviction for certain crimes. Hence, offenses which constituted crimes against peace or crimes against humanity carried automatic sentences of either death or life imprisonment. Offenses which constituted conventional war crimes, meanwhile, provided various sentences depending on the crime itself. For example, conviction on charges of "murder" or "killing hostages" called for sentences of death or life imprisonment; "forcing women to become prostitutes" or "robbing," drew either death, life imprisonment or ten years imprisonment; and "malicious insults" or "violating Red Cross regulations" resulted in life imprisonment or imprisonment for not less than seven years. Reduction of sentences was not allowed.¹⁷

All convictions required confirmation by the Ministry of Defense. In cases involving death sentences or life imprisonment, the Ministry further submitted all relevant information to the President of the Republic--Chiang Kai-shek--"for a fiat of execution." If the Ministry or the President believed the judgment to be "faulty or improper," they could return the case for re-trial. An accused could appeal a con-

¹⁶Law Reports, v. 14, Annex, pp. 157-58.

¹⁷Ibid., pp. 158-59.

viction within ten days of the judgment. Finally, the Chinese--ever alert to see that no guilty Japanese went unpunished--permitted the Ministry of Defense to refer any case back for re-trial after further investigation. Particular attention was shown to trials ending in acquittals or in instances where the case "gave rise to doubts."¹⁸

II. "The Trials"

Strangely enough, American officials supervised the first war crimes trials conducted on Chinese soil. Beginning in early 1946, a series of trials centering about the inhuman treatment afforded captive United States airmen by Japanese took place in Shanghai. Closer examination of these trials is found elsewhere in this study.¹⁹ Noteworthy here, however, is the fact that, despite initial and sometimes irritating (to Americans) delays by Chinese authorities, the unfolding and disposition of these trials was the result of closely coordinated Chinese, American and even British investigation and preparation.²⁰

Meanwhile, as Americans organized and conducted trials in Shanghai, Chinese authorities busily apprehended Japanese suspected of committing war crimes against Chinese civilians during the occupation

¹⁸Ibid., pp. 159-60.

¹⁹See, e.g., The New York Times, Jan. 24, 1946, China Press, Jan. 4, 25, 27, Feb. 28, Mar. 1, 1946. See, also, supra, Chapter I.

²⁰On American impatience with Chinese inactivity, see The New York Times, Sept. 22, 1945. On U.S.-Sino cooperation vis-à-vis the trials, see statement by Gen. Wedemeyer, in Straits Times, Sept. 18, 1945; Stars & Stripes (Shanghai), Oct. 31, Dec. 19, 1945. On British assistance, see China Press, Oct. 29, 30, Dec. 15, 1945, Sept. 18, 1946.

period. At first, most arrests occurred in the Peiping-Tientsin region, as war crimes teams and the appropriate military personnel swept northward.²¹ But soon investigations spread throughout China's vast spaces. Shortly after, the number of atrocities reported and suspects named reached staggering proportions. On March 3, 1946, the Inspection Department of the Shanghai District Court announced that it had completed compiling 11,889 cases of war crimes. Nine days later reports disclosed that the number of cases of Japanese atrocities filed in Shanghai alone had ballooned to over 30,000.²²

The accused in these cases consisted of Japanese army and "gendarmerie" personnel, and some civilians. Most were suspected of murder and manslaughter," or "wilfully destroying properties;" far less with "torturing civilians," "plundering," and "rape." In an effort to manage this enormous task, the Chinese government constituted a total of 13 military tribunals in 13 districts, including Canton, Hankow, Northeast Haichow, Chuchow (Chekiang), Honan, Hunan, Shanshi, Hopei, Suiyuan, and Taiwan.²³

For a while, Chinese officials struggled with the problem. Lack of proper accommodations and the seemingly boundless demands of investigation and preparation caused several delays and postponements.²⁴ By the second week of April 1946, however, trials were under way. A

²¹Stars & Stripes (Shanghai), Nov. 30, 1945. China Press, Dec. 25, 1945, Jan. 24, 1946.

²²Ibid., Mar. 3, 12, 1946.

²³Ibid., Mar. 3, 16, 1946.

²⁴Ibid., Mar. 15, 16, 27, Apr. 4, 9, 1946.

Chinese Major General and member of the Military Court prefaced the opening of the first war crimes trial held in the Peiping-Tientsin area by declaring that all cases would be tried "according to military law." Despite "bestial, wartime Japanese behavior, he further asserted, his court intended to dispense justice and not revenge.²⁵ The trial commenced on April 10, and closed eight days later. Of the five Japanese charged with "murdering Chinese civilians," all were found guilty. Four accused received the death penalty, and the fifth got five years' imprisonment at hard labor.²⁶

Before too long, war crimes trials began all over China. Limits of time and space render it impossible to cover here, even perfunctorily, all of these trials. Therefore, examination of the trials' special features, exemplified by a few outstanding cases, will have to suffice.

The charge most frequently preferred by Chinese prosecutors against Japanese accused, previously mentioned, was "murder." And while precise figures are unavailable, it would appear accurate to conclude that, as regarded this particular offense, Chinese Tribunals delivered considerably more convictions than acquittals. Death sentences were common.²⁷

²⁵Ibid., Apr. 9, 1946.

²⁶Ibid., Apr. 18, 1946. All Chinese trials held before enactment of the Law of Oct. 24, 1946, were conducted under the terms of Chinese rules governing war crimes trials then in effect. Basically, the same principles applied. See Law Reports, v. 14, Annex, Case No. 83, p. 3.

²⁷See, e.g., China Press, Apr. 18, May 24, 1946; Jan. 7, Feb. 3, Aug. 15, Sept. 23, Dec. 11, 17, 19, 1947; Jan. 27, May 18, 28, June 8, Sept. 2, 1948. Malay Mail, July 26, 1949.

Perhaps the most unique aspect of Chinese war crimes trials rested in their heavy reliance upon international law. Other nations, to be sure, applied international law at their trials. Yet none did so as frequently, broadly or assertively as the Chinese. The following examples may be regarded as typical.

One celebrated Nanking case concerned the ex-Governor of Japanese-occupied Hong Kong, Lt. Gen. Isogai. Charges against him included, inter alia, "having allowed his troops in the advance on Nanking to rape, loot, murder and burn," and having "encouraged the sale of opium to destroy public morale."²⁸ While, as the UNWCC noted, there existed "no rule of customary International Law providing that a court delivering judgment in a war crime trial must state the reasons for its opinion," Chinese courts invariably did.²⁹ In the present case, a five-men military court found Isogai guilty of all charges, particularly of "instigating and supporting imperialistic aggression." For this "crime against peace," it sentenced Isogai to life imprisonment.³⁰

The trial of Lt. Gen. Hisao Tani, the "Japanese Fire Eater," also engendered much sensation in Nanking. According to the indictment against him, Tani had "authored" the Rape of Nanking in 1937. The "blood guilt of untold thousands," assailed the press, clung to his hands. Tani pleaded not guilty, but the overwhelming evidence adduced against him, as well as the testimonies of hundreds of eyewitnesses,

²⁸London Times, July 23, 1947.

²⁹Law Reports, v. 15, p. 20.

³⁰Malay Mail, July 26, 1947.

bespoke otherwise.³¹ More than a month after the trial had begun, the court read its decision:

Hisao Tani, having been convicted of instigating, inspiring and encouraging during the war the men under his command to stage general massacres of prisoners of war and non-combatants and to perpetrate such crimes as rape, plunder and wanton destruction of property, is hereby sentenced to death.

Following appeal and confirmation of sentence by the Ministry of National Defense and President Chiang K'ai-shek, Tani was duly executed.³²

A Chinese military court in Shanghai sentenced a Japanese Admiral, former commander-in-chief of the Imperial Fleet in China, to 15 years' confinement for "breaking international law." The accused, said the court, had been "instrumental" in forming the South China puppet regime during the war and had participated in mapping out Japanese aggression against China.³³ Chinese courts regularly based convictions on similar grounds.³⁴

Chinese authorities sometimes took extraordinary measures. In one instance, instead of merely confirming the verdict, the National Defense Ministry issued a "formal edict" demanding that the three defendants be put to death. Because they wantonly killed "Chinese combatants and non-combatants, expounded the Ministry, the accused had "to be executed in accordance with the Chinese Law and the Hague War

³¹China Press, Feb. 6-8, 1947; Straits Times, Feb. 7, 1947.

³²China Press, Mar. 11, 1947; Apr. 2, 27, 1947.

³³Ibid., June 1, 1948.

³⁴See, e. g., ibid., June 2, July 16, Aug. 3, 1948.

Regulations."³⁵ Chinese courts frequently convicted Japanese of offenses which overlapped the bounds of both war crimes and crimes against peace. For example, they adjudged accused guilty of "conspiracy to make war" or "conspiracy to murder."³⁶

A substantial number of Chinese war crimes trials dealt with the legal principle of command responsibility. Determined from the start that culpable individuals not be allowed to escape responsibility for the misdeeds of their subordinates, Chinese authorities relied heavily on the precedent established in the American trial of Gen. Tomoyuki Yamashita, held in Manila in 1945.³⁷ Of the trials that fit in this grouping, one surpassed in importance all the others, as it highlighted clearly both the principle of command responsibility and the defense plea of superior orders.

The accused, Takahashi Sakai, had served as a military commander in China during the war of 1937-1945. Between 1931 and 1934, evidence adduced at the trial revealed, Sakai had acted to form terrorist organizations in Peiping and Tientsin; had threatened to attack these places by artillery and air force; and had ordered the establishment in South China of a puppet administration designed to overthrow the Chinese government.³⁸

³⁵Ibid., Dec. 22, 1947.

³⁶Ibid., e. g., Oct. 27, 1946; June 1, 1948.

³⁷See Law Reports, v. 14, Annex, p. 158, n. 1; for Yamashita trial see supra, text, Chapter 3. For other trials dealing with doctrine of command responsibility, see, e.g., China Press, June 1, 2, 8, 25, 1948.

³⁸Law Reports, v. 14, p. 1.

From 1939 to 1945, the indictment read, the accused incited or permitted his subordinates to commit acts of atrocity in Kwantung, Hainan and Hong Kong. Such action resulted, Chinese prosecutors alleged, in the massacre of some 200 people, and the torture and mutilation of many more. Sakai was subsequently charged with commission of crimes against peace, war crimes and crimes against humanity.

Sakai pleaded not guilty. To charges that he had participated in a war of aggression and had instigated a war against peace, he responded that he had merely obeyed the orders of his government. Charges of atrocities he countered by arguing that he had not known about the acts of his subordinates, and therefore was not responsible for them.³⁹

The Chinese Military Tribunal rejected Sakai's pleas and found him guilty on all charges. Parts of the judgment are instructive. From it, one may discern, as did a noted author on international law, that Sakai's "liability for crimes against peace lay only in the fact that he had conducted military operations which formed part of a war aggression" against China. "This view of liability," perceived the author, "is wider than that taken" by the Tribunals at Nuremberg and Tokyo.⁴⁰

In dismissing the accused's plea of superior orders, the Tribunal said: " . . . Aggressive war is an act against world peace.

³⁹Ibid., pp. 1-2.

⁴⁰Brownlie, International Law, p. 182. Also, see Law Reports, v. 14, p. 4.

Granted that the defendant participated in the war on the orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime."⁴¹ In this respect, the court behaved in accordance with the rule and practice generally accepted by the other Allied nations.

Left unclear in the judgment--probably intentionally--was whether the Tribunal found Sakai guilty for crimes against peace committed during the war of 1937-1945, or whether it encompassed the period of hostilities from 1931-1937.⁴² The court also determined Sakai guilty of war crimes and crimes against humanity in that "he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929."

As regarded the question of Sakai's responsibility for the acts of his subordinates, the Tribunal took a position generally recognized "by nations and their courts of law," and firmly established by the Yamashita case: " . . . a field Commander must hold himself responsible for the discipline of his subordinates." Failure to prevent effectively or to tolerate consciously the commission of violations by subordinates, ruled the court, constituted a war crime.⁴³ The court condemned Sakai to be shot. After ratification by Chiang Kai-shek, punishment was executed before a large, approving public audience.⁴⁴

⁴¹Ibid., p. 5.

⁴²Ibid.

⁴³Ibid., pp. 6-7.

⁴⁴China Press, Sept. 14, 1946; Straits Times, Sept. 15, 1946.

The most publicized, interest-provoking and, ultimately, controversial, trial in China was that of General Yasutsugu Okamura. Former Commander-in-Chief of all armed forces in China during the war, Okamura, averred the China Press, represented the "highest" wartime Japanese authority in China "pulling strings behind the puppet Wang Ching-wei regime in Nanking." Many Chinese considered him "the Number One Japanese war criminal in China." To be sure, the Yen-an Communists had placed Okamura at the head of their war criminals list as early as December 1945.⁴⁵

For Okamura's trial, the Ministry of National Defense organized a Special Military Tribunal in Shanghai. A large auditorium designed to accommodate many expected spectators was provided. The China Film Company prepared energetically to capture on newsreel the historical event soon to unfold. Extensive pre-trial publicity touched upon nearly all aspects of the case.⁴⁶

Chinese authorities, too, recognized the unusually high degree of public interest generated by the forthcoming trial. It was necessary, they therefore discerned, to place the trial and events relating to it in proper perspective. There was no denying the true significance of the upcoming Okamura trial, asserted the President of the five-man Military Tribunal, Sheh Mei-yu. He predicted that the hearing would come to "occupy an important page in the annals of the Chinese military commissions." Above all, however, he stressed that Okamura would

⁴⁵China Press, Aug. 3, 14, 1948; Dec. 22, 1945.

⁴⁶Ibid., Aug. 3, 11, 14, 1948.

receive a "fair trial." Neither leniency nor a "vengeful attitude," but justice according to the evidence adduced, said President Shih, would determine Okamura's fate.⁴⁷

Charges preferred against Okamura included, inter alia, supporting aggression, violating Article 46 of the Hague Convention (which provides respect and protection for civilian lives and property in areas occupied by belligerent forces), and "tolerating the massacre of Chinese civilians and burning of houses by Japanese troops and other crimes."⁴⁸

Responsibility for the deaths and the destruction of property of countless Chinese civilians, contended the prosecutor, rested squarely on Okamura's shoulders. A military commander, he pressed, must be responsible for all acts of his subordinates. In reasoning that sounded far more political than legal, he inquired: "If Okamura should be let go free, what would the Chinese nation think of this tribunal? What would the relatives of victims of Japanese brutalities think of this military, commission?" He demanded the death penalty for Okamura.

Such assertions were without legal foundations, argued counsel for the defense. The prosecution, he insisted, had produced "no concrete evidence" of Okamura's guilt; his client should therefore be acquitted. "Supervision" of the actions of troops, he continued, could only be effectuated by "immediate superiors," not by any commander--Okamura--behind the front. Okamura, he maintained, "did send supervisory orders in the written form to the front, prohibiting soldiers from

⁴⁷Ibid., Aug. 15, 1948.

⁴⁸Ibid., Aug. 3, 11, 1948.

killing, committing arson, and attacking innocent people." He concluded with a pithy, basic and cogent peroration: "We are here to try Okamura with law. Since there is no evidence against him, he should be released." The court then adjourned sine die.⁴⁹

For the next five months the Okamura trial remained unsettled. A "serious ailment," believed to be tuberculosis, hospitalized Okamura, and resulted in indefinite postponement.⁵⁰ Not until January 1949 did the trial resume, and later that month the tribunal rendered its verdict. "Lack of evidence," declared the court, made only one decision possible: not guilty. But the court went even further, expounding in its opinion a legal reasoning which seemingly undermined much of the validity of the doctrine of command responsibility.

Okamura, the tribunal stated, had not been appointed to the commander's post in China until eight months before V-J Day. His merely being the head of the Japanese Army, it decided, could not in itself constitute a war crime, nor could he be held responsible exclusively for violations perpetrated by subordinates. Furthermore, the court added, Okamura had acted commendably in ordering his men to surrender their arms and cease hostilities after V-J Day.⁵¹

Okamura's acquittal drew immediate and strident criticism from the Chinese Communists. A Peking broadcast violently mocked the

⁴⁹Ibid., Aug. 24, 1948.

⁵⁰Ibid., Sept. 25, Nov. 9, 1948.

⁵¹The court's decision was not verbatim, but as reported in the press. See ibid., Jan. 27, 1949. Cf. the decision reached by a U.S. military commission in Yamashita case, supra, Chapter 3.

Nationalist government for its weakness, and demanded the re-arrest and re-trial of Okamura and other "unjustly" released Japanese war criminals.⁵² Particularly irritating to the Chinese Communists--and perplexing to students, no doubt--were reports that Okamura, along with 259 "other Japanese war criminals," had been turned over to the custody of S.C.A.P. in February 1949.⁵³

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At this point, other, perhaps less sensational, facets of the Chinese war crimes operation merit attention.

Japanese suspects, it would appear, were treated well by their Chinese captors. On several occasions, unsolicited press reports described the rather comfortable conditions of incarceration afforded war criminal suspects: "housed in rooms, furnished Japanese-style; rooms are heated and they get generous rations; they can read and play games." According to another journalist, Japanese suspects awaiting trial in Canton led "a comparatively easy life."⁵⁴ Treatment of this type is all the more remarkable when one recalls the intense animosity felt by Chinese toward Japanese circa 1945. By no means is this meant to suggest that Chinese authorities treated Japanese war

⁵²London Times, Jan. 31, 1949.

⁵³Confusion abounds in this matter. In early Feb. 1949, SCAP took over from China 260 "convicted Japanese war criminals," at the "request" of the Nationalist government. These men were to finish their terms of imprisonment in Sugamo Prison, in Tokyo. One newspaper implied that Okamura was one of the 260; another, that the Communists believed him to be. Yet, as shown, Okamura had been acquitted. See China Press, Feb. 1, 5, 1949; The New York Times, Jan. 31, Feb. 5, 1949.

⁵⁴China Press, Jan. 24, 1946; July 3, 1947.

criminals indulgently during the years 1945-1949. It is meant, however, to indicate the humane behavior afforded by the Chinese to suspects not yet proven guilty. In fact, Chinese sometimes felt the need to remind themselves and their countrymen of the recent brutality of the Japanese. "We cannot afford to be over-lenient in our attitude towards the Japanese," cautioned an official statement issued in late 1947.⁵⁵

Chinese justice, too, noted officials, was to be stern, not vengeful.⁵⁶ And while Chinese military tribunals convicted many Japanese and awarded harsh--often the harshest--sentences, they also acquitted a good number of suspects. In the early stages of the war crimes operation, Chinese authorities found not guilty and released 180 Japanese suspects after a full preliminary investigation.⁵⁷ A tribunal in Tsingtao acquitted a Japanese colonel and 13 subordinates, despite the seriousness of the charges preferred against them.⁵⁸ A Hankow court acquitted a Japanese "for lack of evidence."⁵⁹ Not to be overlooked, of course, is the decision delivered in the Okamura trial, above.

Chinese trials were sometimes, not always, open to the public. Celebrated cases received wider publicity. The authorities had one

⁵⁵Ibid., edit., Dec. 7, 1945; Malay Mail, Oct. 7, 1947.

⁵⁶See official statements, e.g., in China Press, Apr. 9, 1946. Aug. 15, 1948.

⁵⁷Ibid., Apr. 25, 1946

⁵⁸Ibid., July 19, 1947.

⁵⁹Ibid., Oct. 27, 1946.

trial broadcast live; others, like that of Okamura, were filmed.⁶⁰ Chinese officials exerted every effort to present direct eyewitness testimony at the trials. In this manner, they hoped, "concrete evidence" would either prove or disprove the charges against an accused. Unlike trials conducted by other nations, in fact, civilians at Chinese trials, "acting as representatives of the people," could "present their personal opinion to the court."⁶¹

As previously mentioned, Chinese authorities cooperated closely with Allied war crimes teams in China. Such cooperation, however, worked both ways. Chinese prosecutors, for example, first appeared before a United States Military Commission in Yokohama in September 1946. There, they assisted an American prosecutor in the initial case involving a Japanese accused of war crimes against Chinese nationals.⁶² Moreover, the first Sino-American Joint Military Commission opened in Yokohama in November 1947. On trial were eight Japanese servicemen accused of committing acts of brutality, torture and murder against Chinese prisoners of war. Additional joint tribunals in Japan followed.⁶³ On one occasion, American officials agreed to transfer to Canton for retrial by the Chinese a notorious Japanese war criminal. The accused had been previously tried and sentenced to death by a United States

⁶⁰See, e.g., ibid., Mar. 3, 1946, Aug. 5, 11, 1948; Stars & Stripes (Tokyo), Aug. 20, 1948.

⁶¹China Press, Nov. 13, Mar. 20, 1946.

⁶²Ibid., Sept. 5, 1946.

⁶³Ibid., Nov. 27, 1947, See, e.g., Mar. 4, Oct. 13, 1948.

tribunal in Shanghai.⁶⁴

Final, precise statistics relating to Chinese war crimes trials are unavailable. However, as of April 30, 1948, American officials reported these figures: Accused tried, 215; Convicted, 163; Sentenced to death, 54.

Unofficial press accounts disclosed that, between May 1948 and February 1949, Chinese courts sentenced two more Japanese to death, five others to imprisonment and acquitted one. Disposition of trials still in progress (presumably a small number) remains a mystery, as chaos and disruption caused by the civil war severely limited newspaper coverage. Amended statistics thus are: Accused, 223; Convicted, 170 (75.9%); Acquitted, 53 (24.1%); Death Sentences, 56 (32.9% of total accused convicted).⁶⁵

III. "The Trials and China's International Relations"

Internal convulsions dominated Chinese policy, national and international, from 1945-1949. Barely had Japan capitulated in September 1945, when another major crisis loomed. Bitter disagreement over whose forces should accept the surrender of Japanese troops, seize enemy equipment and occupy enemy territory, erupted into "increasingly frequent" and ever-widening armed clashes between Nationalist and Communist Chinese. By November, noted observers, the situation in North China "was out of hand." The "prospects of peace and stability in China,"

⁶⁴Ibid., Sept. 27, 1946.

⁶⁵U.S. Dept. State. Foreign Relations of the United States. 1948. V. VI, The Far East (Wash. D.C., 1974), June 3, pp. 807-08.

predicted others, seemed seriously jeopardized.⁶⁶ In fact, they were doomed: full-scale civil war soon exploded, and raged across wide areas of China until Communist forces eventually secured control over the mainland in October 1949.

Moreover, as far as trials went, center stage in China was reserved for those of local "puppets"--that is, Chinese who, during Japan's prolonged occupation, collaborated in the Japanese design. Chinese on trial usually included well-known judges, politicians, governors, business men, civilians and mistresses. For years, the local population had awaited longingly the day when these culprits would receive their just deserts. Only the trials of the most notorious Japanese war criminals attracted as great or greater attention than these "puppet" trials.⁶⁷ Similar situations, it will be shown, developed in the Philippines and France regarding trials of nationals who had collaborated with the enemy (see Chapters 10 and 11).

Viewed against this background, the Nationalist government's success in locating and apprehending Japanese suspects, and in organizing and conducting an effective war crimes operation in general, appears quite a remarkable achievement. Chinese, however, had suffered immeasurably under the cruel hand of their Japanese invaders. Never did they waver in their determination to obtain just retribution.

⁶⁶U. S. Dept. of State. The China White Paper, August 1949 (Stanford, 1967) p. 130; Herbert Feis, The China Tangle (Princeton, 1953), p.377.

⁶⁷These 'puppet' trials received considerably more press coverage than did those of war criminals. E.G., from Sept. 1945-June 1946, a lead story relating to 'puppet' trials appeared nearly every day in the China Press.

For that reason, Chinese war crimes trials continued into 1949, the steadily deteriorating Nationalist military position notwithstanding. But pressure engendered and exacerbated by the civil war eventually took its toll. Communist forces scored telling victories all through the latter part of 1947 and after. Communist conquest of Manchuria and destruction of a large Nationalist army there in the winter 1948, in the words of one American military observer, "spelled the beginning of the end" for the Nationalist regime.⁶⁸ War crimes courts consequently closed in Canton, Hankow and Peiping in early 1948. All unfinished cases were transferred to Shanghai for completion.⁶⁹

Conditions in China, meanwhile, worsened. In August reports disclosed that both Nationalist and Communist Chinese were using large Japanese forces to fight one another.⁷⁰ By November the New York Herald Tribune could forecast gloomily that word out of China "clearly indicate(d)" the grave possibility "that the entire country will be lost to the Communists." Chinese authorities thereupon accelerated further the "tempo" of their war crimes operation in an attempt to wind up all trials before the situation no longer allowed for it.⁷¹

Here, the matter becomes even more complex. Significantly, it would appear, internal events determined to a considerable degree when

⁶⁸For the declining military fortunes of the Nationalists after 1947, see U.S. Dept. of State, White Paper, pp. 318-23, 334-36.

⁶⁹China Press, Dec. 27, 1947, Mar. 31, 1948.

⁷⁰Sydney Morning Herald, Aug. 26, 27, 1948.

⁷¹New York Herald Tribune, edit., Nov. 12, 1948, See, e.g., China Press, Apr. 21, June 2, 1948, Jan. 27, 1949.

war crimes trials in China would be brought to an end. Most other Allied nations, while not all succeeded, tried to phase out their war crimes trials in accordance with time limits set by Washington, S.C.A.P. Headquarters or the F.E.C. Chinese authorities did not--could not--wait for these American-sponsored directives. They took initial steps toward winding down war crimes trials in late 1947, and persisted in their efforts all through 1948 and into early 1949--months before the issuance of relevant "recommendations" by S.C.A.P. or the F.E.C.⁷² Indeed, in February 1949, the Nationalist government transferred 260 convicted Japanese war criminals to Tokyo to serve out their terms of imprisonment. Apparently, war-torn China could no longer accommodate the prisoners.⁷³

However, an alternative or, more accurately, a supplementary thesis exists. It may be suggested, that is, that Chiang Kai-shek's view of Japan and Japanese war criminals was, by 1949, somewhat altered by his assessment--cold and sobering, it must have been--of waning Nationalist fortunes on the mainland. With Communist takeover imminent and deepening Russo-American cold war strains and divisions already evident, surely Chiang must have discerned the need for closer association with United States policy in the East. And that policy, after autumn 1948, stressed the economic recovery and political stabilization

⁷²For Chinese efforts to "wind down" war crimes trials, see, e.g., *ibid.*, Dec. 27, 1947, Mar. 31, Apr. 21, June 2, 1948, Jan. 27, 1949. For SCAP recommendation, see *New York Herald Tribune*, Nov. 14, 1948; for FEC recommendation, see *The New York Times*, Mar. 16, 1949.

⁷³*China Press*, Feb. 1, 1949.

of Japan. That, in order to transform the archipelago into a Pacific democratic bastion against Communist advances in the region.

Perhaps this explains the virtual cessation of trials in China after March 1949 as well as the surprising decision in the Okamura case. Continued prosecutions and convictions of Japanese war criminals, Chiang may have thought, would not lend themselves very well to accommodating American policy. Nor would, later on, Chinese insistence upon heavy Japanese reparations payments or the imposing of undue obstacles to repatriation of Japanese citizens in Taiwan: accordingly, the Republic of China "magnanimously abandoned" its reparations claims (Peking did not) and facilitated Japanese repatriation.⁷⁴

In any event and for whatever reasons, China basically determined its own war crimes policy. This remained true in spite of the fact that between V-J Day and 1949, the Nationalist government received enormous amounts of United States military, economic and other aid. It applied, too, to American-conducted trials on Chinese territory. "Primary responsibility" for war crimes trials, stated a Joint Chief of Staff directive in 1946, "rests with the Chinese Central Government," any American action in China required "the acquiescence of the Chinese Government."⁷⁵

Different reasoning determined China's role in international affairs, specifically, that is, at the IMTFE in Tokyo. Like Australia

⁷⁴Lawrence Olson, Japan in Postwar Asia (N.Y., 1970), pp. 82-83.

⁷⁵U.S. Dept. of State. White Paper, p. 354. U.S. Dept. of State, Foreign Relations of U.S. 1946. V. VIII. The Far East (Wash. D.C., 1971), July 22, p. 410.

and New Zealand, China shortly after the war promulgated a "politically explosive list" of Japanese war criminals headed by Emperor Hirohito. The list so embarrassed American officials, reported correspondent Frank Kelley, that for a while they tried to deny its existence.⁷⁶

Yet, there can be no gainsaying that Chinese authorities 'knew the score' as it applied to the IMTFE. It had "been obvious from the beginning," observed editorially the China Press, "that Americans would run the Tokyo Trial." Allied policy in the Far East, wrote The New York Times, in 1945, actually "means American policy in the Far East."⁷⁷

Nevertheless, even in later years, Chinese officials questioned the decision to grant immunity to the Emperor, and insisted on his guilt. Mei Ju-ao, China's representative on the bench at the Tokyo Tribunal, expressed immediately after the trial his belief that the IMTFE had "plenty of evidence" which proved Hirohito had been "an abettor or participator" in crimes against peace.⁷⁸ Still, one may sense that, partly at least, these declamations were intended to appease the popular demand in China for Hirohito's head. For the issue itself, it would seem, had been resolved at an early stage: on March 25, 1946,

⁷⁶New York Herald Tribune, Nov. 6, 9, 1945.

⁷⁷China Press, edit., Sept. 5, 1948. The New York Times, Sept. 17, 1945; also, Sept. 30, 1945.

⁷⁸Malay Mail, Oct. 7, 1947; for Mei's statement, see China Press, interview, Nov. 15, 1948.

Joseph Keenan, chief prosecutor at Tokyo, arrived in Chungking to confer with President Chiang Kai-shek in re China's forthcoming role at the IMTFE. Chiang, it later became known, opposed deposing of the Emperor, fearing that such action might precipitate political instability in postwar Japan. Whether he disclosed such views at the conference in question, however, is unclear. In any event, on that same day, Judge Mei Ju-ao announced in Tokyo that he had brought from China a list of prominent war criminal suspects. While he refused to name those on the list, he revealed that the Emperor was not among them.⁷⁹

A word on the role of the Chinese Communists vis-à-vis China's war crimes operation is warranted. As with the Russians, their intentions were strictly political. Certainly, the Chinese Communists registered some legitimate grievances against, and claims to try, Japanese war criminal suspects. In a few reported instances they had tried and executed guilty Japanese. But always there were political overtones: From the beginning they demanded that members of the Nationalist government be tried as war criminals.⁸⁰ American servicemen (aiding in the transfer of Nationalist forces to northern China), alleged the Yanan Communists in 1947, had committed "atrocities" against Chinese in the Peiping area.⁸¹ Chinese Communists mocked incessantly the Nationalist government for prematurely releasing or acquitting "guilty" Japanese.⁸²

⁷⁹Ibid., Mar. 25, 1946.

⁸⁰Ibid., Dec. 22, 1945; London Times, Jan. 31, 1949.

⁸¹China Press, Jan. 14, 1947.

⁸²See, e.g., London Times, Jan. 31, Feb. 7, 1949.

All war criminals, they ordered, must be turned over to them. S.C.A.P. Headquarters, they charged, in accepting the transfer of 260 Japanese war criminals from Shanghai to Tokyo, was "interfering in the internal affairs of China."⁸³

Communist political propaganda did not terminate there. A renewed inundation of rhetorical barrages followed the establishment of the People's Republic of China in October 1949. Americans, particularly General MacArthur, now emerged as the new target. Chou En-lai, Peking broadcasts, the Hsinhua News Agency, and local Chinese newspapers scathingly denounced "the premature liberation of the Japanese war criminals by MacArthur."⁸⁴

Particularly strident was criticism related to S.C.A.P.'s early parole, in November 1950, of a major Japanese war criminal, Mamoru Shigemitsu. "Under no circumstances," declaimed Chou, would the Chinese people "let MacArthur, the representative of American imperialism, encourage Japanese fascism for the purpose of renewing aggression."⁸⁵ Chinese Communists aligned themselves in this matter with their Soviet "comrades." Similarly, they supported wholeheartedly the findings of the Russian-held Japanese war crimes trials in Khabarovsk (see Chapter 7). They, too, insisted that all "the top Japanese war crimi-

⁸³The New York Times, Jan. 31, Feb. 5, 1949.

⁸⁴London Times, May 18, 1950; "The Chinese People Protest the Illegal Acts of the American Authorities in Japan," in U.S.S.R. Soviet Press Translations (Seattle, 1950), July 1, 1950, v. 15, no. 13, p. 415.

⁸⁵Hsinua News Agency, as reported in ibid., Dec. 15, 1950, v. 5, no. 22, pp. 693-94.

nals, headed by Hirohito," be tried before an "International War Crimes Tribunal" for the crime of preparing bacteriological warfare" for use against the Allies in World War II.⁸⁶

One last factor, relevant to both China's war crimes operations and immediate postwar international relations, should be mentioned. In August 1952, the governments of Japan and Taiwan, the new Nationalist stronghold, ratified a treaty of peace and normalized relations between their nations. Ozaki, Japan's Foreign Minister, emphasized at that time how "delighted" the Japanese were that in the treaty the Republic of China "waived the benefit of the services required to be made available by Japan under the San Francisco Treaty, and . . . opened the way for the release of Japanese war criminals convicted by Chinese Courts." Eighty-eight of the Japanese war criminals in question were released forthwith.⁸⁷

⁸⁶"Chinese Public Demands Punishment of Japanese War Criminals," in ibid., Apr. 15, 1950, v. 5, no. 8, pp. 254-55.

⁸⁷London Times, Aug. 6, 1952.

CHAPTER IX

THE NETHERLANDS

I. "Procedure and Machinery"

The principal burden of identifying, locating and apprehending Japanese war criminals in the East, preceding chapters have shown, "fell mainly upon the British and American military authorities." Australia, then, rendered the next most significant contribution to the overall Allied war crimes effort. Not to be underestimated, though, was the role played by Dutch authorities operating in the Netherlands East Indies. There Dutch military courts tried at least 175 cases involving over three hundred Japanese accused.

Dutch authorities demonstrated their desire to join in an Allied war crimes operation as early as January 1942. At that time, they actively partook in the founding of the International Commission on the Punishment of War Crimes, and subscribed to the Declaration of St. James, emanating therefrom. The Netherlands entered the United Nations War Crimes Commission in October 1943. In 1944 it accepted an invitation to join an additional "branch" of that organization, the Far Eastern Sub-Committee on War Crimes, based in Chungking.¹

¹ Britain. Punishment for War Crimes: The Inter-Allied Declaration signed at St. James' Palace, London on January 13, 1942, and Relative Documents. (London, 1942), p. 3. Also, M. E. Bathurst, "The United Nations War Crimes Commission," Amer. Jrnl. of Int. Law, v. 39, 1945, pp. 565-66, 568ff. The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1948), pp. 127, 129-31.

The Far Eastern Advisory Committee convened in October 1945. It had as its purpose the making of "recommendations" on the "formulation of policies, principles and standards" by which Japan would fulfill its obligations under the Instrument of Surrender. Dutch representatives, too, sat on this body as well as its more permanent offspring, the Far Eastern Commission. More assertive Dutch action was to come. In August 1945, Dr. H. J. Van Mook, Lieutenant Governor-General of the Netherlands East Indies, warned Japanese commanders in the islands that those who mistreated the civilian population or POWs in prison camps "would be treated as war criminals."²

The Netherlands subsequently created two separate sets of regulations for governing war crimes trials in the East and in Europe. Metropolitan Dutch courts in Holland, to wit, relied "mainly on existing provisions of Dutch common penal law." They treated war crimes as offenses against the municipal law, not as violations of the laws and customs of war.³ This differed considerably from the legal approach to war crimes taken in the Netherlands East Indies (N.E.I.).

War crimes trials in the N.E.I. were regulated by several decrees enacted in 1946 by the Lieutenant Governor-General. These regulations, wrote the UNWCC, relied "on novel provisions introducing in

²Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888 (Wash. D.C., 1947), p. 2. The New York Times, Aug. 18, 1945.

³Eventually, Dutch metropolitan legislation was amended more in the direction of N.E.I. legislation: rules of international law were made applicable to acts punishable by Dutch courts as war crimes against humanity. See Law Reports of Trials of War Criminals. 15 vols. Selected and prepared by the UNWCC (London, 1947-49), v. 11, Annex, pp. 86-88; also, v. 15, p. 34.

the sphere of war crimes numerous exceptions to the N.E.I. Penal Code." Put simply, they approached war crimes trials independently of municipal law. Primary reliance was placed on international law, albeit in the narrow sense--that is, no reference was made to "crimes against peace" or "crimes against humanity." Furthermore, N.E.I. common penal law would be applied only in those instances where its "general principles and rules" coincided with the special war crimes legislation.⁴ In their legal approach to Eastern war crimes trials, then, the Dutch basically followed similar lines as Britain, Australia and Canada.

Under Article 1 of the N.E.I. Statute Book Decree No. 44 of 1946, the term "war crimes" was

. . . understood (as) acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy.⁵

The Dutch, similar to procedure employed by Australia and China, added to this definition a list of 39 specific offenses. Numbers 1-34 included acts which might appropriately be placed under any general definition of conventional war crimes or crimes against humanity: for example, "murder and massacres" (1); "torture of civilians" (4); "confiscation of property" (15); and "poisoning of wells" (33).

Netherlands East Indies legislators drew up five additional crimes so as to deal "with types of offenses committed by Japanese war criminals repeatedly and on a large scale." These included, inter alia, "ill-treatment of interned civilians or prisoners" (35); "carrying out

⁴Ibid., also, v. 11, Annex, pp. 87-88, 91.

⁵Ibid., p. 93.

or causing execution to be carried out in an inhuman way" (36); and "intentional withholding of medical supplies from civilians" (38).⁶

Jurisdiction over war crimes trials in the N.E.I. devolved upon military authorities. Japanese accused were tried before temporary courts-martial, appointed by the Governor-General "where a state of siege (had) been declared." Temporary courts-martial were composed of one President (a civil lawyer), and two members, all officers and at least 25 years of age. N.E.I. Statutes made special allowance for jurisdiction over offenses perpetrated outside Dutch territory: all relevant provisions, they held, "with regard to war crimes are applicable irrespective of the place where the crime is committed."⁷

Dutch war crimes courts, therefore, adhered to procedure applicable in military courts. They followed common law rules of evidence, with certain exceptions. Like their Allied counterparts, Dutch military courts departed from the normally strict rules of evidence in their practicable attempt to prosecute Eastern war criminal suspects. A Dutch judge, for example, could recognize as legal evidence "all documents produced at the sitting and all statements wherever made." He could "ascribe to them such conclusive strength as he thinks they may possess" if he believed such material constituted the best or most reasonably accessible evidence under the circumstances.

Under the N.E.I. Statute, an accused had the right "to be represented and choose counsel for defense." If he refused to designate

⁶Ibid., pp. 93-94.

⁷There were three types of Dutch courts-martial. But the temporary courts-martial "appear to be in practice the only ones to be used for war crimes trials." Ibid., pp. 106-07; 97.

counsel, the President of the court assigned one to him. Also afforded the accused was the right to rebut "in person or through counsel" the prosecution argument. More importantly, the court in every case granted the accused the final argument. The prosecution, on the other hand, could at any time during the hearing alter the charges "as it finds necessary in face of the facts and evidence produced." Specifically, it could introduce additional or more serious charges.⁸

Several notable features rendered the N.E.I. war crimes regulations distinct from that of many, if not all, of its Allies. For one, the N.E.I. legislation recognized the concept of "conspiracy." "Any attempt at or complicity and conspiracy in a war crime," it read, "are equally punishable with the crime itself."⁹ In this respect, the Dutch law embraced a much broader application than that of its Allies. Chinese and American regulations, it is true, contained reference to "conspiracy." Yet, both restricted its application exclusively to the sphere of crimes against peace.¹⁰ Dutch law contained no such exclusionary provision; conspiracy might be charged in the commission of any type of war crime.

N.E.I. law also prescribed penalties to be awarded upon conviction:

He who has been guilty of a war crime shall be punished with the death penalty, or imprisonment for life, or imprisonment for not less than 1 day, and not more than 20 years.

⁸Ibid., pp. 106-08.

⁹Ibid., p. 98.

¹⁰See ibid., v. 14, Annex, pp. 152-53; SCAP. Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. Monograph 5, (Tokyo, 1952), Append. 2, p. 216, Also, Law Reports, v. 15, pp. 90-92.

In each case the court decided which sentence to mete out. Of the Allied nations, only China adopted somewhat similar procedure.¹¹

As regarded the defense plea of "superior orders," N.E.I. legislation followed "the generally accepted rule in contemporary international law:" that is, commission of a war crime upon superior orders did not in itself relieve the perpetrator of criminal responsibility. Similarly, Dutch Statutes recognized the legal principle of "command responsibility:" a commander who "tolerated" or failed to take reasonable action to prevent the commission of war crimes by his subordinates was "equally punishable" for said crimes.¹² In these instances, N.E.I. law resembled that of its Allies. But the N.E.I. War Crimes Penal Law also contained a provision which explicitly freed from guilt "he who commits a crime under duress."¹³ Allied nations did not follow suit in this respect.

In common with some of its Allies, the Netherlands created special provisions for war crimes committed by "criminal groups" or "organizations." The Allies, however, restricted application of this charge to European war crimes trials; specifically, to such notorious groups as the Gestapo and S.S. Dutch military courts nevertheless prosecuted Japanese criminal groups for commission of specific crimes.¹⁴

¹¹Ibid., v. 11, Annex, p. 103. Chinese law, too, prescribed set punishments; China's, though, were far more categorized according to the crime itself. See supra, Chapter 8.

¹²Law Reports, v. 11, Annex, pp. 98, 100.

¹³Ibid., p. 102.

¹⁴Ibid., pp. 101-02. Prosecution of "criminal groups is to be distinguished from "joint" or "mass" trials, commonly held by Allied nations in the East. In the former, the crime charged is committed in

In yet another aspect N.E.I. law contrasted from that of its Allies. Under Dutch war crimes regulations, an accused had the right "to challenge any member of the court on the ground of lack of impartiality." Left, thereupon, to the discretion of the court was the decision whether to act upon, or ignore, the challenge. No other Allied nation's war crimes regulations contained a similar provision; in truth, many explicitly precluded such practice.¹⁵

Finally, Dutch military courts, like those of China and France, delivered reasoned judgments. Included in these, N.E.I. law prescribed, had to be "the reasons for the verdict and the description of the offense." Additionally, "the circumstances which, in accordance with the law," produced said verdict and sentence had to be clearly explained. This outstanding feature did not go unnoticed in international legal circles. " . . . It cannot be doubted," averred the UNWCC, "that the courts" which gave "reasoned judgments have tended the most detail to the existing store of knowledge on the international law of war crimes."¹⁶

N.E.I. law also contained certain provisions, hitherto unmentioned, which ran parallel to those found in Allied regulations. It allowed, for example, mixed inter-Allied military courts. Nor was that

such a way that it "can be ascribed to the group as a whole," and is "considered to have been committed by that group." In the latter, all accused are charged with committing merely similar crimes. See ibid., p. 101; also, v. 13, Case no. 79, pp. 140-42.

¹⁵Ibid., v. 11, Annex, p. 108. Cf., e.g., this provision with the following: Britain. Royal Warrant. 14th June 1945, Army Order 81/1945, w/Amendments. HMSO, 1945, Art. 6; Law Reports, v. 5, Annex, "Australian Law Concerning Trials of War Criminals. . . ," p. 99.

¹⁶Ibid., v. 11, Annex, pp. 108-09. Also, v. 15, pp. x-xi, 20.

all. Confirmation of all sentences by the commanding general of the area concerned was required; all judgments needed his "fiat" of execution. Death sentences were referred to the Governor-General, where he could decide to grant pardon. All accused, regardless of the sentence, were entitled to submit a petition for mercy. The Supreme Court then examined the petition and offered its advice before transmitting it to the Governor-General for final disposition.¹⁷

* * *

Dutch war crimes machinery was closely linked with that of the British. General Headquarters, South East Asian Command (S.E.A.C.), in November 1945 assumed primary responsibility for the "investigation and trial" of war crimes perpetrated by Japanese against British nationals. A War Crimes Branch in Singapore coordinated the entire operation. S.E.A.C.'s scope of action covered so vast an area, however, that it soon became the major center for the investigation of war crimes for the whole of Southeast Asia.

The Netherlands, along with the United States, Australia and France, established its own war crimes section at S.E.A.C.'s Headquarters in Singapore. There it maintained "the closest liaison" with its Allies, "with the result," observed a "special correspondent," "that everyone work(ed) in complete harmony to achieve one aim." Also, the Netherlands formed its own team to investigate war crimes committed against Dutch nationals.¹⁸

¹⁷Ibid., v. 11, Annex, pp. 106-07, 109-10.

¹⁸See History of UNWCC, pp. 381-82; also, see Chapter 5. London Times, article, "Far Eastern War Crimes," July 31, 1946.

Allied investigation teams steadily built up cases against Japanese suspects. They scoured the jungles, villages and hills of South-east Asia, unearthing additional evidence and witnesses. Affidavits and statements by former prisoners of war and civilian internees helped in the identification of many Japanese. British personnel handled much of this work, it is true. Still, liaison teams, as mentioned, freely exchanged information. And Dutch, as well as local, authorities in the Netherlands East Indies did their share in the region under their control. Furthermore, the Dutch constituted their own war crimes courts and conducted their own trials in Batavia, Java; Pontianak, (Dutch) Borneo; Medan, Sumatra; Amboina Island; and Macassar, on Celebes Island.¹⁹

Dutch representatives assisted, also, in the investigation and trial of Japanese suspected of committing war crimes against Americans. Soon after Japan's surrender, United States War Crimes Branches operating in the India-Burma Theatre uncovered evidence of war crimes in Java, Sumatra and the Celebes. These mainly involved "ill-treatment in prison camps and illegal executions of American airmen." Most of the POWs in the prison camps had been Australian and Dutch military personnel. United States officials, therefore, relied heavily upon cooperation with Australian and Dutch authorities in order to locate and prosecute the accused. In the end, prosecution cases rested firmly on "joint" American, Dutch and Australian evidence.

Americans helped the Dutch war crimes effort. In one instance, they transferred to the N.E.I. for trial a Japanese Admiral previously

¹⁹See History of UNWCC, pp. 382, 385; Australia. Current Notes On International Affairs. Sydney. v. 17, no. 1, Jan. 1946, p. 4.

sentenced to life imprisonment by a United States Tribunal in Guam.²⁰

Australians, too, conducted wide-scale investigations of war crimes in the Netherlands East Indies area. Occasionally, officers from the Netherlands sat as members of Australian military courts in cases concerning Dutch victims. All evidence obtained and suspects rounded up by Australian military forces in Dutch Borneo were turned over to the Dutch military authorities in January 1946.²¹

II. "The Trials"

Relatively little material on the Netherlands war crimes trials in the East has appeared in the English language to date. Still, enough exists to provide a reasonably representative portrayal of how Dutch military authorities conducted the trials and how they treated Japanese accused. Special attention will be given to the charges preferred, and judgments delivered, by the N.E.I. military tribunals.

* * *

By December 1945 the War Crimes Section in Batavia had designated over 200 Japanese suspects for trial. Of these, mostly POW camp officials and guards, 43 had already been arrested.²² Dutch military authorities in charge of war crimes, indeed, squandered little time. They concluded their first trial in September 1946, when a court in Batavia

²⁰History of UNWCC, pp. 384-86; Stars & Stripes (Tokyo), Jan. 19, 1950.

²¹History of UNWCC, p. 389.

²²Straits Times, Dec. 15, 1945.

sentenced a Japanese captain to death. Charges against the accused had included, inter alia, causing "physical and mental cruelties" upon Dutch, British and American civilian and military internees.²³ Despite limited coverage by The New York Times, the trial attracted little notice abroad. Witness the report presented by Britain's Secretary of State for War, in January 1947, that trials by "Netherlands authorities are to begin shortly."²⁴

One noteworthy trial involved a Japanese hotel-keeper in Batavia charged with "the war crime of enforced prostitution." "In time of war and as a subject of a hostile power," read the indictment, Washio Awochi committed "war crimes by, in violation of the laws and customs of war, recruiting women and girls" to serve as prostitutes at his establishment. "Under the direct or indirect threat" of the Kempeitai (military police), continued the allegations, the women were held involuntarily and forced to serve Japanese civilians solicited by Awochi.²⁵

Evidence adduced at the trial basically substantiated the charges. Some 12 women who had been forced into prostitution testified against the accused. Awochi admitted running the brothel, but insisted that he had done so under orders of the Japanese authorities; he "personally" had "never" used threats or force with the women.

The court found Awochi guilty of a violation of the laws and usages of war. Specifically, it cited entry number 7 on the N.F.I.'s supplemental list of war crimes: "Abduction of girls and women for the purpose of enforced prostitution." The threatening shadow cast

²³The New York Times, Sept. 7, 1946.

²⁴Britain. Parliamentary Debates. 1947. H. of Lords, Jan. 28, 1947, p. 174.

²⁵Law Reports, v. 13, Case no. 76, p. 122.

by the Kempeitai, stated the court, was "rightly considered as being synonymous with ill-treatment, loss of liberty or worse." This amounted "to compulsion in all its possible forms."

Furthermore, reasoned the court, as "leader and head" of the hotel, Awochi "had great financial interests" in its profits. This, linked to the fact that the women forced into prostitution were Dutch, led to the court's conclusion: in view of the total Japanese control over Batavia, and with regard to the abusive and overbearing Japanese beliefs of racial superiority, "it may be taken that" Awochi was "directly responsible" for the ill-treatment imposed on these women. Awochi was sentenced to 10 years" imprisonment.²⁶

Japanese wartime treatment of Allied personnel and civilian populations only rarely varied. Generally speaking it was harsh, even cruel, everywhere. Therefore, it should come as no surprise that many of the charges brought against Japanese in the N.E.I. resembled closely those brought by British, Chinese, American and other Allied authorities elsewhere in the East.

A Netherlands Temporary Court-Martial in Macassar, for instance, tried a first Lieutenant of the Japanese Navy "for violations of the rules of warfare concerning the treatment" of POWs in the Celebes. Specifically, the indictment lodged against Tanabe Koshiro charged him with "intentionally and unnecessarily exposing (Dutch, British, American and Australian) POWs to acts of war," and of "employing POWs on war work."²⁷

²⁶Ibid., pp. 122-23, 124-25.

²⁷Ibid., v. 11, Case no. 59, p. 1.

The court predicated its judgment on the rules of international law. It cited Article 6 of the Hague Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention (1907), and Article 31 of the Geneva Convention (1929) relative to the treatment of POWs. Basically, these statutes provided that: captured officers could not be made to work; POW work should not be "excessive" and should have "no connection" with the war effort; and POWs should be moved to zones of safety as soon as possible.

Koshiro, who pleaded not guilty, was convicted "on the ground of circumstantial evidence." "No direct proof" that he had ordered the crimes was adduced at the trial. The court, rather, "deduced" his guilt from indirect evidence. In his argument, the prosecutor asked for a five year sentence for the defendant. Interestingly, the court exceeded his request, and awarded a punishment of seven years' confinement.²⁸

A trial conducted in Amboina warrants particular attention, inasmuch as its indictment included several diverse charges, and its judgment contained references to both international and municipal law. The accused, first Lieutenant of the Japanese Army Engineer Corps Susuke Motosuke, was charged initially with two crimes: " . . . contrary to the laws and customs of war," ran the indictment, Motosuke had "intentionally, by abuse of the authority he enjoyed over his subordinates . . . incited the latter" to execute Indonesian natives, subjects of the N.E.I., whilst knowing that the victims "had not been tried, at any rate in a legal manner." Thus charges against him also comprised the unlawful execution of accused persons without first providing a fair trial.²⁹

²⁸Ibid., pp. 2-4.

²⁹Ibid., v. 13, Case no. 77, p. 126.

Later developments further complicated the case. In his defense, Motosuke argued that one of the executed Dutch subjects, names Barends, had earlier joined the ranks of "volunteer combatants" serving with the Japanese Army. Motosuke ordered a summary execution only after allegations of insubordination had been proven against Barends. The execution, contended Motosuke, "was a purely internal matter of the Japanese Army, and constituted a lawful act under Japanese laws."³⁰

The problem lay in this: evidence introduced at the hearing verified that Barends "had freely joined" the Japanese Army in the N.E.I. Consequently, the court decided that Barends "was not a Netherlands subject at the time of his execution and therefore no longer a subject of the United Nations." The U.N. had determined, however, that its member nations would deal only with "war crimes committed against subjects of the United Nations." Having lost his nationality, reasoned the court, Barends could not be considered a war crimes victim; thereupon Motosuke could not be tried as a war criminal in this specific instance. That the victim (Barends) had not received a fair trial was irrelevant.³¹

Instead the court found Motosuke guilty of the common law crime of "intentional incitement to murder by abuse of authority," as prescribed in the N.E.I. Penal Code.³² In so doing, the court underscored its jurisdiction over cases "in which victims are, technically, not nationals of the State whose territory is occupied but are nonetheless entitled to the same right of . . . lawful proceedings before pun-

³⁰Ibid., pp. 126, 128.

³¹Ibid., pp. 127-28. *Emphasis theirs.*

³²Ibid., pp. 128-29; also, v. 15, p. 87.

ishment." Moreover, it should not be overlooked that the court's ruling this case, "technically, concerned an 'enemy' subject."

As concerned the other three victims the court found Motosuke guilty of the "war crime" of murder. It based its judgment on the belief that the Indonesians had been deprived of a fair and legally constituted trial. Much of the prosecution case seemed to rest on the testimony of one Japanese witness, a prosecutor at the trial in question, whose testimony corroborated these allegations.³³

Significantly, in both findings the court held that the Indonesians "had committed punishable offenses." Therefore, in both cases Motosuke's "culpability consisted in that, although the victims were guilty of offenses and were liable to punishment by the occupying authorities, they were punished in an unlawful manner."³⁴

Dutch military tribunals, as did their Allied counterparts, sought particularly to prosecute Japanese accused of perpetrating crimes heinous or colossal in nature. A court in Pontianak, Dutch Borneo, for example, convicted and condemned to death Japanese Vice Admiral Kamada Michiaki for ordering the decapitation in 1944 of 1500 West Borneo natives. The victims allegedly had "plotted" against Japanese rule there.³⁵ For "murdering and terrorizing" some 2,000 Dutch POWs in a prison camp on Flores Island, N.E.I., four Japanese received death sentences before a Batavia court. Ten other accused, found guilty to lesser

³³Ibid., v. 13, pp. 127-29, 130.

³⁴Ibid., p. 130; also, v. 15, p. 113, n. 8.

³⁵The New York Times, Oct. 19, 1947.

and varying degrees, received sentences ranging from 3-15 years' imprisonment.³⁶ And a temporary court-martial in Medan, Sumatra, charged four Japanese with killing "through maltreatment" 5,000 Indonesian slave laborers, 1,000 civilian internees, and 500 Allied POWs during the Japanese occupation of Indonesia.³⁷ Other examples may be found.³⁸

Some Dutch trials, though, contained unique aspects or twists which set them apart from those conducted by other Allied nations. One trial, for instance, centered about the misdeeds of 16 members of the Tokkeitai, Special Japanese Naval Police, in Macassar during the occupation. Charges against the men included, inter alia, that they, "contrary to the laws and customs of war, carried out unlawful mass arrests and/or exercised systematic terrorism (i.e., torture) against persons suspected by the Japanese of punishable acts. . . ." What distinguished this trial from others was that "the defendants were tried not as individuals, but as members of a group as a whole with the commission of specific crimes."³⁹

All 16 accused were found guilty, in varying degrees. Nine, including the two senior officers, received the death penalty, the others got sentences ranging from 1-20 years' imprisonment. In rejecting several accused's defense plea of superior orders, the court deter-

³⁶Malay Mail, May 2, 1947.

³⁷The New York Times, Dec. 16, 1948; Stars & Stripes (Tokyo), Jan. 19, 1950.

³⁸See, e.g., ibid., Mar. 17, 1949; also, Straits Times, Dec. 15, 1945.

³⁹Law Reports, v. 13, Case no. 79, pp. 138, 140.

mined that "no subordinate may be successful with this plea if the orders were clearly criminal in themselves."⁴⁰

In another singular case Colonel Akira Nomura, chief of the Japanese planning board in Java, confessed to stealing part of the \$30 million State Treasury. Unfortunately, he insisted, he could not remember where he hid it. The Netherlands prosecutor thus lodged against Nomura a "double charge, illegal possession of property and responsibility for war crimes."⁴¹

Perhaps two of the most remarkable trials took place in 1947. At that time, two Dutch military courts convicted four Japanese of the war crime "commission of hostilities contrary to the terms of an armistice." The accused, evidence proved, had partaken in the operations of Indonesian rebels in the N.E.I. after the Japanese surrender. Technically, a state of war still existed between the Netherlands and Japan. Therefore, the court ruled, the accused in contravening an armistice, violated international law and committed a war crime.⁴²

* * *

In March 1949 the Stars & Stripes reported as currently underway the "last" trial "involving Japanese" in the N.E.I. Yet, in December of that year, the Malay Mail disclosed that eight war criminal suspects

⁴⁰Ibid.. pp. 140, 144-45.

⁴¹The New York Times, June 25, 1946.

⁴²Law Reports, v. 15, Supplemental Cases, p. 132.

remained to be tried by the Netherlands.⁴³ Dutch executions of condemned Japanese, it is certain, continued right up until the end of 1949.⁴⁴ Nevertheless, the date of the final war crimes trial in the N.E.I. remains a mystery.

Also a mystery are precise, final statistics relating to Dutch war crimes trials in the East. The latest available data, reported March 1, 1948, is as follows:⁴⁵ Cases tried, 175; Accused involved, 308; Accused convicted, 301 (99.3%); Acquitted, 7 (1.4%); Death sentences, 102 (33% of total accused convicted).

A mere glance at the above tabulation reveals that, at this time, the Dutch had convicted slightly over 99% of all Japanese tried. Just about 33% of all accused involved had received the death penalty.⁴⁶ These figures, while incomplete, nonetheless indicate the harshness of Dutch justice: British military courts, in comparison, convicted 89.5% of all accused, and condemned 26%; Australian military courts convicted 69.5%, condemned 23%; and American military courts convicted 87%, condemned 14%.⁴⁷

⁴³Stars & Stripes (Tokyo), Mar. 3, 1949, Malay Mail, Dec. 6, 1949.

⁴⁴Stars & Stripes (Tokyo), Jan. 19, 1950.

⁴⁵History of UNWCC, Append. IV, p. 518.

⁴⁶Cf. these figures with those of "unverified Japanese press accounts" which said that Dutch courts acquitted 55% of all those accused. See Russell Brines, MacArthur's Japan (Phila., 1948), p. 117. The UNWCC's figures must be regarded as more reliable.

⁴⁷British figures as of Mar. 1, 1948, in History of UNWCC, Append. IV, p. 518, and supra, Chapter 5; See Australian Encyclopaedia (Sydney, 1958), Table 2, p. 156 for final figures on Australian trials; American figures, too, are final, in John A. Appleman, Military Tribunals and International Crimes (Indianapolis, 1954), p. 267. Even in the Philippines, where postwar enmity toward the Japanese ran high, a lower percentage (91.3%) of Japanese were convicted; the percentage (58) of death sentences awarded, however, was higher. See below, Chapter 10, p. 275. For amended U.S. figures, see Chapter 4, p. 116.

Also, Dutch treatment of Japanese war criminals in the East contrasted starkly with that afforded German war criminals in Europe. Dutch courts in Holland after World War II sentenced only 14 Germans to death and, of these, only 5 were executed. Only 193 Germans were convicted in all. So few Germans were prosecuted, said a noted Dutch jurist, because in the "confused days" after the Nazi surrender, most war criminals escaped.⁴⁸

In any event, as internal convulsions--to be examined momentarily--overtook postwar N.E.I., the Dutch war crimes operation ground to a halt. At the request of Dutch authorities, 638 Japanese, "most convicted war criminals," were returned to Japan in early 1950. There they served out the remainder of their sentences at Sugamo prison, in Tokyo.⁴⁹

III. "The Trials and the Netherlands International Relations"

War Crimes trials in the Netherlands East Indies, as in other Allied countries, were influenced by national and international events. In fact, even past events, it would seem, had some effect.

Prior to World War II, Indonesians had grown tired, even disillusioned, with Dutch colonial rule. "Distrust" of the Dutch mounted throughout the 1930s. "Dutch repression" caused Westernized Indonesians to look "away from the West and towards Japan." And Tokyo's offer of autonomy to Korea in the mid-thirties "naturally made a favorable impression." Put simply, in the eyes of the population the Japanese grew

⁴⁸Bernard V. A. Röling, "The Law of War and the National Jurisdiction Since 1945," Recueil Des Cours. Academie De Droit International, v. 100, pp. 329-30, n. 2.

⁴⁹Stars & Stripes (Tokyo), Jan. 14, 1950.

in stature as the Dutch declined. Feelings of "Asian inferiority," submitted a noted authority, Leslie H. Palmier, "found their outlet in glorification of the Japanese. . . ." ⁵⁰

For these reasons, Indonesians greeted Japanese invaders in December 1941 as "liberators." Far more important, however, were the effects of four years of cruel, unyielding Japanese occupation: Indonesians, observed journalist A. T. Steele, became "united by Japanese cruelty." Despite the great suffering they inflicted, the invaders nevertheless promoted Indonesian nationalism, and awakened the popular political consciousness. Between 1941-1945, wrote Steele, Indonesia "made greater progress towards self-rule than during the entire three centuries of Dutch control." ⁵¹

Such developments did not augur well for the Netherlands postwar plans in the East. By 1945 Dutch authorities had deemed it "essential to recover the colonies and reestablish control over them." Minimal concessions to local administrations they would accept, "but they would not succumb to demands for immediate independence or autonomy." ⁵²

Yet these were the precise demands made by Indonesian nationalists immediately after the war. To the misfortune of both Indonesians and Dutch, irreconcilability soon led to violence. Indonesian nationalists clashed first, in September 1945, with British troops sent to

⁵⁰Leslie H. Palmier, Indonesia and the Dutch (London, 1962), p. 38.

⁵¹See article, "United By Japanese Cruelty," in New York Herald Tribune, Nov. 15, 1945; also, Palmier, Indonesia and The Dutch, pp. 41, 43.

⁵²Akira Iriye, The Cold War In Asia (Englewood-Cliffs, N.J., 1974), pp. 86-87.

accept the surrender of Japanese forces in Indonesia.⁵³ From July 1947-August 1948 Dutch forces conducted "police actions"--i.e., military campaigns--against territories held by the nationalists. U.N. attempts to halt the fighting proved futile. A shower of biting criticism rained upon the Netherlands. It soon became obvious that, as a result of their colonial policy, "the Dutch had alienated the world outside."⁵⁴

But what does this have to do with war crimes policy? Bear in mind the fact that the Indonesian nationalist movement received vital impetus from the Japanese invasion, defeat of Dutch forces and political propaganda. The "ignominious collapse of Dutch resistance in Java," reported Steele, "made a deep adverse reaction on the people." Moreover, the Japanese not only "encouraged" Indonesian nationalists; before their surrender they turned over to them large quantities of arms.⁵⁵ Some Japanese even collaborated with Indonesian guerrillas after the surrender of Japan.⁵⁶

Perhaps, it may be suggested, these factors, combine with a strong desire to expunge the image of Japanese as Asian "liberators" while, at the same time, resurrecting the image of Western colonial power, account for the inordinately high percentage of convictions and death sentences awarded by Dutch war crimes courts. This is not meant

⁵³For the reasons behind the clash, see M. A. Fittsimons, The Foreign Policy of the British Labour Government: 1945-1951 (Indiana, 1953), pp. 59-61.

⁵⁴Palmer, Indonesia And The Dutch, pp. 56-58, 59ff., 66-67.

⁵⁵New York Herald Tribune, Nov. 15, 1945. Fittsimons, British Foreign Policy, p. 59.

⁵⁶See, e.g., several trials supra, pp. 294; also, note 58.

to impute vengeful or political motives to Dutch policy; but rather is offered as a possible explanation for the harshness of Dutch justice.

The Netherlands, as did the other Allied nations, accepted American predominance in the postwar Pacific. Washington, though, interfered little with Dutch policy in the East from 1945-1948.⁵⁷ In late 1948 United States policy in the East shifted direction somewhat. As the Cold War with Russia became increasingly entrenched, as Communist-led or inspired insurgencies raged throughout Southeast Asia, and as Chinese Communists prepared to take control of the mainland, American policy-makers sought to construct firm anti-Communist bastions in the East. Principal attention turned to Indonesia, "potentially the strongest country in Southeast Asia," and Japan.

Washington thus urged the Hague to cease fighting in Indonesia, and to reconsider its colonial policy there.⁵⁸ In Japan, Allied policy shifted from reform to recovery. Regarding war crimes policy, Washington, S.C.A.P. and the Far Eastern Commission now persistently "recommended" that the Allied nations try to "wind up" all trials by September 1949.⁵⁹

Considering the profound difficulties they were experiencing in

⁵⁷ Basic U.S. policy, set down in a memorandum of Dec. 26, 1945, was to leave administration of the N.E.I.--aside from "responsibilities relating to the surrender of the Japanese"--to Dutch authorities. See U.S. Dept. of State. Foreign Relations of the United States 1946. VIII (Wash. D.C., 1971), pp. 787-89.

⁵⁸ Russell H. Fifield, Americans In Southeast Asia: The Roots of Commitment (N.Y., 1973), p. 85.

⁵⁹ U.S. Dept. of State. Foreign Relations 1948. VI (Wash. D.C., 1974), p. 822; New York Herald Tribune, Nov. 14, 1948; The New York Times, Dec. 24, 1948, Mar. 16, 1949.

Indonesia, the Dutch most likely would have been agreeable to the prescribed termination date for trials. But in December 1949 the Malay Mail reported that Dutch trials would continue into the new year, the delay being due to the "trouble with the Indonesian nationalist movement." The Netherlands closed out its war crimes operation with the transfer, in early 1950, of all convicted Japanese to Sugamo prison in Tokyo.⁶⁰

⁶⁰ Malay Mail, Dec. 6, 1949, Stars & Stripes (Tokyo), Jan. 14, 1950.

CHAPTER I

THE PHILIPPINES

I. "Procedure and Machinery"

While perhaps not approving of such sentiments, few reasonable persons would determine blameworthy, or incomprehensible, pervasive Filipino hatred of Japanese after World War II. From the time they conquered the Philippines (May 1942) until the day of General Douglas MacArthur's "return" (October 1944) and after, Japanese occupation forces exercised oppressive, iron-fisted control over the archipelago. Beatings, torture, abject humiliation and murder became during that period frighteningly commonplace to a generally defenseless Filipino population. To be sure, the register of unconscionable atrocities bared at the Yamashita and Honna trials (See Chapter 3) constituted the most pointed examples of both widespread and concentrated brutalities perpetrated by Japanese in the Philippines; but there were others--certainly less publicized, yet equally inhumane.

Any account of Filipino contribution to Japanese war crimes trials must stress foremost that people's unique status during the period under study. Unlike other participating nations, the Philippines, up until July 4, 1946, lacked national independence; it remained a colonial possession of the United States. Accordingly, Americans influenced to a great degree, and often prescribed, Filipino activities

relative to war crimes and other spheres. Want of national sovereignty also prevented inclusion of the Philippines as a member of the United Nations War Crimes Commission, founded in October, 1943.

However, the same did not apply in regard to other Allied organizations. Having previously decided to grant the Islands their independence in July 1946, Washington saw to it that Filipino representatives sat on the Far Eastern Commission (F.E.C.) and its progenitor, the Far Eastern Advisory Commission. Both bodies, discussed at length elsewhere in this study, set about to offer "recommendations" pursuant to the "formulation of policies, principles and standards" by which the Allies would supervise Japan's postwar settlement.

Ambassador Carlos L. Romulo doubled as "Permanent Representative of the (soon to be) Republic of the Philippines" to the United Nations and the F.E.C. Of the seven working committees created at the latter's inaugural meeting of February 26, 1946, Committee No. 5 warrants particular attention. Entitled "War Crimes," it outlined as "subjects for consideration" the "Identification, apprehension, . . . trial . . . and punishment" of Japanese war criminals. Chaired by a Chinese, this committee nonetheless throughout its existence had as its Deputy Chairman a Filipino: initially Mr. F. C. Rodriguez, succeeded by Mr. J. U. Jovellanos.¹

Filipinos also partook in the trial of major Japanese war criminals at the IMTFE. An amendment to the original Tokyo Charter enabled each member of the F.E.C. to nominate a justice and an associate pros-

¹Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888 (Wash. D.C., 1947), pp. 2-5, 8; also, FEC. Second Report by the Sec. Gen. July 10, 1947-Dec. 23, 1948. Pub. 3420 (Wash. D.C., 1949), p. 51.

ecutor to the Tribunal. Thus might non-signers of the Instrument of Surrender (Japan)--particularly India and the Philippines--be permitted to sit in judgment of their erstwhile invaders and tormentors. Mr. Justice Delfin Jaranilla, in fact, delivered a "concurring Opinion" complementary to, yet separate from, the majority judgment of the IMTFE.²

Meanwhile, groundwork for the preparation and actual presentation of war crimes cases in the Philippines was being laid by American authorities there, assisted occasionally by Filipinos. S.C.A.P. Headquarters established in Manila in April 1945 the War Crimes Investigation Detachment. Assigned to this office was the task of obtaining evidence and investigating accounts of war crimes inflicted upon American and Philippine personnel. On July 1, 1946, this office officially became Legal Section, Manila Branch. As a territorial possession of the United States, and after, the Philippines worked in close cooperation with American war crimes teams in the Islands. However, not out of disinterest, but for reasons which will be examined in the succeeding pages, Filipino authorities often 'dragged their feet' when it came to war crimes investigations and prosecutions. Prompting by Americans, therefore, at times proved necessary, and often fruitful: Filipino Army officers, in an early example, ably assisted the Investigation Detachment in unearthing evidence later used so effectively in the prosecutions of Generals Yamashita and Homma.³

²For amended Charter, see "Trial of Japanese War Criminals," U.S. State Dept. Pub. 2613 (Wash. D.C., 1946), pp. 39-44. Delfin Jaranilla, "Concurring Opinion By the Honorable Mr. Justice Delfin Jaranilla Member from the Republic of the Philippines," IMTFE, Nov. 1, 1948.

³SCAP. Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. monograph 5. (Tokyo, 1952), pp. 41-42. Also, see Manuel Lim, "Highlights of the Yamashita and Homma Trials," Philippine Law Journal, v. 22, 1947, p. 9.

As in China, wartime atrocities had been perpetrated directly on Philippine territory. This differed from circumstances confronting, say, the British, Australians or Americans, where all war crimes had been committed against nationals overseas. Consequently, the latter were forced to create regional War Crimes Branches at various locations near or at the site of violations in order to make arrests and arrange and carry out trials. Filipinos had no need for war crimes agencies abroad. They thereupon adopted the model set by China, but initially prescribed by the UNWCC: they established a National Office, "charged with the duties of investigating the crimes which fell into its sphere, apprehending the accused . . . and conducting the trials in its own courts."⁴

"Under United States pressure"--the Judge Advocate General of the United States Army and other American officials "urged" repeatedly President Osmena--Filipino officials prepared in March and April 1945 a measure outlining war crimes trial procedure. Signed on August 16, 1945, Executive Order No. 64, as it became known, spawned the National War Crimes Office as a branch of the Philippine Army. Immediately thereafter, responsibility for "effecting the speedy and prompt trials and just punishment of Japanese war criminals" devolved upon this office. Or, rather so directed Executive Order No. 64. Actually, primary responsibility for these duties remained in the hands of American authorities until January 1, 1947.

⁴The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1948), p. 5.

National War Crimes Office, read the directive, was also "to proceed with the collection of evidence of war crimes and atrocities committed within the Philippines against both persons and property from all available sources" extending over the period from December 1941 to the Japanese surrender. Maintenance of relevant records and the sifting, collation and analysis of evidence were also among its functions. Among other things, the measure underscored the signal importance of American-Filipino association. "Jointly coordinating with the United States War Crimes Office," the Philippine counterpart would effect the "speedy and prompt trial of all alleged guilty persons" apprehended and arrested by investigation teams. Specifically, Executive Order No. 64 prescribed that "direct liaison" between American and Filipino War Crimes Offices be preserved at all times. In this manner, free exchange of relevant "information and evidence," as well as "cooperation" in the "apprehension and trial" of Japanese suspects, would result.⁵

American authorities conducted all war crimes trials in the Philippines until January 1, 1947, when the United States War Crimes Branch, Manila, closed. Filipinos, as mentioned, had participated in the gathering of evidence at some of these trials. Despite the closing of their Manila office, American personnel remained in the Islands, effectively assisting their Allies in the preparation of uninitiated or unsettled cases as of, at least, June 1947. Such action allowed for the orderly transition of war crimes-related duties from the United States to its former colony, now the Republic of the Philippines. Re-

⁵Adamin A. Tallow, Command Responsibility: Its Legal Aspect (Manila, 1965), pp. x-xi. Also, Lim "Yamashita and Homma," pp. 5-6.

sponsibility for the disposition of remaining trials, involving non-American victims, from that point on rested with Filipino authorities.⁶

National independence necessitated, among a score of things, new or supplemental war crimes regulations. Executive Order No. 64, after all, had left conduct of Japanese trials to American military commissions. Accordingly, on July 29, 1947, President Manuel A. Roxas signed and announced Executive Order No. 68, which "expressly" repealed its predecessor. Section I of this measure directed that Japanese war criminal suspects be tried by military commissions "to be convened by or under the oath of the President" of the Philippines.⁷

In truth, the Commander-in-Chief, National Defense Forces, convened most Philippines war crimes tribunals. Military commissions, following the American pattern set down in S.C.A.P. war crimes regulations of December 5, 1945, required a minimum of three officers on the bench; usually, though, Philippine commissions comprised five men. Of these, one was designated both President and "Law Member." As in Allied courts in other theatres, Filipino authorities exerted every effort to place on commissions officers of equal or superior relative rank to the accused. Philippine Army Generals, for instance, always presided over trials involving accused generals or flag officers.⁸

A panel of qualified Philippine Army lawyers were assigned, under the supervision of Captain Pedro Serran, to defend Japanese accused.

⁶See, e.g., China Press, June 10, 1947. History of UNWCC, p. 383.

⁷Tallow, Command Responsibility, p.xii.

⁸Ibid.,; also, Letter of May 17, 1976, from Chief, National Archives, Republic of the Philippines, to author.

Initially, Filipinos, in harmony with United States and Allied policy, allowed defendants to select their own defense counsel, usually civilian lawyers from Japan. However, precipitation by Japanese defense lawyers of a disruptive and unseemly incident in a Manila courtroom, to be examined in the next section, resulted in the partial cancellation of such practice by 1948. Thereafter, in some instances exclusively Filipino lawyers defended Japanese on trial. In a similar vein, a special Philippine Army division handled the prosecution of war criminals; although, on some occasions, civilian lawyers in the employ of the Philippine government assumed this task. Official interpreters and reporters were provided each commission.⁹

"The Procedure, the Facts, the Law and the Consequences followed by the Philippine Military Commissions," noted an expert in international law, "were similar to that of the Nuremberg and Far East Tribunals. . . ." Therefore, Philippine military courts defined "war crimes" broadly, as did the Charters of the two International Military Tribunals as well as United States regulations. War crimes thus constituted crimes against peace (planning and waging wars of aggression in violation of international agreements); crimes against humanity (generally offenses perpetrated against non-combatants and property belonging thereto); and conventional war crimes (violations of the laws and usages of war).¹⁰

Rules governing the admission of evidence, again, closely hewed to those instituted in S.C.A.P. and other Allied regulations. Indeed,

⁹Ibid., China Press, Nov. 22, 1947, Jan. 16, 1948.

¹⁰Tallow, Command Responsibility, p. 374.

United States influence in this respect is beyond question. Couched in language nearly identical to that found in corresponding American provisions, Executive Order No. 68 ordained that:

The Commission shall admit such evidence in its opinion shall be of assistance in proving or disproving the charge, or such as in the Commission's opinion would have probative value in the mind of a reasonable man. The Commission shall apply the rules of evidence and pleading set forth herein with the greatest liberality to achieve expeditious procedure.

Hence, Philippine military commissions admitted as evidence, inter alia, any document, irrespective of its classification, which appears to the Commission to have been signed or issued" by any member or agency of "any Government;" "any report which appears . . . to have been signed or issued by the International Red Cross. . .;" affidavits, depositions or other signed statements; any diary, letter, sworn or unsworn statements; copies of any of the above; "facts of common knowledge;" and hearsay.

Also, Philippine military commissions adopted generally recognized procedure as applied to the defense plea of "superior orders." Such, directed Executive Order No. 68, "shall not constitute a defense, but may be considered in mitigation of punishment if the Commission determines that justice so requires." A supplemental provision set the stage for trials of Japanese who occupied high governmental posts, either in the Philippines or Japan, during the war. An accused's "official position," it read, "shall not absolve him from responsibility, nor be considered in mitigation of punishment." Trials ending in convictions required further examination by a National War Crimes Review Board. Death penalties demanded confirmation by the President of the Philippines

before their execution.¹¹

One final element distinguished Philippine war crimes trials from those conducted elsewhere by the Allies. Filipino hearings featured an abundance of testimony by live witnesses. As all alleged offenses had taken place, so to speak, 'in their own backyard', Filipino military authorities experienced relatively less difficulty in locating and bringing forth eyewitnesses. Only in China, likewise the scene of actual atrocities, did a similar pattern develop. Generally, as has been shown, Allied trials instead depended heavily upon evidence documentary in nature.¹²

II. "The Trials"

Transfer of responsibility for war crimes trials from American to Philippine authorities consumed time. No simple undertaking was this--especially in light of three national and international crises, all of monumental proportions, which confronted squarely the newly independent Republic at this time. Discussion of these matters is reserved for the final section of the present chapter. Here it would serve well to note one example of just how long a single case might remain unsettled in the Philippines.

In June 1947 American war crimes personnel in Manila had nearly completed preparations for the trial of 31 Japanese accused of canni-

¹¹Ibid., pp. 198-201. See, e.g., China Press, July 28, 1948, Feb. 16, 20, 1949.

¹²See statement by Col. A. C. Carpenter, While this remark referred to American-held trials in the P.I., the same reasoning certainly applied to Filipino-conducted trials. Stars & Stripes (Tokyo), Dec. 14, 1945.

balism. According to the American prosecutor, S. Melville Hussey, the accused had been captured in February 1947 in Mindanao, in the southern Philippines. There, the unit had hidden from American forces in mountain caves since Japan's surrender. Alleged offenses had occurred during this hiding period, that is after the war itself. "At least a dozen" confessions, written and signed by the Japanese prisoners, had been obtained by Hussey. Also secured were the testimonies of eyewitnesses. The Japanese had "enjoyed eating human flesh and ate well beyond what was required to keep them from starving," these individuals attested. Hussey himself described the palpable atrocities as "the worst of the war."

Turning over all relevant materials to Filipino authorities charged with handling this and other trials, Hussey predicted that the present hearing would "be held in Manila within three months."¹³ Obviously, much of the foundation of this case had already been constructed by the time it passed to Filipino trust. Yet, despite an ample head start, according to press accounts this trial was not ultimately disposed of until late September 1949. At that time, ten of the accused were sentenced to hang, four received life imprisonment and three were acquitted. The fate of the rest remains unclear.¹⁴

Eventually, Philippine authorities became more organized, at least as far as trial scheduling was concerned. Before too long, to wit, trials unfolded with increasing regularity. November 1947 saw the

¹³China Press, June 10, 1947; Lim, "Yamashita and Homma," p. 6.

¹⁴The New York Times, Sept. 21, 1949.

commencement of several Manila hearings, including the archipelago's first mass trial. Tried on charges "ranging from looting to multiple rape and murder" in two small towns on Cebu Island during 1944 were 13 Japanese officers and servicemen. Final settlement of this trial too, however, was prolonged. Not until mid-February 1949 did the National War Crime Board of Review confirm the twelve death sentences meted out to the accused.¹⁵ While this trial attracted moderate public interest only, events which took place at a hearing later in the month captured the lion's share of headlines.

In an abrupt and dramatic reminder to all concerned just how little time had actually elapsed since V-J Day, fistcuffs erupted in a Philippine courtroom. On trial for war crimes was Lieutenant Junzo Matsuta, a former Chief of the Kempeitai in a province of Luzon. A Filipino Captain, Chief of the Philippine Army Prosecution division, had offered several repeated objections to frequent postponements in the arraignment and trial of the accused. Arguing on behalf of Matsuta was a Japanese civilian lawyer. Presently, tempers flared; the two lawyers exchanged harsh words. Then, apparently without physical provocation, the Japanese defense attorney attacked the Filipino prosecutor, and "used judo" on him.¹⁶ A near scandal resulted. S.C.A.P.'s Legal Section investigated the brawl, in which, later press reports disclosed, "the Filipino prosecutor . . . and four Japanese lawyers (had) exchanged blows frequently."¹⁷

¹⁵China Press, Nov. 5, 1947; Feb. 16, 1949.

¹⁶Ibid., Nov. 22, 1947.

¹⁷Ibid., Nov. 23, 1947.

In the end, Filipinos replaced Japanese civilian lawyers as defense counsel in the Matsuta case.¹⁸ Nevertheless, as if to underline sharply its determination to mete out justice, not vengeance, at war crimes trials, the Philippine military commission shortly after "dramatically" acquitted Matsuta. Charges preferred against him had included "responsibility for atrocities committed by men under his command;" that is, they involved the legal principle of command responsibility--the same grounds upon which Generals Yamashita and Homma had been convicted and condemned. That such a decision should result in a case recently witnessed by so disgraceful a show of mutual enmity as to embroil court personnel in fisticuffs, deserved notice. And so, asserted the China Press:

The acquittal was hailed as a demonstration of Filipino justice and fair play based on the court's belief in the defense claim that Matsuta had been relieved of his Kempeitai command prior to the commission of the atrocities.¹⁹

As might be expected, a good number of Filipino trials, like the one above, concerned the legal principle of command responsibility. Not surprisingly, too, the memories of Yamashita and Homma--the crimes attributed to them as well as their ultimate fates--cast long shadows across the minds of Filipino prosecutors, the Philippine population and Japanese accused of similar offenses. Generally, this charge was brought against only the highest-ranking Japanese or those, like Matsuta, who commanded notoriously wicked posts during the occupation.

As a matter of fact, the "first Japanese general to be tried by

¹⁸Ibid., Jan. 16, 1948.

¹⁹Ibid., Feb. 25, 1948.

a Philippine war crimes commission" stood accused of violating this principle. Preparations for the trial of Lt. Gen. Shizuro Yokoyama, who headed the Army which occupied Manila, began in September 1948.

Charges brought against Yokoyama comprised as replete a list of nefarious deeds imaginable; "direct responsibility for the destruction of the city of Manila;" deliberate destruction of churches and other public and private buildings; "murder" of President Elpidio Quirino's wife and three children during the "rape of Manila;" allowing the commission of atrocities by troops under his command, resulting in the deaths of over 35,000 civilians in neighboring provinces of Manila. Upon the latter charge, however--violation of command responsibility--Filipino prosecutors predicated their case. To this effect, they cited testimony from the Yamashita trial to prove that the "chain of command" had passed from the Japanese commander-in-chief to Yokoyama.²⁰ Other high-ranking officers, for example, Maj. Gen. Kenshichi Maska, former Commander of all Philippine Kempeitai in late 1944, faced similar charges as Yokoyama.²¹

Probably the most celebrated case tried by a Philippine military commission was that of Lt. Gen. Shigenori Kuroda. Kuroda, Yamashita's predecessor, was the "only living former commander-in-chief of the Japanese Army of the Occupation, Philippines." A five-man commission, headed by Brig. Gen. Calixto Duque, deputy chief of the Armed Forces of the Philippines, heard the case, which attracted widespread publicity. Presenting argument on behalf of the accused were three Philippine Army

²⁰For trial coverage, see ibid., Sept. 15, 23, Nov. 9, 1948.

²¹Malay Mail, Dec. 16, 1949.

officers, appointed by the court. As allegations against Kuroda included commission of offenses upon United States personnel, S.C.A.P.'s Legal Section dispatched S. Melville Hussey to "handle the prosecution of the American phase of the case." He worked cooperatively with Filipino prosecutors.

Specifically, the accusers charged Kuroda with command responsibility for the thousands of instances of "maltreatment, torture and murder" inflicted upon Filipino inhabitants by troops under his authority during 1943-1944. Atrocity deaths due to such barbarity, assailed prosecutors, had exceeded 2,800. Eleven months after Kuroda's arraignment the military commission reached a verdict. Kuroda, said the tribunal, was guilty as charged. Yet, in overt contrast to action taken by United States military commissions in cases involving similar legal principles, charges, circumstances, etc.--those of Yamashita and Homma, to be precise--the Philippine commission spared the accused's life: it sentenced him to life imprisonment at hard labor.²²

For this reason alone, the Kuroda trial stands out. It is impossible to ascertain exactly why the court ruled as it did in this case: press accounts were incomplete, often insubstantial and repetitive; and the trial transcript is, as yet, unavailable. Before delivery of judgment, Kuroda addressed the court with words hauntingly reminiscent of Yamashita's. His "conscience," he began, was "clear:" he had done all he could to "enhance," not envenom, "Filipino-Japanese relations." Concluding, he said simply, " . . . as a man of reason and rectitude,

²²For trial coverage, see, e.g., China Press, Dec. 3, 1948; Stars & Stripes (Tokyo), Aug. 14, 1948, July 15, 1949; The New York Times, July 14, 1949.

(I) did my best to prevent my subordinates from committing any acts that were illegal."²³

Perhaps as wartime memories and passions gradually receded further into the past, decisions like that rendered in the Kuroda trial became possible--as they had not been at the time of Yamashita's. In September 1945, less than two weeks after Japan's official surrender, Imperial Prince Higashikuni implored Americans to "forget Pearl Harbor" and "bury hate." The New York Times replied editorially that, maybe sometime in the future, when Japan had been "liberated" and "democratized," this could be accomplished. As for now, it stated solemnly, "It's too soon to forget."²⁴

One thing concerning the Kuroda and other preceding trials is certain: Philippine military commissions manifestly adjudged that command responsibility "rests on a just and sound foundation." " . . . (H)istorically speaking," wrote a Filipino specialist on international law, "command responsibility has been in being from the time of the existence of the armed forces of any nation. . . ." "At the bottom of the principle," he continued, "is the solemn obligation of every superior officer to maintain strict discipline among his subordinates."²⁵

Philippine military commissions, as their Allied counterparts in other theatres, heard a variety of trials covering a multiplicity of charges, accused, twists and characteristics. Present attention will be

²³Stars & Stripes (Tokyo), July 15, 1949.

²⁴The New York Times, edit., Sept. 15, 1945.

²⁵Tallow, Command Responsibility, pp. 3, 40-41, 59.

devoted to either/or the most typical and most remarkable of these. Filipino courts, for example, frequently tried Japanese accused for perpetrating "mass murder of unarmed non-combatant" Philippine residents. The number of victims in these cases extended anywhere from 20 into the thousands; often, they had been members of the Philippine guerrilla movement. Methods of killing varied, but commonly included bayonetting, beheading, hanging, torturing, burning and shooting.²⁶

The "longest war crimes trial ever held in the Philippines" lasted 113 days. It ended with the sentencing to death of all 14 accused for wartime atrocities in the town of Infanta, Quezon Province, Luzon. The defendants, former Japanese naval officers, ranged in rank from lieutenant commanders down to ensign. Specific charges brought against them included "murder, rape, ordering the deaths of Filipino and Chinese citizens," or carrying out illegal orders to commit the same.²⁷

Figuring in another noteworthy trial was the man who issued the illegal orders in the preceding case, former Rear Admiral Takesue Furuse. So important did Filipino officials consider this trial that they appointed Commodore Jose V. Andrada, "the highest ranking Philippine naval officer," to head the military tribunal. Furuse, in a rare departure from customary practice in Japanese war crimes trials, pleaded guilty. So enthusiastically, in fact, did Furuse accept responsibility for ordering members of his command (the 14 accused, above) to kill 152 unarmed Filipino non-combatants in Luzon, that both his defense attorney

²⁶ See, e.g., China Press, Jan. 23, Feb. 20, 1949; Stars & Stripes (Tokyo), Aug. 10, 1948, June 28, Oct. 27, 1949.

²⁷ China Press, Feb. 20, 1949; The New York Times, Feb. 19, 1949.

and Commodore Andrada stepped in. They re-apprised him of his rights, explaining "that he could plead not guilty and place the burden of proof on the prosecution." Despite this "admonition," Furuse "insisted on pleading guilty." Subsequently, the court convicted him and sentenced him to hang.²⁸

The first execution of a Japanese upon sentence of a Philippine military commission took place in August 1948. Captain Chuhiro Kudo, the condemned, had been judged responsible for the slaying of more than 100 Filipinos at Bay Laguna in February 1945.²⁹ In a pointed display of impartiality, a Manila military court convicted a Filipino accused of "wartime spying" for the Japanese while, at the same time, acquitting a Japanese officer on war crimes charges. Lieutenant Toru Kurasawa's acquittal, like most Philippine acquittals and case dismissals, was based on "insufficient evidence."³⁰

Interestingly, some convicted Japanese afterwards experienced changes of heart: shortly before their execution, three Japanese seamen addressed a letter to President Quirino in which they "volunteered" to fight Communist insurgents (Hukbalahaps) in the Philippines or elsewhere; in another instance, 13 condemned Japanese requested "admittance to the Christian faith" before their execution. These former Kempeitai, convicted of "torture and murder of Filipino civilians" during the war,

²⁸China Press, Mar. 22, 1949; Stars & Stripes (Tokyo), Oct. 28, 1949.

²⁹Ibid., Aug. 10, 1948.

³⁰Ibid., June 28, 1949, Malay Mail, Dec. 16, 1949.

were duly baptized in an Adventist Church in Manila.³¹ And Philippine President Manuel Roxas figured prominently in one extraordinary war crime-related incident. Some time in 1946, word reached Roxas of a Japanese war criminal confined by the Nationalist Chinese at Tsinan, in north China. Recognizing Lt. Col. Nobuhiko Jimbo as the man who, years before in the Philippines, had saved his and other Filipino lives, Roxas wrote to Chiang Kai-shek on his behalf. Chiang soon after freed Jimbo.³²

Manila military courts delivered their final sentence on December 30, 1947. The case involved an issue frequently heard at other Allied trials, particularly Australian and American. Found guilty of ordering the execution of 12 civilian prisoners without first providing a fair and legally constitute trial was Maj. Gen. Kensichi Masuoka. The former Kempitai commander drew 10 years' confinement at hard labor.³³

* * *

Presented at this point is the question of how observers--Filipinos and others--assessed the conduct of Philippine trials in regard to (un) fairness. Some Filipinos, for example, decried the procedural aspect of military-supervised war crimes trials. Among such individuals, most vocal and pronounced stood Justice Gregorio Perfecto, a member of the Philippine Supreme Court which had considered Yamashita's initial

³¹Stars & Stripes (Tokyo), Oct. 28, 31, 1949.

³²Marcial P. Lichauo, Roxas, The Story of a Great Filipino and of the Political Era in Which He Lived (Manila 1952), pp. 234-36.

³³Malay Mail, Dec. 30, 1949.

appeal. Apart from his judicial brethren, Justice Perfecto had registered then, in late 1945, a piercing dissent. At that time he centered his protest against procedure, particularly the rules governing evidence, applied at the trial by the United States military commission. Admission as evidence of unsigned documents, or of diaries, letters, copied statements and the like, he stated, amounted to "a denial of the due process of law constitutionally guaranteed to any person. . . ."

By 1948, Justice Perfecto had become even more strident in his censure. Yamashita and Homma, he told a university audience, "were convicted and executed substantially by the same methods through which the Japanese imperial army murdered so many of our citizens." "Under the standards of our administration of justice," he closed, "the whole thing appeared as a sanguinary farce."³⁴ Focused as these attacks were upon the procedural facet of the trials, they may also be regarded as attacks against Philippine-conducted war crimes trials: Filipinos, it will be recalled, followed nearly exactly American procedure and rules of evidence.

By this stage of the present study, it has been patently demonstrated that British, Australian, American and other critics lodged similar protests against Allied war crimes trials procedure. Filipino officials thereupon responded to their critics with arguments akin to those offered by their Allied counterparts. Military tribunals, they simply pointed out, were to be distinguished from civil courts. The unique character of the former necessitated a relaxation of the ordi-

³⁴Tallow, Command Responsibility, pp. 201-02; China Press, June 14, 1948.

narily strict rules of evidence. War crimes trials, explained a spokesman for the Judge Advocate General's Office, presented "circumstances beyond one's control." It was "not feasible to bring before the Commission all eyewitnesses" to crimes "committed several years ago."³⁵

There were also individuals who declared Philippine war crimes trials in general, not specifically procedurally, unfair. Criticism of this kind usually stemmed from moralistic, rather than legalistic, objections. A Presbyterian pastor in Manila, Eugene A. Hessel, provided an excellent illustration in this respect. Hessel leveled a stinging indictment, both broad and specific in its scope, against the entire Philippine war crimes operation: It was impossible, he contended, "for either the prosecution or defense witnesses accurately to recall details" relative to crimes committed three to five years ago. Moreover, "The crimes were committed during the heat of war. . . ." Who was fit, he pressed, to judge those who had acted "first of all" out of motives of "self-preservation;" or under the orders of a superior? Father Hessel also questioned the "legal" qualifications of Philippine Army officers who comprised commissions. Most disquieting, he suggested that "evidence is accumulating that the prosecution tends to be vindictive:" witnesses had been coerced into testifying--lying-- adversely against Japanese defendants; prosecutors sometimes denied evidence, records, witnesses to the defense. Japanese on trial, he concluded tersely, were being unjustly tried, convicted and sentenced. To rectify this injustice, Father Hessel proposed a return to practices employed in Biblical times:

³⁵Fallow, Command Responsibility, pp. 200-01.

force those who would mete out such punishments to witness their own handiwork; better still, "Let the Judges Do the Hanging!"³⁶

Father Hessel and persons who agreed with him, it would appear, represented a minority. More important, it should be emphasized that at the heart of the pastor's message lay a moralistic condemnation of "man's greatest crime," war itself. Witnesses and Japanese accused at Philippine war crimes trials, technically at least, were protected from the kind of coerced testimony or forced confessions alluded to by Father Hessel. Executive Order No. 68, that is, held that statements and confessions "procured" by questionable means should be nullified or disregarded by military commissions.³⁷

Above all, voices supporting the trials as "fair" were in no short supply. Especially instructive here are the comments of Captain Pedro Serran, chief of the panel of Philippine Army lawyers assigned to defend Japanese accused. Despite a "snowstorm" of letters from former guerilla comrade-in-arms and neighbors of his native village beseeching him "to abandon his task of defending Japanese war criminal suspects," Serran stood firm. " . . . (W)hether a Japanese indicted is convicted or acquitted" mattered not to him. "However," he stressed, "I am duty bound to see that every Japanese accused of atrocities is given a fair trial." "No right-thinking citizen," Serran confidently asserted, "would like to see the Philippines commit a historical blunder through its courts by allowing conviction of innocent people just because they

³⁶Eugene A. Hessel, "Let the Judges Do the Hanging!" Christian Century, v. 66, 1949, pp. 984-86.

³⁷fallow, Command Responsibility, p. 200.

were former enemies."³⁸

According to the press, Philippine officials had indeed refrained from committing just such a "historical blunder." Consider, for instance, the editorial observations of the Manila Bulletin in re the death sentence awarded Chushiro Kido, the "Butcher of Bay Laguna:"

Such were the hatreds generated by Japanese cruelties during the years of occupation that the whole orderly process of trial and conviction reflects credit upon the Philippines. It is a victory of the legal process over the kindred emotions of vengeance and reprisal. . . . The verdict was harsh but the offense was great.

"The entire proceedings," added the Bulletin, "were marked with maturity and dignity."³⁹ Similar conclusions had been drawn, it will be recalled, by the editors of the China Press in relation to the Matsuta trial (above). And a noted Filipino authority on international law determined that the trials heard by Philippine military commissions followed the same high standard of justice as prevailed at Nuremberg and Tokyo.⁴⁰

Statistics for trials held in the Philippines are as follows:
Cases held: 70; Defendants tried, 149; Convictions, 136 (91.3%); Acquittals, 13 (8.7%); Death sentences, 79 (57% of total accused convicted). 182 Japanese had been released and repatriated because of insufficient evidence against them.⁴¹

³⁸China Press, Jan. 16, 1948.

³⁹As reported in ibid., Nov. 10, 1947.

⁴⁰Tallow, Command Responsibility, p. 374.

⁴¹These figures, adduced from press accounts, are not final. They include statistics as of Dec. 16, 1949, provided by Capt. Yenko of the National War Crimes Office. At that time, 8 trials awaited final disposition. Press coverage thereafter extended to but one of the remaining trials; the results of that trial are included in these figures. See Malay Mail, Dec. 16, 30, 1949; Stars & Stripes (Tokyo), Dec. 13, 1949. Also, see statistics given by Tallow, Command Responsibility, pp. 374-76. These are patently incomplete, as they make no reference to trials of Japanese above the rank of major.

III. "The Trials and the Philippines International Relations"

The Philippines confronted three grave situations in the immediate postwar period. First loomed the agonizing question of how to dispose of Filipinos suspected of collaboration with the Japanese during the occupation. Next stood the increasingly formidable challenge to Philippine republicanism posed by Communist-led or instigated aggression. Initially, this threat emanated from an indigenous guerrilla organization, the Hukbalahaps (Huks), which began as a wartime anti-Japanese army. By mid-1949, however, Filipino security fears had widened to embrace potential regional advances, particularly those backed by Communist Chinese. Compounding and overlapping these difficulties was a third major crisis, the virtual devastation and economic ruin of the Philippines.

So that one may understand just where the matter of Japanese war crimes trials placed in relation to these national and international priorities, it is necessary to examine, even briefly, further into the latter's composition.

* * *

No issue proved more nationally divisive than that of collaboration. That many of the Philippines' highest and hitherto most respected government officials and citizens had succumbed to Japanese occupation rule, serving as puppets, carrying out odious policies and even persecuting their countrymen, weighed heavily enough upon the national conscience. Yet, after the war, Filipinos faced the problem of what to do with collaborators: that is, whether to inter past hatreds and humiliations

tions, absolve these individuals and concentrate on rebuilding their homeland and society; or to seek redress for past evil-doing and, in some cases, outright treason.⁴²

Almost immediately after V-J Day, the collaboration issue assumed the characteristics of a political football. American officials, notably Interior Secretary Harold L. Ickes, demanded the expulsion "from authority and influence" in the Islands of all collaborators. American Army authorities presented the reconstituted Philippine government with a list of some 5,600 Filipinos against whom, they pressed, indictments should be lodged. Expedite the "Quisling trials," said The New York Times. The political fortunes of Philippine leaders rose and fell according to their wartime records.⁴³

By 1946 Washington modified its stance. Cold War realities in general, and the rise of Communist-led insurgencies in the Philippines and other parts of Southeast Asia in specific, revised the policy. The American government presently discerned the urgent need for the political stabilization of the Philippines, its soon-to-be "outpost of democracy" in Southeast Asia. United States spokesmen thus played down the collaboration issue. In the end, very few Filipinos stood trial on such charges. A Presidential Amnesty Proclamation of January 28, 1948, technically at least, brought the matter to a close.⁴⁴

⁴²Indeed, collaboration "remains an explosive issue in the Philippines even a generation afterword," See David J. Steinberg, Philippine Collaboration in World War II (Ann Arbor, 1967), pp. vii, 32-33, 37-38.

⁴³Ibid., pp. 123-27; The New York Times, Sept. 11, 1945.

⁴⁴Steinberg, Philippine Collaboration, pp. 143-46, 161-62; also, see Sung Yong Kim, United States-Philippine Relations, 1946-1956 (Wash. D.C., 1968), p. 109.

What, one may ask, has all this to do with Japanese war crimes trials? Nothing, would be a proper response. And therein lies the significance. As long as the collaboration issue remained unsettled, as it did until at least 1948, Filipino attention--official and private--was substantially diverted from other, less searchingly intimate, matters. Indeed, a perusal of Philippine Congressional Records reveals a burning interest, attested to by heated and prolonged debates, in the question of what to do with collaborators; reference to war crimes trials and relative concerns, on the other hand, are conspicuously scant. Congressmen typically characterized the collaboration issue as "a matter of momentous importance to the Philippines;" no such phraseology, to be sure, appeared in talks in re war crimes trials.⁴⁵

A similar situation, previously commented on, emerged in China. There the lion's share of public, private and press attention centered about the trials of notorious wartime "puppets," rather than those of Japanese war criminals (see Chapter 8). So, too, did the trials of Nazi collaborators and Vichy puppets dominate postwar France's political scene (see Chapter 11). Put simply, Filipinos regarded as more pressing the disposition of collaboration suspects rather than disposition of Japanese war criminal suspects.

"The Hukbalahaps constituted the greatest threat to law and order the postwar (Philippine) Republic had faced," so concluded one

⁴⁵See, e.g., the long and fiery debates in Republic of the Philippines. Congressional Records. House of Representatives. Manila. vol. I-III, 1945-1948. v.I, Sept. 15, 1945, pp. 1118-19; v. III, nos. 12-14, Feb. 9, 11, 12, 1948, pp. 209-28; 241-62; 277-325; Feb. 13, 1948, pp. 329-423.

scholar.⁴⁶ Indeed, shortly after the islands became independent, the Huks resumed their campaign to overthrow the government and establish in its stead a Communist, anti-American regime. By September 1946, "as large scale fighting flared up . . . in the central Luzon provinces," the China Press observed that the Philippines seemed to be "Poised on the Brink of Civil War." Presently, the degree and magnitude of violence accelerated. "Shoot to kill" orders were issued by the Filipino government. Declarations of "open war" on the Huks soon followed.⁴⁷

Between 1946 and 1953, the Philippine government engaged the Huks in a guerrilla-type civil war. Fighting occurred mostly in Luzon. Exploration in depth of the dynamics and fortunes of the Huks movement, important though they be, need not detain us here. What is relevant in this instance is the realization that yet another major national crisis presented itself to the Filipino government and people. Furthermore, this "real possibility that a Communist regime would take over the islands" took place at the same time that the collaboration issue smoldered. It, too, served to deflect Filipino interest from other, less pressing, matters--like Japanese war crimes trials.⁴⁸ And to make things worse, from mid-1949 on Chinese Communists bent on subversion "intensively and systematically" infiltrated the archipelago. The "Communist threat to the Philippine Islands,"

⁴⁶Russell H. Fifield, Americans In Southeast Asia: The Roots of Commitment (N.Y., 1973), p. 78.

⁴⁷Press coverage of the nascent and then widespread civil war was extensive. See, e.g., China Press, Sept. 1, 13, 1946; Jan. 4, 14, 1947.

⁴⁸Fifield, Americans In Southeast Asia, pp. 77-79.

President Quirino solemnly disclosed later that year, was "very serious." Thoughts of imminent Communist conquest of the Chinese mainland exacerbated these fears.⁴⁹ Philippine measures designed to counter such threats to its security, as well as other exigencies, exerted great--overwhelming--pressure on the National Treasury. From whence would these funds come?

Four years of war had left the Philippines a shambles. Industry, heavy and light, lay prostrate. So, too, with agriculture. Food production, like per capita production, had declined precipitously. The majority of Filipinos were starving. Throughout the Islands towns, villages and cities had been destroyed, rendering untold numbers of people homeless. Manila, the archipelago's key urban center, was razed. In light of such "economic chaos," reasoned one scholar, Filipinos grew predominantly concerned with the question of "physical survival;" " . . . all other considerations had to be judged in this context."⁵⁰

For aid in their time of desperation, Philippine authorities looked directly, and naturally, to the United States. As early as April 1945 President Truman had promised President Sergio Osmena that he "would ask Congress for generous aid to help reconstruction" in the war-blasted archipelago. Truman signed the first bill "designed to rehabilitate the Philippine Islands and give them economic support during the early years of recovery" in May 1946. American assistance continued to

⁴⁹Malay Mail, June 16, Dec. 31, 1949; Also, "Official Philippine circles in Washington (were) greatly concerned over possible Anglo-American recognition of the Communist regime in China," June 6, 1949.

⁵⁰Steinberg, Philippine Collaboration, pp. 114, 122-23.

flow until, by early 1950, some "\$2 billion worth of overall aid" had reached the Islands.⁵¹

Heavy American economic and other assistance, however, also carried with it drawbacks for the Philippines. Before long, suggested historian Russell H. Fifield, "the Philippine economy was more dependent on the United States than any state in the Union was dependent upon the rest of the nation." That was not all. Following a path forged by other nations (for one, Britain), the newly independent Republic of the Philippines grew increasingly reliant for its national security upon overwhelming American military might in the Pacific. Not surprisingly, President Roxas acknowledged the factor of large Filipino debt to the United States in his Inaugural Speech of May 28, 1946. He said then: "If we succeed as a nation--and of course we will succeed--we will have the Americans to thank."⁵²

How did such economic and political realities affect the Philippines war crimes operation? One can only conclude that, financially speaking, the latter was considerably impeded, even curtailed, by the nation's desperate plight. A Filipino former Chief of Prosecution, Legal Section, Manila, S.C.A.P., for example, explained the Philippines' initial dilatoriness in launching its war crimes operation in economic terms. Filipino tardiness in establishing a National War Crimes Office, despite persistent American prodding, Dr. Manual Lim believed, stemmed from President Osmena's "conscious(ness) of the financial bankruptcy of

⁵¹Harry S. Truman, Year of Decisions (N.Y., 1955), pp. 65-66; New York Herald Tribune, May 1, 1946; Fifield, Americans in Southeast Asia, p. 78.

⁵²Ibid., p. 73; New York Herald Tribune, May 2, 1946.

the nation."⁵³

The Philippines also found weighty the financial drain of maintaining its representation and auxiliary personnel at the IMFFE in Tokyo. And when Allied authorities requested in December 1948 further Filipino participation in three minor war crimes trials to be held soon in Japan, Manila declined. "Apparently," observed the press, such action stemmed from "lack of funds." At the same time--as if to dispel doubts of Filipino ability to continue its trials, while simultaneously admonishing his countrymen--Philippine Ambassador to the U.N. Carlos P. Romulo underscored his nation's need to evolve a "definite policy regarding further war crimes trials."⁵⁴ Occasional transfer of convicted Japanese war criminals from Manila to Sugamo prison, Tokyo, to serve out their sentences may have been due to the Republic's inability to accommodate them.⁵⁵ Put simply, the exorbitant costs of conducting an extensive war crimes operation exceeded Manila's financial ability.

Furthermore, Philippine reliance on the United States for money and defense rendered it, particularly in the immediate postwar period, inordinately susceptible to American influence. To be sure Filipino foreign policy, said Vice President Elpidio Quirino in April 1947, was "tied up with that of the United States."⁵⁶ As concerned war crimes trials policy, it may fairly be said that American authorities 'called

⁵³Lim, "Yamashita and Homma," p. 6.

⁵⁴Stars and Stripes (Tokyo), Dec. 15, 1948.

⁵⁵See, e.g., China Press, July 28, 1948.

⁵⁶*Ibid.*, Apr. 1, 1948.

the shots'. Hence, while some Filipinos registered dissent against procedure and/or policy adhered to at the IMTFE, most accepted it. Notably, no enduring public or official outcry demanding the trial of Emperor Hirohito as a war criminal took place in the Philippines, as it did in Australia, China and New Zealand.⁵⁷

As has been shown, Philippine military commissions basically followed policy and procedure as set down in S.C.A.P. regulations. Frequent delays notwithstanding, Filipino authorities adequately responded to American urgings that they initiate, conduct and expedite war crimes trials. And while Manila failed to comply with the F.E.C. (but United States-sponsored) "recommendation" that all war crimes trials be completed by September 30, 1949, it did succeed in bringing all hearings to a close by December 30 of that year.⁵⁸

Yet, in regard to one outstanding matter Filipinos refused to abide by American policy. Not once after V-J Day, and before, did the Philippines relax even slightly its insistence that Japan pay heavy reparations for damages caused in the Islands.⁵⁹ In later years Filipino

⁵⁷Such dissent and, specifically, demands for Hirohito's trial, were either extremely isolated or deliberately screened from press coverage. See, e.g., Philippines, Congressional Records, H. of Reps., v. I, no. 8, Aug. 22, 1945, p. 685, and Stars & Stripes (Shanghai, Oct. 23, 1945). The Filipino representative at the IMTFE, Justice Delfin Jaranilla, delivered a separate "Concurring Opinion." His major discord rested in that the Tribunal "acted with so much leniency in favor of the accused" in treatment afforded and sentences awarded them. See "Concurring Opinion," IMTFE, pp. 17, 34.

⁵⁸For FEC "Recommendation" of Mar. 31, 1949, see FEC, Third Report by the Sec. Gen. Dec. 24, 1948-June 30, 1950. Pub. 3945 (Wash. D.C., 1950) pp. 5, Append. II, 17.

⁵⁹See, e.g., Philippines. Congressional Record, H. of Reps., v. I, Sept. 7, 1945, pp. 920-21; Malay Mail, June 6, 17, 31, 1949.

demands grew sharper and more pronounced. By 1949 it had become clear that United States aid, though substantial, was not nearly enough; in fact, Filipinos believed that it had been "woefully inadequate."⁶⁰ The recent American decision to discontinue collection of reparations from Japan was fine, said Ambassador Romulo, but Americans should not expect the Philippines to do likewise. "The United States can be as magnanimous toward Japan as she pleases. . . . (S)he can afford it. But the Philippines," he cautioned, "is not so fortunate." Time and again Romulo and other officials stressed the importance of Japanese reparations to the nation's reconstruction, citing the "ruins of the Philippines."⁶¹

Not all Filipinos were so understanding. The editors of the Manila Times, for example, lambasted the United States' "intense propaganda campaign" which sought to justify Japan's economic recovery as "necessary to insure the stability of the entire Far East." Most of Asia's people and resources, noted the newspaper, lay outside of Japan; what about their economic welfare?⁶²

Most other concessions to United States policy objectives--particularly, conclusion of an "early peace treaty with Japan"--the Philippines government was more than willing to make. But as the Philippines' "immediate problem" as of late 1949 was "economic, not political," explained President Quirino, any change in reparations policy would be unacceptable. Indeed, failure to resolve satisfactorily this point

⁶⁰Steinberg, Philippine Collaboration, p. 142; New York Herald Tribune, May 1, 1946.

⁶¹The New York Times, July 14, Dec. 24, 1949.

⁶²Manila Times, edit., June 14, 1948.

"resulted in a delay of the (San Francisco peace) treaty by the Philippines." Final arrangements concerning reparations were ironed out in an agreement between Tokyo and Manila in 1956.⁶³

* * *

Japanese war crimes trials, it may be seen, occupied a relatively minor level of importance vis-à-vis more pressing Philippine national and international priorities. The collaboration issue captured the general Filipino attention due to its decidedly and pervasively intimate nature. That the Huks' and, later, external Communist aggressions greatly worried the Philippine government is understandable, committed as these movements were to its overthrow. Most important of all, the virtual economic devastation of the archipelago left its imprint on the lives of every Filipino. So urgent, in truth, did Manila consider this crisis, that it was willing to oppose firmly and directly a leading policy (that relating to reparations) of the power--the United States--it depended predominantly upon for its national and economic security.⁶⁴ Unquestionably, Philippine postwar interests in Japan centered about economic concerns, specifically reparations payments.

Such national preoccupation explained, for instance, how newly elected President Roxas could deliver in June 1946 a lengthy "state of

⁶³On P.I.'s willingness to conclude an "early" peace treaty with Japan, see Malay Mail, June 17, Dec. 31, 1949, Stars & Stripes (Tokyo), Feb. 24, 1950. For reparations settlement, see Frederick S. Dunn, Peacemaking and the Settlement With Japan (Princeton, N.J., 1963), pp. 109-110, 123-25; Lawrence Olson, Japan in Postwar Asia (N.Y., 1970), pp. 24-26, 52.

⁶⁴The matter of Japanese reparations constituted "the only disagreement" in U.S.-Philippine relations, according to the Malay Mail, June 17, 1949.

the nation" address, touching "on almost every problem engaging his attention in Washington and Manila," without including a single reference to the question of war crimes trials;⁶⁵ why large numbers of condemned Japanese war criminals sometimes awaited execution indefinitely: Death sentences required final presidential confirmation and usually he was "too busy with pressing matters of state to attend to them;"⁶⁶ and the reasoning behind a journalist's conclusion in August 1948 that "Filipinos would rather forget war atrocities. . . ." Specifically, he was alluding to the paucity of public responses to a government-circulated questionnaire detailing Japanese wartime violations.⁶⁷

In brief, in light of these three major crises and their relative aspects, it is truly remarkable that the Philippines conducted as many war crimes trials as it did; and no less that it did so in such generally orderly and procedurally correct fashion.

⁶⁵The New York Times, June 4, 1946.

⁶⁶China Press, July 28, 1948.

⁶⁷Stars & Stripes (Tokyo), Aug. 5, 1948.

CHAPTER XI

FRANCE

I. "Procedure and Machinery"

Save for the Soviet Union, France conducted fewer Japanese war crimes trials than any major Allied participant. This was due less to indifference than with past and concurrent events in Europe and the unique wartime and immediate postwar status of Indochina, the site of French-related war atrocities. Four years of humiliating foreign occupation left an indelible imprint on the French consciousness. When it came to war crimes, therefore, French attention primarily focused on incidents which had occurred in Europe, and the postwar trials there of Germans, members of the Vichy government and Nazi collaborators.

Furthermore, agreements concluded in 1940 and 1941 between Vichy and Tokyo resulted--technically, at least--in Franco-Japanese collaborative rule over Indochina from 1941-1945.¹ Such action limited the scope of, but did not preclude, the commission of actual wartime hostilities and war crimes on Indochinese soil. And, finally, no sooner had World War II ended when French forces in Indochina became engaged in a bitter guerrilla war with indigenous Communist-led nationalists. Thus did such elements unite to confine to a minor one France's contribution to the

¹"From the moment that agreement" between Vichy and Tokyo was signed in early 1941, "it was obvious that French sovereignty over Indochina had become a farce." See Bernard Fall, The Two Viet-Nams: A Political and Military Analysis. 2nd. rev. ed. (N.Y., 1967), p. 45.

investigation, apprehension and prosecution of Japanese war criminals in the East.

Nevertheless, France actively associated itself with Allied war crimes policy. Delegates of the Free French National Committee signed the Inter-Allied Declaration on Punishment for War Crimes in London on January 13, 1942. Along with the Soviet Union, China, the Dominions and India, the "Fighting French" took a decidedly constructive step in October of that year when they "jointly supported" an Anglo-American proposal to establish forthwith a United Nations War Crimes Commission (UNWCC). Serious Allied investigation into the perpetration of war crimes, European and Eastern, began in October 1943 with the founding of the UNWCC. Among the Commission's "distinguished lawyers and diplomatists" from 16 nations, thus sat representatives of the government of France.²

Frenchmen also entered and partook in the activities of a UNWCC Sub-Committee set up in Chungking in May 1944. Chief among the Far Eastern "branch's" functions was investigation into Japanese wartime atrocities, particularly those committed in China. Without compromise to the united effort, each Allied representative understandably expressed specific concern for information relative to offenses inflicted upon his countrymen in various locations throughout the East. Most pressing to the French, for example, said Francois de Menthon, Minister of Justice, were reports of "Japanese war crimes in French Indo-China."³

²Punishment for War Crimes: The Inter-Allied Declaration signed at St. James' Palace, London on January 13, 1942, and Relative Documents. (London, 1942), p. 12. M. E. Bathurst, "The United Nations War Crimes Commission," Amer. Jrnl. of Int. Law. v. 39, 1945, pp. 565-68.

³The History of the United Nations War Crimes Commission and the Development of the Laws of War (London, 1948), pp. 127, 129-31; The New York Times, Feb. 25, 1945.

By late autumn 1944 the Allied liberation of France neared completion. A somewhat rejuvenated nation, led by the universally recognized head of the French Resistance, Charles De Gaulle, thereafter assumed a more assertive stance vis-à-vis the conflict in the East. " . . . (A)ny Japanese guilty of mistreating French or Indochinese citizens would be regarded as a war criminal and treated as such," General DeGaulle warned Tokyo in May 1945.⁴ France was one of nine nations whose representative joined General Douglas MacArthur in the signing of the Japanese Instrument of Surrender on September 2, 1945. Later that month, Chinese Nationalist military authorities invited the French Commanding General to attend the Japanese formal surrender ceremonies in Hanoi. The French officer, however, refused for diplomatic reasons.⁵

Frenchmen, moreover, sought to participate, even peripherally, in the postwar settlement of Japan. French representatives thereupon attended the convening of the Far Eastern Advisory Commission in October 1945, and the inaugural meeting of its offspring, the Far Eastern Commission, on February 26, 1946. They served on the latter body throughout its existence. French troops, though, did not share in the occupation of Japan; and, certainly, the number of French personnel that did, whether in secretarial or some other minor capacity, was minimal. Finally, France dispatched to Tokyo for service at the IMTFE from April 1946 to November 1948 two jurists, Justice Henri Bernard and assistant prosecutor Mr. Robert Oneto. Justice Bernard, in fact, delivered a dissent-

⁴Ibid., May 13, 1945.

⁵Ibid., Sept. 31, 1945.

ing opinion, separate from the majority Judgment.⁶

An Ordinance of August 28, 1944, provided French military tribunals with jurisdiction to try war criminals. While French war crimes regulations were designed, primarily, to accommodate trials held in the "French Zone of Germany," certain articles rendered the rules "applicable not only to Metropolitan France but also to Algeria and the Colonies (i.e., Indochina)." For instance, under Article 1 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 French protection . . . or against the property of any natural persons enumerated above, and against any French corporate bodies.⁷

Remarkably, and unlike those of any of the Allied nations, French regulations left undefined the terms "war crime" and "war criminal." In actuality, French military tribunals deemed punishable offenses which constituted, first, violations of the French municipal law; only secondly did they consider whether such infractions were "justified by the laws and customs of war." Consequently, French commissions applied either a narrower or broader definition of war crimes than, say, the British Royal Warrant, depending on what the Code Pénal and the

⁶Far Eastern Commission, Activities of the Report by the Sec. Gen. Feb. 26, 1946-July 10, 1947. Pub. 2888 (Wash. D.C., 1947), pp. 1-3. Henri Bernard, "Dissenting Judgment of the Member From France of the IMTFE," IMTFE, Tokyo, Nov. 12, 1948.

⁷Law Reports of Trials of War Criminals. 15 vols. Selected and prepared by the UNWCC (London, 1947-49). v. 3, Annex II, pp. 93-94. Emphasis mine.

Code de Justice Militaire interpreted as illegal. No nation, not even those of the Commonwealth, relied as heavily upon municipal law in the trials of war criminals. Such practice, assessed the UNWCC, resulted in the "enrichment" of the international law of war crimes "by the importation of concepts and definitions from municipal laws."⁸

Again uniquely, the Ordinance omitted any specific mention of trial procedure. Hearings, it direct simply, were to be held "in accordance with the French laws in force." Thus in accordance with the Code de Justice Militaire, tribunals consisted of five military judges, the majority of whom were "selected among officers, non-commissioned officers and other ranks belonging, or having belonged, to the French Forces of the Interior or a Resistance Group." Each military tribunal had a President, invested with special powers. His authority in regard to rules of evidence, for example, enabled a relaxation of ordinarily strict practice, if deemed necessary:

The President shall have a discretionary power in relation to the conduct of the proceedings and the finding of truth. He shall be able . . . to cause to be produced any evidence which seems to him to be of value for the finding of the truth, and to call . . . any person to whom it seems necessary that a hearing should be given.⁹

Charged with the responsibility of lodging an indictment (Act d' Accusation) and presenting the case against an accused was a Public

⁸Ibid., pp. 93, 95. Also, see v. 15, pp. 9-10. The closest thing to an official definition of war crimes was found in a statement made by M. de Menthon on July 17, 1944: "A war crime is a crime under common law which would come within the purview of French penal law, whether committed in Germany or elsewhere against French nationale" See United Nations Information Organization. Info. Paper No. 1, 1945, p. 2.

⁹Law Reports, v. 3, pp. 94, 99.

Prosecutor, usually a civilian lawyer in the employ of the French government. Afforded each accused was the right to choose his own attorney. Should he refuse to do so, the court "officially" appointed defense counsel. Prior notification of the accused as to "crimes alleged, the text of the law applicable, and the names of . . . witnesses" slated to be called by the prosecution was mandatory. French law prohibited a defendant from testifying "on oath;" still, he could take the witness stand unsworn. When the testimony, witnesses and arguments had been heard, the opportunity to offer final words was granted the accused and his counsel. Except where the tribunal determined as potentially dangerous "to public order or morals," war crimes trials were conducted publicly. Judgment, in any event, had to be pronounced in open court.¹⁰

Military tribunals reached all decisions, including whether to acquit or convict, by majority vote.¹¹ Before awarding sentence, tribunals considered any possible extenuating circumstances. Thereupon, the President read "in public sitting" and "in various degrees of fullness, the reasons for decisions arrived at." Adopted regularly by only French, Dutch and Chinese courts, this practice of delivering reasoned judgments won, again, the praise of the UNWCC. Undeniably, that organization concluded, the courts which provided reasoned judgments "tended the most detail to the existing store of knowledge on the interna-

¹⁰Ibid., pp. 98-99.

¹¹Decision by majority vote prevailed only in "war time." In peacetime, decisions had to be at least by a 5-2 vote (the commission having been expanded by one member in peacetime). France was technically at war with Japan until the ratification of the San Francisco Peace Treaty in Sept. 1951.

tional law of war crimes."¹²

Upon a conviction, French military tribunals could award a wide range of punishments under municipal criminal law. Basically, tribunals meted out penalties labeled "corporal and ignominious," which comprised any of the following: death; penal servitude for life; deportation; penal servitude for a term; detention; and confinement. In reference to certain offenses, the Code Pénal demonstrated greater specificity. To wit, it provided a penalty of death upon conviction for premeditated murder or poisoning; while voluntary homicide drew life imprisonment, except when "preceded, accompanied or followed by another crime."

Under the Code de Justice Militaire, a convicted accused could register an appeal within 24 hours of the time of judgment. Reviewal of such petitions by a Military Appeal Tribunal ensued presently. This court concentrated exclusively on determining whether the decision pronounced "thereby constituted a correct application of the law;" "questions of fact," that is, it overlooked. Invalidation of a decision of an inferior court might occur in several unusual cases, among others, when the military tribunal had been improperly composed; "when the rules of competence (had) been violated;" when the penalty meted out failed to conform with the appropriate provisions of the criminal code; and when "a violation or omission of the (valid) formalities" had occurred. Decisions by the Military Appeal Tribunal were final.¹³

¹²Law Reports, v. 3, p. 99; also, v. 15, pp. 2, 20.

¹³Ibid., v. 3, pp. 97, 99-100.

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At this point it would be well to note a distinction, hereafter, between this and preceding chapters. The present chapter contains no separate examination of "the trials." This is due to the inaccessibility of relevant materials as well as to the practical limitations of space vis-à-vis France's relatively minor role in the Allied war crimes operation.¹⁴ Rather, an attempt will be made to integrate significant information relative to the trials within the following section on war crimes trials machinery.

The Code de Justice Militaire required the establishment "in time of war" of "at least one Permanent Military Tribunal in each military region." As the "seat" of this court, the Code further directed, "shall, in principle, be the chief town of the military region," Saigon became the site of French war crimes tribunals in Indochina.¹⁵

Central throughout this entire study has been the theme of Allied cooperation. Yet, in still another departure from generally accepted Allied (save for the Soviets) procedure, the Ordinance of August 28, 1944, contained no provision enabling the creation of mixed inter-Allied tribunals. Despite this conspicuous omission, French authorities nonetheless in other areas actively engaged in collaborative efforts

¹⁴The author has tried in vain to obtain relevant French government documents, beyond those already cited. Ostensibly, they are not yet available to the public. Furthermore, the French commenced their Eastern trials in 1947, the same year that the UNWCC decided to "wind up" its activities. Detailed coverage by that body of French trials in Saigon was therefore precluded. Finally, press coverage of French Indochinese trials was spotty, frequently inconsequential and nearly always inconclusive.

¹⁵Law Reports, v. 3, p. 93.

with their Allied counterparts. At the Singapore headquarters of British--supervised South East Asian Command's (S.E.A.C.) War Crimes Branch, to wit, France maintained its own war crimes section. Operations of such war crimes teams included liaison functions and the investigation of atrocities perpetrated against French nationals there and in adjacent regions. At various locations within S.E.A.C.'s control, French officials constituted their own courts and heard their own cases. In turn, S.E.A.C. stationed a War Crimes Liaison officer at the French military headquarters in Saigon.¹⁶

Nor was French cooperation exclusively limited to the British. Paris dispatched a liaison officer to S.C.A.P.'s War Crimes Branch at Yokohama, where he remained throughout 1947. Separately, and in close coordination with the Legal Section's Investigation Division of S.C.A.P., this officer conducted investigations of violations concerning his own nationals. S.C.A.P. sometimes arrested Japanese suspects upon request of French authorities in Indochina. As with the British, French military authorities reciprocated, extending assistance to United States war crimes teams in regions under their control. Expansion of India-Burma Theatre's war crimes activities shortly after Japan's surrender led to the unearthing of numerous crimes involving American victims. Most concerned ill-treatment of POWs and captured airmen throughout Southeast Asia. The incredibly difficult task of locating, identifying and apprehending Japanese suspects in these regions resulted in the successful completion of only four cases in Indochina, involving the

¹⁶History of UNWCC, p. 381.

illegal executions of eleven American airmen. Of seven Japanese tried, five were sentenced to death and two to imprisonment.¹⁷

While friction undoubtedly existed between French and Chinese Nationalist forces in Indochina circa autumn 1945, evidence of cooperation may also be found. In one instance, a Shanghai military tribunal in January 1948 transferred to local French authorities for trial in Indochina a notorious Japanese war criminal. Imputed to the accused, General Chijisima, was a long list of torture and murder committed during his tenure as Governor General of Indochina and as commander-in-chief of Japanese forces in Java and other South Sea regions.¹⁸

Aside from its general application, French municipal law as comprised in the Code Pénal and the Code de Justice Militaire specified certain offenses which proved particularly effective in the prosecution of war crimes. These included, inter alia, "the illegal recruitment of armed forces;" "criminal association," for example, organizations "engaged in systematic terrorism;" "poisoning;" "premeditated murder" and killing as a form of reprisal; "illegal restraint of civilians;" "illegal" employment of prisoners of war on "war work;" "pillage;" "abuse of authority;" and "offenses against wounded, sick or dead soldiers."¹⁹

As it developed, the overall pattern of French war crimes trials did not stray far from that set down by the other participating nations. Definite distinctions, it is true, existed in the formal texts of French

¹⁷Ibid., pp. 383-84, 386; Stars & Stripes (Tokyo), Dec. 9, 1949.

¹⁸China Press, Jan. 10, 1948.

¹⁹Law Reports, v. 3, pp. 95-96.

and other Allied war crimes regulations. Nevertheless, tribunals sitting in Saigon, Singapore, Yokohama, Java, Manila and elsewhere applied similar law, espoused similar principles and experienced similar fortunes, good and bad.

French military authorities in Saigon, for instance, before too long learned to distinguish between European and Eastern war crimes: to wit, crimes perpetrated by Japanese forces, even specially formed contingents as the Kempeitai, defied strict interpretation as so-called group crimes (that is, commission of specific offenses by units, not individuals). That such conspiratorial behavior had occurred routinely in Europe, by the Gestapo, S.S. and other "criminal organizations," was beyond gainsaying. Not so in the East, however. And so the French, as did their Allies (save for the Dutch, see Chapter 9), forwent prosecution of criminal groups and in its stead regularly resorted to the holding of "joint" or "mass" trials. These hearings, as has been shown previously, featured groups of Japanese numbering anywhere from 3 to 93 charged simultaneously with committing, or participating in, the same or similar offense(s). One notable Saigon case of this kind witnessed 49 Kempeitai tried "jointly" on war crimes charges. As the alleged crimes had been charged "variously" and in various degrees of guilt, it is worthy of note, so too, the sentences handed down reflected this diversity. Thirteen of the accused, including 4 in absentia, received the death penalty; 27 received prison terms of different lengths, all at "hard labor," and several in "solitary confinement;" and 9 were acquitted.²⁰

²⁰London Times, Feb. 17, 1947; China Press, Feb. 17, 1947.

French military tribunals, again like their Allied counterparts, tried Japanese on a wide variety of offenses. But whereas Allied courts in most cases alleged war crimes which might easily and simultaneously be interpreted as violations under their respective municipal laws, French tribunals invariably adhered to this practice. Thus French prosecutors accused Japanese of "mass murder" of French POWs by "outright decapitation" or prolonged torture; of "ill-treatment of POWs and having forced them to do certain work in violation of international conventions;" of "mass slaughter" or "assassination" of French POWs, civilians and men and women of the Indochinese resistance movement.²¹ French indictments commonly charged accused with "rape," "ordering the execution (of a French officer) without trial," and murder of literally hundreds of non-French, that is Vietnamese, POWs.²² Again, each of these alleged offenses constituted violations under French municipal law. Moreover, no Japanese stood before a Saigon court charged with "crimes against peace" or "crimes against humanity." Japanese suspects against whom tenable cases could not be built were released and returned to Japan.²³

A recurring defense plea at Eastern war crimes trials was that of "superior orders." While the Code Pénal held that no crime was committed "when the homicide, wounding or striking was ordered by the law or by legal authority," supplemental legislation adjusted this provision so that it complied more readily with generally accepted Allied practice.

²¹Ibid., Nov. 4, 1946, Feb. 17, Apr. 16, 1947.

²²Straits Times, Feb. 20, 1947; London Times, Mar. 20, 1951.

²³Stars & Stripes (Tokyo), Dec. 9, 1949.

Commission of crimes upon "Laws, decrees or regulations issued by the enemy authorities," stated the Ordinance of August 28, 1944, was in no way justified. Only ". . . in suitable cases" might such a defense "be pleaded as an extenuating or exculpating circumstance."²⁴

Similarly, French authorities maintained a stance akin to that of their Allies as concerned the legal principle of command responsibility. That the actual perpetration of an atrocity might be attributed to a subordinate did not necessarily free from responsibility his superiors. French law considered the latter "as accomplices in so far as they (had) organized or tolerated the criminal acts of their subordinates."²⁵

The precise termination date of French-conducted trials is unclear. According to press accounts, as of December 1949 some 53 Japanese suspects still awaited trial in Saigon. As late as March 1951, it is known, French military authorities were yet in the process of executing condemned Japanese war criminals.²⁶

* * *

It may be seen from the above, then, that significant procedural and interpretive discrepancies existed between the French municipal codes and the Allied nations' specially created war crimes regulations. France's operation in the East nonetheless generally embraced a philosophy, if not a strict definition, of war crimes and war crimes trials similar to that of its Allies.

Final, exact statistics relative to French war crimes trials are unavailable. However, as of April 30, 1948, American officials re-

²⁴Law Reports, v. 15, pp. 156-57, v. 3, p.96.

²⁵Ibid., p. 94.

²⁶See Malay Mail, Dec. 6, 1949; London Times, Mar. 20, 1951.

ported these figures: Accused, 68; Convicted, 57 (83.8%); Acquitted, 11 (16.2%); Sentenced to death, 19 (33.% of total accused convicted).²⁷

II. "The Trials and France's International Relations"

French authorities did not assign great import to Japanese war crimes trials. Dawning in the immediate postwar years, they apparently felt, were matters far more pressing and momentous to France's future.

First, war trials which took place in Europe, as opposed to those in the East, attracted overwhelming French attention. Indeed, within the initial twelve months after the war's end some 40,000 Nazi collaborators and sympathizers had been sentenced in France by special courts; another 85,000 had been tried and acquitted. Also, in the spheres of economic reconstruction and national security, French concerns misgivings and fears riveted upon continental realities and uncertainties.²⁸

Secondly, after 1944 French authorities imparted increasing consideration to the matter of recovering the Asian colonies and reestablishing sovereignty over them. Shortly after Japan's surrender in September 1945, first British and then French troops arrived to disarm Japanese forces in southern Indochina. (Chinese Nationalist forces handled Japanese disarmament in the north.) However, upon their return the European powers met strong anti-colonial protests. Vietnamese nationalists, in ever-broadening and ever-loudening choruses and led, spiritually

²⁷U.S. State Dept. Foreign Relations of the United States 1948. VI (Wash. D.C., 1974), June 3, 1948, pp. 307-08.

²⁸See e.g., Herbert Feis, From Trust To Terror (N.Y., 1970), pp. 233-36.

if not titularly, by Ho Chi Min's Communist-controlled Viet Minh, demanded independence.

Limited reform of colonial administration, perhaps, the French would concede; but independence was out of the question. Riots and violence presently escalated to the point where British and French authorities forced surrendered Japanese troops to interfere and help them quell disturbances. Before too long, things veered completely out of hand. By late September 1945, in the words of Joseph Buttinger, a preeminent specialist on Vietnam, "the Vietnamese war of national liberation against France (began), a war that within a few months spread over the entire South, and into Hanoi and the northern half of Vietnam a little more than a year later."²⁹

While sidestepping discussion of the rights or wrongs of such developments, the study at hand nevertheless demands examination of how these factors affected France's war crimes operation. Following due preparation, French trials opened in Saigon sometime in early 1947.³⁰ Bitter fighting between French forces and Vietnamese nationalists, meanwhile, had been taking place up to then, and continued all through the period under study. In brief, no sooner had World War II ended, when France found itself embroiled in another costly--and constantly

²⁹ Joseph Buttinger, Vietnam: A Political History (N.Y., 1968), pp. 224-25. For first-hand accounts of the initial anti-French riots, see The New York Times, Sept. 9, 31, 1945. Akira Iriye, The Cold War In Asia (Englewood-Cliffs, N.J., 1974), pp. 86-87.

³⁰ While the exact date is ambiguous, consider this remark by a British M.P., made Jan. 28, 1947: French trials in Indochina "are to begin soon." See Britain. Parliamentary Debates (Hansard) Fifth Series. H. of Lords, p. 174, Also, see China Press, Jan. 4, 1946.

escalating--war. How much time, manpower and resources, it may be asked, might French forces in Indochina feasibly have been expected to devote to the prosecution of Japanese war crimes trials in light of this precarious and volatile situation?

At this point, an even more abstruse question arises. France adopted as its primary objective in postwar Indochina the thwarting of Vietnamese independence. By late September 1945 French military authorities actively and com only used Japanese troops to help them, as Buttinger put it, "Strike back at the Vietnamese even before reinforcements from France had arrived;" thousands of Vietnamese were routinely, and without reasonable cause, arrested and imprisoned.³¹ Exactly how willing, then, were French forces in Indochina to detract from their effort against the Vietnamese nationalists in order to prosecute for war crimes members of the Japanese military--currently engaged in conflict with the Vietnamese on French bidding? Also to be reckoned with, psychologically if not in all cases legally, was the thorny question of to what extent French Indochinese wartime collaborators shared responsibility for Japanese atrocities. Questions as these defy simple or precise answers.. It seems certain, though, that the factors submitted above considerably contributed to determining France's minor role in the Allied Eastern war crimes operation.

Several remaining elements shared in the curtailing of France's Eastern war crimes role, and they deserve mention. France's "colonial woes," for one, were not limited to Asia. Besides confronting a " full-

³¹Buttinger, Vietnam, p. 225. See, also, Buttinger, A Dragon Defiant: A Short History of Vietnam (N.Y., 1972), p. 31.

scale revolution" in Indochina, observed the China Press, France was "experiencing unrest in all her main colonial possessions," particularly those in Africa.³²

Furthermore, at the same time that trials in Saigon began, post-war France's domestic economic and political fortunes had plummeted to a new low. Spring 1947 witnessed severe food shortages, stunted agricultural and industrial production, mounting labor unrest and soaring inflation. Social disorder loomed as a genuine possibility. Feeding on, and nurturing, these ills to their own advantage were the French Communists, supported by Moscow. Never before had Communists been so close to attaining legitimate political power in France. As Herbert Feis pointed out, only the announcement and eventual effectuation of the Marshall Plan headed off these formidable challenges to French economic and political stability. To be sure, "the American program of aid was developed in the nick of time " for France.³³

A final factor, so patently simple as to escape possibly serious notice, militated against an extensive French Eastern war crimes operation: fewer war crimes occurred in Indochina than in other theatres. So-called Franco-Japanese collaborative rule in Indochina--in reality, iron-fisted Japanese control--limited the degree of actual combat in that territory. Save for several Japanese attacks against, and wholesale massacres of, French garrisons in 1941 and 1945, no major battles of World

³²China Press, edit., June 3, 1947.

³³Feis, Trust To Terror, pp. 233-36.

War II took place on Indochinese soil.³⁴ Consequently, while Japanese behavior proved no more acceptable or humane there than elsewhere, war crimes committed on Indochinese territory were relatively fewer in number and less widespread than in other parts of the East.

³⁴On this point, see Buttinger, Vietnam, pp. 188-89, 201-07. See also The New York Times, May 14, Sept. 11, 1945.

CHAPTER XII

JUDGMENT AT TOKYO

On November 4, 1948, the IMTFE reconvened in Tokyo to render judgment on Japan's 25 major war criminals. Final arguments, it will be recalled, had been completed in April. It had taken the eleven international jurists seven months to analyze and weigh the enormous collection of evidence introduced at the trial. Now, judgment day was at hand.

After reading aloud in court the lengthy majority opinion, President Webb announced the verdicts on November 12. All 25 defendants were found guilty. Tojo, former Foreign/Prime Minister Hirota, and five generals received death sentences. Sixteen defendants received life imprisonment. One, former Foreign Minister Togo, received 20 years' confinement; another, former Foreign Minister Sugiyama, received 7 years' confinement. In addition, five separate opinions were submitted: two, those of Justices Webb (Australia) and Jaranilla (the Philippines), concurred with the majority judgment; three, those of Justices Pal (India), Roling (the Netherlands) and Bernard (France), dissented wholly or in part. Despite "vigorous protest" by defense counsel, the Tribunal refused to read in open court the three dissenting opinions.¹

The Judgment comprised 1218 pages, of which the bulk, some 1050, were devoted to a detailed historical survey of Japan from 1928-1945.

¹The court, argued defense counsel, was "unfair" in its refusal to allow the defendants "to know what is said touching their lives and liberty." London Times, Nov. 11, 13, 1948.

Its actual judgment of the accused covered 7 pages and its reasoning behind individual verdicts, 82 pages. It opened with a short account of the establishment of the IMTFE, followed by a brief examination of the separate counts in the indictment.² Shortly thereafter, it touched upon the rules of evidence and procedure employed at the trial, noting that such had not been applied "with rigidity." Rather, it stated,

Indulgences were granted from time to time, having regard to the paramount need for the Tribunal to do justice to the accused and to possess itself of all facts relevant and material to the issues.³

From the outset, the Tribunal took special note of defense challenges which had been addressed to jurisdictional matters, including issues as the unprecedented nature of the IMTFE and several of the charges in the indictment. The IMTFE, it stated, "derives its jurisdiction from the Charter . . . ;" and the law of that instrument "is decisive and binding on the Tribunal." No "arbitrary exercise of power on the part of the victorious nations" was this, held the majority; nor had any new law been made by its actions. Instead, here quoting its Nuremberg predecessor, the Tribunal maintained that the Charter merely expressed "international law existing at the time of its creation."⁴

According to the majority, a body of international law, customary if not statutory, had evolved in the decades preceding World War II. Japan's "claim to a place among the civilized communi-

²IMTFE. Judgment, pp. 2, 7-11, 17.

³Ibid., p. 18.

⁴Ibid., pp. 23-25.

ties of the world" for "many years prior" to 1930 had imposed certain responsibilities upon that nation. After all, reasoned the Tribunal, Japan had "voluntarily incurred . . . obligations designed to further the cause of peace" by participating, to varying degrees, in a host of international treaties, agreements and conferences: to wit, naming but a few, the Hague Conventions of 1899 and 1907, the Nine Power and Four Power Pacts of 1922, the Geneva Conventions of 1929 and the Kellogg-Briand Pact of 1928.

By signing, while not ratifying, the latter Japan had accepted "the solemn renunciation of war as an instrument of national policy" This "necessarily involve(d) the proposition that such a war is illegal in international law" and that "those who plan and wage such a war . . . are committing a crime" Against this background, asserted the Tribunal, must the "Accused's acts . . . be viewed and judged."⁵

Responding to defense contentions that certain offenses charged in the Indictment were unprecedented and therefore invalid in international law, the majority, again, adopted the reasoning of the Nuremberg Tribunal. It was true, conceded the Tribunal, that never before in the history of the world had individuals been held criminally responsible for an act of State, or for plotting and waging a "war of aggression" also, that the latter term had up to the present proved stubbornly undefinable. Nonetheless, it maintained, "The maxim 'nullem crimen sine lege' ("There is no crime if there is no law.") is not a limitation on

⁵Ibid., p. 82.

sovereignty but in general a principle of justice." In fact, averred the Tribunal, " . . . far from it being unjust to punish (those deemed guilty) it would be unjust" if they "were allowed to go unpunished."⁶

Moreover, the Tribunal rejected defense assertions that the Potsdam Declaration had made reference to war crimes in the narrower, that is conventional, sense only. Surely stated the majority, "the Japanese Government, who advised the acceptance of terms of surrender," understood the term "war criminals" as it applied in the Potsdam Declaration to mean Japan's highest political and military leaders. Here, the Judgment cited an entry of August 10, 1945--four days prior to the official surrender--in the Kido Diary. Then, the Emperor had told Kido, "I could not bear the sight . . . of those responsible for the war being punished . . . but I think now is the time to bear the unbearable."⁷ Put simply, the Tribunal discarded allegations that ex post facto doctrine had been violated or that the accused had been misled as to Allied intentions prior to surrender.

Furthermore, the Tribunal concluded that Japan had launched aggressive wars against certain of the Allied powers. Certainly, it reasoned, those initiated on December 7, 1941, against Britain, the United States and the Netherlands, constituted aggressive wars, "whatever may be the difficulty of stating a comprehensive definition" of that phrase. " . . . (U)nprovoked attacks, prompted by the desire to seize the possessions of these nations"--as these were--"cannot but be charac-

⁶Ibid ., pp. 25-26.

⁷Ibid., p. 27.

terized" as such.⁸ And because "the waging of aggressive war was unlawful killing, "determined the majority, defendants convicted under Counts 39-52 of the indictment were guilty of "murder."⁹

Finally, the Tribunal rejected certain defendants' claims to special treatment under the Geneva Convention of 1929. It cited at length the United States Supreme Court in re the appeal of General Yamashita, that said Convention applied only to "judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war."¹⁰

The Judgment dismissed outright defense arguments that Japan had acted in justifiable self-defense. Measures taken by the Allied powers to restrict Japanese trade, it found, were intended to induce Japan to abandon a course of aggression and expansion embarked upon years before. As such, ruled the Tribunal, Allied actions were justifiable. Going further, it pointed out that Japanese aggression had well preceded any Allied economic counter measures.¹¹

A substantial portion of the Judgment dealt with the commission of conventional war crimes. Indeed, the Tribunal devoted over 130 pages to the detailing of evidence relating thereto. Several key facts were underscored: First, of 235,000 American and British POWs taken by German and Italian Armies during World War II, 4% died in captivity; of

⁸Ibid., p. 994.

⁹Ibid., pp. 34, 36.

¹⁰Ibid., p. 28.

¹¹Ibid., pp. 991-1000.

the 132,000 taken by the Japanese Army, 27% died in captivity. Second, the Allies and Protecting Powers had lodged with Japanese governmental authorities numerous "Formal and informal protests and warnings against violations of the laws of war" during the Pacific War. These had been, concluded the Tribunal, mostly "ignored" and occasionally acknowledged and their allegations denied; sometimes Japanese authorities had responded with "untruthful explanations." The final point concerned the 1929 Geneva Convention on the Protection of Prisoners of War. Granted, stated the Tribunal, Japan had only signed, not ratified, that agreement. Nevertheless, it stressed, in 1942 Foreign Minister Togo had assured the Allied powers that, "while not formally bound by the Convention, Japan would apply" its provisions "mutatis mutadis."¹²

Presented to the Tribunal had been such an overwhelming amount of indisputable evidence, concluded the Judgment, that it proved:

atrocities committed in all theatres of war on a scale so vast, yet following so common a pattern in all theatres, that only one conclusion is 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.

"Despite instituting" a seemingly "appropriate" system for handling POWs and civilian internees, the Accused, ruled the majority, had "flagrantly disregarded" the "customary and conventional rules of war designed to prevent inhumanity. . . ." In addition, "by failing and neglecting to punish those guilty of ill-treating (POWs and civilian internees) or by prescribing trifling and inadequate penalties for the offense," the

¹²For evidence relating to conventional war crimes, see ibid., pp. 1,001-1,136. See also pp. 1002-03, 1099, 1117-26.

Japanese government had "condoned" such behavior.¹³

The Tribunal also dealt at length with the chief conspiracy charge, as contained in Count 1 of the Indictment. Upon long deliberation, it was determined that the original charge had been too broad in its scope. No concrete evidence, that is, had been adduced to prove serious Japanese designs "to attempt to secure the domination of North and South America." It "accordingly treat(ed) Count 1 as if the charge had been limited" to the conspirators' "resolve to dominate "East Asia, the Western and South Western Pacific Ocean and the Indian Ocean, and certain of the islands in these oceans."¹⁴

Within this narrower definition, the Tribunal found "that the existence of the criminal conspiracy to wage wars of aggression as alleged in Count 1 . . . has been proved."¹⁵ According to the Judgment, the years after 1920 had witnessed a:

long struggle between the conspirators, who advocated the attainment of their object by force, and those politicians and latterly those bureaucrats who advocated Japan's expansion by peaceful measures or at least by a more discreet choice of the occasions on which force should be employed. This struggle culminated in the conspirators' obtaining control of the organs of government of Japan and preparing and regimenting the nation's mind and material resources for wars of aggression designed to achieve the object of the conspiracy.

The "entirely unconstitutional and at times wholly ruthless" methods used by the conspirators had included, stated the Tribunal, the follow-

¹³Ibid., pp. 1001-02.

¹⁴Ibid., P. 1137.

¹⁵Ibid., p. 1142.

ing: propaganda, governmentally unsanctioned military action abroad, assassination of opposing leaders, plots and intrigues, and a military revolt. Only after they had eliminated or had become much stronger than domestic political opposition, did the conspirators implement their aggressive plans.¹⁶

In perhaps its most pointed rebuke of the Accused the Tribunal asserted that Japan's:

Far reaching plans for waging wars of aggression, and the prolonged and intricate preparation for a waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object. That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging of disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.¹⁷

Not all the Accused, held the Tribunal, were parties to the conspiracy from the beginning, or even at the same time. Rather, all "who at any time" were "parties to it" or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count 1.¹⁸

Certain elements of the "conspiracy" had received specific or greater attention in earlier sections of the Judgment. But a few can be mentioned here. The Tribunal had noted as "the outstanding feature"

¹⁶Ibid., pp. 1138-39.

¹⁷Ibid., pp. 1141-42.

¹⁸Ibid., pp. 1142-43.

of the years after 1928, for example, "the gradual rise of the military" to a predominant position in the Japanese government. Before too long, observed the Tribunal, civilian elements had lost any "effective check on the ambitions of the military."¹⁹ Japanese designs for the "economic reorganization" of Manchukuo, determined the majority, had as their "sole purpose" to make of that territory "a work-house for production of war goods for use by Japan."²⁰ In a final instance, the Tribunal rejected Japanese arguments that the Tripartite Pact of 1940 (concluded between Germany, Italy and Japan) had been "defensive" in intent and thereby designed to promote peace; instead, it labeled the Pact "a compact made between aggressor nations for the furtherance of their aggressive purposes."²¹

The Tribunal considered "the charges against individual defendants in respect only of the following Counts: 1, 27, 29, 31, 32, 33, 35, 36, 54 and 55." Counts 27 to 36 alleged the waging of wars of aggression against specific Allied nations. Counts 54 and 55 dealt exclusively with the ordering or permitting of, or failure to prevent, respectively, conventional war crimes. The Tribunal found it "unnecessary to deal" with Counts 2 and 3, or 4, which charged "more limited" and "more specific" conspiracies, respectively, than that "found proved under Count 1." Other Counts were dismissed for various reasons. Count 5, previously alluded to above, charged a conspiracy "wider in extent and with even more grandiose objects than that charged in Count 1." Counts

¹⁹Ibid., p. 84.

²⁰Ibid., p. 643.

²¹Ibid., pp. 519-20.

6 to 26, and 37 to 53, the majority felt, necessitated no pronouncement in light of findings made under more comprehensive Counts. Count 28, pertaining to a war of aggression against China, had been adequately covered in Count 27, determined the Tribunal. No war of aggression had been conducted against Thailand (Count 34), ruled the Judgment. And lack of total sovereignty for the Commonwealth of the Philippines rendered the war of aggression conducted against it (Count 30), technically, a war against the United States.²²

Of the seven defendants sentenced to death by hanging (Diohara, Hirota, Itagaki, Kimura, Matsui, Muto and Tojo), all had been convicted on at least one of the conventional war crimes charges (Counts 54 and 55).²³ In fact one, Matsui Iwane, had been acquitted on all Counts, save 55. Matsui had been commanding officer of Japanese forces in Central China from 1937-1938. The Tribunal found him guilty of "disregard of duty" and failure "to prevent breaches" of the Laws of War in permitting the infamous "Rape of Nanking."

Along with Matsui, only one other defendant escaped conviction under Count 1. He, Shigemitsu, nevertheless was found guilty on five Counts of aggressive war (27, 29, 31, 32 33) and one conventional war crimes Count (55). He received 7 years' imprisonment. Two other defendants, Hata and Koiso, were found guilty on conventional war crimes Counts yet escaped the death penalty. They received life imprisonment. Two others, Oshima and Shiratori, were acquitted on all Counts, save Count 1; they received life imprisonment. No discernible sentencing pattern emerged.

²² Ibid., pp. 1143-44.

²³ For individual verdicts and sentences, see ibid., pp. 1146-1218.

Ostensibly, the Tribunal took into account many peripheral factors in determining an Accused's relative guilt. For example, career diplomat and former Foreign Minister Togo was convicted on the same Counts (1, 27, 29 31, 32) as General Umezu, former commander of the Kwantung Army in Manchuria. Togo, however, received 20 years' confinement; Umezu, life.

* * *

Eight of eleven judges, then, supported in toto the Judgment of the IMTFE. Two of the majority, as noted, submitted separate opinions. To those, and the three dissenting judgments, we now turn.

Justice Webb's concurring "Separate Opinion" departed only slightly from the basic reasoning set down in the majority judgment. To be sure, Webb had withdrawn his original 650 page separate judgment because, he believed, "it now appears that in most matters the majority judgment is the same as mine."²⁴ Close examination of that document substantiates this view. Still, Webb's shorter (21 pages) statement embraced certain distinctive viewpoints.

Significantly, Webb disagreed fundamentally with the majority's concept of conspiracy. While crimes of conspiracy, maintained Webb, existed in Anglo-American and other national legal systems, the crime of "naked conspiracy" had no basis in International Law. Perhaps, he conceded, it should; "but this Tribunal is not to determine what ought to

²⁴Letter, May 12, 1976, from Australian Acting Senior Archivist to author. The full document, dated Sept. 17, 1948, comprised two volumes and 658 pages. It is entitled, IMTFE, "Sir William's Judgment." Webb's reasoning, even words, on many of the trial's basic points are nearly exact to those used in the majority judgment. See, e.g., his conclusions that Japan's leaders "understood the term "war criminals" to include those responsible for the war," pp. 2, 13; and his conclusions as to a Japanese "common plan" regarding conventional war crimes, pp. 250-62.

be but what is the law." The IMTFE had "no authority to create a crime of naked conspiracy based on the Anglo-American concepts;" to prosecute individuals for such a generally unfounded crime, Webb believed, "would be nothing short of judicial legislation."²⁵ Noteworthily, in his retracted judgment, Webb found none of the accused guilty on Count 1 of the Indictment.²⁶

Webb also took issue with the question of punishments meted out by the majority. Granted, acknowledged Webb, "It may well seem that death should be the minimum punishment for a crime so great as initiating or waging a war, with its accumulated evil." However, he observed, the Nuremberg Tribunal had imposed life sentences on several accused, despite their convictions on charges of plotting and waging aggressive war. It did so, Webb suggested, in consideration of "the fact that aggressive war was not universally regarded as a justifiable crime when (the defendants) made war." Certainly, he proceeded, no Japanese defendant should receive harsher treatment than the German accused, whose crimes "were far more heinous, varied and extensive. . . ." Webb thereupon recommended that "no Japanese accused should be sentenced to death for conspiracy to wage . . . or waging aggressive war."²⁷ Despite such misgivings, Webb deemed none of the sentences "manifestly excessive or

²⁵William Webb, IMTFE, "Separate Opinion of the President," Nov. 1, 1948, pp. 8-9.

²⁶Webb, though, in his original judgment found all the accused save Matsui guilty on Counts 2, 3 or 4, which charged lesser, more limited or more specific conspiracies to wage aggressive war. See individual verdicts in "Sir William's Judgment."

²⁷Webb, "Separate Opinion," pp. 14-17.

manifestly inadequate."²⁸

What some considered to be the most "sensational" aspect of Webb's statement centered about the legal status of the Emperor.²⁹ Webb carefully avoided saying that Hirohito should have been indicted. Yet his implication was clear: the Emperor's unquestioned authority in the period before, at the start of, and during the war could conceivably have led to his prosecution. "His immunity was, no doubt," Webb conceded, "decided upon in the best interests of the Allied Powers." Nonetheless, Webb believed that justice required his taking into account the Emperor's immunity, "when determining the punishment" of the convicted accused. In all, Webb recorded no dissent.³⁰

Justice Jaranilla, likewise fully supported the judgment of the Tribunal. Unlike Webb, though, he offered no disagreement as concerned the question of criminal conspiracy. Actually, Jaranilla went even further in his concept of conspiracy than did the majority: the accused's participation in a "common plot," he contended, could have been extended to crimes against humanity and conventional war crimes, and not merely limited to crimes against peace, as the Tribunal ruled.³¹

Jaranilla directed several pointed remarks at the lengthy dissent,

²⁸Ibid., p. 21.

²⁹New York Herald Tribune, Nov. 14, 1948.

³⁰Webb, "Separate Opinion," pp. 18-20, 21.

³¹Delfin Jaranilla, "International Military Tribunal for the Far East. Concurring Opinion By the Honorable Mr. Justice Delfin Jaranilla Member from the Republic of the Philippines." Nov. 1, 1948, pp. 2-5, 6, 11-12. The full statement comprised 35 pages.

to be examined momentarily, filed by Justice Pal of India. Pal, for one, contended that the Charter of the IMTFE was invalid. If so, Jaranilla responded, then Pal's "appointment as such member (of the IMTFE) is invalid . . . because he derives his appointment from the authority of the Charter." An invalid appointment, reasoned Jaranilla, would consequently render all of Pal's acts invalid and strip his (dissenting) opinion of "any legal authority."³²

Jaranilla also disagreed with those--again, Pal, but this time by implication--who maintained that the Allies should not have used the atomic bomb in the war against Japan. Such arguments, Jaranilla stated, were aimed at minimizing "the responsibilities of the defendants . . . for the atrocities and inhuman acts committed during the war."³³

It would seem that Jaranilla's sole discord with the majority judgment focused on the issue of punishments. A "few" of the penalties, he felt, were "too lenient, not exemplary and deterrent, and not commensurate with the gravity of the offense or offenses committed."³⁴ "In fact," Jaranilla believed:

if any criticism should be made at all against this Tribunal, it is only that the Tribunal has acted with so much leniency in favor of the accused and has afforded them, through their counsel, all the opportunity to present any and all pertinent defenses they had, thus protracting the trial.³⁵

By far the most piercing dissent lodged against the majority

³²Ibid., pp. 29-30.

³³Ibid., p. 24.

³⁴Ibid., p. 34.

³⁵Ibid., pp. 16-17.

judgment flowed from the pen of Justice Radhabinod Pal of India. Virtually every aspect of the IMTFE--its jurisdiction, rules of evidence and procedure, reasoning, legal definitions and, especially, its judgment--fell within the purview of Pal's lengthy (some 700 pages) censure. Alone among the separate opinions, it was published commercially (Calcutta, 1953).

The IMTFE, Pal opened, had jurisdiction only over crimes "committed in or in connection with the war which ended" September 2, 1945. Alleged violations pursuant to events which occurred before December 1941--during, that is, "conflict" in Manchuria, "hostilities" in China, and "incidents" on the Sino-Russian border--fell "outside the jurisdiction of the Tribunal."³⁶ A "victor's power under International Law, asserted Pal, did "not entitle him to sit on trial over the vanquished for all his life's doing."³⁷

Not "a manifestation of power," but a "Court of Law," said Pal, must the IMTFE strive to be. Therefore, it must be careful to apply only those rules and to prosecute only those crimes long established in international law. A "so-called trial" based on a "definition of crime now given by the victors," Pal admonished, "would be a sham employment of legal process for the satisfaction of a thirst for revenge."³⁸

No authoritative and "binding" body of international law, maintained Pal, had developed up to World War II. Instead, it remained a

³⁶Radhabinod Pal. International Military Tribunal for the Far East, Dissident Judgment. (Calcutta, 1953), pp. 9-10.

³⁷Ibid., p. 578.

³⁸Ibid., p. 17.

"recognized rule of international life" that sovereign nations insisted on retaining complete freedom of action where questions vital to their existence arose; so, too, he said that nations freely resorted to "war as a legitimate instrument of self-help" whenever peaceful solutions failed.³⁹ Not the Kellogg-Briand Pact, or any other international agreement up to or after 1928, had declared or made war unlawful." Nor did any customary law develop making any war criminal." In fact, the Pact recognized "Each State's" "prerogative of judging for itself" what constituted "justifiable self-defense." War, Pal held, "in international life remained . . . outside the province of law. . . ."⁴⁰

Pal swiftly dismissed any concept of "aggressive war." Had not, he inquired, the "U.S.S.R. and the Netherlands "attacked Japan?" Were those wars aggressive? Citing a theme--the trial of vanquished by victors--he would constantly return to, Pal noted: "Perhaps at the present stage of International Society the word "aggressors" is essentially 'chamelonic' and may only mean 'the leaders of the losing party.'"⁴¹

Pal disposed of prosecution allegations of "murder" with equal adroitness. "In order to take any killing outside the definition of murder," he stated, "all that is necessary is to show that it was done in war, the war itself is not required to be justified at the same time."⁴²

Pal accepted fully the defense argument that Japan, and the defendants, had acted in "self-defense." Increasingly assertive Japanese

³⁹Ibid., p. 103.

⁴⁰Ibid., pp. 35, 37, 42, 54, 59.

⁴¹Ibid., pp. 116-18, 121.

⁴²Ibid., pp. 587-91.

actions in Manchuria circa 1928-1931, said Pal, had their origins in "China's desire to exclude Japan totally" from the territory. He did not rule out Japan's "hypothesis" that China had "engineered" the Mukden Incident of October 1931. He saw no reason to doubt the genuineness of fears expressed by Japanese statement of the 1920's and 1930's relating to the spread of Communism in China;⁴³ or to doubt that Japanese leaders of the 1930's earnestly believed that the "situation in China had changed," thereby necessitating establishment of a "New Order" of things in East Asia. Pal, throughout, avoided comment on the right or wrong of Japanese actions; he merely contended that such actions had been undertaken in self-defense and violated no existing international law.⁴⁴

Furthermore, went this reasoning, Japan had been "really driven to take action" against Britain and the United States. Anglo-American economic measures and fortification of Pacific territorial possessions, Japan truly believed, threatened its existence. Japan, held Pal, "did not see any way out of the situation created by these powers."⁴⁵ Indeed, Pal agreed that Secretary of State Hull's Note of November 26, 1941, exacted such draconian concessions from Japan that war was their only viable recourse. The attack on Pearl Harbor, thus, had been in self-defense. Pal accepted unquestioningly the forthrightness of Japanese negotiators; America, he felt, should have accepted Ambassador Kurusu's assurances to Hull of Japan's peaceful intentions, and continued the

⁴³Ibid., pp. 217, 231-32, 247, 249-50.

⁴⁴Ibid., pp. 472-74.

⁴⁵Ibid., pp. 405-06, 408.

talks.⁴⁶ As to Japan's southward advance into the Netherlands East Indies and French Indochina in early 1940-1941, Pal underscored Japan's decided dearth of its own "material resources:" Japan was a 'have not' nation. From the start of its modern period, Pal sympathized, it had struggled at a disadvantage vis-a-vis established and more generously endowed Western powers.⁴⁷

More than any other, the issue of a criminal conspiracy attracted Pal's attention. Pal deemed "preposterous" the majority judgment's notion of a 14-year plot on the part of the accused. Such a conclusion, he felt, was impossible unless one "strained" the mind to force diverse and disparate elements to fit into a preconceived theory. Systematically, he challenged the Tribunal's key themes: For example, "external events" had "led" to Japan's establishment of the puppet state of Manchukuo;⁴⁸ "internal affairs" then prevailing "amply explained" the military's gradual accession to power in Japan during the 1930's;⁴⁹ Japan's preparations for war against Russia and the Western powers especially the United States, Pal held to be defensive measures. Every nation, he stressed, was "more or less" preparing for war in the interwar period. And, he noted, "The policy of expansion, even aggressive expansion, is not the same thing as conspiracy."⁵⁰

⁴⁶Ibid., pp. 544-47, 512, 521-22.

⁴⁷Ibid., p. 498.

⁴⁸Ibid., pp. 560; 241, 272, 281.

⁴⁹Ibid., p. 371.

⁵⁰Ibid., pp. 405-08, 455, 460-61.

Events leading to the Pacific War, Pal concluded, had developed "gradually." Japan had acted and negotiated with "sincerity," in its attempt to forestall the conflict.⁵¹ Furthermore, each of the accused had come to power "gradually," and not by way of a pre-fixed design. Not the "designers, but . . . the proper constitutional authorities" had placed the accused in vital governmental positions because they "enjoyed the requisite confidence." Pal censured the Tribunal's notion of a conspiratorial plot to capture control of the Japanese government: "the story here has been pushed a little too far, perhaps, to give it a place in the Hitler series."⁵²

Pal's conclusions as regarded the matter of criminal conspiracy was inevitable, considering the preceding: None had existed. Circumstances had "developed in such a way during the relevant period to lead Japan to adopt certain policies in her foreign relations. . . ." Beyond that, "conspiracy" by itself, judged Pal, "is not a crime in international law;" nor could the Charter make it such.⁵³

Nor, decided Pal, had any "common plan or conspiracy" existed in respect to the commission of atrocities. Violations of the laws and customs of war, even wide-scale examples as the Rape of Nanking and the Bataan Death March, had been "all stray instances."⁵⁴ Unlike the accused at Nuremberg, Pal noted, the Tokyo defendants "were not charged with

⁵¹Ibid., pp. 499, 512.

⁵²Ibid., pp. 381-82.

⁵³Ibid., pp. 558, 562, 574.

⁵⁴Ibid., pp. 595, 628, 665, 693.

actually perpetrating atrocities." And, he continued, "there is absolutely no evidence of any order, authorization or permission as alleged in Count 54." In fact, stated Pal, "if there was anything approaching" direct orders to commit atrocities, "it is the decision coming from the Allied powers to use the atomic bomb."⁵⁵

Pal also exculpated the accused on Count 55 of the Indictment: ". . . as members of the government, it was not their duty to control the troops in the field. . . ." Indeed, he added "It is difficult to make even the commanders of the army responsible for what was happening" after 1944, when Japan's defeat loomed inevitable.⁵⁶

Innocent of conventional war crimes, too, according to Pal, were the military men among the accused. General Matsui, for one, had "sought to control" his troops at Nanking in 1938, but his efforts "proved ineffective." True, Tojo had ordered the use of POWs to construct the Thai-Burma railway in violation of existing international conventions, and resulting in the deaths of untold thousands of Allied servicemen. But, said Pal, Tojo's was "a mere act of state . . . and I would not make him criminally liable for it."⁵⁷

Clearly, believed Pal, the IMTFE symbolized victor's justice. International law, he held, required "unanimous agreement" among the parties concerned. It "serves no useful purpose" to conduct war crimes trials of vanquished only; "If it is really law which is being applied,"

⁵⁵Ibid., pp. 599, 620-21.

⁵⁶Ibid., pp. 629-31.

⁵⁷Ibid., pp. 630-31, 634-35, 669.

advised Pal, then prosecute also culpable "members of the victor nations." Otherwise, war crimes trials offered no deterrent to future ill-behavior and undermined, rather than reinforced, universal principles of justice. Punishment exclusively of the vanquished reasoned Pal, added nothing "to the risk of defeat" and merely underscored the notion of 'might makes right'.⁵⁸ Pal thereupon recommended "that each and every one of the accused . . . be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges."⁵⁹

Much more limited in scope, incisiveness and size (23 pages) than that of Justice Pal's, was the dissent of Justice Henri Bernard of France. To begin with, Bernard upheld the "constitutionality of the creation of the Tribunal." "The crimes committed against the peoples of a particular nation," he observed, "are also crimes committed against members of the universal community." For want of a truly "universal authority," reasoned Bernard, the "universal community" was empowered to exercise "a defacto authority which can organize the trial of crimes against peace and humanity. . . ." Applied at such a trial would be the law, not of "the victor or the defeated, but that of all nations." As a consequence of these principles, stated Bernard, "the Allied Nations were . . . perfectly qualified to create" the IMTFE.⁶⁰

The fact that the victors had authored the Charter and set up the IMTFE mattered little to Bernard. "It is sufficient proof of the good-will of the Allies," he believed, "that instead of punishing the

⁵⁸Ibid., pp. 65-68, 83, 99.

⁵⁹Ibid., p. 697.

⁶⁰Henri Bernard. "Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East." Nov. 12, 1948, pp. 1-3.

defendants without any trial of any kind, they turned them over to a Tribunal free to acquit them." He dismissed defense objections to the jurisdiction of the IMTFE.⁶¹

Bernard could not share the view of the majority that the Charter furnished it a "substantive law." Rather, he maintained, the authority of the IMTFE to prosecute for crimes against peace, to declare aggressive war illegal and to hold individuals criminally responsible for starting a war rested on a firmer, immutable foundation: natural law. He had "no doubt" that aggressive war, regardless of any principles inherent in the Kellogg-Briand Pact, is and always has been a:

crime in the eyes of reason and universal conscience--
expressions of natural law upon which an international
tribunal can and must base itself to judge the conduct
of the accused tendered to it.

Additionally, Bernard asserted, both collective and individual responsibility "are inscribed in natural law and not in the constitutive acts" of the authors of the Charter. The universality of these principles, Bernard thought, justified his rejection of defense claims that ex post facto doctrine had been violated. In short, he concluded, "natural or universal law" "exists outside and above nations."⁶²

Unquestionably, determined Bernard, the accused "can under certain conditions be held guilty" for failure to prevent conventional war crimes. He insisted, however, that individual convictions and punishments be awarded with demanding specificity. That is, "it would not be just to

⁶¹Ibid., pp. 2-4.

⁶²Ibid., pp. 8-11, 18.

place on the same footing" one who actively participated in the crime, one who knew of the crime and did nothing to halt it, and one who tried to stop the crime but whose actions proved ineffective.⁶³

The gist of Bernard's dissent centered about the procedure followed by the Tribunal. Despite guarantees of a fair trial for the accused embodied in the Charter, Bernard believed that:

Essential principles, violations of which would result in most civilized nations in the nullity of the entire procedure , . . . were not respected.

Three factors determined his reasoning: 1) No official and independent inquiry had preceded the trial. Contrary to Continental legal procedures, the defendants had been deprived:

an opportunity to endeavor to obtain and assemble elements for the defense by means of a preliminary inquest conducted equally in favor of the Prosecution and of the Defense by a magistrate independent of them both. . . .

Bernard considered this a "particularly serious" violation. 2) The prosecution was carried out in an "unequal and unjustified way." Bernard, in this respect, pointed an accusing finger directly at the Emperor, "whom the trial revealed could have been counted among the suspects and whose absence from the trial . . . was certainly detrimental to the defense of the Accused." 3) The judges of the IMTFE did not deliberate aloud and jointly prior to reaching their decisions. No oral discussion pursuant to the majority judgment took place; nor could Bernard attest that all members of the Tribunal took cognizance of each separate opinion prior to rendering judgment.⁶⁴

⁶³Ibid., see pp. 13-17.

⁶⁴Ibid., pp. 18-20.

Whereupon, Bernard concluded: "A verdict reached by a Tribunal after a defective procedure cannot be a valid one." Furthermore, he had reservations concerning the majority's notion of a conspiracy. Such a concept, as well as that of "aggressive war," had been "too vague" in international circles at the time of their alleged occurrence. He was uncertain whether the accused could have known, then, that their actions might be later judged criminal--or, for that matter, whether an actual conspiracy had been proven. And undeniably, averred Bernard, any such conspiracy "had a principal author (the Emperor) who escaped all prosecution and of whom in any case the present Defendants could only be considered as accomplices."⁶⁵

While convinced "that certain Defendants bear a large part of the responsibility" for wide-scale conventional war crimes committed by members of the Japanese army and navy, Bernard nevertheless reserved judgment on any of the accused:

I could not (he said) venture in the formulation of verdicts, the exactitude of which would be subject to caution or to sentences, the equity of which would be by far too contestable.⁶⁶

Finally, Justice Bernard V. A. Röling of the Netherlands presented a moderately lengthy (249 pages) dissenting opinion. He began by stressing the limited power of the Charter and, thereby, the limited jurisdiction of the Tribunal. The "victorious powers have no authority to create new international crimes," he cautioned, "but are bound by the provisions of existing international law." Only alleged crimes pur-

⁶⁵Ibid., pp. 20-22.

⁶⁶Ibid., pp. 22-23

suant to the Pacific War came within the IMTFE's jurisdiction; all others, say, Russo-Japanese border incidents of 1938 and 1939, lay outside its consideration.⁶⁷

Röling doubted whether the Kellogg-Briand Pact of 1928 or any other international resolution criminalized war "in the ordinary sense." In fact, not before the London Conference of summer 1945 were crimes against peace regarded as "true Crimes."⁶⁸ Yet, Röling submitted, crimes in international law:

can also 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 than a villain, and where the punishment emphasizes the political measure rather than the judicial retribution.

"In this sense," believed Röling, "the crime against peace, as formulated in the Charter, is in accordance with international law." Moreover, whereas the "dominant principle" in this violation should be the "dangerous character of the individual," the "punishment should only be determined by considerations of security." To Röling, who in this instance cited the action of the Nuremberg Tribunal, this meant "that no capital punishment should be given to anyone guilty of the crime against peace only."⁶⁹

Röling addressed the question of conspiracy only peripherally:

" . . . (W)ellnigh impossible" was it, he suggested, "to define the

⁶⁷Bernard V. A. Röling. "Opinion of Mr. Justice Röling, Member for the Netherlands. International Military Tribunal for the Far East." Nov. 12, 1948, pp. 4-5, 7-10.

⁶⁸Ibid., pp. 26-32, 44-45.

⁶⁹Ibid., pp. 48-49.

concept of initiating or waging a war of aggression both accurately and comprehensively." Simple membership in a government which decided for war, he felt, was insufficient; rather, "The intention with which one enters such a government is decisive. . . ." Throughout Röling emphasized that "it is not the aim in this case--the domination of East Asia--which constitutes the crime, but only the aggressive war as a means to achieve that aim."⁷⁰

The IMTFE, discerned Röling, embraced both positive and negative aspects. For one, the Allies might have, as the Potsdam Declaration pledged, "eliminate(d) for all time" those Japanese responsible for the war. "Mere political actions, based on the responsibility of power," he reasoned, "could have achieved this aim." Instead, they provided the accused a judicial proceeding "which cannot be regarded as a violation of international law (due to its unprecedented character) in that it affords the vanquished more guarantees than mere political action could do."⁷¹

A negative side, too, existed, according to Röling. He cited the Tribunal's frequent denial to the accused of the right "to prove aggressive intentions" on the part of other countries--the prosecuting nations, namely. He also differed fundamentally in various respects with the majority judgment's interpretation of historical fact. For example, Röling concluded that, as early as 1936, Japanese leaders had decided to expel Western powers from East Asia, "but in a peaceful and gradual manner." Japan's actions toward Russia, said Röling, emanated

⁷⁰Ibid., pp. 52, 221.

⁷¹Ibid., p. 47.

from "fear" and were always "defensive" in nature; similarly, Japan had decided to fight the United States only if the latter "intervened with armed force" to impede its plans to establish a New Order in East Asia.⁷²

Röling reserved some of his most pointed remarks and insights for the consideration of verdicts and sentences of individual defendants. "Internment for life is, at this state (in the development of international law), the appropriate punishment" for crimes against peace, determined Röling. Only accused found guilty of conventional war crimes, he felt, should receive the death penalty.

Within this definition, Röling approved 11 of the 16 life imprisonment terms meted out by the majority. Three of the accused who received life sentences, Oka, Sata and Shimada, Röling believed "should have been found guilty of conventional war crimes" and thus should have received the "supreme penalty." He "respectfully agreed(d)" with all death penalties pronounced, save for that of Hirota. Hirota, along with Hata, Kido, Shigemitsu and Togo, Röling thought, "should have been acquitted. . . ."⁷³

Doubtless, Röling maintained, Hirota should have been acquitted on charges of conventional war crimes. As Foreign Minister, Hirota "certainly had no knowledge whatsoever and could have had no knowledge, while he certainly could not have prevented . . . atrocities." "Generally speaking," Röling cautioned, "a Tribunal should be very careful in

⁷²Ibid., pp. 86, 78-83, 87-89, 104-09, 120ff., 125-26.

⁷³Ibid., p. 178.

holding civil government officials responsible for the behavior of the Army in the field." Furthermore, Hirota "did not belong to those arch-aggressors who are judged by this Tribunal to deserve the death penalty;" on the contrary, he urged pursuit of Japanese aims "only in a gradual and peaceful manner."⁷⁴

Hata, said Röling, "was a professional soldier." And "No soldier should ever be found guilty of the crime of waging an aggressive war simply for the reason that he performed a strictly military function. "Aggression," Röling added, "is a political concept. . . ."⁷⁵

Kido, it appeared to Röling, had never been "one of the group which directed Japanese policy towards aggressive war." Nor had he wielded decisive authority. Whether Kido had done all he could to divert Japan from war was inconsequential, believed Röling. Rather, "As international law now stands, those should be regarded as guilty of the crime against peace who actively support, and bring about, the aggressive war, and not those who failed to sufficiently (sic) promote peace." Kido's responsibility for conventional war crimes, said Röling, had not been "substantiated."⁷⁶

Evidence laid before the IMTFE, stated Röling, revealed Shigemitsu "as a diplomat and a statesman who worked for peace rather than for war." Wrong indeed, felt Röling, would it be to charge with waging an aggressive war a public official who entered the government expressly to

⁷⁴Ibid., 191-210.

⁷⁵Ibid., pp. 179, 188; also, 179-90.

⁷⁶Ibid., pp. 211-27.

oppose that war. Such action would "compel" peaceful-minded statesmen "to abstain from holding positions in which they could achieve their desire." As Foreign Minister, concluded Röling, Shigemitsu had done his best to prevent or halt atrocities by forwarding all protests and complaints to the "proper authorities." Japan's Foreign Ministry, he noted further, "had no way of conducting independent investigations."⁷⁷

Last, it had been "proved beyond doubt," asserted Röling, that Togo had entered the Tojo Cabinet in October 1941 to prevent a Pacific War. Yet, Togo understood that failure would result in his being forced to support the government--out of loyalty--in war. An individual who joins a government "for the sake of promoting peace," but "is forced to vote for war," Röling thereupon concluded, "cannot be accused of aggressive intent." As regarded "any doubt about Togo's motives," Röling believed that "the defendant should have the benefit of that doubt."⁷⁸

* * *

Representatives of the Allied Council for Japan convened on November 24, 1948, to review the verdicts and sentences of the IMTFE. General MacArthur presided. At the meeting, diplomats from the United States, Britain, China, the Soviet Union, New Zealand and the Philippines recommended "no change." The Australian and Canadian also recommended no change, yet were "not opposed to reduction in sentences." While abstaining from official comment, the French representative "personally appealed for clemency." Commutation to life imprisonment for all death

⁷⁷Ibid., pp. 228-41.

⁷⁸Ibid., pp. 244-48.

sentences was favored by the Indian delegate. And the Dutch representative suggested commutation to life of Hirota's sentence and lessening four other sentences.⁷⁹

MacArthur's review followed. Within the limitations of the authority and duties of his position, MacArthur could, he said,

find nothing of commission or omission in the incidents of the trial itself of sufficient import to warrant my intervention in the judgments which have been rendered. No human decision is infallible, but I can conceive of no judicial process where greater safeguard was made to evolve justice.

He directed the appropriate military authorities "to execute the sentences as pronounced by the Tribunal."⁸⁰

Yet another act, however, remained to be played. On December 6 two defendants, Doihara and Hirota, won the right to a preliminary hearing by the United States Supreme Court. The vote had been 5-4, with Justice Robert H. Jackson dramatically casting the tie-breaker. Jackson had done so, he said, to preclude efforts by "critics and enemies" "to impeach the good faith and to discredit the justice of this country. . . ." His action, interestingly, attracted both applause and rebuke.⁸¹

Less than three weeks later, the Court presented its decision. By a 6-1 count, it rejected petitioners' central argument that the IMTFE

⁷⁹William Sebald with Russell Brines, With MacArthur In Japan: A Personal History of the Occupation (N.Y., 1965), pp. 167-69.

⁸⁰Courtney Whitney, MacArthur, His Rendezvous With History (N.Y., 1956), pp. 281-82.

⁸¹The New York Times, Dec. 7, 1948. James F. C. Liu, "former Historical Assistant to the Chinese Prosecutor, IMTFE," denounced the U.S. Supreme Court action, contending that: "Nowhere in the entire course of legal history has the verdict of an international court been subject to the review of a national court. . . ." Letter to editor, in *ibid.* Meanwhile, Jackson's vote in favor of hearing the Tokyo defendants' appeals won praise, in St. Louis Post Dispatch, Dec. 7, 1948.

was essentially national in character. "We are satisfied," stated the majority, "that the tribunal which sentenced these petitioners is not a tribunal of the United States." Rather, it was an Allied creation. Thus, concluded the Court, American courts "have no power or authority to review, affirm" or otherwise alter its judgment or sentences.⁸² Three days later, on December 23, 1948, the seven condemned accused were executed at Sugamo prison in Tokyo.

* * *

And so the IMTFE passed into history. One major dimension of the Tokyo Trial, however, is still lacking: A balanced examination of how participants and contemporaries and later observers, jurists, and historians--both supporters and detractors--assessed the IMTFE. Toward partially filling that void, the following is directed.

"It is inevitable that many will disagree with the verdict," MacArthur had perceived in his review of the IMTFE's judgment and sentences.⁸³ Certainly, his was an understatement. "Many" indeed agreed with arguments put forth at the trial by defense counsel or with the reasoning expounded by the dissenting Justices. Let us address some of the more controversial issues.

1) Unprecedented nature of the IMTFE and crimes alleged. Critics emphasized that the Tokyo Tribunal, and its Nuremberg counterpart, were the first of their kind in the history of the world. The same, they

⁸²Justice Murphy dissented; Rutledge reserved decision; Douglas issued a separate concurring opinion; and Jackson abstained. See The New York Times, Dec. 21, 1948.

⁸³Whitney, MacArthur, pp. 281-82.

contended, applied to the crimes charged before them. Never before had government leaders been held responsible for planning or waging a war; or had individuals been held criminally responsible for acts of State. Even today, they noted, terms such as "aggressive war" and "aggression" lack precise definition.⁸⁴ By their conclusion, "The basic fact is that the victorious powers tried 27 leaders of the defeated Japanese nation for violation of ex post facto law." Several American former defense counsel, among them George F. Blewett and Gordon Ireland, later wrote articles to this effect.⁸⁵ So, too, did several Indians, K. K. Basu and T. S. Rama Rao, basically repeating views previously expressed by Justice Pal;⁸⁶ some Britons, including a specialist on international law, Viscount Maughan;⁸⁷ some contemporary journalists and, latterly, scholars.⁸⁸ Generally included among these critics should be those who

⁸⁴On the indefinability of "aggressive war," then and now, see, e.g., C. A. Pompe, An Aggressive War: An International Crime (The Hague, 1953), pp. 30-33, 70; Enrico Serra, L'Aggressione Internazionale (Milan, 1946), p. 173; John G. Stoessinger, The Night of Nations (N.Y., 1963), p. 246.

⁸⁵See e.g., George F. Blewett, "Victor's Injustice: The Tokyo War Crimes Trial," American Perspective, v. 4, 1950, pp. 283, 286-87; Gordon Ireland, "Uncommon Law in Martial Tokyo," Year Book of World Affairs, v. 4, 1950, pp. 82-86; Owen Cunningham et. al., "Forum On War Crimes Trials," Amer. Bar Assn. Comp. and Int. Law Sect., 1948, pp. 35-36.

⁸⁶K. K. Basu, "Tokyo Trials," Indian Law Review, v. 3, 1949, pp. 29-30; T. S. Rama Rao, "The Dissenting Judgment of Mr. Justice Pal at the Tokyo Trial," Indian Year Book of International Affairs, v. 2, 1953, pp. 279-80, 283-84, 288-89.

⁸⁷F. H. Maughan, U.N.O. And War Crimes (London, 1951), pp. 71-72, 79; Lord Hankey, "Postscript," in ibid., pp. 110-27 passim.

⁸⁸See, e.g., Herbert Solow, "A Rather Startling Result," Fortune, v. 39, no. 4, 1949, p. 166; Walter L. Riley, "The International Military Tribunal for the Far East and the Law of the Tribunal as Revealed By the Judgment and the Concurring and Dissenting Opinions." Unpub. Ph.D. Dissert., U. of Washington, 1957, pp. 145, 176, 199; Richard H. Minear, Victor's Justice: The Tokyo War Crimes Trial (Princeton, 1971), pp. 47-67 passim.

faulted, on nearly identical principles, the Nuremberg Tribunal.⁸⁹

Supporters of the IMTFE argued that "in international law there is no restriction as to ex post facto law--the question can only be the enforcement of law which is found in the common conscience and which is not subject to quick mutation." They cited Henry Stimson to the effect that "international law is not a body of authoritative codes or statutes; it is the gradual expression case by case of the moral judgments of the civilized world." "The first case tried in any situation," explained an American authority on war crimes trials, John A. Appleman, "is necessarily a case of first impression," " . . . (A)ll courts were at one time unprecedented," said a Filipino expert on international law.⁹⁰

Inasmuch as this was true, the supporters believed that the Tokyo Tribunal had not made any new laws; it had applied existing laws which had received universal recognition over the years through international agreements or custom. Not only former prosecutors at Tokyo such as Walter L. McKenzie and A. S. Comyns-Carr, maintained this view;⁹¹ others, several New Zealanders, Australians (most notably Lord R. A. Wright, chairman of the UNWCC), and jurists agreed.⁹² While the Tokyo

⁸⁹See, e. g., Encyclopedia Britannica Book of the Year 1946. "International Law," p. 398; G. W. Paton, "The War Trials and International Law," Res Judicatae, v. 3, 1947, pp. 124-25.

⁹⁰John A. Appleman, Military Tribunals and International Crimes (Indianapolis, 1954), pp. 47-48, 70; James T. Brand, et.al. "Forum On War Crimes Trials," Amer. Bar Assn. Comp. and Int. Law Sect., 1948, p. 46, Adam A. Tallow, Command Responsibility: Its Legal Aspect (Manila, 1965), p. 196.

⁹¹Among the former prosecutors that held this view were Walter L. McKenzie, "The Japanese War Trials," Jrnl. of the Nat. Assn. of Ref. in Bankruptcy, v. 21, 1947, p. 103; A. S. Comyns-Carr, "The Judgment of the International Military Tribunal for the Far East," Trans. of the Grotius Soc., v. 34, 1948, p. 141; David N. Sutton, "The Trial of Tojo: The Most Important Trial in All History?" Amer. Bar Assn. Jrnl. v. 36, 1950, p. 164.

⁹²Harold Evans, "The Trial of Major Japanese War Criminals," New

Judgment represented a "revolution in law," Justice Röling wrote years later, "the new concepts were based on the conscience of the people. . . . In an emotional outburst the world demanded that war should be outlawed to the extent that individual war-makers should be made criminally responsible."⁹³ Those who complained of ex post facto violations, additional supporters stressed, should recall the long list of pointed Allied warnings given to Japanese leaders during the war.⁹⁴

2) Procedure followed at the trial. Critics found much unacceptable here. Richard Minear, a political scientist, quoted Justice Pal's observation that, "In prescribing the rules of evidence for this trial the Charter practically discarded all the procedural rules devised by the various national systems of law . . . to guard a tribunal against erroneous persuasion. . . ." Pal (and Minear) alluded, of course, to the relaxation of normally strict rules of evidence, thus allowing admission as evidence of documents, unsigned statements, hearsay and the like. Some critics censured the "inconsistent rules of procedure" employed: the changing composition of the bench, noted defense counsel Owen Cunningham, constantly upset majority-decided procedural rulings.⁹⁵

Former defense counsel alleged that, throughout the proceedings,

Zealand Law Review, v. 23, 1947, p. 8; R. Q. Quentin-Baxter, "The Task of the International Military Tribunal at Tokyo," ibid., v. 25, 1949, pp. 133-34; Lord R. A. Wright, "War Crimes Under International Law," The Law Quarterly Review, 1946, pp. 547-48, 555; Robert B. Walkinshaw, "The Nuremberg and Tokyo Trials; Another Step Toward International Justice," Amer. Bar Assn. Jnl., v. 35, 1949, p. 302. Tallow, Command Responsibility, pp. 177-78, 325-26, 339.

⁹³Bernard V.A. Röling, "The Tokyo Trial in Retrospect," in Yamaguchi Susumu, ed. Buddhism and Culture (Kyoto, 1960). p. 264.

⁹⁴See remarks of Viscount Cecil in re Nazi criminals, in Britain. Parl. Deb. H. of Lords, v. 142, July 29, 1946, p. 1067; Paul Katona, "Japanese War Crimes Trials," Free World, v. 12, 1946. n. 39; Joseph B. Keenan and Brendan F. Brown, Crimes Against International Law (Wash. D.C., 1950), pp. 21-26.

⁹⁵Minear, Victor's Justice, pp. 118-19, Pal's emphasis; Cunningham

the bench hindered their efforts; evidentiary and procedural rulings invariably went against them; "The prosecution witnesses were favored, the defense witnesses abused; vital cross-examination was disallowed. Replacement of the American Judge early in the trial, said Ireland, should have by itself invalidated the IMTFE, as was the custom "at common law."⁹⁶ Furthermore, they asserted, the overall quality of the American defense team had been poor; and "the Japanese (lawyers) did not know what the case was about." In later years, Japanese defense attorneys agreed that the defendants' case had been "severely handicapped" by the bench's biased procedural and evidentiary rulings.⁹⁷

A host of doubters questioned the IMTFE's practice of awarding verdicts and sentences by majority vote. Hirota, they emphasized, had been condemned by a count of 6-5. Such action not only contravened traditional Anglo-Saxon legal procedure; but, noted Minear, verdicts and sentences at Nuremberg required the concurrence of three out of four Judges.⁹⁸

et.al., "Forum," p. 35. Certain Judges at the IMTFE not infrequently took leaves of absence for reasons of health, state, etc.

⁹⁶Ibid. Blewett, "Victor's Injustice," p. 291; Ireland, "Uncommon Law," pp. 60, n. 10, 68, 87.

⁹⁷On quality of defense counsel, American and Japanese, see ibid., pp. 68, 71-72; The New York Times, Sect. IV, Letter to editor by Valentine B. Deale, former Acting Chief, American Defense Counsel, IMTFE, Dec. 19, 1948, Views of Japanese attorneys as republished in interview, Nippon Times, May 7, 1956.

⁹⁸As voting was secret there is no way of knowing for certain precisely by what count the IMTFE convicted and sentenced individual defendants. According to press reports, an "unnamed judge" felt "morally justified" to reveal the votes to an Associate Press journalist. Besides Hirota's, this report said, the other six death sentences had been by 7-4 margins. See Stars & Stripes (Tokyo), Dec. 9, 1948. Minear,

Challenges directed against procedural and evidentiary practice employed at the EMFE drew the same responses as did similar challenges in re minor war crimes trials: the Tokyo Tribunal was a military tribunal and as such constituted "a continuation of the war effort of the Allied Nations." Those who stood accused before it were subject to military procedure, rules and discipline. To claim for the accused rights normally afforded defendants in civil criminal courts--as Robert Jackson pointedly underscored in the Disentrager case of 1950 (see Chapter 3)--would be to extend to the Japanese at Tokyo greater legal protection than American servicemen standing before United States courts-martial enjoyed.⁹⁹

Also, former Tokyo prosecutors Keenan and Brown pointed out that "The Charter provisions, relating to procedure and evidence, were drafted to set up machinery which would make justice possible." It thus became necessary to admit a wide variety of evidence, even hearsay. Here they quoted President Webb who, addressing the court, said: "You must remember that we are not eleven jurors. We are eleven men who can claim

Victor's Justice, pp. 89-92. Actually, allusion to the Nuremberg voting method was an unfair comparison. Justices at the latter had no choice but to decide matters by a 3 out of 4 count: They could not demand unanimity; this would grant a veto power to any of the four represented nations. Obviously, no matter could be decided by less than three votes. Also, see Maughan, U.N.O., p. 100; Lord Hankey, Politics, Trials and Errors (Chicago 1950), p. 119.

⁹⁹The quote is Justice Jackson's, closing argument at Nuremberg. See Tappan Gregory, "Murder Is Murder and the Guilty Can Be Punished," Amer. Bar Assn. Jrnl., v. 32, 1946, pp. 545-46. Walkinshaw "Nuremberg and Tokyo," p. 300. Also, Johnson v. Disentrager, 339 U.S. 763 (1950), 70 Sup. Ct. 936 at pp. 946-47, 94 L.Ed. 1255.

to have some experience in weighing evidence. . . ." Rules excluding admission of hearsay, they thereupon explained, were intended to cope with the "ignorance" of juries, not legally trained individuals. That the proceedings often departed from Anglo-American legal procedure "was natural and normal, since the Tribunal was international."¹⁰⁰

Beyond this, supporters considered that the "Tojo trial itself provided a wholesome example of a concept of Anglo-Saxon justice." The defendants' rights, they believed, had been scrupulously upheld by the following: a clearly-worded public indictment, served sufficiently prior to trial as to allow adequate defense preparation; insurance of competent counsel, Japanese and American; the right of defendants to cross-examine and call witnesses, request evidence and offer testimony; full translation; "the burden of proof rested throughout on the Prosecution," so the Tribunal stated on several occasions;¹⁰¹ the serving of all prosecution evidence on the defendants at least 24 hours before trial introduction; totally public hearings; maintenance of "complete written records, both in English and Japanese," "available to the Japanese public" at the library of S.C.A.P.'s Civil Information and Education Section in Tokyo.¹⁰²

¹⁰⁰Keenan and Brown, Crimes Against International Law, pp. 139-50.

¹⁰¹Ibid., pp. 146-47, 152; Joseph B. Keenan, "Observations and Lessons From International Criminal Trials," Univ. of Kan. City Law Rev., v. 17, 1949, pp. 122-23; A. Frederick Mignone, "After Nuremberg, Tokyo," Tex. Law Rev., v. 25, 1947, p. 489.

¹⁰²Evans, "Major Japanese War Criminals," p. 38; McKenize, "Japanese War Trials," p. 105.

Other independent observers agreed with these conclusions.

Said one Filipino specialist in international law, Adamin A. Tallow:

The (International) proceedings in Germany and Japan could most fairly be judged, not by the fact that at the present stage of world jurisdiction perfect justice cannot be had, but rather by the degree of fairness actually shown by the courts. (And) . . . they had demonstrably acted in harmony with the highest traditions of judicial dignity and impartiality.¹⁰³

3) Composition of the IMTFE's bench. Critics here focused their attack on four points: First, they held, the IMTFE constituted, not an "international," but merely a "multinational body;" no neutral or Japanese Justice, that is, sat on its bench.¹⁰⁴ Second, while "truly able men," nonetheless the Justices at the IMTFE were not superior legal authorities;" in fact, stressed Minear, only Justice Pal "had any background in international law."¹⁰⁵ Third, as Russia had committed numerous major aggressions during the war, maintained Lord Hankey and journalist Lafe R. Allen, it should have been excluded from naming a member of the bench.¹⁰⁶ Fourth, certain Justices may have been "biased" against the accused. Some had had "personal involvement" with, or in-

¹⁰³Tallow, Command Responsibility, p. 471. The IMTFE was "being held . . . in accordance with proper standards of international justice and equity," in Australia. Parliamentary Debates, v. 187, June 21, 1946, p. 1754; also, it had been "conducted in a scrupulous manner," in New Zealand. Annual Report of the Dept. of Ext. Affrs. Wellington, 1949, Pub. 83, p. 19.

¹⁰⁴Solow, "Startling Result," pp. 158, 160, 162; "Sentence Japanese War Criminals," Christian Century, v. 65, Nov. 12, 1948, p. 1262; Minear, Victor's Justice, pp. 75-76, 80.

¹⁰⁵Ibid., pp. 81-82, 86; Riley, "IMTFE," p. 198.

¹⁰⁶Hankey, Politics, pp. 136-141; L. F. Allen, "Judgment Day In Tokyo," Military Government Journal, v. 2, 1949, p. 12.

investigating, war crimes prior to their appointment; they should have been replaced. Justice Webb, said Ireland, was "constitutionally and temperamentally unfit to preside" over the IMTFE.¹⁰⁷

The IMTFE, countered proponents, was "an international court, appointed and acting under international authority." Would critics, these persons asked, have required that a representative from every nation of the world sit on the bench, thus truly comprising an international body? Even if one accepted the proposition that presence of neutrals on the IMTFE would have been preferable, "it by no means follows," observed Tallow, "that painstakingly fair administration of justice was otherwise not possible."¹⁰⁸ In 1960 Justice Röling concluded that exclusion from the Tokyo bench of a Japanese or neutral judge constituted "a grave error." Yet, one year later he conceded that "For the time being national or multinational tribunals fulfill the function that belongs to an international criminal court."¹⁰⁹

Furthermore, not even the defense requested a Japanese Justice. This, supporters held, was due to the lesson of trials conducted after World War I--that is, to the "fiasco" of Germany's trials of its own war criminals. That "another violator . . . sat on the bench" (i.e., the

¹⁰⁷Cunningham et.al., "Forum," pp. 34-35; Minear, Victor's Justice, pp. 82-83; Ireland, "Uncommon Law," p. 66.

¹⁰⁸U.S. Dept. of State. Foreign Relations of the United States 1948, VI (Wash. D.C., 1974), Dec. II, pp. 925-26; Tallow, Command Responsibility, p. 341; Donald R. Harkelroad, "Book Review: Victor's Justice: The Tokyo War Crimes Trial. By Richard H. Minear," N.Y.U. Jrnl. of Int. Law and Pol., v. 5, 1972, p. 415.

¹⁰⁹Röling, "Tokyo Trial in Retrospect," p. 257, and "The Law of War and the National Jurisdiction Since 1945," Recueil Des Cours, Academie De Droit International, v. 100, 1961, p. 356.

ussian Justice), said a noted authority on international affairs, C. A. Pompe, "was regrettable. . . . But should this have been a compelling reason to leave the law unapplied and to let its flagrant violators go unpunished?" As to the quality and impartiality of the Justices, former prosecutors maintained that their behavior "demonstrated the fairness of the choice of judges;" it was, they said, "above reproach." All were "distinguished judges," said a member of the Australian Parliament. And, noteworthyly, Justice Pal in his dissent defended the "moral integrity" of his brethren.¹¹⁰

4) A political trial by victors. Indeed, a host of jurists, political scientists and historians shared to a considerable extent Tojo's assessment of the IMTFE: "I can only say it was a victor's trial." By far, the sharpest censure in this respect came from former defense counsel. The "object of the trial was vengeance, vindication and propaganda," said Cunningham: Judgment and verdict were purely political and no heed was paid to evidence," asserted J. N. Freeman.¹¹¹

Other, more detached contemporary authorities, however, joined in these conclusions. The IMTFE, deemed George F. Kennan, was a political trial merely "surrounded with the hocus pocus of a judicial procedure." It had been "profoundly misconceived from the start," Kennan believed, and as such worked "increasing injury to the Allied cause in Japan." ". . . (S)olely an instrument of political power," Supreme Court Justice

¹¹⁰Kennan and Brown, Crimes Against International Law, pp. 40-41; Pompe, Aggressive War, pp. 247-48. Australia. Parl. Deb., v. 187, June 21, 1946, 1754; Pal, Dissentient Judgment, p. 7.

¹¹¹Tojo statement, in Nippon Times, Nov. 13, 1948. Cunningham et. al., "Forum," p. 34; statement by J. N. Freeman, in China Press, Feb. 8, 1949.

William Douglas had labeled the IMTFE in his separate opinion following the appeal of Hirota et. al. Such "political trials," averred Lord Hankey, expressed a policy of revenge . . . under the cloak of a trial."¹¹²

Such opinions found renewed expression in succeeding years. But latterly critics, significantly, discovered additional avenues of criticism. The Allied powers, led by the United States, said these individuals, had fashioned their war crimes trials policies with definite purposes in mind: First, to reveal to the world, through an international tribunal, that "World War II had been a dark plot against civilization" engineered by the Axis powers; to punish the guilty after a fair and impartial trial, thus vindicating justice and the peace-loving nations of the globe; and to codify and expand the scope and authority of international law so as to help deter future conflicts. And second, to free the Japanese people from "the worst psychological aftermath of defeat by passing the guilt of war on to the military sector of society."¹¹³

Allied plans plans and hopes, "flawed by sincerity," went awry, suggested lawyer Terry L. Albertson--not surprisingly, they said, having been based from the start on erroneous assumptions. Contrary to Allied beliefs, the critics most notably Minear and historian Paul A. Schroeder, argued, "Japan was not Germany; Tojo was not Hitler; the Pacific war was not identical with the European war." Notions of a criminal conspiracy, which perhaps proved valid at Nuremberg, had no similar application at

¹¹²Kennan Conversation with MacArthur, Mar. 21, 1948. Foreign Relations of U.S. 1948, p. 718; Douglas' opinion, The New York Times, June 28, 1949; Hankey, Politics, p. 111.

¹¹³Minear, Victor's Justice, p. 134; John W. Hall, Japan From Prehistory To Modern Times (N.Y., 1971), p. 350.

Tokyo. The results were tragic: "Gross injustice was committed at Tokyo," concluded Minear. "The leaders of the defeated nation, and they alone," he added, "were offered as a sacrifice to a better world."¹¹⁴ Tojo and his colleagues in the dock, contended others, including some Japanese, had died to spare the rest of the nation from war guilt.¹¹⁵

Trial by victors? Certainly, that was the case. How, inquired IMTFE supporters, could it have been otherwise? "Someone must act as policeman if law is violated," observed Lord R. A. Wright. "The policeman must belong to the stronger side. So it is in ordinary life." Furthermore, he added,

Nor can a criminal complain that he is entitled to be tried by an impartial and neutral Court and not by a Court constituted by the enemy. All he is entitled to is a trial on fact and law conducted on the principles of elementary justice. A burglar cannot complain that he is being tried by a jury of honest citizens. Trials of international criminals are watched by the world and the Court knows that it is also itself on trial.

Did the fact that the victors convened the Tribunal, composed the bench, prepared the indictment, laid down the procedure, conducted the prosecution and, finally, "as a judicial body," sat in judgment render the IMTFE unfair? No, maintained Appleman. Was not the same true, he asked, "and necessarily so, in all criminal law?" Was not it "literally 'The People of the State of (say) Illinois against John Jones'. . . ?"¹¹⁶

¹¹⁴Terry I. Albertson, "Book Review: Victor's Justice: The Tokyo War Crimes Trial. By R. H. Minear," Harv. Int. Law Jnl., v. 13, 1972, p. 554; Minear, Victor's Justice, pp. 134, 169; Milton Cantor, "Book Review: Victor's Justice: The Tokyo War Crimes Trials. By R. H. Minear," Amer. Jnl. of Leg. Hist., v. 16, 1972, p. 371; Morinosuke Kajima, Modern Japan Foreign Policy (Rutland, Vt., 1969), p. 58; David Bergamini, Japan's Imperial Conspiracy (N.Y., 1971), p. 1061; Paul W. Schroeder, The Axis Alliance and Japanese-American Relations, 1941 (Ithaca, 1958), pp. 218-20, 226-27.

¹¹⁵See comments of influential Japanese publisher, in Time magazine, Jan. 13, 1949, p. 19; also, Shinso Hanayama, The Way of Deliverance: Three Years With the Condemned Japanese War Criminals (N.Y., 1950), p. 26.

¹¹⁶Lord R.A. Wright, "War Crimes Under International Law," p. 550;

Not all, particularly former prosecutors, were prepared to accept the view that no Japanese conspiracy had been proven. Even a fellow critic found Minear's presentation of the conspiracy charge somewhat casual in its assessment. He seemed to have overlooked, said attorney Donald Harkelroad, "that acts committed by several in concert may be more dangerous and in need of strict prohibition than the same acts committed by individuals. . . ."¹¹⁷ Former prosecutors Keenan and Solis Horwitz reminded that the IMTFE sentenced no one to death "for having committed the crime against peace only." Rather, those given death penalties "had all been convicted of conventional war crimes."¹¹⁸

Proponents, furthermore, believed that the IMTFE had performed three major and positive accomplishments: First, its "foremost service . . . was to establish the facts authentically, particularly with the Japanese people." Through the Tokyo Trial, maintained these individuals the Japanese first learned "how they got into war."¹¹⁹ Second, along with the Nuremberg Tribunal, the IMTFE found legal precedents vital to world security and future peace. These "trials represented tangible examples," asserted prosecutor A. Frederick Mignone, "of the law's progress in attempting to meet the needs of society--the society of nations

Appleman, Military Tribunals, p. 12.

¹¹⁷Keenan and Brown, Crimes Against International Law, pp. 88-89, 91, 111-112; Comyns-Carr, "Tokyo War Crimes Trial," p. 113. Harkelroad, "Book Review," p. 444. The New York Times, edit., Nov. 13, 1948. Also, Quentin-Baxter, "Task of IMT at Tokyo," p. 137.

¹¹⁸Rolling, "Tokyo Trial in Retrospect," p. 260; Solis Horwitz, "The Tokyo Trial," International Conciliation, v. 465, 1950, p. 573.

¹¹⁹"Joseph Keenan Meets the Press," American Mercury, v. 70, 1950, p. 458; Quentin-Baxter, "Task of IMT at Tokyo," pp. 137-38; Allen, "Japan's Militarists Face the Music," pp. 42, 44.

or the world in fact." Indeed, said New Zealand government spokesmen, journalists, international lawyers, among others, powerful precedents had been set which would hold individuals as well as nations accountable for their actions.¹²⁰

Third, the trial had achieved justice. Repeating arguments formerly voiced by Robert H. Jackson, holders of this view reasoned thusly: Obviously, atrocities had been perpetrated as a result of, and during, the Pacific war. The Allied victors thereupon confronted three options in this respect upon the war's end: Let "the guilty go unpunished; execute them outright; or conduct a trial, imperfect though such an exercise might prove. "That criticism on Nuremberg and Tokyo is warranted," perceived years later Justice Roling, "does not imply that the principal idea materialized in these trials would necessarily be wrong." The Tokyo and Nuremberg Judgments and sentences, concluded Pompe, "are facts which are sealed by the express and solemn approval of the majority of civilized nations. . . ." They constituted, he said further, "not extraordinary political proceedings but the administration of justice. . . ."¹²¹

5) An incisive dissent by the Washington Post, casting infamy on the proceedings and judgment of the IMTFE. Several critics, among them Minear and Morinosuke Kajima, a historian, have pointed to the Post's editorial of January 11, 1949. "It is more and more evident to us," that newspaper observed, "that the good name of justice, let alone of

¹²⁰Mignone, "After Nuremberg, Tokyo," pp. 476-77; New Zealand. Annl. Rept., 1949, p. 19; Gordon Walker, in Christian Science Monitor, Nov. 12, 1948; Roling, "Tokyo Trial in Retrospect," pp. 185, 187.

¹²¹See, e.g., ibid., p. 265; Brines, MacArthur's Japan, p. 126; Pompe, Aggressive War, Intro., p. xiii.

the United States, has been compromised . . . in Tokyo."¹²²

While perhaps a minor point--but perhaps not--the present author searched a host of additional newspapers for a comparative sampling. No express objective determined the choice of journals, save for the fact that a considerable number of those selected had been used in researching other facets of this study. Consider the results: of the 13 additional newspapers surveyed, only two--and those in incisive language--concurred with the Post's conclusions. Condemnation of Ito et.al. amounted to a "triumph of sheer force, unsupported by legal sanctions," wrote the editors of the Chicago Daily Tribune. "The defendants lost the war; their judges won it," they added. Execution of the sentences, based on illegal verdicts, held the St. Louis Star Times, would constitute "just plain pure murder."¹²³

Eleven newspapers, some with certain qualifications, meanwhile deemed the IMFFE and its verdict "fair" and "just." They were: the China Press (Shanghai); Christian Science Monitor (Boston); Evening Star (Washington, D.C.); London Times; New York Herald Tribune; The New York Times; Philadelphia Inquirer; San Francisco Chronicle; Stars & Stripes (Tokyo); Sun (Baltimore); and Sydney Morning Herald.¹²⁴

¹²²Miner, Victor's Justice, p. 160; Kajima, Japan's Foreign Policy, p. 51.

¹²³Chicago Daily Tribune, edit., Nov. 16, 1948; St. Louis Star Times, edit. Dec. 1, 1948.

¹²⁴All references are to editorials of Nov. 13, 1948, save for China Press (Nov. 7, 15), Evening Star (Nov. 18), and New York Herald Tribune (Nov. 13, 23). The author found no editorial on the judgment of the IMFFE by the London Times. Rather, the Times featured a lead story, positively assessing the trial, by its special "Tokyo Correspondent."

Here is what some of them said: The IMTFE's "aim was justice. The proceedings, furthermore, were in consonance with the best principles yet devised for the attainment of justice" (Chronicle); Despite critics "there will still be wide agreement that the (Tokyo) trials . . . have done essential justice" (Sun); "the people of the world today and the historians of tomorrow will agree, we believe, with the verdicts of guilt. . . . If ever men waged a cruel and barbarous war of aggression, these did" (The New York Times); The IMTFE's "monumental purpose as a documentation of war guilt . . . remained unimpaired (despite the trial's inordinate length)" (Morning Herald).

Two editorials deserve special attention. "Here is justice for monumental crime--a rather imperfect, shopworn justice, perhaps," observed the Christian Science Monitor. Yet, it added,

human law is usually imperfect in its beginning.
 . . . No cynicism should hide the great step forward that has been taken in holding the responsible leaders of a nation up to the stern bar of international morality. It is a vital first step toward a new order of world law.

Finally, there was the powerful editorial presented by the China Press. "Humanity," its editors assured, "pronounce(d) the verdict on the makers of the last war." Let there be "no mistake," for, it asserted:

Although not all the nations of the world were represented (at the IMTFE), that body did in name and in fact represent the conscience of humanity. Perhaps, like all humanity, it may have strayed a little here and there in rendering its final verdict. . . . In the final analysis, it makes little difference whether the judges were Australian, or Dutch, American or Chinese. They could just as well have been Algerian or Chilean, Siamese or Swiss. Their verdict would have been the same. A crime against one nation is a crime against all nations.

* * *

To be sure, additional controversial or challengeable elements of the IMTFE exist beyond those spotlighted above. Some, notably the matters of selecting defendants and excluding Hirohito from prosecution, have received extended coverage in previous pages. Others, regrettably, have been passed over due to limitations of space.

EPILOGUE

"Ideals Upheld"

Alas, hopes that the Nuremberg and Tokyo principles would assist in the deterrence of further wars failed to materialize. In truth, as Eugene Davidson, a noted authority on Nuremberg, has suggested, "it may be argued that the uneasy peace that has endured between the major powers since World War II has been kept not because of, but despite, Nuremberg."¹ His point is well taken: any serious attempt to apply and enforce the Nuremberg principles might have caused a world war in given situations in certain troubled areas of the globe. The majority of statesmen in the immediate postwar period, however, enjoyed no such perception.

By autumn 1945 Allied leaders breathed a sigh of relief. The most destructive war in all history had been fought, and won; those who had gravely threatened the peace-loving and democratic nations, peoples and institutions of the world lay prostrate. Toward fashioning an improved and secure international order, free from aggression, the Allies thereafter directed their full attention.

As concerned the Pacific war, one undeniable factor surely impressed Allied leaders. During the conflict Japanese military and civilian personnel had perpetrated countless atrocities against countless Allied POWs, civilian captives and local populations. While perhaps not the result of an organized governmental plan, these crimes were not

¹Eugene Davidson, The Nuremberg Fallacy (N.Y., 1973), p. 291.

"stray incidents" either, as Justice Pal submitted.² Repeated warnings and protests against such crimes had been lodged by Allied and neutral officials with the Japanese Foreign Ministry throughout the war. Not surprisingly, consequently, Allied leaders expected cessation of such incidents. Yet they continued.

Certain of the defendants at the IMTFE admitted having learned of Allied and neutral protests during the war. Unable, they swore, to effect any change by themselves, they had forwarded these remonstrances to "competent authorities." One wonders, though, why these defendants, the military men among the accused and the "competent authorities," utterly failed to halt or reduce Japanese atrocities in the field--particularly in light of Japanese' profound veneration for discipline; the Imperial rescript of 1882 whereby every Japanese serviceman vowed to regard all superior orders as emanating directly from the Emperor; and the fact that, despite die-hard determination to fight to the end, Japanese armed forces unquestioningly obeyed Hirohito's surrender proclamation of August 14, 1945. Put simply, might not the issuance and enforcement of high-level orders to Japanese Army and Navy field commanders demanding, not indulgent, but civilized, treatment of opposing captives and civilians have proved partially effective? Assuming, of course, that those concerned cared enough to pursue satisfactorily the matter at hand.

By and large, the underlying point here is this: had the Tokyo defendants been tried on conventional war crimes charges only,

²For a brief, but devastating, account of Japanese atrocities, see Edward F. L. Russell, The Knights of Bushido: A Short History of Japanese War Crimes (London, 1958).

most likely no substantial controversy or criticism would have arisen. But the Allies chose to do otherwise.

Creators of the Nuremberg and Tokyo Tribunals conceived the notion of postwar trials of leading war criminals with Allied unity as their foundation. Indeed, characterizing the thoughts of Allied statesmen were visions--however misguided they may now appear--of "one world." Was it so unreasonable, however--in 1945-1946--to accept the argument that the eleven nations which had fought Japan and comprised the IMTFE spoke for the remainder of the peace-loving world? They included the bulk of humanity in numerical terms. Nothing in life is absolute; it would have proved impossible to win the approval of all the world's nations. And moreover, if the trials were political, they lucidly reflected political realities then existing and accepted: witness the U.N. General Assembly's adoption in December 1946 of a resolution affirming "the principles of international law recognized" by the Nuremberg Charter and Judgment.³

One final aspect remains, whose importance cannot be overestimated. It would be egregiously unfair and inaccurate to assess the entire Allied war crimes operation in the East on the basis, exclusively, of the IMTFE. Hopefully, the present study has gone far in underscoring the small part assumed by the Tokyo Trial in relation to the overall Allied effort. Some 1,400 trials, involving some 7,000 accused, it would seem, constitute a far better instrument of evaluation than one trial

³United Nations Yearbook, 1940-1947. (N.Y., 1947), p. 254.

involving 23 accused.⁴ Noteworthily, a good number of authorities who have criticized the International Military Tribunals have praised the conduct of "minor" trials throughout the East for their fairness and justness. George F. Kennan is a notable example.⁵

Minor trials featured, with remarkable consistency in the various theatres, excellent and devoted defense counsel; sufficient procedural safeguards, subject, of course, to military law; fair-minded judges; in most theatres, extraordinarily thorough and impartial review procedures; adequate translation facilities;⁶ generally, with some exceptions, public

⁴The figure of 1,400 trials is a minimal one at best, as some Allied nations' statistics were incomplete and some left unreported the number of trials held. See Table below. The figure of 7,000 accused involved is derived from reports that 920 Japanese received death sentences, and 5,472 terms of imprisonment, in *Asahi Shimbun*, Staff of, *Pacific Rivals* (N.Y., 1971) p. 182; added to these figures were the number (again incomplete) of accused acquitted by Allied military courts. See Table below:

<u>Nation</u>	<u>No. of Cases</u>	<u>Accused Tried</u>	<u>Convictions</u>	<u>Acq'tls.</u>	<u>Death</u>
U.S.	452	1,402	1,224	178	181
*Britain	388	1,143	1,023	120	305
Australia	296	924	644	280	148
Russia	1	12	12	0	0
*China	-	223	170	53	56
*Netherlands	175	308	301	7	102
*Philippines	70	149	136	13	79
*France	-	68	57	11	19
	<u>1,382</u>	<u>4,229</u>	<u>3,567</u>	<u>662</u>	<u>920</u>
*incomplete					

⁵U.S. Dept. of State. Foreign Relations of the United States 1948. VI (Washington, D.C., 1974), Mar. 21, 1948, pp. 717-18.

⁶On this point, see Law Reports of the Trials of War Criminals. 15 vols. (London, 1947-49), v. 15, pp. 193-95.

hearings; and accessible, complete records of the proceedings. A considerable percentage of the accused, too, were acquitted; perhaps not as many as might have been expected received death sentences. Commutation of sentences was not uncommon.

In his piercing dissent in the *Yamashita* case, United States Supreme Court Justice Murphy cautioned his countrymen never to allow the pursuit of retribution to "justify the abandonment of our devotion to justice." "To conclude otherwise," he said, "is to admit that the enemy has lost the battle but has destroyed our ideals."⁷ If anything, the IMTFE and other eastern war crimes trials sought to institutionalize ideals--so vital to a peaceful and prosperous world, their creators believed--not destroy them. On the whole it may be concluded that, while imperfect, the trials successfully upheld these ideals.

⁷In re Yamashita, 372 U.S. 1 (1946).

SELECTED BIBLIOGRAPHY

Official Proceedings, Documents and Government Publications:

Australia. Department of External Affairs. Current Notes On International Affairs. Sydney. 1945-1952.

_____. Parliamentary Debates. Senate and House of Representatives. Sydney. 1945-1951.

Bernard, Henri. "Dissenting Judgment of the Member From France of the International Military Tribunal for the Far East. November 12, 1948." INTFE, Tokyo.

Britain. Parliamentary Debates. (Hansard). Fifth Series. House of Commons. Official Report. Vols. 376, 411-432. 1941-1942, 1945-1947. London: HMSO.

_____. Parliamentary Debates. (Hansard). Fifth Series. House of Lords. V. 142. 1945-1946. London: HMSO.

_____. The War Office. Royal Warrant. Regulations for the Trial of War Criminals. 11th June 1945, Army Order 81/1945, with Amendments. HMSO, 1945.

Canada. Parliament. Debates, House of Commons. 1946. Ottawa: Controller of Stationery, 1946.

_____. Report of the Department of National Defense for the Fiscal Year, 1946. Ottawa: Controller of Stationery, 1947.

_____. Report of the Department of National Defense for the Fiscal Year, 1947. Ottawa: Controller of the Stationery, 1947.

_____. Report of the Secretary of State for External Affairs, 1946-1948. Ottawa: Controller of Stationery, 1946-1948.

Far Eastern Commission. Activities of the Report by the Secretary General. Feb. 26, 1946-July 10, 1947. Publication 2888. Far Eastern Series 24. Washington, D.C.: GPO, 1947.

_____. Second Report by the Secretary General. July 10, 1947-Dec. 23, 1948. Publication 3420. Far Eastern Series 29. Washington, D.C., GPO, 1949.

_____. Third Report by the Secretary General. Dec. 24, 1942-June 30, 1950. Publication 3945. Far Eastern Series 35. Washington, D.C.: GPO, 1950.

The Far Eastern Commission: A Study in International Cooperation: 1945-1952. Dr. George H. Blakeslee. Publication 5138. Washington, D.C.: GPO, 1953.

General Tomoyuki Yamashita vs. Lieutenant General Wilhelm Styer. United States Supreme Court Records. Lawyers' edition. 327, October 1945.

Instrument of Surrender (Japan). September 2, 1945.

International Military Tribunal for the Far East. Judgment. Tokyo. November 1948.

International Military Tribunal for the Far East. Proceedings. Tokyo. 3 May 1946- 16 April 1948.

Jaranilla, Delfin. "International Military Tribunal for the Far East. Concurring Opinion By the Honorable Mr. Justice Delfin Jaranilla Member from the Republic of the Philippines. 1 November 1948."

Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. 15 vols. London: HMSO, 1947-1949.

New Zealand. Department of External Affairs. Annual Report of the Department of External Affairs. Wellington, 1948-1951. Publications 65-97.

_____. Parliamentary Debates. Legislative Council and House of Representatives. Wellington, 1945-1949.

_____. War History Branch, Department of Internal Affairs. Prisoners of War. W. Wynne Mason. Official History of New Zealand in the Second World War 1939-1945. Wellington, 1954.

Pal Radhabinod. International Military Tribunal for the Far East. Dissident Judgment. Calcutta: Sanyal & Co., 1953.

Philippines, Republic of the. Congressional Record. House of Representatives. Vols. I-III, 1945-1948. Manila.

Potsdam Proclamation. July 26, 1945.

Punishment for War Crimes: the Inter-Allied Declaration Signed at St. James' Palace, London, on 13 January 1942 and relative documents. Issued by the Inter-Allied Information Committee, London, HMSO, 1942.

- Roling, Bernard V. A. "Opinion of Mr. Justice Roling, Member for the Netherlands. International Military Tribunal for the Far East. November 12, 1948."
- Sleeman, Colin, ed. with a foreword by Lord Mountbatten. Trial of Gozawa Sadaichi and nine others. London: William Hodge and Co., Ltd. 1948.
- Sleeman, Colin and S. C. Silkin, eds. Trial of Sumida Haruzo and Twenty Others (The "Double tenth" Trial). London: William Hodge and Co., Ltd. 1951.
- Supreme Commander for the Allied Powers. "International Military Tribunal for the Far East, established at Tokyo January 19, 1946." Washington, D.C.: GPO, 1947.
-
- Trials of Class "B" and "C" War Criminals. History of the Non-Military Activities of the Occupation of Japan. Tokyo: SCAP, 1952. Monograph 5.
- Takayanagi, Kenzo. The Tokio Trials and International Law: Answer to the Prosecution's Argument on International Law. Tokyo, 1948.
- Tojo, Hideki. Affidavit of Hideki Tojo, Individual Defense. Mimeographed, n.p. 1945.
- Union of Soviet Socialist Republics. Current Digest of the Soviet Press. 1949-1951. Published by the Joint Committee on Slavic Studies.
-
- Information Bulletin. Published by the U.S.S.R. Embassy in the U.S.A. 1946, 1950-1951.
-
- Materials on the Trial of Former Servicemen of the Japanese Army Charged With Manufacturing and Employing Bacteriological Weapons. Foreign Languages Publishing House, Moscow, 1950.
-
- New Times. 1946-1950.
-
- Soviet Press Translations. Seattle: Seattle: Far Eastern and Russian Institute, University of Washington, 1946-1950.
- United Nations Information Organization. Information Paper No. 1. Issued by the Reference Division of the UNIO, 1946.
- United Nations Yearbook 1946-1947. New York: 1947.
- United States Army Forces In the Pacific. "Regulations Governing the Trial of War Criminals." 24 September 1945-27 December 1946.

United States of America vs. Tomoyuki Yamashita; public trial before the Military Commission convened by the commanding general, United States Army forces, Western Pacific, Exhibits. Manila? 1945. 5 v.

United States Department of State. Bulletin. "Answer to Soviet Protest on MacArthur Clemency Circular." 23 (July 10, 1950).

_____. Bulletin. "Apprehension, Trial, and Punishment of War Criminals in the Far East." 16 (May 4, 1947).

_____. Bulletin. "Non-Military Activities in Japan and Korea." (May 12, 1946).

_____. Bulletin. "Trial of Far Eastern Criminals." 14 (May 19, 1946).

_____. Bulletin. "Trial of Far Eastern War Criminals." 14 (March 10, 1946).

_____. Bulletin. "Trial of Japanese War Criminals." 20 (May 1, 1949).

_____. Bulletin. "USSR Motives on Trying Emperor of Japan Questioned." 22 (February 13, 1950).

_____. The China White Paper, August 1949 Stanford: Stanford University Press, 1967.

_____. Foreign Relations of the United States 1946. VIII. Washington, D.C.: GPO, 1971.

_____. Foreign Relations of the United States 1947. VI. Washington, D.C.: GPO, 1972.

_____. Foreign Relations of the United States 1948. VI. Washington, D.C.: GPO, 1974.

_____. "International Military Tribunal for the Far East." Publication 2765. Washington, D.C.: GPO, 1947.

_____. "Moscow Meeting of Foreign Ministers, December 16-26, 1945." Publication 2448. Washington, D.C.: GPO, 1946.

_____. Occupation of Japan: Policy and Progress. Publication 2671, Far Eastern Series 17. Washington D.C.: GPO 1947.

_____. "Trial of Japanese War Criminals." Publication 2613. Washington, D.C.: GPO, 1946.

- _____. the War Department, Navy Department.
United States Initial Post-Surrender Policy for Japan.
 August 29, 1945.
- United States Supreme Court. Johnson v. Eisentrager, 339 U.S. 763 (1950),
 70 Sup. Ct. 930. 94 L.Ed. 1255.
- _____. In re Yamashita, 327 U.S. 1 (1946).
- _____. "Judicial Decisions in re Yamashita (and)
in re Hotta." American Journal of International Law, 40
 no.2, April 1946.
- Webb, Sir William. International Military Tribunal for the Far East.
 "Separate Opinion of the President, November 1, 1948."
- _____. International Military Tribunal for the Far East.
 "Sir William's Judgment, September 17, 1948."
- Whitney Courtney Brig.Gen. U.S. Army Chief, Government Section, "The
 Case of General Yamashita. A Memorandum." November 22, 1949.
 GHQ, SCAP, Government Section.
- Wright, Lord Robert A. History of the United Nations War Crimes Com-
 mission and the Development of the Laws of War. London: HMSO,
 1948.
- Memoirs, Books, Articles By Participants and Contemporaries:
- Acheson, Dean. Present At the Creation. New York, W. W. Norton, 1969.
- Allen, Lafe Franklin. "Japan's Militarists Face the Music." American
 Foreign Service Journal. 24: August 1947.
- _____. "Judgment Day in Tokyo." Military Government
 Journal, 2: Fall, 1949.
- Blakeney, Ben Bruce. "International Military Tribunal." American Bar
 Association Journal. 32: August 1946.
- Blewett, George F. "Victor's Injustice: The Tokyo War Crimes Trial."
 American Perspective. 4: Summer 1950.
- Brines, Russell. MacArthur's Japan. Philadelphia: J.B. Lippincott, 1948.
- Byrnes, James F. Speaking Frankly. New York: Harper & Brothers, 1947.
- Brown, Brendan F. "Red China, the Tokyo Trial, and Aggressive War."
 Louisiana Bar Journal. 3: January 1956.
- Churchill, Winston. The Grand Alliance. Boston: Houghton, Mifflin & Co.
 1950.

- Comyns-Carr, Arthur S. "The Judgment of the International Military Tribunal For the Far East." Transactions of the Grotius Society.
- _____. "The Tokyo War Crimes Trial." Far Eastern Survey. 18; May 18, 1949.
- Dickinson, George. "Japanese War Trials." Australian Quarterly. 24, June 1952.
- _____. "Manus Island Trials." Royal Australian Historical Society. 38, pt. 2: July 1952.
- Evans, Harold. "The Trial of Major Japanese War Criminals." New Zealand Law Review. 23: January-December 1947.
- Evatt, Herbert V. Australia In World Affairs. Sydney: Angus and Robertson, 1946.
- _____. "Has the Menace of Japan Been Removed?" New York Times Magazine. February 3, 1946.
- Feldhaus, J. Gordon. "The Trial of Yamashita." Current Legal Thought. 13: August 1947.
- Guy, George F. "The Defense of Yamashita." Wyoming Law Journal. 4: Fall 1949.
- Hanayama, Shinso. The Way of Deliverance: Three Years With the Condemned Japanese War Criminals. Trans. by Hideo Suzuki, et. al. New York: Charles Scribner's Sons, 1950.
- Hankey, Lord. Politics, Trials, and Errors. Chicago: Henry Regnery Company, 1950.
- _____. "Postscript," to Viscount Maugham. U.N.O. and War Crimes. London: John Murray, 1951.
- Hauxhurst, H. A., Owen Cunningham, Charles F. Wennerstrum, James T. Brand. "Forum On War Crimes Trials (Addresses)." American Bar Association. Comparative and International Law Section. 1948-1949.
- Hessel, Eugene A. "Let The Judges Do The Hanging!" Christian Century. 66: August 24, 1949.
- Horwitz, Solis. "The Tokyo Trial." International Conciliation. 465: November 1950.
- Hull, Cordell. The Memoirs of Cordell Hull. New York: MacMillan Company, 1948. 2 vols.
- Ireland, Gordon. "Uncommon Law in Martial Tokyo." Year Book of World Affairs. 4: 1950.

- _____. "Ex Post Facto From Rome To Tokyo." Temple Law Quarterly. 21: July 1947.
- Jackson, Robert H. The Case Against the Nazi War Criminals. New York: Alfred Knopf, 1946.
- _____. "Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, London, 1945." U.S. Department of State Publication 3080. Washington D.C., 1949.
- "Joseph Keenan Meets the Press." American Mercury. 70: April 1950.
- Katona, Paul. "Japanese War Crimes Trials." Free World. 12: November 1946.
- Keenan, Joseph B. and Brendan F. Brown. Crimes Against International Law. Washington, D.C.: Public Affairs Press, 1950.
- Keenan, Joseph B. "Observations and Lessons From International Criminal Trials." University of Kansas City Law Review. 17: 1949.
- Kennan, George F. Memoirs, 1925-1950. Boston: Little, Brown and Company, 1967.
- Kenworthy, Aubrey S. The Tiger of Malaya. New York: Exposition, 1953.
- Kodama, Yoshio. Sugamo Diary. Trans. by Taro Fukuda. Japan: n.p. 1960.
- Lim, Manuel. "Highlights of the Yamashita and Homma Trials." Philippine Law Journal. 22: January 1947.
- Liu, James F.C. "The Tokyo Trial." China Monthly. 8: July 1947.
- _____. "The Tokyo Trial. Second Look." China Monthly. 8: August 1947.
- Lyman, Albert. "Yokohama War Crimes Trials: A Review." Journal of Bar Association of Washington, D.C. 17: June 1950.
- MacArthur, Douglas. "General MacArthur's Review of the War Crimes Sentences Issued on November 24, 1948." Contemporary Japan. 17: July/December 1948.
- _____. Reminiscences. New York: McGraw-Hill, 1964.
- McKenzie, Walter I. "The Japanese War Trials." Journal of the National Association of Referees in Bankruptcy. 21: July 1947.
- Maugham, Frederick H. Viscount. U.N.O. and War Crimes. London: John Murray, 1951.
- Meek, F.E. "War Crimes Trials in the Pacific." Idaho State Bar. 21: 1947.

Mignone, A. Frederick. "After Nuremberg, Tokyo." Texas Law Review. May 1947.

Reel, A. Frank. The Case of General Yamashita. Chicago: University of Chicago Press, 1949.

_____. "Even His Enemy." Ohio Bar Association Report. 19: June 3, 1946.

Rolling, Bernard V.A. International Law in an Expanded World. Amsterdam: Djambatan, 1960.

_____. "The Law of War and the National Jurisdiction Since 1945," Recueil Des Cours. Academie De Droit International. 100: The Netherlands, 1961.

_____. "On Aggression, On International Criminal Law, On International Criminal Jurisdiction." Netherlands International Law Review. April 1955, July 1955. 2 Pts.

_____. "The Tokyo Trial in Retrospect." In Yamaguchi Susumu, ed. Buddhism and Culture. Kyoto: Nakano Press, 1960.

Romulo, Carlos P. I Walked With Heroes. New York: Holt, Rinehart & Winston, 1961.

Schwebel, Leon. "Crimes Against Humanity." The British Yearbook of International Law. London: Oxford University Press, 1946.

_____. "The United Nations War Crimes Commission." The British Yearbook of International Law. London: Oxford University Press, 1946.

Schwebel, William with Russell Brines. With MacArthur In Japan: A Personal History of the Occupation. New York: W.W. Norton 1965.

Shigemitsu, Mamoru. Japan and Her Destiny. edited by F. S. Pigot. Trans. by Oswald White. New York: E.P. Dutton, 1958.

Spurlock, Paul E. "The Yokohama War Crimes Trials, The Truth About A Misunderstood Subject." American Bar Association Journal. 36: May 1950.

Stimson, Henry L. "The Nuremberg Trial: Landmark in Law." Foreign Affairs. January 1947.

_____, and MacGeorge Bundy. On Active Service. New York: Harper & Brothers, 1948.

Sutton, David N. "The Trial of Tojo: The Most Important Trial in All History?" American Bar Association Journal. 36: February 1950.

Togo, Shigenori, The Cause of Japan. Trans. by Togo Fumihiko and Ben Bruse Blakeney. New York: Simon and Schuster, 1956.

Truman, Harry S. Year of Decisions. New York: Doubleday, 1955.

U Ba U. My Burma. The Autobiography of a President. New York: Taplinger Publishing Co., 1959.

Vasilyev, A. N. "The Soviet Trial of the Chief Japanese War Criminals." Soviet Press Translations. 3: no 7, April 1, 1948.

Webb, Sir William. "Introduction" to David Bergamini, Japan's Imperial Conspiracy. New York: William Morrow, 1971.

Wilkie, Wendell. One World. New York: Simon and Schuster, 1943.

Wright, Quincy. "Due Process and International Law." American Journal of International Law. 40: no. 2. April 1946.

Wright, Lord Robert A. "War Crimes Under International Law." The Law Quarterly Review. January 1946.

Yoshida, Shigeru. The Yoshida Memoirs. Trans. by Kenichi Yoshida. Boston: Houghton, Mifflin Company, 1962.

Newspapers and Magazines:

Chicago Daily Tribune. November 16, 1948.

China Press (Shanghai). October 1945-March 1949

Christian Science Monitor. November 1948.

Dominion (Wellington). January 18, 1940.

Evening Star (Washington D.C.). November 18, 1948.

London Times. 1945-1952.

Malay Mail. April 1947-December 31, 1947; April 30, 1949-December 31, 1949.

Manila Times. June 14, 1948.

New York Herald Tribune. 1945-1951.

The New York Times. 1945-1951

Nippon Times. December 9, 1945; February 10, 1946; November 13, 1948; May 7, 1956.

Philadelphia Inquirer. November 13, 1948.

St. Louis Post Dispatch. November 1948.

St. Louis Star Times. December 1, 1948.

San Francisco Chronicle. November 1948.

Stars & Stripes (Shanghai, China edition). 1945-1946.

Stars & Stripes (Tokyo, Japan edition). 1945-1950.

Straits Times (Singapore). September 1945-March 1947.

Sydney Morning Herald. January 1948-January 1949.

Sun (Baltimore). November 13, 1948.

Time Magazine. January 3, 1949.

Washington Post. January 11, 1949.

Unpublished Ph.D. Dissertations:

Riley, Walter L. The International Military Tribunal for the Far East and the Law of the Tribunal As Revealed By the Judgment and the Concurring and Dissenting Opinions. Ph.D. Dissertation, unpublished. University of Washington, 1957.

Wadsworth, Lawrence W. Jr. A Short History of the Tokyo War Crimes Trials with Special reference to Some Aspects of Procedures. Ph.D. Dissertation, American University, 1955.

Secondary Materials: Articles, Law Journal Articles, Book Reviews:

Albertson, Terry L. "Book Review: Victor's Justice: The Tokyo War Crimes Trial. By Richard H. Minear." Harvard International Law Journal. 13: Summer 1972.

Australian Encyclopaedia. "War Crimes Trials." Sydney: Angus and Robertson, 1958.

Basu, A. K. "Tokio Trials." Indian Law Review. 3: 1949.

Bathurst, M. E. "The United Nations War Crimes Commission." American Journal of International Law. 39: 1945.

- Daxter, R.R. "The Municipal and International Law Basis of Jurisdiction Over War Crimes." British Yearbook of International Affairs. 28: 1951.
- Brand, G. "The War Crimes Trials and the Laws of War." British Yearbook of International Law, 1949. London: Oxford University Press.
- "The British Court for War Criminals." By "E". The Law Journal. 95: September 15, 1945.
- Cantor, Hilton. "Book Review: Victor's Justice: The Tokyo War Crimes Trial. By Richard H. Minear." American Journal of Legal History. 16: October 1972.
- Cowles, Willard B. "Trial of War Criminals By Military Tribunals." American Bar Association Journal. June 1944.
- Daly, James J. A. "The Yamashita Case and Martial Courts." Connecticut Bar Journal. 21: April-June 1947.
- Encyclopedia Britannica Book of the Year, 1946. London. "International Law."
- Erickson, George L., Jr. "United States Navy War Crimes Trials (1945-1949)." Washburn Law Journal. 5: Winter 1965.
- Fairman, Charles. "The Supreme Court On Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case." Harvard Law Review. 59: no. 6. July 1946.
- Finch, George A. "The Punishment of War Criminals." Inter-American Academy of Comparative and International Law. 4: 1954.
- Ganoe, John T. "The Yamashita Case and the Constitution." Oregon Law Review. 25: April 1946.
- Garcia-Mora, Manuel R. "Crimes Against Peace In International Law: From Nuremberg to the Present." Kentucky Law Journal, 53: 1964.
- Glueck, Sheldon. "The Nuremberg Trial and Aggressive War." Harvard Law Review. 39: 1946.
- Green, L. C. "The Trials of Some Minor War Criminals." Indian Law Review. 4: 1950.
- Gregory, Tappan. "Murder Is Murder and the Guilty Can Be Punished." American Bar Association Journal. 32: no. 9. September 1946.
- Hartelroad, Donald R. "Book Review: Victor's Justice: The Tokyo War Crimes Trial. By Richard H. Minear." New York University Journal of International Law and Politics. 5: Summer, 1972.
- Harper, M.D. "Australia and the Peace Settlement With Japan." Australian Institute of International Affairs. Sydney. 1950.

"Have We Lost the Peace?" Christian Century. July 13, 1949.

Hogan, Willard N. "War Criminals." South Atlantic Quarterly. 45: no. 4. October 1946.

Howard, Kenneth A. "Command Responsibility for War Crimes." Journal of Public Law. 21: 1972.

"International Hangings." The Commonwealth. 49: November 26, 1948.

"International Military Tribunal for the Far East." International Organization. 1: February 1947.

"International Military Tribunal for the Far East." International Organization. February 1949.

Kuhn, Arthur H. "International Law and National Legislation in the Trial of War Criminals: The Yamashita Case." American Journal of International Law. 44: July 1950.

Kudryavtsev, V. "The Verdict Against Japanese Militarism." Soviet Press Translations. 4: no. 1. February 1, 1949.

Liu, James F. C. "The Tokyo Trials: Source Materials." Far Eastern Survey. 17: no. 14. July 28, 1948.

Lyon, Charles S. "Book Review: The Case of General Yamashita. By A. Frank Reel." Columbia Law Review. 50: 1950.

Markov, M. "America's 'New Policy' in the Far East." New Times. 12: April 3, 1950.

_____. "The Approaching Trial of Major Japanese War Criminals." New Times. 8: April 15, 1946.

Mayevsky, V. "Monstrous Crimes Committed By Japanese Barbarians." USSR Information Bulletin. 10: no. 3. February 10, 1950.

Miller, Robert W. "War Crimes Trials at Yokohama." Brooklyn Law Review. 15: no. 2. April 1949.

Moon, Bucklin. "Book Review: The Case of General Yamashita. By A. Frank Reel." The New York Times Book Review. October 9, 1949.

Paton, G. L. "The War Trials and International Law." Res Judicatae 3: October 1947.

Quentin-Baxter, R. Q. "The Task of the International Military Tribunal at Tokyo." New Zealand Law Journal. 25: June 7, 1949.

Raginsky, M. "Monstrous Atrocities of the Japanese Imperialists." New Times. 2: January 8, 1950.

_____. and S. Rozenblit. "What People Expect of the International Military Tribunal in Tokyo." Soviet Press Translations. 3: no. 14, July 15, 1948.

Hana, Rao, T. "The Dissenting Judgment of Mr. Justice Pal at the Tokyo Trial." Indian Year Book of International Affairs. 2: 1953.

Kie, Robert. "The War Crimes Trials." American Journal of International Law. 48: 1954.

"Sentence Japanese War Criminals." Christian Century. 65: November 12, 1948.

Solow, Herbert. "A Rather Startling Result." Fortune. 39: no. 4. April 1949.

Polman, Edgar B. "Review of Recent Supreme Court Decisions." American Bar Association Journal. 32: 1946.

Trainin, A. "From Nuremberg to Tokyo." New Times. 12: March 17, 1948.

"Two Japanese War Criminals." New Republic. 114: February 25, 1948.

Vasiliyev, V. "The Atrocities of the Aggressors Have Been Exposed!" Soviet Press Translations. 5: no. 13. July 1, 1950.

Walkinshaw, Robert B. "The Nuremberg and Tokyo Trials: Another Step Toward International Justice." American Bar Association Journal. 35: April 1949.

Secondary Materials: Books:

Appleman, John A. Military Tribunals and International Crimes. Indianapolis: Bobbs-Merrill, 1954.

Asahi Shimbun, the Staff of. The Pacific Rivals. New York: Weatherhill, 1971.

Beloff, Max. Soviet Policy in the Far East, 1944-1951. London: Oxford University Press, 1953.

Bergamini, David. Japan's Imperial Conspiracy. New York: William Morrow, 1971.

Brady, Alexander, and F. H. Scott, eds. Canada After The War. Issued under auspices of the Canadian Institute of International Affairs. Toronto: MacMillan of Canada, 1944.

Browne, Courtney. Tojo: The Last Samurai. New York: Holt, Rinehart, and Winston, 1967.

Brownlie, Ian. International Law and the Use of Force By States. Oxford: The Clarendon Press, 1963.

- Butow, Robert J. C. Japan's Decision To Surrender. Stanford: Stanford University Press, 1954.
- _____. Tojo and the Coming of the War. Stanford: Stanford University Press, 1961.
- Buttinger, Joseph. A Dragon Defiant: A Short History of Vietnam. New York: Praeger Publishers, 1973.
- _____. Vietnam: A Political History. New York: Praeger Publishers, 1968.
- Calocoreossi, Peter. Survey of International Affairs. 1947-1948. 1949-1950. London: Oxford University Press, 1952, 1953.
- Davison, Eugene. The Nuremberg Fallacy: Wars and war Crimes Since World War II. New York: MacMillan, 1973.
- Dinstein, Yoram. The Defense of 'Obedience To Superior Orders' In International Law. Leyden, the Netherlands: A. W. Sijthoff, 1965.
- Dunn, Frederick S. Peacemaking and the Settlement With Japan. Princeton: Princeton University Press, 1963.
- Fall, Bernard L. The Two Vietnams: A Political and Military Analysis. 2nd rev. ed. New York: Praeger Publishers, 1967.
- Feis, Herbert. The China Tangle. Princeton: Princeton University Press, 1953.
- _____. From Trust To Terror. New York: W. W. Norton, 1970.
- Fifield, Russell H. Americans In Southeast Asia. The Roots of Commitment. New York: Crowell Company, 1973.
- Fitzsimons, M. A. The Foreign Policy of the British Labour Government: 1945-1951. Notre Dame, Indiana: University of Notre Dame Press, 1953.
- Gardner, D. H. Canadian Interests and Policies in the Far East Since World War II. Eleventh Conference, Institute of Pacific Relations. Canadian Institute of International Affairs. Toronto, 1950.
- Hall, John Whitney. Japan: From Feudalism To Modern Times. New York: Dell, 1971.
- Hinton, Harold C. China's Turbulent Quest. New York: MacMillan, 1970.
- Iriye, Akira. The Cold War In Asia. Englewood Cliffs, N.J.: Prentice Hall, 1974.
- Jessup, Philip. A Modern Law of Nations. New York: MacMillan, 1958.

- Kajima, Morinosuke. Modern Japan's Foreign Policy. Rutland, Vt.: Charles E. Tuttle, 1969.
- Kaplan, Morton A. and Nicholas deB. Katzenbach. The Political Foundations of International Law. New York: John Wiley, 1961.
- Kawai, Kazuo. Japan's American Interlude. Chicago: University of Chicago, 1960.
- Kim, Sung Yong. United States-Philippine Relations, 1940-1956. Washington, D.C.: Public Affairs Press, 1968.
- Leatham, Samuel. New Zealand's Interest and Policies in the Far East. New Zealand Institute of International Affairs. Wellington, 1950.
- Michano, Marcial P. Roaxas. The Story of a Great Filipino and of the Political Era in Which He Lived. Manila: Eiko Printing Press, 1952.
- Liu, R. F. A Military History of Modern China, 1924-1949. Princeton: Princeton University Press, 1956.
- Medlicott, W. N. British Foreign Policy Since Versailles, 1919-1963. London: Methuen, 1968.
- Meyer, Armin H. Assignment: Tokyo. Indianapolis: Bobbs-Merrill, 1974.
- Minear, Richard H. Victor's Justice: The Tokyo War Crimes Trial. Princeton, Princeton University Press, 1971.
- Olson, Lawrence. Japan In Postwar Asia. New York: Praeger, 1970.
- Olver, A. S. B. Outline of British Policy in East and Southeast Asia, 1945-May 1950. London: Royal Institute of International Affairs, 1950.
- Pamier, Leslie H. Indonesia and the Dutch. London: Oxford University Press, 1962.
- Pompe, C. A. Aggressive War: An International Crime. The Hague: Martinus Nijhoff, 1953.
- Potter, John Deane. A Soldier Must Hang. The Biography of an Oriental General. London, Frederick Muller, Ltd., 1963.
- Reisehauer, Edwin O. Japan. The Story of a Nation. New York: Alfred Knopf, 1970.
- _____. The United States and Japan. 3rd ed. New York: Viking Press, 1965.
- Rosencrance, R. N. Australian Diplomacy and Japan, 1945-1957. London. Cambridge University Press, 1962.

- Russell, Edward F. L. The Knights of Bushido: A Short History of Japanese War Crimes. London: Cassell & Company, 1958.
- Schroeder, Paul W. The Axis Alliance and Japanese-American Relations, 1941. Ithaca, N.Y.: Cornell University Press, 1958.
- Serra, Enrico. L'Aggressione Internazionale. Milan, 1940.
- Sherwood, Robert E. Roosevelt and Hopkins. New York: Harper Brothers, 1948.
- Steinberg, David Joel. Philippine Collaboration in World War II. Ann Arbor: University of Michigan Press, 1967.
- Stoessinger, John G. The Might of Nations. New York: Random House, 1963.
- Szulo, Lad. Czechoslovakia Since World War II. New York: Grosset & Dunlap, 1971.
- Tallow, Moamin A. Command Responsibility: Its Legal Aspect. Manila: By author, 1965.
- Tinker, Hugh. The Union of Burma. A study of the First Years of Independence. 2nd. ed. London: Oxford University Press, 1959.
- Tung, William L. International Law In an Organizing World. New York: Thomas Y. Crowell, 1968.
- Ulam, Adam B. Expansion and Coexistence: Soviet Foreign Policy 1917-1973. 2nd. ed. New York: Praeger, 1974.
- Veale, F.J.. Advance To Barbarism: The Development of Total Warfare From Sarajevo To Hiroshima. 3rd rev. ed. London: Mitre Press, 1968.
- Wakefield, Harold. New Paths For Japan. New York: Oxford University Press, 1948.
- Whitney, Courtney. MacArthur: His Rendezvous With History. New York: Alfred Knopf, 1956.
- Woetzel, Robert K. The Nuremberg Trials In International Law. New York: Praeger, 1960.