

**Victor's Justice, Victim's Justice: The Role of 'Class A' War Crimes in Shaping the  
Legacy of the Tokyo Tribunal**

By

Laura Nicole Dyer

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## **Abstract**

The Class A component of the International Military Proceedings for the Far East (IMTFE), also known as the Tokyo Trial, has had a central—and at times overbearing—presence within the legacy of the tribunal. Documents from the very beginning of the legal proceedings have established a clear prioritization by the Allied forces to target the ‘arch criminals’ accused of committing the newly coined charges of ‘crimes against peace’. Important historical figures involved in the trial, as well as subsequent historians and legal scholars, have continued to problematize and attack the trials for this focus. This criticism, while at times legitimate, has helped solidify the legacy of the Tokyo Trial as ‘victor’s justice’. Due to this focus, usually at best the Tokyo Trial is dismissed or devalued; at worst it has become a tool of Japanese war crimes apologists and deniers. The legal emphasis on Class A war crimes did have significant flaws and weaknesses which are important to highlight. However, historical analysis has become stuck in a ‘victor’s justice’ time loop, limiting the historical scope of the Tokyo Trials for too long. There is an urgent need to move beyond this concept within the scholarship of the IMTFE, while also understand the impact of this focus. The fixation with ‘victor’s justice’ has been seared into specific national narratives of remembrance, victimhood and trauma. While it will also touch upon the transnational factors that contributed to Japan’s process of silencing and remembering, this paper will explore the ways in which Class A war crimes have come to define and construct the legacy of the Tokyo Trial and its place in Japan’s national wartime narrative. Though there is a place within the historical discussion of the IMTFE for concepts such as ‘victor’s justice’ and criticism of crimes against peace, this paper will conclude with a discussion on how scholars can move beyond this limiting perspective and reach a more complex understanding of the Tokyo Trial and its legacy.

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## Abbreviations List

CCD	Civil Censorship Detachment
FRUS	Foreign Relations of the United States
GHQ	General Headquarters
IMTFE	International Military Tribunal for the Far East
IPS	International Prosecutor's Section
LAC	Library and Archives Canada
SCAP	Supreme Commander for the Allied Powers
SSEA	Secretary of State for External Affairs

## INTRODUCTION

### **To Sit in Judgement: An Introduction to the Tokyo Trial**

*“Well, Nuremberg was the first, and Tokyo was the last. In the event of a third world war there surely will be nobody left to judge—or to sit in judgement”*<sup>1</sup>- Arnold C. Brackman

In 1946, American journalist Arnold C. Brackman was reporting on the Tokyo Trial from the front row of the press section as a United Press Staff Correspondent. Less than a year earlier Shigemitsu Mamoru and General Umezu Yoshijiro, two of the indicted war criminals on trial, had boarded the U.S.S Missouri and signed the instrument of surrender on behalf of the Japanese government and military. With this capitulation the Second World War formally ended, and the seven year American occupation of Japan began.<sup>2</sup> Brackman was only twenty-three years old when he was assigned to cover the trial. He recalled in his book *The Other Nuremberg: The Untold Story of The Tokyo War Crimes Trials* that sitting in the dock, just to his right, were the “familiar names and faces” of his childhood.<sup>3</sup> Brackman grew up reading newspaper headlines about these men and their wars of expansion and colonization; to him, names like Tōjō Hideki, Itagaki Seishirō, and Matsui Iwane represented larger than life villainous characters, not the tired old men sitting before the court.<sup>4</sup> Despite their underwhelming appearances however, these defendants were accused of causing an immense amount of violence and suffering across Asia. Indeed, the impact and trauma of their actions continues to be felt globally to this day. Including Tōjō, Itagaki and Matsui, a total of twenty-eight Japanese civilian government officials and military leaders were

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<sup>1</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (London: Collins, 1989), 453.

<sup>2</sup> Note: While the occupation of the Japanese mainland ended in 1957, the Ryukyu Islands did not have their sovereignty restored until 1972.

<sup>3</sup> Ibid, 17.

<sup>4</sup> Note: This thesis will be adhering to the Japanese convention of listing surnames before given names. For example, Tōjō Hideki instead of Hideki Tōjō. The exceptions being those who purposely follow Western conventions and in the case of citations and footnotes, which follow the Chicago Manual of Style formatting.

charged by the Allied forces with waging aggressive war, along with ‘conventional’ acts of wartime violence. These men and the legal proceeding that judged them continue to shape regional politics and the historical memory of the Asia-Pacific War to this day.<sup>5</sup>

Officially known as the International Military Tribunal for the Far East (IMTFE), the Tokyo Trial began in earnest on May 3, 1946, and concluded two and a half years later, on November 12, 1948. It was a long journey from beginning to end; no one, not even a single one of the judges was able to attend every session of the proceedings. Brackman himself was reassigned before the final verdict was delivered but continued to be informed about the trial by his journalist colleagues.<sup>6</sup> Eventually, of the twenty-eight men indicted seven were executed and sixteen were sentenced to life imprisonment. Two others received limited sentences, one of them sentenced to twenty years, another one to seven. Two men died during the trials of natural causes and one was declared mentally unfit to be prosecuted.<sup>7</sup> Following a majority-rule system, the Allied justices were heavily divided on the final judgment: five wrote separate opinions, three of which openly dissented against certain aspects of the ruling. One justice, Radhabinod Pal, rejected the verdict completely and declared all the defendants not guilty.

The tribunal was held in the former Japanese Military Academy in Tokyo, a practical choice, as it remained mostly undamaged by Allied firebombing. The building, according to Brackman, was transformed into a sleek and modern court room setting, “a fitting stage for the international drama that was about to be played out there.”<sup>8</sup> It is estimated that it cost the Allied

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<sup>5</sup> Note: When referring collectively to the many conflicts Japan engaged in from 1937 to 1945, the term Asia-Pacific War will be used.

<sup>6</sup> Ibid, 1-3.

<sup>7</sup> Though there is compelling evidence that questions whether Ōkawa Shūmei was only pretending to have mental health issues. See Brackman, 113-4.

<sup>8</sup> Ibid, 18, 98.

Powers around a million dollars to equip and decorate.<sup>9</sup> Like the Tokyo Trial's companion tribunal in Nuremberg, the location of the court had the added effect of symbolically impressing upon the defeated nation its demise. Nuremberg was considered the symbolic birthplace of the Nazi Party, while holding a war crimes trial in the former Japanese military academy signified that Japan's military establishment and its influence was at an end.<sup>10</sup> However, the IMTFE has enjoyed none of the Nuremberg Trial's longevity or interest within historical discussion. The 'other Nuremberg' is a frequent nickname for the tribunal; longer running than its German counterpart, by the time the IMTFE was dissolved, initial feelings of post-war optimism were replaced by the fatigue of burgeoning Cold War tensions. Scholars who study the IMTFE frequently comment on the fact that while Nuremberg is commemorated, Tokyo is dismissed by others as the problematic 'younger sister' of the German tribunal.<sup>11</sup> Brackman himself lamented decades later that with all the terrible crimes the Tokyo Trial prosecuted, "how does one account for the virtual disappearance of the IMTFE from history?"<sup>12</sup>

The answer to Brackman's question is not a simple one. While it is true that the IMTFE has often been ignored or neglected within the Western historiography of the Second World War, the Tokyo Trial has never truly disappeared from Japanese national memory. Rather, as Madoka Futamura described it, the IMTFE is a ghost that "persistently haunts" any discussion of the war,

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<sup>9</sup> Owen Cunningham, *Trial of Tōjō: Interview with Owen Cunningham*, side 1, Iowa Oral History Project, 1975, Des Moines Public Library, Iowa. <http://archive.org/details/TrialOfTojoInterviewWithOwenCunningham>.

<sup>10</sup> Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, (Cambridge: Harvard University Asia Center, 2009), 9.

<sup>11</sup> A cursory look into most of the well-known English language books on the IMTFE usually contains this comparison on the historical memory of each trial. For example: John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999), 454-460; Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Michigan Classics in Japanese Studies, no. 22 (Ann Arbor: Center for Japanese Studies, University of Michigan, 2001), ix; Totani, 12.

<sup>12</sup> Brackman, 22.



including issues of responsibility and reconciliation.<sup>13</sup> Perhaps it is better to argue that the historical memory of the trial has frequently been avoided or silenced, rather than allowed to slip into the forgotten corners of history. However, this explanation also seems inadequate to fully address the range of tensions within the collective memory of the war. The IMTFE was a messy, complex, multi-faceted legal proceeding that historians and legal scholars around the world continue to grapple with. Frequently, two distinct sides emerge in the historical scholarship: was the tribunal a bold attempt at establishing a precedent for an international legal framework for human rights and global peace, or was it a poorly disguised attempt at ‘victor’s justice’, coupled with a desire to force Japan into the United States’ new post-war world system? As John Dower concluded, the Tokyo Trial and the six-year American occupation of Japan were some of the last blatant exercises “in the colonial conceit known as ‘the white man’s burden.’”<sup>14</sup> Others consider the tribunal to be an imperfect but ultimately useful building block for the current international legal conventions surrounding war crimes.<sup>15</sup> The answer, on both a political and historical level, is it is all these things. These tensions co-exist uneasily within the collective memory of the IMTFE, as well as outside it, in the Japanese national memory of the war.

Furthermore, the Allied Powers, specifically the United States, have used the IMTFE to create and interpret a specific historical narrative of the Second World War. The Tokyo Trial stands as a historical record just as much a legal one. Its narrative of the war has given birth to what some Japanese historians and conservative nationalists have called *Tōkyō Saiban Shikan*; the ‘Tokyo Trial view of history’. Not only did the tribunal’s final judgement seek to explain Japanese foreign

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<sup>13</sup> Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Contemporary Security Studies (London ; New York: Routledge, 2008), 13.

<sup>14</sup> Dower, *Embracing Defeat*, 23.

<sup>15</sup> Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington: The University Press of Kentucky, 2001).

policy during the war, but it also simplistically summarized Japan's 'war of aggression' as a single conspiracy for world domination led by a military clique by which moderate politicians were held hostage.<sup>16</sup> In his opening address to the tribunal, chief prosecutor Joseph B. Keenan declared:

“Mr. President, this is no ordinary trial, for here we are waging a part of a determined battle of civilization to preserve the entire world from destruction. The threat of destruction comes not from the forces of nature, but from the deliberate planned efforts of individuals, as such as members of groups who seem willing to bring the world to a premature end in their mad ambition for domination.”<sup>17</sup>

This narrative fits together well with Allied policies regarding the demilitarization and democratization of Japan in the post-war period. As John Dower astutely noted: “the tribunal essentially resolved the contradiction between the world of colonialism and imperialism and the righteous ideals of crimes against peace and humanity by ignoring it. Japan's aggression was presented as a criminal act without parallel, and almost entirely without context.”<sup>18</sup> Central to the prosecution's efforts to prove a deliberate, planned effort of domination, was the 'Class A' indictment, which charged defendants with waging an aggressive war and committing 'crimes against peace'. Evidentiary documents from the early stages of the trials have established a clear prioritization by the Allied forces in targeting the 'archcriminals' who committed 'crimes against peace'. Conventional war crimes, while also prosecuted, were not the primary focus of the Tokyo Trial. Instead, they were classified as 'Class B' crimes. The other newly created charge, 'crimes against humanity', was designated 'Class C'. Despite the presence of the latter two charges, it was this emphasis on Class A war crimes that has helped solidify the legacy of the Tokyo Trials as 'victor's justice'.

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<sup>16</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 87-90.

<sup>17</sup> John R. Pritchard and Sonia Magbanua Zaide, eds., *The Tokyo War Crimes Trial*, vol. 1. (New York: Garland Publishing Inc., 1981), 384.

<sup>18</sup> Dower, *Embracing Defeat*, 470-1.

Therefore, it is understandable that some individuals at the time of the trial, as well as subsequent historians and legal scholars, have continued to problematize and attack the IMTFE for its emphasis on crimes of aggression. In fact, many historical critiques of the trial make a point of noting that they do not seek to excuse the war crimes Japan committed in its neighbouring countries, but rather their issue lies with the charges of conspiracy and waging aggressive war. Some arguments articulate this better than others, who fall into the trap of sounding more like apologists for Japanese actions than critics of them. Richard Minear, perhaps the best known American historian and critic of the trial, is frequently accused of belonging to the later category. In the past he has been forced to defend himself from such criticism, declaring that: “I do not hold a brief for Tōjō, I hold a brief for justice, even to my enemies.”<sup>19</sup>

Due to the criticism of the Class A indictment, the Tokyo Trial is usually at best dismissed or devalued, and at worst, become a weapon of apologists and deniers. This criticism, while at times legitimate, is also sometimes overbearing. The focus on Class A war crimes during the IMTFE and within the historiography of the tribunal creates a useful analytical framework. The trial had significant flaws which are important to highlight, something this paper also seeks to do. However, the fixation within the literature on ‘victor’s justice’ has eclipsed many other legitimate directions of inquiry. Historical analysis has become stuck in a ‘victor’s justice’ time loop, limiting the historical scope of the Tokyo Trial and discouraging critical engagement with the entirety of the legal proceedings, beyond Class A crimes. There is an urgent need to move beyond the use of ‘victor’s justice’ as an analytical framework; it has become seared into specific national narratives of remembrance, victimhood and trauma both in Japan and neighbouring countries. Because of this, the IMTFE has become a lens through which Japan has memorialized, remembered, and

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<sup>19</sup> Minear, xiii.

silenced its past. Ultimately, while acknowledging the transnational factors that have contributed to the process of silencing and remembering Japan's wartime actions, this paper explores the ways in which Class A war crimes have come to define and construct the legacy of the Tokyo Trials and their place in Japan's national wartime narrative. Starting with the initial misgivings and concerns those involved in the trial had with prosecuting aggressive war, this paper traces these criticisms through to current scholarship, while also highlighting some of the quieter voices of dissent that have not always been addressed within the literature of the IMTFE. Though there is a valid place in the historical discussion of the tribunal for concepts such as 'victor's justice' and criticism of 'crimes against peace', this paper will conclude with a call to move beyond this limiting perspective and discuss ways in which a more complex understanding of the Tokyo Trial and its legacy can be reached.

The chapters of this thesis are organized thematically, and each chapter follows a rough chronological layout. While the primary focus of this project remains the IMTFE and the indictment of Class A war criminals, exploring their relationship with the concept of 'victor's justice' will cover several decades, beginning in the 1930s with the Sino Japanese war and ending during the early Cold War Period. The first half of Chapter 1 traces early efforts of those building and prosecuting the Allied legal case against Japan, examining some of the tensions and fragile links that held these Class A charges together. The second half of this chapter draws upon original and secondary research to focus on individuals involved with the tribunal, whose public and private criticisms of the Class A focus solidified allegations of 'victor's justice' before the IMTFE even adjourned. Though this chapter predominantly focuses on the historically underrepresented opinions of the IMTFE majority verdict justices regarding aggressive war, it also acknowledges the fact that certain justices' official statements of dissent have heavily impacted the postwar

debate surrounding ‘victor’s justice’. Specifically, Indian Justice Radhabinod Pal, whose dissenting opinion has become not only fuel for the ‘victor’s justice’ narrative, but a lightning rod around which Japanese war crimes apologists gather. Knitting these two sides together reveals that misgivings about Class A crimes were much more widespread than historians have argued at times.

Chapter 2 traces the English language historiography of the IMTFE which is frequently guilty of dichotomizing discussions of the tribunal. One of the overarching historical debates surrounding the tribunal is whether it was just a practice of hollow justice by victorious nations, or an ill-fated but commendable effort in establishing an international humanitarian legal framework. At times certain scholarship has been so wrapped up in the discussion of the legitimacy of crimes against peace, that other aspects of the trial, including its prosecution of Class B and C crimes, have not received the attention they deserve. Chapter 3 builds upon the previous two chapters to study how the fixation with Class A crimes, both historically and within the scholarship, has become part of Japan’s national wartime narrative. Specifically, how crimes against peace encouraged both the remembering and silencing of war crimes within collective memory, and how the ‘victor’s justice’ framework has been politicized both by conservative and liberals within Japan. Also discussed, is how ‘victor’s justice’ has been used to avoid or nullify some of the significance of the other crimes prosecuted at Tokyo. Chapter 4, briefly addresses the transnational factors that played an important role in shaping the memory of Japanese war crimes, including the Cold War, and the dropping of the atom bombs. While this thesis argues that the focus on Class A war crimes significantly shaped how Japanese war crimes were collectively interpreted within Japan, transnational factors and events were more than just an ambiguous backdrop upon which national narratives of forgetting and remembering unfolded. The paper concludes with a section discussing the possibilities of moving beyond the conventional historical

framework of ‘victor’s justice’, as well as recognizing those scholars who have sought to move beyond this framework in their own way. When discussing the IMTFE, certain questions arise: is the ‘victor’s justice’ discourse as indispensable as it is unsuccessful in fully understanding the complex nuances of the trial? Is there a way to decenter the Class A crimes from the historical narrative and refocus on other underrepresented areas of the tribunal, like the prosecution of Class B and C crimes? The final chapter examines these questions and asks what kind of frameworks this would involve, as well as what kind of history-writing this could look like.

### Researching the Tokyo Trials

Before providing a more detailed overview and historical context for the Tokyo Trial, it is important to discuss the wide variety of sources and documents that were examined during the research process, as well as some of the methodological frameworks behind this paper. It has been 73 years since Japan surrendered aboard the U.S.S Missouri in 1945, ending the Second World War. This year, 2018, marks the seventieth anniversary of the conclusion of the IMTFE proceedings. Despite the gap of almost a century between the war and the present, the trauma and memory of these events continue to be visible, politically significant and contested transnationally. This thesis owes a great deal to memory studies and, as Patrick Finney once described, the “explosive proliferation of work on collective remembering across the humanities and social sciences.”<sup>20</sup> Many sections of this paper, though particularly Chapter 3, are guided by analytical frameworks developed and disseminated through the examination of memory and trauma involving the Second World War.

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<sup>20</sup> Patrick Finney, “Introduction,” in *Remembering the Second World War*, ed. Patrick Finney (London: Routledge, 2017), 2.

‘Memory’ is a fluid, broad, and everchanging concept, much like the body of scholarly work that seeks to engage with it. Therefore, analyzing both the memory and the historical context of the IMTFE and the Second World War is an ongoing and, in many ways, urgent scholarly project.<sup>21</sup> There is no single theory or framework that this paper explicitly draws on. However, it is important to note the general key developments within the field of memory studies that have shaped this paper’s arguments. These include the shifting focus to transnational and transcultural frameworks, the growing concern with, and suspicion of the nation-centric approach to memory, and the move from an emphasis on static memory to a more fluid mobility.<sup>22</sup> Global studies has greatly influenced the trend of moving beyond national narratives and their approaches to memory. Official narratives of remembering are still predominantly controlled by the nation-state and some of the most valuable recent contributions to the field of collective memory and Japanese war crimes have operated within these spatial and temporal confines. However, this paper approaches the field of remembrance and the Tokyo Trial with a more transnational approach. It is important to recognize that national frames are no longer self-evident scales for “the study of collective remembrance”, due to a variety of factors like regional integrations, post-coloniality and globalized communication.<sup>23</sup> The third point that anchors the analysis of this work is to conceive mnemonic acts not as possessing “particular containers”, but rather emphasizing the movement and shifting of memory over time.<sup>24</sup> The concept of ‘travelling memory’ as understood by Astrid Erll, has greatly shaped this paper’s understanding of how the IMTFE has been remembered, forgotten and discussed within Japan’s collective memory of the war.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid, 2-3.

<sup>23</sup> Chiara De Cesari and Ann Rigney, eds., “Introduction,” in *Chiara de Cesari and Ann Rigney, Eds., Transnational Memory: Circulation, Articulation, Scales*, vol. 58 (Berlin: de Gruyter GmbH & Co., 2014), 2.

<sup>24</sup> Astrid Erll, *Memory in Culture*, Palgrave Macmillan Memory Studies (New York: Palgrave Macmillan, 2011), 12.

The seeds of this thesis originally grew from research into two specific sets of documents: interrogation transcripts from the tribunal's International Prosecution Section (IPS), held at the University of Toronto, and a series of letters discovered by chance at Library and Archives Canada (LAC), between Justice E. Stuart McDougall and the Canadian government. Each had surprising elements, considering that neither set of documents has received much attention within the English language scholarship, particularly the McDougall correspondence.<sup>25</sup> One of the only direct analyses done using the correspondence is John Stanton's detailed—though at times problematic—work “Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal”. Stanton's article positions itself as an examination of the Canadian government's war crimes and foreign policy ambitions, rather than a specific study of the IMTFE. While the archival research is quite thorough, at times his arguments seem coloured by oversimplified narratives about Canada's post-war foreign policy agenda and its role as a middle-power nation. Perhaps most eyebrow raising, is his claim that Canada was “free of a colonialist past” and therefore a perfect candidate for pursuing an agenda of world peace.<sup>26</sup> In his move to maintain that Canada was an unenthusiastic participant in the trials, Stanton neglects Canadian personnel like Brigadier Henry Nolan, E.H. Norman and Colonel Moore Cosgrave, who, for the most part, remained enthusiastic about the trial, despite recognizing some of the more technical issues that plagued it.<sup>27</sup> Instead Stanton treats McDougall's personal criticisms of the trial as an extension of the Canadian government's own opinions of the IMTFE.

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<sup>25</sup> Note: the IPS transcripts, which has been edited and compiled by renowned Japanese historian Awaya Kentarō have been used effectively in the past, though research that utilizes them tend to focus on different topics, like the decision to indict Emperor Hirohito. See Dower, *Embracing Defeat*.

<sup>26</sup> John Stanton, “Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal,” *The Journal of American and Canadian Studies*, no. 17 (January 1999): 61–87, 61.

<sup>27</sup> See: RG25-A-3-b/5762, Department of External Affairs Fonds, Library and Archives Canada.



While it is true that overall the Canadian government did appear rather unenthusiastic about involving itself in the prosecution of war criminals, particularly after the events of the Tokyo Trial, conflating McDougall's opinion with the Canadian governments, or the rest of the Canadian contingent in Tokyo, is misleading. Following in Stanton's footsteps, Yuki Takatori has also used the McDougall correspondence in her own work on the Canadian involvement with the IMTFE. Her well-researched and detailed contributions to the subject are valuable additions to the field.<sup>28</sup> Nevertheless, they situate themselves more as case studies on Canadian participation within the tribunal, rather than tied into the larger narrative of 'victor's justice'. In fact, the McDougall correspondence has, with a few exceptions, generally been left out of most literature regarding the IMTFE. Despite being acknowledged by some of the scholarship involving other justices it remains an underutilized source. While scholars such as Ann Trotter, James Sedgewick and Neil Boister have all acknowledged or expressed familiarity with McDougall's government correspondence in their own writings, this appears to come from a letter Justice Northcroft sent to his own government in New Zealand. This letter, which also included McDougall's formal complaint to the Canadian government, provides a useful but extremely narrow lens through which to view the Canadian justice's dissent. This document does not include the full correspondence, and only Sedgewick spends much time exploring McDougall's opinions of the IMTFE separately from Northcroft's.<sup>29</sup> Other than these contributions, very little has been done to incorporate the

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<sup>28</sup> See Yuki Takatori, "Justice Tempered by Realpolitik: Canada's Role in the Tokyo Trial," *International Journal of Canadian Studies*, no. 32 (October 1, 2005): 45; Yuki Takatori, "'Little Useful Purpose Would Be Served by Canada': Ottawa's View of the Tokyo War Crimes Trial," in *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*, ed. Kerstin von Lingen, *History of Warfare* 117 (Leiden: Brill, 2018), 148–66.

<sup>29</sup> See Ann Trotter, "Chapter 6: Justice Northcroft (New Zealand)," in *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, ed. Toshiyuki Tanaka, Timothy L. H. McCormack, and Gerry J. Simpson (Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 81–92; James Burnham Sedgewick, "The Trial within : Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948" (University of British Columbia, 2012), <https://doi.org/10.14288/1.0072876>; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford ; New York: Oxford University Press, 2008).

insights this correspondence provides into the general scholarship of the Tokyo Trial. Amusingly, one of the most important recent contributions to English language literature on the IMTFE even misspells Justice McDougall's name when mentioning him.<sup>30</sup>

From each set of archival documents, two things became apparent. First, the agenda to prosecute Class A crimes was emphasized over the pursuit of Class B and C charges. Second, disillusionment regarding the IMTFE, mainly due to the prosecution of Class A crimes, was more widespread and serious among the Allied forces than scholarship has previously shown. This complicates traditional narratives of the Tokyo Trial, which at times underemphasize misgivings that were originally voiced during the proceedings, other than those of more infamous dissenters like Justice Pal. These narratives also tend to focus more on the trial itself, rather than evidence gathering and case building stages of the prosecution. While there are some exceptions to this, as mentioned above, they exist on the peripheries of the scholarship.

The transcripts of the IMTFE, which provide a full account of the court's sessions and legal documents, were crucial to understanding how Class A war crimes were understood, as well as how the judges, prosecution and defence interacted with these charges. These records, with a final page count of 48,288, have been helpfully gathered into a set of 22 volumes, along with 5 finding guides.<sup>31</sup> I would like to acknowledge the hard work of scholars R. John Pritchard and Sonia Magbanua Zaide in compiling and editing these volumes, as historical research involving the IMTFE before these volumes were published was extremely challenging. While sections of the court transcripts were examined for this project, to engage completely with all 22 volumes was unfortunately not feasible for a study of this length. Therefore, the research emphasis was placed

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<sup>30</sup> Boister and Cryer's book (see n. 29) does at times spell the judge's surname correctly, however most of the time it is spelt 'MacDougall' instead.

<sup>31</sup> See Pritchard and Zaide.

on areas where it was felt the most critical discussions on the legitimacy of the concept of aggressive war took place; specifically, the Tokyo Tribunal Charter, the charges list, the final judgement, and the five separate opinions submitted with the verdict: the separate opinion of the Australian justice, the concurring opinion of the justice from the Republic of the Philippines justice, and the dissenting opinions of the French, Indian and Dutch justices. These volumes were used together with two volumes of IMTFE documents compiled and edited by former Tokyo Trial Justice Bernhard Röling. These volumes feature a reprint of the tribunal judgement and a full transcript of the separate opinions. For accessibility reasons, it was useful to have these resources gathered separately from the rest of the documents. All these records have also been cross-referenced with Archive Canada's box set of transcripts, though this set unfortunately does not contain all the documents found in the other two bodies of texts mentioned above. One of the issues with the original boxed sets of transcripts—sent to all former Allied Power at the conclusion to the trial—is that each one is missing different sections, has poorly hectographed pages and lacks finding aids to help navigate thousands of pages of raw documentation.<sup>32</sup>

Information on court evidence exhibits, both rejected and used by the tribunal, has been gathered mainly from secondary sources or supplemented with documents from the war crimes trial's investigative processes. Research at Archives Canada failed to turn up any exhibits, though there are gaps in certain collections where one can conclude photographs and other pieces of evidence existed at a certain point. The whereabouts of these documents, and whether they were deliberately removed, lost, or damaged beyond repair is unknown. A definitive edition of all exhibits has never been published, nor is it ever likely to be. Most exhibits were returned to the countries of the prosecutors who presented them when the trials concluded. In addition to the

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<sup>32</sup> Pritchard and Zaide, vol. 1, 3. Pritchard details his own difficulties creating the volumes here as well.

exhibits being scattered in various locations, most archives have had more difficulties preserving them than other IMTFE documents.<sup>33</sup> Some exist in the Australian War Memorial Library in Canberra, and others can be found at the National Archives and Records Administration in Maryland.<sup>34</sup> However, access to the Australian and American documents was limited by practical realities regarding research scope. Despite this, documents accessed from American military interrogations records, and other evidence gathered by the IPS in Tokyo do help paint a picture of the ‘proof’ that the Allied forces gathered to support indictments the Tokyo Trial defendants.<sup>35</sup> Another collection of documents this work draws from are the ‘Foreign Relations of the United States’ records regarding Japan from the mid 1940s to late 1950s. These files give valuable insights into how Class A criminals became featured in American foreign policy decisions in the region.<sup>36</sup> Finally, as previously mentioned, declassified documents from the Canadian Government’s Department of External Affairs regarding the IMTFE were also examined, though I acknowledge that the usefulness of these documents in understanding the general efforts of the Allied governments in Tokyo is limited by the minor role Canada played in the overall proceedings.

To support the research outlined above, this paper also relies on several secondary sources. However, I acknowledge that these sources are either English language publications, or Japanese and Chinese texts that have been translated. While this limits the potential broadness of the historiographical framework, and risks projecting problematic Western academic biases or

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<sup>33</sup> Ibid.

<sup>34</sup> Totani, 5.

<sup>35</sup> See International Prosecutor’s Section, Allied Command Headquarters, *東京裁判 = Document the International Military Tribunal for the Far East (国際検察局(IPS)尋問調書)*, ed. Kentarō Awaya and Yutaka Yoshida, First Edition, 52 vols. (Tokyo: Nihon Tosho Senta, 1993).

<sup>36</sup> In addition to the Foreign Relations of the United States archives (hereafter FRUS), several Japanese edited compilations of American diplomatic documents concerning Japan during the same period were helpful. See: Osamu Ishii and Naoki Ono, eds., *Documents Related to Diplomatic and Military Matters 1955 = 日米外交防衛問題 1955 年*, vol. 2, Documents on United States Policy Towards Japan, VI (Tokyo: Kashiwashobo Publishing Co., 1999).

orientalist tones into the arguments, attempts will be made to acknowledge these biases, and avoid them where possible.

### Contextualizing the IMTFE

#### *The War(s)*

In 1937, after years of occupying Manchuria and creating the puppet state of Manchukuo, the Japanese army invaded China following a skirmish with Chinese forces at the Luguo Bridge near Beijing. The exchange is generally thought to have been an escalation of tensions over a missing Japanese soldier, despite his eventual return to his unit,<sup>37</sup> While the ‘Marco Polo Bridge Incident’ can be contextualized within the broader scope of the Asia-Pacific War as only one small part of the move to consolidate Japanese hegemony in the region, it was also the beginning of a series of escalated violent conflicts between Japan and China. In the direct aftermath of the incident, successive Japanese military victories led to the occupation of large swathes of territory along the eastern and southern Chinese coastline, as well as major inland cities. Soon after these victories, the Japanese Army, in Dower’s words, “bestrode Asia like a colossus”, attacking Pearl Harbor in 1941, and by 1942 almost completely occupying the East Indies, French Indochina, Burma, the Philippines, Hong Kong and Malaya.<sup>38</sup> Ultimately, what began as an ‘incident’ in northern China quickly evolved into the Sino-Japanese War, which later merged with the Second World War in 1941 when the United States entered the conflict.<sup>39</sup>

The crimes committed during the Asia-Pacific War were widespread, and the violence perpetrated by Japanese soldiers against civilians in occupied territories was overwhelming:

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<sup>37</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 13.

<sup>38</sup> Dower, *Embracing Defeat*, 21-2

Note: While many of these terms are outdated and colonial, wartime boundary/territory labels will be used in this paper for clarity

<sup>39</sup> The 1937 skirmish should not be confused with the Mukden Incident of 1931, which allowed Japan to seize and occupy most of Manchuria leading up to the Second Sino-Japanese War.

incidents of mass rape, murder, forced prostitution, chemical and biological experimentation on humans, torture, and forced labour were widespread. By the time peace became official with the surrender ceremony aboard the U.S.S Missouri on September 2, 1945, millions of persons had been displaced or killed on both sides of the conflict. The IMTFE was created to address the atrocities committed by the Japanese army during the Asia-Pacific War. The signing of the Instrument of Surrender aboard the Missouri came with the promise of ‘stern justice’, as well as thousands of American soldiers flooding into Tokyo Bay. A few weeks earlier, on August 15, Emperor Hirohito had spoken directly to his subjects for the first time in his reign, broadcasting his surrender speech across Japan. Even though many had difficulties understanding his speech—Hirohito spoke a highly formal, imperial version of Japanese as opposed to the more colloquial common one—and he never used the term surrender, the Emperor’s message was clear.<sup>40</sup> “Grand peace for all the generations” he said, would come through “enduring the unavoidable and suffering the unsufferable”, accepting the Allied provisions laid out in the Potsdam Declaration.<sup>41</sup>

The first wave of occupation forces landed in Japan on August 28, arriving too late to witness the mass destruction of files and supplies that followed the Emperor’s broadcast. “Bonfires of documents replaced napalm’s hellfires” in Tokyo as military and government officials sought to erase their wartime activities.<sup>42</sup> However, the soldiers did witness firsthand the devastation of the Allied firebombing campaign upon their arrival. Colonel Moore Cosgrave, the Canadian representative aboard the Missouri, sent his government several observations regarding the state of the area around Tokyo Bay. The city of Yokohama “ceased to exist” Cosgrave wrote, “I

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<sup>40</sup> Dower, *Embracing Defeat*, 34-6.

<sup>41</sup> Hirohito, Emperor of Japan, “Text of Hirohito’s Radio Rescript.” *New York Times*, August 15, 1945. It should be noted that though the New York Times transcript uses the word ‘unavoidable’, it is possible this is a translation error. Other respected translations have quoted the emperor as saying, “endure the unendurable”.

<sup>42</sup> Dower, *Embracing Defeat*, 39.

witnessed the dreadful affect of the modern fire bombs which fused glass, iron and household effects into complete nothingness.”<sup>43</sup> Despite the heavy destruction to the surrounding infrastructure, the surrender ceremony lasted less than thirty minutes, a carefully calculated display of superior American military might. Shigemitsu Mamoru signed on behalf of the Japanese government, while Umezu Yoshijiro signed on behalf of the Japanese Army. The decision to have these two officials present instead of the Emperor was contentiously debated by some members of the Allied forces, though the Americans rejected the idea after consulting with the British government. “While agreeing in principle we desire to make certain amendments on the grounds that we doubt if it is wise to ask the Emperor personally to sign the surrender terms,” a memo, sent August 11, 1945, from British Prime Minister Clement R. Attlee to the American Secretary of State read.<sup>44</sup> The Missouri proudly flew the thirty-one star standard that was used by Commodore Matthew Perry’s ship when he forced Japan out of isolation in the 19<sup>th</sup> century. It was a clear message from General Douglas MacArthur, who wished to highlight that Japan’s status as an imperial empire began and ended with American warships.<sup>45</sup> MacArthur, the commander of the United States Army Forces in the Far East, was appointed the Supreme Commander of the Allied Powers (SCAP) and charged with overseeing all aspects of the American occupation, including

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<sup>43</sup> “Airmail No. 427 Observations from Colonel Cosgrave, Forwarded to the Secretary of State for External Affairs by Paul Malone,” September 11, 1945, RG25-A-3-b/5762/ File No. 104-B, Department of External Affairs Fonds, LAC.

Note: Cosgrave called the twenty-three minute surrender ceremony an “impressive affair”, tactfully leaving out of his written observations the fact that he signed the Japanese copy of the instrument of surrender in the wrong place, leading delegates from France, New Zealand and the Netherlands to follow suit. This created a small diplomatic scene aboard the warship and led the New York Times to publish an article headlined “Canadian’s ‘Boner’ Postponed Peace”.

See: Robert Trumbull, "Canadian's 'Boner' Postponed Peace: Improperly Placed Signature on the Surrender Document Amended by MacArthur's Aide", *New York Times*, September 3, 1945.

<sup>44</sup> Winant to the Secretary of State, August 11, 1945, *Foreign Relations of the United States (FRUS): Diplomat Papers, 1945*, volume 6, the British Commonwealth, the Far East, doc408, (Washington: Government Printing Office, 1969), U.S. Department of State. <https://history.state.gov/historicaldocuments/frus1945v06/d408>.

<sup>45</sup> Dower, *Embracing Defeat*, 19, 40-1.

the organization of the Tokyo Trial.<sup>46</sup> His speech to the delegates on board the Missouri was both a stern warning and an arrogant promise to Japan:

“We stand in Tokyo today reminiscent of our countryman, Commodore Perry, ninety-two years ago. His purpose was to bring enlightenment and progress by lifting the veil of isolation to the friendship, trade, and commerce of the world. But alas the knowledge thereby gained of Western science was forged into an instrument of oppression and human enslavement. Freedom of expression, freedom of action, even freedom of thought were denied through the suppression of liberal education, through appeal to the superstition and through the application of force. We are committed by the Potsdam Declaration of principles to see that the Japanese people are liberated from this condition of slavery. It is my purpose to implement this commitment.”<sup>47</sup>

The speech is filled with many themes relating to later criticisms of the Tokyo Trial: including undertones of colonialism, a desire for ‘victor’s justice’, and a plan to forcibly align Japan with the United State’s new post-war world system. MacArthur’s victory speech brings to mind the accusation by John Dower, that the occupation of Japan was one of the last blatant exercises “in the colonial conceit known as ‘the white man’s burden.’”<sup>48</sup> Therefore, it is easy to see why some historians have compellingly argued that, in many ways, the IMTFE was a part of a multi-layered plan to ‘liberate’ the Japanese from their ‘slavery’ to those military and government officials responsible for waging the war.<sup>49</sup>

### *‘Stern Justice’*

It was clear early on that the Allies were aware that conventional war crimes were committed in the Asia-Pacific region. The Roosevelt administration frequently condemned the

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<sup>46</sup> Note: In many government documents, SCAP frequently refers to not just MacArthur, but also his entire office. The paper will take care to try and distinguish between the two, using General Headquarters (hereafter GHQ) to refer specifically to MacArthur and his staff where necessary.

<sup>47</sup> Douglas MacArthur. “The Texts of the Official Statements and Orders Issued About the Surrender of Japan”, *New York Times*, September 2, 1945, 3.

<sup>48</sup> Dower, *Embracing Defeat*, 23.

<sup>49</sup> See Dower, *Embracing Defeat*, and Michael Lucken, *The Japanese and the War: From Expectation to Memory*, (New York: Columbia University Press, 2017).



treatment of Allied prisoners of war (POWs) and other acts of violence committed by Japanese soldiers. The Nanjing Massacre was widely reported around the world, and many European leaders swore they would seek justice for those living in their colonies who had been mistreated by Japanese forces.<sup>50</sup> However, most early statements on what kind of punishment Axis Powers would face upon capitulation were predominantly focused on Nazi Germany. Very little was said before 1942 about how the Allies would handle Japanese criminality, or what ‘justice’ would look like in the Asia-Pacific region.<sup>51</sup> In December 1943, Generalissimo Chiang Kai-shek, Franklin Roosevelt and Winston Churchill met in Egypt to discuss the official Allied position regarding Japan. The Cairo Conference’s declaration, released a few weeks later, vowed that “the Three Great Allies” would “restrain and punish the aggression of Japan”, secure an unconditional surrender, and free Korea from colonial rule.<sup>52</sup> Shortly afterwards, the United Nations War Crimes Commission (UNWCC) was established to gather materials in anticipation of prosecuting the Axis governments once the war ended. However, it was not until 1944 that the UNWCC focused more specifically on the Japanese Empire, creating the Special Far Eastern and Specific Sub-Commission, which began to compile lists of potential war crimes suspects and witnesses.

The Potsdam Conference is frequently highlighted, along with the Cairo Declaration and the Kellogg-Briand Pact of 1928, as the legal basis for the IMTFE’s creation and jurisdiction.<sup>53</sup> Though the Kellogg-Briand Pact did not actually criminalize aggressive war, those who signed the

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<sup>50</sup> Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (Austin: University of Texas Press, 1979), 4-6. Note: It is unclear if De Gaulle and others extended this promise to all their colonial subjects, not just metropole citizens.

<sup>51</sup> For specific examples and details on policies and declarations that were voiced see Solis Horwitz, *The Tokyo Trial*. (New York N.Y.: Carnegie Endowment for International Peace, 1950).477-80, also Boister and Cryer, *The Tokyo International Military Tribunal*, 17-20.

<sup>52</sup> “Cairo Conference 1943,” The Avalon Project at Yale Law School: Documents in Law, History and Diplomacy, accessed July 1, 2017, <http://avalon.law.yale.edu/wwii/cairo.asp>.

<sup>53</sup> Joseph B. Kennan and Brendan Francis Brown, *Crimes against International Law* (Washington: Public Affairs Press, 1950).

pact promised to renounce war as “an instrument of national policy”.<sup>54</sup> The signatories, including Japan, the United States, Great Britain, and Germany, promised to settle dispute only through peaceful means. The Potsdam Declaration, though also not a treaty, echoed the pact’s sentiments. Released in July 1945, two months after the collapse of Nazi Germany, it demanded unconditional surrender from Japan. Any less than this would result in “prompt and utter destructions”, a threat realized with the use of atomic bombs a few weeks later.<sup>55</sup> The declaration also decreed that:

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, for we insist that a new order of peace security and justice will be impossible until irresponsible militarism is driven from the world....we do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.<sup>56</sup>

IN these frameworks, the Tokyo Charter was conceived; written predominantly by the American Chief Prosecutor by Joseph B. Keenan and GHQ, it appointed eleven justices, from New Zealand, Australia, the United States, Canada, India, the Philippines, the United Kingdom, France, China, the Netherlands, and the Soviet Union, to preside over the IMTFE.<sup>57</sup> As previously mentioned, the Charter organized the charges presented at the tribunal into three general categories: Class A, B, and C. The formal definitions, as laid out in the Charter, are as follows:

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; b. Conventional War Crimes: Namely, violations of the laws or customs of war; c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,

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<sup>54</sup> “Kellogg-Briand Pact 1928,” Text, The Avalon Project at Yale Law School: Documents in Law, History and Diplomacy, accessed July 2, 2017, [http://avalon.law.yale.edu/20th\\_century/kbpact.asp](http://avalon.law.yale.edu/20th_century/kbpact.asp).

<sup>55</sup> “The Berlin (Potsdam) Conference, July 17-August 2, 1945 (a) Protocol of the Proceedings, August 1, 1945,” The Avalon Project at Yale Law School: Documents in Law, History and Diplomacy, accessed June 13, 2017, [http://avalon.law.yale.edu/20th\\_century/decade17.asp](http://avalon.law.yale.edu/20th_century/decade17.asp).

<sup>56</sup> Ibid.

<sup>57</sup> See ‘List of Major Figures’ in appendix for full names and details.

or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan.'<sup>58</sup>

Each of the three categories were broken up into three groups of indictments. Of the 55 charges, 1 to 36 were grouped together as crimes against peace, with each individual charge highlighting a component of the Class A definition above. The second group, charges 37 to 52, were loosely gathered under the heading of murder charges. This involved the murder of both civilians and Allied soldiers, and covered events such as the Nanjing Massacre. Finally, charges 53 to 55 were simply referred to as charges of conventional war crimes and crimes against humanity.<sup>59</sup> The language of this latter group of charges does reflect the language of Class B and C crimes, though it is broader in scope than the second indictment section which focused explicitly on the crime of murder. Because none of the individual charges listed above directly call any of the specific acts being prosecuted crimes against humanity—despite being organized under that subheading—some argue that there was no prosecution of Class C crimes in the Asia-Pacific region.<sup>60</sup> These claims are understandable; more could have been done to adequately address Class C crimes. The trials did not, for example, ever discuss the human experiments committed by the Japanese army on civilians in occupied territories. Nor did it prosecute any of those at Tokyo for crimes committed against countries like Korea when they were Japanese colonies. While the

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<sup>58</sup> Robert Cryer and Neil Boister, eds., “Charter of the International Military Tribunal for the Far East,” in *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (New York: Oxford University Press, 2008), 7–11.

<sup>59</sup> Bernhard V.A. Röling and C. F. Rüter, eds., *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, vol. 2. (Amsterdam: APA-University Press Amsterdam, 1977). 527.

<sup>60</sup> Sandra Wilson et al., *Japanese War Criminals: The Politics of Justice After the Second World War* (New York: Columbia University Press, 2017), 274-5.

Note: See charge list above for details.

prosecution did bring forward some evidence of the widespread rape, and enslavement of local populations for the purposes of forced labour, they were certainly not the focus of the IMTFE. The prosecution also never suggested that the Japanese government had attempted genocide, or anything on the same scale as the Holocaust. Genocide is the charge most commonly associated with Class C crimes and there was no evidence of an organized mass extermination in the Asia-Pacific. In the case of the Tokyo Trial it appears that Class B and C were blended together, so that Class C crimes were dovetailed in to Class B ones. For example, some of the charges that involved the unlawful killing and torture of soldiers also listed civilians as victims of these crimes. However, the scale and scope of atrocities like the Nanjing Massacre were interpreted as going beyond typical definitions of conventional war crimes, and instead they were considered crimes against humanity. Therefore, it is inaccurate to dismiss crimes against humanity as entirely absent from the charges list. It would be more accurate to say that those on trial were never found explicitly guilty of Class C crimes, or that the Tokyo Trial could have done more to represent these crimes. The fact remains that the IMTFE is still partially responsible for the silencing of these crimes within the collective memory of Japan's war times experiences. Their lack of visibility left room for debate and assumptions about how the IMTFE treated Asian victims of Japanese war crimes, a topic that will be discussed further in later chapters.

The Australian Justice William Webb was appointed as President of the Tribunal by SCAP. According to the Tokyo Charter, at least six of the eleven judges needed to be present on any day for the sessions to convene, and a majority judgement would be used to deliver the verdict. Considering that many Allied members were worried about the potential length of the IMTFE, this

provision was most likely intended to speed up the proceedings.<sup>61</sup> It is also doubtful the Allied Powers anticipated the diverse range of opinions within the judicial panel regarding class A crimes.

The IMTFE was not the only court proceeding against the Japanese military. Thousands of trials took place throughout the Asia-Pacific. Conducted separately by many countries, including Britain, the Netherlands, China, Canada, France, the Philippines and Australia, the trials focused more on conventional war crimes and war crimes committed against civilians under occupation.<sup>62</sup> In total, 5,706 individuals, both Japanese and collaborators, were charged with war crimes by the Allied Powers at the end of the conflict. Of this group, 4,524 were found guilty and 1,041 were condemned to death. Roughly a tenth of these death sentences were later commuted to life imprisonment but many died of natural causes before they could complete their sentences or were released.<sup>63</sup> A sizeable number of Korean and Taiwanese persons were also prosecuted as collaborators. This put many in the uncomfortable position of being both victims of Japanese colonial violence and responsible for perpetrating violence while under Japanese control. The duality of victimhood for those colonized by Japan reveals one of the ways in which the trials were, in the words of Yuma Totani, “ill-equipped to handle the problems associated with Japanese colonialism.”<sup>64</sup>

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<sup>61</sup> Article 12 of the Tokyo Charter deliberately outlined that “strict measures” be take to “prevent any action that would cause any unreasonable delay” in the proceedings. See Pritchard and Zaide, vol. 20, 48426.

<sup>62</sup> Note: the following statistics do not include the Soviet Union’s independent legal proceedings, which were held in Khabarovsk, in 1949. Focusing on the use of bacterial and chemical warfare against Chinese and Russian soldiers, the trial played an important role in uncovering the full extent of the horrors bacteriological warfare Units 731 and 100 committed against both military and civilian targets, while linking the Emperor directly to the creation of these units. When the Soviets brought the trial transcript forward as evidence of the Emperor’s complicity in these war crimes, the other Allied forces dismissed it as communist propaganda. The transcript of the proceedings is now generally accepted an important and overall accurate, historical document. For records of the trial see *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons* (Moscow: Foreign Language Publishing House, 1950). Also see Jing-Bao Nie, “The West’s Dismissal of the Khabarovsk Trial as ‘Communist Propaganda’: Ideology, Evidence and International Bioethics,” *Journal of Bioethical Inquiry* 1, no. 1 (2004): 32-42. doi:10.1007/bf02448905.

<sup>63</sup> Wilson et al., *Japanese War Criminals*, 270.

<sup>64</sup> Totani, 13.

With the introductory foundation in place, there is one final point to note before moving on to subsequent chapters. The IMTFE, as Yuma Totani pointed out in her book *The Tokyo War Crimes Trial: Pursuit of Justice in the Wake of World War II*, is “a focal point for the remembrance” of the Second World War. It marks the beginning of Japan’s ongoing confrontation with its wartime activities; its historical significance is controversial and complex.<sup>65</sup> However, this paper does not seek to provide a detailed argument in support or condemnation of the Tokyo Trial, ‘victor’s justice’, or Class A crimes. Nor does it endeavor to challenge the verdict. Though at times this thesis does engage with the historiographical debate of whether or not the IMTFE was ‘victor’s justice’, arguments dealing with these issues have, for the most part, been effectively explored by several scholars.<sup>66</sup> Instead, as stated earlier in this introduction, this paper seeks to examine the relationship between ‘victor’s justice’, the collective memory of the Tokyo Trial, and crimes against peace, while challenging current historical assumptions about the tribunal.

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<sup>65</sup> Ibid, 1-2.

<sup>66</sup> For example: Neil Boister and Robert Cryer’s *The Tokyo International Military Tribunal*; Yuma Totani’s *The Tokyo War Crimes Trial*, as well as multiple works by historian Awaya Kentarō.

## CHAPTER 1

### **I Look Forward with Horror to What Will They Produce: The Search for Proof of Aggression and Conspiracy**

*“I am convinced that the accused have not had and cannot have a fair trial”*<sup>67</sup> – Justice E. Stuart McDougall

While reading the IMTFE’s final judgement in November 1948, Chief Justice William Webb attempted to refute the defence’s criticisms of the legality of the tribunal. Throughout the trial, one of the major points argued by the defence council was that they did not believe that the Tokyo Trial had the authority to find the Class A war criminals—or ‘big fish’ as Joseph B. Keenan called them—guilty of aggressive war.<sup>68</sup> The law, they argued, was being retroactively and hypocritically applied to Japan. However, “the Charter is not an arbitrary exercise of power on the part of the victorious nations but is the expression of international law existing at the time of its creation”, Webb sternly told the court.<sup>69</sup> The chief justice was known for his gruff attitude towards those who questioned the tribunal’s decisions and authority; there are many instances in the transcripts where his behaviour towards the defence and witnesses reads as aggressive or downright hostile.<sup>70</sup> Webb’s statement not only acknowledged that questions regarding the legitimacy of the prosecution existed even before the trial concluded, but also that a more general discourse around the concept of ‘victor’s justice’ existed at the time.

This evidence contrasts considerably with the opinions of those who argue that the concept of ‘victor’s justice’ did not “gain currency” until the 1970s, with the release of Richard Minear’s

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<sup>67</sup> “Letter to Louis St. Laurent, Secretary of State for External Affairs (SSEA) from Justice McDougall,” March 19, 1947, RG25-A-3-b/5762/ File No. 104-J, Department of External Affairs Fonds, LAC.

<sup>68</sup> Maga, 32.

<sup>69</sup> Pritchard and Zaide, *The Tokyo War Crimes Trial*. vol. 20, 48437.

<sup>70</sup> For example, there were many instances in during the witness cross-examination stage where Webb and the defence council squabbled and were openly rude to one another. See Pritchard and Zaide, *The Tokyo War Crimes Trial*. vol. 2.

book *Victor's Justice*.<sup>71</sup> It is certainly fair to point out that Minear's book, perhaps the best known English language source on the IMTFE, did bring more attention to the 'victor's justice' debate in non-Japanese scholarship. However, what this view regarding the Tokyo Tribunal often neglects, is that the interpretation of Class A crimes as 'victor's justice' was a widespread and contentious issue among those involved in the Allied war and occupation efforts, not just an afterthought of subsequent scholarship. Of course, accusations of 'victor's justice' were voiced most loudly by the Defence Council and the Indian Justice Radhabinod Pal, as Minear himself recognizes.<sup>72</sup> In fact, Minear's book spends so much time lambasting the trial and fixating on Justice Pal's dissenting opinion, that aside from a few moments highlighting the other dissenting statements and defence council's arguments, it neglects other individuals who also felt uneasy with the IMTFE's verdict. *Victor's Justice*, whether intentionally or not, paints a picture of a few good men at the IMTFE attempting to stand up to Imperial America, its show trial, and the hypocritical Allied narrative of the 'just' war.<sup>73</sup> Of course, there is some truth to these arguments; those amongst the Allied forces voicing criticism for the tribunal were the minority. However, the narrative Minear encourages erases much of the quieter criticism that came from within the Allied governments, as well as the private dissention within the majority opinion. They are almost completely absent from his narrative. As these dissenters did not always make their criticism a matter of public record, mainstream English language scholarship has historically overlooked their individual voices outside of the majority judgement.

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<sup>71</sup> Wilson et al., *Japanese War Criminals*, 103.

<sup>72</sup> For details on the utilization of the term within the Defence Council, see Matthias Urs Zachmann, "Loser's Justice: The Tokyo Trial from the Perspective of the Japanese Defence Council and the Legal Community," in *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*, ed. Kerstin von Lingen, *History of Warfare* 117 (Leiden: Brill, 2018), 294–306.

<sup>73</sup> See Minear, *Victor's Justice*.



Miner is not alone in his assumptions; most early scholarship on the Tokyo Tribunal follows the narrative that there was either very little controversy over the IMTFE when it was ongoing or minimally acknowledge any controversy within the Allied ranks by limiting focus to the more outspoken critics.<sup>74</sup> While later contributions to the literature do an excellent job of tracing some of the lesser-known criticism that surrounded the trial at the time, such instances are still generally painted as isolated or uncommon opinions rather than widespread.<sup>75</sup> Little has been published that gives a fuller picture of the anxieties regarding Class A crimes and accusations of ‘victor’s justice’ both during and immediately after the IMTFE. Therefore, this chapter has two main objectives. Firstly, to briefly analyze the Allied determination to bring forward and centralize the charge of crimes against peace, from the early planning stages of the trial to the offices of the IPS. This section draws upon a mixture of original archival research and secondary sources to highlight some of the tensions that surrounded the concept of conspiracy to wage aggressive war, as well as the punishment of individuals for the actions of a wartime government. The second focus is to analyze some of the less well-known dissenting parties of the IMTFE: the justices who may not have written a separate opinion or necessarily disagreed with the concept of crimes against peace, but never-the-less expressed their own anxieties and dissatisfaction with the way the Allied forces chose to pursue the Class A indictment. This includes examining the previously underrepresented opinions of Canadian Justice E. Stuart McDougall, and other judges such as

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<sup>74</sup> See Brackman, Horwitz, and Piccigallo.

<sup>75</sup> Note: John Dower devotes some time in his book *Embracing Defeat* to this subject, though it is in passing rather than as significant point. Furthermore, like most who broach the subject (for example: Timothy Maga in his book *Judgement at Tokyo*, Herbert Bix’s *Hirohito and the Making of Modern Japan*, Nachdr. (New York: Perennial, 2002), Neil Boister and Robert Cryer’s *The Tokyo International Military Tribunal*), the conversation remains predominantly focused on the dissenting judges. While some, like Yuma Totani, do attempt to widen the lens of analysis, they still neglect many of the judges who only signed the majority opinion. An exception to this trend is the recent edited volume *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, ed. Toshiyuki Tanaka, Timothy L. H. McCormack, and Gerry J. Simpson, International Humanitarian Law Series, v. 30 (Leiden ; Boston: Martinus Nijhoff Publishers, 2011).

Justice Northcroft from New Zealand, and Lord William Patrick from Great Britain. Also discussed, will be the original American judge, John P. Higgins, whose misgivings about the IMTFE and the crimes against peace charges might have played a role in his untimely departure from the proceedings. Except for Higgins, who left early, these men's personal opinions have been historically erased by their choice to only be part of the majority opinion, and their own quiet dissent has only started to become more researched in the last decade.

The focus on these four judges, as opposed to the rest of the majority opinion, is for practical reasons and not meant to erase or purposefully exclude. McDougall, Patrick and Northcroft wrote most of the majority judgement and enjoyed more visible and influential positions on the bench; Higgins stands out for his early departure from the proceedings in June 1946. However, other justices including Chinese justice Mei Ju-ao and the Soviet justice Ivan Zaryanov were also influential, and key supporters of the majority decision. Neither of these men are particularly well discussed within English language scholarship. Mei was especially critical to shaping the tribunal's opinions on Japanese territorial expansion in Manchuria and criticizing some of the European judges' imperialist assumptions on the matter.<sup>76</sup> Nevertheless, due to the social and political upheavals in their own countries during and after the IMTFE, and because of personal decisions, neither judge's papers or private opinions are widely accessible.<sup>77</sup> The second section of this chapter also includes opinions from other, non-judicial officials involved in the IMTFE and American Occupation, who also expressed concerns about the way 'crimes against peace' were being prosecuted by the Allied Powers. Some of these people did so privately, while others got

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<sup>76</sup> Sedgwick, 314-5.

<sup>77</sup> Note: At the time of submission, the author became aware that a selection of Mei's surviving diaries and papers were about to be published in English, though the date this book will become available is unclear.

into publicized debates on the subject. Regardless, all these cases raise serious questions about if concern over the IMTFE was more widespread than Minear and others have depicted.

Therefore, the emphasis of this chapter will be on the ‘silent majority’. Since most of the critical scholarly focus on the IMTFE already revolves around more well known dissenters like Radhabinod Pal, discussion on such figures in this paper is limited to laying the ground work for Chapter 3, which traces how fixations with Class A crimes have become part of Japan’s war time narrative and the memorialization of the trials. Pal of course, was not the only one who dissented in his separate opinion. However, the decision to focus on the Indian judge, instead of Justices Bernhard Röling and Henri Bernard, is because the latter two upheld the legitimacy of crimes against peace, even though they disagreed with how the charter criminalized it. Bernard felt that natural law did outlaw crimes against peace, and that many of the defendants were responsible for the “abominable” crimes committed by the Japanese army.<sup>78</sup> However, he “could not formulate a final opinion” on the charges because the “principal author” of the crimes, Emperor Hirohito, was absent from the defendant’s list.<sup>79</sup> Röling felt that aggressive war was not an illegal act at the time the war began but he believed that in this case, the tribunal being *ex post facto* law did not mean it was dismissible as the defence council argued. Rather, it was a new law that the Allied Powers had the right to invoke in the name of word peace.<sup>80</sup> While these opinions are noteworthy, neither judge has had the impact Radhabinod Pal has on the memorialization of Japanese war crimes. What this chapter seeks to illustrate, is that not only were the anxieties over Class A crimes more widespread

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<sup>78</sup>Henri Bernard, “Dissenting Opinion of the Member from France,” in *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, ed. Bernard V.A. Röling and C. F. Rüter, vol. 1, 2 vols. (Amsterdam: APA-University Press Amsterdam, 1977), 496.

<sup>79</sup> Ibid

<sup>80</sup>Bernard V.A. Röling, “Opinion of the Member from the Netherlands” in *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, ed. Bernard V.A. Röling and C. F. Rüter, vol. 2, 2 vols. (Amsterdam: APA-University Press Amsterdam, 1977), 1059.

than initially assumed by some scholarship, but that discussions surrounding the prosecution of aggressive war at Tokyo set the tone for the future historiographical and public debates surrounding ‘victor’s justice’ at the IMTFE.

#### An Interview with a War Criminal

Guided by the Tokyo Charter, the IPS was first and foremost interested in pursuing an agenda of Class A crimes. According to the Charter, a defendant had to be charged with crimes against peace to activate court jurisdiction over Class B and C crimes.<sup>81</sup> In fact, according to a document sent from the British Secretary of State for Dominion Affairs to the New Zealand government, the United States had not intended to even include Class B and C crimes in the IMTFE Charter until Britain objected to this decision.<sup>82</sup> For the most part, the decision to make Class A crimes mandatory for indictment was not a challenging issue; almost all of the defendants were of high enough rank or government position that it was plausible that they would have been at least aware of any plan to wage aggressive war. However, in the case of Matsui Iwane, the decision to press Class A charges is unique. Matsui was in charge of the Japanese expeditionary force in China and responsible for capturing cities including Shanghai and Nanjing during the Sino-Japanese war. He was also in command of both cities when the Japanese army committed some of its worst atrocities there. Matsui was therefore charged with conspiring to murder on a wholesale scale, prisoners of war and civilians generally under Japan’s control (count 44), as well as in specific Chinese cities, like Nanjing (count 46). He was also charged with the third group of indictments, which were combined Class ‘B/C’ crimes (count 54, 55). However, the additional Class A charges he faced included not just participating in the overarching conspiracy (count 1)

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<sup>81</sup> Cryer and Boister, “Charter of the International Military Tribunal for the Far East.” 7–11.

<sup>82</sup> Secretary of State for Dominion Affairs to Minister for External Affairs New Zealand, January 18, 1946, File no EA 106/3/22, part 1, Archives New Zealand, as cited in Boister and Cryer, *The Tokyo International Military Tribunal*, 25.

and waging war against China (count 27), but also waging and planning war against the United States, Portugal, the British Commonwealth, the Netherlands, Thailand, the Philippines, the Soviet Union and France (charges 2-11, 16, 17, 19, 25-32, 34-36).<sup>83</sup>

The link between General Matsui and some of the crimes against peace charges were tenuous—at best—despite his role in the Nanjing Massacre. As Matsui did not directly participate in war theatres outside of China, the only possible link he would have with those charges was the two years he spent on the Cabinet Advisory Council. The prosecution’s reasoning for Matsui’s inclusion as an archcriminal conspirator was that “since he occupied no position where he could cast a vote to determine aggressive policies, his indictments must rest upon his part in carrying them out.”<sup>84</sup> The judges also seemed to consider Matsui’s inclusion on the Class A charge list an overreach; they only found him guilty on counts 54 and 55, Class B/C war crimes. His case reveals some of the grey areas regarding the realities of prosecuting with a mandatory requirement of crimes against peace.

Many of the IPS case files document multiple conventional war crimes and crimes against humanity, which is surprising given that only ten of the defendants were found guilty of Class B/C crimes. There were numerous case files devoted to the ‘Nanking Incident’ and there were several lists of witnesses who were gathered to give testimony about atrocities in China and the Philippines.<sup>85</sup> Furthermore, the IMTFE heard evidence on Class B/C crimes that was not only provided by the American prosecution, but also by other Allied countries. For example, the

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<sup>83</sup> “International Military Tribunal for the Far East: Full Indictment List,” 1946, Tavenner Papers and IMTFE Official Records, Box 1, Indictments Folder, University of Virginia Law Library, <http://imtfe.law.virginia.edu/collections/tavenner/1/2/full-indictment>.

<sup>84</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 57.

<sup>85</sup> See International Prosecutor’s Section, “Case #449 Nanking Incident,” in *Kokusai Kensatsukyoku (IPS) Jinmon Chōsho*, ed. Yoshida Yutaka and Kentarō Awaya, vol. 50, 52 vols. (Tokyo: Nihon Tosho Senta, 1993). and “Case #378 Witnesses,” in *Kokusai Kensatsukyoku (IPS) Jinmon Chōsho*, ed. Yoshida Yutaka and Kentarō Awaya, vol. 45, 52 vols. (Tokyo: Nihon Tosho Senta, 1993).

Chinese prosecution presented mainly on the Nanjing Massacre, but also conventional war crimes inflicted on soldiers.<sup>86</sup> It also brought forward a significant body of evidence regarding Japan's role in supporting the trade in opium and other narcotics in China. The Netherlands showcased evidence of the Japanese military practice of forcing Dutch and Indonesian women into sexual slavery and the British Commonwealth brought to the stand Vivian Bullwinkel, an Australian nurse who was the only survivor of the Banka Island massacre in 1942.<sup>87</sup> However, cases like these do only represent a fraction of what the IMTFE and the IPS spent its time on; the dominant focus at Tokyo remained Class A crimes. After all, the prosecution had to prove that most of the defendants had conspired, organized, instigated or waged wars of aggression between 1928 and 1945.

In its quest to extract the answers that best suited the Allied narrative of Japanese aggression and the American occupation agenda, the IPS used a variety of questionable interrogation tactics to solicit the answers they wanted from suspects. This included using leading questions and pointed statements to essentially coach the subject of interrogation to give the desired answers. When reading some of these interrogations, it is not difficult to see why one might be concerned over the quality of justice administered at the IMTFE. The IPS also spent much of their time wrapped up in muddy, pre-war Japanese politics. As John Dower put it, this often meant arguing that Japan had been “led into ‘aggressive militarism’ by a small cabal of irresponsible militaristic leaders”.<sup>88</sup> Kido Kōichi, the former Privy Seal to the Emperor, was at the center of this

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<sup>86</sup> Pritchard and Zaide, *The Tokyo War Crimes Trial*. vol 2.

Note: it should be noted that when referring to Chinese soldiers, it was usually ones that supported the Nationalist government, not the Communist army. As Chiang Kai-shek controlled what was presented by the Chinese at the IMTFE, many communist supporters were erased from the Chinese narrative of victimhood while he was in power.

<sup>87</sup> Totani, 152, 165, 176.

<sup>88</sup> Dower, *Embracing Defeat*, 480. Note: In addition to compellingly arguing against this viewpoint, Dower's work also reveals some of the ways Japanese elites influenced the IPS by pushing viewpoints like the “Konoe

conspiracy. Kido was responsible for protecting Hirohito from indictment, providing names to the IPS for the Class A defendants list, and generally pushing forward this ultra-nationalist military version of events. There was some truth to these accusations since many of the defendants had belonged to some of the military factions that struggled for control of the Japanese government in the pre-war years. The problem was this narrative was sometimes used as misdirection to protect other potential war criminals, like the Emperor. Some former faction members also used the IMTFE as an opportunity to save themselves and accuse enemies, becoming collaborators with the IPS.<sup>89</sup> In many ways all these jostling political agendas made Kido a perfect Class A defendant. Described by John Dower as a “cunning intriguer” who was ready to sacrifice himself to save the Emperor, Kido cooperated fully with the IPS; he singled out fifteen of the defendants who were later charged with waging aggressive war.<sup>90</sup> For example, part of the interrogation that took place on February 20, 1946, showcases many of the elements highlighted above. Kido and his interrogator were discussing some of the political uprisings and attempted military coups against the civilian government that occurred during the early 1930s:

Q: It’s true though isn’t it, that the immediate desire of both [military] factions, although they differed in how to accomplish it, was for the military to obtain control of the Government. That is true, isn’t it?

A: Yes, generally so.

Q: In their long-range plan, both factions were thinking in terms that after they had obtained control of the Government and had built up the military power they were seeking to acquire, they then desired to have Japan expand further into Manchuria and China. Wasn’t that their long-range [plan]?

A: I don’t believe they had a long-range plan in that respect but the young officers were indignant of the fact that their preparations were insufficient.

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Memorandum”. In doing so, they helped shape not only the defendants list but also the entire direction of the prosecution. See 480-5

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

Q: Don't you think it was in their planning that they wanted the country to become strong in a military sense so that they could have a show-down on China affairs which were always embarrassing through these various incidents. They wanted a sufficient force in order to make demands in China and if they weren't carried out, they could move in with their military for force and settle it.

A: Such is the indication but I don't know if they had plans.<sup>91</sup>

After a few more questions about the specific military leaders involved in the 'February 26<sup>th</sup> Incident' of 1936—one of the attempted coup d'états by military factionalists—the interrogator asked: "But the real purpose of the military group we have been talking about was to build up sufficient military and governmental strength so that an aggressive foreign policy could be adopted with reference to China and Russia. Is that correct?"<sup>92</sup>

For the most part Kido responded positively to the leading questions his interrogator was asking and focused specifically on Class A crimes, naming those he claimed were linked to the military and government's 'aggressive foreign policy'. Most lines of inquiry were more about what he could confirm was happening around him than what he did, even though he was later found guilty of the Class A counts 1, 27, 29, 31, and 32, and sentenced to life imprisonment.<sup>93</sup> Kido also submitted his wartime diaries as evidence, which would be used against him and many of the other defendants during the interrogation and trial phases. While much of the interrogation of Kido was focused on crimes against peace, the great care Kido and the IPS took to avoid implicating the Emperor in any allegations of war crimes was clear. For example, below is a rather eyebrow raising excerpt from an interrogation on February 25, 1946. It illustrates the ways in which the

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<sup>91</sup> International Prosecutor's Section, "Case #5 Kido Kōichi: Interrogation, February 20, 1946, 1345-1530, Sugamo Prison, Tokyo," in *東京裁判 = Document the International Military Tribunal for the Far East (国際検察局(IPS)尋問調書)*, ed. Yoshida Yutaka and Kentarō Awaya, vol. 3, 52 vols. (Tokyo: Nihon Tosho Senta, 1993), 40–41.

Note: though it is unclear what specific incidents are being referred to here, it is most likely the events of the Manchurian Incident.

<sup>92</sup> *Ibid.*, 41.

<sup>93</sup> Pritchard and Zaide, *The Tokyo War Crimes Trial*. vol. 20, 49803-6



Emperor was erased from any potentially incriminating situations that would imply he might also be a Class A war criminal. More generally, it also exposes some of the questionable lines of interrogation the IPS was undertaking.

Q: The truth of the matter is that intelligent people, such as the Emperor and yourself, fully realized [by 1941] what was going on both in Manchuria and China was not strictly a self-defence operation. Is that true?

A: At the beginning I believe it was a matter of self-defence, but I believe it was utilized as a foothold for future development.

Q: Yes, I understand but you said the other day with reference to Manchuria, that you personally, and also the Emperor, felt in the early days that it was likely self-defence but there came a time in the Manchurian Incident when the expansion went so far that you fully realized it was no longer a matter of self-defence. Isn't that true?

A: Yes<sup>94</sup>

The IPS files provide an interesting picture of how SCAP prosecuted crimes against peace, and how these crimes were developed into the central component of the IMTFE. In some cases, like Kido Kōichi's, the prosecution found willing collaborators in Japanese officials and defendants. In other cases, like that of Class B/C war criminal Matsui Iwane, they found weak evidence to make what was arguably an insufficient Class A charge work. Each of these examples reveals the tensions and fragile links that held some of the Class A charges together. When these examples are considered together with several of the judges' misgivings about the tribunal, they do paint a rather bleak picture of the IMTFE.

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<sup>94</sup> International Prosecutor's Section, "Case #5 Kido Kōichi: Interrogation, February 25, 1946, 0930-1600, Sugamo Prison, Tokyo," in *東京裁判 = Document the International Military Tribunal for the Far East (国際検察局(IPS)尋問調書)*, ed. Yoshida Yutaka and Kentarō Awaya, vol. 3, 52 vols. (Tokyo: Nihon Tosho Senta, 1993), what page 81-82.

### The Silent Dissenters

In 1983, Tokyo hosted an international symposium to re-examine the IMTFE and its legal and historical legacy. The Dutch Justice Bernhard Röling, a well-known figure within the ‘victor’s justice’ debate due to his dissenting opinion and continued publications on the trial, was the guest of honour. At the symposium, which boasted an impressive guest list of respected historical and legal scholars, the ‘victor’s justice’ debate created such heated discussions that at times the moderators had difficulty reigning in the participants.<sup>95</sup> However, one of the most interesting comments during the conference did not mention ‘victor’s justice’ at all. When presenting an overview of the historical importance of the IMTFE, R. John Pritchard concluded that he would not “speak of their [the judges] various findings” as they were “in general a matter of public record, to be read either in their majority judgement or through their separate opinions.” Pritchard did acknowledge that the trial transcripts only give a “glimpse” of the views some of the justices.<sup>96</sup> This is partially because Justice Webb functioned as the dominant voice of the bench; the Australian judge was literally the only one on the panel with a microphone.<sup>97</sup> As a result, most of the other judges rarely engaged directly with the court, making whatever glimpses the transcripts can give very brief indeed. The issue with this is that further research reveals that some of the justices’ personal opinions on the trial and its findings were very different from the majority opinion that they endorsed. Many of these opinions were not publicly announced but rather expressed privately in diaries, to colleagues, or in stern letters back to their home governments. While the majority opinion judges did one way or another, support and believe in the concept of Class A crimes, many were dismayed by how the Allied forces chose to pursue these charges, and

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<sup>95</sup> For example, Chihiro Hosoya, ed., *The Tokyo War Crimes Trial: An International Symposium*, 1st ed (Tokyo : Kodansha Ltd., 1986). 110-114.

<sup>96</sup> R. John Pritchard, “An Overview of the Historical Importance of the Tokyo War Trial,” in *The Tokyo War Crimes Trial: An International Symposium*, ed. Chihiro Hosoya, 89–101, 91-2.

<sup>97</sup> Trotter, 83.

the impact this might have on the ultimate legacy of the IMTFE. The following sub-sections chronicle some of these opinions, to highlight some of the more unfamiliar dissenters of the IMTFE.

*Justice John P. Higgins, the United States*

Justice Myron C. Cramer was not the first American Judge at the Tokyo Tribunal, though he did see the trial through to its conclusion in 1948. The position was first briefly held by John P. Higgins, Chief Justice of the Massachusetts Superior Court. The original appointment of Higgins was not well received by some of the prosecution, particularly Chief Prosecutor Joseph B. Keenan. The head of the IPS had wanted someone of higher stature than a state judge and sent several scathing telegrams protesting this choice, in his ‘notoriously frank’ manner.<sup>98</sup> Despite these complaints, Higgins was approved by SCAP and arrived in Tokyo in March 1946. However, a few months later Keenan got his wish when the American judge resigned in June, citing an “imperative” need to return to his duties in Massachusetts. The official narrative given was that since the trial was stretching on longer than anticipated, he could not be away from his office for this extended length of time.<sup>99</sup> However, the decision created a minor headache for SCAP; both the British and New Zealand governments privately made it clear to the Americans that they found the appointment of Cramer as a replacement judge, “distinctly disturbing to their governments”.<sup>100</sup> Furthermore, the replacement of justices was regarded as an unusual legal move, causing the two

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<sup>98</sup> Brackman, 69-70.

Note: To say Keenan was disappointed in Higgin’s appointment was perhaps an understatement. He sent numerous cables to the War Department, describing the choice as “out of line” and a “distinct embarrassment”. See Yuki Takatori, “The Forgotten Judge at the Tokyo War Crimes Trial,” *Massachusetts Historical Review* 10 (2008): 115–41, 119.

<sup>99</sup> “Quits Tokyo War Court: Higgins Pleads Urgent Duties on Massachusetts Bench,” *New York Times*, June 25, 1946, <http://search.proquest.com/hnpnewyorktimes/docview/107519380/abstract/2B14B77A37C94C35PQ/5>.

<sup>100</sup> “Memorandum by the Assistant Secretary of State (Hilldring) to the Legal Advisor (Fahy), July 25, 1946”, *FRUS, 1946*, volume 8, The Far East, doc343, (Washington: Government Printing Office, 1969), U.S. Department of State. <https://history.state.gov/historicaldocuments/frus1946v08/d343>.

governments to warn that it might “discredit the findings of the Tribunal on legal grounds”.<sup>101</sup> They told the United States that they would not formally object to Cramer but it seems that their concerns led the legal advisor for the State Department to issue a memorandum, explaining the legal justification for appointing a new judge.<sup>102</sup>

The journalist Arnold Brackman, who interviewed multiple members of the prosecution and defence after the trial concluded, painted a less diplomatic picture of the chaos that ensued after Higgins’s resignation. On July 5, 1948 a meeting at the IPS turned into a “dreadful row” as prosecutors from Canada, New Zealand, Australia and the Netherlands argued that SCAP had no authority to replace a member of the bench.<sup>103</sup> The Americans, Soviets and Chinese retorted that if Higgins’s seat was not filled, it would embarrass the IMTFE, which the United States was fully financing. Ultimately, it was agreed upon that it was in everyone’s best interest if Higgins did not resign, though his refusal to rescind his decision meant that this was impossible.<sup>104</sup> Therefore, alternative arrangements were made, and Higgins quietly returned to Massachusetts, where he continued to serve as the head of the Massachusetts Superior Court until his sudden death in 1955. It is understandable that Higgins’s main reason for departing was the expected timeline of the trial. Two years is a considerable amount of time to be away from the office, and a considerably longer time than Higgins had originally been led to expect. Furthermore, his replacement to the Superior Court died suddenly a few weeks into the Tribunal. It did not help either, as Arnold Brackman uncovered, that someone had leaked Keenan’s furious cables to Higgins.<sup>105</sup> Higgins

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<sup>101</sup> Ibid.

<sup>102</sup> “Memorandum by the Legal Advisor (Fahy), August 5, 1946”, *FRUS, 1946*, volume 8, The Far East, doc344, (Washington: Government Printing Office, 1969), U.S. Department of State. <https://history.state.gov/historicaldocuments/frus1946v08/d345>.

<sup>103</sup> Brackman. 132.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid, 131, 133.

embarrassment over the situation could have been one of the central reasons for resigning. There is also evidence that Higgins saw the IMTFE as shaping up to be a “great failure” and wished to depart from the justices’ bench to avoid becoming further entangled in such a mess.<sup>106</sup>

Throughout his brief tenure at Tokyo, Higgins repeatedly expressed his own disenchantment with the IMTFE. According to Aristides Lazarus, one of the tribunal defence lawyers later interviewed by Arnold Brackman, when Higgins privately visited the defence team to inform them of his departure he told them that he considered the trial a farce and congratulated them on the fight they were giving the prosecution.<sup>107</sup> Unfortunately, Higgins told them, he could not wait the two years he suspected it would take for the trial to end, but that if any of the defence ever quoted him publicly he would deny having made such remarks.<sup>108</sup> Despite generally praising the defence, some of his most serious misgivings about the trial revolved around specific American defence lawyers, some of whom he thought were completely unsuitable for their role at the IMTFE. “Unless good lawyers [are] found soon, God bless the Japanese defendants”, he once wrote in his diary.<sup>109</sup> His driver in Tokyo, Carlo Mantini, even recalled once Higgins confided in him that: “the Japanese are being railroaded. I don’t want to be a part of this.”<sup>110</sup>

Yuki Takatori raised the question of how different would the IMTFE verdict have been if Higgins had stayed on, in her article “The Forgotten Judge at the Tokyo War Crimes Trial”.<sup>111</sup> After all, in addition to being critical of the IMTFE and its agenda, Higgins was a former

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<sup>106</sup> Yuki Takatori, “The Forgotten Judge at the Tokyo War Crimes Trial,” *Massachusetts Historical Review* 10 (2008): 115–41, 128.

Note: Takatori’s paper, chronicling the decision of Higgin’s to leave Tokyo, makes excellent use of Higgins’s private journals and correspondence.

<sup>107</sup> Brackman, 133.

<sup>108</sup> *Ibid.*

<sup>109</sup> John P. Higgins, diary, June 4, 1946, private collection, quoted in Takatori, “The Forgotten Judge”, 130.

<sup>110</sup> Carlo Mantini, interview by Yuki Takatori, March 2, 2002, quoted in Takatori, “The Forgotten Judge”, 130.

<sup>111</sup> Takatori, “The Forgotten Judge”, 137-8.

Democratic senator, and generally a more liberal leaning judge than his replacement, a conservative military judge. Based on the comments he made, there is also a chance he would have desired to write a separate opinion questioning the legal integrity of the trial, as some of the other judges on the bench decided to do. Though it seems unlikely that SCAP or the United States' government would have allowed that, as Takatori pointed out, such an outcome "would have been a devastating statement coming from the judge representing the United States."<sup>112</sup> Despite documents unearthed by historian Bradley F. Smith—which reveal that Cramer was initially concerned about the legality of Class A crimes before finally accepting aggressive war as a criminal act—Cramer ended up being one of the 'hanging judges' on the panel.<sup>113</sup> The second American judge voted for the death penalty in nine of the cases, though in the end only seven defendants were sentenced to this fate. The death sentence of career diplomat and former prime minister Hirota Koki was one of the more controversial sentences that was handed down; his fate was decided by a vote of six to five.<sup>114</sup> Regardless of the possibilities of what could have been, it remains interesting to note that Justice Higgins was not an avid supporter of the IMTFE and this was likely one of the contributing factors that led to his early departure from the IMTFE. In any case, the 'forgotten judge' remains largely absent from discussions surrounding 'victor's justice' and the IMTFE.

*Justice E.H Northcroft, New Zealand and Lord William Patrick, Great Britain*

Erima Northcroft and William Patrick developed a close friendship over the course of the IMTFE. The two Commonwealth judges had quite a few similarities and areas of common ground: both were educated in the British common law legal system as opposed to the Continental civil

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<sup>112</sup> Ibid, 136.

<sup>113</sup> Bradley F. Smith, *The Road to Nuremberg* (Basic Books, 1981), 80-6.

<sup>114</sup> "How Trial Judges Voted," *Nippon Times*, December 10, 1948, quoted in Takatori, "The Forgotten Judge", 136.

tradition, and they were only five years apart in age. Each had seen action during the First World War: Northcroft as an artillery officer and Patrick as a flight commander who was shot down behind enemy lines.<sup>115</sup> Together, the two rented a cottage on Chuzenji Lake, about two hours north of Tokyo in the Nikko Hills. The two men used the property as an escape from the tribunal and were apparently quite fascinated by the autumn colours and Japanese countryside.<sup>116</sup> It appears that both professionally and privately, they formed a deep bond over the course of the tribunal.

Therefore, it is not surprising that Northcroft once summarized his working and personal relationship with his British counterpart as the “United Kingdom-New Zealand bloc of two.”<sup>117</sup> Other justices like Pal and Webb, are often remembered as solitary figures with few allies on the bench due to their dissenting opinions and strong personalities.<sup>118</sup> Northcroft and Patrick on the other hand, took the same political and legal stances throughout the tribunal. Together with Justice McDougall, they formed the foundation of the majority opinion. These three men also became something of a clique, frequently at odds with others on the bench and collaborating to push their own agendas. For example, the group is suspiciously linked to the decision to temporarily recall Justice Webb to Australia, removing him as head of the judges’ panel. Though originally Northcroft received Webb’s appointment as Chief Justice positively, he later called the Australian “brusque to the point of rudeness” and described Webb’s behaviour towards the defence council and witnesses as “peremptory and ungracious”.<sup>119</sup> This could be dismissed as a clash of egos,

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<sup>115</sup> David Smith, “Bench and Bar 1928-1950,” in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, ed. New Zealand Law Society and Robin Cooke (Wellington, Auckland: Reed, 1969), 125; “Lord Patrick Senator of College of Justice,” *The Times*, February 18, 1967, sec. Obituaries.

<sup>116</sup> Smith, “Bench and Bar 1928-1950”, 126.

<sup>117</sup> “Letter from Northcroft to Sir Michael Myers, September 19, 1946” quoted in Trotter, 83.

Note: Trotter extensively details actions in Tokyo through the judge’s correspondence with his government and colleagues back home.

<sup>118</sup> Note: This theme is present consistently throughout the literature, especially concerning Webb. See Totani and Minear for examples.

<sup>119</sup> *Ibid*, 83-4.

however as previously pointed out, the Australian justice was not always the most agreeable in some of his interactions with the court. On at least one occasion, altercations between Webb and the American defence council ended with an attorney being ejected from the proceedings.<sup>120</sup>

Lord Patrick also found Webb to be incapable, and privately expressed to the British government his own misgivings about “the quick-tempered bully”.<sup>121</sup> These comments support the suspicions of some historians that Patrick and Northcroft were involved in the push to get Justice Webb expelled from the bench. In October 1947, Canberra suddenly recalled its judge, citing an immediate need for him to resume his duties at home. Though SCAP was successful in bringing Webb back to Tokyo two months later, perhaps it is no coincidence the recall came only two months after the Prime Minister of New Zealand relayed Northcroft’s complaints to the Australian Government. Lord Patrick also bitterly complained about Webb to his own government, which caused discussion in the Lord Chancellor’s office about a possible recall of the Australian judge.<sup>122</sup> McDougall too, voiced concerns to the Canadian government though it does not appear that the Canadian government ever acted on these concerns.

The issues amongst the members of bench continued to grow as the trial stretched on, exacerbated by the fact that several judges openly broke away from the group to write their own verdicts. Justices Webb, Jaranilla, Bernard, Röling and Pal were all writing separate opinions by summer of 1948, each coming to different conclusions on issues like guilty verdicts, tribunal authority, and jurisdiction. Patrick and Northcroft however, saw the tribunal as bound to the Charter, which made it a valid extension of international law and beyond the reproach of the judges’

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<sup>120</sup> Brackman, 339-40.

<sup>121</sup> “Memorandum by Lord Patrick enclosed from Lord Normand to Lord Jowitt, February 5<sup>th</sup>, 1947. LC02 2992, Public Records Office, United Kingdom, quoted in Boister and Cryer, *The Tokyo International Military Tribunal*, 99.

<sup>122</sup> Trotter, 88; Boister and Cryer, *The Tokyo International Military Tribunal*, 94-5.



bench.<sup>123</sup> The Scottish judge also considered it “rank dishonesty” that Pal accepted a position on the bench when he openly acknowledged to the other judges that he did not believe in the legitimacy of Class A war crimes or authority of the charter. Northcroft felt similarly, voicing his own opinion that Pal should have voluntarily withdrawn from the trial.<sup>124</sup>

This difficult situation ultimately proved too much for Northcroft. He sent a letter home to his government, requesting permission to resign. In the letter, Northcroft confirmed that Patrick had given him permission to disclose that the Scottish judge was in complete agreement and had also issued a threat of resignation to his own government. The trial, Northcroft wrote, was almost certainly going to prove “futile, valueless, or worse.”<sup>125</sup> “If a Court of this standing is seriously divided, and I’m sure it will be,” he continued, foreshadowing the fractured verdict, “then modern advances in international law towards the outlawry of war may suffer a serious set-back.”<sup>126</sup> Patrick and Northcroft were supported by MacDougall, who sent his own letter threatening resignation to his government. Despite these heavy threats, the majority clique’s rebellion was killed in the cradle. Northcroft was firmly told that he could not resign, as it would not only give the defendants a possible legitimate cause for grievance, but it was New Zealand’s duty to avoid scandal. If, as Northcroft suggested, the British, Canadian and New Zealand representatives resigned, it would bring American anger and accusations of sabotage down on the Commonwealth governments.<sup>127</sup>

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<sup>123</sup> Trotter, 86-7.

<sup>124</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 98.

<sup>125</sup> “Letter from Northcroft to Humphrey Francis O’Leary, Chief Justice, March 18, 1947 (Ministry of Defence Files), quoted in Trotter, 87.

<sup>126</sup> Ibid.

<sup>127</sup> “Letter from Sir Michael Myers to Northcroft, April 24, 1947. Doc. No. 707” in *Documents on New Zealand External Relations Volume II: The Surrender and Occupation of Japan*, ed. Robin Kay (Wellington: P.D. Hasselberg, Government Printer, 1982), 1667-8, quoted in Trotter, 87-8.

Justice Northcroft did seem to genuinely believe in the legitimacy of Class A crimes, despite his anxieties over the legacy of the IMTFE. He especially understood the tensions surrounding the prosecution of aggressive war. In a 1949 letter to the Prime Minister of New Zealand he wrote: “[t]he Nuremburg and Tokyo Tribunals were *ad hoc* bodies created to supply the want of any appropriately established tribunal...The establishment of a permanent international criminal court [should] be regarded as a matter of urgency.”<sup>128</sup> This comment is particularly revealing, as it seems that not only was Northcroft aware that critics of the IMTFE were dismissing the trial as illegal but that on some level he felt similarly. He seemed to understand that if the Tokyo Tribunal was not immediately followed by a validating institution like the International Criminal Court, its verdict would be in jeopardy of being dismissed as impartially constituted, and forever dogged by accusations of ‘victor’s justice’.<sup>129</sup> Though perhaps not as vocal in their misgivings as Higgins, Patrick and Northcroft still provide insight into some of the prevailing criticisms and anxieties regarding the tribunal at the time of its proceedings. Not only were concerns about Class A crimes and ‘victor’s justice’ present amongst those who wrote dissenting opinions, but also among those who supported the majority judgement. Furthermore, as mentioned above, Patrick and Northcroft were not alone in these fears; Canadian Justice McDougall was also concerned with the legacy of the trial and the toll that disagreements over Class A crimes was having on the judges’ bench.

*Justice E. Stuart McDougall, Canada*

Like some of the other justices on the bench, E. Stuart McDougall was not his country’s first choice for a seat at the IMTFE.<sup>130</sup> The Canadian government struggled to find a judicial

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<sup>128</sup> “Northcroft to Peter Fraser, March 17, 1949, Doc. No. 739 in Kay, 1736-7, quoted in Trotter, 91.

<sup>129</sup> Ibid, 1736-7, [see n.57].

<sup>130</sup> Note: Higgins left prematurely, and France also selected a different judge before sending Bernard.

candidate who was also a military officer of major-general or higher rank, as the Americans requested. Eventually, Ottawa proposed a compromise that the nominee be someone with a military background who had served as an officer.<sup>131</sup> The two finalists—John Andrew Hope and John Keiller Mackay—were proposed based on these requirements, with Hope eventually being selected. However, at the last minute the Ontario Chief Justice torpedoed the appointment, claiming that Hope was too essential to be parted with.<sup>132</sup> Despite not being one of the original finalists, McDougall was quickly appointed as a substitute, and arrived in Tokyo in March 1946.

Though he may be a puzzling final choice given he was absent from original selection process, McDougall proved to be an important member of the IMTFE. He wrote significant portions of the final verdict and shaped many of the important decisions set before the judges. McDougall was also largely responsible for reducing the original 55 charges down to 17 and was generally quite respected by his peers at the tribunal.<sup>133</sup> Therefore, he gave the Canadian government a considerable headache when he threatened to resign from the IMTFE in March 1947, just shy of a year after the tribunal began. Written in unison with the rest of the majority clique's own letters home, McDougall paints a rather bleak picture for the trial's verdict and subsequent legacy. It's clear from the contents of the letter that McDougall, while bound to his duty to deliver a majority verdict, acutely understood what was at stake if the IMTFE could not shake off the issues that plagued the judges' bench: specifically, the schism between the vocal dissenters and the majority opinion judges regarding crimes against peace.

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<sup>131</sup> Yuki Takatori, "'Little Useful Purpose Would Be Served by Canada': Ottawa's View of the Tokyo War Crimes Trial," in *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*, ed. Kerstin von Lingen, *History of Warfare* 117 (Leiden: Brill, 2018), 148–66.

<sup>132</sup> "Letter from the Deputy Minister of Justice" RG25-A-3-b/3641/ File No. 4060-C-40, General Registry, LAC.

<sup>133</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 98-100.

Even with this sense of duty to his role as the Canadian voice on the judges' bench, McDougall did not cushion his blows when it came to his criticisms of the IMTFE. “[The United States] did not see fit to send qualified men to take charge of the preparation and handling of the case” he wrote, before continuing: “we have now reached the point where it is obvious that not only is the trial futile but that the final judgement will have the effect of detracting from, rather than adding anything useful to jurisprudence in International Law.”<sup>134</sup> McDougall also spent time criticizing Chief Justice Webb for his ineffectual leadership, though this is hardly surprising given how the rest of the majority clique described the Australian. He also attacks two unnamed members of the bench for taking the “extraordinary view” that aggressive war was not a crime.<sup>135</sup> The two members in question are almost certainly Justices Pal and Röling, as both openly questioned the pre-existing legality of Class A crimes and the tribunal's right to prosecute them in their separate opinions.

It is McDougall's predictions on the future legacy of the IMTFE and its ability to administer justice that are the most shocking, given his status as a majority verdict judge. He complained it was impossible for the final judgement to be anything “but a complete failure, even from a political point of view.”<sup>136</sup> Aware at this stage of the trial that the final verdict would not be accepted unanimously, his fear was that such a disunified judgement would make whatever contribution the IMTFE could make to international law so open to debate that any future international tribunal would be severely jeopardized. McDougall concluded his letter somberly by writing: “I now ask myself if I have not done my duty and am not entitled to be relieved of the responsibility of contributing on Canada's behalf to what I am convinced will be an international

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<sup>134</sup> “Letter to St. Laurent from Justice McDougall,” March 19, 1947, RG25-A-3-b/5762/ File No. 104-J.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

tragedy? I speak strongly because I feel strongly.” He further recommended that Canada withdraw itself entirely from the IMTFE, as it “will do credit to no nation” and only be used to “justify the vengeance of a successful belligerent.”<sup>137</sup>

The letter stunned the Canadian government. They did not know how to respond to the resignation threat, nor had they anticipated these kinds of criticisms from their judge. Ottawa reached out to London for advice and received the reply that it would be “unfortunate” if McDougall resigned, advising that he stay in Tokyo.<sup>138</sup> The High Commissioner for Canada cabled that he “was considering the position with the Foreign Secretary and Dominions Secretary, but as yet they do not see how our Government and our representatives can be extricated from an extremely unsatisfactory and embarrassing position.”<sup>139</sup> External Affairs also requested that Hume Wrong, the Canadian Ambassador to the United States, make discreet inquiries into the matter. Wrong wrote back that he had not learned much, which led him to believe that either there was no widespread concern amongst the Americans over the IMTFE, or they were just ignorant of the facts. “About the only fairly definite bit of information that we have developed about the proceedings relates to the competence of the Head of Prosecution, Mr. Keenan...he is a definite menace to the success of the trials,” Wrong concluded. In May 1947, three months after McDougall sent his scathing letter, Ottawa had still not responded. This caused McDougall to write another letter proposing that unless his health prevented it, he would “carry on” and “consider the matter closed”.<sup>140</sup> It is likely that after Northcroft and Patrick received their cease and desist orders, the

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<sup>137</sup> Ibid.

<sup>138</sup> “Telegram from the High Commissioner for Canada in Great Britain to SSEA”, June 12, 1947, RG25-A-3-b/5762/ File No. 104-J, Department of External Affairs Fonds, LAC

<sup>139</sup> High Commissioner for Canada in Great Britain to Secretary of State for External Affairs, 8 May 1947, RG15/89-90/029/42/104-5/5, quoted in Stanton, “Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal.”

<sup>140</sup> “Letter from McDougall to SSEA”, May 20, 1947RG25-A-3-b/5762/ File No. 104-J, Department of External Affairs Fonds, LAC

Canadian justice assumed his own protest would achieve little and quietly accepted his fate. Writing hastily in pencil at the bottom of the received letter, an unknown SSEA bureaucrat scrawled: “can we lay this matter to rest?”<sup>141</sup>

E. Stuart McDougall’s pronounced disillusionment with the IMTFE as well as his fears over how it would be remembered, have frequently been echoed by critics in the subsequent decades following the tribunal. Despite this, most of these critics have not read McDougall’s correspondence in full, and he remains one of the most under-discussed jurists of the Tokyo Tribunal. This is probably due to his prominent role as a majority opinion judge, but also because Canada’s role at Tokyo was widely overlooked in scholarship on the IMTFE until the 1990s.<sup>142</sup> Nevertheless, his correspondence provides valuable insight into some of the silent dissent within the majority verdict regarding the judicial schisms over Class A crimes, and how fears of ‘victor’s justice’ were significant issues even before the end of the trial.

#### Dissent in the Ranks: Opposition to the IMTFE amongst the Allied Powers

This section briefly traces some of the criticisms and concerns regarding the IMTFE of those outside the justices’ chambers. These views came from various groups involved in the IMTFE and the American occupation of Japan. Apart from defence lawyer Owen Cunningham, all the men below were complicit in the creation and continuation of the Tokyo Tribunal. Also, unlike Cunningham most chose to express their doubts quietly to their government or peers, sometimes only decades after the trial concluded. The purpose of this segment is not to imply that these men spoke for all their colleagues regarding widespread dissatisfaction with the IMTFE; nor

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<sup>141</sup> Ibid.

<sup>142</sup> See: Stanton, “Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal.”; Patrick Brode, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions 1944-1948* (Toronto: University of Toronto Press, 1997).

is it meant to provide a complete picture of dissent at the time of the trials. Such an objective, while admirable, is beyond the scope of this paper. It is only meant to highlight how criticisms of Class A crimes and ‘victor’s justice’ ‘gained currency’ long before the 1970s, and were not limited to a few loud voices of dissent, like the infamous Judge Pal.

### *Owen Cunningham*

Owen Cunningham was responsible for handling one of the more controversial charges present at the Tokyo Tribunal. The American Defence lawyer was in charge on handling count 5, conspiring with Germany and Italy to acquire complete domination of the world. He was also in charge of the defence for Ōshima Hiroshi, the Japanese Ambassador to Germany.<sup>143</sup> Cunningham’s courtroom strategy was to use vinegar rather than honey. His sharp tongue got him into more than one verbal altercation with Chief Justice Webb. Surprisingly, despite the courtroom hostility the two men were good friends outside of the trial. Cunningham later revealed that even though they “fought like tigers”, the two men maintained a warm correspondence well after they had each returned to their home countries.<sup>144</sup> Present for almost all the tribunal, Cunningham ran afoul of SCAP during the judgement deliberation period when he presented a scornful critique of the IMTFE to the American Bar Association. Asked to give a speech about the tribunal to the law group on September 7, 1948, Cunningham described the Tokyo Trial as a farce, claiming that the tribunal had been “reduced into a political football with eleven nations outdoing each other to air their international grievances.”<sup>145</sup> For Cunningham, the major issue of law was the concept of aggressive war, which he argued had never been defined or properly made punishable by law. The

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<sup>143</sup> Note: Ōshima was sentenced to life imprisonment and was one of the surviving prisoners paroled and granted clemency in the 1950s.

<sup>144</sup> Owen Cunningham, *Trial of Tōjō: Interview with Owen Cunningham*, side 2, the Iowa Oral History Project, 1975, Des Moines Public Library, Iowa, <http://archive.org/details/TrialOfTojoInterviewWithOwenCunningham>.

<sup>145</sup> Owen Cunningham et al., “Forum on War Crimes Trails,” *Proceedings of the Section of International and Comparative Law (American Bar Association)*, 1948, 30–47.

IMTFE was not a real trial, he concluded, but a “vehicle of vengeance and propaganda”.<sup>146</sup> Cunningham’s speech highlighted the messiness of attempting to wed vaguely worded laws like the Kellogg-Briand Pact with the settling armed conflicts after the fighting has ended. Despite all the Charter’s claims that its authority was based in pre-existing international law, most of those connections were vague enough to cause considerable debate. Calling the proceedings *ex post facto* law, hypocritical and a major evil, Cunningham continued: “the Tokyo Tribunal is not a part of any established judicial system, but it is a court improperly convened, administering an unlegislated, unprescribed and unauthorized death penalty. There is absolutely no basis for the Tokyo Trials.”<sup>147</sup>

Cunningham’s public speech was not well received when the SCAP learned of it. “Mocking Justice”, one headline from the Chicago Daily Tribune read in response to the speech; “day by day the scandal of the war crimes trails mounts. This time the 11 nation international tribunal trying 25 former Japanese leaders at Tokyo has made a mockery of justice” the article continued.<sup>148</sup> A secret tribunal meeting was held in response to the speech, ruling that Cunningham was indefinitely barred from the court. The defence lawyer claimed years later that he had not actually intended to create such a debacle, as he had originally believed the trial was going to end much sooner than it did. The judgement deliberation had been ongoing since April 1947, and he had not anticipated the process going on as long as it did. Despite the expulsion, when Cunningham returned to Tokyo to protest his ban he ran into Justice Webb, who cheekily told him “I thought it was a great speech”.<sup>149</sup>

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<sup>146</sup> Ibid, 32.

<sup>147</sup> Ibid, 35.

<sup>148</sup> “Mocking Justice,” *Chicago Daily Tribune (1923-1963)*, October 17, 1948.

<sup>149</sup> Cunningham, *Trial of Tōjō: Interview with Owen Cunningham*, side 2.



### *The American Military Occupation*

A few military officials involved in the American occupation also expressed objections over the Tokyo Tribunal. This is unsurprising, as they were all individuals who could potentially find themselves in similar positions to the defendants if crimes against peace became consistently enforced in future conflicts. General Willoughby, or “my pet fascist” as MacArthur was fond of calling him, was GHQ’s chief of intelligence.<sup>150</sup> He was also the man supposedly responsible for giving the leaders of the Unit 731, the Japanese army’s biological warfare unit, immunity in exchange for data on their research involving human experiments.<sup>151</sup> Willoughby was also Justice Röling’s tennis partner. Years later, the Dutch judge recalled Willoughby telling him that “the trial was the worst hypocrisy in recorded history.”<sup>152</sup> He even told Röling that the IMTFE was the reason he forbade his son from joining the military. If the tables were turned, Willoughby argued, America would have fought just like Japan had.<sup>153</sup>

Brigadier-General Elliot Thorpe, the man responsible for compiling the list of Class A criminals, also privately expressed disappointment in the Tokyo Tribunal. He once described the whole affair as “mumbo-jumbo” and an act of revenge. He admitted years after the trial that: “I still don’t believe that was the right thing to do. I still believe it was an *ex post facto* law. They made up the rules after the game was over, so we hanged them because they used war as an instrument of national policy.”<sup>154</sup> Another General, WM C. Chase remarked, “we used to say in

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<sup>150</sup> Andrew Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (New York: Oxford University Press, 2009), 237.

<sup>151</sup> Daqing Yang, “Documentary Evidence and the Studies of Japanese War Crimes: An Interim Assessment,” in *Researching Japanese War Crimes Records: Introductory Essays*, ed. Edward J. Drea (Washington, DC: Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, 2006), 37.

<sup>152</sup> Bernard Victor Aloysius Röling and Antonio Cassese, *The Tokyo Trial and beyond: Reflections of a Peacemaker* (Cambridge, UK: Polity Press, 1993), 85.

<sup>153</sup> *Ibid.*

<sup>154</sup> “Oral Reminiscences of Brigadier-General Elliot R. Thorpe”, May 29, 1977. RG 49, box 6, MacArthur Memorial, Norfolk, Virginia, 10-12, quoted in Dower, *Embracing Defeat*, 452.

Tokyo that the U.S. had better not lose the next war, or our generals and admirals would all be shot at sunrise without a hearing of any sort.”<sup>155</sup> It is interesting that none of these men, not even Cunningham, mention Class B or C crimes in their critiques of the IMTFE. In fact, discussion on these charges amongst those criticizing the tribunal was conspicuously absent. Little Perhaps these critics also found it easy to forget that the trial covered crimes other than Class A charges when the focus was so heavily fixed on aggressive war.

#### The Vocal Minority: Justice Radhabinod Pal

Radhabinod Pal is a multifaceted and controversial figure within the IMTFE. A high court judge from Calcutta, Pal was an expert in international law and attacked everything about the tribunal, believing it to be an extension of hypocritical Allied colonialism and an attempt to retroactively apply new international laws to previous conflicts. This has led some, like Herbert Bix, to refer to the Indian judge as “an outright apologist for Japanese Imperialism”.<sup>156</sup> Absent for 109 out of 466 days of court proceedings, Pal apparently used to bow to the defendants when he entered the room, admiring them for ‘liberating Asia’ from Western colonialism.<sup>157</sup> He found all the defendants at the IMTFE not guilty in a separate opinion that was over 1,000 pages long, which concluded that the final verdict was rooted in politics, not international law or any Anglo-American conceptions of legal or juridical method. “It is said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing that the victor can not give the vanquished is justice”, he wrote in his final verdict.<sup>158</sup> While Pal did write that there was no doubt

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<sup>155</sup> William Curtis Chase, *Front Line General: The Commands of Maj. Gen. Wm. C. Chase: An Autobiography* (Houston: Pacesetter Press, 1975), 144, quoted in Dower, *Embracing Defeat*, 627, n.15.

<sup>156</sup> Bix, 595.

<sup>157</sup> Ibid, 596.

<sup>158</sup> Radhabinod Pal, “Judgement of the Member from India” Bernard V.A., *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948*, ed. Röling and C. F. Rüter. vol. 2, 2 vols. (Amsterdam: APA-University Press Amsterdam, 1977), 1036-7.

that the conduct of Japanese soldier in Nanjing was “atrocious” and “fiendish”, he decided that most of the witnesses called before the court regarding the massacre seemed overzealous and exaggerated the facts. General Matsui, he believed, had at least tried to end the massacres and therefore had done due diligence. Pal argued in his separate verdict that the ones who physically committed those terrible brutalities were not before the court and therefore not under consideration.<sup>159</sup>

Despite Justice Pal’s controversial opinions, there are important arguments within his verdict that are often neglected when he is dismissed as an apologist. While he may be “a poster child for Japanese nationalism” as Latha Varadarajan stated, he also had legitimate criticisms of the IMTFE and its colonial undertones.<sup>160</sup> Many countries that were victims of Japanese violence did not get a voice at the tribunal and instead were hastily organized as subheadings within their colonial rulers’ lists of grievances. Furthermore, even the assumptions that the IMTFE were based on were problematic; European imperialism was implicitly endorsed and codified into international law, but Japan was being punished by those same European powers for attempting to act similarly.<sup>161</sup> For the Allied Powers to assume that they existed within an international community based on equal humanity ignored the colonial elephant in the (court)room. Yet these truths do not detract from the fact that, as Varadarajan eloquently wrote: “Pal’s caustic criticism of imperialism suddenly disappears from the page when discussing Japanese policies in occupied

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<sup>159</sup> Ibid, 984-5.

<sup>160</sup> Latha Varadarajan, “The Trials of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal,” *European Journal of International Relations* 21, no. 4 (December 1, 2015): 793–815, <https://doi.org/10.1177/1354066114555775>, 795.

<sup>161</sup> Gerry J. Simpson, “Chapter 2: Writing the Tokyo Trial,” in *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, ed. Toshiyuki Tanaka, Timothy L. H. McCormack, and Gerry J. Simpson (Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 81–92.

territories, be it China or the Philippines.”<sup>162</sup> In this regard, he certainly was something of an apologist.

Justice Pal has had significantly more influence on the legacy of the IMTFE than any other member of the judges’ bench. He is frequently cited by scholars and, as discussed in Chapter 3, his arguments are often directly cited in the debate over ‘victor’s justice’ and the IMTFE. However, he was not alone in his criticisms and concerns, despite that fact that he was critical for different reasons than most of the others focused on in this chapter. In fact, so many of those directly involved with the IMTFE had misgivings about the trial that it is fair to wonder if such disillusionments did not help shape the Tokyo Tribunal’s lack of historical prominence in English language scholarship on the Asia-Pacific War. The sour taste the proceedings left in so many mouths might have made it easier to consign the IMTFE to what Arnold Brackman described as “the dust bin of history”.<sup>163</sup> If even those who participated in the legal processes of the tribunal shouted—or in some cases whispered—‘victor’s justice’, it can hardly be a surprise that this is one of the first avenues of inquiry that scholars often turn to when analyzing such a complicated historical legacy.

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<sup>162</sup> Varadarajan, 807.

<sup>163</sup> Brackman, 22.

## CHAPTER 2

### What We Talk About When We Talk About the Tokyo Trial: A Historiographical Analysis

*“To determine [the tribunal’s] historical significance has proved to be highly complex however, because there has been disagreement over the legitimacy of the Tokyo Tribunal as an impartial arbitrator of justice.”<sup>164</sup> -Yuma Totani*

Given the fact that discontent over the IMTFE amongst the members of the Allied nations was extensive, the lack of English language scholarship immediately following the tribunal’s conclusion is unsurprising. As lawyer Georg Schwartzenberger noted, the “legal standards—or their absence—of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment”.<sup>165</sup> A few vocal supporters did publish books in support of the IMTFE during the 1950s, for example, former prosecutors Joseph B. Keenan and Solis Horwitz.<sup>166</sup> Usually though, published discussion was for legal rather than historical scholarship. It was not until the 1970s, with Richard Minear’s greatly influential *Victor’s Justice*, that Western historians began to look more closely at the IMTFE. However, these early attempts to analyze the tribunal were often polarizing and played strongly into the dichotomies surround the ‘victor’s justice’ and Class A war crimes debates that developed during the trial. Furthermore, even with these new developments, the tribunal’s vast trove of documentation and records remained largely untouched outside Japan until the late 1990s and early 2000s.

That it has taken so long for the IMTFE to become more widely discussed as a historical subject would have no doubt been a disappointment to those who supported and organized the tribunal proceedings. The IMTFE was meant to be a historical record just as much as a legal one.

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<sup>164</sup> Totani, 2.

<sup>165</sup> Simon Chesterman, “Forward,” in *Trials for International Crimes in Asia*, ed. Kirsten Sellars (Cambridge [UK] ; New York: Cambridge University Press, 2015).

<sup>166</sup> See Keenan and Brown; Horwitz.

In the “determined battle for civilization” that the Allied powers were apparently fighting, at least according to the prosecutions opening statement, the Tokyo Trial was meant to stand as a recorded history of Japanese aggression and violence.<sup>167</sup> This narrative was specific and rigid in nature, leaving no room for any counternarratives that might have complicated the Allied “good war” myth with issues like Western colonialism or Japanese memories of victimhood. In contrast, the explosion of publications regarding the Tokyo Tribunal at the beginning of the twenty-first century has brought much needed and more nuanced perspectives to the field. Ground breaking books such as Madoka Futamura’s *War Crimes Tribunals and Transitional Justice: the Tokyo Trial and the Nuremburg Legacy* (2008), Neil Boister and Robert Cryer’s’ *The Tokyo International Military Tribunal: A Reappraisal* (2008), and Yuma Totani’s *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2009), have become the foundation of current scholarship. John Dower also belongs to this category for his influential work *Embracing Defeat* but his attention to the IMTFE is more a footnote than a primary focus.

Despite the nuance and quality research that recent works have injected into the field, they still operate, for the most part, within the confines of the ‘victor’s justice’ debate. Although Totani’s book provides valuable insights into the way this dichotomized narrative has eclipsed so many relevant lines of inquiry within the historiography of the IMTFE, none of these scholars are completely successful in escaping the long shadows of the ‘victor’s justice’. Whether intentionally or not, their concentration centers mostly on questions over the legitimacy of Class A war crimes and whether the accused received a fair trial from the victorious nations. While these are all valid

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<sup>167</sup> Pritchard and Zaide, *The Tokyo War Crimes Trial*. vol. 1, 383-4.

and crucial lines of inquiry, the historiography of the IMTFE has become overly occupied on these themes.

The question of whether or not the tribunal was an exercise of ‘victor’s justice’ is intrinsically linked to Class A war crimes. This debate has been directly inherited from the discontent regarding crimes against peace at the time of the Tokyo Trial and from dissenting opinions—like Justice Pal’s—which have been preserved within this discourse. By allowing this debate to become the dominant narrative, the handling of other crimes by the tribunal has become an underrepresented area in scholarship on the IMTFE. Furthermore, when Class B and C crimes are analyzed, accusations are frequently leveled that SCAP did nothing to prosecute many of the more heinous crimes committed by Japanese soldiers, including the sexual enslavement of Asian women. While it is true that the prosecution could have done more in this area, particularly in bringing forward evidence concerning Asian women in areas formerly occupied by Japanese colonial rule, this does not mean the IMTFE did not attempt to prosecute these kinds of crimes. The IPS and SCAP did heavily focus on Class A crimes but it also addressed some Class B or C crimes committed against Asian populations. The persistent myth that it did no such thing, is frequently used to validate accusations of ‘victor’s justice’. However, recent efforts within the scholarship are beginning to challenge these assumptions and complicate the pre-existing narratives of the trial.

The purpose of this chapter is to provide a brief chronological overview of some of the major influential works within the English language historiography of the IMTFE, as well as analyse how these works have addressed the issues outlined above. Some of the more current historiographical contributions that have been published in the wake of Boister and Cryer, Futamura, and Totani’s influential works have managed to successfully disentangle themselves

from ‘victor’s justice’ discourse. However, the majority are still wrapped up in discussions over the legitimacy of the trials, and how Class A crimes are involved with this. There is a pressing need to move beyond such limited scopes of inquiry, to create more robust and well -rounded scholarship on the IMTFE.

This chapter focuses almost exclusively on Western and English language scholarship as Japanese scholarship on the IMTFE is very different and not well-suited to generalized comparisons. It is true that at times Japanese academia certainly faces challenges from ultra-conservative Japanese nationalists who, in supporting apologist narratives, seek to ‘rescue’ Japanese history and disrupt the field with alternative narratives of the Asia-Pacific War.<sup>168</sup> However, for the most part Japanese historians have consistently and for much longer, been more nuanced in their approach to the tribunal than their Western counterparts.<sup>169</sup>

#### The 1970s and 1980s

Legal scholar Gerry Simpson once reflected that in order to study the IMTFE before John Pritchard and Sonia Zaide made the tribunal transcripts widely accessible, one had to read a book that would go on to “define the field for three decades.”<sup>170</sup> Simpson is not exaggerating the influence of Richard Minear’s book *Victor’s Justice*. When it was originally published in 1971, it was the only monographic treatment in Western academia on the Tokyo Trial.<sup>171</sup> Minear’s intention in *Victor’s Justice* was to “demolish the credibility of the Tokyo Trial and its verdict” by systematically attacking it from a legal and historical approach.<sup>172</sup> One of the main influences on

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<sup>168</sup> For example: Masaaki Tanaka, *What Really Happened in Nanking: The Refutation of a Common Myth*, 1st ed (Tokyo: Sekai shuppan, Inc, 2001); the collective works of Nobukatsu Fujioka, a University of Tokyo scholar and leader of the textbook revision movement.

<sup>169</sup> Note: for those interested, Yuma Totani’s book *The Tokyo War Crimes Trial* provides an excellent and extremely detailed analysis of the Japanese historiography of the IMTFE.

<sup>170</sup> Simpson, “Chapter 2: Writing the Tokyo Trial.”, 29.

<sup>171</sup> Minear, ix.

<sup>172</sup> *Ibid*, xvii.



Minear's book was the Vietnam War, a conflict which he felt was in many ways just an extension of the American imperialism that was present in Tokyo; he considered the book "political scholarship" and aligned himself within leftist political ideology. To say that *Victor's Justice* has nothing good to say about the IMTFE is perhaps an understatement. Minear believed that the only good that might come from the trial was the lessons that could be learned from it.<sup>173</sup> With an impressive underpinning of archival research, Minear systematically attacked every angle of the trial, from the more technical aspects of the legal process to the decision not to try the Allied Powers for war crimes too. He saved most of his scorn however, for the Class A crime 'conspiracy to wage aggressive war'. Minear completely eviscerated most of the charges dealing with aggressive war, calling them illegal and hypocritical.<sup>174</sup> His attention is so focused on this that he does not address the IMTFE's handling of Class B or C crimes with any real enthusiasm or depth.

Despite the three decades between its original publication and the subsequent reprint, the 2001 edition of *Victor's Justice* is virtually the same as its predecessor, the only difference being a new foreword in which Minear defended himself from critics that accused him of becoming an apologist for Japanese war crimes. The pairing of a leftist American professor with right-wing nationalist apologists from Japan certainly makes for odd bedfellows. However, although some of their arguments seem dangerously similar, Minear is not an apologist. He genuinely condemns the atrocities committed by the Japanese army and believes that trials prosecuting conventional war crimes can be valid. Still, despite these differences, he has not been able to shake his association with such political groups, much like the man he so admires, Radhabinod Pal.<sup>175</sup>

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<sup>173</sup> Ibid, xx-xxi, 177-8.

<sup>174</sup> Ibid, 170-180.

<sup>175</sup> Ibid, x.

This unfortunate comparison between Minear and far right Japanese apologists arises partially because Minear encourages the false dichotomy that plays into the hands of those who seek to politicize the Tokyo Tribunal for their own political agendas. He dismisses the Tokyo Trial as nothing more than undiluted exercise in power and political vengeance. Minear has refused to acknowledge, even in his 2001 reprint, that despite its flaws the IMTFE helped establish precedents that have become codified into international law. For example, command responsibility and the rejection of act-of state doctrine were all new concepts at the time but are now widely accepted legal norms. Minear's silence on these matters, as Japanese critic Okuhara Toshio noted, leaves readers with the impression that "this type of criticism can be considered valid even today."<sup>176</sup> The rigidity of *Victor's Justice* tempers some of its more valuable contributions to the scholarship on the IMTFE. Minear's viewpoint leaves no room for more nuanced views of the trial and exemplifies, as James Sedgewick rightly pointed out, "reductive binaries that permeate the literature."<sup>177</sup> The book has become a symbol of the historiographical fixation with Class A war crimes carried to its most extreme form.

Very little was published by Western scholarship regarding the IMTFE during the 1970s and 1980s in comparison to the tribunal's Nuremberg counterpart.<sup>178</sup> The works that were published all revolved around the same themes of reappraising the IMTFE's legal and historical legacy by placing their arguments within the pre-existing 'victor's justice' debates of their predecessors. Arnold C. Brackman's *The Other Nuremberg* was released in 1987, and despite

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<sup>176</sup> Okuhara Toshio, "Shōkai: Victor's Justice - The Tokyo War Crimes Trial," *Kokushikan Daigaku Seikei Ronsō*, no. 18 (June 1973): 349–63., 363, quoted in Totani, *The Tokyo War Crimes Trial*, 238.

<sup>177</sup> Sedgewick, 17.

<sup>178</sup> Note: Other notable works that were published during this period include: Piccigallo, *The Japanese on Trial*; Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarisation of Japan* (New York: Macmillan, 1987). However, none of these have reached the levels of influence that Minear has had over subsequent scholarship.

offering unique insight into the IMTFE through his lived experiences as a reporter at the trial, Brackman spends much of the book repackaging the prosecution's arguments rather than providing any substantial new analysis on the tribunal.<sup>179</sup> While Brackman claims that *The Other Nuremburg* "is an attempt to set the record straight", it still clings to the narrative outlined by Keenan's "determined battle of civilization" speech in the prosecutions opening statement.<sup>180</sup> Though he does admit that the IMTFE was not a perfect application of international justice, Brackman does not question the historical conclusions that the IMTFE sought to validate.<sup>181</sup> He is not fully supportive of the tribunal but Brackman's viewpoint does place itself solidly opposite Minear's, further establishing the traditional binaries found within the early historiography of the IMTFE.

The 1983 Tokyo Symposium on the IMTFE also encountered similar issues. Attempting to reevaluate the trial, participants spent most of the time rehashing the same questions: was Tokyo 'victor's justice? Were Class A crimes legal? Did it set a good precedent or a bad one? Hosoya Chihiro one of the organizing chairs, argued that 1983 was the time to address these questions with an "objective and comprehensive re-examination of the Tokyo Tribunal."<sup>182</sup> The symposium certainly made noteworthy contributions with its critical examination of eurocentrism and the role played by colonialism in the prosecutorial efforts. Its decision to highlight the voices of scholars from Asian countries formerly occupied by Japan, like Burma, Korea, and China, is also critical to its historical value.<sup>183</sup> It is noteworthy however, that despite this push for more multidisciplinary, transnational perspectives, not a single woman presented on the panels during the symposium.

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<sup>179</sup> For example, Brackman, 19-22.

<sup>180</sup> Pritchard and Zaide, vol. 1, 384; Brackman, 24-28.

<sup>181</sup> Brackman, 24.

<sup>182</sup> Hosoya, 10.

<sup>183</sup> Ibid.

Furthermore, the symposium was hardly the dispassionate discussion the organizers had hoped for. Most of the panelists could not seem to agree on how to remember the Tokyo Trial, with divisions in opinion falling along the same lines as previous ‘victor’s justice’ debates. Some historians even appeared to openly question each others integrity at certain points, though for the most part the discussion was polite.<sup>184</sup> The discussion of Class B and C crimes was present and perhaps even more contentiously debated than Class A crimes, however this was very noticeably a secondary aspect of the symposium. The conference’s transcripts were published in 1986 and although its proceedings provide insight into both Japanese and non-Japanese academic opinions on the IMTFE at the time, the symposium remained consumed by the same binary debates that preoccupied Minear a decade earlier.

#### From the 1990s to Today

The end of the twentieth century and the beginning of the twenty-first saw several new contributions to the field that signalled a move away from the more extreme dichotomies of earlier scholarship. Though they still operated within the same frameworks and grappled with many of the same debates, these works brought new perspectives, research and nuance to the English language historiography of the IMTFE. Two books from the 1990s, Herbert Bix’s Pulitzer Prize winning *Hirohito and the Making of Modern Japan* and John Dower’s equally acclaimed *Embracing Defeat*, were particularly important to the field. During this period many case studies regarding individual former Allied countries were also published. These case studies examined the Allied nation’s contributions to the tribunal proceedings.<sup>185</sup> Bix argued that Hirohito, whom he

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<sup>184</sup> Ibid, 172-6.

<sup>185</sup> For example: Stanton, “Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal”; Brode, *Casual Slaughters and Accidental Judgments*. Other notable works published in this period include: Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials*; Sebastian Conrad, “What Time Is Japan? Problems of Comparative (Intercultural) Historiography,” *History and Theory* 38, no. 1 (February 1999): 67–83, <https://doi.org/10.1111/0018->

called “one of the most disingenuous persons ever to occupy the modern throne”, should have been tried as a war criminal at the IMTFE.<sup>186</sup> Bringing forward compelling new evidence that the Emperor was aware of (and at time sanctioned) war crimes, Bix placed blame on SCAP and American political maneuvering for a miscarriage of justice. He concluded that Hirohito had a ‘direct leadership’ role in the Japanese ‘expansion’ and conduct of his army.<sup>187</sup> Dower also advanced knowledge regarding Allied decisions to protect the Emperor, particularly with his research in IPS archives.<sup>188</sup> The chapter “Victor’s Justice, Loser’s Justice” in *Embracing Defeat* also explored issues of race and colonialism within the IMTFE decision making process. Built upon an impressive array of sources, it concluded that the Tokyo Trial was flawed justice forced on a losing nation by the victorious Allied forces.<sup>189</sup>

However, the books by Dower and Bix provide only limited discussion on the trial, as each focuses on broader topics involving the Emperor, the Second World War and the subsequent American occupation of Japan. They also continue to put forward arguments within the framework of the ‘victor’s justice’ debate, only slightly inversed from previous interpretations. This concept, as outlined by Yuma Totani, is one that argues that the IMTFE is ‘victor’s justice’ not because of what it focused on (Class A war crimes) but what it was silent on.<sup>190</sup> Bix for the most part, was less critical of the IMTFE than Dower. He acknowledged that there were aspects of the trial that were unjust: the decision to not prosecute Japan’s use of chemical weapons, the fact that the accused were not always given due process, and that Korea was wrongly excluded from the judges’

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2656.771999077; Bernard Victor Aloysius Röling and Antonio Cassese, *The Tokyo Trial and beyond: Reflections of a Peacemonger*.

<sup>186</sup> Bix, 4-5.

<sup>187</sup> Ibid, 604-15.

<sup>188</sup> Dower, *Embracing Defeat*, 336-8.

<sup>189</sup> Ibid, 446-56.

<sup>190</sup> Totani, 250.

attention Yet, he also spent much of his time connecting Class A war criminals to the policies behind Class B crimes. Thus, Bix seemed to feel most of the men on trial deserved to be in the defendant's box.<sup>191</sup> It was the choice to exclude the Emperor from the defendant's list, the "one person in power during the entire seventeen-year period of the alleged conspiracy", that made the trial "irrevocably flawed."<sup>192</sup> For Dower, it was the decision not to indict Hirohito but also what he called the tribunal's inherent 'whiteness', the hypocrisy of American war time actions, and the lack of representation of Asian victims of the trial. He wrote,

The plight of the Koreans was, in a way, emblematic of the larger anomaly of 'victor's justice' as practiced at Tokyo. It called attention to the fact that the recent wars in Asia had taken place not among free and independent nations, but rather on a map overwhelmingly demarcated by the colors of colonialism.<sup>193</sup>

This 'new victor's justice' critique, as Totani calls it, is the cornerstone of much of the recent scholarship surrounding the IMTFE. For example Tanaka Toshiyuki's book *Japan's Comfort Women* (2002) argued that the Japanese military's forced sexual enslavement of Asian women was not prosecuted at the IMTFE and that the Allied Powers chose not to pursue a focus on this partially because of their own involvement in systems of coerced prostitution within Japan.<sup>194</sup> Like Dower, the reasons Tanaka considers the IMTFE a practice of 'victors justice' is the marginalization of Asian voices within a predominantly white, male trial. Tanaka argues that it was only white 'comfort women' who received any attention from the IMTFE. For example, the Dutch prosecution, he argued, were not concerned with what had happened to Indonesian 'comfort women'.<sup>195</sup>

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<sup>191</sup> Bix, 615-6.

<sup>192</sup> Ibid.

<sup>193</sup> Dower, *Embracing Defeat*, 470.

<sup>194</sup> Toshiyuki Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution during World War II and the US Occupation*, Asia's Transformations (London ; New York: Routledge, 2002), 4-7.

<sup>195</sup> Ibid, 82-3.

Tanaka's book is detailed, well researched and organized. It breaks down and describes in detail the multiple systematic levels of sexual exploitation and abuse the Japanese military inflicted on women during the war. It is also fair to consider the IMTFE first and foremost a colonial trial. However, other historians have more recently introduced new evidence that refutes claims that the IPS completely ignored Asian women when investigating Japanese sexual violence. In fact, many of these new works argue that the prosecution spent significant effort investigating these crimes.<sup>196</sup> While that does not mean that the issue of Asian 'comfort women' was sufficiently addressed at the IMTFE, it does complicate black and white notions of the tribunal.

The three monographs previously mentioned, Madoka Futamura's *War Crimes Tribunals and Transitional Justice: the Tokyo Trial and the Nuremburg Legacy*, Neil Boister and Robert Cryers' *The Tokyo International Military Tribunal: A Reappraisal*, and Yuma Totani's *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, were all published within a period of two years. Together they signal a shift within English language IMTFE scholarship, marking the noticeable start of a move away from traditional 'victor's justice' frameworks of analysis. There have of course been several other notable works produced around this time but except for Yuki Takatori's recent analyses on the American and Canadian legal contingents at Tokyo, most have not had the same impact on the field as these three works.<sup>197</sup>

Working from a background of legal scholarship, Boister and Cryer's 'reappraisal' of the IMTFE brought an impressive volume of new archival material to light. The book

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<sup>196</sup> See Totani, 178-80.

<sup>197</sup> See Takatori, "The Forgotten Judge at the Tokyo War Crimes Trial"; Takatori, "'Little Useful Purpose Would Be Served by Canada': Ottawa's View of the Tokyo War Crimes Trial."

gives a much more detailed picture of the legal processes of the trial and those involved in it, than perhaps any other English language source to date. Futamura's project married history, sociology and political science to gain insight into the tribunal as a work of transitional justice. It engaged in a massive social study of Japanese public opinion of the IMTFE and war crimes. Like Boister and Cryer, Totani also undertook a massive amount of archival research for her work. Featuring archival findings from India, New Zealand, Australia, the United States and Japan, *The Tokyo War Crimes Trial* challenges many assumptions made about the tribunal by preceding scholars. All three books bring forward much needed fresh research and deliberately question or refute traditional assumptions and clichés about the IMTFE.<sup>198</sup>

Despite their contributions, it is unclear whether the three important recent works fully move beyond 'victor's justice' and more traditional narratives of the tribunal. Totani and Futamura certainly succeed in this endeavor more than Boister and Cryer do. Yet each in their own way remains focused on the victor's justice' debate, even as they simultaneously work to critique the framework. The issues these works have in navigating around the 'victor's justice' concept speaks to the certain unavoidability of this historical framework, despite the growing recognition that it is no longer an adequate structure for current scholarship. While none of these scholars seem particularly comfortable with the idea of 'victor's justice' and the overwrought debates over Class A war crimes, they nevertheless proceed to operate, for the most part, within the confines of this discourse. Most of Totani's main argument calls on both English and Japanese scholarship to move further away from triumphalism (Keenan's civilization speech) and skepticism, both new

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<sup>198</sup> Simpson, 31.



and old (victor's justice).<sup>199</sup> Her critique is a much needed intervention, and she succeeds in injecting more complexity into her analysis of the trial than many previous works. However, most of *The Tokyo War Crimes Trial* does not actually position itself outside of traditional discourse. Totani spends significant time weighing in on questions about the legality and fairness of the IMTFE, attempting to salvage some of the legacy of Class A crimes from their critics by re-centring the trial within the current international legal system. Furthermore, despite her prediction that imminent new research phases in the study of the Tokyo Trial will rely on 'interdisciplinary approaches' to break away from the binary debate, Totani gives little hint on what this new work might look like.<sup>200</sup>

Boister and Cryer's book produces an extremely thorough analysis of what seems like the entire contents of the New Zealand archive's holdings on the IMTFE. Most of their book focuses on analyzing the Class A components of the trial, though a few sections deal more specifically with crimes against humanity and conventional war crimes. Despite the impressive number of new documents that Boister and Cryer introduce, their approach to the tribunal also follows the established methods of analysis. The book chastises the extreme dichotomies of the 'victor's justice debate' but does not seek to subvert them. The 'reappraisal' in question was an attempt to rescue the trial from cynics who dismiss the legal value of the IMTFE too quickly. Gerry Simpson aptly described their position when he concluded, "in the end, Boister and Cryer seem almost protective of the Tokyo Trial: neglected, misunderstood, misinterpreted and more legitimate than we have been led to

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<sup>199</sup> Ibid.

<sup>200</sup> Totani, 258-9.

believe.”<sup>201</sup> In its attempt to save the IMTFE, the book sets itself to challenge traditional ‘victor’s justice’ arguments without actually moving beyond them.

Madoka Futamura’s *War Crimes Tribunals and Transitional Justice* undertakes one of the largest examinations within English language scholarship on the ways in which the IMTFE has been remembered and forgotten within Japanese collective memory. One of the most intriguing aspects of Futamura’s work is her findings on the effects the trial’s historical record has had on the public consciousness of Japanese war crimes. Her research into this topic is based on a substantial number of group interviews and Japanese newspaper polls. She outlines her main goal as interrogating the common assumption that the Tokyo Trial is unimportant and historically dismissible. This includes how the IMTFE strengthens or detracts from the Nuremburg Trial, as well as the impact of the tribunal on post-war Japan.<sup>202</sup> In confronting these issues Futamura argues that the assumption that ‘victor’s justice’ was imposed on Japan by the Allied Powers via the IMTFE is still widespread within the country. Though Futamura does take care to distance her own opinions of the tribunal from her work, *War Crimes Tribunals and Transitional Justice* does in fact analyze the trial from within the ‘victor’s justice’ binary, arguing that the IMTFE was a counterproductive failure in terms of reconciliation and social transformation.<sup>203</sup>

The fact that the selected works highlighted above found themselves bound, one way or another, to render a final judgement of their own on the effectiveness of the trial or place themselves within the victor’s justice debate does not make them less important or valuable contributions to scholarship. However, as Yuma Totani pointed out in her own work, it has limited

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<sup>201</sup> Simpson, 32.

<sup>202</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 1.

<sup>203</sup> *Ibid*, 147-51.

the scope of IMTFE historiography significantly over the last seventy years. The fact that this trend is slowly becoming recognized as inadequate for the needs of current scholars has led to some changes and more nuanced perspectives being adopted. Recently a few new publications have taken steps to embrace fresh frameworks of inquiry, though these have been deliberately left out of the conversation here, as they are better suited to discussions within the concluding chapter. Despite all of this being a hopeful sign for the future of the field, the fact remains that debates surrounding the legitimacy of the tribunal and whether it was ‘victor’s justice’ continue to dominate the field of Japanese war crimes and the historiography of the IMTFE.

## CHAPTER 3

### **Becoming the Narrative: The Legacy of Crimes Against Peace and the Remembering and Forgetting of Atrocities**

*“Accepting the severity  
of the judgement for now,  
still there is a small feeling of hesitation.”*<sup>204</sup> -Murata Haruko

Based on analysis of the historical and historiographical fixation on Class A war crimes and ‘victor’s justice’ in the proceeding chapters, this section discusses how these debates have become incorporated into Japanese wartime narratives. John Dower once mused that the Tokyo Trial is “the great sitting duck of conservative Japanese revisionists”.<sup>205</sup> While this is true, the IMTFE occupies a central space in much of the dialogue that engages with Japanese reflection on the Asia-Pacific Conflict, be it conservative or otherwise. This chapter does not seek to summarize its findings with any sweeping conclusions about singular narratives or remembrance. Nor does it desire to weigh in on whether Japan is ‘right’ or ‘wrong’ in the ways in which it processes the complicated layers of its war time acts, traumas, and experiences. No one stance towards the IMTFE discussed in this chapter represents the whole of Japanese opinion on these subjects. There are deep memory rifts within how the government and individual Japanese citizens disseminate and interpret the IMTFE. As Philip Seaton wrote in his own study on the collective memory of Japanese war crimes, “the key to understanding Japanese war memories is not assessing what Japanese people ‘know’ or ‘do not know,’ but identifying the conceptual frames used to evaluate

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<sup>204</sup> Murata Haruko, originally printed in Mizugame, March 1949, reproduced in Yoshimi Yoshiaki “Senryōki Nihon no Minshū Ishiki –Sensō Sekinin o Megutte”, *Shisō* 811 (January 1992):73-99, 82, quoted in Dower, *Embracing Defeat*, 510.

<sup>205</sup> John W. Dower, *Ways of Forgetting, Ways of Remembering: Japan in the Modern World* (New York: New Press, 2012), 114.

war-related issues.”<sup>206</sup> This chapter argues that the IMTFE, with its focus on Class A crimes and the ‘victor’s justice’ debate, is one such framework.

From its beginnings within the tribunal proceedings to its current contested status in the historiography of the trials, the debate over of ‘victor’s justice’ remains strongly in place even today, a driving force in shaping the post-war debate on war time responsibility, victimhood and aggression. The Asia-Pacific War has not yet been consigned to ‘history’ in many areas of the world and in Japan it remains very much a ‘current affairs’ issue.<sup>207</sup> This chapter examines specifically the way certain facets of the IMTFE’s controversial legacy regarding Class A crimes and ‘victor’s justice’ has shaped post-war conceptions of Japan’s war time history. This includes examining the impact Justice Pal’s dissenting opinion has had on these understandings, as well as the impact of the Allied decision not to indict the Emperor Hirohito. Another focus will be on how the IMTFE’s emphasis on Class A crimes—and therefore the lack of focus on Class B and C ones—has been politicized within Japan. Analyzing these relationships reveals how intimately the IMTFE is linked to narratives of Japanese ‘war guilt’ and war crimes.

Engaging with the entire discourse of the IMTFE and its legacy is beyond the scope and resources of this paper. It is also a project that has already been competently undertaken by other scholars within the field, as discussed in Chapter 2.<sup>208</sup> Therefore, the focus here will be on how aspects of the tribunal have been politicized to serve certain agendas. It is also important to address some of the bias, misconceptions and issues that commonly befall non-Japanese scholars who approach the subject of Japan’s collective memory of war crimes. I understand the limits of my

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<sup>206</sup> Philip A. Seaton, *Japan’s Contested War Memories: The “Memory Rifts” in Historical Consciousness of World War II*, Routledge Contemporary Japan Series (London ; New York: Routledge, 2007), 9.

<sup>207</sup> *Ibid.*, 7.

<sup>208</sup> See Madoka Futamura, *War Crimes Tribunals and Transitional Justice*.

position on this issue, and do not seek to go beyond it. Foreigners engaging with Japanese war memories of the Tokyo Trial frequently evoke what Philip Seaton has accurately described as “the orthodox interpretation of Japanese war memories in English speaking Allied countries.”<sup>209</sup> What he refers to is the tendency amongst members of the Western media and intelligentsia to treat Japanese people, and their collective memory, as a monolithic entity with a uniform opinion of the conflict. That opinion is usually conservative and nationalist in nature. While these conservative and nationalist opinions certainly exist in Japan, as discussed later in this chapter, they are not part of the mainstream narrative of the war. Despite this, when former Allied nations look at Japan’s relationship with war crimes and the IMTFE today, discussions usually revolve around Japan’s ‘inability’ to take responsibility for its past. They often highlight stories involving opposition to ‘comfort women’ memorials, Japanese textbook controversies, and war crimes denials by certain high-ranking politicians.<sup>210</sup> Given that these stories are the ones those outside the Asia-Pacific region usually receive concerning Japan’s relationship with its past, it is not surprising that orthodox interpretations tend to encourage assumptions of moral authority within the West’s relationship with Japan. These views also stay neatly in line with traditional Allied narratives of the Second World War, and the black and white conceptions of the conflict. This paper recognizes the diversity within the different ways the IMTFE is contested and commemorated within the collective war time memories of Japan and seeks to respect these difference.

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<sup>209</sup> Ibid, 2.

<sup>210</sup> Several books cover these events and trends in detail, including Futamura, *War Crimes Tribunals and Transitional Justice*; Seaton *Japan’s Contested War Memories*; Gi-Wook Shin and Daniel C. Snieder. *Divergent Memories: Opinion Leaders and the Asia-Pacific War*, Studies of the Walter H. Shorenstein Asia-Pacific Research Center. Stanford, California: Stanford University Press, 2016.

Politicizing the IMTFE: The Left, The Right and the ‘Victor’s Justice’ Debate

Though conservative and ultranationalist groups often receive the most attention for their interpretation of the legal and historical narratives of the IMTFE, there are several different viewpoints from across the Japanese political spectrum that compete to put forward their own dominant narrative of the tribunal. The idea of ‘victor’s justice’ has been co-opted by a plurality of groups on both sides of the political landscape. No one political identity holds a monopoly on ownership of the term and they all interpret the concept very differently; Japanese judgement on the IMTFE falls on a spectrum of moral reasoning.<sup>211</sup> Despite this diversity of opinion, politicization of the IMTFE also tends to generally fall into the same contentious binary debates that scholars of the trial have engaged in for much of the post-war period. The way Class A war crimes are perceived within Japanese collective memory is no exception to this trend.

*Tōkyō Saiban Shikan*, the ‘Tokyo Trial view of history’, is a concept pushed by right wing critics to describe the perceived outlook, narratives, and values ‘imposed’ on Japan by the Allied Powers via the tribunal. The term is used regularly and vaguely by many tribunal critics, who are usually non-academic. The basis for these claims lies in the prosecution of crimes against peace, particularly the aspects of aggressive war and conspiracy. The prosecution set out to prove that since the early 1920s, Japan’s military leaders had engaged in a cohesive plan to militarily, politically and economically dominate the Asia-Pacific region, as outlined by count 1 of the Class A charges.<sup>212</sup> The judges’ bench concurred that the IPS had proven this charge to be fact, finding almost all the defendants guilty on this count. The controversy surrounding how crimes against peace were prosecuted has made the IMTFE into a stick with which conservative revisionists and

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<sup>211</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 21.

<sup>212</sup> See Chapter 1 for more details of this.

nationalists beat their opponents with. It has led to the accusation that Japan did not actually wage an aggressive war, but that this was a falsehood concocted by the Allied victors to demonize Japan. For example, as legal scholar Satō Kazou once argued, “the view that Japan had conducted aggression was created and proliferated based mostly on the judgement of the Tokyo Tribunal”.<sup>213</sup>

Right wing criticism of the trial is usually based on what was prosecuted during the trial proceedings, rather than what the IMTFE left out. Bound within this is an acute sense of victimization and unfairness. The ‘Tokyo Trial View of History’, revisionist Fujioka Nobukatsu complained, “takes the judgement handed down at Tokyo to be completely true, [and] says the war Japan fought was an ‘aggressive war’ in breach of international law, conventions and treaties, and that says Japan’s actions and behaviour were all critical and wrong.”<sup>214</sup> One of the leading figures in the neo-nationalist movement during the 1990s, Fujioka claimed that it was impossible to challenge ‘victors’ history of without being accused by the left of being a war crimes denier or apologist.<sup>215</sup> In this regard, ‘victor’s justice’ furthers a victimization narrative that persists in some corners of Japanese society. The criticism of the IMTFE in this context is meant to push for a return to a view of history that Japan can be ‘proud’ of as opposed to what revisionists call a ‘masochistic’ view of history. Kobori Keiichirō, the neo-nationalist author of *Re-examining the Tokyo Trial: The Starting Point that Ruined Japan* summarized this idea by saying that Japanese people felt frustrated by the IMTFE’s verdict of Japan as ‘the bad guys’, especially when the Allied Powers were not free of morally dubious war time actions.<sup>216</sup> Thus, one of the most intriguing

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<sup>213</sup> Futamura, *War Crimes Tribunals and Transitional Justice*. 95.

<sup>214</sup> Nobuyuki Fujioka, *自由主義史観とは何か: 教科書が教えない歴史の見方 (What is the Liberalist View of History?)* (Kyoto: PHP Publishing, 1997), 39, quoted in Futamura, *War Crimes Tribunals and Transitional Justice*, 141.

<sup>215</sup> Fujioka, 109,10 quoted in Futamura, *War Crimes Tribunals and Transitional Justice*, 141.

<sup>216</sup> Keiichirō Kobori, *Saikenshō Tōkyō Saiban: Nihon o Dame Ni Shita Shuppatsuten (Re-Examination Tokyo Trial: The Starting Point That Ruined Japan)*, Dai 1-han (Tōkyō: PHP Kenkyūjo, 1996). quoted in Futamura, *War Crimes Tribunals and Transitional Justice*, 97.



aspects of the right-wing approach to understanding the IMTFE, the way it contextualizes the tribunal within narratives of national pride and identity.

There is very little room within the right-wing narrative of Japanese victimhood for Class B and C war crimes. They complicate the narrative of Japan as a non-aggressor and so are frequently looked upon with skepticism or outright denial by many neo-nationalist groups. Fujioka himself, despite claiming to attempt to find a middle ground between war crimes deniers and the ‘Tokyo Trial View of History’, has defended the ‘comfort women’ system and claimed it has been grossly exaggerated by progressives and the IMTFE.<sup>217</sup> The testimony of Asian victims concerning acts of violence perpetrated by the Japanese army might only be a secondary focus of the IMTFE but it is another reason why there is emphasis on the tribunal being an illegitimate version of the past, forced onto Japan by the victorious nations. The neo-nationalist movement of the 1990s and early 2000s saw an explosion of publications attempting to refute or deny the Nanjing ‘Incident’.<sup>218</sup> Tied into these acts of denial, was the claim that Nanjing ‘Incident’ was greatly exaggerated by the IMTFE in order to falsely construe Japan as a criminal state equivalent to Nazi Germany.<sup>219</sup> Some recent scholars of the historical memory of the Nanjing Massacre have argued that these revisionists are perhaps their own worst enemies, as their inflammatory remarks are what has publicized the Nanjing Massacre so widely beyond Japan’s national boundaries.<sup>220</sup>

There is a certain paradoxical element to the idea that the Tokyo Tribunal’s narrative is an accepted historical record from which Japan needs to escape. Most progressive critics and anti-

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<sup>217</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 143.

<sup>218</sup> For example: Tadao Takemoto, *The Alleged “Nanking Massacre”: Japan’s Rebuttal to China’s Forged Claims*, ed. Nippon Kaigi (Tōkyō: Meisei-sha, 2000); the collected works of Sakurai Yoshiko.

<sup>219</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 95.

<sup>220</sup> Takashi Yoshida, *The Making of the “Rape of Nanking”: History and Memory in Japan, China, and the United States*, A Study of the Weatherhead East Asian Institute, Columbia University (New York: Oxford University Press, 2006), 5.

revisionist scholars, even ones who believe that the IMTFE ultimately had legal and historical value, do not argue for a full acceptance of every stance the tribunal took. In fact, one of the major issues many of these groups have is also with Class A war crimes. The difference between the two sides' interpretations of the IMTFE is that progressive critiques usually do not argue that the Asia-Pacific Conflict was not an aggressive war, at least not in the case of the colonial and military expansion into Asia. In fact, most Japanese people accept that the Asia-Pacific War was generally an act of aggression.<sup>221</sup> This fact highlights the disunified, fragmented approach to war crimes memory in Japan. However, that does not mean accusations of 'victor's justice' are not also prevalent in these groups. Instead, these critiques focus on acknowledging the colonial aspects of Japan's military expansion and the idea that the IMTFE's focus on Class A war crimes allowed many Class B/C crimes to go unacknowledged and unpunished.

The IMTFE proceedings marked the first time most of the Japanese public was confronted with its military establishment's crimes related to human trafficking, rape, and sexual slavery. Many Japanese soldiers recalled returning home from the war to be reviled or rejected by their fellow citizens upon learning of what had happened during the war.<sup>222</sup> This meant that the tribunal, in many respects, set the tone for how the public would learn—or in the case of Unit 731, not learn—of these crimes. This does lead to the question that if the Japanese public learned about these war crimes from the IMTFE, then why has their memory within the historical narrative of the war so often been considered silenced or overlooked? The answer to this lies in many transnational and national factors but also because of the perceived failing of IMTFE to adequately prosecute these crimes. The Allied focus on 'Class A war criminals' and the deliberate exclusion

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<sup>221</sup> Dower, *Ways of Forgetting, Ways of Remembering*, 110.

<sup>222</sup> *Ibid*, 119.

of other crimes committed against Asian populations has opened it up to accusations of ‘victor’s justice’ from the left-wing Japanese groups as well. It created the impression that the victorious nations were not interested in true justice, just revenge against Keenan’s ‘big fish’. Class C crimes were present in the original charges list but were not directly ruled upon. They were part of the charges that the majority justices condensed or struck off the final verdict.<sup>223</sup> This decentering has had a significant impact on the left’s interpretation of the IMTFE. The amalgamation has led many readers to assume that Class C crimes were not even prosecuted, as previously mentioned. For many on the left in Japan, the lack of visibility regarding Class B/C crimes within the final verdict made it easier for some to downplay and deny these crimes, not just within the collective memory of the trial but also within the collective memory of the Asia-Pacific War.

Then there is the colonial factor; it can not be denied that the IMTFE dealt with Japanese colonialism by effectively ignoring it. This has drawn the ire of many commentators within the political left, who consider one of the major issues with the IMTFE to be ‘American constructivism’.<sup>224</sup> This became a particularly strong sentiment in the late 1980s, when many trial documents were declassified and made more widely available in Japan. The IMTFE did not do enough, progressive critics said, to bring to the foreground the extent of Japanese war crimes in Asia. One critic involved in this ‘alternative victor’s justice’ perspective, Awaya Kentarō, mused that because of these flaws the IMTFE has become an “obstruction to overcoming the past” rather than a “facilitator of the process” within Japan.<sup>225</sup>

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<sup>223</sup> For details see Pritchard and Zaide, vol. 20, 48450-54.

<sup>224</sup> Totani, 248.

<sup>225</sup> Kentarō Awaya and the NHK Reporters. *NHK Supesharu: Tōkyō Saiban e no Michi (The NHK Special: The Road to the Tokyo Trail)*. (Tokyo: Nippon Hōso Shuppankai, 1994), 212, quoted in Totani, 250.

These are some of the broader, more politicized ways that the IMTFE exists uneasily within Japan's collective memory of the war. At the center of these tensions, are unresolved issues involving Class A war crimes and accusations of 'victor's justice'. These issues do not exist only in a broader capacity within Japan's memory of war-related issues. There are also two very specific facets of the tribunal that have shaped Japanese narratives and binary debates surrounding IMTFE; the decision to exclude Emperor Hirohito from the Class A war crimes list and the turbulent legacy of Justice Radhabinod Pal.

### Excluding Hirohito

The Allied Powers' decision to excuse Emperor Hirohito from being tried as a Class A war criminal is widely criticized as one of the most significant problems with the IMTFE and is one of reasons why the tribunal is often dismissed as a legitimate source of justice by some scholars and progressives. John Dower once called the emperor's exemption made the IMTFE proceedings "farical." Michael Lucken wrote that "the image of an actively pacifist emperor controlled by military leaders is not only implausible....but simply too miraculous to be credible."<sup>226</sup> Madoka Futamura blamed this decision for the lack of significant public discourse on the trial, and for the general apathy Japanese citizens feel towards the proceedings. She argues that the "politically thorny" issue of the Emperor's culpability is why the trial is only widely talked about in a limited political and academic circle within Japan, despite its far-reaching implications for post-war Japan.<sup>227</sup>

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<sup>226</sup> Dower, *Ways of Forgetting, Ways of Remembering*, 125; Lucken, 164.

<sup>227</sup> Madoka Futamura, "Chapter 3: Japanese Social Attitude Towards the Tokyo Trial: From a Contemporary Perspective," in *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, ed. Toshiyuki Tanaka, Timothy L. H. McCormack, and Gerry J. Simpson (Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 81–92, 47.

At the time, the SCAP and the United State's governments decision to exclude the Emperor from the IMTFE was also controversial.<sup>228</sup> Some of the Allies, particularly the Australians, were furious at the unilateral decision. In a memo to the Canadian government pleading for support in indicting the Emperor, the Prime Minister of Australia wrote:

We are convinced that the advantage of associating the Emperor personally with the collapse and defeat of Japanese militarism, [will greatly help] to destroy any legend that he is outside and above responsibility for the conduct of the war and its ultimate disaster for Japan.<sup>229</sup>

Progressive Japanese opinion also called for Hirohito to abdicate and face charges. The IPS received hundreds of letters from all spectrums of Japanese political life, demanding either that the Emperor be punished or pleading that he be allowed to remain on the throne.<sup>230</sup> French Justice Henri Bernard had considerable issues with the Allied decision not to try the Emperor, as did others on the judges' bench. Chief Justice Webb concurred with the majority verdict that found all the defendants guilty. He did however, object to the immunity of the emperor, writing "the authority of the Emperor was proved beyond question when he ended the war", concluding:

I do not suggest the Emperor should have been prosecuted. That is beyond my province. His immunity was no doubt decided upon in the best interests of all the Allied Powers. Justice requires me to take into consideration the Emperor's immunity when determining the punishment of the accused found guilty: that is all.<sup>231</sup>

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<sup>228</sup> Bix, 582-618.

Note: Herbert Bix has extensively documented American policy regarding Hirohito's lack of indictment, using an impressive array of primary sources.

<sup>229</sup> "Memo from the Prime Minister of Australia to the Prime Minister of Canada" August 11, 1945 RG25-A-3-b/5762/ File No. 104-B, Department of External Affairs Fonds, LAC.

<sup>230</sup> See International Prosecutor's Section, Allied Command Headquarters, *東京裁判 = Document the International Military Tribunal for the Far East (国際検察局(IPS)尋問調書)*, ed. Kentarō Awaya and Yutaka Yoshida, First Edition, 52 vols. (Tokyo: Nihon Tosho Senta, 1993).

<sup>231</sup> William Webb, "Separate Opinion of President", in *The Tokyo Judgement: The International Military Tribunal for the Far East: I. M. T.F. E. , 29 April 1946-12 November 1948*, ed. by Dr. B.V.A. Röling and Dr. C. F. Ruter vol. 2, 2 vols. (Amsterdam: APA-University Press Amsterdam, 1977) 473-8.

Japanese war aggressions cannot be fully explored without a trial of the Emperor. The Allied Powers and SCAP chose to preserve the ruler's moral authority and the institution he represented, instead of engaging with any question of the Emperor's guilt. By letting wartime Japanese government(s) take the full blame, they allowed Japan to avoid fully confronting its actions in the war. The refusal to indict him has been considered a blow to the credibility of the IMTFE. The fact that Hirohito remained on the throne meant that in some respects there was no decisive break from Japan's militarist past. The long term impacts of the refusal to indict Hirohito have been significant. There has never been any official inquiry into the role he played during the war, nor is there ever likely to be. The official view of both the Allied Powers and the Japanese government to this day is that he bears no responsibility for the destruction that was wrought in his name.<sup>232</sup> The decision had a subtle, but significant impact on how Japan has come to engage with its war responsibility and collective memory of the war. After all, if the man in charge of the Empire at the time that it committed its most horrific acts was not punished, how can Japanese collective responsibility even begin to be addressed? As some have asked, how can the IMTFE not be a selective exercise in 'victor's justice' if one of the main architects behind the Asia-Pacific War could quietly escape the consequences of his actions?<sup>233</sup>

It is perhaps not coincidental then, that the collective process of memorializing Japanese war crimes and discussions of the legacy of the Tokyo Trial picked up after the Emperor's death in 1989. Following his death, Japanese academic and political circles engaged significantly more in heated discussions about Class B and C crimes, as well as the absence of Asian voices within traditional victim's narratives of the IMTFE.<sup>234</sup> In 1993, the Japanese government released the

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<sup>232</sup> Dower, *Ways of Forgetting, Ways of Remembering*, 125.

<sup>233</sup> *Ibid.*

<sup>234</sup> See Futamura, "Chapter 3: Japanese Social Attitude Towards the Tokyo Trial".

Kono statement, which concluded that the Japanese military was ‘directly or indirectly’ responsible for the management of ‘comfort stations.’ Hirohito’s passing also signalled the release of many privately held diaries and memoirs, which further spawned new discussions of the issue of Japanese war responsibility. The refusal to include Emperor Hirohito in the IMTFE as a Class A criminal almost certainly affected discussion of Japanese war responsibility and the legacy of the IMTFE.

### The Legacy of Radhabinod Pal

Chapter 1 mentioned that there is perhaps no IMTFE judge more influential to the ‘victor’s justice’ debate in Japan than Radhabinod Pal. His dissenting verdict of not guilty has frequently been used to give IMTFE conservative critics in Japan a veneer of legitimacy and vindication when condemning the tribunal as trumped up vengeance with no authority to prosecute Class A crimes. Pal’s legacy is extrinsically tied to the conservative movement in Japan. On April 28, 1952, the day the American occupation of Japan ended, Pal’s dissenting opinion was published by a member of the nationalist group ‘the Greater Asia Society’ under the title *The Truthful Judgment as Told by Dr. Pal*.<sup>235</sup> After the trial, Pal returned to Japan several times to visit convicted class B and C prisoners. In the 1960s, he was given the Japanese ‘First Order of Merit’ for his contributions to ‘world peace.’ None other than Hirohito himself presented the award.<sup>236</sup>

More recently, Pal’s writings have been used by neo-nationalist writers to counter accusations of Japanese war crimes as opposed to directly challenging the Tokyo verdict, most notably, in response to Iris Chang’s *The Rape of Nanking: The Forgotten Holocaust of World War II*. Though some of the historical inaccuracy of Chang’s book has made it a favourite target of

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<sup>235</sup> Totani, 224.

<sup>236</sup> Ibid, 224-9.

Nanjing Massacre deniers, its status as a best seller in North America has also solidified it as a voice of authority on the massacre for many outside of Japan. In the foreword of an English language reprinting of Pal's *Dissent*, two years after the release of Chang's book, conservative Japanese scholar Nakamura Akira wrote:

As a jealous lover of truth, Justice Pal had nothing but truth to guide him in trying the accused at the Tribunal, and yet the spirit of the court as a whole was not generous enough to listen to the reason and justice of the defeated. Seeing how much is made of, say, Iris Chang's *The Rape of Nanking* in some parts of the world today, I cannot help but question how far the world has progressed over the last half century in the search for truth as well as knowledge and reason.<sup>237</sup>

Nakamura goes on in his foreword to call the Nanjing Massacre nothing more than 'lies' and bemoaning the fact that 'lies' like Chang's are the same as the ones that "deceived the military court at Tokyo and elsewhere."<sup>238</sup> This example highlights some of the ways Pal's verdict is still used today as a template through which to dismiss the IMTFE and Japanese war crimes.

Justice Pal's dissenting opinion and its divergence from the rest of the bench's opinions, even the other dissenting ones, has become an important part of the Japanese conception of war crimes and the Asia-Pacific war. Whether Pal meant to be interpreted this way or not when he wrote his verdict, he has enabled contemporary Japanese nationalist arguments that claim the true purpose of the Tokyo Tribunal was not to prosecute war crimes but to exact revenge. In this way, his influence casts a long shadow over the collective process of memorializing Japanese war crimes and the IMTFE. His dissent also represents the lack of a strong unified position within the verdict, a crucial factor in undermining the IMTFE's historical narrative. Pal calls attention to the colonial nature of the IMTFE and the morality of the United States' use of atomic weapons on Japan. While

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<sup>237</sup> Akira Nakamura, forward to *International Military Tribunal for the Far East: Dissident Judgment of Justice Pal*, by Radhabinod B. Pal (Tokyo: Kokusho-Kankokai, 1999), vi.

<sup>238</sup> *Ibid.*, vii.



these are all legitimate issues the criticize, neo-nationalists in Japan have been known to co-opt these critiques to de-rail legitimate criticism of Japanese war time actions, which John Dower describes as “a kind of historiographic *cancellation* of immorality—as if the transgressions of others exonerate one’s own crimes.”<sup>239</sup>

### In Conclusion

In their book, *The Tokyo International Military Tribunal: A Reappraisal*, Neil Boister and Robert Cryer rather aptly describe ‘history’s negative verdict’ on the Tokyo Tribunal. They state that the historical backlash to the tribunal “suggests that there is a price to be paid for prosecutorial and judicial over reaching. The broad interpretation of conspiracy, the murder charges, and the shadowy usage of joint criminal enterprise have all served to cast doubt on the legacy of the trial.”<sup>240</sup> The Allied Powers naively intended for the IMTFE to settle the history of the Asia-Pacific War but in fact it did just the opposite. The verdict is a major sore point for nationalist and revisionist observers concerned with Japanese war responsibility, almost exclusively because of the tensions surround the ‘victor’s justice debate and the perceived victimization of Japan. The left and more progressive circles of Japan have also been critical of the Class A focus, though much like the dichotomized debates within Western scholarship of the trial, the verdict is often interpreted as a different kind of ‘victor’s justice.’ This one supposedly sidelines the impact of colonialism and Japanese war time violence against its Asian neighbours. Each side makes assumptions about or distorts the facts of the IMTFE to suit its own narratives. While neither of these interpretations of the IMTFE should be construed as representing the whole of Japanese opinion on the tribunal or the country’s war time experiences, they do reveal how fluid and complicated the memory of the war has become in Japan. All these conflicting, politicized

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<sup>239</sup> Dower, *Ways of Forgetting, Ways of Remembering*, 117.

<sup>240</sup> Boister and Cryer. *The Tokyo International Military Tribunal*. 327.

interpretations of the IMTFE simultaneously exist under the umbrella of Japanese collective memory, contained by the nation-state and complicating the ways in which Japanese people engage with their own historical past.

## CHAPTER 4

### **Memory Meets Global: Remembering and Silencing Japanese War Crimes Outside of the IMTFE**

*In the history of memory, the national paradigm continues to reign supreme.*"<sup>241</sup> - Sebastian Conrad

This chapter will briefly outline and address some of the transnational factors that also shaped the collective process of memorializing Japanese war crimes and the IMTFE. It is important to recognize that the Tokyo Trial and the development of its legacy did not exist in a bubble; while the primary focus of this paper is on the Class A war crimes indictment and how the IMTFE significantly contributed to the collective interpretation of Japanese war crimes, it should be emphasized that transnational factors and events were more than just an ambiguous backdrop against which national narratives of the Tokyo Trial unfolded. Furthermore, the memorialization of Tokyo Tribunal did not occur solely within the bubble of national borders. Fixation on the legal and political implications of Class A crimes in scholarly literature on the IMTFE is a primary reason why analyzing these external forces is necessary. The nation cannot be the only unit of study regarding collective remembrance. The purpose of this chapter is not to undervalue the agency of the Japanese government, certain political groups or scholars have proven influential in promoting or criticizing a culture of denial and silence when it comes to war crimes. Rather, it seeks to place discussions of the IMTFE within a broader sociopolitical and historical framework, to foster a more nuanced understanding of the conditions surrounding the Tokyo Trial. This chapter also acts as a stepping stone for discussions on how to move beyond the fixation on Class A crimes and 'victor's justice', which emerge in the conclusion of this thesis. It achieves this by turning the historical gaze outwards onto more transnational forces such as the Cold War, the dropping of the

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<sup>241</sup> Sebastian Conrad, "Entangled Memories: Versions of the Past in Germany and Japan, 1945—2001," *Journal of Contemporary History* 38, no. 1 (January 2003): 85–99, <https://doi.org/10.1177/0022009403038001965>, 85.

Atomic bomb, and more generally American actions in Japan both during and after the Second World War, all of which affected how the IMTFE has been memorialized.

### Cold War, New World Order

By the time the IMTFE ended in 1948, it was becoming clear that the idealistic hopes for world peace that had existed in 1945, would not be achieved. The trial at Tokyo had not really become the “intellectual and moral revolution” that chief prosecutor Joseph B. Keenan had proposed it would be.<sup>242</sup> Tensions between the Soviet Union and the United States mounted, and Chinese Communist forces won a civil war against the Nationalist government in 1949, starting a new era under Mao Zedong. The Soviet Union, one of Japan’s historical foes, was influencing communist factions in the newly independent Korea, while the United States pushed its own agenda there. In 1948, unification attempts failed, dividing Korea permanently into North and South, with tensions boiling over into a full-blown war two years later. As the Cold War and the conflict in Korea intensified, perceptions of who the enemy was shifted from Germany and Japan to former allies like China and the Soviet Union. Japan found itself in an advantageous position of having the past overlooked by its former enemies.

There was a definite pressure from SCAP for Japan to focus criticism of wartime actions outwards rather than inwards in the immediate aftermath of the trials. In fact, American occupation policy at the beginning of the Cold War was generally to discourage Japanese reflection on atrocities altogether. The public space for interpreting wartime memories was restricted by SCAP, which during the occupation ran its suppression and control operations through the Civil Censorship Detachment (CCD) division. A list of just over thirty banned topics was imposed on the Japanese media and literary world under occupation. This included any criticism of SCAP, any

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<sup>242</sup> Keenan and Brown, v.

defense of war criminals, the atomic bomb, or praise for any ‘undemocratic’ forms of government.<sup>243</sup> Some issues were more blue-pencilled than others; for example, some of the lighter criticisms made it into the press about the Tokyo Trial, while almost all discussion on the atomic bombs was heavily censored. However, because the CCD was more secretive about its existence and practices than its pre-war Japanese Empire counterpart, the Information Bureau, the Allied agency was more difficult to criticize.<sup>244</sup>

As SCAP strictly controlled the domestic conversation on Japanese war crimes, the IMTFE was the first time many Japanese people heard explicit details about the horrific acts their army committed. This initially led to many of the atrocities being heavily publicized and to many horrified responses from the Japanese public. Despite this outrage, many public responses were also censored, as GHQ was particular about the way in which it allowed the Japanese public to reflect upon the crimes. For example, Saeki Jinzaburō, expressing some of his emotions about the war crimes discussed at the Tokyo Trial, wrote this poem:

So full of grief is this day  
that it made me forget  
the vexation of the day  
we lost the war.<sup>245</sup>

The nuance of Saeki’s poem—his regret about losing the war becoming overshadowed by his of horror at the crimes he learned the Japanese army committed—was not appreciated by the CCD. His poem was not published due to its ‘negative tone’ regarding Japanese defeat. As John Dower remarked in his book on the American Occupation of Japan, *Embracing Defeat*, censorship

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<sup>243</sup> Dower, *Embracing Defeat*, 341.

<sup>244</sup> Lucken, 167.

<sup>245</sup> Saeki Jinzaburō in Yoshimi Yoshiaki “Senryōki Nihon no Minshū Ishiki –Sensō Sekinin o Megutte”, *Shisō* 811 (January 1992):73-99, 82, quoted in Dower, *Embracing Defeat*. 508.

“became an integral part of American policy itself, to discourage recollection of Japan’s atrocities.”<sup>246</sup>

The tone of American policy towards Japanese war crimes, and by extension the trial it had helped set up to prosecute them allowed Japan’s post-war conservative government, in the words of Herbert P. Bix, to “be tricky in their treatment of war criminals.”<sup>247</sup> Despite formally accepting the ruling of the Tokyo Tribunal by signing the Treaty of San Francisco in 1952, many Japanese government officials and members of far-right conservative movement dismissed the IMTFE as ‘victor’s justice’ and the war crimes as propaganda. The Diet restored the remaining Class A criminals’ pensions and began a campaign to get American permission to release the surviving war criminals. The United States responded warmly to the idea, seeing it as an opportunity to wash its hands of the problem of Japanese war criminals. The American government was also keen to keep Japan under its sphere of influence. In a Department of State Memo to the Japanese Embassy dated January 10, 1955, John Foster Dulles worried that the Japanese government’s desire to discuss the possibility of establishing relations with the USSR and ‘Communist China’ would harm the American Cold War agenda in the region, and considered that any such alliance countries would be a “major diplomatic defeat”.<sup>248</sup> These political events certainly made the United States more open to the idea of freeing the war criminals. The United States was not keen on allowing Japan to reassert economic or political ties with communist countries.

Therefore, it is unsurprising that United States was supporting the Japanese government’s requests for the Clemency and Parole Board for War Criminals to release all the imprisoned

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<sup>246</sup> Dower, *Embracing Defeat*, 508.

<sup>247</sup> Bix, 651.

<sup>248</sup> Naoki Ono and Ishii, eds., “Telegram from the Department of State to Embassy Tokyo, January 10<sup>th</sup>, 1955”, *Documents Related to Diplomatic and Military Matters 1955 = 日米外交防衛問題 1955 年*, vol. 2, VI (Tokyo: Kashiwashobo Publishing Co., 1999), 17–18.

Japanese war criminals. Established by President Truman via an executive order in September 1952, the board was an independent panel comprised of officials from several American government departments. While the American government indicated to Japan that it was interested in negotiating further releases, it avoided letting the Japanese know that the administration was considering fully supporting the request to the Board for an immediate release of the remaining war criminals. Instead, over the course of the year the Americans opted to authorize a steady stream of paroles, while avoiding the mass release that Japanese government officials requested. Each time the war criminals were discussed by the two governments, the issue usually dovetailed into a larger conversation the two governments were having to ensure the economic and political success of Japan, while also tiptoeing around Cold War policies and promoting an anti-communist agenda.<sup>249</sup> Government documents reveal that by releasing the prisoners steadily, the Americans achieved two things: continued leverage in ongoing negotiations with the Japanese government, and an eventual end to their responsibility for the remaining war criminals.

The issue of how to handle the sensitive issue of releasing Class A war criminals was not just a debate for the American government, but also for the American public. In an opinion piece to the *New York Times* in August 1955, George A. Furness, a former member of the defense council for the accused at the IMTFE, wrote:

I submit that we should now make the decision to release the Japanese still confined in Sugamo Prison, whether such decision be based on justice or politics or both. After all, we are asking more of the Japanese than attendance at parties or state visits; more even than so-called “coexistence.” We are asking them to rearm as part of the free world and therefore as our allies. We cannot, for reasons of policy and justice, justify a policy under which we accord worse treatment to those whom we ask to be our allies than we do to those against whom we ask them to ally. Not one

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<sup>249</sup> See “Telegram from the Department of State to Embassy Tokyo, August 31<sup>st</sup>, 1955” and “Office Memorandum from Mr. McClurkin to Mr. Robertson, January 20<sup>th</sup>, 1955” in Ono and Ishii, eds., *Documents Related to Diplomatic and Military Matters 1955 = 日米外交防衛問題 1955 年*, vol. 2, VI 24-5, 313-5.

of the Communist Chinese or North Koreans have been punished in any way, this cannot be said of the Japanese.<sup>250</sup>

From August 1955 to March 1956, the United States paroled 73 war criminals. In total it had released 66 percent of the Class A, B and C prisoners for which it was responsible, compared to the 85 percent release record of Great Britain. By March 1956, only one Class A war criminal, Satō Kenryō, remained incarcerated; the rest of the remaining Tokyo Trial defendants had been released the previous year.<sup>251</sup> However, a report sent from the American Embassy in Tokyo to the Department of State, titled “A Fresh Start with Japan”, voiced fears this was not enough to sway the Japanese away from ‘Communist Powers’ and back to the Americans. “Either we do without a senior partner in this half of the world, or it must be Japan”, the report began, announcing that the signs of Japanese “discontent” with American policy toward their country was subtle but growing.<sup>252</sup> The report congratulated the government for releasing the last of the ‘Class A’ criminals earlier that year but insisted that the “full release of the remaining war criminals would remove the persistent, galling and emotion-charged problem in Japanese-American relations”. The report concluded that, “there is hardly any other field in which we could accomplish so much at so little cost to ourselves.”<sup>253</sup>

The United States needed Japan as an ally and buffer against the threat of communism in the Asia-Pacific and this was a factor in deciding what it chose to overlook in the post-war years. The surviving Class A criminals became political tools, to be “sacrificed to political exigency”.<sup>254</sup>

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<sup>250</sup>George A. Furness, “Japan’s War Criminals,” *New York Times*, August 29, 1955, sec. Opinion.

<sup>251</sup> Naoki Ono and Ishii, eds., “Memorandum on Current Problems, March 18th, 1956”, *Documents Related to Diplomatic and Military Matters 1956 = 日米外交防衛問題 1956 年*, vol. 2, VII (Tokyo: Kashiwashobo Publishing Co., 1999), 77-80.

<sup>252</sup> Ono and Ishii, eds., “A Fresh Start with Japan, September 21, 1956”, *Documents Related to Diplomatic and Military Matters 1956*, vol. 2, VII, 255; Ono and Ishii, eds., “Japan-U.S. Relations, June 19, 1956”, *Documents Related to Diplomatic and Military Matters 1956*, vol. 2, VII, 175.

<sup>253</sup> Ono and Ishii, eds., “A Fresh Start with Japan, September 21, 1956”, *Documents Related to Diplomatic and Military Matters 1956*, vol. 2, VII, 282.

<sup>254</sup> Boister and Cryer, *The Tokyo International Military Tribunal*, 330.



In the quest to achieve this objective, the United States deliberately fostered a “milieu of willful forgetting” through the release of War Criminals and the censorship of controversial issues related to the IMTFE.<sup>255</sup> This had led some, like John Dower, to argue that the America Cold War agenda allowed Japan to remember the criminal but forget the crimes.<sup>256</sup> Therefore, while this thesis does wish to avoid Western assumptions that the IMTFE was completely forgotten in Japan, it is important to note that the erasure and silencing of the tribunal was encouraged by the United States’ Cold War agenda. Those who had been arrested as future Class A defendants for potential subsequent tribunals rode on the Cold War’s anti-communist coattails all the way out of Sugamo Prison, their charges dropped around the same time Tōjō Hideki and the others found guilty and executed. Many of these released men would go on to assume positions of authority in the Japanese government, including Nobusuke Kishi, who became Prime Minister of Japan in the 1950s. These decisions have led to the IMTFE being silenced and erased outside of Japan as well. As Neil Boister and Robert Cryer observed: “if a quiet burial of the Tokyo Trial was the intention of the Allies, they succeeded outside of Japan enviably; even obtaining primary material on the Tribunal is difficult.”<sup>257</sup>

As the IMTFE was already surrounded by controversy, disillusionment, and accusations of ‘victor’s justice’, releasing the criminals became an easy way to appease the Japanese government. However, in many ways this also caused the tribunal to be further delegitimized. The rather sudden about-face from the United States only served to cast further doubt on the proceedings. This was not lost on other former Allied countries. The rapid transformation from axis power to Cold War ally left some resentful of America’s policy on Japan. As an Australian representative on the Allied

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<sup>255</sup> Dower, *Embracing Defeat*, 508.

<sup>256</sup> Ibid.

<sup>257</sup> Boister and Cryer, *The Tokyo International Military* 324-5.

Council for Japan, William Macmahon Ball grumbled, “seldom can a defeated nation have had such an important role allotted to it so soon after its defeat”.<sup>258</sup>

The Cold War also led to a disconnect between Japan and two of the countries against which it had committed some of its most serious crimes: Korea and China. Both North Korea and China were under a communist sphere of influence, while Japan remained in the American one. The subsequent isolation that came from this division greatly influenced why stories of Unit 731 and ‘comfort women’ only arose towards the end of the Cold War, during the ‘memory wars’ of the eighties and nineties. A massive explosion in public debate and academic scholarship arose during this period. Attempts to reopen and engage with Japanese war crimes discourse, has become a favourite subject of memory studies. The marginalization of Asian countries like Korea and China within postwar Japanese memory occurred partially because Cold War politics deliberately discouraged conversation between these countries. Global historian Sebastian Conrad has argued that transnational factors like Cold War politics discussed led to “partial amnesia about Japan’s expansionist past” and as a result “Japanese victimization of other Asian nations and the history of Japanese violence on the Asian mainland remain[s] largely undiscussed”.<sup>259</sup> Though Conrad is not wrong, his argument at times overlooks the agency of the Japanese political right in fostering a culture of forgetting with respect to war crimes, especially when he claims that this marginalization was “not so much” a product of internal conscious decisions as they are were transnational factors.<sup>260</sup>

Though it is critical to highlight the role global influences played in the process of memorialization, there were quite a few internal conscious decisions made by Japan that helped

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<sup>258</sup> Harries and Harries, 194, quoted in Takatori, “Justice Tempered by Realpolitik.”, 56-7.

<sup>259</sup> Conrad, *Entangled Memories*, 92.

<sup>260</sup> *Ibid*, 94.

secure the release of Japanese war criminals. The Japanese government worked extremely hard to secure the release of prisoners and bury any perceived stigma of war guilt. The American Occupation formally ended on April 28, 1952 but as early as November 1952, Tokyo was requesting clemency for the twelve surviving Class A criminals still incarcerated. In November 1953, Japanese petitions for release clearly implied that the criminals should be freed because they were wrongly convicted, thus challenging the tribunal's verdict outright.<sup>261</sup> The boldness of these requests raised several eyebrows amongst the former Allied nations but as Yuki Takatori wrote:

Japan, as if testing the limits of the generosity of the parole board, submitted request after request for further remission of sentences, the most audacious being a plea to reduce them to time served, so the parolees would be eligible, if they so wished, to run for office in the upcoming national election.<sup>262</sup>

Furthermore, it is difficult to disentangle the IMTFE—an event that was arguably not transnational, despite the large cast of state and non-state actors—from attempts to downplay Japanese war crimes, as the tribunal encouraged the silencing of Asian voices by tailoring its indictment and defendants' lists to suit an Allied political agenda that for the most part, did not include such voices. The focus remained firmly on Class A crimes, meaning that many Class B/C crimes committed by the Japanese army were never dealt with by the court. The judges heard nothing about Unit 731 and its chemical and biological weapons testing on Chinese civilians because the United States had negotiated an immunity deal in exchange for scientific data.<sup>263</sup> Korea and Taiwan, both colonized by Japan, were unable to seek justice at the tribunal for the war crimes committed against them, including forced labour, sexual exploitation and slavery. Although

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<sup>261</sup> Takatori, "Justice Tempered by Realpolitik.", 57.

<sup>262</sup> "Letter to MacArthur" May 21, 1957, D 1.3.0.3-10, vol. 5, The Diplomatic Records Office, Ministry of Foreign Affairs, Japan, quoted in Takatori, "Justice Tempered by Realpolitik.", 58.

<sup>263</sup> Note: Sheldon Harris's book *Factories of Death: Japanese Biological Warfare, 1932-45, and the American Cover-up*. (London: Routledge, 1994) provides a thorough discussion on this particular chapter of Japanese war crimes.

as previously mentioned, evidence of certain atrocities, including the Nanking Massacre, were heard in court. However, because most of the charges directly concerning these crimes were not ruled upon in the final judgement or were absorbed into other indictments, they were not visible in the final verdict. Because of all these decisions, the Tokyo Trial did aid some of the more problematic aspects of the America agenda of modernization in Japan, and the building of a new post-war world system.

#### Japan as the Victim and Victimizer

On August 6, 1945, the *Enola Gay* dropped its cargo over the Japanese city of Hiroshima, marking the beginning of the age of nuclear warfare. On August 9, Nagasaki became the second, and last, victim of the American atomic bombing campaign. Since these events, the two cities have become “icons of Japanese suffering,” tragedies capable of shifting Japanese memory of the war and victimization onto itself, and away from those the country victimized.<sup>264</sup> No doubt, the uniqueness of Japan’s situation also heightened the tragedy; to this day Japan remains the only country to have atomic or nuclear weapons used against it in war. The bombs occupy a central place in Japan’s *higaisha ishiki*, its ‘victim consciousness’.<sup>265</sup> Immediately after the bombs detonated, American agents set about collecting data on the use and effects of these weapons. The official report, released by the United States Strategic Bombing Survey, estimated that total casualties in Hiroshima ranged from 100,000 to 180,000, while estimates for Nagasaki hovered between 50,000 and 100,000. The “most plausible” estimate for total deaths, the report concluded, hovered around 110,000. However due to the subsequent deaths caused by radiation, and the difficulties of accurately gauging statistics after an event of such destructive magnitude, the true

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<sup>264</sup> John W Dower. "The Bombed: Hiroshima and Nagasaki in Japanese Memory." *Diplomatic History* 19, no. 2 (1995): 281.

<sup>265</sup> *Ibid.*

number would certainly have been much higher. The United States was not sure of the accuracy of the pre-bomb population statistics of each city, or how many victims were cremated before the survey was able to document them.<sup>266</sup> Contemporary historians now believe the total death toll from the bombs to be triple the early estimates, arguing the number to be at least as high as 300,000.<sup>267</sup>

The IMTFE is in many ways inseparable from discussions on the dropping of the atom bombs. Together, the events highlight the duality of the Japan's identity as a perpetrator of violence and a victim of violence. Due to American censorship, the temporal overlap regarding discussions of each event has led to an uneasy tension between the two facets of Japanese history. During the American occupation of Japan almost all criticism related to the dropping of the bombs, including the number of deaths related to long-term radiation exposure, was censored. This censorship marginally relaxed towards the end of 1948, coinciding with the end of the Tokyo Trial. From this point on, the Japanese public began to encounter the tragedies of Hiroshima and Nagasaki on a more intimate level.<sup>268</sup> The overlapping timeline of the relaxed censorship and the Tokyo Trial's conclusion had an influence on Japanese war memory and as such reveals just how complicated war guilt can become; as John Dower observed,

The culminating moments of the protracted Allied juridical campaign to impress Japanese with the enormity of their wartime transgressions thus coincided with the moment many Japanese had their first encounters with details, personal descriptions of the nuclear devastation that Americans had visited upon them.<sup>269</sup>

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<sup>266</sup> Franklin D'Olier et al., eds., "The United States Strategic Bombing Survey: The Effects of Atomic Bombs on Hiroshima and Nagasaki," July 1, 1946, President's Secretary's File, Truman Papers, Truman Library Archives, [https://www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents/pdfs/24.pdf](https://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/pdfs/24.pdf), 16.

<sup>267</sup> Dower, "The Bombed". 282.

<sup>268</sup> Ibid, 289.

<sup>269</sup> Ibid

The second point of overlap was that American occupation authorities feared the dropping of the atom bombs could be used in a smear campaign against the trials. This fear was not entirely unwarranted; before SCAP secured Japan in the direct aftermath of the surrender, certain politicians—like Class A criminal Shigemitsu Mamoru—and the media had discussed using the bombs as counterpropaganda against the occupation forces and the subsequent war crimes trials.<sup>270</sup>

For many in Japan there was an “immoral equivalence” to Japanese military actions in Asia, and the American bombing campaign in Japan.<sup>271</sup> To some the decision to try Class A criminals, but not to punish those responsible for the atomic bombs, helped prove that the legal proceedings were nothing more than haphazard justice forced upon a defeated nation. It is easy to assign the separate signifiers of ‘victim’ and ‘perpetrator’ but when the two-overlap within the same spaces, there is often a struggle to unify the two concepts within one national identity. It is often easier to see the two identities as mutually exclusive terms, which is how the bombs have cancelled out or altered certain perceptions of the Japanese army’s crimes amongst some of the country’s far-right. In fact, this tension continues to be felt today. For example, thousands of Koreans were in Hiroshima and Nagasaki when the atomic bombs detonated, mostly being used by Japan as forced labour. Discussions regarding how these ‘double’ victims fit into Japanese narratives regarding the atomic bombs was reignited when then sitting President Barack Obama visited Hiroshima in 2016.<sup>272</sup>

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<sup>270</sup> Ibid, 275-6.

<sup>271</sup> Ibid

<sup>272</sup> Note: it was reported by the media that some in the Japanese government were discouraging the idea of asking Barack Obama to apologize for Hiroshima upon his visit to the memorial. There were apparently fears that such an apology would mean Japan would also have to apologize for its wartime conduct, something the Japanese government was apparently keen to avoid. See: Jake Adelstein, “Japan Doesn’t Want the U.S. to Apologize for Bombing Hiroshima. Here’s Why,” *Los Angeles Times*, April 29, 2016, <http://www.latimes.com/world/asia/la-na-japan-hiroshima-apology-20160429-story.html>.

Hiroshima and Nagasaki have, understandably, cast long shadows over Japanese wartime memory. The deployment of atomic weapons has had the unforeseen side effect of complicating the collective memory of the IMTFE and Japan's experiences as a wartime aggressor. For some Japanese, the bombs tower over all other atrocities committed during the Second World War; though the end of the Cold War and the subsequent warming of relations between Japan and its former victims has helped shift this perspective to a slightly more balanced one for most of the Japanese public.<sup>273</sup> This observation is not meant to criticize the validity of the peace and anti-nuclear movements that emerged in Japan after the war as a response to the bombs. Nor is the exploration of Cold War politics above meant to excuse some of the internal political forces that worked to delegitimize the IMTFE and the crimes the tribunal sought to prosecute. Nonetheless, recognition of some of the transnational factors that have contributed to Japan's process of understanding its own wartime actions is crucial to a fuller understanding of the complicated legacy of the IMTFE and Class A war criminals.

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<sup>273</sup> Dower "The Bombed", 295; Conrad, "Entangled Memories".

## CONCLUSION

*“Why can’t we have a middle ground? We need both views.”*<sup>274</sup> - Anonymous Japanese student interviewed by Madoka Futamura

### Real Motives and Dissenting Opinions

On November 4, 1948, two years after the proceedings began, Justice William Webb began to read out the verdict for the Tokyo Trial. Like the tribunal itself, the reading of the judgement was also a lengthy affair. It took a little over a week to get through the entire document, with the trial finally adjourning on November 12. Webb concluded that 779 witnesses gave evidence in the trial through depositions and affidavits, while 419 testified in person. The prosecution’s case alone took eight months to complete.<sup>275</sup> Of the 55 counts in the original indictment, 38 were dismissed as irrelevant or not within the jurisdiction of the court. The judges ruled that of the 36 charges of crimes against peace, only eight needed to be decided upon due to overlap between each indictment. Those eight charges included general conspiracy to wage aggressive war as well as one count for every country or empire Japan waged aggressive war against.<sup>276</sup> The bench also ruled to dismiss the entire second group of charges, concerning the murder of civilians, soldiers and conspiracy to commit murder. Webb told the court that the judges decided they did not have authority to make a ruling on these crimes. This was not, he said, because they did not feel that crimes had occurred, but because the Charter did not allow them to make decisions regarding conspiracy apart from crimes against peace. Therefore, charges involving conspiracy to commit murder and conspiracy to commit conventional war crimes (37, 38, 44 and 53) were disregarded and not ruled upon. Of the charges involving murder without conspiracy –39 to 52—Webb argued that it was unclear

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<sup>274</sup> Futamura, *War Crimes Tribunals and Transitional Justice*, 78.

<sup>275</sup> Pritchard and Zaide, vol. 20, 48425-48426.

<sup>276</sup> Note: Those charges were waging war against China, the United States, the British Commonwealth, the Netherlands, France and two counts against the U.S.S.R: waging war at Lake Khassan and Nomohan. Other countries or territories who had been victims of the Japanese army were hastily organized into one of these groups.



whether they were reliant on the charge of ‘unlawful war being proven’, or ‘breaches of conventional war crimes law.’ Either way, the Australian judge said, each of these crimes was covered in the broader sense by the indictments in group one, or the remaining conventional war crimes charges, counts 54 and 55.<sup>277</sup>

Despite the condensed list of charges, all the accused except Matsui and Shigemitsu were found guilty of count one of overall conspiracy to wage aggressive war. Matsui was convicted of Class B crimes for his role as head of the Japanese forces responsible for the Nanjing Massacre. Shigemitsu, though exonerated of the conspiracy charges, was still found guilty of waging aggressive war and of having knowledge of, but failing to stop, the inhumane treatment of Allied POWs. The dissenting opinions of the Indian, French and Dutch justices were not read aloud in court, despite the defence council’s request to do so.<sup>278</sup> The *Times* correspondent covering the trial had a rather cynical view of why this was the case. “The judges are leaving for their home countries in a few days. The haste at the end of the trial can only be considered unfortunate on its moral effects, since the Japanese say openly that the judge’s real motive in not reading the dissenting opinions is their desire to get home for the Christmas festivities.”<sup>279</sup>

So, with a whimper rather than a bang, the IMTFE hastily concluded. Seven of the accused were condemned to death, while the rest received prison sentences ranging from seven years to life. In response to the defense council’s arguments that the Tokyo Trial did not have the authority to find these men guilty, let alone sentence them to death, the final verdict was not sympathetic. “The charter is not an arbitrary exercise in power on the part of victorious nations but is the

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<sup>277</sup> Pritchard and Zaide, vol. 20, 48450-54. Also see List of charges in appendix for details.

<sup>278</sup> Our Own Correspondent. “Tokyo Trial Findings.” *The Times* (London, England) Nov. 13, 1948.

<sup>279</sup> *Ibid.*

expression of international law existing at the time,” Justice Webb read.<sup>280</sup> Though Webb showed awareness that the debate over the validity of Class A crimes focused on accusations of ‘victor’s justice’ it is unlikely the Australian judge fully grasped just how prominent this debate would become within future discussions on the legacy of the IMTFE.

### Where Do We Go from Here?

Over the course of this paper it has become clear that there is an urgent need to move beyond the use of ‘victor’s justice’ as an analytical framework. The IMTFE did have significant flaws which are important to highlight, something that the previous scholarship on the tribunal has done an admirable job of doing. The concept of ‘victor’s justice’ has become seared into specific national narratives of remembrance, victimhood and trauma both in Japan and its neighbouring countries. Because of this, the IMTFE has become a lens through which Japan has memorialized, remembered, and silenced its past. However, when current modes of analysis are no longer enough, how do we move forward? How do we engage with the IMTFE and its relationship with Japanese war experiences and memories in a way that ultimately moves beyond binary debates and oversimplified dichotomies? Ultimately, the question is ‘how can we move beyond ‘victor’s justice’? I believe the answer lies in several interdisciplinary frameworks of analysis, including transnational, transcultural, and postcolonial history writing.

Within more nuanced critiques of ‘victor’s justice’ there are already traces of transcultural frameworks. Some historians, seeking to critically reflect on the way the history of the IMTFE has been constructed, examine how ‘victor’s justice’ fits into this narrative. Likewise, there have been concerted attempts to bring more transnational and postcolonial methodologies into the current historical field. Postcolonial history writing perspectives are particularly crucial to building new

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<sup>280</sup> Pritchard and Zaide, vol. 20, 48437.

avenues of understanding and inquiry regarding the IMTFE. Even critiques within the ‘victor’s justice’ frameworks criticizing the tribunal for its Eurocentric application of justice, over simplify the colonial relationships and power structures within the trial and between the Japanese and those who sought to prosecute them. This is because for the most part these narratives do not closely examine the global imperial power and legal structures of the period, nor do they contextualize the IMTFE within the broader frameworks of these studies. Furthermore, many historians have frequently referred to history as ‘the handmaiden’ of the nation-state.<sup>281</sup> If this is the case, then just as important but frequently confused with history, is the nation-state’s other handmaiden, memory. Through the utilization of transnational spatial and temporal frameworks, a stronger historical understanding of the relationship between the IMTFE and the memorialization of Japanese war crimes can be developed. As Chapter 4 alluded to, the historiography of the Japanese war crimes reveals that “the seemingly national discourse on what [are] considered problematic legacies of war and violence [are] always inscribed into larger transnational contexts.”<sup>282</sup>

Three recent publications within the historiography of the IMTFE highlight some of the important ways in which these tools can be implemented to help expand and reconsider current assumptions within the Tokyo Tribunal. *The Japanese and The War: Expectation, Perception, and the Shaping of Memory* (2017) by Michael Lucken is in many ways, global history’s answer to the challenge of moving beyond ‘victor’s justice’ narratives.<sup>283</sup> Furthermore it is quite possible that it will one day stand beside Dower’s *Embracing Defeat* as a benchmark within the field. Lucken examines the ways in which memories of the Asia-Pacific War have influenced Japan’s culture

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<sup>281</sup> Ann Curthoys and Marilyn Lake. "Introduction." In *Connected Worlds: History in Transnational Perspective*, ed. Ann Curthoys and Marilyn Lake. (Canberra: Australian National University Press, 2006), 5.

<sup>282</sup> Conrad, “Entangled Memories”, 86

<sup>283</sup> Note: Lucken’s book was originally published in 2013 in French, but the English translation has only recently been published.

and society. Emphasizing Japanese sources, he writes a narrative of the production of Japanese cultural memory in a way that moves beyond Eurocentric historical modes, perspectives and boundaries. While the IMTFE is not the central focus of his work, it stands as an impressive example of how one can significantly broaden the scope of current war studies, as well as reintroduce the Tokyo Trial into that field.

Two volumes of collected works that specifically engage with the IMTFE also highlight the ways in which new frameworks can further strengthen the historiography. *Transcultural Justice at the Tokyo Tribunal* (2018) engages with the trial in a way that “contextualizes legal agents as transnational forces, constituted through dialogues about the process of faction making.”<sup>284</sup> It also brings significantly new global perspectives and research into discussions on the IMTFE. Other examples of new approaches are Milinda Banerjee’s chapter on “India’s ‘Subaltern Elites’ and the Tokyo Trial” and Anja Bihler’s “On a ‘Sacred Mission’: Representing the Republic of China at the International Tribunal for the Far East.”<sup>285</sup> *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (2011) directly engages with and challenges the traditional ‘victor’s justice’ narratives. Although some of its chapters succeed at this better than others, the book explores several under-researched areas within the scholarship and works towards engaging in analysis beyond ‘victor’s justice’ critiques. The interdisciplinary, international contributors highlight the contemporary relevance of studying the Tokyo Trial and its legacy within international law.

There is also the problem of unfamiliarity. Though Nuremberg was not without its controversies, it is much wider known and much less controversial than its sister trial in Japan.

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<sup>284</sup> Lingen, Kerstin von, ed. *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48*. History of Warfare 117. Leiden: Brill, 2018.

<sup>285</sup> Ibid.

The IMTFE lingered into the Cold War, long after the ideals of post-war world peace had been shattered. The way the tribunal dragged on might also be a factor in why the IMTFE is lesser known. Whatever the reason, the atrocities committed in Asia-Pacific have existed in the shadow of European war crimes for too long. They have yet to receive the attention or commemoration they deserve. Equally frustrating is the lack of research; exploration of the tribunal and its debates reveal that there is so much more to be understood about the war crimes. Certain misconceptions of the trial linger in contemporary scholarship and collective memory. Furthermore, vast amounts of documentation and records concerning war crimes and the IMTFE have yet to be properly analyzed.<sup>286</sup> Within the context of the Second World War, the IMTFE has languished in a dusty corner long enough. To break away from simplistic narratives of the crimes and the trials, further research must be done.

### In Conclusion

This paper has presented five major concerns and arguments. Its first aim was to trace the early efforts of those building and prosecuting the Allied legal case against Japan, as well as examine some of the tensions and fragile links that held some of the Class A charges together. Second, it focuses on the ‘dissenters’ of the IMTFE, whose public and private criticisms of the Class A focus solidified allegations of ‘victor’s justice’ before the IMTFE even adjourned. Examining these two sides together reveals that misgivings about Class A crimes were much more widespread than at times assumed and that since the IMTFE’s inception there has been a predominant focus on Class A crimes. The third aim was to examine some of the most influential works within the English language historiography of the IMTFE to highlight how discussions of the tribunal are frequently characterized by binary debates interpreting the concepts of aggressive

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<sup>286</sup> Totani, 261.

war and ‘victor’s justice’. Analyzing these debates brings us closer to understanding the ways in which different interpretations of ‘victor’s justice’ have come to monopolize scholarship of the tribunal.

The fourth argument of this thesis built upon the previous two chapters to study how the fixation with crimes against peace within the IMTFE, both historically and in scholarly work, has become part of Japan’s national wartime narrative. Specifically, the chapter that discusses how the Class A crimes, the immunity of emperor Hirohito, and the dissenting judgement of Radhabinod Pal have been used to criticize or dismiss the Tribunal and its complex legacy. Finally, in attempting to move beyond the nation-state as a unit of analysis, the paper has briefly addressed the transnational factors that also played an important role in shaping the memory of Japanese war crimes, including the Cold War, and the dropping of the atom bombs. The intention of this was to open discussion on what moving beyond conventional ‘victor’s justice’ narratives could look like, while recognizing some of the new directions scholarship is taking to move beyond such limiting frameworks.

When examined for its effectiveness in delivering justice to the victims of Japanese war crimes, the Tokyo Trial is a double edged sword. On the one hand, the IMTFE’s primary focus on Class A crimes has allowed many to dismiss it as an illegal and unfair judicial process. This kind of ‘victor’s justice’ makes it easier for some to devalue the tribunal or outright reject any legitimacy it had in punishing Class A crimes. Within Japanese collective memory of the Trial, this is particularly dangerous when it involves Japanese right-wing apologists for Japan’s wartime actions. ‘Victor’s justice’ creates a platform for those who wish to dismiss the tribunal, hide Japanese colonialism under criticisms of its European counterparts, and ignore any legitimacy the trial had in pointing out aspects of Japan’s wartime aggression.

Conversely, the IMTFE's perceived lack of focus on class B and C crimes had the effect of encouraging accusations of a different kind of 'victor's justice'. This one arguing that the tribunal's application of law did not provide closure for many Asian victims of Japanese war crimes. Some have taken this a step further and argued that the trial did not even address certain crimes like sexual slavery unless the victims were white, reflecting Allied racism and sexism.<sup>287</sup> As this paper has already acknowledged, the failure to address certain crimes that could have been filed under Class B and C charges did take place. The crimes of Unit 731 are the most well known example of how the Allied political agenda mishandled Asian victims of the war. There is also the exclusion of war crimes concerning Korean and Taiwanese victims of Japanese war crimes, particularly regarding 'comfort women.' However, as has been briefly shown in this paper and in much more detail elsewhere, proving Japanese sexual violence against Asian women was in fact part of the prosecutorial priorities of Tokyo.<sup>288</sup>

The question should therefore not be 'did the Allies prosecute these crimes?' but 'did they do so sufficiently?' For the most part the answer is still no, as those who work with the ever shrinking number of living survivors of Japanese sexual violence will tell you.<sup>289</sup> However, we can no longer make the claim that they were ignored. The centralized, overbearing presence of Class A crimes did influence some of the binary arguments regarding the coverage of Class B and C crimes by the IMTFE. Their lack of visibility certainly gave deniers more freedom to reject such crimes, as discussed in Chapter 3. These are just a few of the ways that false dichotomies

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<sup>287</sup> See Tanaka. *Japan's Comfort Women*.

<sup>288</sup> For example: Totani; Ustinia Dolgopol, "Chapter 16: Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes Against Comfort Women in The Tokyo Trial," in *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden ; Boston: Martinus Nijhoff Publishers, 2011), 81–92. There are many Japanese historians who has also refuted these assumptions in their own work, such as Hayashi Hirofumi. See Hirofumi Hayashi, *BC-kyū senpan Saiban (Class BC War Crimes)*, (Tokyo: Iwanami shoten, 2005), as cited in Totani, 179.

<sup>289</sup> Dolgopol, 243-4.

surrounding the IMTFE's 'victor's justice' debates have negatively impacted portions of Japan's national wartime narrative and shaped how crimes against peace encouraged both the remembering and silencing of war crimes within collective memory.

'Victor's justice' critiques are a useful, but ultimately reductive method of historical writing. Given the historical context in which the IMTFE was created and the subsequent transnational events that consumed post-war politics, it could never have been a 'fair trial'? Furthermore, fairness is not the right question to be asking seventy years on from the IMTFE. The fact that it still is being asked highlights the emotional and powerful responses the tribunal continues to invoke, even decades later. Indeed, Gerry Simpson was correct when he wondered aloud if the most significant piece of the IMTFE's legacy was to open Japanese political culture and collective memory to argument and debate concerning responsibility for Japanese actions during the Asia-Pacific War.<sup>290</sup> Therefore, reinterpreting the 'victor's justice' debate, whether from a more nuanced or traditional standpoint, only pushes the field of Japanese war crimes so far. Particularly when so much new research is coming to light that questions old assumptions about the Allied prosecution effort and the war crimes themselves. More and more English language scholars are gradually moving away from these reductive arguments because of the growing awareness that 'victor's justice' is no longer enough to understand the complicated identities and memories the field of Japanese war crimes trials holds. Although there are still many challenges ahead for those studying the International Military Tribunal for the Far East and its contentious legacy, this shift in perspectives is a hopeful indication of things to come.

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<sup>290</sup> Simpson, 32.



## Appendix A

### List of Major Figures

#### CHIEF OF PROSECUTION

Joseph B. Keenan (the United States)

#### THE JUDGES

President and Chief Justice Sir William Webb (Australia)

Erima Harvey Northcroft (New Zealand)

Mei Ju-ao (China)

E. Stuart McDougall (Canada)

Colonel Delfin Jaranilla (The Philippines)

Lord William Patrick (Great Britain)

Radhabinod Pal (India)

Bernhard Röling (The Netherlands)

Henri Bernard (France)

Major-General I. M. Zaryanov (Soviet Union)

John P. Higgins/ Major General Myron C. Cramer (The United States)

#### THE DEFENDANTS<sup>291</sup>

Araki Sadao (General, War Minister, Leader of the Kōdō-ha, the extreme right-wing “Imperial Way” military faction)

Doihara Kenji Ⅱ (General, Chief of the Intelligence Service in Manchukuo and Japanese 5th Army)

Hashimoto Kingorō (Colonel, founder of Sakurakai)

Hata Shunroku (General, War Minister, Commander-in-Chief of the China Expeditionary Army)

Hiranuma Kiichirō (Baron, Prime Minister, President of the Privy Council)

Hirota Kōki Ⅱ (Diplomat, Prime Minister, Foreign Minister)

Hoshino Naoki (Bureaucrat, Chief Cabinet Secretary)

Itagaki Seishirō Ⅱ (General, Kwantung Army, War Minister)

Kaya Okinori (Bureaucrat, Finance Minister)

Kido Kōichi (Lord Keeper of the Privy Seal)

Kimura Heitarō Ⅱ (General, Commander of the Burma Area Army)

Koiso Kuniaki (General, Kwantung Army, Prime Minister, Governor-General of Korea)

Matsui Iwane Ⅱ (General, Commander of the Shanghai Expeditionary Force and Central China Area Army)

Matsuoka Yosuke<sup>o</sup> (Diplomat, Foreign Minister)

Minami Jirō (General, War Minister, Governor-General of Korea)

Muto Akira Ⅱ (General, Chief of Staff of the 14th Area Army)

Nagano Osami<sup>o</sup> (Admiral, Navy Minister, Chief of the Imperial Japanese Navy General Staff)

Oka Takasumi (Admiral, Chief of the Bureau of Naval Affairs)

Ōkawa Shūmei (Civilian, Involved in Mukden Incident, Propagandist, Political Philosopher)

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<sup>291</sup> Ⅱ represents the accused who were subsequently sentenced to death.

<sup>o</sup> represents the accused who died during the trial before a verdict was produced

<sup>◇</sup> excused after displaying signs of a mental breakdown at the beginning of the trial

Ōshima Hiroshi (Army Officer, Ambassador to Germany)  
Satō Kenryō ◇ (General, Chief of the Military Affairs Bureau)  
Shigemitsu Mamoru (Diplomat, Foreign Minister)  
Shimada Shigetarō (Admiral, Navy Minister, Chief of the Imperial Japanese Navy General Staff)  
Shiratori Toshio (Diplomat, Ambassador to Italy, Foreign Ministry)  
Suzuki Teiichi (General, Chief of the Cabinet Planning Board)  
Tōgō Shigenori (Diplomat, Foreign Minister, Ambassador to Germany, Ambassador to Soviet Union)  
Tōjō Hideki Ⅱ (General, Prime Minister, War Minister)  
Umezu Yoshijiro (General, Commander of the Kwantung Army, Chief of the Imperial Japanese Army General Staff Office)

## List of Charges<sup>292</sup>

### GROUP I-CLASS A

Count 1: conspiring as leaders, organisers, instigators or with other accomplices between January 1, 1928 and September 2, 1945 to have Japan wage wars of aggression against any country which might oppose her purpose of securing the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans.

Count 2: conspiring over the same period to have Japan wage aggressive war against Northern China, including Manchuria.

Count 3: conspiracy to wage aggressive war to secure complete dominion over all of China.

Count 4: conspiring to have Japan wage aggressive war against the United States, Portugal, the British Commonwealth, the Netherlands, China, Thailand, the Philippines, the Soviet Union and France to secure complete domination of East Asia and the Pacific and Indian Oceans.

Count 5: conspiring with Germany and Italy to acquire complete domination of the world.

Counts 6 to 17: charges all except Shiratori with having planned and prepared aggressive war against the countries listed above.

Counts 18 to 26: charges all with initiating aggressive war against the countries listed above.

Counts 27 to 36: charges all with waging aggressive war against the countries listed above.

### GROUP II -MURDER

Count 37: charges some of the accused with conspiring to murder the soldiers and civilians of the United States, the Philippines, the Netherlands, Thailand and the British Commonwealth by initiating unlawful hostilities in breach of the Hague Convention.

Count 38: charges the same accused in count 37 with conspiring to murder in violation of numerous individual treaties between Japan and the Allied forces.

Counts 39 to 43: charges the same accused of murder at the attack on Pearl Harbor (39), Kota Bahru (40), Hong Kong (41), on board the H.M.S Petrel at Shanghai (42), and at Davao (43).

Count 44: charges all those accused with conspiring to murder on a wholesale scale, prisoners of war and civilians under Japan's control.

Count 45 to 50: charges some of the accused with the murder of disarmed soldiers and civilians at Nanking (45), Canton (46), Hankow (47), Changsha (48), Hengyang (49), Kweilin and Liuchow (50).

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<sup>292</sup> Paraphrased from official charge list. For the original, detailed list of charges, see Bernhard V.A. Röling, and C. F. Rüter, eds. *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.)*, 29 April 1946-12 November 1948. Vol. 1. Amsterdam: APA-University Press Amsterdam, 1977. 20-22.

Count 51 to 52: charges certain accused with the murder of Soviet armed forces at the Khalkhin-Gol River (51) and the Lake Khassan area (52).

#### GROUP III-CLASS B/C

Count 53 and 54: charges all except Okawa and Shiratori with having conspired to order, authorize or permit members of the Japanese army to commit breaches of the laws and customs of war against prisoners of war and civilian internees, as well as failing to adequately secure the observance and preservation of these laws.

Count 55: the same accused are charged with recklessly disregarding their legal duty to take adequate steps to secure the observance and prevent the violations of, breaches of the laws and customs of war.

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