Changing Dimensions of International Criminal Law: An Overview

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Abstract

This paper is particularly designed to familiarize students and young researchers of other subjects than law with the multifarious history of international criminal law in its first part. The second part focuses on the under-researched Tokyo International Military Tribunal and its diverse judges' bench of eleven men called to Japan to adjudicate over the nation's former leaders after the Second World War. Its diverse staff as well as its controversial legacy due to a never-ending debate about its legitimacy makes it particularly suitable for lively intellectual debate between students and scholars from a broad variety of academic backgrounds

Keywords: International Criminal Law, Tokyo International Military Tribunal, etc.

Introduction

International criminal law is a discipline which, both in academia and practice, is best approached with readiness for and interest in interdisciplinary exchange. Setting up and running international criminal courts and tribunals as well as drafting and appraising the related material law are activities not limited to lawyers only. Among the many functions this field of public international law is supposed to fulfill, the maintenance of international peace and security through securing accountability for the most outrageous and atrocious human rights violations is arguably the central one. This function is of interest and relevance for each and every one of us, be it as an individual or as a member of civil society, because such grave violations of human rights may affect our own lives, our well-being, and our pursuit of happiness when we expect it least. Individuals and civil society around the world look to the institutions supposed to implement international criminal law and, no matter whether the lawyers involved like it or not, evaluate their legitimacy from a non-legal perspective. These institutions and the lawyers working at, with or on them will greatly profit if political scientist, sociologists, historians, psychologists, philosophers, and many others increase their academic and practical engagement with international criminal law.

Part I – The History of International Criminal Law

First Steps in Questioning Impunity

While there are laudable attempts to trace the roots of international criminal law back to the

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19th century and beyond, this paper will be limited to the basic milestones of the 20th and early 21st century. Some of these milestones have a flavor of victors' justice, but there are also less well-known examples of justice by the vanquished with questionable success. Two of the latter are linked to the Armenian genocide, the so-called 'Aghet'.

In April 1915, the Ottoman government commenced large-scale persecution of the Armenians living in the Empire's territory under the pretext of their siding with the war enemy Russia.[1]Between 1 and 1.5 million Armenians lost their lives during arrests, deportations,and massacres, news of which were reported and caused great concern all over Europe. As early as in May 1915, Great Britain, France, and Russia issued a joint declaration in which they announced personal accountability of those responsible for "these new crimes of Turkey against humanity and civilization."[2]

Responding to this joint declaration, the Osman Prince Salid Halim stated that an intervention would constitute a violation of Turkey's sovereign rights over her Armenian subjects.[3] The great European powers in fact omitted any direct intervention to protect the Armenians during the war years. In 1918, however, the French Prime Minister Georges Clemenceau wrote a letter to the Armenian people's representatives in which he assured that the perpetrators of the massacres would be punished "according to the supreme laws of humanity and justice."[4]

At the Paris Peace Conference not much later, the state leaders established a special commission to examine all potential wartime atrocities.[5] The members of that commission eventually suggested prosecution of all those enemy subjects with a record of crimes against the laws of war or the laws of humanity.[6] At the main conference table, the United States and Great Britain advocated collective punishment: The Ottoman Empire should be divested into new microstates and mandated territories, with a relatively small territory alone remaining for Turkey.[7]

The Peace Treaty of Sèvres, signed by the Allied and Associated Powers and the Ottoman Empire on 10 August 1920, contained two provisions aimed at implementing the 1915 joint declaration. Articles 226 and 230 of the Treaty envisaged military tribunals to prosecute Ottoman nationals for both war crimes in general and the Armenian massacres in particular.[8] However, power politics soon changed the victors' approach to the Ottoman Empire and new alliances

became more important than accountability for past crimes. The Treaty of Sèvres never saw ratification and was, instead, replaced by the Treaty of Lausanne which contained a general amnesty.[9]

Notwithstanding such retreat of international pressure, the Ottomans established a national military tribunal to try those charged with atrocities committed against the Armenian people. The tribunal's legal bases rested in national law, but the prosecutor also used the term "crimes against humanity" when referring to the charges.[10] Only three of the overall 17 death sentences could be enforced because most of the prominent accused had escaped on time.[11] The establishment of a new nationalist government eventually led to the closure of the military tribunal, leaving behind a mixed legacy of early local ownership over international crimes but limited success in bringing perpetrators to justice.

The other major defeated nation of the First World War, Germany, provides us with a second example of even less successful local ownership or justice by the vanquished. The abovementioned special commission assessing wartime atrocities at the Paris Peace Conference accused the German Emperor Wilhelm II and Crown Prince Wilhelm of war crimes and crimes against the "law of humanity."[12] The Treaty of Versailles, the peace treaty concluded between the Allied and Associated Powers and Germany on 28 June 1919, contained a legal basis to prosecute the then ex-Emperor of "gravest violations of international morals."[13] Wilhelm II and his core family had, however, made a timely escape to the Netherlands and that host country refused to extradite him for such a trial.[14]

Article 228 of the Treaty of Versailles further contained a broader provision for a higher number of military tribunals to deal with lower-ranking perpetrators of "acts in violation of the laws and customs of war" against Allied nationals.[15] In early 1920, the Allies realized that it would be difficult for them to collect the required evidence and arrest suspects, and they worried about a possible destabilization of the new German Republican government. Tentatively, they agreed to Germany's proposal of national trials before the German Supreme Court in Leipzig, based on lists of suspects transmitted by the victorious powers.[16]

It is difficult to find reliable complete figures, but it seems that the Allies handed Germany the names of and evidence against 901 German nationals. 888 of them walked free after having been acquitted or after procedures were discontinued before trial. The Supreme Court handed

down only 13 guilty verdicts coupled with mild prison sentences, not all of which were served to the end because some war criminals escaped with the help of prison officers.[17] The German version of "justice by the vanquished" proved considerably less successful than its Ottoman counterpart and both of these undertakings led to long-lasting dissatisfaction amongst those who had advocated for accountability adequate to the horrors of the First World War.

The following interwar years saw many well-intended small efforts but little actual progress in the establishment of a permanent international criminal jurisdiction. Two examples worth mentioning due to their potential to change international law were two League of Nations conventions negotiated in 1937. Both the Convention for the Creation of an International Criminal Court[18] and the Convention for the Prevention and Punishment of Terrorism[19] aimed at creating lasting structures so to avoid the pitfalls of *ad hoc* mechanisms and *ex post facto*laws. However, India remained the only state to ever have ratified the Terrorism Convention,[20] and the Court Convention did not see a single ratification after only 13 signatures.[21] The minimum number of ratifications was not reached for either of the two documentsand they ever entered into force, leaving their preventative potential in relation to the Second World War to the realm of speculation.

The Birth of International Criminal Justice

All milestones nowadays often referred to as the 'birth of international criminal justice' were set after the Second World War. Their preparation began in 1942 with the Moscow Declaration in which the Allies announced the criminal prosecution of the Germans for "atrocities, massacres and cold-blooded mass executions" in certain territories.[22]1943 saw the establishment of the United Nations War Crimes Commission to implement the Moscow Declaration by taking up and docking on to the materials left by the largely futile post-1918 efforts.[23]The Commission suggested that the Allies prosecute violations of "the principles of international law, derivable from the established customs of civilized nations, the laws of humanity and the dictates of public conscience."[24]

It took until June 1945 for these plans to become more concrete after the capitulation of Germany. Allied representatives met in London to negotiate the most adequate and feasible way of dealing with major and minor war criminals of the Axis Powers. The logic behind prosecutions by the victorious powers was that the German Reich had made its affairs those of the other warring parties when it initiated the conflict through its aggressive wars, enabling the formerly attacked states to now disregard Germany's sovereignty. Put differently, the right to

sit in judgment over former German leaders and their followers stemmed from Germany's disregard for the sovereignty of the judges' nations.[25] After having agreed on the details, the representatives concluded the London Agreement with the Charter of the International Military Tribunal attached to it on 8 August 1945.[26] Art. 6 of the Charter gave the Tribunal jurisdiction *rationemateriae* over crimes against peace, war crimes, and crimes against humanity.

The International Military Tribunal was set up in Nuremberg and the four major Allied powers of the European war theatre were represented equally: One principal judge with an alternateand one prosecution team each came from the United States, Soviet Russia, the United Kingdom, and France respectively. 24 formerly high-ranking Germans were selected as the accused of the major war crimes trial which opened on 20 November 1945 and lasted until 1 October 1946. Twelve of the accused were eventually sentenced to death while three others were acquitted. The Soviet judge Iona T. Nikitchenko filed a dissenting opinion concerning these acquittals and a particular life sentence – he would have preferred convictions for all of the accused and death instead of the life sentence.[27]

The Nuremberg trial against the major war criminals was not the only undertaking to enforce accountability for atrocity crimesin occupied Germany. Control Council Law No. 10 empowered the American, Soviet, British, and French occupation forces to conduct similar trials for perpetrators lower in the hierarchy in their respective zones.[28] The Americans set up the Nuremberg Military Tribunals to conduct twelve more trials between 1946 and 1949 in the Bavarian city where the Nazis had previously held their notorious party rallies. These trials focused on certain professional groups, like the 'Jurists' Trial',[29] on parts of the Third Reich's government structure, like the 'Ministries Trial',[30] on paramilitary death squads behind the frontline, like the 'Einsatzgruppen Trial',[31] and even on industrialists, like the 'I. G. Farben Trial'.[32] Aside from these and other trials within Germany, many liberated European neighbor countries also endeavored to bring those to justice who, as Hitler's representatives, had unleashed a reign of terror. One significant example is the Supreme National Tribunal of Poland which, *inter alia*, dealt with several infamous concentration camps.[33]

Meanwhile the Second World War had also come to an end in its Pacific theatre with the surrender of Japan on 2 September 1945. Notwithstanding the total number of nine Allied nations signing the instrument of surrender with Japan, the United States took a dominant role, exercised mostly through the US Army General Douglas MacArthur who assumed the position

of Supreme Commander for the Allied Powers. To avoid time-consuming diplomatic negotiations and the need for compromise, MacArthur simply established the International Military Tribunal for the Far East ("Tokyo IMT") and stipulated its Charter by special proclamation in early 1946.[34] Like its counterpart in Germany, the Tribunal had jurisdiction over crimes against peace, conventional war crimes, and crimes against humanity. The period to be scrutinized by the eleven judges, however, was considerably longer as it extended from 1 January 1928 to 2 September 1945.[35] Overall, the Tokyo Tribunal was a much more time-consuming undertaking and involved larger quantities of staff than the Nuremberg Tribunal. A more detailed account may be reserved for the second part of this paper.

Japan also faced its counterpart to the trials held in Germany under Control Council Law No. 10. The Judge Advocate Section of the United States Eighth Army organized the prosecution of so-called 'Class B' and 'Class C' war criminals beforemilitary commissions in Yokohama.[36] Between late 1945 and 1949, these commissions examined a total number of 996 individuals, of whom 319 underwent trials which resulted in 142 acquittals and 177 guilty verdicts.[37] Japanese soldiers who had been captured in other areas of the Pacific sphere or in mainland China similarly faced trials by the authorities that took over control after the Japanese retreat and surrender, including the United Kingdom and Australia.[38] Both the Yokohama trials and comparable trials in Asia remain under-researched so far and may be recommended to young scholars motivated to do pioneering work.

Cold War Deadlock?

The approach of the Cold War and the formation of two power blocks split along an ideological divide affected the ascent of international criminal justice in a not particularly favorable way. The young United Nations Organizations ("UN") launched several efforts to stabilize international criminal law and leave a more successful record to history than the League of Nations had done in the interwar years. While the UN General Assembly had already affirmed the principles of international law contained in the Charter of the International Military Tribunal at Nuremberg in a very general manner on 11 December 1946,[39] it took until 1950 for the International Law Commission to formulate the seven Nuremberg Principles which form the core legacy of the Tribunal.[40] On 9 December 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force on 12 January 1951 after having obtained 20 ratifications.[41] In 1954, the International

Law Commission eventually adopted a Draft Code of Offences Against the Peace and Security of Mankind supposed to be something like a standing charter of international crimes to avoid or at least mitigate further controversies about *ex post facto* laws and victors' justice.[42] That was as far as the postwar momentum carried the international society and developments on the global playing field fell asleep for almost four decades.

A high but often forgotten number of activities at the national level during those four decades calls into question whether that era truly deserves to be branded as 'deadlocked'.The abduction of Adolf Eichmann, organizer and logistical 'mastermind' of the Holocaust, by the Israeli secret service Mossad in Argentina in 1960 was a notable opening for these often-neglected local trials.[43] The judges at the District Court of Jerusalem held that genocide had been a crime before 1945 already and the universality principle allowed Eichmann's prosecution in Israel without violating the principle *nullumcrimen sine lege*.[44] The Supreme Court of Israel, to which Eichmann appealed after having been sentenced to death by the District Court, agreed with the reasoning of the latter and upheld the judgment.[45]

The Attorney General of Frankfurt/Main in Germany, Fritz Bauer, was discontent with the very limited effect that the major and subsequent war crimes trials conducted by the Allied powers on German soil and trials like the one against Adolf Eichmann in foreign countries had on the German people. While he had been unsuccessful in persuading the West German Government to request Eichmann's extradition from Israel to Germany,[46] the political leaders could not prevent him from investigating and prosecuting lower-ranking personnel that had maintained the Holocaust machinery on the ground, namely in Auschwitz. The first great Auschwitz Trial against 22 defendants was conducted in Frankfurt/Main between December 1963 and August 1965; two less famous trials at the same location followed in the years 1965-1966 and 1967-1968 respectively. Bauer had opened a new chapter in the German process of transitional justice that did not close with his untimely death in 1968.[47]

While there are more examples of what may be called 'late justice for old Nazis' from various countries, like the 1970s/80sTouvier and Barbie trials in France[48] or the Finta trial in Canada,[49] it is worthwhile to shed a light on less well known national cases. One was the People's Revolutionary Tribunal in Cambodia established in 1979 right after the Khmer Rouge regime had been overthrown by the Vietnamese invasion.[50] A group of experts tasked with investigating the atrocities committed during the regime's reign between 1975 and 1979

estimated that approximately 1.7 million people had been killed.[51] Only two individuals were indicted for genocide before the Tribunal seated at Phnom Penh: Pol Pot, 'Brother No. 1', and IengSary, 'Brother No. 3' in the notorious Khmer Rouge hierarchy.[52] The trial was held *in absentia* which, seen jointly with factors like the presentation of questionable evidence, led to its appraisal as a show trial.[53] In light of this critique and as both accused had remained at large, avoiding the execution of their death sentences,[54] it is not surprising that neither the Cambodian people nor the international community considered this 'invader's justice' as a satisfactory line of accountability to be drawn under the past.

The "Golden Era" of International Criminal Law

The thawing of the Cold War after 1989 softened the ideological opposition in the UN Security Council that had so often resulted in deadlocks during the previous four decades. The 1990 sare a well-researched and intensely analyzed period, often referred to as the golden era or renaissance of international criminal law,[55] hence this section of the paper will be limited to a brief overview.

The dissolution of the multiethnic Socialist Federal Republic of Yugoslavia after the death of its long-term president Tito led to several armed conflicts breaking out from 1991 onwards.[56] In May 1993, the UN Security Council adopted Resolution 827 (1993) with the Statute for an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, or, more commonly, the International Criminal Tribunal for the former Yugoslavia ("ICTY").[57] The Security Council used Chapter VII of the UN Charter as a legal basis for the resolution, which meant that the conflict in former Yugoslavia had to constitute a threat to international peace and security and that the measures available under Chapter VII had to cover the establishment of an international criminal tribunal–two findings that were not uncontroversial.[58] The Tribunal with primacy over national courts had jurisdiction over war crimes, crimes against humanity, and genocide when committed on the territory of the former Yugoslavia after 1 January 1991.[59] When it officially closed on 31 December 2017 after 24 years and 161 indictments, not a single individual on the list of alleged perpetrators remained at large and celebrations on how the Tribunal had paved the way for the ICC glossed over previous criticism of Western imperialism.[60]

It took no longer than until 1994 when the UN Security Council saw the need to make use of its Chapter VII powers again to establish another international criminal tribunal. Resolution 955 (1994) contained the Statute for the International Criminal Tribunal for Rwanda ("ICTR"),[61] closely modeled after the ICTY statute but aimed at dealing with African atrocities. The institution seated at Arusha, Tanzania, had to address the genocide in Rwanda committed mostly by the Hutu majority against the Tutsi minority ethnic group – a conflict where the world community and its blue-helmeted "peacekeepers" had watched the slaughter of approximately 1 million people during a period of three months without intervening.[62] While the ICTR had faced even stronger criticism than its Hague sibling in the early years after its establishment and a handful of fugitives are still at large, it is mostly considered to have turned into a success story in its later years of operation before its closure on 31 December 2015.[63]

Irrespective of their record, both the ICTY and the ICTR functioned as midwives for the birth of the International Criminal Court ("ICC") through the Rome Statute of 1998. The International Law Commission pulled out its materials from the 1940s and 1950s and presented a Draft Statute for an International Criminal Court to the UN General Assembly as soon as in 1994.[64] An *ad hoc* committee appointed by the General Assembly prepared a report until the following year, after which a more formalized Preparatory Committee took over to work on drafts for an international conference. The report of the Preparatory Committee was completed in 1996, clearing the way for more than 160 states, 17 international organizations and 250 non-governmental organizations to assemble in Rome in 1998 – the rest is history.[65] The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002, leading to the creation of what had been thought to become *the* world criminal court.

Next to its high and noble aims like ending impunity and bringing justice to victims, one of the more grounded purposes of the ICC wasto renderthe establishment of new institutions for new conflictsunnecessary. An analysis of the time between 2000 to date reveals, however, a practical development quite to the contrary which may be described as 'mushrooming' of international criminal courts and tribunals or, at least, courts and tribunals with international elements. The Special Panels for Serious Crimes in East Timor[66] and the Special Court for Sierra Leone[67] were established in 2000 and 2002, respectively, and may still be disregarded as negotiations for them had begun before it was clear when the Rome Statute would enter into force.

In 2004, the Extraordinary Chambers of the Courts of Cambodia were founded to again address the atrocities committed by and under the Khmer Rouge regime between 1975 and 1979 after the abovementioned People's Revolutionary Tribunal had proven dissatisfactory. The hybrid tribunal staffed with international and national lawyers is embedded in the Cambodian court system and rests on an agreement reached between the UN and Cambodia after four years of most difficult negotiations.[68]

2007 saw the establishment of the Special Tribunal for Lebanon, the first international judicial institution with jurisdiction *rationemateriae* over the crime of terrorism. The Tribunal located at Leidschendam, a suburb of The Hague, is predominantly supposed to address the assassination of the former Lebanese Prime Minister Rafiq Hariri in 2005.[69] Notwithstanding this fairly limited task, it faces criticism for lengthy and expensive trials *in absentia* and internal quarrels amongst the judges becoming public.[70]

The youngest noteworthy institution is the Kosovo Specialist Chambers and Specialist Prosecutor's Office, established in 2017. Kosovo created the Chambers as part of its domestic court system, but they are staffed with international personnel and occupy a building at The Hague, where they will adjudicate over crimes under international and national law. The European Union, through its Rule of Law Mission to Kosovo, was the main driving force behind this new creation.[71]

Part II – The International Military Tribunal for the Far East and its Judges

The Tokyo IMT is not and has never been a blind spot in the history of international criminal justice, but it has received considerably less attention than its Nuremberg twin. While the trial in Japan was longer and its court record contained more pieces of evidence than the one in Germany, much less literature, be it popular or academic, deals with the undertaking in East Asia. Common knowledge of people both in the Eastern and Western hemispheres does not cover even the most basic information on the Japanese major war crimes trial.[72]

Such a lack of visibility is highly regrettable as the Tokyo IMT may provide the generations responsible for the development and maintenance of international law today with valuable lessons. The need for the selection of the right judges is one learning where we may turn to the former grand auditorium of the Japanese War Ministry that served as courtroom between 1946 and 1948. Even if one does not count the two judges who resigned and were replaced at the

beginning of the trial and only looks at a bench of eleven, the Tokyo IMT was staffed with the largest judicial panel ever seen in the history of international criminal law. The clash of not only legal cultures and philosophies but also personalities amongst the Tokyo judges has, when analyzed thoroughly in an interdisciplinary study, the potential to nourish the selection process for the eighteen judicial posts at the ICC.

Background of the Tokyo IMT

While it is never easy to select a starting point fora diplomatic process as long and complex as the one leading to the establishment of the Tokyo IMT, the well documented 1942 Inter-Allied Declaration of St James may serve for this purpose here. The Declaration focuses on German war crimes and calls the perpetrators' punishment a principal war aim, but the Chinese representative whose involvement was limited to the role of a conference guest stated that it was China's intention "to apply the same principles to the Japanese occupying authorities in China when the time comes."[73]

On 1 December 1943, the United States, China, and Great Britain published the Cairo Declaration in which they announced to continue joint military operations against Japan until the latter surrendered unconditionally. Japanese aggressions should be punished on the inter-state level by loss of all territories the Imperial Army had conquered or occupied since 1914.[74] While these three major Allies did not touch the issue of individual criminal liability, the aim of an unconditional surrender kept the doors open for establishing respective tribunals after the victory.

The big leap came one and a half years later, with the Potsdam Declaration of 26 July 1945. Once again, the leaders of the United States, the Republic of China, and Great Britain had met to decide on the fate of Japan after the foreseeable end of the war. With explicit reference to the Cairo Declaration, the three powers declared: "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."[75] Upon signing the instrument of unconditional surrender aboard the USS *Missouri* on 2 September 1945, the representatives of the Japanese government formally accepted the terms of the Potsdam Declaration and acknowledged the authority of the Supreme Commander for the Allied Powers to "take such steps as he deems proper to effectuate these terms of surrender."[76]

Only a few days earlier, on 29 August 1945, the United Nations War Crimes Commission had adopted its summary recommendations concerning Japanese war crimes and atrocities. The Commission referred to the terms of the Potsdam Declaration quoted above and suggested that the Supreme Commander of the United Nations or an equivalent authority establish one or more "International Military Tribunals" for the trial of those most responsible for "aggressions, cruelties and brutalities which have outraged the civilized world."[77]

Throughout fall 1945, the General Headquarters of the Allied Powers in Japan ordered several arrest waves to apprehend those suspected of being high-ranking war criminals.[78]The preparations reached a major milestone when, on 19 January 1946, General Douglas MacArthur in his capacity as Supreme Commander for the Allied Powers ("SCAP") proclaimed the establishment of the International Military Tribunal for the Far East.[79] The annexed original version of the Tribunal's Charter (an amendment would follow on 26 April 1946) lists crimes against peace, conventional war crimes, and crimes against humanity as matters within its jurisdiction *rationemateriae*.[80] The judges' bench should be made up of no less than five nor more than nine members, hence providing seats for up to one member from each Allied signatory to the Japanese instrument of surrender.[81] The amended version would allow for two more judges, one from India and another one from the Philippines, expanding participation to all members of the Far Eastern Commission.[82]

Appraisal of the Tokyo IMT

A survey of the appraisals the Tokyo IMT has received throughout the decades reveals a striking divide between participants involved in the Tribunal machinery on the one hand and outside observers on the other hand. The Australian William Webb, who had been selected as Presiding Judge by the SCAP, opened the first hearing on 3 May 1946 by stating that "there has been no more important criminal trial in all history."[83] Joseph B. Keenan, the American Chief of Counsel for the International Prosecution Section, went even further: "This trial is important to all other nations and to unborn generations of every nation, because these proceedings could have a far reaching effect on the peace and security of the world."[84] Solis Horwitz, a younger prosecutor working under Keenan in Tokyo, wrote in 1950 that the major war crimes trial in Japan was "of major importance to statesmen, diplomats, historians, political scientists, economists and psychologists."[85] He underlined that the eleven-nation undertaking was of

utmost significance to those concerned with establishing a system of world peace and order under law.[86]

A sharp contrast to these hymns of praise and assurances of the own institution's weight was already provided by contemporary observers. The American Major General Charles Willoughby, Chief of Intelligence in General MacArthur's occupation staff, considered the Tokyo IMT to be the "worst hypocrisy in recorded history."[87] The historian Richard Minear, whose 1971 book *Victors' Justice: The Tokyo War Crimes Trial* provided first access to the Japanese major war crimes trial for later-born generations, equally rejected the undertaking. In his opinion, the Tokyo IMT was such a bad precedent that the world should rather return to the law as it stood before 1945.[88] AwayaKentaro, a Japanese scholar, much later strongly criticized the set-up of the Tribunal where colonial masters from Europe sat in judgment over would-be colonial masters from Japan that had dared to compete with them.[89]

The Judges' Bench

In light of this strong criticism, one may turn to the eleven judges who took the most elevated seating position in the former War Ministry auditorium in Tokyo's Ichigaya area. The elevation of their judges' bench was a visible symbol of these men's power over the conduct of the proceedings, and with such privilege comes the responsibility that justifies a closer look at their record. In a 1975 study on international judges mostly focusing on those of the International Court of Justice, LyndelPrott collected a non-exhaustive list of institutional expectations to judges in Western democracies.[90] In lack of comparable global studies or younger analyses, this list may loosely serve as a yardstick for the Tokyo judges, too. It contains the following expectations:

1) Impartiality, i.e. incorruptibility and no personal interest in the case;
2) Serious and dignified behavior during trial hearings;
3) Loyalty to the chamber and other colleagues, in particular, politeness when giving separate concurring or dissenting opinions;
4) Refraining from critique outside the judges' chamber in publications, letters, etc.;
5) No obstructive or upset behavior when suggestions for the majority judgment are rejected.[91]

While the judges formed a collective of eleven, or rather thirteen if one also counts the French

and the American judge who retired before and shortly after the beginning of the trialrespectively, the adequacy of their behavior is best assessed by scrutinizing each and every one of them individually. Such analysis reveals that none of these demands above were met.

The abovementioned William Floyd Webb, President of the Tokyo IMT, had been Chief Justice of the Queensland in Australia before being called to the High Court in April 1946.[92] His judicial career had not been particularly outstanding and it was rather one of his additional positions that turned out to be problematic: Webb had presided over a commission investigating Japanese war crimes in New Guinea until shortly before his departure to Tokyo.[93] Once he took the presidential position that included power over the only microphone on the bench,[94] it turned out that he had the talent to affront his colleagues with his coarse and quick-tempered personality.[95] When it became clear to Webb that he could not align a majority behind his views, he distanced himself from his judicial brethren in a huff.[96] Instead of fulfilling his presidential role by trying to unify or at least manage the group of judges mindfully, he directly affronted everyone who disagreed with him on the substance of the law, even if such disagreement was clothed in the most polite terms like those of the Chinese judge Meiconcerning the Tribunal's jurisdiction.[97]

The Canadian Edward Stuart McDougall had some record of general practice before criminal and civil courts in his home country as well as army service during the First World War. His membership in commissions to investigate labor trouble and the publication of a book on mining law in the province of Quebec suggest specialization in fields that did not necessarily recommend him for nomination to Tokyo.[98] There are hints that McDougall suffered heart attacks during the summer of 1946, struggling with the heat and the humidity of Tokyo and the lack of reliable air conditioning in the courtroom. Against this background, his doctors advised him to leave the city during July and August 1947, irrespective of whether the entire Tribunal took a recess or not.[99] Despite such health issues, McDougall did not shy away from criticizing Webb's almost dictatorial understanding of his role as presiding judge and proposed that the judges should rather work on a true joint majority judgment instead of simply signing a document single-handedly drafted by Webb. The latter furiously crossed the Rubicon by announcing that he would now write his own judgment and distribute it for acceptance or rejection.[100]

Mei Ru'ao,[101] the judge from China, had enjoyed legal education in the United States, namely at Stanford University and the University of Chicago, before traveling in Europe in

1928.[102] Such background actually made him an ideal candidate for bridging Eastern and Western thinking and cultural differences on the Tokyo bench. However, it seems as if his professorial and political positions in China after his return to his home country in 1929, including his membership in the Legislative Yuan from 1934 onwards,[103] rather influenced him to become a conservative nationalist. As his diary covering his arrival and first weeks in Tokyo reveals, he considered his judicial role as that of a representative of the Chinese people that had suffered under the Japanese rather than that of an individual professional capacity: On an almost daily basis, he met with the Chinese political representatives and businessmen on semi-official duty.[104] Mei's mindset went hand in hand with his legal pragmatism, which enabled him to flexibly adjust his legal opinions and join the majority.[105] Nevertheless, he also attempted to inject a non-Anglo-American view in the majority judgment by arguing that too many citations from decisions of British or American courts "would mar the international character of the Tribunal."[106]

While little is known about the first French nominee, Henri Heimburger, who resigned before even traveling to Tokyo,[107] the colonial career of the second nominee Henri Bernard is well documented. After appointments as a prosecutor and judge in Conakry, Guinea, and Dakar, Senegal, respectively, Bernard was based in the Central African Republic from 1941 onwards.[108] From the outset this may indicate that Bernard had gained at least an unconscious imperialist attitude through assimilation, but a closer look establishes that it was quite to the contrary. He repeatedly endangered his career when he investigated criminal complaints of local natives against their white colonial oppressors– a scandalous behavior that would have ended his career had the Colonial Minister not supported him.[109] His pugnacious personality became evident in Tokyo when he engaged in the French language dispute between President Webb and the French Associate Prosecutor Robert Oneto: Onetoinsisted on presenting the phase of the prosecution case for which he was responsible in French, which was not an official language of the Tribunal. Webb, with the backing of the majority of judges, insisted on Oneto switching to English despite his heavy French accent. Bernard intervened behind the scenes and sided with Oneto after he had learned that the third channel available for simultaneous translation had been covertly occupied by the Soviet judge and his team. Bernard argued prejudice against the French nation and eventually persuaded Webb to allow Oneto's presentation to be held in French.[110] In the end, the independent-mindedness of Bernard prevailed over his government's

interest in him joining the majority and, by that, defending French colonial interests in Asia, and he wrote a short dissenting opinion in which he would have acquitted all accused because of the Tribunal's procedural flaws.[111]

Radhabinod Pal was the member representing India, a nation that had not signed the Japanese instrument of surrender and had only been included after the Indian agent-general in Washington, Girja Bajpai, had persuaded the US Department of State that a tribunal of "virtually all-white character" adjudicating over Asian war crimes would hardly be perceived as legitimate.[112] Pal was born into a poor family residing in the Bengal district of Nadia, now part of Bangladesh, which made his school and college education largely dependent on scholarships. He first obtained a bachelor's and then a master's degree in mathematics at Presidency College, Calcutta, before switching to the legal track. Pal began to lecture law at the University of Calcutta in 1923, where he also obtained his legal doctorate in 1924.[113] It is highly likely that he visited the four guest lectures held by the Harvard professor Manley O. Hudson on "current international co-operation" in 1927.[114] In these lectures, Hudson conveyed a deep skepticism towards the so-called international community of equal states and its capability to secure lasting peace by lifting the veil of sovereignty – an attitude also weaved into the fabric of Pal's dissenting opinion at the Tokyo IMT.[115] In 1937, Pal joined the International Law Association and traveled to its congress on comparative law held at The Hague, where he was elected as one of the congress's joint presidents and served as a reporter on legal philosophy.[116] After collecting such first-hand international experience, Pal was appointed as an officiating judge at the Calcutta High Court for several terms of more than two years in total between 1941 and 1943.[117] His last position in West Bengal before being sent to Tokyo was that of the Vice-Chancellor of the University of Calcutta for a two-year term from early 1944 until early 1946.[118]

Lord Patrick, the representative of the United Kingdom and a key majority builder in Tokyo, was one of Justice Pal's strongest opponents. After a straightforward career in the Scottish Faculty of Advocates from 1913 onwards and Royal Air Force service in the First World War, he was made a Senator of the College of Justice, Scotland's Supreme Court, in 1939.[119] Patrick's judicial experience in a legal system blending elements of common and civil law was one he shared with the Canadian judge McDougall and what might have been one of the reasons for which the two, together with the New Zealander Northcroft, formed the nucleus of the majority.[120] When in Tokyo, Patrick intensely communicated with the authorities in London

and frequently reported the positions of his judicial brethren. He informed the Lord Chancellor that there were judges who refused to apply the law of the Charter blindly but examined whether it complied with international law – something Patrick denounced as fraudulent and insincere, expressing the view that aparticular colleague concerned should never have accepted the appointment to the Tokyo IMT.[121] Together with his colleagues McDougall and Northcroft, Patrick stood for legal pragmatism and judicial creativity in finding the law required to arrive at a verdict that was in line with their inner conviction of Japanese guilt.[122]

Bernard V. A. Röling was the youngest amongst the judges, 39 years of age when he traveled from the Netherlands to Japan. After law studies in his home country and neighboring Germany, he had first embarked in academic work, receiving his legal doctorate and lecturing at the University of Utrecht, before he became a judge and later on also a professor of criminal law.[123] Like Henri Bernard, the files of Röling's judicial career show traces of his pugnacious personality: In 1940, the German occupation authorities in the Netherlands replaced probation by a pardon system, taking the observation of the convicts out of the criminal judges' hands. Röling circumvented that change in one case by staying the proceedings against an accused for three months, announcing that his subsequent verdict would also take into consideration the accused's behavior during that period. A newspaper report on that judicial resistance reached the German Reich Commissioner for the Netherlands, who demanded Röling's immediate arrest, but the responsible officers at the Ministry of Justice shied away from such a move that would have meant a confrontation with the entire Dutch judiciary.[124] When coming to Japan, Röling proposed the agreement that the Tribunal's output should be nothing but a majority judgment, and all dissent or disagreement should be kept behind closed chambers' doors. It was the Indian judge Pal who brought down that agreement upon his arrival by refusing to join it.[125] Interestingly enough, these circumstances did not hinder the two men in developing a deep friendship characterized by the exchange of poems and a rapprochement of Röling to Pal's intellectual ideas, through which the Dutch judge eventually also became a dissenter.[126]

The New Zealander Erima Harvey Northcroft was another majority builder and closer to Patrick than to Röling and Pal. His national career from an advocate in Auckland over the Judge Advocate General's office to a judgeship at the Supreme Court may rightly be called illustrious and might be the reason for his openly displayed self-confidence in Tokyo.[127] Northcroft did not even dodge conflicts with President Webb as he, for example, criticized the

latter's first draft for a majority judgment to have the quality of "a not very good student's essay."[128] He not only attacked the Australian's legal drafts but also denounced his petulant and impatient behavior in the courtroom.[129] While he himself ranked third with 49 absences from trial days, Northcroft nevertheless condemned Pal's 109 absences as "the gravest blot that had yet stained the honor of the court."[130] It is stunning that the New Zealander himself did not shy away from traveling to his home country at least once, not bothering much about returning to Tokyo almost a week later than scheduled – after all, there was an "elaborate verbatim record from which [he] was able to pick up the threads."[131] After the trial, he reported to the Prime Minister and appraised the Tokyo IMT as a successful undertaking by which a warning had been given to national leaders who contemplate aggression.[132]

Delfin J. Jaranilla of the Philippines had a similar background as his Chinese colleague Mei. He studied law in the United States, at Georgetown University, sponsored by his government. After his return to the island state, Jaranilla worked up his way through the judiciary before being appointed Attorney General in 1925 and later serving as Judge Advocate General.[133] Whereas Mei saw himself as a representative of the sufferingChinese people as a whole, Jaranilla had personally suffered under the Japanese when he became their prisoner of war and was forced on the notorious Bataan Death March, a war crime to be adjudicated at the Tokyo IMT.[134] While he survived and retook high positions in the Philippines as Secretary of Justice and then Associate Justice of the Supreme Court after liberation, it is no surprise that Jaranilla joined the majority but also wrote a separate opinion criticizing the sentences for the Japanese accused as too lenient.[135] Despite Jaranilla came from a non-independent nation just like his Indian colleague, his attitude towards the Tokyo IMT as revealed by his interactions with fellow judges and by his separate opinion indicates that the Filipino had comfortably assumed his position within the imperial infrastructures that Pal criticized so strongly.[136]

The Soviet Russian judge Ivan M. Zaryanovhad a military background.After service in the Czarist Army during the First World War, he was a regional Commissar of Justice before being promoted as a military judge. Only then did he start to read law at the Mid-Asiatic State University in Tashkent, continuing his studies at the Institute of Red Professors of Law in the early 1930s.[137] At the time of his appointment for Tokyo, Zaryanov was a member of the Military College of the USSR Supreme Court to which he returned after 1948.[138] In Japan, Zaryanov exerted pressure on President Webb to secure the exclusion of defense evidence suggesting

that the USSR had initiated wars of aggression.[139] Interestingly, while joining the majority, the Soviet judge was against the death penalty for personal reasons and due to its abolishment in the USSR.[140] Zaryanov's contribution to the majority judgment was not particularly visible outside of the judges' chambers, but he did not hesitate to draft his internal memoranda in unmistakable words: When Webb wanted to re-open the issue of 'naked conspiracy' as a crime under international law in August 1948, Zaryanov replied that the matter was "so indisputable and clear that after more than two years of the trial it does not require any special explanation."[141]

The first judge nominated by the USA was Justice John P. Higgins of the Massachusetts Supreme Court.[142] Joseph Keenan, the American Chief Prosecutor, had sought to prevent this appointment as he wished for a jurist of international stature to represent the nation that took the lead in the Tribunal's organization and administration.[143] After graduation from Harvard College and completing his LL.B. studies in less than half of the usual time, Higgins started to practice law and, soon after, also pursue a political career. He successfully ran for the National Congress in 1934 and engaged in several legislative projects with a liberal social flavor. In 1937, Higgins became the youngest Chief Justice of the Massachusetts Superior Court, where he served until his nomination for Tokyo.[144] This career was apparently not illustrious enough for Keenan, who called this choice as a "distinct embarrassment" and discouraged MacArthur to appoint the US judge as the Tribunal's president.[145] On 21 June 1946, not even two months after the trial opening, Higgins was so dissatisfied with the pace of the proceedings and the quality of many lawyers involved that he tendered a letter of resignation with President Webb and General MacArthur.[146]

Following the resignation of Justice Higgins, the US Justice Department nominated Major General Myron C. Cramer as his replacement without further ado.[147] The Harvard Law School graduate practiced for a decade before serving in World War I and joining the regular army afterward, being commissioned in the Judge Advocate General's department. Shortly before Pearl Harbour and US entry into the Second World War, Cramer was appointed Judge Advocate General himself – an office he held until his retirement in November 1945.[148] Towards the end of his career, Cramer had been involved in the preparations of the Nuremberg major war crimes trial.[149] This military record was one of the reasons for which some of the defense counsel in Tokyo challenged Cramer's joining the bench, beside the fact that a number of hearings had already been held.[150] Webb only briefly dismissed the motion and later stated for the record

that Cramer had familiarized himself with the part of the proceedings that had taken place before his appointment by reading the transcripts and examining the exhibits.[151]

As has been illustrated in this section, Cramer joined and contributed to a highly diverse bench composed of judges from very different backgrounds. Their previous education and careers had formed these men who, in parts, spent up to two and a half years together in a foreign country to pass judgment on this nation's former leaders. James B. Sedgwick's works on participant experiences and the negotiations of justice at the IMTFE are an encouraging first step on a road on which more interdisciplinary research must follow.[152]

Conclusion

By sketching the history of international criminal law with a particular focus on unsuccessful and hence often repressed justice by the vanquished as well as national adjudication of international crimes during the Cold War, this paper contains hints to many entrance points for interdisciplinary work on under-researched topics. The same accounts for the Tokyo IMT, where it is particularly noteworthy that new studies on such a diversely staffed institution should come from a comparable diversity of researchers –in relation to subject-matter, cultural and ethnological background. The use of today's communication technology for joint and parallel work on neglected facets of international criminal law will help to avoid the common pitfalls of eurocentrism or Western ethnocentrism in striving for an ever-improving human rights protection.

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