# Chapter 10
# Law and Politics in the Tokyo Trial


**Yoshinobu Higurashi**

**Abstract** This chapter provides a detailed examination of the legal and political aspects of the International Military Tribunal of the Far East of May 1946–November 1948, more commonly known as the Tokyo war crimes trial. It reviews the legal origins of the three classes of war crimes, assesses the perspectives of the Allied prosecutors, and traces the process whereby judgments and sentences were reached. The chapter concludes with how international policy developments (peace and independence of Japan) affected the fates of those convicted and poses questions about the judicial process itself.

## What Are Class A War Criminals?

The Tokyo Trial (officially, the International Military Tribunal for the Far East; May 3, 1946 to November 12, 1948) was a war crimes tribunal held after World War II had ended, in which 11 victorious Allied powers (the United States, the United Kingdom, the Republic of China, the Soviet Union, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippines) prosecuted and tried 28 leaders of the defeated Japan. Its precedent was the Nuremberg Trial in Germany (the International Military Tribunal; November 20, 1945 to October 1, 1946), where four Allied powers (the United States, the United Kingdom, the Soviet Union, and France) sat in judgment on Nazi leaders.

The Tokyo Trial was the concluding point of the wars of the Shōwa period as well as the starting point for postwar thought. For that very reason, there has long been a dispute between two diametrically opposed views concerning the trial. One is the affirmative argument: the school of thought that the Trial was "civilization's justice," and that it was only natural to sit in judgment on the barbaric Japanese militarists responsible for perpetrating a war of aggression and atrocities. Then, there is the

Y. Higurashi
Faculty of Law, Teikyo University, Tokyo, Japan



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negative argument: the theory that the tribunal was "victors' justice," vindictive in terms of fairness and the grounds for punishment.

Both arguments are attractive, being plain, simple, and easy to understand, though which is more compelling varies according to whether you see Japan or the Allies as being in the right. Each theory directly confronts the other, as you can trace in the arguments put forth by the prosecution and the defense. The 1978 enshrinement of the 14 Class A war criminals together with the other souls in Yasukuni Shrine was a sort of spiritual measure that served as a complete rejection of the Tokyo Trial. It remains very difficult to discuss the Tokyo Trial calmly and rationally.

With that as a brief background, I have tended to endorse the view that takes the Tokyo Trial as a policy of international politics, combining aspects of both civilization's justice and victors' justice, deeming it a mistake to see it as either one or the other exclusively. So, it is from such an angle that I would like to use this chapter to make a political history examination of several points related to the Trial.

First, let us start by defining what Class A war criminals were. The term "war criminals" used by today's mass media means those responsible for defeat and the mistakes leading to it in sporting events and corporate governance. The original meaning, however, is different. Officially, the Nuremberg and Tokyo International Military Tribunals had jurisdiction over three types of war crimes. First, "crimes against peace" are international crimes of planning, preparation, initiation or waging of a war of aggression (Class A crimes). Second, "war crimes" are violations of the traditional laws or customs of war (Class B crimes). And third, "crimes against humanity" are international crimes for inhumane acts against any civilian population or persecutions on political, racial, or religious grounds (Class C crimes). Those indicted for crimes against the peace were called Class A war criminals. Moreover, indictment for crimes against the peace was an essential condition at the Tokyo Trial, so simply put, a Class A war criminal meant the same as being a defendant in the Tokyo Trial. (The designation of Class A war criminal was not used in Germany.)

## The Establishment of New War Crimes

Of the three types, punishment for the second (conventional war crimes) was traditionally recognized and accepted. But the first and third (crimes against peace and crimes against humanity) were crimes newly defined in the later stages of World War II; in other words, they are ex post facto laws. Just how were international military tribunals established on the basis of laws created after the fact?

In the Atlantic Charter they issued on August 14, 1941, US President Franklin D. Roosevelt and British Prime Minister Winston Churchill revealed their concept for post-war, the "final destruction of Nazi tyranny." It was to remake the German state.

Two months later, Churchill also endorsed the punishment of war criminals who committed "Nazi atrocities" as an Allied objective of the war, which gained the

support of other Allied powers. By eliminating the Nazi leadership, Roosevelt and other Allied leaders thought to remake Germany as a peaceful country. In this way, punishing war criminals after the end of World War II became something on a much larger scale, leading to the intermingling of Allied occupation reforms with the drive to remake the states of the defeated.

Nazi atrocities, not starting a war, were subject to punishment at that time. Further, how exactly to try these crimes was left vague. It was only in the autumn of 1944 that things became more specific.

The United States began planning in earnest for the postwar settlement after the Normandy landings of June 1944, when Allied victory seemed more certain. US Treasury Secretary Henry Morgenthau, Jr. insisted that Nazi leaders be summarily executed; they were to be shot dead immediately after confirmation by the witnesses themselves. Though it seems like an unreasonable approach from today's perspective, Roosevelt had indicated a degree of understanding at the time.

Morgenthau's summary execution proposal borrowed from British ideas. Britain, opposed to a trial, thought to resolve the issue of war criminals expeditiously by summary executions, as Attorney General David Maxwell-Fyfe spoke plainly: "There are two things to avoid—one is Nazi propaganda; the other is the trial of the actions of the countries of the prosecutors" (Department of State 1949).

However, Secretary of War Henry L. Stimson severely chastised Morgenthau and criticized summary execution as a barbaric, feudal method. The "thorough apprehension, investigation, and trial of all the Nazi leaders" (i.e., employing the civilized method of a trial) that would leave a public record is how we can demonstrate to the German people the evil of the Nazi crimes, he stated (Department of State 1972). Civilization's justice was, above all, a rejection of summary executions.

In the end, Stimson's argument won out and became US national policy. Decision makers in the War Department under Stimson's command created the framework for the International Military Tribunal. In the course of their work, the range of acts subject to punishment expanded beyond atrocities to include planning and starting a war of aggression.

As for the grounds for punishing the act of starting a war, attention focused on the 1928 Pact of Paris (officially, the General Treaty for Renunciation of War as an Instrument of National Policy). Although this treaty outlawed wars of aggression, it did not stipulate punishment for violators. Regardless, the War Department high-handedly reinterpreted the treaty, making it the legal grounds to criminalize such acts, thereby enabling the punishment of individuals, too, an interpretation that was then employed at the International Military Tribunal.

Britain, the Soviet Union, and France agreed with the US approach, and lawyers and jurists from the four countries debated the concepts for the International Military Tribunal at the London Conference (June 26–August 8, 1945). Their final agreement, the London Agreement dated August 8, and its basic laws, the annexed Charter of the International Military Tribunal, established the "crimes against peace" and "crimes against humanity."

## Activities of the Allied Prosecutors

The aforementioned policy approach for the punishment of German war criminals was then applied to Japan. The Potsdam Declaration that the United States, Britain, and the Republic of China issued on July 26, 1945 clearly laid out the basic policy for punishing war criminals in the case of Japan. Paragraph 10 states: "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

The defense at the Tokyo Trial appealed that "war criminals" of the Declaration were those who violated the traditional laws or customs of war, and that it did not include the retroactive laws of "crimes against peace" and "crimes against humanity." Although their arguments were persuasive, the Allies' aim lay elsewhere. The London Conference had not yet reached its conclusions when the Potsdam Declaration was issued, which is why it used the expression "all war criminals."

Japan accepted the Potsdam Declaration and surrendered on August 14. That means Japan had accepted that the Allies would carry out war crimes trials and that the Japanese government had a duty to cooperate with it.

The US prosecutorial team led by Joseph B. Keenan arrived in Japan in December 1945. They were confronted with the unexpected situation of a dearth of evidence, however, because the Japanese side had systematically destroyed a large quantity of records and documentation at the time of the country's defeat, so the team had to collect information through interrogations and questioning of the accused and other related parties. Other written materials began to turn up after a little time had passed, including secret documents and Lord Keeper of the Privy Seal Kido Kōichi's diary. Thus, quite a bit of material was gathered in the end. We can say this collection was one significance of the Tokyo Trial.

Along with gathering information and evidence, the prosecution also examined who to indict. The team became more international after February 1946 with the addition of participants hailing from countries other than the United States. There were four criteria for selecting defendants: (1) they could be indicted for crimes against the peace; (2) they represented an event or organization; (3) there was firm evidence of their guilt; and (4) they either participated actively in, or at least did not oppose, the conspiracy for a war of aggression.

We should perhaps pay special notice to the second point. The level of international notoriety of Japanese leaders was remarkably low, unlike their counterparts in Germany, and many people did not know who was responsible, Tōjō Hideki aside. Members of the prosecutorial team for the most part did not know much about Japanese politics, diplomacy, economics, or culture. And so, they found it efficient to select representatives in high-level posts at the time of the Manchurian Incident and other incidents during the Pacific War.

At a meeting of associate prosecutors on April 8, 1946, they removed Ishiwara Kanji, Masaki Jinzaburō, and Tamura Hiroshi as potential candidates for prosecution and settled on 26 men as defendants. But, owing to a proposal from the Soviet associate prosecutor who had arrived late to Japan, Shigemitsu Mamoru and Umezu

Yoshijirō were added, increasing the number of defendants in the Tokyo Trial to 28. (There were 24 defendants at the Nuremberg Trial, as well as *Die Schutzstaffel* (the SS) and five other groups indicted as criminal organizations.)

## The Process for Drafting Judgments

Let us next look at the process for how the group of justices drafted their judgments. The International Military Tribunals in Japan and in Germany consisted of only judges representing Allied countries; there were no jurists from neutral nations. On this point, Stimson's right-hand man, John J. McCloy, the former assistant secretary of war, later remarked that "[d]uring the last war we had failed to get any neutral support on the war criminal problem," admitting that they had not even considered getting a judge from a neutral country (Department of State 1983). A "victors' court" was an outcome of the war.

The Tokyo Trial opened on May 3, 1946 at Ichigayadai Heights, in the building of the former Ministry of the Army and the former Imperial Army General Staff. The defense filed a motion on May 13 challenging the jurisdiction of the court. It argued that, since crimes against peace and crimes against humanity did not exist as war crimes at the time the Potsdam Declaration was issued, these crimes were outside of the court's jurisdiction.

In response, the justices engaged in fierce discussion behind closed doors of the judges' chambers. They decided to dismiss the defense's motion for the time being but delayed announcing their reasons for doing so, owing to a lack of consensus among the judges regarding jurisdiction.

The first judge to express his doubts about crimes against peace was actually Chief Justice William F. Webb, the representative from Australia. Although, unlike Indian judge Radhabinod Pal, he lacked a clear argument against the court's jurisdiction, Webb did question whether they should, once again, carefully consider the question of the criminality of wars of aggression under international law.

The judges from the other Commonwealth countries (Britain, Canada, New Zealand) protested vociferously, insisting that their duty as judges was to try the defendants under the condition that the criminality of war was a given. There was no consensus of opinion among the other justices.

The rift among the judges deepened with every passing day. Alvary Douglas Frederick Gascoigne, head of the United Kingdom Liaison Mission in Japan (UKLIM), reported the following information to the British Foreign Office in London on April 25, 1947. According to British Justice William Donald Patrick, reaching a unanimous judgment would be impossible. Webb was writing his own "judgment" using his own legal grounds that did not accord with the judgments at Nuremberg (October 1, 1946) that recognized the criminality of war. He believed that Pal and Dutch Justice B. V. A. Röling would probably not agree to guilty verdicts (Lord Chancellor Office 1945).

The British government responded by exploring various options, but after realizing all were problematic, concluded that they would have to hope for the best and leave it up to Patrick to shape the majority. Around the spring of 1948, a majority group among the justices was established, comprising the seven judges from Britain, Canada, New Zealand, the United States, the Soviet Union, the Republic of China, and the Philippines, over the point of affirming the criminality of war using the same rationale as Nuremberg.

This majority wrote the legal theory and finding of facts for the judgment—the reason why the judgment of the Tokyo Trial is called the "majority judgment" and the "majority opinion"—and they excluded the four justices who did not agree with the principle set by Nuremberg from drafting the judgment. Through such maneuvers, the justices kept the process from falling apart.

Meanwhile, the four judges who had been excluded each submitted a separate opinion. French Justice Henri Bernard's dissent laid bare the inner workings of the process. "The part of the judgment relating to the finding of facts was drafted entirely by the majority drafting committee. . . and copies of this draft were distributed to the other four justices. The 11 justices were never called to meet to discuss orally a part or in its entirety this part of the judgments. Only the individual cases of the draft were discussed orally" (Asahi 1962).

Then, the judgment of the majority (1445 pages in English) was read aloud in the courtroom from November 4 to 12, 1948. The legal theory of the judgment was the following. "The Charter [of the Tribunal] is . . . the expression of international law existing at the time of its creation. . . . With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. . . . Aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam . . ." (Nitta 1968).

## What Were the Grounds for a Death Sentence?

Over the course of the hearings in opening court, Ōkawa Shūmei was excluded from the Trial due to mental illness, and Matsuoka Yōsuke and Nagano Osami died of illness. Thus, there were only 25 defendants at the time the judgment was rendered. Chief Justice Webb pronounced their verdicts and sentences on November 12, 1948. All were guilty. Seven were given death by hanging: Dohihara Kenji, Hirota Kōki, Itagaki Seishirō, Kimura Heitarō, Matsui Iwane, Mutō Akira, and Tōjō Hideki. Shigemitsu Mamoru was sentenced to 7 years' imprisonment, Tōgō Shigenori to 20 years', and the remaining 16 men were given life sentences. Incidentally, of the 22 defendants at Nuremberg, 12 were sentenced to death by hanging, four sentenced to prison terms, three to life imprisonment, and three were found not guilty.

And so, what were the grounds for the death sentences? While nothing definitive has yet been discovered that clearly explains the reasoning, we can understand from examining several documents available to us now that the United States and Britain decided long before the tribunals that the grounds for any death sentence should be

found in atrocities committed (violations of the laws or customs of war). They reasoned it was dangerous for the Allies to seek death sentences based on crimes against peace, which some regarded with grave doubt as ex post facto law. And so, the US Justice Myron C. Cramer said the following to Webb in June 1948: "There is no specific statute in international law saying that those responsible for planning or waging aggressive war shall be sentenced to death." The tribunal, however, does have the authority to impose a death sentence for incidents that violate the laws of war (Higurashi 2002). In summary, the basis for the death sentence was grave atrocities that violated the laws or customs of war (Class B war crimes). For crimes against peace, those found guilty received a maximum of life in prison.

Judged from this angle, mistreatment of prisoners of war was linked to the political administration of the Ministry of the Army in charge of dealing with prisoners of war as well as the army commanders in the field. The seven men sentenced to death by the Tokyo Trial were found guilty of grave atrocities, which formed the basis for their punishment.

Even Tōjō (prime minister, army minister, and home minister) received a death sentence for the "barbarous treatment of prisoners [of war] and internees" at home and abroad related to the Bataan Death March and the construction of the Taimen Railway (between Burma and Thailand, then called Siam). According to the judgment, "He took no adequate steps to punish offenders and to prevent the commission of similar offences in the future. His attitude towards the Bataan Death March gives the key to his conduct towards these captives. . . . Thus the head of the Government of Japan knowingly and wilfully [sic] refused to perform the duty which lay upon that Government of enforcing performance of the Laws of War. . . . he advised that prisoners of war should be used in the construction of the Burma-Siam Railway . . . The Tribunal finds Tōjō guilty under Count 54 [related to the laws or customs of war]" (Nitta 1968).

In the cases of Matsui Iwane and Hirota Kōki, the sole civilian to get a death sentence, the reason for their sentences was the Nanjing Incident during the Second Sino-Japanese War. Of particular note, Matsui was found completely not guilty in relation to a war of aggression, and yet he received a death penalty for being the commander of the Central China Area Army at the time of the Nanjing Incident. Irrespective of this seeming imbalance, it appears that it was necessary to find someone responsible for the Nanjing Incident that shocked the world.

Meanwhile, that not a single member of the Imperial Japanese Navy received a death sentence is explained by the fact that there was insufficient evidence to convict Oka Takasumi and Shimada Shigetarō on charges of committing atrocities; the judges sentenced both of them to life imprisonment.

## The San Francisco Peace Treaty and Release of the War Criminals

After the close of the Tokyo Trial, the General Headquarters (GHQ) began moving on a system of clemency, reducing sentences and paroling prisoners in March 1950. This was a natural part of normal judicial proceedings under civilization's justice, not related to the so-called reverse course. The review for parole was extremely rigorous.

The Japanese side had hoped that peace would bring a general amnesty for all Class A war criminals and all Class B and C war criminals related to atrocities. However, the Allied powers, especially the United States, would not allow it, in order to uphold the righteousness of civilization's justice. They believed it to their advantage to maintain the sentences (i.e., justice) that they imposed.

Article 11 of the peace Treaty of San Francisco, signed on September 8, 1951, reads as follows: "Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on the recommendation of Japan" (The Peace Treaty with Japan 1951).

That means Japan had the obligation to carry out the sentences of convicted war criminals even after its sovereignty was restored. As for reducing sentences or parole, Japan had the authority to recommend but the authority to grant them rested in the country that made the judgment. Even after regaining its independence, Japan was not permitted to simply release the prisoners and rescind the judgments.

Concerning the oft-debated phrase "Japan accepts (*judaku*) the judgments," the Japanese Ministry of Foreign Affairs (MOFA) acknowledged and did not oppose the judgments. It is useful to reference a March 1953 document from the Third Division of the Foreign Ministry's Treaties Bureau: "'acceptance (*judaku*)' means that Japan does not dispute . . . the legality of the trials under international law . . . or, in the case of the Allied Nations continuing those sentences and carrying them out, the legality of doing so. In other words, Japan is obligated by Article 11 [of the Treaty] not to object to the claim that these are crimes under international law" (Ministry of Foreign Affairs 2013).

This is not a narrative of actively approving and "deeming the judgments to be appropriate" but rather one passively acknowledging that Japan "would not oppose the legality of the judgments under international law." A result naturally arising out of the Potsdam Declaration and the peace treaty, the Japanese government and MOFA had no other alternative from the perspective of international trust.

In fact, MOFA sought to find a solution in negotiations for releasing war criminals after the peace treaty. During the Allied occupation, 892 prisoners including Class A criminal Shigemitsu were paroled. As of April 28, 1952, when Japan regained its sovereignty, there were 1244 convicted war criminals imprisoned,

including those serving time overseas and, as of September that year, 12 Class A war criminals imprisoned in Sugamo Prison (former prime minister Hiranuma Kiichirō passed away in August). For Japan, the convicted war criminals were nothing more than the "remnants of the occupation", thought to be an injustice unbecoming of an independent country. Even both wings of the Japan Socialist Party agreed on the release of the Class B and C criminals. The era was steeped in such an atmosphere. It was in this context that the Japanese government actively recommended the parole of the remaining war criminals.

Talks were difficult, but the solidarity of the West was viewed quite seriously during this period of the Cold War. With the parole of Satō Kenryō on March 31, 1956, all Class A prisoners had been paroled. On May 30, 1958, at the time of Kishi Nobusuke's cabinet, the remaining Class B and C convicts were also paroled, and all effectively had their sentences reduced as their terms were considered served in full as of December 29, 1958.

The final aspect to consider is the actual political settlement. Until the very end, however, the United States maintained the public fiction that the paroles and reduced sentences were by judicial settlement, in order to maintain the righteousness of "civilization's justice."

Meanwhile, Japan came through the occupation a nation based firmly on an axis of cooperation with the United States. It might be said that the Tokyo Trial, which was the contemporary hurdle to settling accounts for war responsibility, facilitated the shift toward cooperation with the United States.

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