

Beyond Victor's Justice?  
The Tokyo War Crimes Trial  
Revisited

*Edited by*

Yuki Tanaka, Tim McCormack and Gerry Simpson

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# Chapter 11

## The Case against the Accused

*Yuma Totani*

### I. Introduction

Until about the mid-1990s, research on the Tokyo Trial centred on exploring charges pertaining to crimes against peace, or the ‘crime of aggression’ as it is presently known in the Rome Statute of the International Criminal Court.<sup>1</sup> The prosecution’s case on war crimes and crimes against humanity, by contrast, came under scrutiny only in the last decade or so. This type of bias in the existing scholarship has been conditioned partly by historians’ prejudgments about the nature of the Trial, but more fundamentally by the inherent structural constraints of the Tokyo Trial itself. In the months leading up to and after the Japanese acceptance of surrender in 1945, the Allied Powers developed the policy that the post-war international tribunals in Europe and in the Far East would focus on securing, above all, a ruling on individual criminal liability for crimes against peace: planning, preparing, initiating, and waging aggressive war, or participating in the conspiracy to accomplish actions thereof.<sup>2</sup> The Allied Governments, and in particular the United States, pursued this policy as a concrete step toward instituting an international legal system for deterring future aggressors and preventing the kind of war devastation that the Axis aggression had caused.<sup>3</sup> This US-inspired policy, first introduced at Nuremberg, was replicated and followed to the letter at Tokyo. The Tokyo Charter, indeed, required that the principal charges against the defendants be crimes against peace while deeming charges on war crimes and crimes against humanity as optional. Consequently, much of the court battles at Tokyo revolved around substantiating aggressive war charges, even though evidence of Japanese wartime atrocities was, in fact, also presented. The disproportionate emphasis that the Allied policy-makers placed on crimes against peace had far-reaching consequences: court sessions on crimes against peace came to define the Japanese remembrance of the Tokyo Trial while those on war crimes and

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1 Opened for signature 17 July 1998, 2187 UNTS 90, Article 5 (entered into force 1 July 2002).

2 For the exact definition of crimes against peace, see Charter of the International Military Tribunal for the Far East, signed in Tokyo on 19 January 1946, amended 26 April 1946, TIAS 1589, 4 Bevans 20, Article 5(a) (“Tokyo Charter”).

3 On the US advocacy of crimes against peace, see Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (1992) 3–55.

crimes against humanity rarely inspired public debates or investigations for many decades.<sup>4</sup>

The purpose of this chapter is to bring to light this underappreciated aspect of the Tokyo proceedings to fill the gap in the existing studies of the Tokyo Trial. The pages to follow will show that the members of the International Prosecution Section – the official name of the prosecuting agency at Tokyo – did honour their Governments’ joint policy decision, but that they also went at length to hold the Japanese accused accountable for other offences. Ultimately, the prosecution did not only succeed in securing important rulings on crimes against peace, but also won several war crimes convictions.

## II. From Arrest to Judgment: Crimes against Peace

The original policy paper,<sup>5</sup> developed by the US Government, designated that at least one international tribunal in the Far East (which turned out to be the only one – the International Military Tribunal for the Far East, or the ‘Tokyo Tribunal’) would assume a special mandate for hearing evidence against those war criminals whose principal offences were crimes against peace. This did not preclude the possibility of developing charges concerning wartime atrocities. The policy paper indicated that two other types of offences – war crimes and crimes against humanity – would also fall under the international tribunal’s jurisdiction. However, it specified that the investigative agency ‘should attach importance’ to the type of offence described in ‘paragraph 1.A’ of the policy paper, which was crimes against peace.<sup>6</sup> The Tokyo Charter underscored this point by containing the following provision:

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses *which include Crimes against Peace*.<sup>7</sup>

The above provision delimited the scope of General Douglas MacArthur’s action – and subsequently, that of the prosecution – in the selection of defendants for the Tokyo proceedings. As the Supreme Commander for the Allied Powers (SCAP) in occupied Japan, MacArthur had the responsibility, among other things, to apprehend, investigate, and initiate trials of major Japanese war criminals at the special international tribunal.<sup>8</sup> To fulfil these obligations, he ordered the arrest of some 100 individuals by relying on the lists of suspects the US War Department had

4 For post-war debates on the Tokyo Trial, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008) 190–262.

5 ‘Report by the State–War–Navy Coordinating Subcommittee for the Far East’ in US Department of State, *Foreign Relations of the United States: Diplomatic Papers* (1945) Vol 6, 926–36.

6 *Ibid* Vol 6, 930.

7 Tokyo Charter, above n 2, Article 5 (emphasis added).

8 See ‘Appendix “D”’: Draft Joint Chiefs of Staff Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes’ in ‘Report by the State–

prepared. Those who were named for the SCAP-led arrests were all suspected war criminals on account of crimes against peace. Whether or not the same individuals also committed war crimes or crimes against humanity did not concern the US War Department or MacArthur, at least in their preparation for the Tokyo Trial.<sup>9</sup> Meanwhile, MacArthur separately ordered the arrest – in his capacity primarily as General of the US Army – of numerous other individuals who were suspected of violating rules and customs of war in the treatment of Americans or other Allied nationals. He had them investigated and tried at the US military commissions in Manila, Shanghai, and Yokohama, which fell under his direct control. He had some of the suspects transferred to other war crimes courts, too, in order that they be tried by the appropriate Powers concerned.<sup>10</sup> Since the main charges against them were war crimes, not crimes against peace, MacArthur referred none of these suspects for trial at Tokyo. Only when evidence pointed to the suspects' involvement in the commission of aggressive war would he be required to transfer the cases to the international tribunal. Conversely, individuals such as Tōjō Hideki and the members of his War Cabinet – who were among the first to face the SCAP-led arrest – could not be brought to an American military commission. MacArthur initially made a request to that effect but was denied, because President Harry Truman adopted the policy of pursuing *international* prosecution of Axis leaders for crimes against peace *including* the Pearl Harbor attack.<sup>11</sup>

Starting from December 1945, attorneys from 11 Allied countries gathered in Tokyo to form the International Prosecution Section and took up where MacArthur left off. They investigated each of these 100-plus suspects in order to determine the defendants for the Tokyo proceedings. The prosecutors narrowed down the list of suspects to a group of 28 defendants, which would represent – and would be introduced as representing – the key government and military organs that 'had played vital roles in Japan's program of aggression'.<sup>12</sup> The prosecutors also had the same group represent key *phases* of the Japanese war, from the invasion of China to

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War–Navy Coordinating Subcommittee for the Far East, 12 September 1945', above n 6, Vol 6, 932–6.

9 For the lists of suspects, see Tōkyō saiban handobukku henshū iinkai, *Tōkyō saiban handobukku* (1989) 200–3. For correspondence between Washington and Tokyo regarding the arrest of major war crimes suspects, see US Department of State, *Foreign Relations of the United States: Diplomatic Papers* (1945) Vol 6, 941–2, 944, 952–3, 961–74, 976–8, 985–6.

10 For an overview of the American war crimes trials, see the final report prepared by the SCAP Legal Section: 'History of the Non-Military Activities of the Occupation of Japan: Trials of Class "B" and "C" War Criminals' in *SCAP Monograph Drafts: 1945–51*, US National Archives, RG 331, Box 3676, 0331-UD-1698. For an overview of the entire Allied war crimes programme, see Philip Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (1979). For a comprehensive research guide to records related to American and Allied war crimes trials in the US National Archives, see <<http://www.archives.gov/iwg/japanese-war-crimes>>.

11 On MacArthur's request for the Tōjō trial, see Totani, above n 4, 25–6.

12 Solis Horwitz, 'Document 465: The Tokyo Trial' (1950) 28 *International Conciliation* 473, 496.

the outbreak of the Pacific War.<sup>13</sup> The group included names of individuals such as Itagaki Seishirō, one of the plotters and staff officers of the Kwantung Army that initiated unprovoked attacks on Zhang Xueliang's Army in Manchuria in September 1931. Several – but not all – members of the Tōjō War Cabinet were also named so that they could represent the phase related to the war against the US. Two-thirds of the counts – 36 out of 55 – in the Indictment focused on crimes against peace, reflecting the centrality of this type of offence in the prosecutorial effort at Tokyo.<sup>14</sup> The large number also highlights the prosecution's strategy to itemise different facets of aggressive war in order to allow multiple avenues for establishing the individual defendants' responsibility.<sup>15</sup>

Defence counsel at the Tokyo Trial challenged the validity of all counts associated with crimes against peace. The main objection was that the law pertaining to crimes against peace was *ex post facto* and that no war, therefore, could be considered a crime under the existing body of international law.<sup>16</sup> The Tokyo Tribunal rejected the prosecution contention, however, concluding that the Nuremberg Tribunal had already resolved all legal controversies and that 'crimes against peace' was already an established, workable legal concept. To emphasise its 'complete accord' with the Nuremberg Judgment, the Tokyo Tribunal also wrote:

[T]his Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.<sup>17</sup>

The Tokyo Tribunal thus affirmed the Nuremberg Judgment in full, setting out another precedent for determining individual criminal liability for the crime of aggression.

On substantive matters of crimes against peace, the Tokyo Tribunal upheld 8 of the 36 counts while dismissing the rest, either on technical grounds or for the reason of insufficient evidence. Main factual findings are as follows. First, successive leaders of the wartime Japanese Government participated in a common plan to

13 Ibid; Letter from Arthur Comyns-Carr to Joseph B Keenan, 25 February 1946, reproduced in Awaya Kentarō, Nagai Hitoshi, and Toyoda Masayuki (eds), *Tōkyō Saiban e no Michi: kokusai kensatsu kyoku, seisaku kettei kankei bunsho* (1999) Vol 3, 161–2.

14 For the Indictment, see United States et al v Araki Sadao et al in *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide* (2002) Vol 2, Indictment ('*Tokyo Major War Crimes Trial*').

15 The Indictment at Nuremberg contained only two overarching counts of crimes against peace.

16 For the defence's central legal arguments, see Takayanagi Kenzō, *Tokio Trials and International Law: Answer to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3 and 4 March 1948* (1948). This book contains the full text of the defence summation, delivered in March 1948.

17 *Tokyo Major War Crimes Trial*, above n 14, Vol 101, Majority Judgment, 48 439.

wage aggressive war between 1928 and 1945, with the goal to secure Japan's military, political, and economic domination over East Asia, the western and south-western Pacific, and the Indian Ocean. Second, in pursuit of the common plan, they also committed the substantive offence of crimes against peace: the waging of aggressive war. The countries against which the accused launched aggressive war were the British Commonwealth of Nations (including Australia, Canada, India and New Zealand), France, the Mongolian People's Republic, the Netherlands, the Republic of China, the Soviet Union, and the US (including the Philippines). All but one defendant were convicted of one or more of conspiracy or the substantive counts of crimes against peace.<sup>18</sup>

These findings must have generally satisfied the International Prosecution Section, since the Tokyo Tribunal upheld most of the prosecution's key arguments. That said, the American prosecutors found one aspect of the Judgment disappointing.<sup>19</sup> The Tokyo Tribunal gave no clear-cut ruling on the question of whether or not the Japanese leaders planned a surprise attack on Pearl Harbor in breach of international law, even though the American prosecution team made detailed arguments on this issue. The Majority of eight judges – who rendered the Majority Judgment of the Tribunal – did concur with the prosecution that Hague Convention III of 1907<sup>20</sup> (on which the prosecution's case was built) 'undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced'.<sup>21</sup> However, they pointed out that 'it [the Convention] does not define the period which must be allowed between the giving of this warning and the commencement of hostilities'.<sup>22</sup> This aspect of Hague Convention III, consequently

permits of a narrow construction and tempts the unprincipled to try to comply with the obligation thus narrowly constructed while at the same time ensuring that their attacked [sic] shall come as a surprise.<sup>23</sup>

Given this loophole, the judges deemed it pointless to try to determine the Japanese leaders' true intent regarding the observance of Hague Convention III. The attack on Pearl Harbor constituted a crime against peace, the Majority concluded, but not on account of the Japanese failure to provide a prior warning as required by the Convention. Rather, it was the decision of the Tōjō Cabinet to defy US embargoes

18 The one defendant acquitted of crimes against peace was Matsui Iwane, although he was found guilty of war crimes in connection with the Rape of Nanjing, and sentenced to death: see *ibid* Vol 101, Majority Judgment, 49 814–16.

19 On Keenan's complaint about the Tribunal's findings in relation to the Pearl Harbor attack, see Higurashi Yoshinobu, *Tōkyō saiban no kokusai kankei: kokusai seiji ni okeru kenryoku to kihan* (2002) 457.

20 Hague Convention (III) Relative to the Opening of Hostilities, opened for signature 18 October 1907, UKTS 8 (1910) (entered into force 26 January 1910) ('Hague Convention III').

21 *Tokyo Major War Crimes Trial*, above n 14, Vol 103, Majority Judgment, 49 576.

22 *Ibid* Vol 103, Majority Judgment, 49 576.

23 *Ibid* Vol 103, Majority Judgment, 49 579.

and resort to the use of force in order to continue aggression in China and beyond, which made the Pearl Harbor attack unlawful and criminal.<sup>24</sup>

The Tokyo Tribunal commonly handed down life or lesser terms of imprisonment to those whom it found guilty of crimes against peace. It did not impose the death penalty even though it delivered the stern ruling that

no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it.<sup>25</sup>

Rather, the Tokyo Tribunal reserved capital punishment for those whom it found guilty of war crimes. The seeming hesitation of the judges to impose the death penalty on those convicted of aggression appears to reflect their conflicting views about the gravity of different types of offences. It also points to the judges' decision to follow the example set at Nuremberg and avoid controversy altogether. At least President Webb – the Australian judge and the SCAP-appointed President of the Tokyo Tribunal – recommended so. In his Separate Opinion, concurring with the Majority Judgment, he wrote that the Nuremberg Tribunal 'took into account the fact that aggressive war was not universally regarded as a justiciable crime when they [the German accused] made war',<sup>26</sup> and that it handed down no capital punishment for those guilty of this type of offence. The Tokyo Tribunal, in his opinion, should follow suit, and mete out no death penalty to those whom it found guilty of crimes against peace.<sup>27</sup> If this was indeed the general sentencing practice of the Tokyo Tribunal, it would follow that Tōjō and several others received the death penalty not because of their convictions for crimes against peace; rather, their war crimes convictions were the determinant factor.

### III. War Crimes Prosecution: Challenges and Outcomes

The International Prosecution Section gave its Opening Statement on 4 June 1946, and began presenting its case a week later. The presentation continued through to 24 January 1947. The prosecution case soon followed, which lasted from 24 February 1947 to 12 January 1948. The Tribunal adjourned for several months after hearing rebuttal, sur-rebuttal, and summations of the two parties. It delivered its Judgment – the Majority Judgment of eight, and five separate concurring and dissenting opinions – between 4 and 12 November 1948.<sup>28</sup>

The prosecution's presentation consisted of 15 separate phases. Most had to do with introducing evidence related to crimes against peace, but at least four concerned

24 Ibid Vol 103, Majority Judgment, 49 581–2A.

25 Ibid Vol 103, Majority Judgment, 49 769.

26 Ibid Vol 109, Separate Opinion of President Webb, 17.

27 Ibid. One of the dissenting judges, Justice Röling, expressed similar views: see *ibid* Vol 109, Dissenting Opinion of Justice Röling, 178.

28 The separate concurring and dissenting opinions were not read in court.

war crimes. The first phase on war crimes focused on evidence of atrocities in China including the large-scale atrocity that the Japanese Armed Forces committed in Nanjing in 1937–38. The second phase turned to atrocities in the Philippines. Pedro Lopez, the lead prosecutor for the Philippines, took charge of this phase. He had formally been assigned to prepare evidence related to ‘crimes against humanity’, but the actual cases he presented were essentially war crimes. Victims of atrocity for this phase were all individuals who were protected under rules and customs of war, such as American and Filipino prisoners of war, Allied civilian internees, and the Filipino civilian population in combat areas and Japanese-occupied territories. The third phase of war crimes covered instances of atrocity in places other than China and the Philippines: the Japanese-occupied British colonies in Southeast Asia, Dutch East Indies, French Indochina, and other islands in the South and Central Pacific. The lead Australian prosecutor, Alan Mansfield, oversaw the preparation of this phase, while prosecution staff from other countries – Canada, France, the Netherlands, and the US – shared with the Australian team the burden of collecting and presenting evidence. The fourth and last phase was used to introduce supplementary evidence concerning individual defendants’ knowledge of war crimes and their authorisation of the commission thereof.

For the members of the International Prosecution Section, the Tokyo Trial presented a unique opportunity to pursue criminal liability of the Japanese leaders not only for aggression but also for war crimes that commonly accompanied the Japanese conduct of war. Yet, Joseph Keenan, the lead American prosecutor who served as Chief Prosecutor of the International Prosecution Section, did not fully appreciate the significance of war crimes prosecution. He rather made little personal commitment to prepare evidence of war crimes, because as the SCAP-appointed Chief Prosecutor, his primary task was to press charges of crimes against peace and not other categories of offences.<sup>29</sup> Moreover, he regarded the war crimes phases as an obstacle to the expeditious proceeding of the Trial, for which he was also responsible.

As the prosecution’s case on crimes against peace was reaching its completion, Keenan thus proposed to other Allied prosecutors that they shorten or even drop the war crimes phases so as to save time. This proposal met united opposition. Expressing dissent, Mansfield and Lopez – whose phases would be directly affected by Keenan’s proposal – argued that their countries as well as others ‘attached great importance to the offences in respect of treatment of Prisoners of War and civilians’.<sup>30</sup> Other Allied prosecutors agreed, joining the view that to give up war crimes charges at this late stage would be injurious. In the end, Keenan had to retract his proposal and instead allow the war crimes phases to proceed as planned.<sup>31</sup> This confrontation was a watershed moment in the making of the Tokyo Trial, since the Chief Prosecutor’s concession enabled voluminous evidentiary materials of Japanese war crimes to make it to the courtroom and become an integral part of the record of the Tokyo Trial.

29 ‘Report by the State–War–Navy Coordinating Subcommittee for the Far East’, above n 6, Vol 6, 930–1.

30 Totani, above n 4, 116.

31 For more detail, see *ibid* 115–16.



To pursue the Japanese leaders' responsibility for various instances of mass atrocity, the prosecution initially developed 19 counts that fell under the following three categories: (1) murder; (2) conspiracy to commit war crimes and crimes against humanity; and (3) war crimes and crimes against humanity. The Tokyo Tribunal dismissed most of them on technical grounds, and retained only two counts that fell under the third category – war crimes and crimes against humanity.

In these two counts (Counts 54 and 55), the prosecution made little conceptual distinction between war crimes and crimes against humanity. This reflects less the lack of expertise than the general understanding among the prosecutors that in the Asia Pacific region, they did not have instances of mass atrocity that required the special use of law pertaining to crimes against humanity. All instances of atrocity known to them were war crimes, that is, violations of rules and customs of war involving Allied nationals as the principal victims. In the courtroom, the lead prosecutor for the Philippines who was supposedly responsible for preparing evidence of crimes against humanity did not present any clear-cut case. Nor did other members of the prosecution set forth any substantive legal or factual arguments concerning crimes against humanity. The Tokyo Tribunal, for its part, made no findings on crimes against humanity. It instead treated all documented cases of atrocity as war crimes. The two counts on war crimes and crimes against humanity, in this regard, should be understood *in substance* as war crimes.

The two war crimes counts in the Indictment articulated contrasting theories of individual responsibility. Count 54 charged that the group of defendants 'ordered, authorized and permitted' their subordinate officers in government and in theatres of war to commit atrocities repeatedly in violation of rules of war.<sup>32</sup> Count 55, meanwhile, charged that the accused 'deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war'.<sup>33</sup> The crucial difference between the two is that the former sought to determine guilt of an accused on evidence primarily of criminal *orders* while the latter, criminal *negligence*.<sup>34</sup> These theories of individual responsibility were not entirely new and were, in fact, applied at contemporaneous Allied war crimes trials. But developing war crimes charges on either theory posed unique problems at Tokyo. The following difficulties are particularly noteworthy.

First, the prosecution faced tremendous challenges in securing evidence of criminal orders because of the empire-wide document destruction that the Imperial Japanese Government had orchestrated prior to effecting demobilisation. During the court proceedings, the prosecution introduced some evidentiary materials that attested to this government-initiated obstructionism. For instance, a certified memorandum prepared by Miyama Yōzō, the Chief of the Correspondence Section of the First Demobilisation Bureau (the former Japanese War Ministry), informed that the War Ministry dispatched a telegram (dated 14 August 1945) to the Japanese Armed

32 For Count 54 of the Indictment, see *Tokyo Major War Crimes Trial*, above n 14, Vol 2, Indictment, 13.

33 For Count 55 of the Indictment, see *ibid.*

34 The word 'permitted' leaves some ambiguity to the exact meaning of the charge in Count 54.

Forces, which read that ‘the confidential documents held by every troop should be destroyed by fire immediately’.<sup>35</sup> The original of this telegram was not available to the Tribunal, since the War Ministry had also ordered the destruction of the telegram itself. As a result, no copy presumably survived the war.<sup>36</sup>

In another directive (dated 20 August 1945) from Tokyo to respective Japanese Armies in Korea, Taiwan, Manchuria, China, Hong Kong, Thailand, Borneo, Malaya, and Java, the following instructions were given:

Personnel who mistreated prisoners of war and internees or who are held in extremely bad sentiment by them are permitted to take care of it by immediately transferring or by fleeing without trace. Moreover, documents which would be unfavorable for us in the hands of the enemy are to be treated in the same way as secret documents and destroyed when finished with.<sup>37</sup>

The Japanese Armed Forces had days and weeks to carry out these government orders, since as of 14 August 1945 (the day the Government of Japan accepted the terms of the Potsdam Proclamation), the Allies were far from ready to take control of the vast territories of the Japanese empire. By the time the Allied occupation forces moved in, they could do little to address the *fait accompli*.

To overcome the difficulties created by the dearth of Japanese government and military records, the International Prosecution Section sought other available evidentiary materials. At least it had access to voluminous documents and witnesses at the disposal of Allied intelligence agencies and war crimes investigation teams. The evidentiary materials included: affidavits, depositions and statements taken from victims, perpetrators, and bystanders; Japanese military orders, war diaries, and other records that were confiscated from captured Japanese soldiers; records of the court proceedings, court exhibits, and judgments of contemporaneous Allied war crimes trials; and actual eyewitnesses. Most of these evidentiary materials did not implicate any specific individual defendants at Tokyo. However, the prosecution could use them to substantiate the geographical stretch, patterns, and recurrence of Japanese-perpetrated war crimes. The recurrence of similarly-patterned war crimes across the theatres of war, in turn, would allow the prosecution to argue that these atrocities were not randomly-committed acts but an integral part of the Japanese war effort for which the members of the central Government were accountable. Or in the words of Alan Mansfield:

[T]his similarity of treatment throughout the territories occupied by the Japanese forces will ... lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders and soldiers, but of the general policy of the Japanese forces and of the Japanese Government.<sup>38</sup>

35 *Tokyo Major War Crimes Trial*, above n 14, Vol 32, Transcript, 14 700.

36 *Ibid* Vol 32, Transcript, 14 699–700.

37 *Ibid* Vol 32, Transcript, 14 718–19. The Majority of the Tokyo Tribunal quoted part of this evidence in the Judgment: at Vol 103, Majority Judgment, 49 760–1.

38 *Ibid* Vol 28, Transcript, 12 861.

To strengthen its case, the prosecution also tapped into a selection of Allied diplomatic records, extant Japanese government documents, and witness accounts, which would show that certain of the accused – former prime ministers, foreign ministers, high-ranking officials in the war and navy ministries, etc – had regularly received briefings regarding the Allies' repeated protests as well as other types of information about Japanese war crimes.<sup>39</sup> As will be shown shortly, this method of substantiation was able to convince the Tokyo Tribunal.

Another challenge that the prosecution faced in developing charges of war crimes concerned the application of the theory of criminal negligence. While widely used at contemporaneous Allied war crimes trials,<sup>40</sup> this was still an untested doctrine when it came to cases involving civilians in positions of authority (as opposed to *military* officers in the chain of command). Yet it was precisely such persons – prime ministers, foreign ministers, and other high-ranking members of government – who constituted the majority of the defendants at Tokyo.

In order to make this a workable concept to the Japanese accused, the prosecution turned to the pre-World War II Hague and Geneva Conventions.<sup>41</sup> It found, for instance, in Hague Convention IV of 1907 the following provision: 'Prisoners of War are *in the power of the hostile Government, but not of the individuals or corps who capture them*'.<sup>42</sup> The same principle was repeated in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.<sup>43</sup> The prosecution further referred to a comparable provision in the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, which read:

The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.<sup>44</sup>

39 For more discussion on the prosecution's evidence, see Totani, above n 4, 98–189.

40 Jurisprudence on criminal negligence at World War II war crimes trials varied greatly. For related discussion, see David Cohen, 'Beyond Nuremberg: Individual Responsibility for War Crimes' in Carla Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999). I am indebted to David Cohen for helping me understand jurisprudential matters of the Tokyo Trial.

41 See *Tokyo Major War Crimes Trial*, above n 14, Vol 2, Indictment, Appendix B(i), Appendix D.

42 Hague Convention (IV) Respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, UKTS 9 (1910), Article 4 (entered into force 26 January 1910) ('Hague Convention IV') (emphasis added).

43 Opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931). Article 2 of the Convention states, in part, '[p]risoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them'.

44 Opened for signature 27 July 1929, 118 LNTS 303, Article 26 (entered into force 19 June 1931).

Drawing upon these Conventions, the prosecution set out an argument that the duty to ensure the proper treatment of prisoners of war and the civilian population in conflict zones rested *primarily with those individuals who constituted the Government*, and secondarily with the military commanders in theatres of war.


The Australian member of the prosecution team, Lieutenant Colonel Thomas Mornane,<sup>45</sup> elaborated during the summation the prosecution's interpretation of the doctrine of criminal negligence, especially with respect to high-ranking government officials. He began with the statement that '[i]t is, in our submission ... clear that it is the Government as a whole which is primarily responsible for the prevention of breaches of these Laws of War',<sup>46</sup> thereby recapitulating the common principle articulated in the Hague and the Geneva Conventions. He then continued:

This casts in the first place a duty upon every member of the cabinet and their advisors, and every high officer in the chain of command directly concerned with these matters to satisfy himself that the Laws are being obeyed. Ordinarily no doubt this duty [to prevent breaches of the laws of war] could be discharged by satisfying himself that proper machinery had been established for the purpose. But when information reaches him which raises a doubt as to whether they are being flagrantly disregarded, or shows plainly that they are, then a much higher duty devolves upon him.<sup>47</sup>

According to the statement above, 'every member of the cabinet and their advisors' assumed a higher level of responsibility when they realised that the laws of war were being disregarded, despite the existence of disciplinary systems. What exactly, though, does this 'higher duty' involve? Mornane had an answer. He explained that there was

a clear duty upon every official [in the cabinet] who knew about the commission of any of these war crimes to use such power as he possessed to put the matter right at once, at least to the extent of bringing the outrages to an immediate stop.<sup>48</sup>

In other words, members of cabinet with knowledge of atrocity must do everything in their power to ensure their government's observance of its international obligations to protect prisoners of war and civilians in theatres of war. Alternatively, Mornane stated, these officials may 'resign' in protest.<sup>49</sup>

During the court proceedings, the prosecution rely contested the prosecution's voluminous evidence that documented widespread war crimes. However, it challenged the prosecution's arguments concerning the criminal liability of gov-

45 He succeeded Alan Mansfield as the lead Australian prosecutor after the latter completed the first year in Tokyo and returned to Australia.

46 *Tokyo Major War Crimes Trial*, above n 14, Vol 84, Transcript, 40 III.

47 Ibid.

48 Ibid Vol 84, Transcript, 40 II2.

49 Ibid.

ernment leaders for war crimes. On the one hand, the prosecution conceded that Japanese-perpetrated war crimes were widespread and might have even been similarly-patterned. However, it argued that these characteristics could not be construed as evidence of criminal orders or authorisation. Takayanagi Kenzō for the prosecution argued that '[s]uch a matter [the similarity of the patterns of atrocity] may have been a sheer reflection of national or racial traits' and that '[c]rimes no less than masterpieces of art may express certain characteristics reflecting the mores of a race'.<sup>50</sup> Given the possibility of these alternative explanations, the prosecution and the prosecution's inference as to the policy dimension untenable.

As for the prosecution's contention on criminal negligence, the prosecution again disagreed, especially with the application of the theory to civilian leaders of the Government. The prosecution argued that members of the Cabinet had no power or authority to meddle with military matters *including* war crimes. Their duty as a Minister of the Government, rather, was limited to forwarding incoming protests and reports to appropriate authorities in the military. To do anything beyond that would have been overstepping their legal duty and violating jurisdictional boundaries between Ministries. The prosecution admitted that certain of the accused who had served in the War Cabinet regularly received reports concerning Japanese military violence. But, it argued that each of these individuals did fulfil his duty, by forwarding incoming information to the military authorities concerned.<sup>51</sup>

Neither of the prosecution's arguments persuaded the Tokyo Tribunal. In the final Judgment, the Tribunal concluded that 'torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy,' and that given the scale, the geographical spread, and commonality of patterns of atrocity, 'only one conclusion is possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces'.<sup>52</sup>

As for the applicability of the doctrine of criminal negligence to civilians in positions of authority, the Tribunal affirmed the prosecution's contention in full. The pertinent part in the Judgment begins by reiterating the prosecution's core argument, as it read:

Prisoners taken in war and civilian internees are in the power of the Government which captures them ... For the last two centuries ... this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929.<sup>53</sup>

With respect specifically to the liability of the members of the Cabinet, the Tribunal wrote:

<sup>50</sup> Takayanagi, above n 16, 57. For the Japanese translation, see the Japanese version that is included in the same volume: at 71.

<sup>51</sup> For more detail on the defence contention, see Totani, above n 4, 119–50.

<sup>52</sup> *Tokyo Major War Crimes Trial*, above n 14, Vol 103, Majority Judgment, 49–592.

<sup>53</sup> *Ibid* Vol 101, Majority Judgment, 48–442.

[I]t is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.<sup>54</sup>

By the statement above, the Tribunal ruled that government officials at the cabinet level must not rest content simply to accept assurances from authorities concerned when there is reason to doubt their validity. In such circumstances, they must *seek* information proactively in order to verify the true state of affairs and, by extension, do all in their power to ensure their government's compliance with its international obligations to protect prisoners of war and civilians in theatres of war. A member of cabinet 'may resign,' the Tribunal maintained, so that the person could dissociate himself with a government that tolerates the continuation of atrocities. But failing that, and

[i]f he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners[,] he willingly assumes responsibility for any ill treatment in the future.<sup>55</sup>

Quite interestingly, these rulings concerning cabinet liability did not necessarily translate into guilty verdicts for all defendants who had served in the successive War Cabinets. Many were in fact acquitted. The former Cabinet members who were convicted on grounds of criminal negligence were limited to the following three: Hirota Kōki, Foreign Minister at the time of the Rape of Nanjing (June 1937 – May 1938); Shigemitsu Mamoru, Foreign Minister during the Pacific War (April 1943 – April 1945); and Koiso Kuniaki, Prime Minister after the fall of the Tōjō Cabinet (July 1944 – April 1945). In establishing their convictions, the Tribunal made the following common findings: (1) that they received reports on Japanese-perpetrated atrocities; (2) that other than passing along information to the military, they did not take other actions to stop the atrocities; (3) that they were aware of the notoriety of the Japanese conduct of war and, therefore, had reason to doubt the validity of the military's assurances; and (4) that they remained in Cabinet, thereby supporting, in effect, a government that tolerated the continuation of the commission of atrocities. These three defendants aside, the Tribunal found seven others including Tōjō Hideki guilty of war crimes although on different legal and factual grounds.<sup>56</sup>

54 Ibid Vol 101, Majority Judgment, 48 445.

55 Ibid Vol 101, Majority Judgment, 48 446.

56 The Tokyo Tribunal did not always articulate in full its reasoning for each defendant's conviction and acquittal. David Cohen analyses methodically this and other related problems of the Tokyo Judgment in his unpublished manuscript, 'The Jurisprudence of the IMTFE Judgment and its Legacy'.

Hirota's guilty verdict concerning the Rape of Nanjing merits attention, since it articulates how the Tokyo Tribunal applied the doctrine of criminal negligence to actual cases involving civilian leaders of the Government. The Tribunal summarised Hirota's action, or the lack thereof, as follows:

As Foreign Minister he received reports of these atrocities immediately after the entry of the Japanese forces into Nanking [Nanjing]. According to the Defence evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. ... He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.<sup>57</sup>

Hirota's conviction – and the death penalty that accompanied the conviction – is unpopular in Japan because many believe it was either extremely harsh or an outright miscarriage of justice. It has also appeared incomprehensible how a government official who fell outside the chain of command could be held criminally liable for atrocities committed by Japanese Army and Navy personnel. Yet, the Hirota case has recently been subjected to judicial reassessment. In the 1998 trial judgment in the case of Jean-Paul Akayesu, the International Criminal Tribunal for Rwanda referred to the Hirota case as a relevant precedent and wrote:

It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking [Nanjing].<sup>58</sup>

#### IV. Concluding Remarks

This chapter outlined the prosecution's case against the accused, the prosecution contention, and the Tribunal's findings at the Tokyo Trial. In so doing, it moved away from the existing framework of analysis that emphasised the US leadership and its prosecutorial priority, and instead brought to the fore the rich, yet under-appreciated aspects of the court proceedings relative to war crimes. Central findings in this chapter are the following.

First, while crimes against peace were formally the centrepiece of the prosecutorial effort at Tokyo, the significance of the Tribunal's rulings on crimes against peace may not be as great as it is generally assumed. As shown in preceding pages, the

57 Ibid Vol 103, Majority Judgment, 49 791.

58 *Prosecutor v Akayesu (Judgment)* (Trial Chamber I, Case No ICTR-96-4, 2 September 1998) [633]. The Trial Chamber also noted that Justice B V A Röling – one of the dissenting Judges at Tokyo – disputed the validity of Hirota's conviction and that the Hirota case remains contentious.

Tokyo Trial served as little more than a 'follow-on' from the Nuremberg Trial in that the judges limited their contribution on jurisprudential matters to offering their 'unqualified adherence' to the Nuremberg Judgment. Second, the Tribunal's findings regarding the Pearl Harbor attack similarly show that the outcome of the Tokyo proceedings may not have been shaped by the US prosecutorial agenda as heavily as it is generally believed. The American prosecution team failed to secure a conclusive ruling about the Japanese violation of Hague Convention III. In all likelihood, it also failed to secure Tōjō's death penalty on account of his authorisation for the launch of aggressive war against the US. The Tribunal's sentencing practice rather suggests that multiple convictions on war crimes determined Tōjō's capital punishment.

Third, and finally, the Tokyo Trial as a *war crimes* trial – as opposed to a *war* trial focused on the charges of crimes against peace – provided for some creative interpretations of law, especially pertaining to theories of individual responsibility. In particular, certain constraints at Tokyo – such as the narrow mandate of the Tribunal and the dearth of Japanese government and military records – compelled the prosecution to grapple with the existing body of international law and flesh out how military and civilian leaders of the Government could be held accountable for mass atrocity. This, in turn, forced the Tokyo Tribunal to articulate its own views on the issues of leadership responsibility, especially where cabinet liability for mass atrocity was concerned. The question remains whether or not the Tokyo Judgment will stand up to the test of history. Yet, the Tokyo Trial arguably was among the first historical cases that began to address complex issues of individual responsibility of State leaders and to explore applicable legal principles. In this respect, this Trial was an important precedent-setter. The challenge for future researchers will be to explore further the vast corpus of the under-studied trial records and reach a comprehensive assessment of the Trial's legacy today.