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# The Tokyo Tribunal's Legal Origins and Contributions to International Jurisprudence as Illustrated by Its Treatment of Sexual Violence

Diane Orentlicher\*

## 5.1. Introduction

When my generation of international legal scholars came of age, efforts to research the International Military Tribunal for the Far East ('IMTFE') turned up remarkably few resources, at least in the English-language literature. Those we found invariably began by noting how little attention the Tribunal had received compared to the International Military Tribunal ('IMT') in Nuremberg.<sup>1</sup> And when legal scholars *did* acknowledge the Tokyo Tribunal, they typically did so by adding "and Tokyo" to their reflections on Nuremberg's legal legacy.<sup>2</sup> Thus in the legal academy as in

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<sup>1</sup> This oft-noted point is captured in the title of a book by Arnold C. Brackman: *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow & Co., New York, 1987. See also R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances: A General Preface to the Collection", in R. John Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East*, The Edwin Mellen Press, 1998, vol. 2, p. xxi, noting that scholars have studied the Tokyo trial proceedings "only rarely and even then, [...] generally superficially" ("Tokyo Trial Records"). While I have cited volume 2 here, Pritchard's "General Preface" appears in each volume of this collection.

<sup>2</sup> See, for example, M. Cherif Bassiouni, "Nuremberg Forty Years After: An Introduction", in *Case Western Reserve Journal of International Law*, 1986, vol. 80, no. 2, pp. 61-64.

other disciplines, the Tokyo Tribunal was widely treated as “a sister institution, nothing more”.<sup>3</sup>

In consequence, the Tribunal’s distinctive contributions to the field of international criminal law were long obscured, with important exceptions to be sure. Writing as recently as 2010, one scholar noted that some experts in this field “completely overlook the IMTFE’s existence” or misstated key features of its operation and legacy.<sup>4</sup> This is notable. After all, the Tribunal played a foundational role in international criminal law, a field whose explosive growth in the early 1990s was one of the signal developments in international law in the latter half of the twentieth century.

What, then, accounts for legal scholars’ relative neglect of the Tokyo Tribunal? This chapter explores several key reasons, and then considers how the resulting gap in knowledge diminished the generally rich body of scholarship in the field of international criminal law.

## 5.2. Accounting for Legal Scholars’ Relative Neglect

One factor behind this general neglect is that the legal framework of the Tokyo Tribunal was derivative (though by no means a carbon copy) of the law of the IMT, as Section 5.3. elaborates. Accordingly, many saw the Tokyo proceedings as “little more than an echo of the far more famous proceedings held at Nuremberg”.<sup>5</sup>

Compounding this perception, the IMTFE concluded its work two years after the IMT issued its historic judgment. Recalling that the Nuremberg Trial “began quite soon after the end of the war, and it did not last very long”, a former judge on the IMTFE noted the obvious and important consequence: this timing substantially elevated global awareness of the IMT relative to the Tokyo Tribunal.<sup>6</sup> At least among Western scholars, then, it was natural to focus on Nuremberg when constructing narratives of international law’s historic post-war shift to principles of individual responsibility for crimes under international law.

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<sup>3</sup> Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy*, Routledge, 2008, p. 9.

<sup>4</sup> Zachary D. Kaufman, “The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations”, in *John Marshall Law Review*, 2010, vol. 43, pp. 753-54.

<sup>5</sup> These words come from an unidentified source quoted in Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, University of Texas Press, Austin, 1979, p. 9.

<sup>6</sup> B.V.A. Röling, “Introduction”, in Chihiro Hosoya *et al.* (eds.), *The Tokyo War Crimes Trial: An International Symposium*, Kodansha International, New York, 1986, p. 16.

Another contributory factor was the Tokyo Tribunal's perceived lack of 'international' representation. Despite the participation of judges from 11 countries, the IMTFE has long been perceived to be less 'international' than the IMT, whose judges and chief prosecutors came from four countries. To be sure, this view is hardly uniform. Some argue, for example, that the greater diversity of States participating in the Tokyo Tribunal enhanced its legitimacy.<sup>7</sup> Yet for reasons elaborated in Section 5.3., many have seen the IMTFE as a fundamentally American enterprise.

Crucially as well, concerns about the fairness and independence of the Tokyo Trial have coloured the way legal scholars construct its legacy.<sup>8</sup> This stands in marked contrast to how most international law experts have constructed the legacy of Nuremberg, which has been widely embraced as a "spectacular success"<sup>9</sup> despite concerns that the IMT embodied victors' justice and imposed retroactive punishment.

Recent scholarship has questioned whether the Tokyo Tribunal's acknowledged flaws were of a fundamentally different order than those long associated with Nuremberg, or at any rate were as extreme as has long been supposed.<sup>10</sup> While that inquiry is beyond the scope of this chapter, it is relevant here to note a third factor behind generally harsh assessments of the IMTFE: vocal critics of the Tokyo Tribunal included key participants in its proceedings. This phenomenon was famously exemplified in Judge Radhabinod Pal's blistering dissent,<sup>11</sup> but it was not just Pal who faulted core features of the IMTFE. In his dissenting opinion, Judge Henri Bernard averred: "A verdict reached by a Tribunal after a defective procedure cannot be a valid one".<sup>12</sup> For many years, moreover, a scathing in-

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<sup>7</sup> See, for example, Pritchard, 1998, vol. 2, p. xxxi, see above note 1.

<sup>8</sup> See Futamura, 2008, p. 60, see above note 3; Lachezar D. Yanev, *Theories of Co-Perpetration in International Criminal Law*, Brill/Martinus Nijhoff, 2018, pp. 109-15.

<sup>9</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, 2000, p. 147.

<sup>10</sup> See, for example, Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, 2008.

<sup>11</sup> Although Pal's judgment was not read in court, it was reported in the Nippon Times along with other judgments; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, p. 324 n. 183.

<sup>12</sup> Dissenting Judgment of the Member from France (Henri Bernard), Tokyo Trial Records, vol. 105, p. 20 (of Bernard's judgment), see above note 1.

dictment of the Tribunal published in 1971 “seemed to define the field”.<sup>13</sup> Tellingly, its author acknowledged that his “major concern in writing [his] book” was “to demolish the credibility of the Tokyo trial and its verdict”.<sup>14</sup>

For decades, moreover, scholars who may have wished to explore the Tokyo proceedings faced practical challenges. While the Nuremberg judgment and proceedings were quickly published by the British and American governments, the Tokyo judgment and records were never officially published, and were available commercially only decades after the trial ended.<sup>15</sup>

In the section that follows, I elaborate on two points noted above: the relatively scant attention paid by international legal scholars to the IMTFE derives, in significant part, from a longstanding perception that it was (1) derivative of Nuremberg, and yet (2) an essentially American institution rather than a truly international tribunal.

### **5.3. An Echo of Nuremberg and an American Show**

#### **5.3.1. Early Planning for Post-war Prosecutions**

Early planning for post-war prosecutions laid the seeds for perceptions of Tokyo as “an echo of [...] Nuremberg”.<sup>16</sup> Allied leaders’ early statements about wartime depredations warranting punishment focused overwhelmingly on Nazi crimes, though some dealt with Japanese offences.<sup>17</sup> The United Nations War Crimes Commission (‘UNWCC’), which was established in October 1943, at first focused solely on Axis war crimes; in May 1944, however, it established a sub-commission to address war crimes in Asia and the Pacific.<sup>18</sup> Only in late August 1945 did the UNWCC publish

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<sup>13</sup> Gerry Simpson, “Writing the Tokyo Trial”, in Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 29.

<sup>14</sup> Richard H. Minear, *Victors’ Justice: Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971, p. ix.

<sup>15</sup> Boister and Cryer, 2008, p. 325, see above note 11.

<sup>16</sup> Piccigallo, 1979, p. 9, see above note 5.

<sup>17</sup> See Boister and Cryer, 2008, pp. 17-19, see above note 11; Solis Horwitz, “The Tokyo Trial”, in *International Conciliation*, 1950, vol. 28, pp. 477-79; Minear, 1971, p. 8, see above note 14.

<sup>18</sup> See Ustina Dolgopol, “Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes Against The Comfort Women In The Tokyo Trial”, in Tanaka, McCormack, and Simpson, 2011, p. 249, see above note 13.

a white paper recommending that suspected Japanese war criminals be “surrendered to or apprehended by the United Nations for trial before an international military tribunal”.<sup>19</sup>

Similarly, wartime warnings of post-war trials focused at first on Germany. Although a definitive plan to establish the IMT would come later, the United States, the United Kingdom and the Soviet Union laid down a marker in November 1943, when the three countries' leaders issued the Moscow Declaration warning that Germans responsible for atrocities would face post-war punishment.<sup>20</sup> Preparations for post-war prosecutions in Nuremberg were well underway by the time the three major allies in the war with Japan – China, the United Kingdom and the United States – declared their general intentions concerning post-war prosecutions of Japanese. The Potsdam Declaration of 26 July 1945, later endorsed by the Soviet Union, stated that “stern justice shall be meted out to all [Japanese] war criminals, including those who have visited cruelties upon our prisoners”.<sup>21</sup>

Inevitably, too, the legal framework for Nuremberg was adopted first, and provided a model for Tokyo – a key factor behind the previously-noted “and Tokyo” thread in legal scholarship. The US government did not begin drafting a Tokyo prosecution policy in earnest until 9 August 1945,<sup>22</sup> the day after the Nuremberg Charter was adopted. As a participant in the Tokyo proceedings recalled, those who drafted “the Tokyo Charter took full advantage of the work of their predecessors in London, and to avoid substantial differences in carrying out related programs, followed as closely as possible the Nuremberg Charter”.<sup>23</sup>

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<sup>19</sup> Hisakazu Fujita, “The Tokyo Trial: Humanity’s Justice v Victors’ Justice?”, in Tanaka, McCormack, and Simpson, 2011, pp. 5-6, see *ibid.* (quoting UNWCC, Draft Summary of Recommendations concerning Japanese War Criminals and Atrocities).

<sup>20</sup> Moscow Declaration on Atrocities by President Roosevelt, Mr. Winston Churchill and Marshal Stalin, 1 November 1943 (<https://www.legal-tools.org/doc/3c6e23/>).

<sup>21</sup> Proclamation Calling for the Surrender of Japan, United States-China-United Kingdom, Potsdam, 26 July 1945, para. 10 (<https://www.legal-tools.org/doc/f8cae3/>).

<sup>22</sup> See Totani, 2008, p. 21, see above note 10.

<sup>23</sup> Horwitz, 1950, p. 486, see above note 17.

### 5.3.2. American Leadership in London and Domination in Tokyo

As is well known, the United States was the driving force behind the idea of prosecuting Nazi war criminals once the war ended.<sup>24</sup> Early on, the United Kingdom favoured executing the principal Axis leaders; Stalin proposed shooting thousands.<sup>25</sup> In this setting, the United States had to persuade its allies to accept its vision.

The United States also took the lead in developing one of Nuremberg's central innovations – criminalizing the planning, preparation, initiation and waging of wars of aggression, which the Nuremberg and Tokyo Charters termed “crimes against peace”. On this point, too, the United States had to persuade reluctant allies to go along. Doing so was a major focus of US diplomacy, under the leadership of Justice Robert H. Jackson, when the four Allied powers met in London to negotiate the Nuremberg Charter.<sup>26</sup> Only after weeks of difficult negotiations was Jackson able to overcome the strenuous resistance of the French and Soviet delegates.<sup>27</sup> When participants in the London Conference adopted the Nuremberg Charter on 8 August 1945, they included this novel crime in the Tribunal's subject-matter jurisdiction, along with conventional war crimes and another legal innovation, crimes against humanity.<sup>28</sup>

When applied to Nazi atrocities against German citizens, the last crime represented a profound rupture with bedrock principles of international law, which had long deemed outside its regulatory remit the way a government treated its own citizens in its own territory. Partly for this reason, the Nuremberg Charter specified that crimes against humanity could be prosecuted only when committed “in execution of or in connection

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<sup>24</sup> See Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford University Press, New York, 2018, p. 432, n. 16.

<sup>25</sup> See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Alfred A. Knopf, New York, 1992, pp. 29-32; Bass, 2000, p. 147, see above note 9. Before he was persuaded to pursue post-war prosecutions, President Franklin Roosevelt too was sympathetic to the idea of summarily executing Nazi leaders. See *ibid.*

<sup>26</sup> See Totani, 2008, p. 21, see above note 10.

<sup>27</sup> See *ibid.*

<sup>28</sup> Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, Article 6 (‘Nuremberg Charter’) (<https://www.legal-tools.org/doc/64ffdd/>).

with” one of the other crimes set forth in the Charter,<sup>29</sup> which by their nature entailed inter-State armed conflict.

The joint adoption of the Nuremberg Charter at the conclusion of multilateral negotiations and the adherence to that instrument by 19 other States, along with organizational matters that are discussed later, meant that Nuremberg would be widely seen and celebrated as a multilateral project despite its origins in American planning and its debt to American persistence. The process culminating in the promulgation of the Tokyo Charter was markedly different.

The first draft of the Tokyo Charter “was drawn up, in its entirety, by the United States”.<sup>30</sup> While this draft was amended to accommodate the views of US allies,<sup>31</sup>

[i]t was made abundantly clear to the Allied Powers that the Supreme Commander [of occupied Japan, U.S. General Douglas MacArthur,] and the United States Government were determined to go ahead with the Tribunal on American terms. This train was going to depart whether or not the other United Nations chose to go along for the ride. The result was that the Allied Powers [...] fell in step with General MacArthur's diktat [...].<sup>32</sup>

The United States did not share its key policy document for prosecutions in Japan with Allied governments until well into October 1945,<sup>33</sup>

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<sup>29</sup> *Ibid.*, Article 6(c)

<sup>30</sup> Horwitz, 1950, p. 483, see above note 17.

<sup>31</sup> The original Charter, promulgated on 19 January 1946, provided for the appointment of “not less than five nor more than nine Members”. Charter of the International Military Tribunal for the Far East, Article 2, in General Orders No. I, General Headquarters Supreme Commander for the Allied Powers, 19 January 1946. The Charter was amended to allow for up to eleven members so that India and the Philippines, which had not signed the instrument of surrender but had fought against Japan, could nominate judges and prosecutors. See Charter of the International Military Tribunal for the Far East, Article 2, in General Orders No. 20, General Headquarters Supreme Commander for the Allied Powers, 26 April 1946; TIAS No. 1589, 4 Bevens 20 (‘Tokyo Charter’) (<https://www.legal-tools.org/doc/44f398/>).

<sup>32</sup> Pritchard, 1998, vol. 2, p. xxvii, see above note 1.

<sup>33</sup> Totani, 2008, pp. 21, 26, see above note 10; Boister and Cryer, 2008, p. 23, see above note 11. According to Solis Horwitz, a US member of the prosecution staff, a directive ordering the investigation, apprehension and detention of suspected war criminals, which was issued on 21 September 1945, was “approved by all nations taking part in the occupation of Japan”. Horwitz, 1950, p. 480, see above note 17. But Horwitz did not clearly state whether these countries approved of the directive before it was issued.

weeks after Japan surrendered and General MacArthur had arrived in Tokyo to take up his post as Supreme Commander for the Allied Powers in Japan. By that time, the arrests of suspected Japanese war criminals by Americans were well underway.<sup>34</sup> And while the Nuremberg Charter was jointly promulgated by four countries, the Tokyo Charter was issued through the unilateral action of General MacArthur.<sup>35</sup>

### 5.3.3. Legal Frameworks: Derivation and Difference

Although strongly influenced by the IMT Charter, the text of the Tokyo Charter was by no means an exact replica. While the first point may have obscured Tokyo's legal innovations, key differences detracted from the IMTFC's legal legacy (though these were hardly the most important factors behind critical assessments of Tokyo). Even where the two charters were in sync, the taint of retroactive justice has clung more tenaciously to the Tokyo Tribunal than its counterpart in Nuremberg.

The IMTFC's debt to Nuremberg is particularly evident in Article 5 of the Tokyo Charter, which sets forth the Tribunal's subject-matter jurisdiction. Like the IMT, the Tokyo Tribunal had jurisdiction over crimes against peace, as well as participation in a common plan or conspiracy to commit them; conventional war crimes; and crimes against humanity. The Tokyo Charter's definitions of these crimes largely followed, but were not identical to, those in the Nuremberg Charter. For example, instead of including examples of war crimes, as the Nuremberg Charter had done, the Tokyo Charter more succinctly included the category of "Conventional War Crimes: Namely, violations of the laws or customs of war".<sup>36</sup>

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<sup>34</sup> See Brackman, 1987, p. 10, see above note 1.

<sup>35</sup> The Far Eastern Commission ('FEC'), comprising representatives of ten countries that had fought against Japan, was empowered to take decisions that would be transmitted to MacArthur as directives. While its input resulted in amendments to the first version of the Charter promulgated by MacArthur, the FEC largely accepted the US policy on prosecutions in Tokyo. Horwitz, 1950, pp. 481-82, see above note 17.

<sup>36</sup> Tokyo Charter, 26 April 1946, Article 5(b), see above note 31. The corresponding provision in the Nuremberg Charter reads:

WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]

Nuremberg Charter, 8 August 1945, Article 6(b), see above note 28.

The Tokyo Charter's definition of crimes against humanity diverges from its precursor more substantially. In the Nuremberg Charter, crimes against humanity were defined as certain inhumane acts "committed against any civilian population" when other conditions are present.<sup>37</sup> Just days before the Tokyo Trial began, the phrase "against any civilian population" was removed from the definition of crimes against humanity set forth in the original Charter proclaimed by General MacArthur. The amendment was suggested by Joseph Keenan, the American Chief Prosecutor in Tokyo, who wanted to establish that any killing – even of combatants – in the prosecution of a war of aggression is unlawful.<sup>38</sup> The altered definition left scant if any international legal legacy. No one was convicted of crimes against humanity in Tokyo,<sup>39</sup> and the definition of this crime in the amended Tokyo Charter has not been followed in the statutes of other international criminal tribunals.

Turning to crimes against peace, the definition in the Tokyo Charter largely tracked its precursor in the Nuremberg Charter, but added the text italicized below:

Crimes against Peace: Namely, the planning, preparation, initiation or waging of a *declared or undeclared* war of ag-

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<sup>37</sup> *Ibid.*, Article 6(c), see above note 28.

<sup>38</sup> B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond*, Polity, Cambridge, 1993, pp. 56-57. The prosecution did not rely solely on the charge of crimes against humanity to advance this claim. Instead, it linked murder charges to all three crimes falling within the IMTFE's subject-matter jurisdiction. The Majority Judgment side-stepped ruling on this novel claim. For a detailed discussion of the murder counts, see Boister and Cryer, 2008, pp. 154-74, see above note 11.

In another departure from the Nuremberg Charter, which defined "Crimes against Humanity" to include "persecutions on political, racial or religious grounds", Nuremberg Charter, 8 August 1945, Article 6(c), see above note 28, the corresponding phrase in the Tokyo Charter omitted the word "religious", recognizing only "persecutions on political or racial grounds". Tokyo Charter, 26 April 1946, Article 5(c), see above note 31. In addition, the Tokyo Charter did not include any provision authorizing the Tokyo Tribunal to declare an organization or group a "criminal organization", as the IMT was authorized to do. Nuremberg Charter, 8 August 1945, Article 9, see above note 28.

<sup>39</sup> The Tokyo indictment grouped war crimes and crimes against humanity together under the heading "Group Three: Conventional War Crimes and Crimes against Humanity". The three counts listed under this heading emphasized violations of the laws of war, as did the further specifications of these violations in Appendix D. The Judgment dealt with atrocity crimes solely under the rubric of violations of the laws of war, presumably because the prosecutors who took the lead on the atrocities charges did not develop clear arguments about crimes against humanity. See Yuma Totani, "The Case against the Accused", in Tanaka, McCormack and Simpson, 2011, p. 154, above note 13.

gression, or a war in violation of international *law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]<sup>40</sup>

In a further departure from Nuremberg, the Tokyo Charter allowed for the prosecution of individuals only when they were “charged with offenses which include Crimes against Peace”.<sup>41</sup> This limitation reflected the US government’s position, set forth in its previously-noted policy paper, that the investigative body in Tokyo “should attach importance” to crimes against peace.<sup>42</sup> In fact, the United States apparently proposed that the IMTFE have jurisdiction *only* over crimes against peace, but agreed to include the other two crimes in the Tribunal’s remit at the insistence of the United Kingdom.<sup>43</sup>

Despite this accommodation, at one point in the trial Keenan proposed to shorten or even drop the prosecution’s presentation of war crimes evidence, which would leave the Tribunal to rule only on evidence relating to crimes against peace. Keenan’s suggestion drew strong objections from other Allied prosecutors, who prevailed.<sup>44</sup> This, Yuma Totani writes, enabled “voluminous” evidence of Japanese atrocities to become part of the Tokyo Trial and historical record.<sup>45</sup>

As to organizational matters, key differences between the Nuremberg and Tokyo Charters underscored American dominance in Tokyo (though, as already suggested, participants from other countries significantly influenced the conduct and legacy of the trial). The Nuremberg

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<sup>40</sup> Tokyo Charter, 26 April 1946, Article 5(a), see above note 31. Totani suggests that the words “declared or undeclared” were introduced to clarify the irrelevance of a formal declaration in light of the fact that Japan had initiated some armed attacks without prior warning or formal declaration: Totani, 2008, p. 81, see above note 10; Boister and Cryer emphasize the inverse: introducing the phrase clarified “that compliance with the formal requirements for the declaration of war in international law did not deprive a war of its criminal nature if it was aggressive”: Boister and Cryer, 2008, p. 120, see above note 11. The separate addition of “law” after “international” sought to avoid any ambiguity regarding whether international law criminalized aggressive war: Totani, 2008, p. 81, see above note 10. In Totani’s view, this position “had been the view of the planners of the Nuremberg tribunal, but it did not attain its full expression in the Nuremberg Charter”. *Ibid.*

<sup>41</sup> Tokyo Charter, 26 April 1946, Article 5, see above note 31.

<sup>42</sup> Totani, 2011, p. 148, see above note 39.

<sup>43</sup> Boister and Cryer, 2008, p. 25, see above note 11.

<sup>44</sup> Totani, 2011, p. 153, see above note 39.

<sup>45</sup> *Ibid.*

Charter accorded each of the four signatories the right to appoint one judge and one alternate.<sup>46</sup> In contrast, the Tokyo Charter vested General MacArthur with exclusive authority to appoint the Tribunal's judges—albeit, and by no means incidentally, from those whose names were submitted by the nine signatories to the Instrument of Surrender as well as India and the Philippines.<sup>47</sup> And where the Nuremberg Charter provided for the four judges to select their own President,<sup>48</sup> the Tokyo Charter provided for the Supreme Commander to appoint the President of the IMT-FE.<sup>49</sup>

In reality, MacArthur exercised less authority over the Tokyo Tribunal than he seemed to possess in its Charter. As Totani notes, MacArthur did not really have the option of rejecting participating countries' judicial nominees.<sup>50</sup> That he hardly controlled the Tribunal is, moreover, amply demonstrated by the splintered opinions of its judges, including Judge Pal's comprehensive dissent.<sup>51</sup> Nevertheless, the concentration of authority in MacArthur is fundamental to perceptions of Tokyo as an American tribunal, as well as to concerns about its independence.

Just as the IMT Charter accorded each signatory the right to appoint a judge and an alternate, it also gave each the right to appoint a Chief Prosecutor.<sup>52</sup> In contrast to the equal status of Nuremberg's four Chief Prosecutors, the Tokyo Charter provided for the Supreme Commander to

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<sup>46</sup> Nuremberg Charter, 8 August 1945, Article 2, see above note 28.

<sup>47</sup> Tokyo Charter, 26 April 1946, Article 2, see above note 31.

<sup>48</sup> Nuremberg Charter, 8 August 1945, Article 4(b), see above note 28.

<sup>49</sup> Tokyo Charter, 26 April 1946, Article 3(a), see above note 31. In addition, while Article 29 of the Nuremberg Charter vested responsibility for carrying out and potentially reducing sentences in the Control Council for Germany, which comprised the same four States that created the Tribunal, Article 17 of the Tokyo Charter vested this authority in the Supreme Commander for the Allied Powers in Japan. As a result of a policy directive adopted by the FEC, however, MacArthur could exercise these powers only after consulting with representatives of the members of the FEC in Japan. See Boister and Cryer, 2008, p. 26, see above note 11; Horwitz, 1950, p. 482, see above note 17.

<sup>50</sup> Totani, 2008, p. 30, see above note 10.

<sup>51</sup> Two members of the Tribunal, the Australian President and the Filipino judge, submitted separate opinions that registered disagreement with aspects of the majority judgment. The French, Dutch and Indian members filed opinions that dissented from the majority judgment more substantially – in the case of Judge Pal, comprehensively. For a succinct summary of the separate opinions, see Piccigallo, 1979, pp. 28-31, see above note 5.

<sup>52</sup> Nuremberg Charter, 8 August 1945, Article 14, see above note 28.

designate a single Chief of Counsel,<sup>53</sup> whom other participating countries could appoint an “Associate Counsel to assist”.<sup>54</sup> This, Solis Horwitz wrote, was notable: “For the first time eleven nations had agreed in a matter other than actual military operations to subordinate their sovereignty and to permit a national of one of them to have final direction and control”.<sup>55</sup> As already noted, an American, Joseph Berry Keenan, was appointed Chief of Counsel.

In myriad ways that transcend Keenan’s formal position, the imprint of American policy on key prosecutorial decisions shaped enduring assessments of the IMTFE. In particular, the Tokyo Tribunal’s legacy has long been clouded by American insistence that Emperor Hirohito not be indicted, as well as the United States’ role in suppressing evidence of human experimentation involving biological warfare by the Imperial Japanese Army’s Manchuria-based Unit 731.<sup>56</sup>

#### **5.4. Reconsidering Tokyo’s Legal Legacy**

As we have seen, the convergence of myriad factors served to radically diminish the Tokyo Tribunal’s presence, and certainly its stature, in scholarly narratives about the origins of international criminal law. Remarkably, it was long common even among leading experts in the field of international criminal law to describe the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), which was created by the UN Security Council in May 1993,<sup>57</sup> as the first international criminal tribunal since Nuremberg.<sup>58</sup>

Not surprisingly, then, scholars and advocates have often seemed unaware of the Tokyo Tribunal’s substantive contributions to the field of international criminal law.<sup>59</sup> Apparent ignorance of the Tribunal’s treatment of crimes of sexual violence is a notable case in point.

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<sup>53</sup> Tokyo Charter, 26 April 1946, Article 8(a), see above note 31.

<sup>54</sup> *Ibid.*, Article 8(b).

<sup>55</sup> Horwitz, 1950, pp. 486-87, see above note 17.

<sup>56</sup> See Futamura, 2008, p. 63, see above note 3.

<sup>57</sup> UN Security Council, resolution 827, International Criminal Tribunal for the former Yugoslavia (ICTY), UN Doc. S/RES/827 (1993), 25 May 1993 (<https://www.legal-tools.org/doc/dc079b/>).

<sup>58</sup> See Kaufman, 2010, pp. 753-54, see above note 4.

<sup>59</sup> Another factor may have contributed to this phenomenon: until the 1990s, literature exploring the Tokyo precedent focused overwhelmingly on crimes against peace, largely ob-

With justification, scholars and advocates have often held that, until the 1990s, sexual violence was widely viewed as an inevitable by-product of war rather than a grave offense, and for that reason was largely invisible in post-war prosecutions.<sup>60</sup> When the UN Security Council created the ICTY, a global movement sought to ensure that rape would at long last be prosecuted as a war crime, as though this had never happened before.<sup>61</sup>

While advocates' general concerns were amply warranted, many seemed unaware that crimes of sexual violence had been successfully prosecuted at Tokyo as war crimes. As previously noted, the prosecution offered "voluminous" evidence of Japanese atrocities, which included the rapes of thousands of women during the occupation of Nanjing in 1937–38. The prosecution presented evidence of sexual violence principally as alleged violations of the laws of war as defined in the Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land.<sup>62</sup>

Notably in light of concerns that post-war prosecutions did not recognize the serious nature of sexual violence, testimony about rapes committed in Nanjing reflected an acute awareness of the gravity of these crimes. For example, a witness who described summary executions in Nanjing responded this way when asked, "What was the conduct of the Japanese soldiers toward the women" there?: "That was one of the roughest and saddest parts of the whole picture".<sup>63</sup> And when a defence lawyer tried to discredit a witness who testified about mass rapes in Nanjing by suggesting that Chinese soldiers also committed rape, the President of the

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scuring the Tribunal's treatment of other atrocity crimes. See Totani, 2011, p. 147, see above note 39. This is not surprising, as charges relating to crimes against peace dominated the trial and judgment. See *ibid.*; Boister and Cryer, 2008, p. 175, see above note 11.

<sup>60</sup> See, for example, Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law", in *McGill Law Journal*, 2000, vol. 46, p. 220.

<sup>61</sup> See Felice D. Gaer, "Rape as a Form of Torture: The Experience of the Committee Against Torture", in *CUNY Law Review*, 2012, vol. 15, no. 2, p. 295. Some, to be sure, recognized the Tokyo precedent. See, for example, Theodor Meron, "Editorial Comment: Rape as a Crime under International Humanitarian Law", in *American Journal of International Law*, 1993, vol. 87, no. 3, p. 426.

<sup>62</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 19 October 1907 (<https://www.legal-tools.org/doc/fa0161/>).

<sup>63</sup> Tokyo Trial Records, vol. 7, p. 2633, see above note 1 (testimony of Dr. Miner Searle Bates).

Tokyo Tribunal, Australian Justice William Webb, sternly reminded the lawyer “that rape and the murder of women could never be just reprisals”.<sup>64</sup>

The judgment did not provide a detailed assessment of evidence of sexual violence and other Japanese atrocities, which the majority deemed “not practicable”.<sup>65</sup> Nevertheless, its brief review credited evidence concerning rapes in Nanjing and other locations.<sup>66</sup> Of atrocities in Nanjing, the judgment found:

There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city [...]. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.<sup>67</sup>

Although the judgment did not make determinations about the specific classification of these offences,<sup>68</sup> it left no doubt that they constituted

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<sup>64</sup> *Ibid.*, p. 2595.

<sup>65</sup> International Military Tribunal for the Far East, Judgment, 4 November 1948, in Tokyo Trial Records, vol. 103, p. 49592, see above note 1 (‘Judgment’).

<sup>66</sup> See, for example, *ibid.*, pp. 49613 (Hopeh Province), 49617 (Changsha and Kweilin), 49632 (Blora, Dutch East Indies), and 49638, 49640 (Manila).

<sup>67</sup> *Ibid.*, pp. 49605-06.

<sup>68</sup> The prosecution brought several different war crimes charges in relation to crimes of sexual violence. See example, Indictment, Annex D, Section One (“female prisoners were raped by members of the Japanese forces” in violation of Article 4 of the Hague Regulations prohibiting “inhumane treatment”); *ibid.*, Section Twelve (inhabitants of occupied territories were raped in violation of Article 46 of the Hague Regulations requiring respect for “[f]amily honour and rights”).

war crimes.<sup>69</sup> Certain defendants were, moreover, convicted for failing to take appropriate measures to stop these and other atrocities.<sup>70</sup>

This is not to suggest Tokyo modeled appropriate treatment of crimes of sexual violence. Far from it. In particular, the prosecution and judgment have been faulted, and quite rightly so, for their almost complete neglect of the sexual enslavement of so-called “comfort women”.<sup>71</sup> Shamefully, this failure was not for lack of evidence, which was readily available. Indeed, evidence of enforced prostitution was introduced during the Tokyo Trial, and the judgment explicitly recognized that, during the Japanese occupation of Kweilin [Guilin], Japanese forces “recruited women labor on the pretext of establishing factories” yet in reality “forced the women thus recruited into prostitution with Japanese troops”.<sup>72</sup> Even so, as Ustinia Dolgopol writes, “these crimes were never made a central focus of the prosecutors’ case nor of the Judgment”.<sup>73</sup>

Yet this should not obscure the unique contributions of the Tokyo Tribunal. The Tokyo prosecutor’s decision to include acts of sexual vio-

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<sup>69</sup> See, for example, Judgment, Tokyo Trial Records, vol. 103, p. 49592, see above note 1, stating:

The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, *rape* and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy.

(Emphasis added.) See also *ibid.*, p. 49791 (finding defendant guilty of war crimes in relation to “violations of women” and other atrocities in Nanjing).

<sup>70</sup> See *ibid.*, pp. 49815-16 (General Iwane Matsui, Commander-in-Chief of the Central China Area Army, knew of the atrocities, including rape, committed in Nanjing, and “had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty”); *ibid.*, p. 49791 (Kōki Hirota, Japan’s Foreign Minister, “was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. 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”). While my focus here is on the fact that suspects were convicted of *war crimes including rape*, it should be noted that the standard of superior responsibility imposed by the IMTFE has been controversial.

<sup>71</sup> See, for example, Nicola Henry, “Silence as Collective Memory: Sexual Violence and the Tokyo Tribunal”, in Tanaka, McCormack and Simpson, 2011, p. 263, above note 13.

<sup>72</sup> Judgment, Tokyo Trial Records, vol. 103, p. 49617, see above note 1.

<sup>73</sup> Dolgopol, 2011, p. 244, see above note 18.

lence in war crimes charges and the judgment's recognition of rape as a war crime marked a salutary departure from Nuremberg. Despite extensive documentation of Nazi crimes of sexual violence and the introduction of evidence of such crimes during the IMT trial, they were not prosecuted as such in Nuremberg.<sup>74</sup> Viewed in this light, the IMTFE's prosecution of sexual violence as a war crime is historic.

Thus it is striking that, even today, analyses of international jurisprudence on crimes of sexual violence often cite the Tokyo precedent, if at all, for the proposition that its Charter did not explicitly recognize rape as a war crime or crime against humanity.<sup>75</sup>

Fortunately, the first Prosecutor of the ICTY and International Criminal Tribunal for Rwanda, Richard J. Goldstone, never doubted that rape constitutes a war crime provided other elements of war crimes are present. Nevertheless, he and his fledgling staff wanted to marshal the strongest support available for the charges they would bring. During the early years of the *ad hoc* Tribunals' operations, I directed a project, the War Crimes Research Office of the Washington College of Law, that provided legal analyses to the Prosecutor. Among the earliest requests we received was for an analysis of post-war precedents for prosecuting crimes of sexual violence. One of our most extensive memoranda for the Prosecutor explored the Tokyo Tribunal's historic judgment, then the most important precedent in this area.<sup>76</sup>

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<sup>74</sup> See Kelly D. Askin, "Women and International Humanitarian Law", in Kelly D. Askin and Dorean M. Koenig (eds.), *Women and International Human Rights Law*, Transnational Publishers, Ardsley, 1999, vol. 1, p. 52; Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation", 2008, p. 7 (available on the UN's web site); Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, p. 301. Nevertheless, gender-related crimes for which evidence was introduced in Nuremberg "can be considered subsumed within the IMT Judgment", *ibid.*

<sup>75</sup> See, for example, Grace Harbour, "International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment", in Serge Brammertz and Michelle Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 28.

<sup>76</sup> In contrast to many scholars' failure to recognize Tokyo's treatment of sexual violence, the person who served as Goldstone's specialist on gender-based crimes, Patricia Viseur Sellers, has forthrightly recognized the Tokyo Tribunal's singular legacy. Noting criticism of the IMT for its failure to address sexual violence, Sellers continues: "The Tokyo Tribunal prosecutors [...] resolutely indicted the rape of prisoners and female nurses", while its

### **5.5. Conclusion**

For a variety of reasons, including undeniably serious flaws, the Tokyo Tribunal was long neglected or downplayed in legal scholarship, as in other disciplines. As a consequence, its foundational role in and contributions to international criminal law were long obscured. Scholarship in this field was correspondingly diminished, as many scholars and practitioners overlooked opportunities to build upon salutary aspects of the IMTFE's work.

Fortunately, recent years have brought welcome change, as a wealth of impressive scholarship has revisited virtually every aspect of the Tribunal's legacy. Other authors in this volume are among the leading contributors to this rich body of work. Through their work, Tokyo's legacy is being reconstructed in all its rich complexity. And this is invaluable. For a tribunal's record – its failures as well as its successes – can offer vital lessons and resources for contemporary efforts to sanction crimes against the basic code of humanity.

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judges, “upon denoting the plethora of extreme sexual misconduct, forthrightly issued convictions”: Sellers, 2008, p. 7, see above note 74.

