The Allied victory in the Pacific led to the indictment and trial of twenty-eight senior Japanese dignitaries responsible for the deaths of between 20 and 30 million people during World War II. These high dignitaries, charged with crimes against peace, war crimes, and crimes against humanity, were tried by the International Military Tribunal for the Far East.

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True or false. In the book the author analyses the trial and highlights the procedural weaknesses and political negotiations in the work of the International Military Tribunal for the Far West.

A former judge with a passion for history, **Jean Sénat Fleury** was born in Haïti and currently lives in Boston. He wrote several historical books.

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Jean Senat Fleury

TOKYO: Analyzing the Trial

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THE TOKYO TRIAL

JEAN SÉNAT FLEURY

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Introduction

The trial of the twenty-eight senior Japanese officers before the International Military Tribunal for the Far East, known as the "Tokyo Trial," was the second attempt after Nuremberg at an international response to the crimes committed during World War II. As early as 1942, by the St. James' Palace Declaration, the representatives of the eighteen nations that formed the Allied group had affirmed their willingness to prosecute war criminals in international jurisdiction. But this declaration, in principle, had in mind only the crimes committed by the Nazi troops on the European continent. On October 30, 1943, the Moscow Declaration was signed by the foreign ministers of the United States, Britain, and the Soviet Union. It established the jurisdiction under which persons who committed war crimes will be tried. It stipulated that whether or not the abuses were perpetrated in a single country, they will be tried in it; if, on the other hand, the acts took place in several territories, they will be condemned by a joint decision of the Allies.

U.S. President Franklin D. Roosevelt and British Prime Minister Winston Churchill, at the Tehran conference in 1 943, wanted the Nazi and the Japanese defendants to be executed without appearing before a court. Joseph Stalin, the president of the Soviet Union, refused the proposal. The idea of an international trial was then decided. Charles de Gaulle, the French president, was in favor. However, the crimes perpetrated by the Japanese armies were not considered. A United Nations War Crimes Commission was set up at that time to list war crimes in Asia; but it was not until the spring of 1944 that the commission, specially dedicated to the Far East and the Pacific, began to draw up the list of suspects.

Finally, in the proclamation of Potsdam of July 26, 1945, the representatives of the United States, Great Britain, and China specifically announced their intention to bring Japanese war criminals to justice. The Soviet Union, still bound to Japan by a non-aggression treaty, had refrained from taking part in this decision.

On August 6, it was the bombing of Hiroshima and, on August 9, the bombing of Nagasaki, as well as the entry into war of the

Soviet Union against Japan. On August 10, Japan announced that it accepted the terms of the Potsdam Declaration except for the provisions that would target the emperor. On August 14, Japan announced its full acceptance of the Potsdam Declaration. The following day, Emperor Hirohito via the radio addressed the Japanese nation. On August 25, 1945, the United Nations War Crimes Commission (UNWCC) published its recommendations on the prosecution of Japanese war criminals in a document entitled "Draft Summary of Recommendations on Japanese War Crimes and Atrocities." Within the UNWCC, a subcommittee on the prosecution of Japanese war criminals was established in May 1944. This subcommittee was established in Chungking/Chongqing and in Nanjing on October 11, 1944. The subcommittee drew up a list of suspects covering a total of 3,147 World War II suspects in Asia and the Pacific.

While the first contingents of American forces arrived in Japan, on August 29, 1945, the State War Navy Coordinating Committee (SWNCC) discussed the prosecution of war criminals in a document defining general policy of the United States to Japan. This document – SWNCC 150/4 – will be approved by Truman on September 6 and made public on September 22, twenty days after the surrender of Japan was signed on September 2 on the USS *Missouri* (BB-63). In the act of surrender, the issue of war crimes was found.

On September 11, 1945, the supreme Allied commander, Gen. Douglas MacArthur, ordered the dissolution of the Japanese army headquarters. On the same day, he arrested thirty-nine suspects, including Gen. Hideki Tōjō. On October 6, 1945, the Interarms Committee called on MacArthur to put in place the means to try the most important war criminals, and those suspected of planning the war, violating treaties, or participating in a conspiracy aimed at carrying out these same crimes. The directive specified that the facts examined for the trial could go back to the date of the assassination of Chang Zolin, the president of the Republic of China, killed on June 4, 1928, in Shenyang.

On November 12 and 14, 1945, the War Crimes Commission compiled a list of suspects. On November 19, MacArthur ordered a series of arrests. On November 30, 1945, Joseph Keenan was

appointed chief prosecutor by Pres. Harry Truman. Keenan arrived in Tokyo on December 6 accompanied by 39 employees. He quickly collected documents and testimony and developed the Charter of the International Military Tribunal for the Far East. The following days, Keenan published the rules governing the trial of those accused of war crimes. Soon after that, several Japanese officials were arrested by MacArthur including members of the imperial court. On December 27, 1945, a statement by the foreign ministers of the United States, the United Kingdom, and the USSR, recognized the SCAP's full authority to carry out the provisions of the surrender. On January 19, 1946, the charter was promulgated by the Supreme Allied Command. It said:

> I, Douglas MacArthur, Supreme Allied Commander, under the powers vested in me to apply the terms of the surrender that calls for harsh justice for war criminals, order that a Tribunal be established for the Far East for the trial of individuals prosecuted, individually or as members of organizations, for crimes that will include crimes against peace.[1]

Chapter One

Creation of the Tribunal

Created on January 19, 1946, on MacArthur's orders to try crimes against peace, war crimes, and crimes against humanity committed by Japanese leaders between January 1, 1928, to September 1, 1945, and inaugurated in accordance with Point 10 of the Potsdam's request of July 26, 1945, the International Military Tribunal for the Far East indicted Japanese war criminals of the Second World War. It is made up of eleven countries, one for each victorious country of Japan. The charter specifies, in Article 8, that all nations at war with Japan could design an assistant prosecutor. Thirty-nine Americans are in the group of prosecutors known as the International Prosecution Section and a multinational group of five hundred people (lawyers, stenographers, and employees combined). MacArthur asked each member of the Far East Commission to propose the name of a judge and an assistant prosecutor before January 5, 1946.

The International College of Judges includes Australia, the Netherlands, China, the Soviet Union, New Zealand, the United States, Canada, Great Britain, France, the Philippines, and India. The presiding judge is Australian judge William Webb. The chief prosecutor is the American lawyer Joseph Keenan. These judges' rule by majority, with the president having a casting vote in the event of a split (Articles 2 and 3).

Staged by the Americans, the Tokyo Tribunal will try three categories of crimes:

1. Crimes against peace —Acts planned and directed by political and military power.
2. War crimes— the destruction of towns and villages, unjustified devastation.
3. Crimes against humanity— Deportations, massacres, exterminations, and persecution.

Composition of the Tribunal

On February 15, 1946, the nine signatories to the surrender proposed the names of the judges they communicated to MacArthur.

The court is made up of the following judges and prosecutors:

- Sir William Webb, president of the Supreme Court of Queensland, represents Australia.[2]
- Judge Henri Bernard represents France.[3]
- Prof. Bert Röling, thirty-nine-years-old, was the youngest of all the judges. He represents the Netherlands.[4]
- The Chinese Nationalist authorities had appointed General Shih Mei Ho, chairman of the Japanese war crimes tribunal in China replaced by Mei Ju Ao.[5]
- Maj. Gen. Ivan Mikhailovich Zarayanov, appointed by Stalin, represents the Soviet Union.[6]
- Harvey Northcroft, a member of the Supreme Court represents New Zealand.[7]
- William Donald Patrick, Lord Patrick, was the representative of Great Britain.[8]
- Maj. Gen. Myron Cramer, general counsel at the military court represented the United States.[9]
- Stuart McDougall, an expert in labor law, represents Canada.
- Radhabinod Pal represents India.[10]
- Delfín Jaranilla represents the Philippines.[11]
- Joseph B. Keenan, appointed by Truman as chief prosecutor, oversaw carrying out the charges against the Japanese authorities.[12]

Chapter Two

The Accuses

Officially, the trial began on May 3, 1946, with the indictment of twenty-eight Japanese personalities.

- Four prime ministers: Kiichirō Hiranuma, Koki Hirota, Kuniaki Koiso, and Hideki Tōjō;
- Three foreign ministers: Yōsuke Matsuoka, Mamoru Shigemitsu, and Shigenori Tōgō;
- Four ministers of war: Sadao Araki, Shunroku Hata, Shieshiro Itagaki, and Jirō Minami;
- Two ministers of the navy: Osami Nagano and Shigerato Shimada;
- Seven generals: Kenji Doihara, Heitaro Kimura, Iwane Matsui, Akira Muto, Kenryō Satō, Yoshijirō Umezu.
- Two ambassadors: Hiroshi Ōshima and Toshio Shiratori;
- Two officials: Okinori Kaya, (Minister of Finance), and Naoki Hoshino (Chief Cabinet Secretary).

The emperor's adviser, Marquis Koichi Kidō, Adm. Takasumi Oka, ideologue Shūmei Ōkawa, Col. Tatakeyama Hikoichi, and Col. Kingorō Hashimoto, were also charged.

The tribunal targets three different categories of persons: senior officials, military officers, and lower-ranking officers. The accused are entitled to a personal lawyer or, failing that, to a lawyer appointed by the court. The defense receives disclosure of all the exhibits of the trial. The trial is held in English and Japanese, and the judgment is based on procedural rules modelled on those of Nuremberg and intended to guarantee the rights of the defense. The charter states: "Reading of the indictment, asking each of the accused to plead or not to plead guilty, prior statements of the prosecution and defense, presentation of evidence and prosecution and defense witnesses, cross-examination of the defense, defense arguments, prosecution requisitions, and court judgment with the authority to pronounce the death penalty."[13]

The Introductory Indictment

On June 3, 1946, the U.S. attorney general, Joseph Keenan, issued the introductory indictment that opened the trial on the merits:

> Mr. President, Mr. Members of the International Military Tribunal," exclaimed the prosecutor, "it could be that the eleven nations represented by this tribunal and which themselves represent nations containing more than half of the inhabitants of Earth, and who have suffered, as a result of the aggression they have suffered, the loss of a significant part of their resources and a considerable amount of blood, are not able to prosecute and condemn those responsible for these calamities.[14]

His advocacy spans seventeen years of Japan's turbulent political and military history from 1928 to 1945. In his lengthy introductory indictment, Keenan responded to the defense's reproaches about the composition of the tribunal. According to him, this trial is a historical fact, "episode of a battle of civilization designed to preserve the whole world from its destruction."

This threat, he said:

> Is the result of the concerted efforts of individuals, either alone or in groups, to plunge the world into war

in the name of their ambition to dominate the world?" And turning to the accused, after a dramatic pause, he added, "They have declared war on civilization! It is not a matter for this court to exercise the revenge of the victors, but to apply the recognized rule that individuals who have organized a war of aggression are common criminals and deserve ... the reserved punishment . . . universally to murderers, robbers, pirates and looters.[15]

Chapter Three

Logistical Resources

The logistical resources deployed to carry out the trial were considerable: eleven judges, twenty-eight defendants, eleven prosecutors, more than one hundred American and Japanese lawyers, not counting translators, clerks, and assistants. Att. Gen. Joseph Keenan issued the final indictment on April 16, 1948. After 818 sessions, 48,500 pages of minutes, and more than 4,000 exhibits, the court delivered its verdict on November 12, 1948. In total, it will take more than six months for the judges to draft the 1,200 pages of the decision read publicly by President Webb during eight hearings.

In addition to Shūmei Ōkawa, two other defendants escaped conviction: Yōsuke Matsuoka, a former foreign minister, and Adm. Osami Nagano, who died from tuberculosis during the proceedings. Twenty-five defendants heard the court's decision.[16] The seven-month deliberation judgment did not find the unanimous consent of the magistrates. Knowing in advance that there will be colleagues to speak out against the decision, the judges formed a "majority drafting committee" that prepared a draft judgment submitted for minority approval. This majority committee was chaired by U.S. judge Cramer and included representatives from Great Britain, the USSR, China, the Philippines, Canada, and New Zealand. The representatives of Australia, India, Holland, and France were excluded from this committee because the disagreement of these four judges with their colleagues was visible. Minority judges only had the opportunity to make written submissions on the text submitted for approval. However, the final drafting of the judgment had never been the subject of collective deliberation. Here is a resume of the trial timeline:

Trial Timeline

May 3, 1946: Preliminary hearing and reading of the indictment.

May 6, 1946: Findings of defense incidents.

May 17, 1946: Judgment of reference to the substance of the incidents.

June 3, 1946: Introductory indictment.

June 13, 1946 – January 24, 1947: Requisitions of prosecutors (fifteen phases):

1. Description of the Japanese government system: the emperor, the cabinet, and the councils;

2. The takeover by the government army and the indoctrination of the population;

3. Aggression against Manchuria and the rest of China;

4. The policy of domination of the Chinese mainland and the testimonies gathered;

5. The use of drugs as a means of domination of China;

6. China's domination and economic exploitation;

7. The military alliance with Germany and Italy;

8. Japan's preparation for wars of aggression – the war economy;

9. Attack plans against the United States, Singapore and the USSR;

10. The aggression against France;

11. Aggression against the United States and the Commonwealth;

12. Aggression against Holland;

13. Atrocities against the civilian population and prisoners of war;

14. Individual responsibilities.

January 27, 1947: Defense incidents concluded.

January 30, 1947: Replica of the charge on the incidents.

February 3, 1947: Judgment of reference to the substance of the incidents.

February 24, 1947–January 12, 1948: Defense Intervention:

1. Preliminary presentation;

2. General party;

3. Manchuria;

4. China;

5. The USSR;

6. The Pacific;

7. Western powers;

8. War crimes and crimes against humanity;

9. Individual defenses;

10. Personal appearance of sixteen accused;

11. Cross-examination of comparing defendants;

12. Pleas.

January 19, 1948: Replicas of the charge.

March 2, 1948: Defense duplicates.

April 6, 1948: Debate closes.

November 4—12, 1948: Judgment reading.

November 21, 1948: Defense appeal to General MacArthur.

November 24, 1948: General MacArthur's confirmation of judgment.

December 20, 1948: Dismissal of the U.S. Supreme Court's appeal by defendants.

December 23, 1948: Execution of death-row inmates.

The Verdict

Of the eighty "Class A" war criminal suspects detained in the Sugamo prison after 1945, twenty-eight defendants were brought to trial before the International Military Tribunal for the Far East. The accused included nine civilians and nineteen professional military men. Seven sentenced to death were found to be guilty for their implication in mass-scale atrocities.

- Hideki Tōjō, general of the Imperial Japanese Army.[17]
- Kōki Hirota was a career diplomat and former Prime Minister of Japan from 1936 to 1937.[18]
- Seishirō Itagaki, General of the Imperial Japanese Army and Minister of War between 1938 and 1939.[19]
- Iwane Matsui, General of the Imperial Japanese Army.[20]
- Kenji Doihara, General of the Imperial Japanese Army.[21]
- Heitaro Kimura, General of the Imperial Japanese Army.[22]
- Akira Muto, General of the Imperial Japanese Army.[23]

Sixteen other defendants were sentenced to life in prison. Three of the sixteen died in prison between 1949 and 1950. Yosuke Matsuoka and Osami Nagano died in detention during the trial. The remaining thirteen were paroled between 1954 and 1956.[24]A U.S. military document titled "Execution of Prisoners" mentioned how the sentences should be conducted. The executions were to occur soon after midnight, be "private" with no photographs or motion pictures, and those in attendance were expected to offer no unseemly conduct of any kind.

Five thousand seven hundred accused "B/C" war criminals were brought to trial in a total of 2,244 tribunals in Asia. Although the war was fought in his name, Emperor Hirohito was not prosecuted. Many members of the imperial family, officers and dignitaries of the regime, have been preserved also from trial.

A Great Absent

Hirohito, under the name the war was fought, was preserved from the indictment, and the royal family, such as Prince Chichibu, Prince Asaka, Prince Takeda, and Prince Higashikuni, was exonerated in the proceedings. Only Prince Konoe and the Guard of the Seals Kōichi Kido were arrested during the trial. The issue has been the subject of much debate to date. What was Hirohito's role in Japan's war in the Pacific and Southeast Asia? Was the emperor only the providential monarch who put an end to hostilities at the war, that is, a monarch who could not violate the recommendations of the high command of the Japanese army and government? Or was he a devious manipulator who has been the architect of successive plots since the 1930s, facilitating the emergence of fascism and engaging Japan in the path of militarism and expansionism like Germany and Italy?

For some, Hirohito was a convinced pacifist who suffered in his soul because of his limited power to put an end to the suffering and ill-treatment endured by civilians and prisoners during the war. Held by the dignity of his "divine emperor" status, he could not intervene openly in public affairs. For other observers, often foreigners, Hirohito was a fierce dictator in the lineage of Hitler, who had the ambition to occupy the countries in the Pacific and Southeast Asia to spread Japan's hegemony in the region, and, to get there, he encouraged his generals and admirals in their decisions to launch the war.

This question has long been a subject of debate among historians and other military experts on the Pacific War? Based on an agreement between the prosecution and the defense, Hirohito was not present in the dock at the Tokyo trial. His name was forbidden to be invoked in the proceedings.[21] But was the emperor unaware of the war crimes committed by Japanese soldiers in the occupied territories? The answer is no. He was commander-in-chief of the Japanese army and the Japanese navy. He appointed the Japanese prime ministers who were designated by the National Diet. It is inconceivable that he was not responsible for the deaths of millions of civilians and soldiers during the Pacific War. From the Imperial Headquarters, he dictated his orders to the Army

General Staff. He supported the Japanese expansionist policy that led to the occupation of Manchuria in 1931, the declaration of war with China in 1937, the invasion of French Indochina in 1940. He accepted Japan's entry into World War II alongside Hitler from a political and military alliance with Germany. On September 27, 1940, Japan became allies with Germany, and Saburō Kurusu, Japan's ambassador to Germany, signed the Tripartite Pact in Berlin. The Japanese leaders felt that an alliance with Germany would isolate the aggression from America, and would facilitate Japan in its ambitions for expansion in Asia. More than that, Hirohito secretly fomented the Imperial Japanese Navy's attack on the American Pacific fleet on December 7, 1941. The following day, he received reports of the successful Japanese surprise attacks on Pearl Harbor and other strategic sites in the Pacific, and he spent the day in meetings with his prime minister, Privy Council, and senior military leaders.

Interviewed on the war by journalist Kase Hideaki from the popular journal *Bungei shunjū,* Prince Takamatsu, the young brother of Hirohito, implied that he had been a dove, and Hirohito a reckless hawk. Talking to the incident on November 30, 1941, he said, he had spoken to his brother for five minutes, warning him that the navy high command could feel confident only if the war lasted no longer than two years. Takamatsu also recalled warning his brother to end the war right after the Battle of Midway. Four Japanese and three American aircraft carriers participated in this Battle. The four Japanese fleet carriers —*Akagi, Kaga*, *Sōryū* and *Hiryū,* part of the six-carrier force that had attacked Pearl Harbor— were sunk, as was the heavy cruiser *Mikuma.* "After Midway and the exhausting attrition of the Solomon Islands campaign, Japan's capacity to replace its losses in material (particularly aircraft carriers) and men (especially well-trained pilots and maintenance crewmen) rapidly became insufficient to cope with mounting casualties, while the United States' massive industrial and training capabilities made losses far easier to replace. The Battle of Midway, along with the Guadalcanal campaign, is widely considered a turning point in the Pacific war." Takamatsu revealed that he and Prince Konoe had considered asking the emperor to abdicate prior to surrender.

In his plan to play repentant and avoid being tried and convicted, Hirohito in his proclamation of the New Year to the Japanese people, three months after his first meeting with MacArthur, officially renounced his "divinity." In a carefully prepared text, which he addressed to the nation, he declared:

> The bond between us and you, the people, is constantly reconnected by mutual trust, love and respect. It's not just mythology and legends that create it. Never has such a connection been based on the chimerical perception that makes the emperor a living god and which, moreover, considers the Japanese race as superior to all other human races and thus destined to rule the world.[25]

Hirohito later sent a photographer dedicated in English to Gen. Bonner Frank Fellers, who had greeted him when he entered the embassy. Empress Nagako, shortly after the interview on September 27, sent Jean MacArthur, the wife of the American general and commander-in-chief of the occupying forces, a gigantic basket of flowers. Hirohito, a second time, sent MacArthur a lacing and gold writing board, dated to the Tokugawa era, in the nineteenth century. These are calculated actions of the emperor to buy the sympathy of American superior officers in order to escape the justice of the Allies.

On February 1947, MacArthur, during a press conference dedicated to "clearing the air" over Hirohito's trial rumors, told the Japanese press and a group of visiting American newspaper and magazine editors, "The role of the emperor is most important and underscores the intelligence of the thinking embodied in the

Potsdam Declaration." Retaining the emperor, he concluded, "was one of the wisest decisions the Allies could have made." The benefits of that decision involved "the very cooperation of the Japanese people," he explained; and it was time to "move on."[26]

A few days after the verdicts were announced, Hirohito wrote a letter to General MacArthur reassuring him that he had no intention of abdicating.[27]A week after, Keenan reaffirmed that the decision for trying the emperor is not on the table because there is no evidence that he had participated in the crimes committed by the army during the war.[28]According to Keenan, Hirohito was not a war criminal. With the emperor very pleased with this opinion, Keenan had been invited to a private lunch with the emperor at the Imperial Palace. Sonni Efron, a journalist of the *Los Angeles Times*, on September 5, 2000, in an article "New book shows Hirohito was not whipping boy," said:

> The U.S. decision to spare Hirohito from prosecution was intended first to ensure an orderly and disciplined Japanese surrender and cooperation with the occupation, and then, as the Cold War deepened to facilitate the speedy rebuilding of Japan as a constitutional monarchy that would provide an anti-Communist bulwark in Asia.[29]

Chapter Four

Analyzing the Trial

The Allied victory in the Pacific led to the indictment and trial of twenty-eight senior Japanese dignitaries responsible for the deaths of between 20 and 30 million people during World War II. These high dignitaries, charged with crimes against peace, war crimes, and crimes against humanity, were tried by the International Military Tribunal for the Far East.[30] The Tokyo tribunal, established on April 29, 1946, is made up of Gen. Douglas MacArthur, supreme Allied commander in Japan. He was charged with trying Japanese war criminals in the same way that German war criminals had been tried in Nuremberg.

The investigation opened in May 1946, and the court examined the roles assumed by the accused during the operations of the Imperial Japanese Army in Korea, Burma, the Philippines, Vietnam, Cambodia, Thailand, New Zealand, Singapore, Hong Kong, Indochina, and China. In China, particularly in the city of Nanjing, there was the brutal massacre of civilians and the rape of tens of thousands of women and children by Japanese soldiers at the end of 1937. According to official Chinese figures, 250,000 people died in the carnage, and survivors summoned to court spoke of thousands of civilians buried alive, bayoneted, or beheaded with swords.

On November 12, 1948, the president of the court, Australian William Webb, declared the death sentence by hanging of seven defendants, including two former prime ministers, Hideki Tōjō and Kori Hirota, as well as a former Minister of War and four Generals. Many historians have criticized the Tokyo Trial as biased because Hirohito, commander-in-chief of the Japanese army and navy, was exonerated of all liability. Allied prosecutors mounted an important case against him that demonstrated his direct involvement in the planning and the conducting of the war. However, the emperor, who received unwavering support from MacArthur, was not charged. "Washington did not want to destabilize the country by touching its national symbol."

In the eyes of many observers, the trial in Tokyo had the appearance of revenge of the Western powers over Japan,

especially a revenge of the United States, which did not forgive the surprise attack on the American fleet at Pearl Harbor. The winners of World War II also want to punish Japan, which had signed a pact of understanding with Germany and Italy to annex other territories in the Pacific and East Asia. During that period, the Japanese took the opportunity to massacre millions of people, both military and civilian, to establish their hegemony.

On June 18, 1946, U.S. attorney general Joseph Berry Keenan, in charge of the prosecution, indicated that Hirohito would not be tried. This policy of "saving the emperor's head so as not to undermine the monarchical institution" seriously undermines the legitimacy of the trial. The French representative in court, Judge Henri Bernard, criticized the decision as not in accordance with the rules of impartiality that characterize the criminal trial because of Hirohito's absence from the bench. How, in such a case, can we credit the organization of a trial with the absence of the main protagonist? This is the question posed by many experts who wonder why the question of the emperor's impeachment was not addressed during the preparations for the "Tokyo Trial" in the spring of 1946.

The first arrest orders issued in the autumn of 1945 against Prince Nashimoto Morimasa, Fumimaro Konoe, and Kōichi Kido suggested that an indictment of the emperor was inevitable. But while many voices in the United States and several countries called for the punishment of Hirohito for war crimes; on the other side, many others behind the scenes wanted to absolve the emperor. They formulated a list of reasons to justify their claim to offer a pardon to Hirohito, namely: the Japanese's attachment to the maintenance of the monarchy, fear of anarchy opening the flank to a Communist revolution, the need to drive the policy of occupation through the political and administrative structures in place, and U.S. economic and strategic interests at the beginning of the Cold War. Japan is in Asia a necessary bulwark against Communism in general and Soviet territorial ambitions, they said.

According to the deputy head of MacArthur's "Japanese Affairs" section, Col. C.L. Kades, MacArthur believed that Hirohito had atoned for all his mistakes by his unconditional support for the occupation. Maj. Gen. Courtney Whitney, MacArthur's first aide-

de-camp, told the press of his commander's thoughts on Hirohito: "I would have the impression of grossly breaching our commitments if the emperor were to go on trial as a criminal of war after all the service he rendered to the Allies."[31]

In the early days of August 1937, Hirohito met with the Army Chief of Staff Prince Kan'in Kotohito and the chief of the Imperial Navy staff Fushimi Hiroyasu. He asked them to avoid the extensive deployment of troops and concentrate forces at a few strategic points. The emperor received a plan proposing bombing and occupation of strategic points, such as Shanghai and Nanjing, as well as the naval blockade of the coasts. He validated this strategy. On August 13, 1937, the Japanese army invaded Shanghai. On September 4, Hirohito issued a statement to the diet:

> While we are constantly concerned about ensuring peace in Asia by cooperating with China, China does not really understand the real intentions of our Empire. To our deep regret, the Chinese caused constant difficulties and problems that led to the current incident. Our troops, demonstrating loyalty and bravery, endure trials only in order to quickly establish peace in East Asia and to get China to reflect on its actions. [32]

The Tokyo trial has been criticized both in Japan and outside the country.[33] Initially, there are profound differences of opinion among judges who sit on the court. Indeed, on the very day of the judgment, no less than five judges —out of eleven— expressed separate judgments. Indian Judge Radhabinod Pal said all defendants should be acquitted.[34] In a thousand-page brief, which

he would publish on his return to India, he states that no member of the accused group is guilty of war crimes.[35] According to him, the acts of aggression alleged against the Japanese are justified by those committed against their country by the imperialist powers of the West. For this, he refused to put his signature on the judgment, unlike all his colleagues.[36]

The Dutch judge, Bert Röling, the presiding judge, William Webb, and the French judge, Henri Bernard, had different opinions on the trial. For Röling, holding individual leaders personally responsible for egregious acts of state constituted a "milestone in legal development" that seemed crucial in the nuclear age. The Australian judge, Webb, who was leading the proceedings, decried questions that would have led the accused to provide an explanation of the policies they were aware of. When he inaugurated proceedings, Sir William Webb started with the observation that "there has been no more important criminal trial in all history."[37] The French judge, Henri Bernard, who showed remarkable independence in drafting one of the three dissenting judgments on purely legal grounds, explained:

> Considering that the defendants had already been sorted by MacArthur's government, the presiding judge in advance held them guilty. He was only looking for the degrees that would weigh the verdicts. For example, he restricted interrogations to the evidence of innocence." For Bernard, procedural irregularities made the judgment unfair. "A verdict rendered by a court after an irregular procedure cannot be valid.[38]

Twenty-eight Japanese were indicted for "Class A" war crimes, of whom two died during the course of the trial and one was excused on grounds of mental incompetence.[39] Judge Röling dissociated himself from the convictions of Hirota, who he said had opposed the expansionist will of the Japanese military as best as he could and should have been acquitted. Other defendants, he said, were sentenced too harshly, with no death penalty to punish crimes against peace. Several convicts who were released on parole at the Tokyo trials quickly returned to office at the highest level. Mamoru Shigemitsu, who was released in 1950, and four years later became minister of affairs in the government of Ichirō Hatoyama.[40]

On February 1, 1950, the Soviets called on the United States and its allies to establish an exceptional court to try Hirohito and four Japanese generals, including Gen. Shiro Ishii, the commander of Unit 731, as authors of crime against humanity. The Soviet Union, through its foreign minister, Vyacheslav Mikhailovich Molotov, was conducting an increased diplomatic campaign in favor of prosecuting the emperor and the leaders of the *zaibatsu* (financial cartels). Russia was joined in this battle by the Australian government, and both countries solemnly proposed that Hirohito be brought to justice. The Australian government sought indictment of the Japanese emperor for closing his eyes to summary executions of Australian prisoners of war, as well as systematic ill-treatment of tens of thousands of prisoners in defiance of the Geneva Conventions. New Zealand later joined the Soviet Union, China, and Australia in this battle. But the request was rejected by Washington after a tacit agreement between the Japanese ruling class and the U.S. administration. A refusal signed by MacArthur, on behalf of President Truman, was notified to the Russians and Australians in a press release on February 3, 1946.[41]

By deciding to not prosecute Hirohito, the Americans had a well-calculated political objective. They wanted to protect the emperor as an ally in order to make Japan a bastion of anti-Communism in Asia.[42] To do so, there was an agreement between the prosecutor and the defense that Hirohito's name will not be mentioned during the hearings. When General Tōjō inadvertently challenged this agreement, saying, "No one would have dared to go against emperor will," U.S. Attorney General Joseph Keenan suspended the meeting. In the aftermath of the surrender, the first

Japanese government considered holding special courts to try the leaders responsible for the war, but the Americans banned the initiative. The Treaty of San Francisco (1951), by which Japan regained its sovereignty, was conditional on the proposal to accept the verdict of the Tokyo court. But it also had the condition of granting a "no-suit" to those who did not appear before this court, diverting the country from a critical examination of its past by encouraging the impunity that continues to denounce the victims and their families who have endured so much directly or indirectly in the persecutions during the war years.

Beyond the total exemption granted to Hirohito, the decision to release those arrested for war crimes after a few years is criticized.[43] This led to the rebirth of the right and extremist group that would soon return to power. According to Herbert P. Bix, "MacArthur's truly extraordinary steps to save Hirohito from trial as a war criminal had a persistent and profoundly distorting impact on the Japanese understanding of the lost war." For his part, John W. Dower said:

> Even Japanese activists who endorsed the Nuremberg and Tokyo charters and worked to document and publicize the atrocities of the Shōwa regime cannot defend the American decision to exonerate the emperor's responsibility for the war and then, at the height of the Cold War, free and then link to Far-Right war criminals defendants like the future Prime Minister Nobusuke Kishi.[44]

On May 5, 2006, on *Le Monde,* a French newspaper, Philippe Pons said:

> The Tokyo Tribunal has not remained in the annals of international justice as an ideal of fairness, and the judgment of December 1948 [death sentence of 7 of the 28 accused, among which Gen. Tōjō Hideki, a supporter of the excessive struggle against the United States] is fraught with ambiguities. Arbitrary charges, insufficient evidence, and lack of respect for the rights of the defense have made this trial a denial of justice. Henri Bernard, the French judge, criticized the verdict, following a flawed procedure. Radhabinod Pal, the Indian judge said, "If crimes against humanity were judged, we also had to rule on those perpetrated by the United States against civilians, starting with the atomic bombings of Hiroshima and Nagasaki.[45]

According to Awaya Kentarō, professor of modern history at Rikyyo University, the Tokyo trial, where twenty-eight senior Japanese dignitaries were tried from May 3, 1946, to November 12, 1948, contained serious flaws. In a paper published in *Le Monde* on September 26, 2005, Kentarō stated:

At the Tokyo court, the prosecution detailed, with supporting evidence and witnesses, the conduct of the Japanese invasions, from the Manchurian incident to the Pacific War to the Sino-Japanese War. In the expectations of the judgment, the court essentially took up the prosecution's arguments. However, as soon as his work is analyzed in detail, another process, leading to immunity, was closely involved in the proceedings of the indictment. Compared to Nuremberg, many military leaders escaped prosecution. Some crimes were not even examined. Of course, the conditions of the period made careful verification difficult. But the reason is mainly because several cases were deliberately overlooked by the judges. In Tokyo, the United States took the lead role: most of the prosecutors were Americans. The Supreme Allied Commander, General MacArthur, had absolute decision-making power over the issues being dealt with, and if we sometimes preferred to turn a blind

> eye, we must see the effect of American political will.[46]

The biological and chemical experiments conducted by the Japanese troops were not discussed during the trial, for example, those conducted by Unit 731.[47]

Another major problem, which came under severe criticism at the Tokyo Trial, was the overly flexible procedure used to receive evidence in court. The question of admissibility of evidence is one of the foundations of the U.S. criminal proceedings. No hearsay evidence, no documents or witnesses who cannot be cross-examined. The Charter of the International Military Tribunal for the Far East has ruled out the application of these principles, leaving it to the court to assess sovereignly the "probative value" of the elements produced by the parties (Article 13). The charter specifies that certificates, diaries, and documents not received under oath would be considered admissible. The court accepts that the prosecution uses press clippings, conversations with deceased people, and citizen letters about the abuses and crimes of Japanese soldiers during the war in Tokyo. These documents submitted by the prosecution are accepted as evidence without cross-examination, a principle contrary to the American criminal procedure.

The principle of non-retroactivity of the law was one of the reproaches made by the defense that the facts alleged against the accused took place before January 19, 1946, when the charter to try Japanese war criminals was promulgated by the Supreme Allied Command. This argument of non-retroactivity of the law is opposed by prosecutor Keenan who stated that the charges against the accused were considered criminal well before the period of the charge. Indeed, The Hague Conventions of 1907, the Treaty of Versailles of 1919, and the Kellogg-Briand Pact of 1928, signed by Japan, made the war of aggression an international crime. Invading the territories of other neighboring countries, by starting a war of aggression, is not only a crime, but the main war crime.

Defense counsel also pointed to the inadmissibility of the charges against their clients.[48] For example, for defense, the battles of Lake Khasan and Nomonhan were simple border incidents that

had been the subject of negotiated agreements on June 9 and August 19, 1940, and had led to the 1941 Non-Aggression Treaty. How could the Tokyo court take over incidents that the parties themselves had permanently terminated? The Indian judge considered that these were mere border incidents, but the court concluded otherwise. He decided that these operations constituted a war of aggression by Japan against the Soviet Union and Mongolia. For the agreements negotiated between the two countries, defense lawyers stressed that they had not provided any immunity, and that there had been no question of liability, whether criminal or otherwise. The court's view is that these agreements do not constitute a defense to the criminal charge before it. The judges stated on page 841 of the judgment: "It would be for the court contrary to the public interest to consider that there may have been a pardon of crimes, formally or by implication."

Listing the various crimes against peace committed by Japanese leaders, especially the surprise and deadly attack of the Imperial Japanese Army on the American fleet at Pearl Harbor, the Nanking Massacre, the Bataan Death March, the construction of the Burma-Siam Railway, and the abuses of Japanese troops committed on the civilian populations of the occupied territories, the prosecutor said: "All these excesses were by no means isolated acts resulting from the misbehavior but were planned in the execution of a deliberate policy for which the accused are personally responsible."

The Tokyo Trial has also been criticized as "incomplete justice" by many experts.[49]Allied nations that had judged and condemned Japan's top leaders for war crimes and crimes against humanity had not come to the table with their own hands. The Soviet Union participated in the invasion and occupation of Poland by Germany, and was involved in the massacre of about 22,000 Polish military officers and intelligentsia during the Katyn Massacre, in April and May 1940.[50] Katyn bombings by the United States and Britain during World War II killed hundreds of thousands of civilians in cities such as Dresden, Nagasaki, and Hiroshima. President Roosevelt had set up a resettlement program for more than 100,000 Japanese Americans by confining them to concentration camps in the United States.

Judging Hirohito for war crimes before the International Military Tribunal for the Far East would perhaps have a negative impact on Japan, which could fall into serious political and institutional instability, or could even trigger a bloody popular uprising against the American occupying forces in the country.[51] However, such a trial would have made history and would have served as an example to apprentice dictators who would think of using the weapon of war in the future as a strategy to invade other territories and spread their power outside their border.

Chapter Five

Critics on the Trial

Analyzing the trial, it is undeniable that the Allied lawsuit against the Japanese dignitaries in Tokyo marked an important starting point for the establishment of a new international order at the end of the Second World War. However, it is interesting to note that both Nuremberg and Tokyo are not brought with the intention of achieving social justice for victims persecuted by the Nazis in Europe and the Imperial Japanese Army and Navy, but rather for closing the chapter of the Second World War.[52]

The message through these two suspicious trials was that with the war over, it was necessary to choose a few "heads" and give them all the responsibilities in triggering conflicts. To do this, international tribunals were set up, the two most important of which were the Nuremberg International Military Tribunal to try German war criminals and the International Military Tribunal for the Far East to try Japanese war criminals. As the sociologist Jacques Arnaud Démézier said, "Go mad or wise, how the Nazi regime, which had been built on the principle of deprivation of psychological, ideological and social enjoyments, was represented in Nuremberg by only twenty-four Accused. While in the Tokyo trial, only a group of twenty-eight senior Japanese dignitaries faced justice."[53]

Was justice served in the Tokyo War Crimes Trials? This question has been debated since 1948 by many jurists, historians, journalists, and many other experts who had analyzed the verdict. According to Tim Maga, in *Judgment at Tokyo: The Japanese War Crimes Trials:* "The answers depended upon a variety of factors, most of them political." For some, speed and justice had always been contradictory partners. For others, trial length was considered irrelevant." The Catholic Church position on the trial was especially surprising. "Japan was in trial" in the IMTFE and the Allies had been too eager to convict a defecting enemy," said the Vatican in an official statement. Some had criticized Keenan's specific methods and tactics that were more connected to political interests than effective prosecution work.

"They are plain, ordinary murderers," cried Chief Prosecutor Joseph B. Keenan. As a result, Japanese officers and soldiers who conducted war crimes, engaged in unethical medical experiments, or practiced cannibalism were found guilty of the charge of murder. The verdict effectively shows that good law was practiced at the Japanese War crimes trial in Tokyo.

However, many historical works, both in Japan and in the United States, have highlighted procedural weaknesses and political negotiations in the work of the International Military Tribunal for the Far East. As historian Awaya Kentarō, professor of modern history at Rikkyo University, one of the world's leading experts on the issue, pointed out, "Researchers now agree that the US authorities have introduced a number of political objectives in the preparations and conduct of the trial."

The Tokyo Charter, which formalized the jurisdiction of the court, was prepared by the International Prosecution Section, a so-called international body but, at the orders of the American occupying authorities. The other ten participating countries, each of which provided a judge, had arrived very late in the process of preparing the trial and had hardly weighed on its progress. The charge was led by a single team, led by a U.S. attorney, Joseph B. Keenan, who worked closely with the head of the occupation authorities, Gen. Douglas MacArthur. Although Keenan was assisted by ten associate prosecutors, one from each of the other ten countries represented on the tribunal, the American entirely had controlled the prosecution policy and the strategy for the trials.

In Tokyo, two languages were used —English and Japanese— at least six other languages had to be accommodated. Simultaneous interpretation proved extremely difficult in Tokyo and, therefore, statements by witnesses or counsel were stopped at the end of each sentence until translations had been made. The eleven justices in Tokyo, contrary to the four presiding judges in Nuremberg, had no replacement. This resulted on more than two or three occasions in absenteeism on the bench.

For many historians, lawyers and analysts, the Tokyo trials had a revenge on Japan. In an article published in *Le Monde* on May 5, 2006, Philippe Pons said:

> The Tokyo Tribunal has not remained in the annals of international justice as an ideal of fairness, and the judgment of December 1948 (death sentence of 7 of the 28 accused, among which Gen. Tōjō Hideki, a supporter of the excessive struggle against the United States) is fraught with ambiguities. Arbitrary charges, insufficient evidence, and lack of respect for the rights of the defense, had made the trials a denial of justice. The French judge, Henri Bernard, had criticized the verdict, he said, following a flawed procedure. The Indian judge, Radhabinod Pal, said: "If crimes against humanity were judged, we also had to rule on those perpetrated by the United States against civilians, starting with the atomic bombings of Hiroshima and Nagasaki.[54]

Biological and chemical experiments conducted by Japanese troops were not discussed during the trial, such as those conducted by Unit 731. It is estimated that at least 3,000 people had been used for human experiments by Unit 731, and more than 300,000 people had been killed in China by Japanese biological weapons.

Analyzing the Tokyo Trial several questions deserve an answer. For example, two people convicted of being "Class A" war

criminals, Shigemitsu Mamoru and Kaya Okinori, played an important role in post-war Japanese governments. Not only were these two Japanese leaders not charged with war crimes, but also no foreign government objected when they took office.

The other decision that many historians criticized was the fact that Hirohito and the majority of the imperial family members involved in the war were exonerated of criminal prosecution. Indeed, when it came to establish the list of war criminals, MacArthur recommended to the American government that the emperor should be granted immunity while maintaining the imperial system necessary for the proper functioning of the occupation of Japan. Britain, with a similar monarchical system, approved this decision. According to the British government, prosecuting Hirohito for war crimes would be a serious political mistake. His presence on the throne could only prevent Communist infiltration into Japan. Aristides George Lazarus, who served as defense attorney for former general Hata Shunroku, claimed out that midway through the trial, he was asked by an unnamed, high-ranking representative of President Truman to arrange, through Hata, that all the defendants be coached to "go out of their way during their testimony to include the fact that Hirohito was only a benign presence when military actions were discussed at meetings that, by protocol, he had to attend."[55]

In addition to the total exemption granted to Hirohito, there is criticism of the decision to release only after a few years those sentenced for war crimes. Until now, there are major controversies surrounding the release from prison of several officers and officials condemned during the trial in Tokyo. Those individuals found to be war criminals by the International Military Tribunal for the Far East received early paroles. On March 7, 1950, Douglas MacArthur, the American commander, issued Circular 5 Clemency for War Criminals providing for the early release of prisoners who had demonstrated good conduct. Several of the sixteen war criminals given life sentences received early parole.[56] Col. Kingoro Hashimoto, a propaganda spokesman and a participant in controversial military actions ranging from Mukden in Manchuria to the Nanking massacre, received parole in 1954. Field Marshal Hata Shunroku of the Supreme War Council, found guilty of committing atrocities against Chinese civilians, was also paroled in

1954. Adm. Oka Takasumi, who ordered the shooting of both military and civilian survivors of torpedoed Allied ships, was paroled in 1954. Gen. Araki Sadao, a former war minister and education Minister who had rebuilt the Japanese education system along strong militarist lines, was paroled in 1955. Naoki Hoshino, the chief cabinet secretary throughout World War II and the former chief of financial affairs in Japanese-occupied Manchuria, won parole in 1955. Kaya Okinori, the minister of finance and an advocate of selling narcotics to Chinese civilians, was paroled in 1955. Kido Koichi, the guard of the seals and Private Secretary of Hirohito, was paroled in 1955. Gen. Hiroshi Oshima, the military representative to Berlin who helped Japan in signing the military alliance with Germany, was paroled in 1955. Gen. Sato Kenryo, chief of the Military Affairs Bureau and former commander of occupied Indochina, won parole in 1956, along with the architect of slave-labor policies in China, Gen. Suzuki Teiichi. Some of those criminals, who had been former influential figures of the Shōwa era, such as Ichiro Hatoyama and Nobusuke Kishi, had returned to power.

One defendant, Mamoru Shigemitsu, who had helped sign the surrender document to the Allies in 1945, and who was a former ambassador to China and Vice Minister of Foreign Affairs, was sentenced to seven years in prison but was released in 1950. Shigemitsu returned to the diplomacy position and was appointed Foreign Minister in 1954.

In 1978, the "souls" of fourteen people executed as "Class A" war criminals were "welcomed" to the Yasukuni Shrine. They were: Tōjō Hideki, Kenji Doihara, Matsui Iwane, Kimura Heitaro, Koki Hirota, Itagaki Seishino, Muto Akira, Matsuoka Yōsuke, Nagano Osami, Shiratori Toshio, Hiranuma Kiichiro, Koiso Kuniaki, and Umezu Yoshijirō.

As the Chinese historian Cheng Kai pointed out, the Tokyo trial resolved the conflict between Japan and the United States but did not carry any prospect of reconciliation with the Asian countries that had suffered the most during the war. The compromise reached reflected the advent of a new international order based on the fight against the Communist enemy represented by China and the Soviet Union.

The violation of the principle of non-retroactivity is, an essential principle of criminal law: No crimes without a text that prohibits them at the very moment they were committed, was one of the reproaches made by the defense, which considers that the alleged crimes committed by the accused took place during 1931–1945 and the charter to try Japanese war criminals was promulgated by the Supreme Allied Command, on January 19, 1946. It was in the name of the principle of non-retroactivity of criminal law, as said in Latin: *Nullum crimen, Nulla poena sine praevia lege poenali* that defense lawyers pointed out that the charges brought against their clients were inadmissible.

Several generals had tried, in their defense, to refer to orders from their superiors, since the charter of the court prevented them from claiming such an excuse. Those officers claimed that they had not been informed of the excesses committed by the orders they had given, and their orders had been carried out contrary to the plan. According to Prosecutor Keenan, all defendants are guilty of crimes against peace for contributing to the preparation and inset of wars of aggression against Manchuria, China, the United States, and other Asian countries represented in court. These are by no means retroactively sanctioned crimes, Keenan said. To affirm his arguments, the chief prosecutor mentioned in his introductory indictment, several previous international treaties that sanctioned the war of aggression, the 1907 Hague Conventions, which required states to settle their differences peacefully, the Treaty of Versailles, which had specified as early as 1918, that the war of aggression constituted an international crime, and, finally, the Kellogg-Briand Pact of August 27, 1928, which solemnly condemned the use of war for the settlement of disputes, "which will have to be settled peacefully." Fifteen countries, including Japan, have signed the treaty, to which more than sixty states have joined. According to the U.S. prosecutor, Japanese leaders are guilty of violating the commitment made in signing the pact. As such, they deserve to be condemned without the argument of non-retroactivity of the criminal law being validly accepted.

Some historians insist that convictions are too limited. According to them, the trial's findings should have been broadened to extend guilt to the entire Japanese ruling class, including not only the emperor and his court, but also the military elites, the leading

political and economic leaders in Japan. Indeed, many military leaders and high-ranking political leaders had escaped prosecution. Some crimes were not even examined. For example, the atrocities committed by Japanese soldiers throughout the 1930s and early 1940s were rarely mentioned. Several cases were deliberately overlooked by the judges. Japan's conservative ruling class was never worried about its responsibilities in the war in exchange for its cooperation in the anti-Communist policies of the United States.

Another question that arises is why the atrocities committed by the Japanese, particularly the serious human rights violations of Unit 731, were not detailed during the trial? Reading the testimonies on Unit 731 from several witnesses, why did the high staff of this unit, such as Ishii, Wakamatsu, and Kitano escape punishment when evidence had shown they were war criminals? The reality was that Americans and Soviets were deeply interested in acquiring Japanese research results in order to further their own extensive biological warfare program. The fact that the Japanese were able to conduct their research from testing humans without their consent; and American researchers were prohibited by law for using humans for testing purposes, the scientists in America wanted from Ishii's team their valuable human research, and they made a deal.

After the war, delegations of American scientists were sent from Fort Detrick, in Frederick, Maryland, where the United States had inaugurated its BW program in 1942, to Tokyo, in order to negotiate with Ishii and other leading Japanese BW specialists on their research. The first delegation led by Lt. Col. Murray Sanders arrived in Tokyo in autumn 1945; a second delegation led by Lt. Col. Arvo Thompson traveled to Japan in 1946; a third one led by Dr. Norbert H. Fell, Division Chief of Planning Pilot-Engineering Section, arrived in Tokyo in 1947; and finally a fourth delegation led by Dr. Edwin V. Hill, Chief of Basic Sciences, went to Japan in 1948 to negotiate with Japanese BW specialists.

In the Tokyo Trials, the court found several Japanese commanders and leaders guilty of war crimes, but crimes against humanity were not mentioned in the verdict. Those crimes committed by the Japanese soldiers in the Far East were nothing like the Holocaust of Jews and Gypsies in Europe, the judges said.

This difference was emphasized by Justice Pal, who declared that "the case of the present accused before us cannot in any way be likened to the case …of Hitler."

In Tokyo, there were no organizational counterparts to the Nazi Party and its affiliated criminal organs, such as the gestapo and the SS, which made the charge of conspiracy easier to argue in the German case. In 1944, Secretary of War Henry L. Stimson and his aides had concluded that adding conspiracy to the list of war crimes would expedite prosecution of Nazi leaders as well as lower-level members of Nazi organizations.

The more technical criticism of the conspiracy charge in Tokyo was that it did not exist in international law prior to 1945. Justice Webb was unambiguous on this point. "International law, unlike the national laws of many countries," he observed, "does not expressly include a crime of naked conspiracy … So too, the laws and customs of war to not make mere naked conspiracy a crime." By that fact, the tribunal in Tokyo has no authority to create a crime of naked conspiracy based on the Anglo-American concept. However, three of the fifty-five charges brought by Prosecutor Keenan against the accused amounted to war crimes with conspiracy. Charge 54 stated that nineteen defendants had "ordered, authorized or permitted" the commission of war crimes by their subordinates in violation of the laws of war. It was a direct criminal responsibility. Charge 55 showed responsibility for failing to ensure that their subordinates complied with these customary rules.

However, supporting the war crimes thesis was not an easy task for the prosecutors who did not have documents in their possession to support their charges. In the absence of direct evidence, the court relied on witness testimony to convict the accused. In the judgment, we can read: "For several months, the court heard testimony and gathered testimonies from witnesses who reported in detail the atrocities committed in all theatres of war on such a large scale and in a process so similar that only one conclusion is required: these atrocities were secretly ordered or authorized knowingly by the Japanese government or some of its members and by the leaders of the armed forces."[57]

The judges in Tokyo had convicted all the defendants who appeared before them, unlike the Nuremberg judges, who had acquitted three defendants: Hjalmar Schacht, Hans Fritzsche, and Franz von Papen. Only two defendants in Tokyo were sentenced to temporary prison terms (Tōgō and Shigemitsu), while all those who were not sentenced to death were sentenced to life imprisonment. Very little in mind under Article 5 of the charter, which stated that for the three crimes under the jurisdiction of the court (crimes against peace, war crimes, crimes against humanity), judges should establish "individual responsibilities;" the Tokyo judges ruled that all civilian and military leaders who had helped to start or participate in wars to aggression were considered criminals. It was not necessary for the court to determine the share of responsibility for each of them. The atrocities committed by Japanese troops on prisoners of war and civilians in the occupied territories were certainly abominable; and most of the accused had held command functions. However, some defendants, even though they held important positions in the regime, had not personally given orders to massacre, starve, torture and rape the victims in the occupied territories. It was fair for the court to consider the personal responsibility of each of them, and beyond deciding on the condition necessary for his conviction.

That was the view of some of the judges who sat on the court. The issue of the death penalty against almost all the accused was one of the main areas of disagreement among the magistrates. The Australian judge, William Webb, who had led the proceedings as chair, wrote a "concurring opinion" in which he expressed his opposition to the principle of capital punishment, which he considered unjustified when the principal emperor of Japan, had enjoyed immunity. Webb went on to discuss the conduct of the trial and the facts of the individual cases. Though the tribunal found the Japanese army guilty of usurping power by intimidation and assassination, it exonerated the Japanese people for the behavior of their armed forces. It also greatly reduced the number of counts in the original indictment that were considered to have been proved.

Of the twenty-two defendants in Nuremberg, three were acquitted and twelve were sentenced to death (one in absentia). In comparison, there were no acquittals in the Tokyo tribunal, where

twenty-three of the twenty-five defendants were found guilty of participating in the "overall conspiracy" against peace (count 1). Tōjō received the death sentence, along with five other generals: Itagaki Seishirō, Kimura Heitarō, Kanji Ishiwara, Matsui Iwane, and Mutō Akira. Two civil officials, former Foreign Minister and Prime Minister Kōki Hirota, were also sentenced to die. Of the seven men sentenced to death, two were judged guilty of authorizing or permitting atrocities (count 54) as well as of failing to prevent such breaches of the laws of war (count 55), and three were found guilty of the first but not the second of these atrocity charges. One defendant, the former general Matsui Iwane, was given the death penalty on "negative responsibility" grounds for not preventing atrocities by troops under his command during the Nanking Massacre. Kōki Hirota was found guilty of three charges, including overall conspiracy and having failed to prevent atrocities in China. The former prime minister was sentenced to die based on the vote of only six of the eleven judges.

MacArthur had dismissed all appeals for a stay of execution that the condemned brought in front of him. After this decision, seven of the defense lawyers appealed to the U.S. Supreme Court. They declared that the Tokyo Tribunal was an American court established without the consent of congress and had been conducted entirely based on President Truman's executive powers. On December 15, the day before the case was argued at the Supreme Court, the Far Eastern Commission promptly announced that the tribunal "is an international court appointed and acting under international authority." Five days later, the United States Supreme Court ruled that it had no power or authority to revoke the sentences.

The defense lawyers sought to highlight the political nature of the Tokyo Tribunal. In their appeal to General MacArthur in the aftermath of the judgment, they stated as a means of appealing the judgment, "The death penalty would have been imposed by a vote of six to five in some cases and seven to four others." For the French judge, Henri Bernard, it is the entire judgment that he disapproved by considering that "a judgment rendered at the end of an irregular procedure cannot be valid." Bernard believed that the prosecution had been too selective in creating the "Class A" list. He was convinced there was more than enough reason to try

Hirohito. However, according to his opinion, the IMTFE had a "natural" right to exist, he argued, and he was against anyone who attacked the credibility of the court.

In a very long 1,235–page "opinion" that he had published at his own expense upon his return to Bengal, Indian judge Pal was the most vocal in his criticism.[58] In his regard, there is no evidence that the accused were the perpetrators of crimes against peace. It considers that Japanese military operations against China were justified by Chiang Kai-shek's support for the boycott of Japanese trade operations decreed by the Western powers, mainly of the embargo imposed by the United States on Japan's import of oil. According to Pal, Japanese attacks on neighboring territories were justified to protect the Japanese empire from the aggressive environment it was subjected to by Western powers and some neighboring countries in the area, especially the Soviet Union.[59] These were self-defense operations that could not be considered criminal. "The real culprits are not before us," said the Indian magistrate. "Only a lost war is an international crime," he concluded.[60]

Judge Delfín Jaranilla from the Philippines, for his part, considered that the sentence had been too lenient and "was not in proportion to the seriousness of the wrongdoings committed." The dissenting Dutch judge, for his part, considered that three of the defendants sentenced to life imprisonment should have been sentenced to death and that four other convicts should have been acquitted (Hata, Kido, Shigemitsu, and Tōgō). Chinese judge Mei threatened to commit suicide if the death penalty was not imposed on the guiltiest.

Also, when the verdicts were announced on November 12, 1948, the most surprising thing was when the general public learned by the media the entirely unexpected submission of four separate opinions that were in one way or another critical of the tribunal's conduct and conclusions. Justice Pal had acquitted all defendants, while Justice Röling had found five (including Hirota) not guilty.[61] Two justices, Webb and Bernard, had found the tribunal flawed and compromised by the decision not to bring the emperor to trial. Emperor Hirohito was, in fact, the only person in Japan who had been at the center of power during the entire course of the war.

Some of the shortcomings mentioned in the trial were recognized by Attorney General, Joseph Keenan, who was responsible for presenting the elements of the prosecution on behalf of the war-winning Allied countries. "Such trials are unprecedented," he said in his introductory indictment. "We are aware of the dangers of such procedures in the absence of precedents, but it is essential to realize that if we waited for such precedents and remained paralyzed by their absence, the result would be serious consequences without any justification. Today we are faced with brutal realities that somehow call into question the very existence of civilization."

However, for most of the judges, the death sentences against the accused were justified when one considers the damning testimony gathered on war crimes and crimes against peace committed by the Imperial Japanese Army and the Imperial Japanese Navy during World War II. At the Tokyo court, witnesses described the abuses committed by Japanese soldiers on prisoners of war and in civilians in Japanese-dominated Asia. They talked about how the fallen airmen were shot or beheaded with swords in retaliation for the bombing of Japanese cities. They recounted cases of excessive punishment, torture, and inhumane treatment, which were inflicted on prisoners of war in contravention of the Geneva Conventions, and in accordance with the instructions of Japanese army commanders who ordered to maintain strict discipline among prisoners of war. They talked about corporal punishment, the torture that was inflicted at the slightest case of insubordination. As noted in the judgment on page 1089:

> Thousands of victims were beaten to death, others exposed to the tropical sun for hours without protection, others still hung by their arms until they disjointed, or locked in cages or underground cells for weeks without food. Torturing prisoners for information are a serious war crime according to the Geneva

> Convention; and the Japanese Army used this practice throughout the war to annihilate its enemies.[62]

The Tokyo trial was marked by Cold War priorities. In contrast to Nuremberg, the efforts made to bring to justice several members of the Japanese officials for war crimes received little attention by the Western press. The judgment at Tokyo is considered by many experts as a justice of the victors and revenge for Pearl Harbor. For traditional critics, the Tokyo trial was the site of a compromise where, as historian Marukawa Tetsushi pointed out in his contribution to the Gendai Shiso case, "the victor was able to enshrine the vanquished in international order dominated by United States, offering him in exchange the emperor's decommissioning." Thus, the Treaty of San Francisco, which restored Japan's sovereignty, provided for the recognition by the Japanese government of the Tokyo trial and, at the same time, the security treaty that was signed on that occasion permanently established American bases on its territory.

Zaibatsu in Japan....

In Tokyo, the patrons of "*zaibatsu"* were not brought to justice. The three zaibatsu who had been arrested (Ayukawa, Nakajima, and Fujiwara) were not indicted. These Japanese industrialists formed the backbone of Japan's military-industrial complex during the expansion of the empire of Japan during World War II. "*Zaibatsu*" such as Mitsubishi and Nissan were involved in the manufacture of weapons and military aircraft, as well as in the establishment of factories in the colonies, where they used forced labor. The main "*zaibatsu*" were Mitsubishi, Mitsui, Sumitomo, Yasuda, Nissan, Suzuki, Kuhara, Furukawa, Fujita, Okura, Asano, Toshiba, Marubeni, Itochu, Kanematsu, Nuchimen, and Riken.[63]

The bosses of these companies should be held accountable for their active role in World War II. However, far from being worried, the "*zaibatsu*" pin resisted the dismantling desired by Washington during the American occupation of Japan between 1945 and 1950. All their leaders were exonerated of criminal prosecution following

the intervention of the commander-in-chief of the occupation forces, Gen. Douglas MacArthur, with the U.S. administration.[64] Forgotten in the indictment prepared by Prosecutor Keenan, during the trial of the twenty-eight Japanese dignitaries in Tokyo; the group has taken another structure under the new name of "*Keiretsu*."

The Nuremberg trial is considered by many critics to be the trial of the victors. The Tokyo trial was the subject of the same reproaches among many jurists and historians. According to the lawyers of the Japanese defendants, the nations before the representatives of whom the high-ranking Japanese dignitaries appear are guilty of the same crimes, they accuse the accused. The question is how Att. Gen., Joseph B. Keenan, who represented the United States in the trial, can prosecute Japanese defendants for war crimes while the same prosecutor represents the U.S. administration responsible for the incendiary bombings of Tokyo, the atomic destruction of Hiroshima and Nagasaki? How could Soviet judges, chosen by a state that has violated the treaty signed with Japan to militarily invade Manchuria and commit atrocities, convict Japanese officials for crimes against peace committed on nations in the Pacific and Southeast Asia?

The Nuremberg and Tokyo Trials are far from perfect works in terms of the notion of neutral and fair justice. However, despite identified weaknesses and notable shortcomings, both trials have historical successes. They are the result of the formation of the first two international tribunals to establish the responsibility of political leaders who use war as a weapon to oppress their neighbors and conquer their territories. As the judges in Tokyo said, "Individuals are, for the first time in history, brought to justice to personally answer for the crimes they committed in their official capacity as heads of state." Thus, both trials have unquestionably shaped the birth of international justice with the task of prosecuting in the future warring dictators who will commit crimes against peace, war crimes, and crimes against humanity.[65]

NOTES

1. The International Military Tribunal for the Far East Charter (IMTFE Charter) was the decree issued by General Douglas MacArthur, Supreme Commander for the Allied Powers in Allied-occupied Japan, on January 19th, 1946 that formulated the laws and procedures by which the Tokyo Trials were to be conducted. See Sandra Wilson, Cribb Robert, Trefalt Beatrice, Aszkielowicz Dean, Japanese War Criminals: the Politics of Justice after the Second World War, (New York: Columbia University Press, 2017).
2. Sir William Flood Webb was a judge of the Supreme Court of Queensland and the High Court of Australia. He was appointed on February 20, 1946, as president of the International Military Tribunal for the Far East after the end of World War II. See Webb, Sir William Flood (1887–1972), Australian Dictionary of Biography.
3. Born on October 8, 1899, in Arles, France, Justice Henri Bernard of France was a colonial magistrate from the age of twenty-eight. He had spent his entire career in French-speaking Africa and was, at the time of his appointment, general counsel in Bangui. A former colonel, he was a government commissioner in Beirut in 1944. In 1946, Henri Bernard and Robert Oneto, a judge and a prosecutor respectively, were appointed to represent France in Tokyo. Bernard replaced Henri Reimburger, legal adviser to the French ministry overseas. Reimburger was the first appointed by the French authorities, but he resigned for personal reasons before leaving for Tokyo. As Bernard was appointed to replace Reimburger, no one was suspicious of the fact that he had been sentenced to death in absentia in July 1941 by the military court of Gannat for his participation in the insurrection of August 28, 1940, against the Vichy administration, for France free in Brazzaville. The French Minister of the Colonies at the time, Georges Mandel, gave Bernard his support. After almost a year of proceedings at the Tokyo Tribunal, Justice Bernard decided to express his

disapproval on the way the Trial was being conducted. He alerted the president of the tribunal, Justice Webb, of his views, by way of a memorandum dated 30 January 1947.

4. Bernard Röling was appointed as a judge at the International Military Tribunal for the Far East (Tokyo Tribunal) in 1946. He was the younger judge at Tokyo and one of the three dissents —the two others were Henri Bernard and Radhabinod Pal— who disagreed with the judgment in 1948. Bernard disagreed with the Majority on two issues. The more general related to the basis of the Tribunal, which was based on the Potsdam Proclamation and the Japanese Instrument of Surrender. The war, which was ended by this surrender, was between Japan and China from 1931, and the other Allies from December 1941. This was an issue because the USSR sought to bring charges relating to the Lake Khassan and Nomonhan (Khalkhin-Gol) incidents in 1938–39. Both conflicts ended in peace treaties but were prosecuted as crimes against peace before the Tokyo Tribunal. The defense argued that these charges were outside the jurisdiction of the Tokyo Tribunal. See inter alia, in Defense Motion, Paper No 54, May 13, 1946, submitted by Hiranuma Kiichirō, Matsuoka Yōsuke, Shigemitsu Mamoru, Tōgō Shigenori, and Umezu Yoshijirō.

The defense emphasized that the Allies Powers had "no authority to include in the Charter of the Tribunal and to designate as justiciable "Crimes against Peace"; that the terms of surrender, following the Potsdam Proclamation, had stipulated that "Conventional War Crimes as recognized by international law at the date of the Declaration (26 July 1945) would be the only crimes prosecuted"; that killings in belligerent operations, except as they violated the rules and customs of war, could not be construed as "murder" as charged in the indictment; and that some of the accused, as prisoners of war, should have been tried in courts martial as provided by the Geneva Convention of 1929 and not by the tribunal. The legal scholar

Knut Ipsen argues that "crimes against peace" and the related charge of individual responsibility were indeed "*ex post facto* legislation" and, thus, "incompatible with the maxim *nullum crimen sine lege*, which the Tokyo tribunal itself recognized expressly as a 'general principle of justice.' " A better case can be made for the constitutionality of "crimes against humanity," he argues. See Ipsen's contribution in Hosoya, 37–45.

Justice Bernard Röling, contrary to his other colleagues, was agreed with those arguments. Later on, Röling became a member of the Dutch delegation to the United Nations, where he was involved in international disputes. In 1949, he was named professor of criminal law, criminal procedure and criminology in Groningen. In 1962, he founded the Institute of Polemology in Groningen for research into the causes of war and the requirements for peace. For Röling, see B.V.A. Röling, "The Tokyo Trial and the Quest for Peace," in *The Tokyo War Crimes Trial: An International Symposium*, ed. C. Hosoya, N. Andō, Y. Onuma, and R. Minear (New York: Kodansha International, 1986), 130; Röling, The Tokyo Trial and Beyond: Reflections of a Peace monger, ed. Antonio Cassese (Cambridge: Polity Press, in association with Blackwell Publishers, 1993), esp. 65–68, 86–91. "Dissenting Judgment of the Member from France," in Röling, Ruter, *The Tokyo Judgment*, vol. 1, 496.

5. Too concerned about the preparation of the trial of two thousand Japanese who were about to be tried, he had been replaced by Mei Ju Ao, a prominent lawyer, and member of the Legislative Assembly where he chaired the Foreign Affairs Committee.
6. In 1935, Major Zarayanov sentenced to death three white Russians hired by the Japanese as secret agents in Manchuria.
7. Serving as general counsel of the armed forces during the war against Japan Northcroft was the one who was to replace Webb in case of absence.

8. Lord Patrick was considered one of the best lawyers in the court.
9. John Higgins, president of the Massachusetts Court of Appeals, was selected by the Truman administration to represent the United States. He was replaced by Maj. Gen. Myron Cramer, general counsel at the military court. Cramer had conducted an official investigation, at Truman's request, into the events at Pearl Harbor. He was, along with Zaryanov, the only officer of the court.
10. Pal Radhabinod was one of the three Asian judges appointed to the International Military Tribunal for the Far East, the "Tokyo Trials" of Japanese war crimes committed during World War II. A graduate of the University of Calcutta, Pal was an adviser to the City Court of Appeal. Among all the judges of the tribunal, he was the only one who submitted a judgment that insisted all defendants were not guilty. Justice Pal's dissenting judgment was translated and edited by Tanaka Masaaki under the title *Zenyaku: Nihon Muzai-ron* (Tokyo: Nihon Shobō, 1952); the title translates as "Complete Translation: On Japan Being Not Guilty." Tanaka also published an edited volume that same year entitled *Nihon Muzai Ron– Shinri no Sabak*i [On Japan Being Not Guilty– The Verdict of Truth] (Tokyo: Taiheijō Shuppan, 1952). In the mid-1980s, he was still bringing to public forums the argument that "the entire trial was nothing but a farce;" Hosoya, 153–54. Cited by John Dower, *Embracing Defeat,* note (74), 633. See also Radhabinod pal, "Judgment," in the Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946–12 November 1948. Edited by B.V.A. Röling and C.F. Rüter. Amsterdam: University Press Amsterdam, 1977.
11. Delfín Jaranilla was a justice to the supreme court of the Philippines and a professor of law at a university. During the war, he had been a prisoner of the Japanese and had participated in the abominable Bataan March. It was agreed from the outset that

neither India nor the Philippines were an independent state during the war, and, therefore, these two countries could not have their representatives in court. The Indian and Philippine governments had protested the decision. MacArthur, on April 6, 1945, issued an amendment to the charter providing for the appointment of eleven judges instead of the original nine. As a result of this late appointment, Pal arrived in Tokyo on May 17 and Jaranilla on June 13.

12. Born in Pawtucket, Rhode Island, on January 1, 1888, Joseph Keenan was a graduate of Brown University (1910) and the Harvard Law School (1913). He had served with the 137th Field Artillery during World War I and later with the Judge Advocate General's Department. Usually wearing his trademark extra-large bow tie, he was known for his courtroom theatrics and unique facial expressions. He was assisted by several assistant prosecutors. Every nation that had been at war with Japan had the right to appoint an assistant prosecutor. The group of prosecutors, known as the International Prosecution Section, originally composed of thirty-nine U.S. prosecutors, became a multinational group of five hundred people with lawyers, translators, and stenographers.
13. Modeled after the Nuremberg Charter, the Tokyo Charter stipulated that crimes of the Japanese could be tried. Three categories of crimes were defined: crimes against peace, war crimes, and crimes against humanity. Article 6 of the Tokyo Trial also stated that holding an official position or acting pursuant to order of his government or of a superior was no defense to war crimes, but that such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.
14. In November 1945, President Harry S. Truman appointed Keenan as Chief Prosecutor for the International Military Tribunal for the Far East. As Chief Prosecutor, he led efforts to investigate and prosecute war crimes committed by Japanese leaders

during World War II. This included prosecuting 28 high-ranking wartime defendants.

15. Joseph B. Keenan, chief prosecutor in the International Military Tribunal for the Far East, with a focus in his introduction on organized war crime.
16. Soon after the war, the Allied powers indicted twenty-eight persons as "Class-A" criminals, and 5,700 persons were indicted as "Class-B" or "Class-C" was criminals by Allied criminal trials. Of these, 984 were initially condemned to death, 920 were executed, 475 received life sentences, 2,944 received some prison terms, 1,018 were acquitted, and 279 were not sentenced or not brought to trial. These numbers included 178 ethnic Taiwanese and 148 ethnic Koreans.
17. Tōjō Hideki was chief of staff from 1937 to 1938. He was prime minister and minister of war in Japan from 1941 to 1944. Appointed Prime Minister to replace Fumimaro Konoe, he openly advocated a negotiated peace with China and the continuation of negotiations with the United States. He was the mastermind that led Japanese troop attacks on China in 1937. Tōjō attempted suicide on November 11, 1945, before his arrest by American troops. After pleading guilty at trial, he was sentenced to death on November 12, 1948, and executed by hanging, on December 23, of the same year.
18. Before becoming prime minister, Koki Hirota was minister of foreign affairs at the beginning of the Second Sino-Japanese War, during which atrocities in Nanking occurred. He opposed the plans of the high commander of the Imperial Army, particularly the military escalation following the Marco Polo Bridge Incident, as it contradicted his plans for an alliance between Japan, Manchuria, and China against Soviet Union. In 1945, he unsuccessfully led negotiations to maintain peace with the USSR. Convicted of war crimes at his trial, he was executed by hanging on December 23, 1948.

19. Itagaki Sheishiro was strongly linked to the Kwantung Army, in which he served as chief of intelligence in 1931. He played a key role in the Mukden Incident before becoming a military adviser to the Manchurian government from 1932 to 1934. As minister of war, he helped develop the so-called *Hakko ichiu* expansion doctrine to establish a new order in Asia under the leadership of Japan. He was convicted of war crimes by the court, including his role in the Mukden Incident, the escalation of military and diplomatic tensions with the Allies, and the inhumane treatment of prisoners of war during his time as commander of the Japanese forces in Southeast Asia in 1945. He was executed on December 23 by hanging.
20. Matsui Iwane was the commander of the Japanese forces sent to China at the beginning of the Second Sino-Japanese War. He was a strong advocate of Pan-Asianism. Retired in 1935, he was recalled to service in August 1937 in the context of the military escalation with China. Under his command, the Japanese won the Battle of Shanghai at the end of November 1937 and took Nanking a few days later. He encouraged his troops to loot the city and undertake the massacre of at least two hundred thousand inhabitants, a horrific fact that was remembered as the Nanking Massacre. He left the army again in 1938. He was arrested in 1945 and tried in Tokyo for his decisive role in the atrocities committed in Nanking.
21. Doihara was the head of the Manchukuo Secret Service. An officer in the Kwantung Army, he was one of the strategists of the invasion of Manchuria in 1931. He was named "Lawrence of Manchuria." He was accused of deliberately organizing the destruction of the traditional Chinese structure in Manchuria in order to lessen the resistance of the local population to the colonization of their country by the Japanese. He was convicted, sentenced to death, and hanged on December 23, 1948.
22. Kimura was chief of staff in the Kwantung Army from 1940 to 1941. He was deputy Minister of war in 1941

in the Tōjō government, assisting the prime minister in planning military campaigns in China and the Pacific. From 1943 to 1944, he was a member of the Supreme War Council (Japan's highest authority during the war). From the end of 1944, he was appointed Commander-in-Chief of the Japanese forces in Burma. In 1945, he was charged with war crimes for his role in planning military attacks in China and the Pacific and for violating the rights of prisoners of war in Burma. He was sentenced to death and executed on December 23, 1948.

23. Linked to the Kwantung Army, Muto was serving there as Head of the Intelligence bureau at the time of the Marco Polo Bridge Incident in 1937. He served in China during the first months of the Second Sino-Japanese War, and his troops participated in the atrocities during the Nanking Massacre. In 1939, he was appointed major general and served in the planning office of the Ministry of War. He then served in Singapore in 1941, then in Sumatra in June 1944, before being posted to the Philippines in October 1944, where he was appointed chief of staff of the 14th Regional Army under Gen. Tomoyuki Yamashita. Accused in massacres on the Philippine population, as well as on prisoners of war, he was convicted and executed on December 23, 1948.
24. Twenty-eight Japanese originally were indicted for "Class A" war crimes, of who two died while the trial and one was excused on grounds of mental incompetence. See the chart of verdicts and sentences in Horowitz, 584; this is reproduced, with useful added data on deaths and parole dates, in Richard Minear's entry on "War Crimes Trials," *Kodansha Encyclopedia of Japan* (Tokyo: Kōdansha, 1983), 8: 223–25. The granting of clemency in 1958 is noted in Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, N.J.: Princeton University Press, 1971), 175.
25. Hirohito was not put on trial, but he was forced to explicitly reject the claim that the Emperor of Japan

was an incarnate divinity. See John W. Dower, *Embracing Defeat*, (W.W. Norton, 1999), 308.

26. The *New York Times*, June 18, 1946. At his Washington news conference, Keenan declared that the emperor was not a war criminal so much as "a figurehead and a fraud perpetrated on the Japanese people."
27. "Allied Decision to Retain Emperor Was Wise Move, U.S. Editors Told," (*Nippon Times*, Feb. 6, 1947), 1, 2.
28. Cited in Tim Maga's notes, *Judgment at Tokyo*, 157, "MacArthur's precise position over the future of Emperor Hirohito has stimulated plenty of speculation. See, for example, Mosley, *Hirohito, Emperor of Japan*, 331–50. The final word has yet to be typed, although MacArthur kept little written record on the topic. Thanks to recent declassifications and the personal interest of MacArthur Memorial archivist James Zobel, some worthy documentation finally emerges on the MacArthur-Hirohito tale. See William J. Sebald, U.S. Political Advisor for Japan, to H. Merrell Benninghoff, deputy director, Office of Far Eastern Affairs, State Department, Oct. 26, 28, 1948, RG 5, box 107/2, "Political Advisor to SCAP," MacArthur Archives. MacArthur quoted Sebald to Benninghoff. Sebald's lengthy memos to Benninghoff include summaries of conversations with General MacArthur on a Hirohito trial, abdication, or suicide. See also Willoughby interview; Elliott R. Thorpe, brigadier general, U.S. Army, ret., interviewed by J.H. Griffin, lieutenant colonel, U.S. Army, 1981, Senior Officer Oral History Program, project 81–11, RG 15, box 33/11, U.S. Army Military History Institute Interviews, MacArthur Archives. Both Willoughby and Thorpe were close to MacArthur and were also advisors on the Hirohito issue."
29. Sonni Efron, "New book shows Hirohito was not whipping boy," (Los Angeles Times, September 5, 2000).
30. For Keenan's work and views while serving with the IMTFE, contact James Zobel, archivist and Tokyo War Crimes Trials specialist, at the MacArthur

Memorial. See also U.S. Department of State, *Trial of Japanese War Criminals*, 1–13; "Joseph Keenan Meets the Press;" Keenan, "Observations and Lessons."

31. See the interesting bibliography of popular as well as scholarly materials about war crimes and war responsibility in *Shisō*, May 1984. Under "writings and last testimonials of war criminals," these lists between 1950 and 1954 and a total of thirty-one through 1982. By 1954, there also had been published at least nine "insider" accounts of war-criminal defendants and suspects in Sugamo Prison, one book on the U.S. – conducted Yokohama trials of "B" and "C" Class defendants, and six books about various "B/C" trials throughout Asia; twenty-nine more titles on the latter subject are listed between 1956 and 1983. The Japanese translation of A. Frank Reel's *The Case of General Yamashita*, a powerful statement of the injustice of that trial, was published in 1952, the same year the translation of Justice Pal's dissenting judgment appeared.
32. See Bob Tadashi Wakabayashi, Emperor Hirohito on Localised Aggression in China, (York University, Toronto).
33. After Japan surrendered, Maj. Gen. Courtney Whitney accompanied MacArthur to Atsugi Air Base and became Chief of the Government Section at GHQ. With Lt. Col. Milo Rowell, he drafted the Constitution of Japan and sent it to the Diet for approval. Whitney remained close to MacArthur during the entire time of the occupation and served as chief of government section at his headquarters. In 1956, Whitney's biography of his commander, MacArthur: His Rendezvous with History was published. See also Ray A. Moore and Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State under McArthur*, (Oxford University Press, 2004).
34. The trials stimulated a considerable number of critics in Japan and outside the country, and both American and Japanese officials worried about what that might mean for the future of regional relations. See Sebald

and Brines, *With MacArthur in Japan*, (W.W. Norton & Company, 1965), 280–84.

35. Judge Pal published his dissenting opinion privately in India in 1953. The full corpus of majority, concurring, and dissenting judgments was first published privately in 1977; see *TJ*. The full proceedings of the trial were made available in a twenty-two-volume commercial library edition in 1981; see *TWCT*. See John Dower, *Embracing Defeat*, note (18), 627.
36. Prime Minister Shinzō Abe, during a visit to India in August 2007, paid tribute to Judge Radhabinod Pal in a speech to the Indian Parliament in New Delhi and then traveled to Calcutta to meet the judge's eighty-one-year-old son. A monument to the judge was erected in 2005 at the Yasukuni Shrine, the memorial to Japan's war dead and a rallying point for Japanese nationalists. Pal was the only one of eleven Allied justices who handed down a not guilty verdict for Japan's top wartime leaders at the post-World War II International Military Tribunal for the Far East, or the Tokyo trials. "Justice Pal is highly respected even today by many Japanese for the noble spirit of courage he exhibited during the International for the Far East," Mr. Abe told the Indian Parliament. See *The New York Times*, on August 31, 2007.
37. John W. Dower, *Embracing Defeat*, (W.W. Norton & Company, 1999), 444.
38. See Bernard addendum, "The Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East, November 12, 1948," to "Petition in the Case of Togo Shigenori." See also Bernard, "Dissenting Judgment"; Webb addendum: "The Separate Opinion of the President, International Military Tribunal for the Far East, November 1, 1948, RG 5, OMS, box 60, "WE-WED," MacArthur Archives.
39. See Richard Minear's, "War Crimes Trials," *Kodansha Encyclopedia of Japan* (Tokyo: Kodansha, 1983, 8: 223–25. The granting of clemency in 1958 is noted in Minear, *Victor's Justice: The Tokyo War Crimes Trial*

(Princeton, N.J.: Princeton University Press, 1971), 175.

40. On the fear that without a strong presence of the American forces in Japan, the Marxist ideology would spread rapidly on the Asian continent, see Jonathan Haslam, *The Soviet Union and the Treat from the East*, 1933–41, 92–94. "Since mid-1937 China had benefited from having signed a secret non-aggression pact with the Soviet Union, which was delighted to have Japanese power embroiled in China. Soviet aid took the form of military advisers, pilots, planes, equipment, and munitions shipped overland from Siberia and Central Asia, and by sea to Haiphong, then to Rangoon for movement over the Burma Road. Though substantial, it could never compensate for Chiang's repeated defeats on the battlefield." Cited in Herbert P. Bix note (117), *Hirohito and the Making of Modern Japan,* (HarperCollins, 2016), 742.
41. There were powerful men in Washington who did want Hirohito tried, but there was no consensus, and MacArthur took advantage of that situation for pragmatic reasons, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* by Ray A. Moore and Donald L. Robinson, (Oxford University Press, 2004).
42. Cited by John W. Dower, *Embracing Defeat*, note (41), 611–612 …In response to a query from Takayanagi Kenzō, chairman of the Commission on the Constitution, MacArthur stated flatly that "The preservation of the Emperor system was my fixed purpose. It was inherent and integral to Japanese political and cultural survival. The vicious efforts to destroy the person of the Emperor and thereby abolish the system became one of the most dangerous menaces that threatened the successful rehabilitation of the nation." See *JCC/FR*, 73–74; Takayanagi, 79. Japanese as well as American scholars tend to agree that a major motivation behind Article 9 was to alleviate criticism of the retention of the imperial system. See, for example, Hata Ikuhiko and Sodei

Rinjirō, *Nihon Senryō Mitsushi* (Tokyo: Asahi Shimbunsha, 1977), vol. 2, 8–11; Hata, *Shiroku: Nihon Saigunbi* (Tokyo: Bungei Shunjūsha, 1976), 47–78; Theodore McNelly, "General Douglas MacArthur and the Constitutional Disarmament of Japan," *Transactions of the Asiatic Society of Japan,* third series, vol. 17 (1982), 30.

43. John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, (W.W. Norton & Company, 2000).
44. Philippe Pons is the Tokyo correspondent for *Le Monde*. He is the author of many books, including *From Edo to Tokyo: Memory and Modernity, Macao, Misère et crime au Japan du XVIIe siècle à nos jours*. His most popular book is *The Old Capital*.
45. See Awaya Kentarō, "The Tokyo Tribunal, War Responsibility and the Japanese People," translated by Timothy Amos, (*Shukan Kinyobi* on Decmber 23, 2005).
46. On April 3, 1946, the international Far Eastern Commission exempted Hirohito as a war criminal. The prosecution at the International Military Tribunal for the Far East did so publictly on June 18. Formal U.S. policy consideration of "treatment of Hirohito" was removed from the agenda of the State-War-Navy Coordinating Committee on June 12.
47. Cited by John W. Dower, *Embracing Defeat*, note (49), 631, "The pioneer work exposing the cover-up of Unit 731 activities was done by John W. Powell. See his "Japan's Germ Warfare: The U.S. Cover-up of a War Crimes," *Bulletin of Concerned Asian Scholars* 12.2 (1980): 2–17, and "Japan's Biological Weapons, 1930–1945: A Hidden Chapter in History," *Bulletin of the Atomic Scientists* 37. (October 1981): 43–53. Awaya notes that the prosecution also had information about the chemical warfare activities of Unit 1644 in China; see his contribution in Hosoya, 85–86, 116, and his essay in *Asahi Jānaru*, March 1, 1985 (installment 20), 39–40.
48. For defense counsel complaints to MacArthur, Keenan, and Truman, including copies of specific correspondence and follow-up analyses of defense

counsel actions, see Capt. B.M. Coleman to MacArthur and his lengthy report, "American Defense Activities," May 13, 1946; Lt. J.W. Guider, IMTFE, to MacArthur, May 31, 1946; Truman to MacArthur, June 2, 8, 1946, all in RG 5, box ½. "Master File, November 1945–October 1946," MacArthur Archives. Also see the following articles for details on the language barrier issue, all in *Nippon Times*: "Witness Tanaka Clears Kimura of Blame at Tribunal Session Tuesday," Jan. 8, 1947, 1; "Actions of Japan Which Led to War Defended at Trial," Feb. 25, 1947, 1, "Defense Continues to Reveal Strategy," Feb. 27, 1947, 1; "Tribunal Squashes Defense Attempt," Mar. 4, 1947, 1; "Defense Witness Grilled at Trial," Mar. 8, 1947, 1, 2; Quoted in Tim Maga note (33), *Judgment at Tokyo*, 2001, 160.

49. The trials stimulated a considerable degree of criticism in Japan, and both American and Japanese officials in Japan worried about what that might mean for the future of regional relations. See Sebald and Brines, *With MacArthur in Japan,* 280–84.
50. The government of Nazi Germany announced the discovery of mass graves in the Katyn Forest in April 1943. See David Engel, *Facing a holocaust: The Polish government-in-exile and the Jews*, 1943–1945, (UNC Press Books, 1993), 71. See also George Sanford, *Katyn and the Soviet Massacre of 1940: Truth, Justice and Memory,* (Routledge Chapman & Hall, 2005), 44.
51. *New York Times*, June 18, 1946. At his Washington news conference, Keenan declared that the emperor was not a war criminal so much as "a figurehead and a fraud perpetrated on the Japanese people." The idea of the imperial institution itself as a "fraud" designed to control an unenlightened people dates to Basil Hall Chamberlain's essay of 1912, *The invention of a new Religion*. Cited in Herbert P. Bix note (19) *Hirohito and the Making of Modern Japan,* 782.
52. Jacques Arnaud Démézier, in Jean Sénat Fleury's book, *Hitler and Hirohito: On Trials,* (Xlibris, 2019), xxiii.

53. Philippe Pons is the Tokyo correspondent for Le Monde, and author "Le Japan des Japonais," (Liana Levi, 2003).
54. For a technical comparison of similarities and dissimilarities between the two trials, see "*The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*" (Lake Success, N.Y.: International Law Commission, General Assembly, United Nations, 1949), 81–86. See also John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, 454.
55. International opinion concerning the emperor is summarized in Kiyoko Takeda, *The Dual Image of the Japanese Emperor* (New York: New York University Press, 1988). A major portion of the voluminous U.S. archival record on these matters appears in the U.S. Department of State series *Foreign Relations of the United States [FRUS]*. See FRUS 1945, vol. 6, 497–1015, and FRUS 1946, vol. 8, 85–604; Hadley Cantril, ed., *Public Opinion, 1935–1946 (Princeton, N.J.: Princeton University Press, 1951), 392.*
56. After the defense had finished its presentation on September 9, 1947 the IMT spent fifteen months reaching judgment and drafting its 1,781-page opinion. The verdict and sentences of the tribunal were confirmed by MacArthur on November 24, 1948.
57. On the release of war crimes suspects, see Sebald to Sec of State, Dec. 24, 1948, in *FRUS* 1948, vol. 6, *The Far East and Australasia*, 936–37; and Far Eastern Commission policy decisions of February 24 and March 31, 1949.
58. Japanese sources indicate that SCAP did not permit Pal's dissent to be translated; see *Bessatsu Rekishi Tokuhon*, op. cit., 48.
59. Judge Pal published his dissenting opinion privately in India in 1953. He felt so strongly about the criminality of the use of the atomic bombs that when he published his dissenting opinion, he included as an appendix reproductions of twenty-five photographs of victims and physical destruction in Hiroshima and Nagasaki that had appeared for the first time in Japan

in the August 6, 1952, issue of the magazine *Asahi Gurafu* (identified in Pal's book as "The Asahi Picture News"). See *International Military Tribunal for the Far East: Dissentient Judgment of Justice R.B. Pal* (Calcutta: Sanyal, 1953); quoted in John W. Dower note (72), *Embracing Defeat*, 633.

60. Justice Pal's dissenting judgment was translated and edited by Tanaka Masaaki under the title *Zenyaku: Nihon Muzai-ron* (Tokyo: Nihon Shobō, 1952); the title translates as "Complete Translation: On Japan Being Not Guilty." Tanaka also published an edited volume that same year entitled *Nihon Muzai Ron – Shinri no Sabaki* [On Japan Being Not Guilty – The Verdict of Truth] (Tokyo: Taiheiyō Shuppan, 1952). In the mid–1980s, Tanaka was still bringing to public forums the argument that "the entire trial was nothing but a farce"; Hosoya, 153–54; cited in John W. Dower note (74), *Embracing Defeat*, 633.
61. On the Tokyo Trial, see Neil Boister, Robert Cryer, Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments, volume 1, (Oxford University Press, 2008). See also Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial*, (New York: Morrow, 1987).
62. Pal had acquitted all defendants because he viewed World War II as an anti-white Asian nationalist, rather than "from an interpretive perspective located in the South," as Richard Falk claims in "Telford Taylor and The Legacy of Nuremberg," in *Columbia Journal of International Law* 37, no. 3 (1999), 697, n. 12; cited in Herbert Bix note (67), *Hirohito and the Making of Modern Japan*, 780.
63. The initial U.S. lists of primary war crimes suspects did include secret society heads as well as several leading industrialists notably —Ayukawa, Yoshisuke, Nakajima Chikuhei, and Fujiwara Ginjirō, — who were arrested but not indicted; see, for example, FRUS 1945, 6:968, 978. The Soviet Union led by Stalin had insisted strongly on indicting both the emperor and at least one "representative" zaibatsu leader. According

to Russian scholars, the U.S.S.R. originally did propose indicting the three zaibatsu leaders who had been arrested (Ayukawa, Nakajima, and Fujiwara). Keenan was against this decision. See Horowitz, 495–97, on the criteria for determining whom to indict.

64. On April 13, 1946, MacArthur had released from prison Gokō Kiyoshi, chairman of Mitsubishi Heavy Industries, imperial Japan's main arms-maker, and Prince Nashimoto. Shortly afterwards, he released four other top business leaders, including Ikeda Seihin, managing director of the Mitsui *zaibatsu*. See Awaya, "Tokyo saiban ni miru sengo shori," in Awaya, et al., *Sensō sekinin, sengo sekinin: Nihon to Doitsu wa dō chigau ka*, 98. On the release of war crimes suspects, see Sebald to sec. of state, December 24, 1948, in *FRUS 1948*, vol. 6, *The Far East and Australasia*, 936–37; and Far Eastern Commission policy decisions of February. 24 and March 31, 1949. Cited in Bix notes (20–31), *Hirohito and the Making of Modern Japan, 782–783*.
65. The full proceedings of the trial of Tokyo were made available in a twenty-two-volume commercial library, edition in 1981; see *TWCT*.

AUTHOR

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