THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II[1]

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He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking.[3]

I. Introduction

Before there were Rwanda and Yugoslavia, there was Tokyo.[4] Often derided by contemporary Japanese and American Scholars as "the product of vengeance"[5] and "racism,"[6] Japanese nationalists continue to use the Tokyo War Crimes Trial as a "tool for a present-tense political agenda far removed from the late 1940s."[7] Yuma Totani's book scrutinizes primary source material including trial transcripts and U.S. Government documents[8] in an effort to get beyond political agendas and long-simmering resentment. In this material, Totani discovers the Tokyo Tribunal's true nature and reveals the trial's legacy in shaping present-day international law.

Totani begins the book by giving a brief overview of the contemporary debate regarding the significance of the trial. Japanese nationalists and Japanese conservatives believe the trial served the Allies as retribution under the banner of justice.[9] Conversely, liberal critics contend the Allied powers failed the Asian people by intentionally ignoring the devastation the Japanese military wrought against members

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[1] YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2008).
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[3] TOTANI, *supra* note 1, at 135 (quoting the judgment against General Matsui Iwame).
[4] *Id.* at 4.
[5] *See*, *e.g.*, TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS, at x (2001).
[6] *Id.*
[7] *Id.*
[8] TOTANI, *supra* note 1, at 4.
[9] *Id.* at 2.

of their own race.[10] Totani believes the primary source material contradicts both assertions.

Both sides misconstrue some information and ignore other facts outright.[11] The author concludes contemporary scholars overlooked or ignored the original source material, instead relying on shoddy research, hearsay, and blatant falsehoods.[12] Rather than serving as "victor's justice,"[13] Totani describes in detail the measures the Allies took to ensure a fair and orderly trial.[14] Uchida Rikizō, a Japanese law professor observing the trial, wrote: "Here rests the pride of Anglo-American law that, if one were to put it in extreme terms, is prepared to save ninety-nine guilty ones in order to save one innocent man."[15]

II. Leadership, Logistics, and Language

Though often discussed in tandem, the Tokyo Tribunal differed from the tribunal at Nuremberg in the races, nationalities, and languages of the parties involved.[16] While the four countries represented by the prosecution and defense in Nuremberg shared common linguistic and cultural roots,[17] the Tokyo trial team brought together eleven nationalities, each with their own agendas, cultural biases, and language distinct from the accused.[18] Though "lesser powers" like India and Philippines contributed to a full accounting of the Japanese carnage, complications and discord inevitably surfaced.[19] Difficulties translating

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[10] *Id*. at 3 (describing historian Awaya Kentarō's assertion that Allied powers purposefully withheld evidence of certain sensitive war crimes cases).
[11] *Id*. at 2–5.
[12] *Id.* at 3.
[13] *See generally* RICHARD MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).
[14] TOTANI, *supra* note 1, at 208 (noting the beliefs of some Japanese scholars that the principle of a fair trial, the protection of defense rights, and the presumption of innocence were important lessons for improving legal practice in Japan).
[15] Uchida Rikizō, *Significance of the Far Eastern Trial to Legal Theory: Primarily from the Viewpoint of the Field of Anglo-American Law,* CHŌRYŪ, Sept. 1948, at 22–30.
[16] TOTANI, *supra* note 1, at 11 (comparing the linguistic commonalities between German and Allied languages versus the lack thereof between Japanese and the Allied countries' languages).
[17] *Id.* at 12.
[18] *Id.*
[19] *Id.* Even the judges at Tokyo had trouble maintaining unity, producing a majority opinion of eight judges, two separate concurring opinions, and three separate dissenting opinions. *Id.*

materials for all participants and defense's lack of familiarity with Anglo-American court techniques, such as cross-examination, resulted in a lengthier and more complex trial process than in Nuremberg.[20]

Compounding these difficulties, a delay in evidence collection caused irreparable harm to the case-in-chief.[21] The two week delay between the end of hostilities and the occupation of Japan, specifically Tokyo, led to the destruction of an estimated 70% of Japanese military documents.[22] In addition, Joseph Keenan, lead counsel for the prosecution, focused on fruitless interrogations instead of collecting the remaining documentary evidence.[23] According to Totani, Keenan's failure to act, tactical blunders, and frequent absences, greatly complicated the task before the prosecution team at Tokyo.[24]

III. Practical and Political Considerations

Both political and pragmatic choices influenced the selection of the accused and the charges they faced before the Tokyo War Crimes Tribunal. In addition to exigencies of proof, prosecutors worried about the rapidly diminishing educational value of the trial for the Japanese people. "[A]t the present moment we understand that the Japanese themselves support the prosecution, [but] if the trial is delayed or prolonged, they may swing around in their sympathy and end by regarding as martyrs the men whom at present they wish to see condemned."[25] Rather than "indulging in a prolonged war crimes investigation or even try to develop charges against all suspects,"[26] the prosecution selected a representative sample of the most egregious offenses with the "goal of . . . secur[ing] the ruling that planning and waging aggressive war constituted a crime under international law."[27]

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[20] *Id.* at 7.
[21] *Id.* at 32.
[22] *Id.* at 105.
[23] *Id.* at 31. The author characterizes Keenan as a hard-drinking political animal who was not well liked by associate counsel and implies that this condition led Keenan to ignore repeated pleas to secure Japanese government files. *Id.* at 33–36.
[24] *Id.* at 32–41; *but see* JOSEPH B. KEENAN & BRENDON F. BROWN, CRIMES AGAINST INTERNATIONAL LAW 18 (1950).
[25] TOTANI, *supra* note 1, at 67.
[26] *Id.* at 66.
[27] *Id.* The Allies planned a series of trials for "Class A" accused (those accused of crimes against peace) and "Class BC" accused (ordinary war criminals). Although there were several trials throughout the Pacific of Class BC cases, the Tokyo Tribunal was the sole

Strategy and time constraints heavily influenced the prosecution's presentation of evidence.[28] However, expediency came at a cost. Prosecutors rarely called more than one or two witnesses per event and relied heavily on written synopses of testimony to support the charges.[29] To Totani, aside from significantly diminishing the impact of the evidence on Japanese spectators, these practices also contributed to present-day misconceptions about the evidence presented.[30]

Chapter Six's "Rape of Nanking" and the "Burma-Siam Death Railway" emphatically demonstrate the difference between a sanitized written synopsis and live witness testimony.[31] The author's graphic and gripping retelling of the savagery committed against the Chinese people following the fall of Nanking in December 1937 makes abstract arguments over the legality of war insignificant in comparison.[32] Instead of the normal one or two witnesses per crime, Allied prosecutors brought in a dozen witnesses for the Nanking portion of the trial.[33] The shocking episodes recounted by these witnesses, and the defense's clumsy attempts in cross examination to justify them as reprisal for war crimes committed by Chinese soldiers,[34] added a human dimension to the suffering. Despite a working example of effective presentation of

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trial of "Class A" accused. A number of government officials were included in this category along with military accused. *Id.* at 23, 66–77.

[28] *Id.* at 115–17 (describing pressure by General MacArthur and responsive efforts of Keenan to expedite the hearing).

[29] *Id.* at 112–15.

[30] *Id.* at 118. The author believes that, over time, academics have heavily relied on secondary or tertiary sources which fail to describe important evidence that was made available to factfinders. These mistaken assumptions have been used to support theories of cover-ups by the Allies and other prosecutorial misconduct. *Id.* at 2–7.

[31] *Id.* at 119.

[32] *See generally* IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1997) (providing a respresentative example of the type of vivid description that was available to the prosecution by virtue of the evidence it did have).

[33] TOTANI, *supra* note 1, at 121.

[34] *Id.* at 121–27.

> I took this girl to the hospital at some time in February 1938 . . . . They killed her brother's wife because she resisted rape; they killed her older sister because she resisted rape. In the meantime her father and mother were kneeling before them, and they killed them, all of these people being killed with a bayonet . . . . The first month she was raped repeatedly, daily . . . . After that she became so diseased, they were afraid of her, and she was sick there for a whole month.

Id. at 126–27.

witness testimony about Nanking, the prosecution abandoned this strategy for the sake of expediency in the remainder of the tribunal by summarizing vast amounts of documentary evidence and witness testimony. Pragmatism, however, came at the cost of educating the Japanese public or giving a voice to the victims of this tragedy.

Throughout the book Totani repeatedly raises the theme of the tribunal as an educational tool.[35] Even the setting of the trial in a former Japanese military academy communicated to the Japanese people a "symbolic end to the unquestioned authority of the Japanese military establishment."[36] Unfortunately, the prosecution's failure to properly convey the substance of the documentary evidence and written testimony to the general public ultimately shaped later debates about the nature of the trial and its legitimacy.[37] For example, though critics charge the Allies covered-up the "comfort system" used by the Japanese military to enslave and molest Asian women, documentary evidence confirms the Allies substantiated these crimes.[38]

The author acknowledges some valid opposing viewpoints. For example, the Allies tried only members of the defeated powers, whereas Allied nations enjoyed "blanket immunity."[39] The Allies also chose to overlook Emperor Hirohito's culpability in the decision to wage war for the sake of political expediency, in spite of extensive evidence to the contrary.[40] Unfortunately, in his efforts to acknowledge and counter the critics, Totani merely repeats prior positions without exploring why his views are correct.

Nonetheless, the legacy of the Tokyo and the Nuremberg trials survives in "codifying new legal principles and developing the international criminal justice system."[41] Not only did these trials inspire the United Nations to codify prohibitions on "crimes against humanity,

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[35] *Id.* at 10.
[36] *Id.* at 9.
[37] *Id.* at 118.
[38] *Id.* at 3, 253. Military sexual slavery by the Japanese soldiers of Asian women in Japanese-occupied areas was largely tolerated by the military leadership. *Id.* at 120.
[39] *Id.* at 236.
[40] *Id.* at 43–62. "For the Allied powers, Hirohito was as much a politico-military problem as a legal one because of the immense authority he continued to wield—based on his claim to divinity—over the Japanese people." *Id.* at 43.
[41] *Id.* at 258.

genocide, and the crime of aggression,"[42] the Tokyo trial also exposed the Japanese public to the "pride of Anglo-American law,"[43] including the impartiality of judges, the presumption of innocence, the right to cross-examination, and the need to have trials open to the public.[44]

IV. Lessons for Judge Advocates

Despite the enormous challenges facing the prosecution, the Tokyo trial succeeded.[45] The lessons for judge advocates in trial strategy, problem solving, and operating in tandem with our coalition partners have all withstood the test of time. Consider this remarkable feat: lacking any statutory or legal precedents, the prosecutors defined the crime of participating in an "aggressive war" and proved the accused guilty of the corresponding legal elements of the offense. Although the Kellogg-Briand Pact outlawed war in 1928,[46] nothing in the pact stated "whether a war waged in violation of it constituted an international offense."[47]

The prosecution defeated the defense's argument that "crimes against peace was a postwar creation of victor nations," and was inapplicable specifically because it would have to be applied *ex post facto*.[48] The prosecution likewise defeated the defense's argument that jurisdiction was lacking over Japanese military members because only states, rather than individuals, are capable of waging a war.[49] The courts' rejection of both arguments provides a worthy lesson for judge advocates contemplating the introduction of novel legal concepts in military proceedings.

Aside from countering defense arguments, the prosecution overcame obstacles related to evidentiary proof. For example, the Japanese

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[42] *Id.* at 206.
[43] *Id.*
[44] *Id.*
[45] The trial succeeded by punishing the wrongdoers and by validating the existence of war crimes. *But see* KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE, THE POLITICS OF WAR CRIMES TRIALS 42 (2006) (casting the Tokyo Tribunal as a failure to achieve the significance of the Nuremberg Tribunal).
[46] *See* General Pact for the Renunciation of Wars, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57, *reprinted in* AM. J. INT'L L. SUPP. 171–73 (1928).
[47] TOTANI, *supra* note 1, at 20.
[48] *Id.* at 84.
[49] *Id.* (describing the defense's invocation of the act-of-state doctrine).

government's destruction of documentary evidence severely challenged the prosecution's ability to prove that Japanese officials knew of and condoned Japanese soldiers' war crimes.[50] The prosecution team relied on the *modus operandi* of different officials, establishing a widespread pattern of atrocities so similar as to show "those in leadership circles must have authorized the commission of war crimes as a general policy of the Japanese war and military occupation."[51] This lesson for advocates remains clear: sometimes you have to "go to war with the Army you've got."[52] While evidence is inevitably misplaced and memories inevitably fade, good advocates demonstrate the mental dexterity to adapt and implement a winning trial strategy.

Most importantly, the prosecution's evolved trial strategy was sufficient to meet and defeat the defense's contentions of "plausible deniability." Throughout the trial, Japanese officials and military leaders repeatedly disavowed responsibility for their soldiers' war crimes. General Matsui Iwane, the commander of the Central China Army, claimed he lacked responsibility for the atrocities his troops took part in because he lay sick in bed 140 miles away when his forces captured the city.[53] Yet, Matsui's argument did not carry the day. The prosecution demonstrated that a commander in the field is accountable for a subordinate's lack of compliance with the laws of war, despite physical separation[54] Hence, the tribunal found that Matsui had "the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking."[55] This important lesson emphasizes that judge advocates must develop a sense of duty in soldiers to confront those leaders who choose to look away. As Totani notes, "this verdict is recognized as a valid precedent at international criminal courts today."[56]

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[50] *Id.* at 105.
[51] *Id.* at 108.
[52] Beth Teitell, *What's a Guy Gotta Do to Get Canned*, BOSTON HERALD, Dec. 26, 2004, at 42 (citing former Defense Secretary Donald H. Rumsfeld's response to a Soldier who asked about the safety of military equipment)
[53] TOTANI, *supra* note 1 at 132. Matsui later admitted he had knowledge of what he termed "unpleasant outrages," to include "rape, looting, forceful seizure of materials" and "murder." *Id.*
[54] *Id.* at 135.
[55] *Id.*
[56] *Id*.

IV. Conclusion

Although often derided as a "poor cousin" to the Nuremberg War Crimes Tribunal,[57] the Tokyo War Crimes Tribunal stands on its own as an important benchmark in the history of international law. As one historian writes:

> The judgment of the Tokyo trial is regularly cited in war crimes trials around the world today—on issues such as military command responsibility for the failure to stop the perpetration of war crimes by subordinate troops; the level of knowledge required of political leaders to hold them accountable for their failure to exercise their authority to prevent international crimes; the definition of the international crime of aggression; and the appropriate test for the limits of anticipatory self-defense as an exception to aggression.[58]

Totani has not yet surveyed the entire proceedings, noting that massive amounts of historical documents from the 2200 trials against 5600 suspects are still awaiting consolidation, translation, and analysis,[59] Totani's volume nevertheless serves as an excellent starting place for judge advocates wishing to familiarize themselves with one of the early instances of the international law of war in action.

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[57] *See* Tim McCormick, *Lest We Forget the Atrocities of War*, *available at* http://www.theage.com.au/opinion/lest-we-forget-the-criminal-atrocities-of-war-20081109-5kv.html?skin=text-only (last visited Sept. 6, 2009).
[58] *Id.*
[59] TOTANI, *supra* note 1, at 262.