

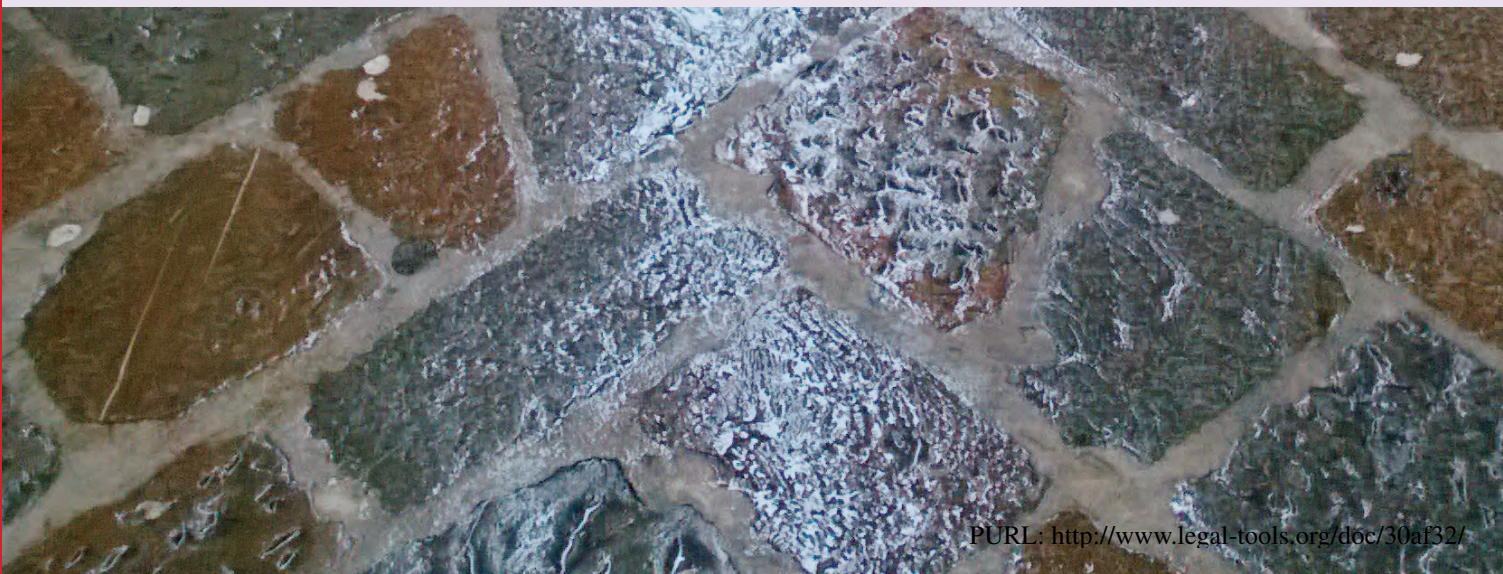
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From Tokyo to the United Nations: B.V.A. Röling, International Criminal Jurisdiction and the Debate on Establishing an International Criminal Court, 1949–1957

Lisette Schouten*

26.1. Introduction

Soon after the delivery of judgment against Nazi perpetrators in Nuremberg, and with trial proceedings at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') in full swing, the General Assembly of the newly established United Nations ('UN') made its first efforts to push the development of international law and institutionalisation of human rights even further. Genocide was declared a crime against international law in a UN Resolution that was approved in December 1946, while the Convention for the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') was adopted by the General Assembly in December 1948. The Universal Declaration of Human Rights, establishing the general rights for individuals, was adopted in the same month.¹ In the Charter of the UN, the General Assembly was also given the responsibility to initiate studies and make recommendations for "promoting international co-operation in the field and encouraging the progressive development of international law and its codification".² The Dutch professor B.V.A. Röling (1906–1985), a former

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¹ William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2004, p. 7.

² United Nations Charter, Chapter IV, Article 13.1.a. The International Law Commission ('ILC') was subsequently created to execute the mandate. The Statute of the International Law Commission (1947), Article 15 defined "progressive development" as the "preparation of draft conventions on subjects that have not yet been regulated by

judge in Japan and a member of the Dutch delegation to the UN, was engaged in these efforts for many years.

While stationed in Tokyo, Röling had been one of the 11 judges involved in the IMTFE who – through their interactions with each other, with their domestic contexts and with the new cultures they encountered – developed new ideas about norms and institutions of international law and justice. After the trial proceedings ended, Röling (who was one of the few Dutch jurists with first-hand experience in delivering international criminal justice) was appointed a member of the Dutch delegation to the UN on the Sixth Committee of the General Assembly and served as the Dutch representative to two special committees of the General Assembly on international criminal jurisdiction. In addition, he became vice-chairman of the 1953 Special Committee on Defining Aggression (‘Committee on Defining Aggression’), and Rapporteur of the 1956 session of this Committee.³ By taking a closer look at Röling’s career, this chapter will consider the reach and legal implications of the Tokyo Trial, the broader contributions of its judges to the emergence of modern international criminal jurisdiction and, through examination of Röling’s ideas on international criminal law, further illuminate the early discussions on an international criminal court.

26.2. The Establishment of the International Military Tribunals

While ideas on the development of international criminal jurisdiction stem from the nineteenth century, it was only after the First World War

international law, or in regard to which the law has not yet been sufficiently developed in the practice of states”. It defined “codification” as “the more precise formulation and systemisation of rules of international law in fields where there already have been extensive state practice, precedent, and doctrines”. See Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, Cambridge, 2008, p. 26.

³ Röling was appointed Rapporteur in the “New York Committee” after he declined an invitation of the United States and Britain to become President of that Committee. Verslag uitgebracht door Prof. Mr. B.V.A. Röling als Nederlands gedelegeerde in het “Committee on International Criminal Jurisdiction”, August 1953, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, National Archives of the Netherlands (‘NAN’). See also Nico Schrijver, “B.V.A. Röling – A Pioneer in the Pursuit of Justice and Peace in an Expanded World”, in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1071–91.

that popular support grew.⁴ The Leipzig trials, held after the war ended to judge German war atrocities, were the first attempt at international criminal justice. However, as only 16 cases were eventually brought to trial resulting in a meagre 13 convictions, the trials were generally considered a failure.⁵ Yet the outcome of the trials stimulated a renewed interest in the matter of an international juridical institution. It triggered the foundation of the Permanent Court of International Justice (1922–1946) in The Hague, which contributed to the clarification and development of international law.⁶ In addition to this, from the 1930s onwards the possibility of an international criminal court was discussed in the League of Nations, culminating in an (unratified) treaty in 1937.⁷

Notwithstanding these efforts to establish international law and supranational legal norms on human rights, the unprecedented and gruesome events of the Second World War fuelled the efforts to lay down guidelines for an international body for the condemnation of war crimes. With the war still raging, representatives of the Allied governments met in international commissions and at international law conferences to decide how “justice should be done on the evildoers” after the war. From 1941 onwards eminent statesmen, lawyers, professors and judges from a wide range of Allied nations gathered in international bodies such as the London International Assembly and the International Commission for Penal Reconstruction and Development, where they discussed the use of legal means to confront war crimes and addressed a number of questions: What are war crimes? Which courts will try these crimes? How best to deal with the plea of superior orders? How to organise the extradition of war criminals?⁸ On 13 January 1942 representatives of nine countries

⁴ Schabas, 2004, p. 2, see *supra* note 1; see also Christopher Keith Hall, “The First Proposal for a Permanent International Criminal Court”, in *International Review of the Red Cross*, 1998, vol. 38, no. 322, pp. 57–74.

⁵ J. Holmes Armstead Jr., “The International Criminal Court: History, Development and Status”, in *Santa Clara Law Review*, 1998, vol. 38, no. 3, pp. 745–835.

⁶ Manley O. Hudson, “The Permanent Court of International Justice”, in *Harvard Law Review*, 1922, vol. 35, no. 3, pp. 245–75; the Permanent Court was unable to meet during the wartime years (1940–1945). See also Manley O. Hudson, “The Twenty-Third Year of the Permanent Court of International Justice and Its Future”, in *The American Journal of International Law*, 1945, vol. 39, no. 1, pp. 1–12.

⁷ Schabas, 2004, pp. 3–5, see *supra* note 1.

⁸ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (“History of the UNWCC”), His Majesty’s Stationery Office, London, 1948, pp. 94–104; see also Kerstin von Lingen,

occupied by Nazi forces met in London and signed their first joint resolution.⁹ In this so-called St James's Declaration, the countries declared their intention to demand justice from Germany for the war crimes committed in their countries and to bring those responsible before a court of law after the war, meaning everyone who ordered, perpetrated or participated in such crimes.¹⁰

After the Moscow Declaration of 1 November 1943, the United Nations War Crimes Commission ('UNWCC'), initially called the United Nations Commission for the Investigation of War Crimes, was established by 17 Allied nations during a meeting on 20 October 1943 at the British Foreign Office in London.¹¹ Its original objectives were limited to the investigation and recording of the evidence of war crimes and the identification of those individuals responsible, as well as reporting to the concerned governments cases "in which it appeared that adequate evidence might be expected to be forthcoming". Later its functions were extended. It received advisory capacity and recommendations could now be given to its members on questions of law and procedure. The UNWCC was chaired by Sir Cecil Hurst and drafted "a convention for the establishment of a United Nations War Crimes Court".¹² The text of this draft Convention was based on the unratified League of Nations treaty and inspired by memoranda issued by the London International Assembly.¹³

However, it was not until the summer of 1945, through the London Agreement of 8 August 1945, that effective means to apply jurisdiction in the international sphere were established. In London it was agreed between the Allies to establish an *ad hoc* International Military Tribunal ('IMT') in Nuremberg to address the grave breaches of international

"Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, no. 1, pp. 45–76.

⁹ Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 19.

¹⁰ History of the UNWCC, p. 1, see *supra* note 8.

¹¹ Representatives of the following 17 Allied nations and dominions were present: Australia, Belgium, Britain, Canada, China, Czechoslovakia, the French Committee of National Liberation, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, the Union of South Africa, the United States of America and Yugoslavia; *ibid.*, pp. 112–13.

¹² *Ibid.*, pp. 2–3.

¹³ Schiff, 2008, p. 24, see *supra* note 2.

law.¹⁴ The most significant feature of the Nuremberg Tribunal was the inclusion in its Charter of two crimes that had not previously been articulated in international law: *crimes against peace* and *crimes against humanity*, making possible the conviction of German high officials who otherwise might have escaped justice.

Two weeks before the conclusion of the London Conference, the major Allies proclaimed their intention to prosecute the Japanese in the same way as the German perpetrators. Some months after the opening of the Nuremberg Trial, on 19 January 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers, announced the establishment of the IMTFE in Tokyo.¹⁵ The Nuremberg Charter served as the model for the Tokyo Charter, although the Americans solely drafted the final IMTFE Charter.

The principal charge against the 28 Japanese leaders to be tried at Tokyo was their participation in the planning and execution of aggressive war in the Asia-Pacific region, the Class A crimes against peace. In addition, they were also held accountable for conventional war crimes committed by the Japanese armed forces against prisoners of war ('POWs') and civilians. Conventional war crimes and crimes against humanity were labelled crimes of category B and C respectively.¹⁶ The Articles about jurisdiction in the Tokyo Charter closely followed those of

¹⁴ The official seat of the IMT was established in Berlin and the Tribunal's first official session on 18 October 1945 was held in that city. The court then adjourned to Nuremberg.

¹⁵ Represented on the bench of the Tokyo Tribunal were 11 of the respective Allied nations: Australia, Britain, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the USA.

¹⁶ Charter of the International Military Tribunal for the Far East ("IMTFE Charter"), Article 5, enacted at Tokyo, Japan on 19 January 1946, and amended on 26 April 1946 (<http://www.legal-tools.org/doc/a3c41c/>) defined the three categories as follows: "A. Crimes against Peace: The planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; B. Conventional War Crimes: Namely, violations of the laws or customs of war; C. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan".

Nuremberg. However, there was one difference with the definition of crimes against humanity embodied in the Nuremberg Charter.¹⁷ While the latter text specified the crime as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The words “or religious grounds” were omitted in Article 5(c) of the IMTFE Charter.¹⁸ Further, no provisions were made in Tokyo for the trial of allegedly criminal organisations, unlike in Nuremberg where both individuals and criminal groups such as the Schutzstaffel (‘SS’), the Sturmabteilung (‘SA’) and the Gestapo were brought to trial.

While the Netherlands did not play a role in the IMT at Nuremberg, they represented their colony of the Netherlands East Indies at the IMTFE.¹⁹ On the invitation of the Americans, a Dutch Judge was called to

¹⁷ According to Antonio Cassese and Röling, the words “against any civilian population” were also deleted from the IMTFE Charter, Article 5(c) in April 1946. They argue that by broadening this class of crimes, punishment for large-scale killing of military personnel in an unlawful war was made possible; see B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemaker*, Polity Press, Cambridge, 1994, p. 3; and Memorandum of B.V.A. Röling to President Sir William Webb on “Murder Charges”, (“Röling Memorandum”), 13 March 1947, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 11, p. 16 (NAN); see also History of the UNWCC, p. 205, *supra* note 8.

¹⁸ The persecution of Jews in Nazi Germany motivated the reference to persecution on religious grounds in the Nuremberg Charter. In their explanation of the fact that there is no mention of “persecutions on religious grounds” in the IMTFE Charter, the UNWCC stated that this was most likely because no such violations had been committed by the Japanese major war criminals. Also, Article 5(c) covered the more important “persecutions on political and racial grounds”. Hence, “in case any persecutions on religious grounds should be established and brought forward in the course of the proceedings, they could easily be included within the notion of prosecution on political grounds”; History of the UNWCC, p. 205, see *supra* note 8.

¹⁹ Apart from the major war criminals that were put on trial in Nuremberg and Tokyo, numerous German and Japanese perpetrators were sentenced in Allied trials. Soon after the surrender of German troops in May 1945, the first Allied post-war trials against Nazi perpetrators were held in the European theatre. At the same time, Allied courts assembled all over the Asia-Pacific region to judge those Japanese accused of Class B and/or Class C war crimes. While national war crimes courts held the trials, they were part of an

take a seat on the IMTFE bench, while a Dutch assistant prosecutor was added to the International Prosecution Section. The search for capable judicial staff was long and difficult, as many jurists were already occupied with post-war justice in the Netherlands and Netherlands East Indies and were therefore unable to leave for Tokyo.²⁰ Suitable candidates were desired to be immediately available, fluent in English and without any wartime connections to the former enemy.²¹ After a selection process that took several months, W.G.F. Borgerhoff Mulder accepted the position of the assistant prosecutor while the young jurist Röling was appointed as

impressive and often extremely complex Allied operation that spanned vast areas and required extensive co-operation. Although the reliability of the following figures is disputable (research has shown that some individuals were counted twice, thrice or even four times, while others were tried by more than one country and the number does not include the results of Soviet trials or later trials by the People's Republic of China) the numbers mentioned by Piccigallo are impressive: 5,700 Japanese individuals were indicted for Class B and Class C war crimes and 920 of them sentenced to death. In the Netherlands East Indies, the Netherlands held 448 war crimes trials against 1,038 Japanese suspects; 969 Japanese suspects were condemned (93.4 per cent), while 236 (24.4 per cent) received the death sentence. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1980.

²⁰ Post-war justice was arranged differently in the two geographical areas. Rules were enacted by the respective governments, and a comparison between the Dutch metropolitan and the Dutch East Indies legislation makes clear that both countries took a different legal approach towards the questions of guilt and the punishment of war criminals. In the homeland, German war criminals and Dutch traitors were sentenced by five Special Courts of Law (*Bijzondere Gerechtshoven*) in the first instance and one Special Court of Cassation (*Bijzondere Raad van Cassatie*). The mixed civilian–military character of Dutch post-war law was reflected in the composition of the courts, as the bench consisted of three civilian jurists and two military members. In addition, 19 tribunals were established where lay justice was exerted under the presidency of a legal expert over those Dutch citizens who had assisted or supported the enemy, had been members of a national socialist organisation or who had somehow benefited from the German occupation. In the Dutch East Indies, Japanese war criminals were sentenced by 12 temporary courts martial ('TCM'). These TCMs were made competent for war crime trials in the first instance. The courts consisted of a president and two members assisted by a legal secretary. All were serving officers or civilians who were, as a result of the "state of siege", given a military rank. The local prosecutors or their substitutes served as judge advocates, they were not militarised. Several of the TCMs tried Japanese defendants as well as (European, Eurasian and Indonesian) collaborators.

²¹ Lambertus van Poelgeest, *Nederland en het Tribunaal van Tokio: volkenrechtelijke polemiek en internationale politiek rond de berechting en gratiëring van de Japanse oorlogsmisdadigers*, Gouda Quint, Arnhem, 1989, p. 27.

the Dutch Judge.²² Röling, a professor of criminal law and criminal procedural law of the Netherlands East Indies who held an endowed chair at Utrecht University was selected, notwithstanding the fact that he did not possess any “Asian” experience nor had expressed any interest in judging Japanese wartime leaders.²³

26.3. Introducing Röling

Shortly after his appointment by the Dutch government, Röling departed for war-torn Tokyo where he arrived at the beginning of February 1946. With trial proceedings only set to start in May 1946, Röling took the opportunity to tour and discover the city and its surroundings.²⁴ Overcoming his self-professed hatred of the Japanese, his initial reservations against the ceremonial nature of Japan’s culture and his dislike of Japan’s traditional music, which he more than once compared to caterwauling, Röling’s opinion about Japan quickly changed for the positive.²⁵ He climbed Mount Fuji, went on excursions to Kyoto and Hiroshima and, more importantly, became acquainted with several well-known Japanese musicians and scholars such as Takeyama Michio and Suzuki Daisetsu Teitaro.²⁶ During his meetings with these people and evening talks with Japanese students, Röling sought their opinion on specific defendants, discussed legal issues

²² W.G.F. Borgerhoff Mulder served as the Dutch assistant prosecutor to the International Prosecution Section. Being several years older, Borgerhoff Mulder had expected to be appointed as Judge with Röling serving as his prosecutor. He made this suggestion to the Ministry of Foreign Affairs which, however, stood by its earlier decision. As a result the relationship between Röling and Borgerhoff Mulder during the proceedings in Tokyo was strained. Van Poelgeest, 1989, pp. 28–29, see *supra* note 21.

²³ Some of his wife’s family members spent their wartime years in internment camps in the Dutch East Indies and perished under the Japanese occupation.

²⁴ Van Poelgeest, 1989, p. 60, see *supra* note 21.

²⁵ Röling: “I am afraid to go home”, he said. “I came here with the Dutch hatred of the Japanese [...] but after nearly two years I have come to like the Japanese people. They are idealists, and sensitive, and they have something to offer to us Westerners, with our emphasis on material things”. See Elizabeth Gray Vining, *Windows for the Crown Prince*, J.B. Lippincott Company, Philadelphia, 1952, p. 169.

²⁶ Röling would keep in touch and meet Takeyama and Suzuki even after returning from Tokyo. Kei Ushimura, *Beyond the “Judgment of Civilization”: The Intellectual Legacy of the Japanese War Crimes Trials 1946–1949*, The International House of Japan, Tokyo, 2003, pp. 125–63; and Röling and Cassese, 1994, p. 35, see *supra* note 17.

related to the trial and tried to explain his views on Japan's war guilt.²⁷ Röling enjoyed these gatherings and his new lifestyle immensely and even began to question America's "lack of understanding for Japanese subtlety".²⁸ In short, during his stay in Japan, Röling became acquainted with and tried to understand the country, its culture and the Japanese way of thinking.

Before his departure for Tokyo, Röling had not received any instructions or directions from the Dutch government, nor was he made familiar with the Charter of the IMTFE. Even more telling, until his position at the IMTFE, Röling had not shown any particular interest in international law, declaring it an "uninteresting and dull" specialism.²⁹ However, upon his arrival in Japan, Röling engaged himself in the content of the Charter, a study of Japanese history and the principles of international law he previously had found so uninteresting. It did not take very long before Röling developed serious reservations about the ambiguous rules of international law that had found their way into the Tokyo Trial's Statute.³⁰ He became less and less convinced of the legality of the main charge in the Charter, namely that Japan would be held accountable and put on trial for the "ultimate crime", the planning and execution of aggressive war in the Asia-Pacific region.

In January 1947, when the prosecution finished the presentation of its case, a majority of the seven judges – excluding Röling, the French Judge Henri Bernard and the Indian Judge Radhabinod Pal – started to write a preliminary Judgment.³¹ Meanwhile, Röling presented a memorandum to Sir William Webb, the Tribunal's President, in which he explained his reservations.³² He argued that the Charter was a limitation on the jurisdiction of the IMTFE and believed it should be left to the Judges to decide whether the provisions of the Charter were in conformity with the laws of nations:³³

²⁷ Hugo Röling, *De Rechter die geen ontzag had. Bert Röling en het Tokiotribunaal*, Wereldbibliotheek, Amsterdam, 2014, p. 85.

²⁸ *Ibid.*, p. 138.

²⁹ Röling and Cassese, 1994, p. 8, see *supra* note 17.

³⁰ Letter of B.V.A. Röling to President Sir William Webb ("Röling Letter"), 23 January 1947, Collection 544 B.V.A. Röling, 1915-1985, access no. 2.21.273, inventory no. 11 (NAN).

³¹ The majority of seven: the United States, Britain, China, the Soviet Union, the Philippines, Canada and New Zealand.

³² Röling Letter, see *supra* note 30.

³³ Röling and Cassese, 1994, p. 61, see *supra* note 17.

In this connection, the essential question is whether the Charter so defines crimes against peace (this is the assumption in the preamble to the indictment) that the tribunal would be bound by its definition of substantive penal law, or whether it was only intended to enumerate those facts in the Charter with regard to which the Tribunal has jurisdiction, thereby leaving it to the Tribunal's judgment whether or not the facts enumerated are to be considered crimes according to international law.³⁴

In other words, Röling wanted to verify the Charter's consistency with existing international law, something most of the other Judges refused and fiercely criticised him for. According to Röling, this was nonetheless a crucial point, as it opened the discussion about "the extent to which aggressive war was a fully fledged crime at that time".³⁵

Unconvinced by the reasoning of the other judges, who referred to treaties such as the Kellogg-Briand Pact of 1928 – which had outlawed war as an instrument of national policy – as evidence of the existence of the crimes against peace and humanity prior to the Second World War, Röling was reluctant to accept the Tribunal's claim that it was entitled to prosecute the Japanese for the crime against peace.³⁶

The Allied Nations undoubtedly have legislative power in Japan by virtue of the surrender as formulated in the Instrument of Surrender. These powers, however, are restricted to legislation for Japan and cannot be stretched to enable the Allied Nations to lay down rules of universal international law by virtue of their victory over Japan. Now there is nothing in the Charter to show that it was intended to state that "Japanese aggression is a crime" [...] If it had been the intention thereby to define crimes against peace and to formulate a role of substantive penal law, then it should be assumed that those who drafted the Charter have either obviously exceeded their powers (supposing that existing international law did not, as yet recognize that rule), or

³⁴ Röling Letter, p. 1, see *supra* note 30.

³⁵ Röling and Cassese, 1994, p. 61, see *supra* note 17.

³⁶ "If aggression was not punished as a specific crime under international law at the beginning of the Second World War, how could this fact be reconciled with the rule on trying and punishing 'crimes against peace' contained in the Statute of the Tokyo Tribunal?"; *ibid.*, p. 10.

supplied an unnecessary rule (supposing that existing international law did already contain that rule).³⁷

These non-conformist views left Röling alienated both from his government back home and from his other colleagues on the bench.³⁸ And while the presence of fellow dissident Judge Pal must have brought some sense of relief to Röling, Pal's intention of providing a dissenting opinion – which went against the Chamber's earlier agreement to secrecy – put Röling in a very difficult position.³⁹ Those Judges not in agreement with the majority were now compelled to express themselves, to prevent being considered in agreement with the others.⁴⁰ Röling thus had to make a crucial decision: Should he resign from his position altogether? Should he accept the Charter and the majority Judgment unconditionally, as his government would have liked and pressured him to do? Or should he follow his “judicial heart” and publish a dissenting opinion? After careful deliberation, Röling decided to accept the Tribunal's Statute but, repudiating any political involvement, to eventually provide a dissenting opinion.

Röling's earlier reservations eventually reappeared in this final dissenting opinion, where he found a middle way between the majority Judgment of his colleagues who, in the words of Antonio Cassese, applied “Western criteria to the actions of the Japanese and saw their crimes through the eyes of the victors” and the views of Judge Pal, who held a

³⁷ Röling Letter, p. 2, see *supra* note 30. Later Röling would declare: “You may set up an international tribunal; you can make a statute for it and that statute will set out the limits of the jurisdiction of the tribunal, beyond which it can never go. But that doesn't mean that whatever is considered a crime in the Charter should be eventually accepted as a crime by the Court. The victor in a war, even in a world war, is not entitled to brand as an international crime everything he dislikes and wants to prosecute for”. Röling and Cassese, 1994, p. 65, see *supra* note 17.

³⁸ Röling and Cassese, 1994, p. 61, see *supra* note 17.

³⁹ Nevertheless, it did not take long before Pal and Röling, who were seated next to each other on the bench, developed a strong friendship. Pal, who argued that Japan had fought the war in order to liberate Asia from Western colonialism, proved to be very influential on Röling's ideas on colonialism, Europe's role in Asia and the rationale behind Japan's behaviour during the war. Ushimura, 2003, p. 166, see *supra* note 26; Röling, 2014, pp. 154–58, see *supra* note 27.

⁴⁰ For a long time, Röling would favour a majority Judgment not to belittle the value of the Court. He was well aware of the fact that the Tokyo Trial was not so much about the fate of the accused, but more about the development of international law. Röling Letter, see *supra* note 30.

solely Asian point of view when judging the actions of the Japanese.⁴¹ After extensive study of the historical background of the conflict – in order to comprehend the reasoning behind Japan’s war against the Allies – and further examination of the principles of international law, Röling dissented with both the majority of the judges and Judge Pal on the reasoning and results.⁴²

First, Röling disagreed with the presentation of the facts in the majority Judgment. He criticised the reinterpretation of historical events for, according to him, they led to a superficial and political interpretation of the historical truth. Founding his opinion on both defence and prosecution evidence, Röling believed that there had indeed been a Japanese conspiracy to commit aggression. However, unlike the majority, who closely followed the prosecution and argued that there had existed one large conspiracy to commit aggression which had already begun in 1928, Röling claimed that it only dated from 1940 when the Japanese military got the upper hand and “the use of armed force was accepted as government policy”.⁴³

Second, as already noted, Röling expressed serious reservations against the ambiguous rules of international law that had found their way into the Statute.⁴⁴ He believed that the Tribunal was not so much about the fate of the accused as about the development of international law. It was therefore “the Tribunal’s job to create authority in the field of international law, and to independently evaluate the lawfulness of the Charter provisions”.⁴⁵ According to Röling, it was “open to question whether the Charter embodies the substantive law to be applied by the Tribunal, or whether the Charter only lays down what acts are subject to

⁴¹ Röling and Cassese, 1994, p. 10, see *supra* note 17.

⁴² Röling only gave his dissension where it might have direct bearing on the question of criminal liability in the sense of the Charter. Opinion of Mr. Justice Röling, Member for the Netherlands (“Röling Opinion”), 12 November 1948, pp. 1–2, 63 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-04-a-min.pdf).

⁴³ *Ibid.*, pp. 63–64, 83–84. See also Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, New York, 2005, p. 45.

⁴⁴ Röling Letter, see *supra* note 30.

⁴⁵ Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, p. lxxvii.

its jurisdiction, and how this jurisdiction is to be executed”.⁴⁶ Unlike the majority of the Judges, Röling believed that the provisions of the Charter had to be verified with general international law; he found them to be jurisdictional instead of law creating.⁴⁷

In turn, this had implications for his opinion on the lawfulness of Japan’s war against the Allies. Röling believed that Japan could not be held responsible for transgressing the “ban on wars of aggression” as it had not been an international crime during the war.⁴⁸ Röling did not go as far as Pal, who argued that the Western powers had been “equally guilty of self-aggrandizement as Japan”, there essentially being no difference between them in terms of moral culpability. But Röling did later declare:

You may set up an international tribunal; you can make a statute for it and that statute will set out the limits of the jurisdiction of the tribunal, beyond which it can never go. But that doesn’t mean that whatever is considered a crime in the Charter should be eventually accepted as a crime by the Court. The victor in a war, even in a world war, is not entitled to brand as an international crime everything he dislikes and wants to prosecute for.⁴⁹

In addition, Röling explained that he was convinced that Japan’s political goals in the pre-war years, to acquire a dominant position in Asia and disabling the European powers in the region, could not be considered an offence in itself.

In order to reconcile his belief that wars of aggression prior to 1939 should not be considered an international *crime*, with the rule on “crimes against peace” contained in the Charter of the Tribunal – the Charter that he had accepted – Röling argued:

In international law the word “crime” is applied to concepts with different meanings. It can indicate acts comparable to political crimes in domestic law where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment reflects a necessary political measure rather

⁴⁶ B.V.A. Röling, Interpretation of the Charter, Annex to Röling Letter, 23 January 1947, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 11 (NAN).

⁴⁷ Boister and Cryer, 2008, see *supra* note 45.

⁴⁸ Röling and Cassese, 1994, p. 10, see *supra* note 17.

⁴⁹ *Ibid.*, p. 65.

than an expression of retribution. If the “crime against peace” is understood in this sense, it is in accordance with international law, and the Charters did not deviate from the present law of nations.⁵⁰

So according to Röling, one should distinguish between those who had committed acts of a “truly criminal nature” (e.g. conventional war crimes) and those who had committed crimes that could be compared to the “political crimes” of domestic law. Because the victorious powers had been on the side of “reason and law” during the war and were now responsible for the maintenance of peace, they “had the right to act against individuals who might prove dangerous for the new order”.⁵¹ Following this novel distinction he had created between the two categories of crimes, Röling argued that a person solely guilty of the crime against peace should not be sentenced to death but only receive a term of imprisonment.⁵²

Third, Röling’s opinion threw light on the law relating to war crimes, in particular on the question of responsibility for omission (command responsibility).⁵³ Röling disagreed in part with the majority and came to a “rather more sophisticated and nuanced view than the majority, one which has commended itself to history more favourably than others”.⁵⁴ Although both the majority and Röling agreed that command responsibility existed in international law, Röling argued that several conditions had to be proven before liability for omission could be established. “Firstly, that the accused knew or should have known of the facts, secondly that he had the power to prevent the acts and thirdly that he had the duty to prevent those acts”.⁵⁵

While referring to earlier trial cases,⁵⁶ Röling consequently argued that the scope of responsibility could differ from case to case.⁵⁷ He

⁵⁰ *Ibid.*, p. 66. Röling Opinion, p. 48, see *supra* note 42.

⁵¹ Röling and Cassese, 1994, pp. 10–11, p. 66, see *supra* note 17.

⁵² *Ibid.*, p. 11.

⁵³ *Ibid.*, p. 10. See also Röling Opinion, p. 54, see *supra* note 42.

⁵⁴ Robert Cryer, “Röling in Tokyo: A Dignified Dissenter”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 4, p. 1120.

⁵⁵ Röling Opinion, pp. 59–60, see *supra* note 42. See also Cryer, 2010, p. 1120, see *supra* note 54.

⁵⁶ Röling Opinion, p. 58, see *supra* note 42.

⁵⁷ *Ibid.*, p. 60.

believed that in this particular case the majority Judgment had taken this responsibility too far in the verdict of several of the defendants, whilst it had been too lenient for others.⁵⁸ According to Röling, the military officers Oka Takazumi, Satō Kenryō and Shimada Shigeterō were guilty of committing conventional war crimes and should have been punished with the supreme penalty, while Field Marshal Shunroku Hata and civilians Kōki Hirota, Kōichi Kido, Mamoru Shigemitsu and Teiichi Togo should have been acquitted.⁵⁹

To briefly summarise, then, in his dissenting opinion Röling showed “rigorous respect for the law” but expressed realism and “a balanced political judgment” at the same time.⁶⁰ His awareness of the influence of personal and political ideas on the majority Judgment in combination with his understanding of Japan’s history and culture made him walk a “careful middle path” between the outspoken positions of his fellow Judges.⁶¹

It is thus fair to say that his first experience with international criminal law in Tokyo left Röling very critical of criminal justice but also endowed him with a realistic and less “Western” view on international law.⁶² Röling had experienced the contradictions derived from the export of Western legal practice to another cultural context. This experience, combined with his openness to the ideas of Judge Pal and his friendships with Japanese scholars, led Röling to be more sensitive towards global

⁵⁸ B.V.A. Röling, “The Nuremberg and Tokyo Trials in Retrospect”, in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, p. 472; and Röling Opinion, p. 60, see *supra* note 42.

⁵⁹ Röling Opinion, p. 178, see *supra* note 42.

⁶⁰ Antonio Cassese on Röling’s dissenting opinion in: Röling and Cassese, 1994, p. 10, see *supra* note 17; see also Antonio Cassese, “B.V.A. Roling – A Personal Recollection and Appraisal”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 4, pp. 1141–52.

⁶¹ Cryer, 2010, p. 1122, see *supra* note 54. Röling on the interpretation of international law: “The position of a country determines the outlook of its lawyers and its judges, their evaluation of values and interests, their opinion about the meaning of treaty-texts and their appreciation of a specific custom”. See B.V.A. Röling, “The Law of War and the National Jurisdiction since 1945”, in *Academie de droit international de La Haye, Recueil Des Cours*, 1961, vol. 100, Martinus Nijhoff, Leiden, p. 332.

⁶² “The victor in a major war usually is in a position to transform his own violation of the law into widely or generally accepted rules of warfare or neutrality. The vanquished, however, in so far as a special military position led him to deviate on other points from accepted custom, is punished for his violations of the laws of war”, in Röling, 1968, p. 392, see *supra* note 61.

values and morality in confronting legal issues. We may therefore argue that the importance of Röling's experience in Asia lay not so much in his contribution to the Tokyo Tribunal but in the creation of new perspectives on international law, in particular on crimes against peace.

26.4. Going Beyond Nuremberg and Tokyo: Röling and the UN

Upon his return to the Netherlands in 1948, Röling continued his judicial and academic functions. In 1948 he was appointed professor of criminal law and criminal procedure at Groningen University, an appointment he took up in 1949.⁶³ In that same year, he was appointed to the Special Court of Cassation, the supreme Dutch authority in the matter of war crimes in Europe. When the Court completed its work in 1951, he served as the chairman of the Advisory Committee on Pardon to Political Delinquents from 1951 to 1954. Yet his interest in the study of legal relations in the international community remained. When he was offered a diplomatic position as a Dutch delegate to the UN, where he would participate in the work of the General Assembly – which was about to discuss the implementation of the principles of Nuremberg and Tokyo – Röling eagerly accepted.⁶⁴ In this capacity, Röling held an egalitarian and global outlook and defended a progressive approach to international criminal jurisdiction.

As mentioned earlier, in the Charter of the UN, the General Assembly had been given the responsibility “to initiate studies and make recommendations for promoting international co-operation in the field and encouraging the progressive development of international law and its codification”.⁶⁵ In 1947 the International Law Commission (‘ILC’) was created by the General Assembly (Resolution 174(II) of 21 November) to implement this obligation. The General Assembly was given responsibility for the election of the ILC's members, controlled its finances and proposed the topics to be considered. It also approved topics submitted by member states and international organisations and reviewed adopted draft articles. Relations between the ILC and the General

⁶³ Later Röling also accepted a chair in international law, combining the positions. When a successor was found to his criminal law chair, he continued only with international law. Röling and Cassese, 1994, p. 118, see *supra* note 17.

⁶⁴ *Ibid.*

⁶⁵ Schiff, 2008, p. 26, see *supra* note 2.

Assembly were channelled through the Sixth (Legal) Committee of the Assembly. The Sixth Committee had completed the draft of the ILC's Statute and gave detailed consideration to the ILC's annual report. The Sixth Committee was also invited to introduce the report in the General Assembly and to aid the ILC's deliberations on its contents.⁶⁶

The first elections for the ILC took place on 3 November 1948, while its first annual sessions opened on 12 April 1949.⁶⁷ The members of the ILC were chosen from candidates nominated by UN member states of the General Assembly “as persons of recognized competence in international law”, from the “main forms of civilization” and “the principal legal systems of the world”.⁶⁸ The ILC met annually for several weeks in the summer, usually in Geneva. In 1950 the ILC formulated the Nuremberg Principles, codifying the legal principles of the IMT. In addition, it was given the mandate to draft a Statute of a new international criminal court (deriving from Article VI of the Genocide Convention) and to prepare a Code of Crimes Against the Peace and Security of Mankind (‘Code of Crimes’).⁶⁹ This Code of Crimes was to “serve as the legal

⁶⁶ Jeffrey S. Morton, *The International Law Commission of the United Nations*, University of South Carolina Press, Columbia, 2000, p. 3.

⁶⁷ For a more detailed history of the ILC, see Ian Sinclair, *The International Law Commission*, Grotius, Cambridge, 1987.

⁶⁸ Schiff, 2008, p. 25, see *supra* note 2.

⁶⁹ During the drafting of the Genocide Convention, it had been the Iranian and Dutch representatives that called for the inclusion of an invitation to the ILC to study the question of an international criminal jurisdiction. The Netherlands draft resolution read as follows:

The General Assembly, Considering that the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal. Considering that in the course of development of the international community the need for trial of crimes by an international judicial organ will be more and more felt. Requests the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of individuals whether private persons or officials, charged with crimes over which jurisdiction will be conferred upon that organ by international conventions. Requests the International Law Commission in the accomplishment of that task to pay particular attention to the possibility of establishing a criminal chamber of the International Court of Justice.

framework for a proposed international criminal court, the issue of jurisdiction was therefore critically important”.⁷⁰

Notwithstanding the palpable connection between these matters of international criminal jurisdiction, scholars have often pointed to the compartmentalised way in which these projects developed, arguing that there was little interaction between them. William A. Schabas states: “Indeed, much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, almost as if the two tasks were hardly related”; and Benjamin N. Schiff notes: “the ILC’s projects to develop a criminal jurisdiction – to design a court and its procedures – and to develop a code of offenses – to define the laws that the court would enforce – flowed intermittently and in parallel, but with little interconnection, thereafter”.⁷¹

The task of formulating a draft statute for the establishment of an international criminal court was given to Special Rapporteurs Ricardo Alfaro (Panama) and Emil Sandström (Sweden),⁷² who held very different views on the establishment of an international criminal court.⁷³ While Alfaro supported the Statute for an international criminal court and a substantive international criminal code, Sandström argued that the world was not yet ready for such a court.⁷⁴ The ILC decided to follow the recommendations of Alfaro and agreed that the establishment of an international criminal court was desirable and possible. The debate on an international criminal court thus continued.

Historical Survey of the Question of International Criminal Jurisdiction: Memorandum submitted by the Secretary-General. Topic: Question of International Criminal Jurisdiction, UN Doc. A/CN.4/7/Rev.1.

⁷⁰ Morton, 2000, p. 37, see *supra* note 66.

⁷¹ Schiff, 2008, p. 27, see *supra* note 2; Schabas, 2004, p. 8, see *supra* note 1.

⁷² Sandström later became chairman of the ILC while Alfaro became Panama’s representative to the ILC.

⁷³ M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, Dordrecht, 1987, p. 4.

⁷⁴ During the examinations of the Rapporteurs’ findings in the ILC, the representative of the Netherlands in the ILC, J.P.A. Francois (1949–1961) supported the establishment of an ICC. Praeadvies betreffende International Criminal Jurisdiction (I.C.J.) en het in het leven roepen van een International Criminal Court (I.C.C.) door Prof. Mr. B.V.A. Röling (“Pre-Advice on ICJ”), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

In 1951 the Sixth Committee recommended to the General Assembly the adoption of a resolution that established a Special Committee for the purpose of drafting a convention for the establishment of an international criminal court.⁷⁵ This committee, better known as the Geneva Committee, was followed in 1953 by a second committee, labelled the New York Committee.⁷⁶

Meanwhile, the first draft Code of Crimes was submitted in 1950 by the Rapporteur Jean Spiropoulos⁷⁷ to the General Assembly, which then referred it back to the ILC for revision.⁷⁸ A second revised and more specific draft on the presumption that an international criminal court should be established by multilateral convention was then submitted to the ILC in 1951. However, the most important of the crimes included in the codification, the crime of aggression, was left undefined.⁷⁹ As the definition of aggression was inexorably linked with the draft Code of Crimes, it was clear that without a definition, the codification could not be

⁷⁵ Some ILC delegates felt the Commission had discussed the ICC *in abstracto* and they wished that the matter should be discussed anew on the basis of concrete proposals. It agreed that a committee of government representatives should consider the problem in all its aspects and, if it came to the conclusions that an international criminal court would be desirable and practical draw up the statute of such a court; *ibid.*, p. 10; See also B.V.A. Röling, “On Aggression, on International Criminal Law, on International Criminal Jurisdiction – II”, in *Netherlands International Law Review*, 1955, vol. 2, no. 3, pp. 279–89.

⁷⁶ The Dutch government was supportive of this proposal:

The Netherlands government was prepared to support the joint draft resolutions proposed by Cuba, France and Iran as amended by the UK. It agreed that a committee of government representatives should consider the problem in all its aspects and, if it came to the conclusions that an international criminal court would be desirable and practical, draw up the statute of such a court. That task would be of great importance as it would affect the willingness of states voluntarily to submit to the court's jurisdiction. The rules of such a statute should contain provision for the prevention of abuse by use of the court, as a weapon in national politics or in a cold war [...] The task was a big one, but the Netherlands government was confident that the work of the proposed committee, which would be commented on later by the governments, would contribute to the ultimate establishment of an international criminal court”.

Pre-Advice on ICJ, p. 10, see *supra* note 74.

⁷⁷ Jean Spiropoulos was the Greek representative to the ILC.

⁷⁸ Schiff, 2008, p. 25, see *supra* note 2.

⁷⁹ Bassiouni, 1987, pp. 5–6, see *supra* note 73.

established. A third track was thus developed. Another separate Committee on Defining Aggression was set up to study the question of defining aggression in 1953.⁸⁰

Röling was heavily involved in all three of these projects.⁸¹ Not only was he the Dutch representative on the Sixth Committee of the General Assembly (1949–1957), he was also the Dutch representative to the two special committees.⁸² He was also appointed to the Geneva Committee (1951) and New York Committee (1953) on international criminal jurisdiction that were established for the purpose of drafting a convention for the establishment of an international criminal court. From 1953 he served as vice-chairman of the 1953 Committee on Defining Aggression⁸³ and as Rapporteur of the 1956 session of the same Committee.⁸⁴ At the same time, Röling was an adviser to the Dutch Ministry of Foreign Affairs through his membership of the Adviescommissie inzake Volkenrechtelijke vraagstukken (Advisory Commission on International Law Issues). This Advisory Commission

⁸⁰ *Ibid.*, p. 6. See also Official Records of the General Assembly, Ninth Session, Supplement No. 11, Report of the Special Committee on the Question of Defining Aggression, 24 August to 21 September 1953, UN Doc. A/2638, pp. 1–15.

⁸¹ Röling was not the only representative who was active in several committees. Representatives of the US (George Morris, John Maktos), Syria (Tarazi), Israel (Jacob Robinson), Yugoslavia (Djuro Ninčić, Aleksandar Božović), Peru (Manuel Mautua) and Britain (Francis Vallat) were, for example, appointed to the Special Committee on Defining Aggression (1953 and 1956) as well as in the special committees on International Criminal Jurisdiction (1951 and 1953).

⁸² His colleague in Tokyo, Radhabinod Pal was later (upon the recommendation of Röling) appointed a member of the ILC.

⁸³ Whereas his viewpoints on the definition of aggression have been scrutinised in other publications, this chapter places emphasis upon Röling's less well-known ideas on international criminal justice and an international criminal court. See for example B.V.A. Röling, "On Aggression, on International Criminal Law, on International Criminal Jurisdiction – I", in *Netherlands International Law Review*, 1955, vol. 2 no. 2, pp. 167–96; Röling and Cassese, 1994, see *supra* note 17; B.V.A. Röling, "The Question of Defining Aggression", in *Symbolae verzijl: presentees au professeur J.H.W. Verzijl a l'occasion de son LXX-ieme anniversaire*, Martinus Nijhoff, The Hague, 1958; B.V.A. Röling, "The 1974 definition of Aggression", in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Martinus Nijhoff, Dordrecht, 1986, pp. 413–22.

⁸⁴ During his time at the UN, one of Röling's main interests was how to decide "which individuals could be held responsible for the crime of aggression, especially in view to the position of subordinates". His former experience at the IMTFE proved to be very influential on his ideas on the "Definition of Aggression". Röling, 1955, see *supra* note 83.

was an independent council for the Dutch government and parliament and gave recommendations on questions of international law.⁸⁵

Although the delegates to the ILC and Special Committees considered themselves legal experts instead of government representatives, the lines between “representative” and “expert” were often blurred.⁸⁶ For example, before he took up his position on the Geneva Committee (officially as a government representative), Röling received a one-page instruction from the Dutch government.⁸⁷ It was, however, Röling himself who had earlier drafted the pre-advice upon which these instructions were based.⁸⁸

26.5. Röling, the Committee on International Criminal Jurisdiction and the International Criminal Court

To have or to have not an International Criminal Court, in view of all the preparatory work done is less a question of the brains, than a question of the heart.⁸⁹

It is important to keep in mind that the deliberations on the development of international law took place during the early years of the Cold War, with political tensions heavily influencing the outcome of the discussions. While Sandström and Alfaro had already expressed different opinions on the possibility of establishing an international criminal court, consensus amongst the world’s major powers could also not be reached. The Soviet

⁸⁵ Although the members of the Advisory Commission had different opinions about the creation of an international criminal court, they remained unanimous in support of one. The Advisory Commission argued that there was a proven need for an international criminal tribunal and believed that the development of international criminal law would greatly benefit from a standing impartial judicial body. Concept rapport inzake de oprichting van een internationaal strafgerechtshof, 1 September 1954, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

⁸⁶ “We considered ourselves rather a Committee of experts than a Committee of Government representatives; in view of all the technical problems we had to face, it hardly could be done otherwise”. Röling, 1955, p. 282, see *supra* note 75.

⁸⁷ Instructie voor de Nederlandse vertegenwoordiger in het “Committee on International Criminal Jurisdiction” hetwelk te Genève zal bijeenkomen op 1 Augustus 1953 (“Instruction for Dutch Representative”), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

⁸⁸ Pre-Advice on ICJ, see *supra* note 74.

⁸⁹ Statement by Röling in the Sixth Committee 23 November 1954 (“Röling Statement”, 23 November) p. 4, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61 (NAN).

Union was opposed to the concept of sovereignty and refused to take its seat in the ILC, the US declared that the formulation of an international criminal court statute was neither possible nor opportune at the present time, and Britain declared that they “were not yet ready for such an important and ultimately highly desirable development in world affairs”.⁹⁰ The Netherlands’ government, however, was and remained supportive of the immediate establishment of an international criminal court, even declaring it unnecessary to wait until the draft Code on Crimes had been adopted.⁹¹

Before Röling was appointed as a member of the Special Committee, he had expressed his thoughts on an international criminal court in the UN’s Sixth Committee in 1950.⁹² Even though he felt that international crimes as such were recognised, he was not sure if the creation of an international criminal court automatically followed the concept of international crimes. He believed that even without an international criminal court the recognition of those crimes was the main achievement, as international law could still be a significant support for law-abiding governments in national courts. The adoption of the Code of Offences Against the Peace and Security of Mankind before the establishment of an international criminal court was therefore not necessary in his eyes.⁹³

⁹⁰ M. Cherif Bassiouni, *Introduction to International Criminal Law*, Koninklijke Brill, Leiden, 2013, pp. 580–81 and Rapport I van het werk van Genève Commissie (“Report I”), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, pp. 2–3 (NAN).

⁹¹ Instruction for Dutch Representative, see *supra* note 87.

⁹² During these early deliberations it becomes clear that Röling’s experience as a judge in Tokyo influenced his thinking on an international criminal court. When addressing the question should the international criminal court be established as a UN body, some ILC members had proposed to establish an international criminal court as a new chamber of the International Court of Justice. The Dutch representative to the ILC had opposed this proposal arguing that magistrates of the International Court of Justice lacked the necessary experience in criminal law. According to Röling, this argument did not hold; in Nuremberg and Tokyo both the prosecutor and judges lacked international law experience. As a result national legal principles were simply transplanted on international law, diminishing the authority of the Tribunals. In his view, it would be better if international law experts were assisted by criminal law experts than the other way around. Pre-Advice on ICJ, p. 12, see *supra* note 74.

⁹³ *Ibid.*, p. 11.

Yet the value of an international criminal court without a legal framework would be incomplete, as the greatest significance of international criminal law “lay in its applicability to the members of the very governments which had violated it, since they could not be prosecuted under national law”. According to Röling, the important question was “whether the institution of an international criminal court would lead to practical results”, keeping in mind that it would have to operate under two different situations: in times of peace and in times of war. The role of an international criminal court in times of war would be easy: “the vanquished would be available for trial and a permanent international criminal court could guarantee objectivity and fairness, could avoid the pitfalls with which any *ad hoc* tribunal would be faced and could establish customs and traditions”.⁹⁴

Hence, Röling argued that “the questions of an international criminal court should be considered in the first place with regard to times of peace as an instrument to prevent war and with regard to crimes committed during small-scale hostilities”. He felt that it was more difficult to decide upon the functions of an international criminal court in times of peace as peacetime crimes, such as genocide or the planning and preparation of a war of aggression, were rarely committed by individuals or groups of individuals without the consent or approval or complicity of their government.

The crucial point was whether in such a case the sovereign states concerned would be prepared to submit their national or international policy to the judgment of an international body which would apply to those policies the rules of international law which were so often valued.⁹⁵

Such obvious political aspects had earlier not been taken into consideration by the ILC, but Röling argued that these aspects belonged to reality and jurists had to face them when formulating rules of law. He stated:

⁹⁴ *Ibid.* As a former judge in an international court Röling might have had a better understanding of the inherent shortcomings of international *ad hoc* courts. Statement by Prof. BVA Röling in the Sixth Committee on 25 November 1954 (“Röling Statement”, 25 November), Collection 544 B.V.A. Röling, 1915-1985, access no. 2.21.273, inventory no. 61, p. 2 (NAN).

⁹⁵ Pre-Advice on ICJ, p. 9, see *supra* note 74.

At the present time, mutual accusations were very frequent. The agenda of the current session contained a number of accusations brought by certain members' states against others. He doubted whether in the current tense international situation sovereign states would be prepared to submit the members of their governments, in connexion with those accusations, to trial by an international criminal court which, if it found them guilty, would sentence them for crimes against peace or humanity.⁹⁶

Röling thus expressed his doubt whether states caught up in the tense international relations of that time would be prepared to submit members of their government to an international criminal court.⁹⁷ He argued that “an international criminal court of worldwide compulsory jurisdiction could only be thought of in terms of the very distant future” and that for the moment only voluntarily accepted jurisdiction could be secured.⁹⁸ It therefore seemed impossible to establish an international criminal court as a UN principal organ (which required an amendment of the Charter). He proposed the following solution: the criminal court would be established as a “subsidiary organ” of the UN. This would imply that states could voluntarily accept criminal jurisdiction by treaty. As a result, criminal jurisdiction would only apply in respect of certain offences and for certain states.

Another option put forward by Röling, was the development of international criminal jurisdiction on a regional basis, i.e. through the Arab League, the Soviet Bloc, the Organization of American States and the Western European Union. While the scope of these organisations would be more limited than that of the UN, the relations among their member states were believed to be closer, and there was also a greater community of interest, mutual trust and understanding. These regional criminal courts could in turn pave the way for a future worldwide criminal court.⁹⁹

⁹⁶ *Ibid.*, p. 1.

⁹⁷ “The vagueness of international law, not only the content but also the legal intensity of its rules, makes that international law is too easily used for political expediency. One can safely assume that ICJ will only be accepted between certain states, and only with respect to certain offenses”. *Ibid.*, p. 13.

⁹⁸ *Ibid.*, p. 8, see *supra* note 74.

⁹⁹ *Ibid.*, pp. 9–10.

It was these arguments and views on an international criminal court that Röling vigorously defended in the Geneva Committee.¹⁰⁰ When the Committee convened in August 1951 it was decided to discuss the preliminary draft article by article, as to determine the jurisdiction of an international criminal court. The Dutch, French and Israeli side preferred a discussion on the fundamental issues instead and protested against this solution. They argued that the logical sequence of discussion would be:

- 1) determination of the function of an international criminal court;
- 2) determination of the body that would perform this function;
- 3) determination of the manner in which this body was to be created.¹⁰¹

Their proposal was, however, rejected and as a result the subsequent discussions within the Committee were difficult and unstructured. It soon became clear to the members of the Geneva Committee that certain aspects needed to be studied in a more organised manner.¹⁰² A drafting committee was therefore established of which Röling was made chairman, its other members being the American, Danish, French and Israeli delegates.¹⁰³

In the words of M. Cherif Bassiouni, “the discussions and written comments [of the Geneva Committee], particularly those of major powers, clearly indicated that the project had no chance of acceptance and was politically premature”.¹⁰⁴ On 31 August 1951 the Geneva Committee completed its report, containing the draft Statute of the international criminal court. In the report it was stated that the Statute of the

¹⁰⁰ The Geneva Committee consisted of 17 members representing Australia, Brazil, China, Cuba, Denmark, Egypt, France, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom, the US and Uruguay; India was originally part of the Committee but later stepped down as it had not been able to find a suitable representative. According to Röling, political motivations lay behind its absence as he knew that Radhabinod Pal had been willing to represent India in the Committee but had not been asked. Report I, see *supra* note 90.

¹⁰¹ *Ibid.*, p. 2.

¹⁰² Eindrapport (“Final Report”), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 1 (NAN).

¹⁰³ Rapport II van het werk van het Genève Committee (Report II), Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 2 (NAN).

¹⁰⁴ Bassiouni, 1987, p. 581, see *supra* note 90.

international criminal court would hold no obligation for the founding members. The intent of the Statute was only the creation of an international criminal court. It was left to subsequent conventions to dedicate its jurisdiction.¹⁰⁵ The report was subsequently submitted to the member states of the UN in order that they might comment on the proposed text.¹⁰⁶ As expected, many were still unwilling to surrender any portion of their national sovereignty to an international criminal court. The Dutch government nonetheless kept supporting the proposed permanent international criminal court while the major powers, although not rejecting the project altogether, were more reluctant.¹⁰⁷ However, as no state wanted to assume political responsibility for the demise of such a court, a second special New York Committee was established. This Committee had to re-examine the Geneva draft while taking into account the comments of the member states.¹⁰⁸ The composition of the New York Committee deviated from that of the first, although five of the previous representatives retained their seats. Röling became its Rapporteur.

26.6. The New York Committee¹⁰⁹

Whereas the fruits of the work of the Geneva Committee had more or less contributed to the study of international criminal jurisdiction, discussing the principal problems deriving from such a jurisdiction, the New York Committee believed enough study had been done.¹¹⁰ It wanted to take

¹⁰⁵ Final Report, p. 1, see *supra* note 102.

¹⁰⁶ *Ibid.*

¹⁰⁷ “The government would welcome the establishment of the court to be coupled with the codification of international criminal law. The government – being of the opinion that international criminal jurisdiction must be founded on the international sense of justice, consider that the court should not be established by a limited number of states, as proposed by the Committee on International Criminal Jurisdiction, but by resolution of the general assembly of the UN. Court as a subsidiary organ of the General assembly”. Observations by the Netherlands Government on the draft Statute for an International Criminal Court, framed by the Committee on International Criminal Jurisdiction which met at Geneva from 1st to 31st August 1951 (A/AC.48/4) Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79 (NAN).

¹⁰⁸ Bassiouni, 1987, p. 581, see *supra* note 90.

¹⁰⁹ Röling Statement, 25 November, see *supra* note 94.

¹¹⁰ 1953 Special Committee on International Criminal Justice: Argentina: Mr. Fernando Olano, Mr. Raul Laurel; Australia: Mr. Allen Loomes; Belgium: Mr. J. Dautricourt; China: Mr. Hua-Cheng Wang; Denmark: Mr. Birger Dons-Moeller; Egypt: Mr. Yehia Sami; France: Marcel Merle; Israel: Mr. Jacob Robinson, Mr. David Marmor; Netherlands:

things further.¹¹¹ The objectives of the committee were established as follows:

- 1) Consideration of the implications and consequences of establishing an international criminal court.
- 2) Methods by which an international criminal court might be established.
- 3) Relationship between an international criminal court and the UN and its organs.
- 4) Re-examination of the Geneva Statute.
- 5) Further considerations on the implications and consequences of establishing an international criminal court.
- 6) Adoption of the report of the Committee.¹¹²

The New York Committee entered into discussions of numerous details, such as “the number of judges, the organization of the Court, special authorities, as the Committing Chamber, the prosecuting authority, the board of clemency and parole, and lastly the procedure before the Court”.¹¹³ However, the most important question under consideration remained in Röling’s words:

Do we want an International Criminal Court now; do we consider it *possible* (in view of the present world relations) and *desirable* (in the sense that in the present time the advantages would surpass the disadvantages), to establish an International Criminal Court? It was recognized by many members of the Committee that at the present time an International Criminal Court could not be but an imperfect Court. In their view, it was useless and even dangerous to create a Court of inferior quality. They thought it was better to have no International Criminal Court than a second rate one. Other members maintained International Criminal

Röling; Panama: Mr. Ernesto de la Ossa; Peru: Mr. Manuel Mautua; Philippines: Mr. Mauro Mendez; UK: Mr. Francis Vallat; USA: Mr. George Morris, Mr. John Maktos; Venezuela: Mr. Victor Perez-Perozo; Yugoslavia: Mr. Djuro Ninčić, Mr. Aleksandar Božović. Draft Report of the 1953 Committee on International Criminal Jurisdiction (“Draft Report”), A/AC 65/L.12, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 75 (NAN).

¹¹¹ Röling, 1955, p. 281, see *supra* note 75.

¹¹² Draft Report, p. 11, see *supra* note 110.

¹¹³ Röling, 1955, p. 281, see *supra* note 75.

Jurisdiction, on the basis of a very modest beginning, should be given a chance to grow. It was better to create a Court with imperfect powers and limited competence, than to create none at all.¹¹⁴

Like he had done in the 1951 special Geneva Committee, Röling once again defended the establishment of an international criminal court in this New York Committee. Emphasising the growing (political) interdependence in the world, he criticised those governments who rejected the establishment of international criminal jurisdiction on the basis of its interference with state sovereignty.

Now one can think of many attitudes as to this concept of absolute state sovereignty. On the one hand there are the states which still consider absolute state sovereignty the key stone of International Relations. But still those states have to recognize that the right to go to war, in former centuries considered the essence of sovereignty, does not longer exist; that state sovereignty consequently is limited by international law; that it is within the sovereign rights of a state to cooperate in creating international law, limiting this very state sovereignty.¹¹⁵

According to Röling the outcome of the IMTs in Nuremberg and Tokyo had thus limited state sovereignty. From this point on, states should realise that the nation state was no longer the primary unit and that the growing interdependence in the world would lead to the development of a global legal morality.

There has grown an interdependence between the states of this world which tends to create common opinions about that is harmful to this world, and which creates such strong feelings about such things considered harmful that the concept of international criminality and of international punishment is bound to develop. In that interdependent world no longer is valid 'right or wrong my country'. In that interdependent world exists the strong opinion about common evil that should be repressed where and by whom

¹¹⁴ *Ibid.*

¹¹⁵ Rede van de vertegenwoordiger van Nederland in de commissie voor een Internationaal strafgerechtshof op 28 juli 1953 [Speech of Representative of Netherlands Commission, 28 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 1 (NAN).

perpetrated. It is this opinion which is the most important factor in the process of establishing international criminal jurisdiction.¹¹⁶

Connected with the development of this global morality were the recognition of the individual in international law and the establishment of individual criminal responsibility in Nuremberg and Tokyo. In Röling's eyes individuals no longer had duties to national states but to the whole of mankind.

International Law during WWII and thereafter has turned to the individual. It is one of the most important trends of modern law, this recognition of the individual. First of all recognition of his rights: universal human rights, the shape and content of which may be debated, the existence of which cannot be denied. Complimentary to those rights: the duties, the duties of the individual towards, not his state, but towards mankind.¹¹⁷

Confidence in this common moral standard was consequently needed to establish a functioning international criminal court. He acknowledged that this confidence was lacking "here and there" but denied "that at the present moment nowhere sufficient confidence could be found to build upon it international criminal jurisdiction".¹¹⁸ When lobbying for the international criminal court he pointed as an example to the success of the European Coal and Steel Community, binding together six states, where a high authority executed international jurisdiction over individuals from these six states. "Here on a regional basis, and in a limited field of economic activity, international criminal jurisdiction has been realised. I give it as an example to those who maintain that international criminal jurisdiction is unrealistic".¹¹⁹

In Röling's view, international criminal jurisdiction not only derived from a common moral standard; it would also strengthen this standard at the same time and serve more or less as a tool to set global standards.

I submit to you that the main purpose of punishment is the maintenance of order by the factual denunciation of the evil criminal deed. It implies the public demonstration that the

¹¹⁶ *Ibid.*, p. 1.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, p. 2.

¹¹⁹ *Ibid.*

act is an evil act, and the punishment expresses how evil the act is considered to be. This demonstration assists the community in maintaining and strengthening its convictions about good and evil. Consequently the real significance of punishment is the strengthening of moral value.¹²⁰

He even drew a picture of this global morality, when he argued for its main features:

Policy of good neighbourship, respect for others, recognition of everyone's right to exist- they are all the expression of the application of the concepts of common morality on international activities. Punishment of the international crime is but the consequence of this attitude.¹²¹

International criminal jurisdiction could fortify the public's opinion about what should and what should not be done, while promoting peace and human well-being. With the establishment of a general opinion about what was to be considered a common evil (found in the principles of Nuremberg and the Genocide Convention) and sufficient confidence in supranational organs that could be entrusted with the task of suppressing that evil, Röling argued that the time had come to provide international judicial action against individuals.

Despite all this, Röling considered the maintenance of peace, especially in an age of nuclear power, the most important function of international justice. He was well aware of the fact that peace could not always be established by the maintenance of rigid international justice and believed that sometimes the principle of "opportunity" should prevail over the principle of "legality".¹²² According to Röling, it was therefore necessary that in international criminal jurisdiction the power of specific political organs (the Security Council, General Assembly or any other organ of the UN) should be recognised to prevent the prosecution of cases as matters of high policy.¹²³

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, p. 3.

¹²² "Do not misunderstand me. The disqualification of aggression as a crime will not prevent all aggression, as the prohibition of murder does not prevent all murder. But this general disqualification as a crime makes it more difficult for a government to get support for an aggressive policy. However there is a danger in the existence of strong moral feelings in IR [...] The idea of the necessity of a crusade against every existing evil may develop".
Ibid.

¹²³ *Ibid.*

Our whole UN organization is set up for the maintenance of peace as its primary function. It may be easily understood that the rigid maintenance of justice could interfere with this primary function of the maintenance of peace. To punish someone as a criminal aggressor might prevent international settlement of an international conflict, and as such might do more harm than good [...] It will therefore be necessary to provide for the possibility of disregarding in exceptional cases the rules of justice for the sake of the maintenance of peace.¹²⁴

For these reasons, and the fact that he believed that the ties between the international criminal court and the UN should be made stronger than previously envisaged in the draft Geneva Statute, Röling once more defended the creation of an international criminal court by a General Assembly resolution, depending upon states' inclination to grant it jurisdiction for specific crimes.¹²⁵ According to him, the "creation of the court by UN resolution would ensure to international criminal jurisdiction the world-wide approach, would establish a court with United Nations authority, would justify the United Nations nomination of judges and would establish relations between the Court's activity and other United Nations activity".¹²⁶ The fact that the establishment of an international criminal court by resolution would lead to a more global framework was also decisive in Röling's decision to vote against a court by multilateral convention. He stated:

The great advantage of this method is that by creating the court the gates are thrown open to the new fields of international cooperation and any state may decide for himself how far he will go into this new territory. It may be that some states are only willing to grant jurisdiction for specific crimes [...] Rather than the convention which aims

¹²⁴ *Ibid.*

¹²⁵ By a vote of eight to two, with three abstentions, the members of the 1953 committee favoured the founding of an ICC by convention prepared by an international diplomatic conference under the auspices of the UN. Röling strongly disagreed. Draft Report, pp. 26–27, see *supra* note 110.

¹²⁶ Rede van de vertegenwoordiger van Nederland in de commissie voor een Internationaal strafgerechtshof op 30 juli 1953 [Speech of Representative of Netherlands Commission, 30 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 1 (NAN).

at a full-fledged International Criminal Justice – and which would run the risk of not being concluded at all – this method creates the possibility of realising international Criminal Justice in a variety of degrees fitting well the different relations between the present states.¹²⁷

Elsewhere Röling noted:

[I]t will be more important since the judges will represent the various legal systems of the world, a representation that cannot be expected in case the court is established by multilateral convention concluded amongst a relatively small number of states.¹²⁸

In the end the New York Committee revised the 1951 Statute so as to make it more acceptable for a larger number of states. However, no agreement could be reached by the members of the New York Committee “on the questions of possibility, practicability and desirability of the creation of an organized international criminal jurisdiction”.¹²⁹ What was

¹²⁷ *Ibid.*, p. 1.

¹²⁸ *Ibid.*, p. 3, see also Rede van de vertegenwoordiger van Nederland in de Commissie voor een Internationaal strafrechtshof op 31 juli 1953 [Speech of Representative of Netherlands Commission, 31 July 1953], Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 61, p. 2 (NAN).

¹²⁹ Röling expressed limited understanding for the position of the US:

During the discussion of our former agenda item I tried to show that the law of Nuremberg amounted to a revolution and that the danger did exist that this resolution would be betrayed by the United Nations. The statement of the distinguished representative from the United States confirmed the reality of this danger. This statement “that the formulation of a draft-code of offences against the peace and security of mankind was neither possible nor opportune at the present time on account of the differences of view separating governments, particularly with regard to the extent of their obligations under international law and the possible criminal liability of their nationals” affirmed my fear. It is, however, an ambiguous statement. What “difference of views” are meant? In case it is differences of views as to the content of existing international “criminal law”, the argument would be incorrect. Many of us agreed: a codification should not go beyond the affirmed principles, the recognized law of Nuremberg. The more doubts exist as to the international obligations, arising from the law of Nuremberg, the more reasons exist to take away that doubt by clear codification. Therefore it might seem that other ‘differences of views’ were meant, if the differences of views we casually call the cold war, and that the words of the United States delegation might signify; “There is no room for the law of Nuremberg during a Cold

agreed was “that on the basis of the preparatory studies made by the General Assembly and both the Special Committees the moment had come for the General Assembly to decide what, if any, further steps should be taken toward the establishment of an international criminal court”.¹³⁰ The 1953 revisions were submitted to the General Assembly’s first 1954 session, at which it found that it had to consider the work of the ILC concerning the Code of Crimes first.

The General Assembly thus created a link between the two projects and stalled the international criminal court project until the draft Code of Crimes project could be considered.¹³¹ This draft Code of Crimes was completed and submitted to the General Assembly the same year.¹³² The two committees on aggression however had not been able to define the term, as the issue was fraught with political considerations. The project of an international criminal court thus came to a standstill, as the General Assembly in 1954 decided to suspend consideration of the draft pending completion of the definition of aggression.¹³³ Röling strongly protested against the shelving of the definition.¹³⁴

In my protest I considered inaction on those issues a betrayal of the principles of Nuremberg and Tokyo, which were applied with the understanding that they would be universally valid. Furthermore, I argued that in a time of Cold War the world was more than ever in need of provisions which might diminish the chances of war. Well, it was all a bit Quixotic. The resolution to shelve the item was adopted, with one vote against, from the Netherlands.¹³⁵

War”. I hope this interpretation is incorrect. If it is not incorrect, I simply cannot understand this attitude of a nation which is great and strong and which acts with a good conscience.

Röling Statement, 25 November, see *supra* note 94.

¹³⁰ Bassiouni, 1987, p. 7, see *supra* note 73; Röling, 1955, pp. 281–82, see *supra* note 75.

¹³¹ Bassiouni, 1987, p. 7, see *supra* note 73.

¹³² Schabas, 2004, p. 9, see *supra* note 1.

¹³³ Morton, 2000, p. 44, see *supra* note 66. See also Resolution 898 (IX) International Criminal Jurisdiction, 14 December 1954.

¹³⁴ Draft Report, see *supra* note 110.

¹³⁵ Röling and Cassese, 1994, p. 104, see *supra* note 17. See also Nederlandse Delegatie naar de Twaalfde Algemene Vergadering der Verenigde Naties, Commissie VI (Legal) agendapunt 56; Internationaal Strafgerechtshof, Collection 544 B.V.A. Röling, 1915–1985, access no. 2.21.273, inventory no. 79, p. 2 (NAN).

In the end, none of the three special committees established in the 1950s reached agreement on a definition. It required the establishment of a fourth Special Committee in 1967 and 16 more years before a definition of aggression was finally adopted by the General Assembly in 1974.¹³⁶

The work on an international criminal court, however, did not resume until 1994 when the General Assembly decided to pursue its establishment once more.¹³⁷ In the following years, the ILC draft was heavily revised by several *ad hoc* committees, a Preparatory Committee and during informal meetings. During the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ('ICC') that convened in 1998 in Rome, the Statute of the ICC was finally adopted.¹³⁸

26.7. Conclusion

As we have seen in the case of B.V.A. Röling, the experience of the Tokyo Trial shaped the ideas of its judges, their approach to international law and their contribution to the emergence of modern international criminal jurisdiction in post-IMTFE international law efforts. For Röling, the establishment of an international criminal court was a logical result of the recognition of international criminal law, as designated by the Judgments at Nuremberg and Tokyo. The IMTs had made international law “applicable to the members of the very governments which had violated it” and an international criminal court would be necessary to try these new crimes, since they could not be prosecuted under national law.

Röling's involvement with international criminal jurisdiction in the IMTFE also endowed him with more sensitivity towards global values and morality in legal issues.¹³⁹ His experience in Tokyo, as well as his

¹³⁶ The Committees were created by Resolution 688 (VII) of 20 December 1952, Resolution 895 (IX) of 4 December 1954, Resolution 1181 (XII) of 29 November 1957 and Resolution 2330 (XXII) of 18 December 1967.

¹³⁷ The ILC recuperated its work on the Draft Code in 1981 when Doudou Thiam was appointed Special Rapporteur of the Commission. Thiam produced annual reports on various aspects of the Draft Code, addressing a range of questions “including definitions of crimes, criminal participation, defences and penalties”. The Commission adopted a revised version of the 1954 Draft Code in 1991, which was subsequently sent to the member states. Schabas, 2004, pp. 8–9, see *supra* note 1.

¹³⁸ *Ibid.*, pp. 8–9, see *supra* note 1.

¹³⁹ B.V.A. Röling, *International Law in an Expanded World*, Djambatan, Amsterdam, 1960, p. 21.

activities at the UN, also left him with the belief that a “law of nations” should be established to provide the foundation for peace and security.¹⁴⁰ In Geneva and New York he was, however, confronted with the fact that the world was not ready for the establishment of modern international law, as nationalist interests and the “contextual” problems surrounding legal issues prevailed. As a result, Röling developed an approach to law in which he tried to establish a balance between the realities of international politics and a progressive development of international law.

Although Röling’s attempts in the 1950s to found an international criminal court did not culminate in a permanent court, it was the considerations made during this period that eventually led to an evolution of the legal system as laid down in the 1998 ICC Statute the constitution of the ICC itself at The Hague in 2002. Röling, when looking back to his engagement, stated with some scepticism:

I discovered there that if you want to participate in the progressive development of international law, especially in the field of war and peace, you need more knowledge of societal forces, power relations, prevailing interests, existing values. You cannot just propose what you think is nice for the world. You have to evaluate ends and means. You have to know what has a change of succeeding or under what conditions it can succeed. Therefore, I came to the conclusion that it was necessary to know more about the causes of war and the condition of peace.¹⁴¹

In his later career, Röling argued that to overcome this pervasiveness of state sovereignty – in order to establish international criminal jurisdiction and its centralised organs for its enforcement – a “genuine world law” had to be developed. One had to take a global outlook, “that conceives of international law as a means of guiding and orienting international relations towards the good of the whole”.¹⁴² This law of nations would require a considerable extension of international law and would have to be created to the principle of “one world”. In his book, *International Law*

¹⁴⁰ *Ibid.*, p. x.

¹⁴¹ Röling started the preparations for the establishment of a peace research institute at his university in the late 1950s. In 1962 the establishment of the Polemological Institute was authorised by the University of Groningen and it was formally set up. Röling and Cassese, 1994, p. 118, see *supra* note 17.

¹⁴² *Ibid.*, p. 137.

in an Expanded World (1960) Röling summarised this point in suggesting that “the vision of international law being essentially European must be radically replaced by the view of international law as a body of legal rules functioning at the world level, and for the entire world community”.¹⁴³ Not until the main forms of civilisation and the principal legal systems of the world were represented in international law could a general principle of law be recognised. According to Röling, inequality and inadequate representation of nations had significance for the progressive development and application of international law. He stated:

uncertainty about the manner in which international custom and the “general principles of law as recognized by civilized nations” will be applied might be one of the reasons the new nations hesitate to submit their disputes to the ICC. A factor in this unwillingness is, without any doubt, the inadequate representation of the main forms of civilization.¹⁴⁴

As long as the machinery and content of international law were not able to serve the well-being of all the members of the legal community international law “would be miserable”.¹⁴⁵

It can be argued that Röling with his ideas on a “world law” and “global legal standards” was ahead of his time. The former Dutch wartime Prime Minister Pieter Sjoerds Gerbrandy, for example, declared in 1956 that he “seriously wondered how a Mohammedan, or a Hindu, could grasp what the essence of aggression was; such a statement, he maintained, could only be given by States with a Christian culture”. It comes therefore as no surprise that Röling’s position got him into conflict with his own government. When he was deployed at the UN and issued a book in 1957 on the need to withdraw from the last remaining colony of Netherlands New Guinea, he was dismissed by the Dutch government as a UN envoy in 1958 and returned to academic life.¹⁴⁶ We may conclude that from the government’s perspective, the transnational jurist had developed a rather inconvenient attitude during his Asian experience, which made the official position seem outdated.

¹⁴³ Cassese, 2010, p. 1146 see *supra* note 60.

¹⁴⁴ Röling, 1960, pp. 74–76, see *supra* note 139.

¹⁴⁵ Röling and Cassese, 1994, p. 133, see *supra* note 17.

¹⁴⁶ *Ibid.*, pp. 8–9.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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