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Dissent at Tokyo: The Opinion of Justice Henri Bernard at the International Military Tribunal for the Far East

David Cohen*

It is one of the striking features of the scholarship on the trial of major Japanese war criminals before the International Military Tribunal for the Far East ('IMTFE') that there has been so little scholarly analysis of the separate opinions published alongside the majority judgment. To be sure reference is often made to the fact that there were five dissenting and concurring opinions promulgated alongside that of the majority of seven judges (out of 11) that produced the final judgment of the tribunal. The most famous (or infamous) of these five opinions is that of the Judge Radhabinod Pal of India who announced before the trial began that he would dissent and, true to his word, produced a thousand-page dissenting opinion that bears more similarity to a political tract than to a judicial document. Pal was elevated to the status of a heroic figure in post-war Japan and second place was accorded to Judge B.V.A. Röling of the Netherlands who was lauded for having argued in his dissenting opinion that five of the accused, and most notably former foreign ministers Hirota Kōki and Shigemitsu Mamoru, should have been acquitted. Critics of the Tokyo Trial who take Röling as one of their champions tend to overlook that, while dissenting on these five defendants, Röling agreed with the majority that all the others should have been convicted and nine of them

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sentenced to death. While much is made of these two dissenting opinions their legal content has rarely been seriously analysed. They are viewed more from the standpoint of the result they reached than the legal justifications for those results.

There was, of course, a third dissenting opinion, that of Justice Henri Bernard of France. From a jurisprudential standpoint it is at least as interesting as those of Röling and Pal but has been largely neglected. This is likely due to the fact that it does not provide ammunition for the critics of the tribunal in the way that the opinions of Pal and Röling are felt to. The two other separate opinions, those of the Australian Justice Sir William F. Webb, the president of the tribunal, and of Judge Delfin J. Jaranilla of the Philippines, are also rarely accorded serious attention. Even more neglected is the most interesting of all the separate opinions, which is the massive unpublished opinion of Webb, which he had hoped to be the majority judgment, but which was not accepted as such by enough of his colleagues. Webb decided, for reasons that go beyond the scope of this chapter, to submit a vastly shorter version of his separate opinion and to withdraw the more than 600-page draft he had prepared.

An assessment of the Tokyo Trial, and particularly of how the tribunal reached its final decision, demands that proper attention be paid to the legal content of the majority judgment and of all the separate opinions. Aside from the political polemics that have too often obscured the legal issues at stake in the proceedings, the Tokyo Trial was a judicial process to determine the guilt or innocence of 25 individuals accused of the most serious international crimes. It was the obligation of the tribunal to reach a verdict on each of these individuals and it is on the basis of how they justified those verdicts, as well as the fairness of the trial process as measured by international fair trial standards, that the performance of the judges must be assessed. Under international fair trial standards and due process, as well as under fundamental principles of judicial ethics, it was the duty of the IMTFE to provide a reasoned account of how it reached its decisions on each of the accused individuals based upon a careful analysis and weighing of the evidence presented by the prosecution and the defence, leading to factual findings on all of the elements of all of the charges. It is also the obligation of a reasoned final decision to clearly articulate the applicable legal standards and explain how these standards were applied to the factual findings so as to reach ultimate decisions of guilt or innocence.

As noted above, the majority judgment has seldom been analysed according to such criteria. Likewise, the legal content of the separate opinions has been significantly neglected. This chapter examines the separate opinion of Justice Bernard because of all the separate opinions it has received the least attention. At the same time, the opinion of Bernard sheds light on internal differences among the judges as to some of the most fundamental jurisprudential issues before the court. It also reveals the way in which the legal culture of these 11 judges from such disparate backgrounds shaped the way they viewed such issues. While Bernard's separate opinion may not have had the political impact as those of Pal and Röling, it is striking that it did not. For the thrust of Bernard's objection to the proceedings at the IMTFE is that the Japanese emperor was not also on trial. This uncomfortable fact for many Japanese critics of the trial may explain why Bernard has received so much less attention than Röling and Pal. The grounds of this neglect are also interesting because Bernard's opinion is in some ways similar to those of Pal and Röling in offering an alternative account of the basis of international law and the conceptual and philosophical foundations of the very idea of international justice. For this reason alone it should compel our attention.

At the outset of his opinion Bernard rejects the defence and Pal arguments on the legitimacy of the tribunal. He states that the Allied nations were, by virtue of the criminal nature of the war waged by Japan, "perfectly qualified to create the International Military Tribunal for the Far East". He also finds that the charge of "victors' justice" is without merit because 1) the Allies created a tribunal and turned the accused over to them; 2) there was no alternative mechanism because of the lack of an international authority; and 3) the Allies provided the procedural basis for a fair trial. He concludes his discussion of the issue of the legitimacy of the IMTFE by saying that failure to create such a court "would have deprived the world of a verdict, the necessity of which is universally felt".[1] It is small wonder that critics of the tribunal prefer to focus on Pal and generally ignore the salient points made by Bernard which discredit him. This is also the case because, as will appear, the central thrust of Ber-

[1] Henri Bernard, "The Dissenting Opinion of the Member for France", in Robert Cryer and Neil Boister (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgment*, Oxford University Press, Oxford, 2008, p. 665.

nard's objections to the outcome of the tribunal's proceedings is that Emperor Hirohito was not the principal defendant.

Bernard, like Webb in his unpublished judgment, criticises the position taken by the majority on conspiracy. He finds that the majority erred in dismissing the counts of the indictment on planning and preparation of aggressive war on the grounds that findings of guilt on conspiracy subsume the other modes of liability. On Bernard's view, "planning and preparation are more serious matters than the mere conspiracy; consequently they must be taken into consideration by the Tribunal and should be taken as the basis for conviction if found established".[2] Bernard's view seems to proceed from the position that sole reliance on the vague notion of conspiracy obscures the nature of the accused's individual participation in the crimes of which they have been found guilty. When he states that planning and preparation are "more serious" than "mere" conspiracy he points to the different gravity that may be attached to different modes of liability.

His argument, though not articulated in detail, seems to be that subsuming all accused in a grand conspiracy, and at the same time refraining from making specific findings on counts of the indictment that charge specific modes of conduct by which crimes were perpetrated, makes it difficult to fairly assess the culpability of individual accused. Such culpability should, of course, be based upon factual findings that establish the role of each individual in planning, perpetrating, instigating, waging and so on. The majority's conspiracy theory obscures this. Bernard is indeed correct that taking part in the actual planning and preparation of an aggressive war is more serious than merely being part of a group that has agreed that Japan should wage such a war. Such differential roles should be reflected in sentencing and should be based upon factual findings that support the conclusions about the culpability of each accused. In this regard, as argued above, the majority judgment is sorely deficient.

A major thrust of Bernard's judgment, and one of its most interesting aspects, bears not upon the findings of guilt or innocence, but upon the majority's position on the foundation of the law of the tribunal. According to Bernard, the majority position is that objections made by the defence to the jurisdiction of the tribunal (and echoed by Pal) must be re-

[2] *Ibid*., p. 666.

jected because "the law of the Charter is decisive and binding".[3] These objections include that aggressive war is not illegal, that there is no individual responsibility for war, and that the IMTFE Charter is *ex post facto* legislation and thus itself illegal.

The majority judgment addresses objections to the legitimacy and jurisdiction of the tribunal through a lengthy citation of the Nuremberg judgment which bases the binding nature of the Charter on the "sovereign legislative power" of the victorious Allies to whom Germany unconditionally surrendered. Although Bernard, as indicated above, recognises the right of the Allies to convene such a tribunal, he nonetheless believes that there is a foundation for what he calls the "substantive law" of the tribunal that transcends such "legislative" authority.[4] Bernard, in articulating this view, goes beyond the Nuremberg judgment's discussion of the evolution of international law in the first half of the twentieth century as the basis for the criminalisation of aggressive war. Implicitly rejecting this justification rooted in legal positivism he invokes another, and on his view higher, source of law.

The Nuremberg judgment went beyond the statement of the binding nature of the Charter and elaborated at some length upon the justification for establishing aggressive war as a crime. It explained this manner of proceeding by indicating that even though the Charter was legitimate and binding the issues raised by the defence objections were important for international law. The majority judgment does not engage in such an extended jurisprudential discussion, though Webb does so in his unpublished draft judgment. It is the majority's bald reliance on the Charter alone that is the focus of Bernard's objection.[5]

How, then, does Bernard justify his position that aggressive war is indeed an international crime and a crime for which there is individual criminal responsibility? In contradistinction to the approach of the majority and of Webb, he turns to the European tradition of natural law jurisprudence. He rejects the majority's view that in accepting appointment as a judge at the IMTFE they accept the validity of all of the substantive law

3 *Ibid*., p. 668.

4 *Ibid*.

5 Bernard acknowledges that the majority at times indicates its awareness of other grounds but he argues that the positivistic reliance on the IMTFE Charter is the real basis of its position. *Ibid.*, p. 669.

articulated by the Charter. On Bernard's view such legitimacy must be measured against a higher source of law and not, for example, on interpretation of the Pact of Paris and so on. His position is quite clear:

> There is no doubt in my mind that such war is and always has been a crime in the eyes of reason and universal conscience, – expressions of natural law upon which an international tribunal can *and must* base itself to judge the conduct of the accused tendered to it.[6]

Bernard goes even further, however, and maintains that it is natural law, and not the Charter, which also establishes the responsibility of individuals for state organised criminality:

> There is no doubt either that the individual cannot shelter behind the responsibility of the community the responsibility which he incurred by his own acts. Assuming there exists collective responsibility, obviously the latter can only be added to the individual responsibility and cannot eliminate the same. It is because they are inscribed in natural law and not in the constitutive acts of the Tribunal by the writers of the Charter, *whose honor it is, however, to have recalled them*, that those principles impose themselves upon the respect of the Tribunal.[7]

With regard to the substantive issue of the legitimacy of charging aggressive war as an international crime for which there is individual responsibility, Bernard is in complete agreement with the majority and with Webb. It is in regard to how this position is justified that he dissents. He reverts to the natural law tradition in maintaining that the judges of the IMTFE are only "recalling" principles already grounded in an eternal natural order. He does not elaborate upon the philosophical basis of such claims but it is clear that he is both standing in a certain European tradition and also that his position must be seen in the context of jurisprudential debates that raged in the post-war years over the status of the positive law as against higher principles of justice. In attacking the legitimacy of, for example, the laws of the Nazi regime, scholars such as Gustav Radbruch and others turned to the natural law tradition to argue that an unjust and iniquitous law is not a law at all and may be set aside. Bernard stands in this tradition in claiming that the legitimacy of the IMTFE and of the

6 *Ibid*., p. 670. Emphasis added.

7 *Ibid.* Emphasis added.

law it applied can only be found in the "higher" sphere of natural law and universal reason.[8]

One of the most substantial sections of Bernard's opinion concerns conventional war crimes. The first sentence of this section makes clear his differences with Pal and why his judgment is generally not examined by those who take a revisionist view:

> There can be no doubt that *on all steps of its hierarchy* the members of the Japanese Army and Police made themselves guilty of the most abominable crimes in respect to the prisoners of war, internees and civilians of occupied territories.[9]

Bernard then goes on to focus on crimes against prisoners of war and criticises not holding the accused liable for such mistreatment but rather the legal grounds on which the majority relies. He agrees with the majority that the four groups specified in the majority judgment can be held liable for such crimes:

> (1) Members of the Government; (2) Military or Naval officers in command of formations having prisoners in their possession; (3) […]; (4) officials, *whether civilian, military, or naval*, having direct and immediate control of prisoners.[10]

He disagrees, however, that Article IV of the Hague Convention IV of 1907 provides the correct legal basis for their liability and he further disagrees with the majority's reasoning as to what conditions are required to hold members of the specified groups accountable.[11] Although his interpretation of Article IV is implausible and unconvincing, his critique of the majority's reasoning is far more well founded.[12] As will appear, the real

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8 See, for example, Gustav Radbruch, *Rechtsphilosophie*, 4th ed., Koehler, Stuttgart, 1950 and in the Anglo-American context the famous Hart-Fuller debate. For an overview of the literature and issues in regard to the legal legacy of the Nazi era, see Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Tradition*, Hart Publishing, Oxford, 2003.

9 Bernard, 2008, p. 671, see *supra* note 1.

10 *Ibid*., p. 671. Emphasis added.

11 *Ibid*., pp. 671–73.

12 Bernard, without providing any reasoning to back up his assertion, interprets the provision that prisoners of war "are in the power of the hostile government but not of the individuals or corps who capture them" to mean that those individuals or corps who capture the pris-

reason for rejecting the majority's citation of Article IV appears to be that Bernard prefers to rely on natural law rather than international statutory law as the basis for assessing liability.

Bernard's analysis of the defects of the majority's reasoning follows a similar line as to his objections to the exclusive focus on conspiracy in regard to proving crimes against peace: the lack of individuation with regard to the specific conduct and specific culpability of each accused person before the tribunal. His disagreement with the majority is well founded. He objects to the majority's generalisation of liability based upon institutional position rather than individual conduct and argues that culpability, and hence appropriate sentencing, must differ from individual to individual. One sees here again how much better served the tribunal would have been in adopting the Webb draft judgment as it, to a significant degree, addresses precisely Bernard's concerns.

The essence of Bernard's analysis is that "no-one can be held responsible for other than the necessary consequences of his own acts or omissions". In regard to omissions, for example the crucial category for failure to prevent mistreatment of prisoners of war, Bernard correctly argues that an attribution of responsibility must rely upon "proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences".[13] That an individual cannot be punished for the acts of others of which he had no knowledge or was powerless to prevent is well established not only in the contemporary jurisprudence of the international criminal tribunals but also in fundamental principles of criminal law. The greatest failing of the Yamashita Tomoyuki case was that the prosecution absolutely failed to prove either that Yamashita was aware that crimes were being committed or that it would have been in his power to prevent the crimes that were perpetrated by various Japanese forces scattered across the Philippines. Bernard points to the failure of the majority to provide factual findings on these issues for each of the accused who were convicted of such war crimes charges. Bernard specifically and justifiably rejects the imputation of knowledge to all of these accused on the general grounds that the crimes were widespread. He correctly holds: "No general rule can be made upon

oners have absolutely no responsibility for any war crimes which they perpetrate against them. *Ibid*., p. 671.

13 *Ibid*., p. 673.

this point and proof that omission is the cause of harm done must be furnished in each case by the prosecution".[14] In other words, he rejects the general categorisation of classes of individuals who can be held liable by virtue of their positions and places the burden upon the prosecution of making the case against each of them.

Unlike the majority or Pal, Bernard articulates a clear standard of liability based upon what he takes to be established principles of criminal jurisprudence and natural law, to which he again reverts.[15] He maintains that there are two bases on which guilt may be established for the failure to prevent mistreatment. Although the first basis could be far more clearly formulated, in essence it provides that when a person is accused of a failure to prevent war crimes it must be proved that 1) he or she was able to prevent the commission of the crimes – no legal presumption suffices to establish such proof; 2) the crimes must be the direct result of their omission or negligence. The second basis of liability is more clearly formulated and provides that an individual may be held liable for a failure of duty to protect prisoners of war when their imprudence, negligence or disregard of regulations or orders "created a state of fact suited to the multiplication of violations of the laws of war".[16] In concluding the discussion of this section on conventional war crimes we should note that Bernard focused only on prisoners of war and did not consider crimes against the other two groups he mentioned at the beginning of the section. Given that he there indicated his conviction that Japanese forces were also responsible for the most serious crimes against these groups we are left in the dark as to whether he also had disagreements with the approach of the majority on convictions for such crimes.

The most striking feature of Bernard's standard of liability, however, is that he provides no basis for it either in international practice and custom or in the considerable body of conventional law represented by the Hague and Geneva Conventions. Considering that Japan had declared that it would respect the 1929 Geneva Convention on Prisoners of War one would have thought it appropriate that Bernard would at least refer to its

14 *Ibid*.

15 He concludes this section on conventional war crimes by criticising the view that the treaties, conventions, and customary law encompass the whole of the legal sphere that applies to the regulation of conflict. He points to the universal and natural law "exists outside and above nations". *Ibid*., p. 674.

16 *Ibid*.

provisions. He does not. What he does instead is to refer again to natural law as what he takes to be the proper basis for adjudicating war criminality. Needless to say, he does not cite any authority whatsoever either for the general applicability of natural law or for the specific standards of liability that he articulates. Indeed, his position is baffling in its scope: "Several times in expressing my opinion I preferred the expression of natural or universal law to that of international law".[17]

Bernard here appears to venture into metaphysical terrain with his apparent disdain for the body of international legal doctrine. For his twin proposition that the natural law is higher and "above nations" and that concrete norms to define offences and theories of responsibility can somehow be derived from it, he provides no argument, citation or foundation. He contents himself with the sole remark that although there are differences of opinion as to the nature of natural law, "its existence is not seriously contested *or contestable* and the *declaration* of its existence is sufficient for our purpose".[18]

Bernard's assertion that the mere "declaration" of natural law suffices and cannot be contested indicates that he leans on the natural law tradition that is grounded in faith and belief in a metaphysical higher authority. It is beyond the scope of this analysis to assess the biographical origins of Bernard's approach. More salient for present purposes is Bernard's apparent conviction that he can simply sweep away any discussion of international law jurisprudence with a vague reference to metaphysics. When he states that natural law as the basis for substantive law is not "seriously contested or contestable" he also ignores major traditions of legal philosophy that do precisely that. Indeed, in Bernard's epoch theories of legal positivism, associated with figures like Hans Kelsen but going back much further in the European tradition, were in the ascendancy and it is perhaps for this reason that he wanted to make a stand against it for reasons briefly alluded to above. In any event, it is clear that Bernard stands apart from all of his fellow judges in his belief that the tribunal does have the authority to punish individuals for crimes against peace and for war crimes but that this authority, and the doctrines through which it is implemented, derive not from charters, declarations, conventions or custom, but rather from the metaphysical realm of natural and universal law.

[17] *Ibid*.

[18] *Ibid*. Emphasis added.

Thus far, Bernard's dissent has supported the legitimacy of the tribunal and of the charges against the accused. He has provided alternative rationales for the proceedings but has not challenged the results. The final two sections of his dissenting opinion, however, do just that. In the penultimate section, "Opinion relative to the Proceedings of the Tribunal", Bernard articulates three grounds on which the fairness of the trial might be contested. What is perhaps most peculiar about these grounds is that they are not based upon any reference to the "natural and universal law" which he has previously emphasised as the ultimate and authoritative source of applicable norms.

The first objection made by Bernard is striking in its narrowly chauvinistic view of justice and fair trial rights. Bernard argues that principles of justice have been violated because the tribunal did not employ an investigating judge to collect and analyse the evidence for both prosecution and defence. Bernard's apparent belief that only the French civil law procedural provisions can deliver a fair trial is baffling in its insularity and implication that all trials conducted under the common law and other civil law systems which do not follow the French civil law model are inherently and inescapably unfair. It is also striking that Bernard relies here not upon a reference to his "preferred" standard of natural law but rather upon the positivistic national institutional arrangements of particular countries (unless, of course he believes that the French system derives from divine law, but he does not say so). The inherent contradiction is clear.

The second objection made by Bernard has a valid political foundation, but Bernard cites neither legal authority nor natural law as its basis. Bernard argues that the prosecution of the accused was "unequal" because Emperor Hirohito was not among those indicted. While I wholeheartedly agree on the substance of his claim that Hirohito should have been among the accused, Bernard makes no plausible or reasoned argument as to why it was unjust to convict those who were in fact demonstrated to be guilty of what he himself calls "the most abominable crimes".[19] Here he appears to confuse the political and moral objections that might be made to exclusion of Hirohito with legal standards of fair trial rights. Where, one might ask, is there a recognised norm in international or domestic criminal law that if one individual potentially implicated in a crime is not indicted then

[19] *Ibid*., p. 671.

no one else can be brought to trial for the same or related crimes? Further, at the time of the IMTFE judgment there was no bar to subsequent prosecutions against other class A war criminals, including the emperor.[20]

Bernard's third and final ground is also puzzling. The essence of his objection on the grounds of fair trial rights was that "the eleven judges which compose the Tribunal were never called to meet" to orally discuss the judgment.[21] Bernard explains that a committee of seven prepared a draft majority judgment and that the opinions of the other judges were distributed among all the judges for comment. In fact, the archival records of the tribunal provide us with a substantial body of such memoranda that commented upon, proposed revisions for and debated many parts of this draft judgment. Those participating in that exercise included Bernard. Bernard acknowledges this and also notes that the majority in fact modified parts of their judgment in response to such suggestions. He also notes that drafts of two dissenting opinions were also circulated.[22] He provides no legal basis whatsoever for the assertion that the lack of an oral deliberation of all the judges violated fundamental principles of fair trial rights to such a degree to invalidate the proceedings as a whole.

In sum, none of the three procedural grounds which Bernard views as such serious violations of fair trial rights that they invalidate the proceedings has a firm legal basis. One is rooted in a blind belief in the unique superiority of the French system, seemingly unaware of the serious objections that had been raised inside and outside France of its fairness to the rights of the accused. The second is a political critique of the decision to try Japan's political and military leaders without Hirohito and offers no legal basis for claiming this as a violation of fair trial rights and due process. The third has no basis whatsoever either in the IMTFE Charter or in international law. One is left to wonder whether perhaps Bernard simply felt slighted or left out when the majority did not accept his eccentric view of the foundation of the trial in "natural law". He concludes this section of his opinion with the even more puzzling remark that although he in fact signed the judgment of the IMTFE his signature does not indicate an

[20] See the discussion of the subsequent Tokyo trials of Toyoda and Tamura in Yuma Totani, *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions*, Cambridge University Press, Cambridge, 2015, chs. 2 and 6.

[21] Bernard, 2008, p. 675, see *supra* note 1.

[22] *Ibid*.

"acknowledgement thereof".[23] One again must wonder why a lawyer and judge would sign a judgment which he does not "acknowledge".

The trajectory of Bernard's opinion is a strange one. While the earlier sections make cogent legal arguments about the defects of the majority's approach to liability for war crimes or its sole reliance upon a conspiracy narrative to the exclusion of specific findings on individual accused with regard to their specific conduct in planning, initiating, preparing or waging aggressive war, the opinion increasingly wanders into questionable territory. The culmination of this tendency is perhaps most plainly seen in the two final sections, the second of which turns to the "Verdict and Sentences".

While Bernard has, correctly on my view, criticised the majority judgment for its failure to individualise the culpability of the accused with specific findings on their individual conduct, he appears to be guilty of the same error. His entire critique of the verdicts and sentences occupies less than two pages and does not refer to any of the individual accused but treats them as a group. Bernard articulates three grounds for his objection to the verdicts.

With regard to the charges related to aggressive war he argues that the meaning of the terms "conspiring", "planning", "preparing", "waging" and "initiating" were too vague for the accused to have known what conduct in relation to the war in which they participated was illegal. He states that only "the formal proof" that the accused had "succeeded" in understanding the meaning of these terms could ground their responsibility. This is a strange argument to make considering that Bernard, as seen above, had accepted the illegality of aggressive war as founded in natural and universal law. If this was the natural and universal law which superseded the law of the IMTFE Charter and all relevant international treaties, how could the accused have been unaware of it? It is perhaps for this reason that Bernard tries to rely on his assertion of the "vagueness" of what it means to plan, prepare, initiate or wage war. But it surely stretches the imagination to contend that the Japanese General Staff was unaware of what it meant to "wage war" or to prepare or plan it. What Bernard appears to aim at here is to establish the crime of aggressive war as rooted in immutable natural law, and hence not *ex post facto*, but at the same time

[23] *Ibid*., p. 676.

to find a way to exculpate the accused. The true reason for this strategy appears in his second and most interesting objection to the verdicts.

The second objection of Bernard addresses the conspiracy charge but quickly turns again to the role of Emperor Hirohito, and it is here that Bernard's difficulty with the tribunal appears to reside. Bernard states that he regards the "declaration of the Pacific war" as "the most serious of acts committed against peace".[24] Why the 14 years of the Japanese war and occupation in China were less "serious" he does not indicate. What he does state, however, is of this "most serious act" there was "a principal author who escaped all prosecution and of whom in any case the present Defendants could only be considered as accomplices".[25] That "principal author", he makes clear in the subsequent paragraph, was Emperor Hirohito.

Bernard's revulsion against the decision by the US and British governments to exclude the emperor from the proceedings so they could continue to use him for their own purposes is understandable. The Australian, Chinese and Soviet judges all objected to this manner of proceeding, often vehemently. It must have indeed been galling for a judge convinced of the ultimate responsibility of the emperor to have sat through a trial that only accused those who regarded him as their superior authority. Whatever his objections, however, Bernard's responsibility as a judge was to make findings against each of the accused on the basis of the evidence against them. He did not need to rely on the evidence adduced by the majority alone, for he had access to the complete record of the trial and could have, as Webb did in his draft judgment, analysed this evidence and arrived at his own conclusions as to guilt and innocence. Indeed, since he criticised the majority for not meeting this standard he was surely bound to do so himself. What he did instead was to imply, though not state explicitly, that none was guilty of aggressive war because the emperor did not join them in the defendants' dock. He rather refuses to take a firm stand and instead of analysing the evidence himself he contents himself with stating that the "defects of the procedure followed by the Prosecution did not permit me to formulate a definite opinion concerning the questions raised by the accusations of crimes against peace".[26]

[24] *Ibid*., p. 677.

[25] *Ibid*.

[26] *Ibid*.

In this regard Bernard fails in his fundamental duty as a judge by refraining from clearly stating his findings on the guilt and innocence of the accused based on the facts brought into evidence. His apparent disgust at the exclusion of Hirohito does not justify either invalidating the whole proceedings without a legal justification for this position or in refusing to make findings against the other accused. If they were "accomplices", as he himself states, that characterisation needs to be documented for each of them, as he required of the majority. And if the evidence in fact supports the attribution of accomplice liability then the guilty verdicts would be justified. The fact that he disapproves of the treatment of Hirohito does not relieve him of his responsibility as a judge, and if he found it morally distasteful to participate in such proceedings he should have resigned and in any event should not have signed the majority judgment.

Bernard's treatment of the verdicts with regard to war crimes and crimes against humanity is even more questionable on the same grounds just advanced with regard to his treatment of crimes against peace. He disposes of these charges in seven obscurely formulated lines, though not by indicating that the accused bear no responsibility for them. This final paragraph speaks for itself in testifying to Bernard's abdication of his judicial responsibilities. He has rejected the majority's approach and articulated his own standards for assessing the liability of the accused for war crimes, yet he fails to apply these standards to indicate where he may differ from the majority on their individual verdicts. He finds, as he has already indicated, that Japanese forces perpetrated the most serious international crimes. He also proposes standards for analysing the individual responsibility of the accused for these crimes, yet he concludes his opinion as follows (quoted in full):

> The most abominable crimes were committed on the largest scale by the members of the Japanese police and navy I esteemed I could say nevertheless, and I will add there is no doubt in my mind that certain Defendants bear a large part of the responsibility for them, that others rendered themselves guilty of serious failings in the duties towards the prisoners of war and towards humanity. I could not venture further in the formulation of verdicts, the exactitude of which would be subject to caution or to sentences, the equity of which would be far too contestable.[27]

[27] *Ibid*.

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Historical War Crimes Trials in Asia

LIU Daqun and ZHANG Binxin (editors)

This book offers analyses of historical war crimes trials in Asia from a variety of perspectives. Compared to their counterparts in Europe, the post-WWII war crimes trials in Asia have received much less attention. This is especially true for domestic trials by national authorities in Asia. This book attempts to contribute to the recent trend of uncovering and digging deeper into these trials, with a focus on the Tokyo trial and trials held in China. Sixteen authors from Asia as well as other parts of the world are among the contributors: XUE Ru, ZHU Dan, Yuma Totani, David Cohen, GAO Xiudong, LIU Daqun, WANG Xintong, YANG Lijun, ZHANG Tianshu, ZHANG Binxin, GAO Hong, LI Dan, Nina H.B. Jørgensen, Crystal Yeung, Suzannah Linton, and Guido Acquaviva.

The book examines the historical trials from different perspectives, including the legal concepts used and debates that took place; the influence of the trials within a broader social context, both at their time and later; the collection of evidence; and preservation, compilation and research of historical documents. It not only analyses the trials in their historical and social contexts, but emphasises their present day significance, also as regards the prevention of core international crimes, especially in Asia. The book offers insights on retaining and compiling historical materials concerning these trials as important historical records and new developments in evidence collection in contemporary international criminal courts.

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