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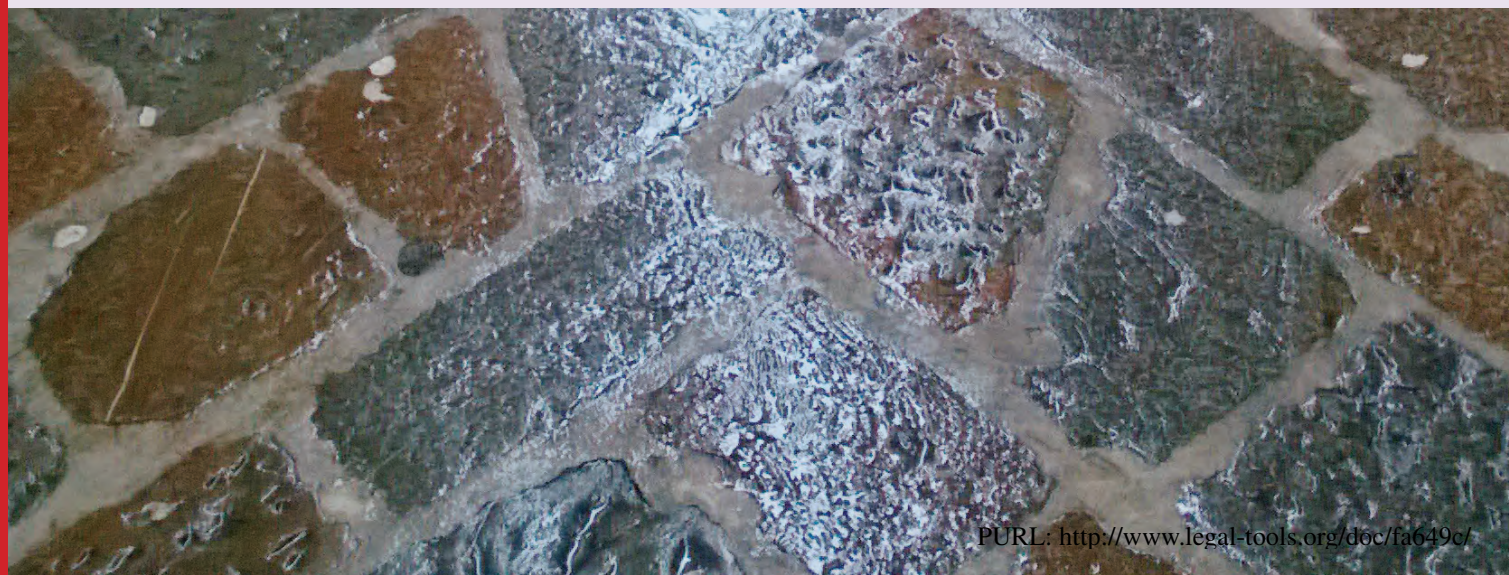

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The Tokyo Military Tribunal: A Show Trial?

Neil Boister*

21.1 Introduction

Show trials of one sort or another are common through history – from the trial and immolation of Jan Hus in Prague for a heresy against Catholicism he never admitted to,[1] through the injustices of the Dreyfus affair in France,[2] to the "telephone justice" meted out to the anti-Putin oligarch Mikhail Khordorovsky in 2010 in Russia.[3] Perhaps those considered most emblematic (they have become a rhetorical device) are the Stalinist trials of the Great Purge of the 1930s,[4] conducted by the likes of the infamous Procurator-General of the Soviet Union, Andrey Vyshinsky, which were followed in the 1950s and 1960s by the post-war Eastern Bloc trials.

This censorious label – "show trial" – has also been applied to international criminal trials. At the Tokyo International Military Tribunal for the Far East (1946–1948) ('Tokyo Tribunal' or 'Tokyo Trial'),[5] it

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1 Thomas A. Fudge, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure*, Oxford University Press, New York, 2013.

2 Piers Paul Reid, *The Dreyfus Affair: The Story of the Most Famous Miscarriage of Justice in French History*, Bloomsbury Publishing, London, 2012.

3 "Russia on Trial", in *The Washington Post*, 8 November 2010.

4 Robert Conquest, *The Great Terror: A Reassessment*, Oxford University Press, New York, 1990; Arkady Vaksberg, *The Prosecutor and the Prey: Vyshinsky and the 1930s Moscow Show Trials*, Weidenfield and Nicolson, London, 1990.

5 International Military Tribunal for the Far East ("IMTFE"), *The United States of America et al. v Araki, Sadao et al.*, ("Araki case"), Judgment, 4 November 1948 (http://www.legal-tools.org/en/doc/28ddbd/). See Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008. The transcripts of the trial are available in R. John Pritchard

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initially took the form of self-criticism. Justice Radhabinod Pal famously dissented from the majority judgment, implying that the trial of the wartime Japanese leadership for crimes against peace and war crimes by the victorious Allied powers was a show trial.[6] This chapter asks whether the categorisation of the Tokyo Trial as a show trial is accurate. It approaches this question by first, in part one, trying to identify the broad characteristics of a show trial. Then in part two, by seeking to identify the presence of these characteristics at Tokyo, the chapter examines whether, and if so how, the Tokyo Trial was a show trial.

Why bother? The principal reason for engaging in this re-examination is to explore whether and if so how trials such as that at Tokyo – although arguably tainted – can nevertheless function as the building blocks of international criminal law. This question has become increasingly important given the growing criticism of international criminal law. As the initial euphoria which coalesced around the reinvigoration of international criminal law in the 1990s has faded, the contradictions within international criminal law have begun to be exposed.[7] This has fuelled the growth in questioning of the rationale of international criminal law itself.[8] This chapter is part of that re-examination.

(ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authorised Commentary and Comprehensive Guide*, Edwin Mellen Press, Lewiston, NY, 1998–2005, 124 vols. A selection of the main secondary sources available in English include: Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008; Madoka Futumaura, *War Crimes Trials and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, London, 2008; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2, pp. 373–444; Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971; B.V.A. Röling and Antonio Cassesse, *The Tokyo Trials and Beyond: Reflections of a Peacemonger*, Polity Press, Cambridge, 1993; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center, Cambridge, MA, 2008.

6 Gerry Simpson, *Law, War and Crime*, Polity Press, London, 2007, p. 108.

7 See, for example, Makau Matua, "Never Again: Questioning the Yugoslavia and Rwanda Tribunals", in *Temple International and Comparative Law Journal*, 1997, vol. 11, pp. 167–88.

8 For two bookends of this criticism see Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, pp.

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21.2. The Characteristics of a Show Trial

All criminal trials are show trials in the sense that they are public attempts to reach a just pronouncement, but only certain trials can carry the pejorative use of the label "show trial" comfortably. Commentators have groped for defining characteristics of this more limited case. Two broad characteristics contain most of the other identified characteristics.

21.2.1. The Predictability of the Outcome

For Jeremy Peterson, one of the most commonly identified characteristics of a show trial is that they are defined by the increased probability, indeed inevitability, of the accused's conviction resulting from the planning and control of the trial.[9] The Stalinist pre- and post- war show trials were characterised, for example, by the undeviating adherence to a scripted (pre-programmed) outcome: guilt. Or to put it another way, the focus of a show trial is on the programmed reduction of "risk" in the conduct and outcome of the trial.[10] The "set piece" nature of the trial is developed through executive control of the establishment of the tribunal, appointment of its officers, control of its jurisdiction and oversight of its conduct.

Procedural fairness is commonly identified as essential to a valid trial. Manipulation of the independence of the court, the rules of criminal process and evidence may be engaged in in a show trial to achieve the desired certainty of outcome. Gerry Simpson considers the ideological rather than evidence-based selection of the accused as a mark of a show trial.[11] Peterson elaborates a number of further specific procedural failings of a show trial: the denial to the defendant of the right to tell his or her side of the story constituted by denial of the right to be heard and/or

561–95; Tor Krever, "International Criminal Law: An Ideology Critique", in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, pp. 701–23.

9 Jeremy Peterson, "Unpacking Show Trials: Situating the Trial of Saddam Hussein", in *Harvard International law Journal*, 2007, vol. 48, no. 1, pp. 257, 260.

10 In rarer cases innocence might be the goal. The Leipzig Trials, for example, were characterised by low punishments and a failure to indict most of the original 900 names submitted. See Antonio Cassese, "Reflections on International Criminal Justice", in *Modern Law Review*, 1998, vol. 61, pp. 1, 7; and generally, C. Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality*, Witherby, London, 1921.

11 Simpson, 2007, p. 113, see *supra* note 6.

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denial of counsel; insufficient evidentiary rights broken down into the denial of the right to obtain exculpatory evidence, denial of the right to challenge the prosecution's evidence, failure to limit the record to relevant evidence[12] or failure to admit relevant evidence; the role of a party in oversight of the trial; insufficient proof requirements; reduced independence or competence of decision-makers; denial of public access; and lack of appropriate appeal rights.[13] A process that exhibits one or more of these failures will tend towards distortion, and if it passes an indeterminate qualitative threshold will become a "wicked" legal process, perhaps, fundamentally, not legal at all.[14] If the trial is unfair the system becomes incredible and ultimately illegitimate. It undermines the community interest in imposing criminal law and punishment through that authority. A show trial publicly expresses not justice but brute power.[15]

It is not, however, simply the moulding of the process to suit which creates a predictable outcome. The crime charged can also either be created or modified to this end. Another of Peterson's common characteristics of a show trial is the unfairness of the crime of which the defendant is accused. More pungently, Judith Shklar characterises a show trial as the commission of an act for which there is no crime.[16] Indeed, as Mark Findlay points out:

> To debate whether the accused should be before the courts in the first place is to misunderstand the reality of show trials. The state controls the labelling process. It can designate offence categories, construe certain behaviour as criminal, identify and apprehend offenders, and ignore surrounding circumstances which might defuse the representation of criminality.[17]

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12 An elementary failing is failure to reject falsified evidence. The 1922 trial of the Social Revolutionary Party designed by Lenin relied heavily, for example, on the evidence of agents provocateurs. See Conquest, 1990, pp. 34–35, *supra* note 4.

13 Peterson, 2007, pp. 270 ff., see *supra* note 9.

14 See David Dyzenhaus, *Hard Cases in Wicked Legal Systems*, Oxford University Press, Oxford, 2010, p. 1.

15 See Mark Findlay, "Show Trials in China: After Tiananmen Square", in *Journal of Law and Society*, 1989, vol. 16, no. 3, pp. 352–53.

16 Judith N. Shklar, *Legalism: Law, Morals and Political Trials*, Harvard University Press, Cambridge, MA, 1986, p. 152.

17 Findlay, 1989, p. 34, see *supra* note 15.

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He notes that the authority wielding power may concentrate on the due process rights of the accused in order to divert attention from the fact that the substantive crime is legally precarious.[18] The manipulation of the legal system becomes necessary because, as Simpson points out, show trials tend to be *ad hoc* responses to specific events.[19] The crime charged is in effect invented to suit the new political circumstances. Achieving the desired outcome may also necessitate manipulation of the general principles of criminal liability. Show trials may be forced to place a heavy reliance on concepts of substantive collective criminal responsibility, such as conspiracy, in order to impose the desired structure on historical complexity and to reinterpret individual action and states of mind to fit that structure. Exploring this reinterpretation of the past, Simpson argues that show trials tend to erase the distinction between political error and criminal liability and to juridically re-enact historical transformations: "The accused are guilty not for what they have done but for where they happen to stand when the political forces are transformed".[20] Though subjectively innocent, they are objectively guilty.[21]

21.2.2. Exhibition for an External Target Audience

For Peterson, the other significant characteristic of a show trial is the design or the management of the trial, with a focus on external observers beyond the courtroom rather than on justice to the individual.[22] How this manifests itself in a particular case will depend in large part on (i) who is the target audience, and (ii) what the lesson is to be. In a totalitarian society this may have an internal element of indoctrination of the subject population, and an external element of propaganda because the authors of the trial are intent on putting on a "show" for an external audience over which they do not have sufficient control.[23] In the Stalinist show trials, for example, the target audience may well have been in part potential internal critics of his rule as well as external critics of the fairness of his regime.

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18 *Ibid.*

19 *Ibid.*

20 Simpson, 2007, p. 114, see *supra* note 6.

21 *Ibid.*, pp. 123–26, citing Maurice Merleau-Ponty, *The Visible and the Invisible*, Northwestern University Press, Evanston, IL, 1969, p. 202.

22 Peterson, 2007, pp. 270 ff., see *supra* note 9.

23 Hannah Arendt, *The Origins of Totalitarianism*, Shocken, New York, 2004, p. 452.

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Observations made about the Stalinist show trials suggest two further features of these teleological demonstrations.

First, they required the acceptance of subjective guilt by the accused, an acceptance based entirely on false confessions extracted by terror.[24] But more than just confession, they also required repentance, or as Robert Conquest puts it "the acceptance of the prosecution's view that the acts confessed to were appalling crimes".[25] Under enormous duress, the accused participated in his or her own fantastic self-denunciation.

This was so fantastic it left the audience guessing as to whether they really were guilty.[26] This led to the second requirement, public subscription to the denunciation of the accused as their enemy. This involved public reinterpretation of the defendant's acceptance of his own guilt and his repentance of these acts into an objective and abominable crime. "I am guilty" had to translate into "we agree that you are guilty of this horrible crime". For George Hodos, the trials had "the aim of personalizing an abstract political enemy", to place that enemy in the dock and "with the aid of a perverted system of justice, to transform abstract political ideological differences into easily intelligible common crimes".[27] The authors of the trial made no effort to use the trial to reinforce a common subscription to the criminal law by the target public. No effort was made to use the trial to establish a community of individuals which invests in that criminal law as a set of legal norms to which their behaviour should conform. To put it in simple Hartian terms, the authors of the trial are uninterested in using the trial to develop legal rules with an "internal aspect" among those not directly aware of what is occurring but rather only commands enforced through fear.[28] In societies where the level of control over individual belief is near total, these commands have an authority that extends far beyond the actual coercive capacity of the state, and thus in a crude sense the community does exist and it does believe that the accused are guilty. This may have been true, for example, of the Stalinist trials of once mighty party functionaries

[24] Conquest, 1990, p. 35, see *supra* note 4.

[25] *Ibid.*, p. 110.

[26] *Ibid.*

[27] George H. Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954*, Praeger, New York, 1987, p. xiii.

[28] H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1994, pp. 82 ff.

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whose unmasking was accompanied by popular legitimacy.[29] However, even in such societies show trials function not to create a sense of social pressure to conform and to choose against interest to subscribe to that pressure and internalise that sense of obligation, but rather as a crude exhibition of Hobbesian authoritarianism carried out without concern for why those subject to the law choose to obey (legitimacy) – only that they should (legitimation). The show trial reinforces loyalty, fidelity, not autonomous morality.[30] There is no morality involved. The audience is freed of the necessity of making a moral judgment because of their belief in the utility of the trial in the ongoing revolution.[31]

21.2.3. Fantasies of Crime and Punishment

These characteristics of a show trial are obviously linked; a predictable outcome is essential for a good show, a good show is important not to overexpose the predictability of the outcome. It may be that the more totalitarian the system, the more emphasis on the enforced compliance of the accused and the audience in the show, whereas the more liberal and legalistic the system, the greater the emphasis on using procedural and substantive manipulation to achieve the desired show. Simpson argues that an international criminal trial is only distinguished from a show trial in degree – show trials are fantastic in every sense, parody legal procedure, parrot obviously fabricated evidence, invent crimes to suit, suggest the unlikeliest of conspiracies, none of which is the case in international criminal trials.[32] It does seem clear that all criminal trials are on a scale – the more controlled and "showy", the more apt the pejorative label of "show trial" becomes. Simpson's insight is that there is no clear bright line between show trials and international criminal trials. International criminal trials may only be less predictable in their outcomes, less showy in their execution. Whether a trial crosses this qualitative threshold will depend on a judgment about its design and execution.

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29 Conquest, 1990, pp. 71 ff., see *supra* note 4.

30 Hannah Arendt makes the point that in a totalitarian system one of the goals is to "empty fidelity of any concrete content". See Arendt, 2004, p. 429, *supra* note 23.

31 Vasily Grossman, *Life and Fate*, Vintage, London, 2006, p. 512.

32 Simpson, 2007, p. 130, see *supra* note 6.

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21.2.4. The Distinction between Victor's Justice and Show Trials

We should be careful, before analysing the Tokyo Trial, however, not to equate the charge of show trial with criticism about victor's justice.[33] While show trials are predictable and showy in design and execution, the charge of victor's justice is grounded in the fact that it is the victors that try the vanquished. Alejandro Chehtman doubts whether on its own the fact the losers are on trial has any relevance to the legitimacy of the trial.[34] He cites Hersch Lauterpacht in support, who considers the assumption of the role of dispensing justice by victors a political inevitability tempered only by legal fairness, which is also a condition of its effectiveness:

> In the existing state of international law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor. This is so in particular when, as may be the case at the close of the second World War, the victorious side represents the overwhelming majority of states and when there are few neutral states left capable of ensuring the impartial administration of justice. Circumstances such as these constitute an additional reason why the manner in which the punishment of war criminals takes place should be not a manifestation of victorious power but an act of international justice.[35]

Victorious states have long held a customary right to punish captured war criminals for violations of the international laws of war.[36] Lauterpacht is at pains to distinguish the exercise of this right from something more vindictive:

> There is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognizant. There is even no question of procedural retroactivity by subjecting him to

[33] Conquest, 1990, see *supra* note 4.

[34] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2010, p. 159-160.

[35] Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", in *British Yearbook of International Law*, 1944, vol. 21, p. 59.

[36] *Ibid.*, pp. 61–62.

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> a foreign jurisdiction in defiance of established law and principles.[37]

The long dominant criticism that the Tokyo Trial was victor's justice made *inter alia* by Richard Minear seems, in contrast to this dry evocation of the right of a victor to sit in judgment on the international crimes of those it captures, to be a criticism that the trial was more than justice imposed by a victor; it was because of the way it was designed for a predictable and exemplary outcome, an unjust trial, a show trial.[38] The defence counsel Owen Cunningham commented about the Tokyo Trial many years afterwards: "Victor's justice spells vengeance, vindication and paradox".[39]

The prosecution of international crimes by the victors in a conflict also raises the question of whether the victorious state is a judge in its own cause. It is suggested by Chehtman that it is a mistake to test the validity of the trial by the impartiality of the states that initiate the trial – the victors – because the interest of the latter does not in his view render the trial partial.[40] In his view impartiality normally depends on the impartiality of individuals participating in the trial as prosecutors, judges and so forth. In this analysis, the yardstick of partiality is whether the participants in the trial express the partiality of the state and their political masters.

Tu quoque arguments that the victorious state had in the past engaged in the now proscribed activity can be validly avoided if the law has in fact changed in the interim. A more difficult to evade 'clean hands' argument is when victorious states do not prosecute an extant crime but one they made up. The argument that they have no authority to do so because they would not be serving the interest of individuals in enforcing an extant criminal law[41] returns us to an already canvassed characteristic of show trials: the absence of substantive legality.

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37 *Ibid.*, p. 67.

38 *Ibid.*

39 Owen Cunningham, Interview: "Trial of Tojo: Part I", The Tokyo War Crimes Trial, Iowa Oral History Project, Des Moines Public Library (no date).

40 Chehtman, 2010, p. 160, see *supra* note 34.

41 *Ibid.*, p. 163.

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21.3. Show Time at Tokyo?

21.3.1. Introduction

It is, as we shall see, at least arguable that the Tokyo Trial was designed to result in a predictable outcome – guilt – and thus to show both the Japanese public and the outside world who were responsible for the war in East and Southeast Asia: Japan and its leaders. However, as we shall see, the Tokyo Trial was neither entirely risk free nor was it an entirely successful exhibition of war guilt. The programmatic and showy aspects of the trial can be explored by examining the trial in greater detail, isolating and contrasting those factors that made for a predictable outcome and an effective exhibition from those that undermined it as a set piece.

21.3.2. Executive Interference

The design of the trial tends to support the show trial thesis because the Tokyo Tribunal was an *ad hoc* court unilaterally legislated into existence by an executive body, for which multinational support was sought as an afterthought. As a matter of international law, the Tokyo Tribunal was a creation of the Proclamation Defining Terms for Japanese Surrender ('Potsdam Declaration') [42] and the Instrument of Surrender.[43] The fact that the Charter of the Tribunal ('Charter') was proclaimed by General MacArthur, Supreme Commander Allied Powers ('SCAP'),[44] rather than by multilateral treaty as in the case of the Nuremberg International Military Tribunal, indicates substantial executive control of the architecture of the trial by the United States. US influence was strongly evident, for example, in the appointment of the US Prosecutor Joseph Keenan as Chief of Counsel and the other Allied prosecutors as

[42] Proclamation Defining Terms for Japanese Surrender, Issued at Potsdam, 26 July 1945 (http://www.legal-tools.org/uploads/tx_ltpdb/POTDAM_PROCLAMATION_RE_JAPANESE_SURRENDER.pdf).

[43] Instrument of Surrender, 2 September 1945 (https://www.legal-tools.org/uploads/tx_ltpdb/Instrument_of_Surrender_Japan_1945_02.pdf).

[44] Special Proclamation of the Supreme Commander of the Allied Powers, C.182, 1 March 1946 (http://www.legal-tools.org/uploads/tx_ltpdb/File%203822-3828.pdf).

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associates.[45] There is a great deal of evidence of the heavy hand of the US State War Navy Coordinating Committee ('SWNCC') in its design. As matters progressed, however, some distance emerged between the trial and its principal architect. The establishment of the Tokyo Tribunal was, for example, sanctioned by Allied control through the Far Eastern Commission ('FEC').[46] And on review of the judgment, the US Supreme Court held that the SCAP was an agent of the Allied powers and an international tribunal.[47] The net result was the masking of US power through the sanction of its allies, making it possible to argue that it was an Allied rather than a US show. In the Supreme Court, Justice William O. Douglas dissented that the Tokyo Tribunal was neither free nor independent of US control.[48] Perhaps the balance of influence is best illustrated by its official title: "*The US and Others v. Araki, Sadao, and others*". This may not be sufficient to justify the label show trial; but it does show significant evidence of goal-directed behaviour.

One of Peterson's characteristics of a show trial is the role of a party in oversight of the trial. However, while the direct interference by the SCAP in the trial at its outset also tends to expose the Tokyo Tribunal as a show trial, the members of the Tribunal soon asserted their judicial independence[49] and the President of the Tokyo Tribunal, the Australian Sir William Webb, actively resisted the SCAP's attempt to direct the Tribunal.[50] The selection of the accused was perhaps the most obvious example of an executive attempt to control the trial. Washington's control of who was to be selected was firm at the outset.[51] It has been argued that in selecting certain accused and labelling them "militarists", the US, working in the Nuremberg idiom, was intent on creating a set of

45 Charter of the International Military Tribunal for the Far East, 26 April 1946 (https://www.legal-tools.org/uploads/tx_ltpdb/CHARTER_OF_THE_INTERNATIONAL_MILITARY_TRIBUNAL_FOR_THE_FAR_EAST_02.pdf).

46 FEC 007/3, 29 March 1946, File no. EA 106/3/22/, Part 1, Archives New Zealand.

47 US Supreme Court, *Hirota v. MacArthur*, Judgment, in *United States Reports*, 1948, vol. 338, p. 198.

48 *Ibid.*, p. 215.

49 Araki case, Transcript, 3 May 1946, p. 21 (http://www.legal-tools.org/en/go-to-database/ltfolder/0_28747/#results), see *supra* note 5.

50 Letter from Judge Northcroft to PM Peter Fraser of NZ, 11 March 1946, File no. EA 106/3/22, Part 1, Archives New Zealand.

51 *Ibid.*, para. 7(d).

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politically disposable opponents[52] embodying something greater than themselves: Japan's imperial aspirations in East and Southeast Asia. Selection was initially *de facto* a SWNCC prerogative but the FEC attempted to assert some control. However, once established, it was the executive committee of the prosecution under the British Prosecutor, Arthur Comyns-Carr, that took control of the selection process, instituting the principal criterion for selection as the degree of involvement in crimes against peace.[53] This is an example of how the introduction of unknown and uncontrolled players into the trial tended to have a disruptive effect on the script. US post-surrender policies certainly continued to have influence in limiting selections, but the non-selection of members of the *zaibatsu* (commercial conglomerates)[54] and Japan's bacteriological and chemical warfare programme introduced a cacophony of dissent within the prosecution.[55] Notoriously it was the SWNCC interfering to exclude from selection the Japanese Emperor, Hirohito, for political reasons, a policy which the FEC then sanctioned,[56] which caused most adverse comment.[57] The New Zealand prosecutor noted, for example, that if it were not for reasons of policy he should have faced trial,[58] and public denunciations were made of Hirohito's *de facto* immunity by Webb[59] and the French Judge Henri Bernard[60] in their separate judgments. While the process of selection tended to push the Tokyo Tribunal towards the

52 Simpson, 2007, p. 120, see *supra* note 6.

53 Memorandum from Mr. Comyns-Carr to the Executive Committee: Subject: Selection of Accused, 1 April 1946, Box 1, Folder 4, IMTFE (IPS), Morgan, MSS 93-4, Law Library, University of Virginia.

54 See Arnold Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, William Morrow, New York, 1987, pp. 85–86.

55 See Tsuneishi Kei-ichi, "Reasons for the Failure to Prosecute Unit 731 and its Significance", in Yuki Tanaka, Tim McCormack and Gerry Simpson, *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, p. 177.

56 Noted in FEC 007/04, 4 April 1946, "Excerpt from the Minutes of the Seventh Meeting of the FEC, 3 April 1946", File no. EA 106/3/22, Part 1, Archives New Zealand.

57 See generally Totani, 2008, p. 43, *supra* note 5.

58 Quilliam to Foss Shanahan, Department of External Affairs, Wellington, 31 October 1947, File no. 106/3/22, Part 6, Archives New Zealand.

59 Araki case, Separate Opinion of the President, 1 November 1948, p. 18 (http://www.legal-tools.org/uploads/tx_ltpdb/JU01-11-a.pdf), see *supra* note 5.

60 Araki case, Dissenting Opinion of the Member for France [Henri Bernard], 12 November 1948, pp. 20–22 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-05-a.pdf), see *supra* note 5.

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threshold of show trial, ironically the internal rancour this caused drew it back because it tended to indicate a lack of control of the outcome or the lesson to be taught.

The formalist response of the Majority of the Tribunal ('Majority') which wrote the judgment in reply to challenges to the SCAP's legislative power to establish the crimes in the Charter – they held the "law of the Charter is decisive and binding on the Tribunal"[61] – assisted merely to confirm the predictability of the outcome of the trial. But the dissents of the Indian Judge Pal, Dutch Judge B.V.A. Röling and French Judge Bernard in this regard famously undermined that predictability. Despite significant evidence to the contrary, Pal considered that the intention in Article 5 which spelled out the jurisdiction of the Tokyo Tribunal over specific crimes, including crimes against peace, was not to enact crimes but to leave the question of whether they were crimes to the Tribunal to decide by reference to appropriate law;[62] the Tokyo Tribunal was "judicial", "not a manifestation of power".[63] This abrogation of legislative power from the Allied governments shocked the New Zealand prosecutor R.H. Quilliam into responding in a report to his superiors: "It would appear to be scarcely credible that the Governments of the United Nations have agreed, by undertaking the prosecution, to the Tribunal deciding the question of the responsibility of the war".[64] But the New Zealand Judge Erima Northcroft was less outraged, noting that if this had not been so, "the nations constituting [the Tribunal] would have made plausible the popular criticism that such trials are acts of vengeance or retribution visited by victorious nations upon the vanquished".[65] The simple possibility of questioning the validity of the crimes in the Charter served to undermine the predictability of its outcome.

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61 Araki case, Judgment, 12 November 1948, p. 24 (http://www.legal-tools.org/en/go-to-database/record/28ddbd/), see *supra* note 5.

62 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal], (http://www.legal-tools.org/uploads/tx_ltpdb/JU01-13-a-min_02.pdf), see *supra* note 5.

63 *Ibid.*, p. 36.

64 Brigadier R.H. Quilliam, Report on the Proceedings of the International Military Tribunal of the Far East, File no. EA 106/3/22, Part 7, p. 18, Archives New Zealand.

65 Mr. Justice E.H. Northcroft, Memorandum for the Right Honourable Prime Minister upon the Tokyo Trials 1946–1948, File no. EA 106/3/22, Part 9, p. 14, Archives New Zealand.

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21.3.3. Procedural Irregularity

In a speech made prior to his appointment to lead the prosecution at Nuremberg, Justice Robert Jackson advocated the necessity of the independence of a judicial process to be used to respond to the depredations of the Second World War, and warned against the use of "farcical judicial trials" to rationalise the political decision to execute alleged war criminals. If a "good faith trial" was to be relied on, guilt would have to be proven.[66] He continued:

> But there is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumor. Men of our tradition cannot regard any proceeding as a trial that does not honestly search for the facts, bring forward the best sources of proof obtainable, critically examine testimony. But, further, you must put no man on trial if you are not willing to hear everything relevant that he has to say in his defense and to make it possible for him to obtain evidence from others. Nothing more certainly discredits an inquiry than to refuse to hear the accused, even if what he has to say borders upon the immaterial or improbable. Observance of this principle is of course bound to make a trial something of a sounding board for the defense.[67]

For Jackson, the validity of an international criminal process depends on procedural fairness.

Procedural fairness at Tokyo was formally pledged in terms of Article 1 of the Charter, which guaranteed the accused a fair trial. In spite of this, the defence immediately attacked the fairness of the trial because the SCAP through the Charter had "so altered and revised the rules of evidence, procedure and trial as heretofore applied by military tribunals and courts of criminal justice by all civilized nations".[68] Denial of the right to counsel is one of Peterson's characteristics of a show trial and such denial was clearly in evidence at Tokyo. The prosecution, for example, used evidence from lengthy interrogations undertaken without

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66 Robert H. Jackson, "The Rule of Law among Nations", in *American Bar Association Journal*, 1945, vol. 31, p. 290.

67 *Ibid*., p. 292.

68 Araki case, Motion to Dismiss on Behalf of All Defendants, 4 July 1946, p. 3, see *supra* note 5.

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the presence of counsel.[69] Although Article 9(c) of the Charter guaranteed the right to counsel at trial, and both Japanese and US counsel were provided, counsel were frequently subject to judicial abuse.[70] Article 9(d) of the Charter established the right to conduct a defence, including the right to examine witnesses and thus to challenge the prosecution's evidence. But in practice, this was limited in various ways. The defence was granted various rights including the right under Article 9(e) to apply for the production of witnesses and documents. Most relevantly however, Article 7 gave the Tokyo Tribunal the power to draft rules for day to day procedure and in terms of Rule 9, the Tribunal gave itself the power to change the rules as it saw fit and in specific cases, which is what it did repeatedly, constantly changing the rules to the defence's disadvantage.[71] Another of Peterson's characteristics of a show trial is a lack of appropriate appeal rights, and this was manifest in the Charter which in terms of Article 17 only provided for review by the SCAP of sentence. When it came to carrying out this duty, it appears that the SCAP may not even have read the Majority judgment[72] before deciding that there was no technical ground justifying change to any sentences, despite some Allied support for mercy,[73] the gift of which was his correct role.[74] Perhaps one of the most glaring procedural irregularities at Tokyo, at least from an adversarial perspective, was the insistence that evidence in mitigation be given before conviction,[75] forcing defence counsel to hypothetically accept conviction.

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69 See Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarization of Japan*, Macmillan, New York, 1987, pp. 111–12.

70 See John A. Appleman, *Military Tribunals and International Crimes*, Bobbs-Merrill, Indianapolis, 1954, p. 244, who cites a large number of examples.

71 See Lawrence W. Wadsworth, *A Short History of the Tokyo War Crimes Trials, with Special Reference to Some Aspects of Procedure*, Ph.D. Thesis, American University, 1955, p. 163.

72 See Röling and Cassese, 1993, p. 82, *supra* note 5.

73 See Report by the British Representative on the Allie Control Council, Sir A Gascoigne to Mr. A. Bevin, 15 December 1948, no 246, F 17785/48/23, File no. 106/3/22, Part 8, Archives New Zealand.

74 GHQ, Far East Command, Public Information Office, Immediate Release, 24 November, File no. 106/3/22, Part 8, Archives New Zealand.

75 Rule 10 – US v Araki, Sadao, et al: Amendment of the Rules of Procedure by the adoption of Rules 10 and 11, Papers of Sir William Flood Webb, Series 4, Wallet 5, 3DRL/2481, Australian War Memorial.

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Insufficient proof requirements are another of Peterson's characteristics of a show trial. Article 13(a) of the Charter provided that the Tokyo Tribunal was not bound by the technical rules of evidence. What tends to support the show trial hypothesis is not the non-technical approach – something common in courts martial – but that this non-technical approach to evidence left the responsibility for verifying evidence and weighing its probative value to a bench drawn from the defendant's enemies.[76] What followed was regular variation of the rules used selectively to permit the prosecution's version to go in, no matter how tenuous and even when based on fourth hand hearsay such as the Saionji-Harada memoirs and the Marquis Kido's diary.[77] At the same time, the Tokyo Tribunal denied admission of defence evidence challenging the prosecution's characterisation of historical events, another of Peterson's characteristics of a show trial. In this way for example, and as pointed to by Pal, the Majority rejected *tu quoque* evidence relating to Allied complicity in crimes against peace such as the Soviet invasion of Finland and of Japan itself in violation of a non-aggression pact.[78] The hearsay rule, opinion rule and best evidence rule were all abused to the end of supporting the prosecution's version of events.[79] The Majority failed to utilise the broad rule of admissibility to permit all relevant evidence to go in. Among many examples, the Tokyo Tribunal allowed the second version of an affidavit by the former ambassador to Japan, Joseph Grew, to go in for the prosecution, but denied as opinion evidence a defence attempt to put in the first version.[80] The failure to admit relevant evidence is one of Peterson's marks of a show trial and that failure certainly occurred at Tokyo. Another of Peterson's marks of a show trial is the failure to limit the record to relevant evidence and this abuse was also on display at Tokyo. The Majority, for example, accepted evidence of violations of Japan's international drug control treaty obligations as a means to aggression in China through its deliberate supply of drugs to the Chinese people.[81]

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[76] Wadsworth, 1955, p. 21, see *supra* note 71.

[77] See Boister and Cryer, 2008 (*Reappraisal*), p. 113, *supra* note 5.

[78] Araki case, Transcript, pp. 21081, 22451, see *supra* note 5.

[79] See Boister and Cryer, 2008 (*Reappraisal*), pp. 105-6, *supra* note 5.

[80] Araki case, Transcript, p. 10208, see *supra* note 5.

[81] See Neil Boister, "Punishing Japan's 'Opium War-Making' in China: The Relationship between Transnational Crime and Aggression at the Tokyo Tribunal", in Yuki Tanaka,

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Many of these procedural and evidential irregularities were used to control the evidence ultimately accepted by the Tokyo Tribunal and thus serve to support the thesis that the trial was a show. Yet in spite of this constant intervention to control the evidence, reading the trial as a whole, one can only conclude that this control constantly faltered: disruptive information seeped through the cracks, the defence mounted a strong assault on the legality of many of these actions, and the trial was subject as it proceeded to blasts of harsh criticism. Perhaps most telling was defence counsel Owen Cunningham's devastating attack entitled "The Major Evils of the Tokyo War Crimes Trial", presented while the trial was in progress to the 1948 American Bar Association Meeting[82] where he concluded: "No nation has the right to administer a lower standard of justice to the citizens of another nation than it would require for its own".[83] He was held in contempt by the Tribunal, but the story was out. According to Cunningham, Webb told him personally that although he must reprimand him he thought "it was a great speech".[84]

21.3.4. Unrepresentative and Biased Judges

Perhaps the most important of Peterson's features of a show trial is a lack of judicial independence leading to a predetermined outcome. There is a *prima facie* case against the Tokyo Tribunal in this regard as the judges were all drawn from the victor nations, with no neutral or Japanese judges. This is dramatically reinforced through the selection by some states of judges with a clear bias such as Webb, who had acted for Australia in war crimes investigations,[85] Judge Delfin Jaranilla from the Philippines, who had been a Japanese prisoner and had been subject to brutal treatment,[86] and the replacement US Judge General Myron Cramer,

Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, pp. 324, 329.

82 File no. 106/3/22., Part 8, Archives New Zealand.

83 "The Major Evils of the Tokyo Trials", Paper to the ABA, Seattle Washington, 7 September 1948, recommendation 4, File no. 106/3/22, Part 8, Archives New Zealand.

84 Cunningham, n.d., see *supra* note 39.

85 See, for example, Sir William Flood Webb, "A Report on Japanese Atrocities and Breaches of the Rules of Warfare", 15 March 1944, AWM 226, 5, Australian War Memorial.

86 IMTFE, *The United States of America et al. v. Araki, Sadao et al.*, Paper no. 141, Motions Presented to the Court, 4 June 1946, vol. 1, 3 May 1946–14 October 1946, IMTFE, Tokyo, Northcroft Archive, MacMillan Brown Library, University of Canterbury.

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whose daughter had been interned by the Japanese in the Philippines.[87] The attempt to unseat the judges for bias failed because the Tokyo Tribunal decided that only the SCAP had the power to do so.[88] Members of the Majority also showed bias during the trial. As Judge Röling pointed out for example, they found that there was no evidence of aggressive intentions on the part of the Soviet Union against Germany or Japan despite denying the accused the right to prove such aggressive intentions.[89]

The constant to-ing and fro-ing of judges at Tokyo, with some absent for significant parts of defence evidence, also suggested a degree of judicial contempt for the process, and perhaps that its outcome was a foregone conclusion. But other judges were livid at this, and the resulting tensions served to increase the rate of disintegration of judicial consensus.[90] The bench had begun to fall apart almost from the outset of the trial when the defence motions challenging the jurisdiction of the court catalysed Pal and then the other dissenters to depart from the hoped-for consensus.[91] But in a significant way it was the Judge President Webb who, through his clumsy attempts to justify the Allied position in natural law in his draft judgments, did much to fuel this disintegration which evolved through the trial to the final judgment written in secrecy by a majority of seven. This disintegration damages the show trial thesis, because it illustrates the faltering Allied control over the execution of the design.

21.3.5. A Trial of Aggression

The design of the Tokyo Trial was built around the crime of aggression. At Tokyo, much greater importance was placed by the Allied powers on the redefinition of the factual behaviour of invasion of another state as a new legal category – a crime – where certain moral or political explanations were no longer tenable. The Allies pursued the cementing of

87 Cunningham, n.d., see *supra* note 39.

88 Araki case, Proceedings in Chamber, Transcript, vol. 22, p. 22, see *supra* note 5.

89 Araki case, Opinion of the Member for the Netherlands [Mr. Justice Röling], p. 86 (http://www.legal-tools.org/uploads/tx_ltpdb/JU02-04-a-min.pdf), see *supra* note 5.

90 See Boister and Cryer, 2008 (*Reappraisal*), p. 96, *supra* note 5.

91 See Röling and Cassese, 1993, p. 29, *supra* note 5.

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this element of the Nuremberg idiom [92] relentlessly. One of the foundational conditions of the trial was the presumption of the correctness of the Western view of the political and military context in East and Southeast Asia; not to accept Japanese aggression would have been to open Allied conduct to criticism. But opening the question inevitably led to uncomfortable questions about which side caused the war. One of the markers of justice is the possibility the accused may go free if the crime itself is invalid. Much ink has been spilt on the question of whether aggression was a crime at the time the Japanese acted. There is little point to add to it here other than to say that while the Majority might validly rely on treaties such as the Kellogg-Briand Pact to determine that there was a tortious obligation not to use force in international relations, this did not translate into a criminal obligation on individuals. This lack of legal authority was subject to brutal criticism from Judge Pal who commented that only a lost war was a crime.[93] He noted that due process in the service of an invalid criminal offence – the crime against peace – did not cure the trial of its political nature.

> The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations.[94]

Röling's resort to interpreting crimes against peace as a political measure to effectively eliminate dangerous political opponents is rooted

[92] See Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, pp. 1, 17.

[93] Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/712ef9/), pp. 128, see *supra* note 5.

[94] *Ibid.*, p. 37.

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in the same scepticism.[95] Webb shared the view that the SCAP could not legislate international law through the Charter,[96] and this led to his attempts to wrestle a natural law solution to it in his draft opinions and to his (finally successful) argument that the death penalty was inappropriate for a conviction of crimes against peace.[97] These judicial responses reflected the disintegrative tendency introduced into the trial by the legislation of crimes against peace for the specific purpose of excusing Allied behaviour and taking control of former enemies.[98] They left it open for critics of the trial, like defence counsel Takayanagi Kenzo, to make the obvious point that the enduring impression on Japanese minds would be one law for the Allies and another for the Japanese.[99]

Paradoxically, the choice of crimes against peace as the trial's centrepiece by the Allies revealed only that Japan behaved like so many imperial states before it, including many of the Allies. But the most potent *tu quoque* argument raised at Tokyo was that the Allies, as imperial powers, could not try these offences not because they themselves continued to engage in imperial invasion, but because they continued to use force against the inhabitants of those territories which they had invaded and colonised. Pal's critique of what he considered to be an Allied attempt to freeze international relations to permit the continuation of these empires but prevent the emergence of new ones,[100] resonates with Simpson's insight that the accused in show trials are subjectively innocent but objectively guilty. This immobilisation of international relations reinforced the notion that the new position, with the imperial powers holding significant imperial possessions by force but disallowing any new use of force to this end, could not validly be used as a yardstick against which to measure the Japanese leaders' conduct that had been carried out under the old reality. It is striking in this regard that many in the

95 Araki case, Opinion of the Member for the Netherlands [Mr. Justice Röling] (http://www.legal-tools.org/doc/fb16ff/), p. 45-45A, see *supra* note 5.

96 Subject: Notes on Certain Points of Law (I), Memo to: All Judges, 12 June 1946, Papers of William Flood Webb Series 4, Wallet 20, 3DRL/2481, Australian War Memorial, 2-3.

97 Araki case, Separate Opinion of the President, pp. 15-17 (http://www.legal-tools.org/en/go-to-database/record/1db870/), see *supra* note 59.

98 See generally Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 101.

99 Araki case, Transcript, pp. 42283–4, see *supra* note 5.

100 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/712ef9/), p. 112, see *supra* note 5.

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prosecution (Chief Prosecutor Keenan in particular) and among those judges more concerned about the tenuous roots of crimes against peace in particular were avowedly naturalist in their thinking.[101] They appear at times to have accepted that in positivist terms the accused may be subjectively innocent but maintained in natural law terms that they were objectively guilty. However, as the arch positivism of the defence was laid out the prosecution tended to become more positivist and the bench split leaving a core of formalists at the centre of the majority (principally Northcroft, Lord Patrick, Edward MacDougall), a number of sympathetic naturalists (Webb, Bernard) and the soft (Röling) and hard positivist dissenter (Pal). The Tokyo Trial may have been designed as a show trial around the validity of crimes against peace, but the division of judicial views on this issue serves to undermine the claim that the execution of the trial was much of a show.

The Tokyo Tribunal's historical investigation of the conduct of Japanese aggression tried to answer the question why the war was begun by Japan by investigating in weighty detail how it was begun. The steps that led to war gave a sense of a growing causal pressure which could be traced to the Japanese high command and political military leadership. This suited legal analysis because of its analytical clarity, but has been decried by historians as essentially a distortion of an incredibly complex picture.[102] The use of crimes against peace did guarantee a very long and increasingly unstable trial. Indeed, it is arguable that no single factor had as negative an impact on the didactic purposes of the trial as its incredible length. As the record grew the Tokyo Trial became bogged down in minutiae of the details of Japanese occupation of China and Southeast Asia, to the point where the audience, both media and public, was bored to death and left, the show began to flop, and the complexities of history began slowly to emerge.

21.3.6. Collective versus Individual Responsibility

Conspiracy, both as an inchoate crime and a form of participation in crimes against peace,[103] was employed at Tokyo as a structural culpability

[101] See Boister and Cryer, 2008 (*Reappraisal*), pp. 271 ff., *supra* note 5.

[102] See, for example, Minear, 1971, pp. 178–80, *supra* note 5.

[103] See, for example, Neil Boister, "The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The

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rather than individual culpability device.[104] It was an elaboration of the outcome that drove reliance on crimes against peace – the responsibility of the accused for the actions of Japan as a whole. This allowed the accused to be joined in single trial, and then a theory of the evidence implicating each of them in a grand rolling conspiracy to be put to the Tribunal. Defence counsel Takayanagi likened these progressive conspiracies to those used for the expansion of the British, French, Dutch and Russian empires and the expansion of the United States.[105] Yet various judges dissented on the validity of the inchoate crime of conspiracy (termed the "naked conspiracy" in the judgment) in international law, most prominently Webb.[106] Conspiracy was more broadly accepted as a principle of complicity in the principal offence of planning for and waging war, transforming those who acted into the implied agents of those who shared their aggressive purpose. The Tokyo Tribunal did not, however, insist on a clear conspiratorial purpose to which all alleged conspirators subscribed. Pal commented sarcastically that he thought the theory of a Japanese conspiracy "had been pushed a little too far, perhaps", in order to give it a "place in the Hitler series".[107] The danger of placing too much emphasis on the collective responsibility of a small group of individual leaders is, as Martti Koskenniemi has more generally pointed out, that it may "serve as an alibi for the population at large to relieve itself from responsibility".[108] This danger appears to have been borne out in Japan. The Tokyo Tribunal did not involve a Stalinist condemnation by the Japanese of their own. The difficulty of convincing the Japanese public that they were guilty was exposed by challenges made to this thesis during the trial and it unravelled. This occurred in part because the authors of the trial did not have sufficient control over the public to make them believe in the thesis. The focus of the trial on

Measure of the Crime of Aggression?", in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 425–47.

104 Simpson, 2007, pp. 118–19, see *supra* note 6.

105 Kenzo Takayanagi, *The Tokio Trials and International Law: Answers to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3rd and 4th March 1948*, Yuhikaku, Tokyo, 1948, p. 17.

106 Araki case, Separate Opinion of the President (http://www.legal-tools.org/doc/1db870/), pp. 8–9, see *supra* note 5.

107 Araki case, Dissenting Opinion of the Member for India [Radhabinod Pal] (http://www.legal-tools.org/doc/03dc9b/), p. 693, see *supra* note 5.

108 Koskenniemi, 2002, p. 14, see *supra* note 92.

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individuals excused the Japanese public collectively and they in turn excused the individuals concerned. A request for release on clemency grounds for all Class A prisoners noted in 1952 that the Japanese public "rather warmly sympathise" with them.[109] It propagated a view of history which is now accepted, at least in Japan, as one of several legitimate competing interpretations of the past. To some, the accused are martyrs and their trial sealed their martyrdom.

21.3.7. Common Criminality

It was one of the intentions of the trial to take key Japanese political actors and depoliticise them in order to make them fit a structure which reduced them to common criminals – conspirators, murderers, drug traffickers. This responded to the need to banish them from Japanese political life because they were politically dangerous to the new configuration of political forces evolving in East Asia. One rather peculiar consequence of this was that instead of trying the accused for crimes against humanity, as set out in the Charter, those charges were dropped and the accused were charged with murder on the heavily naturalist theory that killing in an illegal war is unjustified.[110] By judgment, however, these counts were, probably because of judicial scepticism about them, simply rolled into the judgment about crimes against peace.[111] Once again, the judiciary had both interfered with and accepted the prosecutorial design.

21.3.8. The Tokyo Trial: A "B Movie"?

Identifying the trial's audience and achieving the desired effect on them are critical to the exhibitionary element of a show trial. The intrusion of cameras into the courtroom was originally feared because of the media's power to perturb the outcomes of trials.[112] But the possibility of reaching a far larger audience was too tempting; Nuremberg had already broken

[109] Decision on the Recommendation on Release by Clemency of Class A War Criminals, 20 October 1952, By Shirane, Matsusuke, Chairman of the National Offenders' Prevention and Rehabilitation Commission, File no. EA 106/3/22, Part 11, Archives New Zealand.

[110] Araki case, Counts 39–43, 45–52 of the Indictment (https://www.legal-tools.org/uploads/tx_ltpdb/INDICTMENT_01.pdf).

[111] Araki case, Judgment, 48452-3, see *supra* note 5.

[112] Christian Delage, *Caught on Camera: Film in the Courtroom from the Nuremberg Trials to the Trials of the Khmer Rouge*, University of Pennsylvania Press, Philadelphia, 2014, pp. 177–78.

PURL: http://www.legal-tools.org/doc/fa649c/

the ice, and Tokyo was designed for maximum media exposure. The trial took place in the former Army Ministry buildings in a courtroom of over one thousand seats of which 660 were on an overlooking visitor's gallery. To ensure the newsreel cameras had a clear view, huge Klieg lights, arc lamps used for film-making, were installed, giving the courtroom the appearance of a film set and making it unbearably hot.[113] The theatrical atmosphere was not lost on observers; Judge Northcroft described it as "derogatory of the dignity of the court'"[114]

In result, the audience became a participant in the longer-term process. At Nuremberg, lights were installed above the defendants by the acclaimed feature film director John Ford to reveal the defendant's facial expressions, and a similar practice appears to have been pursued at Tokyo. The filming of the trial at Tokyo was done to highlight the role of individuals in the engineering of Japan's wars of aggression and to expose their excuses as spurious. At Tokyo the audience was both the Japanese public, who would recognise in the individuals on trial their own responsibility, and the global public, who would guarantee what was being narrated would never happen again. The ultimate goal was to cultivate global solidarity through the prosecution of the novel crimes against peace. But in reality, it exposed a shoddy prosecution, judicial partiality, and the trial as long and boring.

Newsreel footage of the trial reveals that by its end, the accused appeared to have accepted that they too had a part to play in the show. When called forward one by one to be convicted these often very frail old men, did so with great dignity, and when they received their penalty – for seven, death – they bowed very formally and retired with grace – the show over. Even if this was not in fact the case, the filming of the trial made it appear so. Yet the filming failed to fulfil the desired function of extending the narrative of condemnation of aggression into the future. Instead what ensued in the post-trial period was a "war" of the films, in which the US newsreels were archived and supplanted by films made from very different national perspectives in Japan[115] and in China.[116]

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[113] Brackman, 1987, p. 152, see *supra* note 54.

[114] See Letter from Judge Northcroft to AD McIntosh, Secretary for External Affairs, Wellington, 2 July 1946, File no. EA 106/3/22, Part 3, Archives New Zealand.

[115] See, for example, Masaki Kobayashi's *The Tokyo War Crimes Trial* (1983) (film) and Shunya Ito's *Pride* (1998) (film).

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21.4. Allied Players in a Tainted Trial

If the criticism of Tokyo as a show trial bites, why then were so many Allied serviceman content to work in this *ad hoc* judicial institution without qualms about its ultimate *ratio*? It is difficult to accept that they were committed without qualms to the Allied cause or following orders as Vyshinsky-like automatons, ready and willing to do their masters' bidding. The emphasis on procedural rather than substantive legality explains why numerous Allied personnel could feel comfortable with the outcome. They had only to ensure the trial was conducted correctly. The trial was very much a legal undertaking where a great deal of effort was made to establish or deny the material and mental elements of the accused's individual guilt, to develop or unsettle the meanings of fundamental principles of international criminal liability, and to follow or change rules of evidence and procedure, and to justify or prevent conviction and punishment. It was this contest over legality which to some extent loosened the controlling political grip of the Allies, and thus rescued the trial from total legal oblivion. However, while the judges and the prosecutors could labour at being disinterested in the substance of the rules then being applied, the trial itself transformed them into historians who worked every day to reinterpret history. And for many, it appears that as their knowledge of the situation grew, their faith in the project withered: judges like Röling, the more they became acculturated to the "enemy", the less convinced they became of the validity of many of the premises of the trial. When very late in the trial, the obviously almost entirely disenchanted Judge Northcroft, Lord Patrick and Judge MacDougall – the core judges of the Majority – all asked their separate governments if they might resign rather than be party to a disintegrating legal precedent, they were told to do their duty.[117] Judge Pal, by contrast, attempted to "rupture" the trial, to expose the system on which it rested by attacking it. But his was not a Jacques Vergès-style frontal and sustained attack on the foundations of the trial,[118] he ruptured the bench internally

[116] See for example, Gao Qunshu's *Dōngjīng Shěnpàn* (2006) (film).

[117] See Ann Trotter, "Justice Northcroft", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited*, Nijhoff, Leiden, 2011, pp. 81, 88.

[118] Described in depth by Koskenniemi, 2002, p. 26, see *supra* note 92.

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during the course of the trial and then the legacy of the trial *ex post facto* through an unread judgment delivered at its end.

21.5. A Bad Trial for Good Ends?

Both Shklar and Mark Osiel argue that show trials for educative purposes are morally defensible if they serve liberal ends and promote the rule of law.[119] The Tokyo Trial might thus be justified as an early step in the global politics of resistance to the use of force by states and thus as a legitimate show trial. But this is hindsight. The noble motive of general suppression of the use of force is an attempt to appropriate the past by modern peace advocates who are still some way from succeeding in doing so.[120] The trial is open to the criticism that it was used for instrumental purposes to vindicate the victor's position not justice, and thus does not possess Hannah Arendt's necessary condition for a trial.[121] Does this mean it has passed the threshold and is a show trial?

A counterview is that the Tokyo Trial was not a success as a show trial. As the monolithic goals of the trial slowly disintegrated under the weight of its own assumptions, some justice and some historical accuracy emerged. The trial was premised on the legality of crimes against peace and this placed irresistible pressure on the judges to manipulate procedural and evidential rules to ensure the trial did not completely disintegrate. Ironically, the very fact that the trial permitted this debate indicates that its authors did not have it under sufficient control and immanent within its design was the danger of moral and legal confusion. The off-message voices from within the trial are those we hear most loudly today. And paradoxically the disintegrative tendencies from a show trial perspective, i.e. those tendencies that tended to undermine the predictability of the trial's conclusion and its role as an exhibition, are integrative tendencies when it comes to the validity of the trial as a legal process.

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[119] Shklar, 1986, p. 145, see *supra* note 16; Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, New Jersey, 1997, p. 65.

[120] The author is among them. See Neil Boister, "New Zealand and the 'Supreme International Crime': Vengeance or Hypocrisy?", in *New Zealand Yearbook of International Law 2008*, International Law Group, Christchurch, 2010, pp. 137–54.

[121] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking, New York, 1963, p. 232.

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21.6. Fractured Foundations

The Tokyo Trial's ruptures revealed the underlying operations of the prevailing global order. The notion that Japan had broken with civilisation, popular with both prosecution and bench, suggested that civilisation was the prevailing order. The trial's greatest failure was its attempt to disguise the fact that the prevailing order itself had produced the armed conflicts in East and Southeast Asia. But the trial revealed the real nature of international society; not built on clear normative principles of right and wrong, but on power. Unsurprisingly, those tensions still prevail. Tokyo did not put to rest the events of the 15-year war. It is not certain that trials of this kind can ever bring on the sleep of history – but they can serve to expose the violence at the heart of much of international legal order and undermine the legitimacy of that order. That is, perhaps, why international criminal trials – particularly of crimes against peace – are so risky, and a poor subject for a good show.

Whether a trial for the crime of aggression under the International Criminal Court Statute will be able to break from this rather dubious historical foundation is an open question. Koskenniemi suggests implicitly that to do so it would have to be conducted in a way that involves a willingness to actively interact with the past and be open to all truth no matter how uncomfortable, including truths about one's own society and its role and implication in events.[122] What this episode in the history of international criminal law teaches is that the crime of aggression will have to escape the symbolic trap of being used for the attribution of blame by one side on the other if it is to be valid. To begin on the presumption of moral and political rectitude, and to try to show this to the Japanese and the rest of the world, as was done at Tokyo, will lead inevitably to failure and the birth and reinforcement of a countervailing truth which the trial will actually fuel.

[122] Koskenniemi, 2002, p. 34, see *supra* note 92.

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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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