

The Tokyo War Crimes Trial at Sixty: Legacies and Reassessment

Yoshinobu Higurashi: The Tokyo Trial, together with the Nuremberg Trials, are the symbolic war crimes trials conducted by the Allied Powers after World War II. Twenty-eight Japanese leaders were accused of responsibility, based on international laws, for the planning and initiation of a war of aggression and atrocities conducted during the war. They were tried in this ad hoc international military court, and all twenty-five defendants at the time of the verdict were found guilty. However, not much has been known in the Western world as to what exactly happened during the trial. Even in Japan, a survey conducted by the Asahi Shimbun in 2006 revealed that 70% of respondents said they didn't know much about the trial.

Victors' Justice vs. Judgment of Civilization

This trial provides one view of the political and diplomatic history of Japan from the 1930s to the defeat in the War. The view is that there was a consistent policy of aggression by Japan, based on a conspiracy. Ever since the time the trial took place, until the present day, much fierce dispute has been taking place, both politically and emotionally. Roughly speaking, there are two divided views on the trial, the "judgment of civilization" versus "victors' justice," and it's difficult, it continues to be difficult, to reconcile these two different views.

The theory of the "judgment of civilization" represents the view affirming the Tokyo Trial, based on the

theory that it pursued the responsibility of Japan for aggression and for atrocities, applying civilized judicial methods, therefore affirming them as a virtuous set of methods. The typical argument that supports this theory was made by former Secretary of War Henry Stimson, who helped to establish the Nuremberg Trials. Until the 1960s, Japanese intellectuals agreed with the way this trial was handled, and with the judgment. However, in this theory, the style of argument is somewhat changed in contemporary Japan. Those who are critical of the prewar days of Japan have started to criticize the Tokyo Trial by saying that that person or that issue was not dealt with in the trial, so it became a little bit complicated. And this type of argument does not represent a negative view towards the Tokyo Trial, because in a way, they seem to have excessive expectations of the trial.

On the other hand, the theory of "victors' justice" represents a negative view of the trial, viewing it as political revenge by the victors, arguing that penalizing the leaders as individuals according to international law constitutes the application of ex post facto law, and it unfairly did not question the past conduct of the Allied Powers. From this viewpoint, the Tokyo Trial was an exercise full of vices. Those who were involved in the trial from the Japanese side, and Justice Radhabinod Pal, an Indian judge, took this position. This view represented a minority view at that time. However, in 1971, two essential books that represented this view were published in Japan and the United States. One is the book entitled, "Tokyo Trial",

written by Mr. Noboru Kojima, and the other is the book entitled, “Victors’ Justice,” written by Professor Richard Minner. These two books are still two of the most widely read books about the Tokyo Trial. Ever since these two books were published, the negative view towards the Tokyo Trial has become a more influential view.

I believe that both “judgment of civilization” and “victors’ justice” are legitimate and correct theories, and that there won’t be any theory to be published in the future which could replace them. A new theory that would emerge would just be a newer version or epigone of one or the other. If it could be possible to formulate a view that could drastically change these two traditional views of the Tokyo Trial, it would have been published by now. The issue here is a tendency to feel that one has to choose one over the other. Rather, I hold the position that the Tokyo Trial should be construed as international politics, which has two aspects: “judgment of civilization” and “victors’ justice.”

This report attempts to provide an objective understanding of this trial by considering the Tokyo Trial as a policy based on international politics, referring to specific policy decisions, basic documents, and commenting remarks regarding the Tokyo Trial. I would like to explore the meanings of “victors’ justice” and “judgment of civilization,” or the state responsibility and the individual responsibility.

Defining “War Criminal”

But first, I’d like to inquire into why Japanese war criminals had to be punished. That answer can be found in

Section 10 of the Potsdam Declaration that Japan accepted on August 14, 1945. Section 10 reads that “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners”, and who violated traditional rules of war. This is the legal grounds for the trials of Japanese war criminals, including the Tokyo Trial. During the trial, this was one of the contentious issues, as the defense team argued that war criminals are only those who violated the rules of war. However, the fact is, this language is very similar to the directive JCS 1067 in occupied Germany: those who were involved in atrocities and war crimes, or those who were involved in the planning and execution of the Nazi plan, which caused such atrocities and war crimes – I think this language was coordinated by John McCloy, Assistant Secretary of War, who was a confidant of Secretary Stimson. Since the London Agreement of August 8, 1945 had not been signed at the time of the Potsdam Declaration, the United States wanted the option of applying crimes against peace to Japan by using vague language.

How did Japan’s side interpret the meaning of war criminals? Among the documents recently released by the National Archives of Japan, there is an affidavit by former Prime Minister Kantaro Suzuki. In it, Suzuki said that he thought war criminals would be determined based on the established concept of international law – in other words, the traditional sense of violation of the rules of war. Therefore, it did not become an issue during cabinet meetings. However, since this is a document prepared by the defense team, and even though this was not discussed in the cabinet meeting, it’s hard to

believe that the Japanese side was not aware of the policy towards Germany. Among the documents released by the National Archives of Japan, there's a personal note written by former Prime Minister Hideki Tojo on August 14, 1945. Tojo wrote that once he was considered as "a person responsible for crimes" by "the enemy's court," he would deal with it "in the Japanese way," implying suicide. He vaguely expected penalties to be meted out upon Japanese leaders.

It's totally understandable that as a trial tactic the defense team attempted to give a narrow interpretation to Section 10 of the Potsdam Declaration. However, it's difficult to assume that Japanese political leaders at that time were that naïve. The Japanese government never inquired about the meaning of war criminals to the Allied Powers, and the Ministry of Foreign Affairs correctly expected as early as September 1945 that the same approach to Germany would be taken to Japan.

And the United States started to consider the policy towards Japan in September 1945, after the Potsdam Declaration was accepted, whether to secure leadership in the Tokyo Trial or to take a coordinated approach, giving equal weight to the four major powers in the Pacific Theater. This was discussed and explored. The U.S. War Department argued for American leadership, and this argument won. And that is referred to in the document SWNCC 57-3, "Policy of the United States in regard to the Apprehension and Punishment of War Criminals in the Far East," October 3, 1946.

This reflects the basic policy of the U.S. regarding the trial of Japanese war

criminals. First, this reflects their application of the Nuremberg framework to Japan, and second, criminality would be pursued retroactively all the way back to the Manchurian Incident. And third, the text read as follows: "For the trial of persons charged with offenses of the type described in paragraph 1.A. [crimes against peace], any international court appointed by the Supreme Commander should be selected by him from persons nominated by the appropriate military commanders of the several nations to be represented upon such court," this places emphasis on crimes against peace, in other words, planning and initiation of a war of aggression. Fourth, Section 5 provided expanded authority to General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), because the U.S. played the major role in the victory against Japan and in the Allied occupation of Japan. Therefore, in the case of Japan, it was MacArthur as SCAP, not international treaties such as the London Agreement, who set up the International Court and prosecution agency and appointed only one chief prosecutor: Joseph B. Keenan of the United States.

American Goals

There were two goals of the United States with respect to the Tokyo Trial. One was to prove crimes against peace – that is, to consider the planning, preparation, initiation or waging of a war of aggression as an international crime, and applying the concept of justice in order to keep the international community safe. This is considered a legal approach. Secretary Stimson and policy-makers were passionate about this approach, thinking this would be an opportunity to realize the American

desire of criminalizing aggression. The Kellogg-Briand Pact, which represents Republican governance of the 1920s, redefined a war of aggression as a crime.

The second goal was to prove the justice of the Allied powers by proving the personal responsibility of the leaders in the trial, and thereby defang Japan. This is considered a political approach. As a result of World War II, the United States lost its sense of safety, and was afraid of a recurrence of the Pearl Harbor attack. The threat to the United States right after the war was not from the Soviet Union, but from Japan and Germany and their possible desire for retaliation during the Tokyo Trial. One should view this from a wider perspective – one of the purposes of the Tokyo Trial should be considered as an international policy to defang Japan by penalizing militarists for deconstructing the multilateral international system.

Those two goals can be construed as American justice and American security policy. The first goal affirms the theory of the “judgment of civilization,” and the latter provides a negative view, that is, it demonstrates the theory of “victors’ justice.” But I believe that these two purposes are linked as a security policy of the United States.

Japanese Government Response

I would like to talk about the response of the Japanese government. Starting with the arrest of Tojo in September 1945, war crimes suspects were starting to be arrested, and the Shidehara administration, in an attempt to determine a unified approach for defense, agreed to give priority to defending the state, and to defend

individuals to the extent that it did not infringe upon the former. This is an attempt to defend both the state and the individuals, but this was not implemented as a formal approach of the government. In one document, one finds this language. “Since the Allied powers prosecuted war criminals as individuals, the Japanese government could not officially defend them.” This is probably because Foreign Minister Shigeru Yoshida was opposed to the official defense. The Japanese government took the position of cooperating with the Allied war crimes trials.

The statements made by Prime Minister Yoshida at the Diet in June 1946 are interesting. Yoshida said, “I think that this war was caused as a result of the collapse of parliamentary politics and party politics by extreme nationalism and militarism,” and “the government is cooperating with the Supreme Commander on arrests of war crimes suspects and in the trial.” This response made by Yoshida should not be considered as an expedient. As a corollary to the acceptance of the Potsdam Declaration, Japan had an obligation to cooperate in the Allied trials. And Yoshida himself thought that these trials were useful for the elimination of militarists. Yoshida and diplomats considered using this trial as a tool for “purification,” and a means to create the environment for a smooth transition to the reconstruction of Japan and cooperation with the United States. In that sense, I believe that the Tokyo Trial served as a security policy for those who were responsible for politics after the war.

In reality, the Japanese government didn’t guide a unified defense approach.

Rather, the defense team confronted the accusations in the indictment. However, the defendants and the defense team alone were too weak. And, the government's approach turned out to be a delegation to "agencies in the administration," such as the Foreign Ministry, former Army, former Navy, and others were to separately provide support to the defense team. However, since no agency was in charge of coordination, bureaucratic warfare was introduced to the efforts and provoked internal conflict within the defense team. Therefore, it ended up encouraging the defense of individuals, rather than defending the state as a whole.

Behind the Scenes

On what happened in the trial, I am not going to touch upon that at this time. I'd like to talk about what happened behind the scenes and after the termination of the trial. In March 1948, George F. Kennan, then Director of the Policy Planning Staff of the U.S. State Department, submitted the document PPS 28, asserting the need for an early conclusion of the war crimes trial in Japan. This was approved as official U.S. policy in October as NSC 13-2. The greatest concern of Kennan at that time was the fear that the war crimes trial in that Cold War environment might stir the Japanese to anti-American sentiment. Moreover, the Far Eastern Commission also reviewed the issues regarding completing the trial, and in February 1949 they decided not to continue Class A trials – that's the document FEC 314-8. The abandonment of the subsequent Class A trials did not encounter any major opposition, and once the trial was ended, the focus was shifted to the discharge of prisoners.

General MacArthur issued Supreme Commander Circular No. 5 on March 7, 1950. This directive systematized the clemency system for Japanese war crimes prisoners and subsequently paroled or discharged them and commutation started to take place. What should be noted here is the fact that the discharge was implemented based on the principles of standard judicial procedures.

Article 11 of the San Francisco Peace Treaty (1951) succeeded this SCAP approach. The text of Article 11 is as follows: "Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan." There are two major points in Article 11. First, to prevent the Japanese government from unilaterally releasing prisoners after Japan restores its sovereignty – that's the number one point. And the second point is to allow clemency in accordance with judicial procedures.

Recently in Japan, what becomes the issue with regard to the San Francisco

Peace Treaty is the expression that “Japan accepts the judgment.” However, there has been no evidence that Japan and the United States pursued the interpretation of this text proposed by British Commonwealth of nations during the negotiations. Also, Yoshida and diplomats were shocked and strongly resisted when they learned that the British draft contained the “war guilt” clause that Japan had planned the war of aggression and will bear the responsibility of the war. However, with regard to this wording accepting the judgment, Yoshida and others did not raise any opposition.

Why, you may ask, did Yoshida and others not resist this wording accepting the judgment? This is my thinking, with regard to that question. The “war guilt” clause states that the state responsibility of Japan, and once accepting it, similar to Article 231 of the Versailles Treaty (1919), making Japan as a nation – the entire public of Japan – assume collective responsibility for the war. Contrary to that, the judgments of the war crimes trial were meted out to the defendants as individuals; therefore, the Japanese government could accept that. In other words, the criminality of individuals enabled the Japanese government and Japanese public to accept the judgments of the trial more easily. The Japanese authorities found a breakthrough in vague provisions for the reduction of sentences, and once independence was restored, Japanese diplomacy became aggressive in the discharge of Class A, B and C prisoners.

Secretary of State John Foster Dulles in the Eisenhower Administration considered the conditional release of Class A prisoners as leading to a stable

relationship with Japan, and would serve as a countermeasure against “aggressive peace efforts” by the Soviet Union. Ambassador John Allison and the Northeast Asian Division of the State Department insisted on discharging prisoners to prevent Japan from becoming neutral or being absorbed into the Soviet bloc. On the other hand, the British Commonwealth of Nations opposed premature discharge of prisoners. However, even those nations gradually started to attach importance to the relationship with Japan in the Cold War environment, and they agreed to conditional parole after ten years of imprisonment. As a result of that, all the Class A prisoners were granted parole by March 1956.

In May 1958, Prime Minister Nobusuke Kishi proposed to Ambassador Douglas MacArthur II a sentence reduction for Class A prisoners, reducing the sentence to time served and consider it an expiration of the prison term. With the coming visit of Kishi to Washington, D.C., the United States accepted that proposal, and all the Class A prisoners had completed their sentences. By doing so, the United States shifted its approach from “judicial settlements” to “political solutions.” However, it should be noted that in spite of this, the United States did not deviate from the principles of judicial settlements. So I think it’s very important to consider looking at the Tokyo Trial on a longer time span, from the commencement of the trials to the release of prisoners.

Aftermath of the Trial

Now, I would like to look at what happened in November 1948, when all twenty-five defendants were found

guilty. And here, we need to confirm the following points. The judgment was given on, and the indictment accused the defendants as, individuals, it did not assert the guilt of Japan as a state. I would consider the individual responsibility as level one, and the state responsibility as level two. So, the level one approach allows the Japanese public to become onlookers of the trial – meaning that the Japanese public can have distance and blame everything on the criminals. And the majority opinion of the judgment is based on the fictitious theory that those who were responsible for the war were a handful of extreme militarists, and the majority of the general public were victims. This is the same theory which the People’s Republic of China took towards Japan from the 1950s on.

Then why does there exist the interpretation that the state itself was guilty? First, in the case of Nuremburg, the focus of attention was given to the Nazis, and the names of the defendants were relatively well-known, whereas in Tokyo, the only well-known person was Hideki Tojo. And although the prosecution designated the Imperial Army as the core of power, the defendants were largely considered as representatives of various organizations, making the meaning of personal responsibility vague. Second, the hidden intention of the U.S. government, including Secretary Stimson, was to affect the Japanese public by making them feel a sense of guilt by punishing the defendants. However, this intention was only known among prosecutors who served as agents of the Allied government, and there’s no evidence that the judges, on whom the government

had limited influence, had such an intention.

Public Response

Let’s sort out the actual response of the Japanese public due to, in part, a suppression of freedom of speech under GHQ censorship. There’s no comment from the Japanese side which squarely criticized the Tokyo Trial. All major newspapers affirmed the judgment in the context of peace and democracy. There was a peace advocacy group called the Peace Problems Symposium (Heiwa Mondai Danwakai) in postwar Japan, and a lot of celebrated intellectuals belonged to that group. Those people affirmed the Tokyo Trial by linking the judgment with the idea of a pacifist Japan. They represent the view affirming the Tokyo Trial as intended by the level two approach. This is different from Prime Minister Yoshida’s view, which is the realistic view of using the trial to Japan’s advantage, and it is also different from the silent majority of political elites.

Mr. Jiro Osaragi, a novelist, felt “the disgrace” of thinking a sentence was passed, not only upon the defendants, but also upon Japanese modern history and the Japanese public itself. This is also considered a level two response, similar to the one from the Peace Problems Symposium. But in the case of Osaragi, a graduate of the University of Tokyo, he was particularly ashamed of “the atrocities committed by Japanese troops.” Incidentally, Mr. Yasunari Kawabata, a Nobel Prize laureate, said, “the inquiry into the cruelty of Japanese people during the trial was the cause of my depression.”

Clearly, what bothered the Japanese public most, and what made the Japanese people most ashamed during the trial were not the issues regarding aggression, but rather the atrocities, such as the Nanjing Incident. Class B and C war criminals who were allegedly involved in such acts were treated as “double-dyed villains” at that time. And with their condemnation by the mass media, they greatly suffered by being portrayed as criminals, causing discrimination against them.

Most Japanese people abhorred any more wars, and thought they had been victims of the war. Masao Maruyama, a political scientist, in 1956 gave his impression that even the members of the Peace Problems Symposium didn't feel personally responsible for the war itself. So, as a result, an indirect approach of level two – this has to do with the image or the mindset – it has to do with whether people felt personally responsible or not. It is a complicated method.

So, most Japanese people felt that they could not easily feel that they had been responsible for what happened during the war, and that's the reason why this did not work out in favor of the allies.

On the other hand, some people felt that the trial itself was victors' justice, and was therefore unfair and vindictive. Justice Pal, the Indian, said that all of the defendants should be found not guilty in his dissenting opinion. And the text of what Pal wrote has been debated vigorously as to whether this has any implications for the guilt of the state as a whole. But I think that Pal's dissenting opinion is in a level one position – individual responsibility – before

everything else, and does not conclude the fact that Japan itself, as a state, was not guilty for the war. Pal made a countercharge against the majority opinion of the Tokyo Tribunal.

The Tokyo War Crimes Trial is something that is difficult for the Japanese to get a grasp on, I feel. It's difficult for them to judge. If you just look at the superficial aspects, you can see that intellectuals were in favor, and counsels for the defense were in opposition. However, the huge majority of Japanese people were so indecisive at that time, I feel.

And here, I would like to refer to Mr. Takaaki Yoshimoto's recollection. Yoshimoto, a poet, looked back upon his impression of the Tokyo Trial: “On one occasion, the trial seemed to be a farce that was rigged in victors' favor, or that was similar to the sacrificial rites slaughtering the scapegoats.” In other words, this is “victors' justice,” and this denies the viability or the justice of the trial itself. But Yoshimoto continued, “On another occasion, it seemed to be rational procedures that permit clear vindications of the defendants. I was vividly impressed by the Western-oriented legal principles.” In other words, this is “the judgment of civilization.”

And so, when you look at the trial itself, that is the conclusion that one of the intellectuals came to, and this also – the trial itself does not say directly that the Japanese were responsible for what happened to the individual Japanese people. Some observers in Japan say that the Japanese people have been brainwashed as a direct result of the Tokyo Trial, but contrary to the hidden

intention of the U.S. government, the trial did not lead directly to feelings of guilt on the part of Japanese people, and this is one conclusion we can come to. The left wing intellectuals in Japan, the effect of the trial, shows – plays out from the 1960s on, and it led to the Japanese desire for peace. And that is, sort of, an indirect effect of the trial on the Japanese people. Thank you very much.

Mike Mochizuki: Thank you very much, Professor Higurashi, for that very balanced and comprehensive look at the Tokyo Trial. Now, we'll turn to Professor Totani.

Yuma Totani: Thank you very much. I'd like to thank Higurashi-sensei for a thorough discussion of the Tokyo Trial. I'd like to take this opportunity to express my special thanks to the Sigur Center and the Sasakawa Peace Foundation USA for hosting this event. My personal thanks go to Mr. Keiji Iwatake, Mr. Matthew Wright, Dr. Mike Mochizuki, and Dr. Daqing Yang. I would also like to thank you all for coming amidst your busy days.

Prosecution of War Crimes

Professor Higurashi talked about the political and diplomatic framework of the Tokyo Tribunal. For my part, I'd like to focus on the substance of the prosecutorial effort. In particular, I will explore one aspect of the Tokyo proceedings: the prosecutorial effort concerning war crimes. In so doing, I would like to consider the following three questions.

First, to what extent did the Tokyo Tribunal contribute to establishing facts

about Japanese-perpetrated war crimes? Two, to what extent did the same trial contribute to determining the locus of responsibility? And three, to what extent did the trial contribute to facilitating the Japanese confrontation with the issues of war guilt?

Until about the mid-1990s, studies of the Tokyo Trial centered on exploring the prosecutorial effort pertaining less to war crimes than to “crimes against peace” – or the “crime of aggression,” as it is currently known in the statute of the International Criminal Court. Research trends on the Tokyo Trial had previously taken such direction due largely to the inherent structure of the trial itself, which Dr. Higurashi has already discussed in his paper. To recap: Just when Japan was about to accept surrender in the summer of 1945, the United States and its allies adopted a policy decision that postwar international tribunals should focus on securing a clear ruling about the criminality of aggressive war under international law. They believed that establishing such legal precedents at this crossroads would help secure international peace and security, deter future aggressors, and prevent the kind of war devastation that Axis aggression had caused. This policy decision was first introduced at Nuremburg, and then seconded at Tokyo.

The Charter of the Tokyo Tribunal indeed explicitly required that the principal charges be crimes against peace – the crime of aggression – while deeming charges on war crimes and crimes against humanity as *optional*. Consequently, most of the court battles at Tokyo revolved around substantiating aggressive war charges, even though

evidence of Japanese wartime atrocities was, in fact, also presented. In today's talk, I do not slight the centrality in the prosecutorial effort of crimes against peace. Rather, I aim at bringing to light an underappreciated aspect of the Tokyo proceedings – that is, the prosecution of war crimes – so that we can have a balanced assessment of the trial's historical significance.

This paper has another purpose. It is meant also to address those international law scholars, human rights experts and policy makers, as well as historians and political scientists, such as yourselves, who are interested in drawing upon the experience of the Tokyo Trial in order to consider the effectiveness of the international law regime today in combating genocide and other large-scale human rights crises.

Over the course of my research, I came to find striking similarities between the challenges that the Allied Powers confronted some sixty years ago, and those that we face today. Take, for example, the crisis in Sudan, and in particular, the recent issuance of the arrest warrant by the International Criminal Court against the Sudanese president, Omar Hassan al-Bashir. On March 3, 2009, the Op-Ed section of The New York Times carried two contrasting viewpoints about the wisdom of the ICC action. On the one hand, there was Desmond Tutu, the former Anglican Archbishop of Cape Town and the 1984 Nobel Peace Prize winner. He gave a strong endorsement of the arrest warrant, arguing that we must send an unequivocal message to people around the world that no one who is responsible for widespread human rights abuse should enjoy special protection from

criminal prosecution. On the other hand, Franklin Graham – president of a relief organization that has been providing humanitarian assistance in Sudan – disagreed. He warned that the arrest warrant would serve no purpose but merely antagonize Bashir and complicate the ongoing peace process. As he puts it, and I quote: “I want to see justice served, but my desire for peace in Sudan is stronger.”

The exact same kind of debate took place among the leaders of the Allied governments some sixty years ago, when they were poised to decide their policy regarding the trial or non-trial of the Japanese emperor, Hirohito. The Allies' ultimate decision was to withhold legal action against him, and instead, use Hirohito's unique power and authority in order to achieve international peace and security.

This example, I hope, gives you some idea that the Tokyo Trial was not necessarily an isolated incident that took place in the remote past, but that it offers invaluable insights into the general working of the international law regime of the world today. In my talk, I will present the Tokyo Trial, in part, as a window through which we can have a better appreciation of the possibilities and limitations of present-day international criminal tribunals.

The Prosecution's Case

It is beyond dispute that during World War II, members of the Japanese armed forces committed war crimes on a vast scale against Allied prisoners of war and the civilian populations in the Asia-Pacific region. This, however, does not necessarily mean that commanders and

staff officers of the Imperial Japanese Army and Navy condoned it. On the contrary, military laws of the respective services prohibited such acts as looting and rape. They stipulated that those who committed these types of offense would receive punishment, ranging from a one-year term of imprisonment to the death penalty. Furthermore, statistical data of the Japanese army, provided by the defense council at the Tokyo Trial, showed that the army authorities did try to enforce these rules by punishing the violators. Between 1937 and 1944, more than one thousand Japanese servicemen in China and in the Pacific theater were court-martialed on charges of rape, and a much larger number of soldiers for other criminal offences. However, Japanese military justice proved largely ineffective in combating widespread war crimes. In spite of many courts-martial, rape, looting and other forms of inhumane acts continued to figure prominently in the Japanese conduct of war across the Asia-Pacific theater.

To explain the seeming propensity of the Japanese soldiers to commit atrocities, one may take into consideration such factors as (1) dehumanizing circumstances of war, (2) the culture of insubordination that plagued the Japanese army, (3) the breakdown of the military chain of command in certain combat situations, and (4) limited training that the Japanese soldiers had received about their international obligations under the Hague and Geneva Conventions. But to make sense of the pervasiveness of Japanese war crimes, it may be necessary also to consider if there were policy dimensions, that is, whether or not members of the Japanese government at the highest level had

ordered or authorized any of those widespread war crimes.

This was precisely the question that the Allied prosecutors at Tokyo attempted to tackle. Preliminary investigations by respected Allied authorities had already revealed that Japanese-perpetrated atrocities were widespread and in certain cases appeared systematic. Given these general characteristics of Japanese-perpetrated atrocities, prosecutors reasoned that the vast majority of the crimes were not isolated instances of atrocity, but rather an integral part of the Japanese policy on war and military occupation. Or, to borrow the words of the lead prosecutor of the Australian team at Tokyo, Alan Mansfield, "This similarity of treatment throughout the territories occupied by the Japanese forces will lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders and soldiers, but of the general policy of the Japanese forces and of the Japanese Government."

Command Responsibility

To substantiate the claim above, Mansfield and his colleagues in the prosecution team drew upon the doctrine of "command responsibility" or criminal negligence. More or less by default, they had to rely on the command responsibility doctrine, because prior to the initiation of war crimes investigations, the Japanese government ordered the destruction of all military records that it feared were potentially incriminating. The concerted effort of document destruction was such that it created an enormous difficulty for the Allied investigators when trying to secure affirmative evidence of criminal

orders. To overcome this challenge, it became imperative that they turned to the legal principle of command responsibility.

The advantage of this doctrine was that it did not require proof of criminal orders or authorizations. Instead, the prosecution needed to show (1) that war crimes were either widespread or systematic; (2) that the accused knew, or had reason to know, that their subordinate troops were committing atrocities; and (3) that the accused had the power and authority to stop the crimes, and yet, did nothing effective to fulfill this duty.

This doctrine was already being applied at other contemporaneous Allied war crimes courts. I may add that it still is used at the present-day international courts, especially at the Yugoslavia ones, where prosecutors have had great difficulty in securing documentary evidence of criminal orders. To appreciate this point, we only need to recall, for example, the Milosevic trial.

By relying primarily on this doctrine, members of the prosecuting agency at Tokyo – especially those from Australia, Britain, China, the Dutch East Indies, French Indochina, the Philippines and the United States – gathered voluminous evidentiary materials from respective theaters of war. The documents gathered consisted mainly of post-war Allied investigative reports; military orders and diaries that had been confiscated from captured Japanese soldiers; and affidavits and depositions that had been taken from the victims of atrocities, as well as perpetrators and bystanders. The collected evidence was then presented in court, showing that the Japanese armed

forces committed similarly-patterned war crimes repeatedly and throughout the Japanese-occupied territories, from the beginning to the conclusion of the war.

At the end of the day, the prosecution's strategy bore fruit. The pertinent part of the judgment read as follows:

“The evidence relating to atrocities and other conventional war crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August of 1945, torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy. During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that only one conclusion is possible – that the atrocities were either secretly ordered or willfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.”

In this ruling, the Tokyo Tribunal upheld the prosecution's basic contention that Japanese-perpetrated war crimes were widespread; that members of the Japanese government and military at the highest level must have either ordered such actions, or at least have known of their occurrence; and that despite such knowledge, they tolerated the continuation of atrocities by way of inaction.

With respect to individual verdicts, the Tribunal found 10 defendants guilty

while acquitting the others. Although, as Dr. Higurashi pointed out, those who were acquitted of war crimes were convicted of crimes against peace. (Therefore, all defendants were found guilty of one count or the other, or both.) The grounds for their conviction – those who were convicted of war crimes – in principle, was command responsibility, that is, the failure to act. In other words, the Tribunal found that they failed to stop widespread war crimes in spite of their knowledge, power and duty to do so.

Hideki Tojo

Among the 10 convicted was Tojo Hideki, the chief defendant, who had been prime minister and concurrently war minister of Japan between October 1941 and July 1944. During the same years, he had also held other cabinet positions on a short-term basis. Tojo's case, I think, is quite interesting, because among the 10 convicted, he was one of the few who were found guilty not only on grounds of command responsibility but also on evidence of his *authorization* to commit war crimes.

For instance, the Tribunal found that as prime minister and concurrently war minister, Tojo renewed the existing government policy not to accord prisoner-of-war status to captives in China. The reason was that no state of war in the strict legal sense existed between the two countries and that Chinese soldiers, therefore, did not enjoy protection under international law. The Tribunal also established that Tojo approved the use of Allied POWs for war-related work in contravention of the rules and customs of war, such as for the construction of the Burma-Siam Death

Railway. Similarly, evidence showed that Tojo encouraged POW camp commanders to make exhaustive use of POW labor, emphasizing that no one should “lie idle doing nothing while eating freely.”

With regard to the command responsibility conviction, the Tribunal established two key facts concerning Tojo: (1) that he failed to take effective action to stop the mistreatment of POWs in spite of his knowledge, power and duty to do so; and (2) that he also failed to mete out adequate disciplinary measures to those who were responsible for the Bataan Death March.

The fact that Tojo received multiple convictions on war crimes is crucial, since these findings most likely determined his death penalty. Generally speaking, the sentencing practice at both Nuremburg and Tokyo was to reserve the death penalty for those who were convicted of war crimes or crimes against humanity, or both. Those who were convicted of crimes against peace *only* would not be sentenced to death. In other words, those who were convicted of charges related to aggressive war – planning and waging aggressive war – did not receive capital punishment. Instead, they were handed down life or lesser terms of imprisonment. What this means is that, had Tojo been convicted of crimes against peace *alone* (such as his authorization to initiate surprise attacks on Pearl Harbor, the Philippines, and British Malaya), he may have escaped capital punishment and may perhaps have also survived the Allied occupation, alongside a dozen other fellow defendants.

The selective use of death penalty is significant also on another count. It shows the relative importance of war crimes in the minds of the judges, notwithstanding the fact that the initial Allied policy was to attach the greatest importance to the prosecution of crimes against peace. This is a point that Professor Higurashi has already discussed.

Now, what are we to make of the preceding discussion? Let's get back to my initial questions. How did the Tokyo Trial contribute to (1) documenting wartime atrocities by the Japanese, (2) establishing the locus of responsibility, and (3) setting in motion the Japanese confrontation with war guilt? What lessons are we to draw from the Tokyo Trial about the working of international criminal trials?

In lieu of a conclusion, I would like to make the following few points for your consideration. First, and in my opinion, the Tokyo Trial could – and did – play an important role in setting the record straight about the Japanese conduct of war and occupation. Again, to recap, prosecutors documented the geographical spread and recurrence of similarly-patterned war crimes. The Tokyo Tribunal, in turn – the judges, in turn – established that members of the central government and military were accountable for the occurrence of widespread war crimes. The judges also found that certain defendants were individually responsible.

Second, the Tokyo Trial also set out an important historical precedent in the field of international humanitarian law. Specifically, it showed that international criminal tribunals could overcome

various challenges – such as challenges in document collection, the application of complex legal doctrines such as command responsibility, and so on – in order to establish the accountability of high-ranking state leaders as well as military commanders for mass atrocities.

Third, as for the tribunal's educational effect, the Tokyo proceedings did not seem to have much positive influence on the Japanese understanding of war, war guilt, or the issues of responsibility. The reasons for the limited educational impact are many, and extremely complicated. But I can say this much for the moment: the narrow mandate of the Tokyo Tribunal; the selectivity of the prosecutorial effort (which includes the exclusion of Emperor Hirohito from the trial process); and the overall structure of the victors' trial against the people of the vanquished nation – these and other structural and contingent problems served as hindrance for the Tokyo Tribunal to win popular support as an impartial arbiter of justice. These obstacles ultimately kept the Tokyo Trial from the Japanese people's postwar truth and reconciliation process.

Yet, as shown in this paper, the substance of the Tokyo proceedings is quite complex and, in fact, far more complex than generally believed. To dismiss the Tokyo Trial as victors' justice, as has often been done, therefore, seems unwarranted. As a matter of fact, the tribunal's findings concerning war crimes, as documented also in the trial transcripts, are quite relevant for understanding the extent to which the Japanese armed forces committed atrocities during World War II. The Tokyo Trial, in this regard, can play an important role in the ongoing

inquiry into the issues of responsibility and war guilt.

As I continue my own exploration of the Tokyo Trial, I look forward to uncovering more trial records so that I can have my part in memory and reconciliation projects such as this one. Furthermore, I hope to promote a constructive dialogue about World War II war crimes among all the peoples and countries concerned. Thank you very much.

Mochizuki: Thank you very much Professor Totani for that excellent presentation, and for focusing our attention on the issue of war crimes and the doctrine of command responsibility. Now, we'll turn to Professor Yang for his comments.

Daqing Yang: Thank you all. I want to begin by reminding us that the two presenters, in order to spend two hours with us, spent probably a total of fifty hours in the air. So, I think I'll keep my comments relatively brief so that they will have more airtime. Plus, many of you in the audience are true experts on international law and international relations of Asia, so I'm sure you'll be eager to ask questions.

Our two speakers presented what really is a small portion of their cutting edge research, as Professor Mochizuki noted, Dr. Higurashi has published many works in Japanese, and Professor Totani's work in fact, I understand, was first published in Japanese as well. So make sure you read their books, if you understand the language, but also raise questions. Here, I want to emphasize the fact that these two excellent pieces of research look at different aspects of the Tokyo Tribunal.

Dr. Higurashi looks at the political aspect of the trial, highlighting six major issues that he alluded to, including the set-up of the trial, the mandate of the trial, also the reception of the trial – the perception on the part of the Japanese. Dr. Totani focused on the internal side of the trial, namely the prosecutorial effort in the courtroom.

I think they agree with each other on the major findings. For example, with regard to the rather limited impact of the Tokyo Trial on changing the way Japanese people look at the issue of war responsibility, which may come as a surprise to some of us.

Two Dualities

Now, I think their presentation – I'd like to focus on the duality in both of their presentations. In Professor Higurashi's presentation, he sets up this duality between the responsibilities of the individual, which he argues that the Japanese government more or less accepted, and on the other hand, there is this responsibility of the state, which he argues that the Japanese government was not prepared to accept.

So in this regard, I would like to probe a little further, namely, what does it mean for the Japanese government to accept the verdict, or the judgment of the Tokyo War Crimes Trial, as indicated in Article 11 of the San Francisco Peace Treaty? Does that mean that in Japan nobody could, from the official point of view, challenge the verdict on these individuals?

Occasionally, we hear that there is the argument from the perspective of domestic law in Japan, these individuals

were not considered criminals. So does that contradict the official stance of accepting the judgment of these individuals as war criminals? That's the question for Dr. Higurashi.

And also, the other side – the state responsibility. If a court, like the Tokyo Tribunal, is not a good place to pursue state responsibility, can we argue that the other measures undertaken by the occupation authorities, such as changing Japan's constitution, reforming the Japanese government, disbanding the military, etc. actually imply that there is a responsibility on the part of the Japanese state? So I would say that if that's the case, maybe the trial did not implant, as the U.S. Secretary of War Stimson had intended, this sense of guilt about Japan among the Japanese people. But at the same time, these other measures undertaken by the occupation authorities may have accomplished that effect.

Dr. Totani also set up a duality. And her duality is conventional war crimes versus crimes against peace. And she makes the argument that, by and large, the Tokyo Tribunal was rather successful in prosecuting conventional war crimes. Here I have two questions. One is more of a clarification. Perhaps because of the limit of space, she presented the picture as if the prosecutor, as well as the judges who eventually passed the sentence, were pretty much acting in unison. Now, of course, the prosecutor – we have a chief prosecutor who is American, who's more likely to exert influence. But, at the same time, we have to keep in mind that this is an international tribunal of prosecutors, of judges supplied by eleven allied countries, as she pointed out. We have

allied prosecutors who were educated in the United States, such as the Chinese prosecutor who was educated at George Washington University law school, but what about prosecutors from the Soviet Union and France, who follow an entirely different legal system? So, in this case, can we speak of a consensus on the part of the prosecution?

Then, when it comes to what she calls the sentencing principle, was there such a thing at the Tokyo Tribunal as a single sentencing principle, when you have judges or justices supplied from eleven countries? Of course, their actual voting record, as I understand, is still kept confidential as to who will receive the death penalty, but there is all kinds of speculation. In some cases a simple majority leads to the death penalty. So, maybe this is a somewhat more complicated picture, but my bigger question for Dr. Totani is that, if indeed, again, conventional war crimes can be successfully prosecuted, then what about crimes against peace or issues about aggression? Can it ever be legally and successfully prosecuted, or is it better left to historians to argue? That's my comment. Thank you very much.

Mochizuki: Thank you very much, Professor Yang, for really zeroing in on a couple of very critical issues. I'm wondering if Professor Higurashi would like to respond to Professor Yang's question about state responsibility and the meaning of Japan accepting the judgment of the Tokyo Trial, according to Article 11 of the San Francisco peace treaty.

Article 11

Higurashi: I'd like to respond to the points raised by Professor Yang. What I talk about is the treaty under which Japan accepted the judgment of the Tokyo Trial. What are the implications of that? I think that's what the Professor was asking. And, as it turns out, we can look at the Japanese text that accepts "saiban." Does this mean trials or judgments? There is a bitter dispute about the interpretation of the wording in Japanese – does the Japanese version say that Japan accepts the conclusion of the Tribunal or that Japan accepts the rightfulness or the legitimacy of the proceedings? That is much more ambiguous than what the English version says. And so, some observers in Japan used this point to say that the Tokyo Tribunal was not legitimate.

Recently, former Ambassador Kazuhiko Togo wrote an excellent book entitled, "Rekishi to Gaiko", about relations between Japan's History Problem and diplomacy, and raised this point. What Ambassador Togo said is that he had never seen a thorough investigation of the interpretation matter in the Ministry of Foreign Affairs records. I also don't have any evidence to back up any of my ideas about why there is a discrepancy between the English and the Japanese versions of this treaty, but I can conjecture or reason that the Ministry of Foreign Affairs translated the English version into Japanese as the trials, instead of the judgments. When you translate it into Japanese as trial, then you can talk about the importance of Pal's dissent from the proceedings and the defense team's rebuttals. So I think that the reason for the translation into Japanese the way it exists is that they

wanted to leave some room for play. I don't think that we should overemphasize this point, though, the fact that there is a difference, a discrepancy between these two versions. The fact is that all twenty-five of the defendants turned out to be guilty; they were judged as guilty, and the Japanese government accepted the result. And there has been no change in stance on this. The Japanese government views the proceedings as having been justified and accepts the ruling.

Domestic vs. International Law

And then as far as the second point is concerned, as Professor Yang talked about, there is a double standard. It is a fact that there was use of a double standard, and that is the Japanese government's position. During the Allied occupation, the tribunal was undertaken and the war crimes convicts were to be given the same strict treatment as ordinary Japanese prisoners were given. But after Japan restored its sovereignty, the war criminals were given pensions because the Ministry of Justice viewed them to be not guilty of crimes, according to Japanese laws. And so they were war criminals under international law, but not viewed to be guilty of criminal actions under domestic law in Japan, so that is where the double standard exists.

Inculcating Guilt

And then, as far as state responsibility is concerned, in the final analysis the proceedings were only an indirect means to give a feeling of guilt to the Japanese people. GHQ had the information and education section, and the CIE section undertook the advertising campaign, the

“War Guilt Information Program,” to inform the Japanese of war responsibility and of mistakes made by the Japanese during the War, and used various means, such as radio and printed publications to make clear the mistakes of the Japanese government and army, and the crimes that were committed. And this has been used to educate the Japanese public about what happened during that time. So it was very shocking for the Japanese to see their wartime leaders being judged, but I think that we should look at the Allied occupation policy overall as having played a large role in educating the Japanese about what happened during the war, and not just at the Tokyo Trial itself. I think that leads to a more balanced consideration of this issue.

Totani: Yes, thank you, Dr. Yang, for your very important questions. They help me clarify certain points that may not have been fully articulated in my presentation.

Judges and Prosecutors

The first question was whether the judges were acting in unison or not. This was actually a big problem at Tokyo. At Nuremburg, the judges – in spite of their differences, such as differences in legal systems in respective countries – understood that Nuremburg was a historic event and they ultimately joined hands to write a uniform judgment. In contrast, at Tokyo, the judges had difficulty nurturing a team spirit, and seemed to have some problems with personal chemistry as well. They ended up producing the majority judgment of eight *and* five concurring and dissenting opinions. So, in terms of consensus building, there was a huge problem.

My discussion centered on the majority judgment, which was accepted – I mean, handed down as the Judgment of the Tribunal. The point I was trying to make in my presentation was that when it comes to certain issues on legal principles, the opinion in the Tokyo Judgment fell in line with that of Nuremburg, and that what was affirmed at Nuremburg and Tokyo has an enduring legacy to this day.

As for the question of whether the prosecutors and the judges were acting in unison, I was trying to show the opposite. The prosecutors – who represented the interests of their respective governments – made a lot of efforts to substantiate the criminality of aggressive war etc. and they did succeed in securing convictions. But they were not so successful when it came to securing desired punishment – that is, capital punishment – for crimes against peace, because the judges had a different idea about sentencing.

Similarly, only 10 out of 25 defendants (3 others were dropped from the Indictment because of death and other health reasons) were convicted of war crimes while the rest were acquitted. This shows that the prosecutors and the judges did not necessarily find the same things or reach the same conclusions. To put differently, it would be inaccurate to say that the judges were doing the bidding of their respective governments.

Sentencing

As for your second question, Dr. Yang, about sentencing practices, thank you for pointing out the voting records. He is right about the judges having conflicting views as to who to convict and acquit.

Although the records were not made public, secondhand information indicates that the judges were divided. At any rate, if you look at the sentencing practice *in general*, and if you take into consideration some of the things said by the chief justice at Tokyo and by the judges at Nuremburg, you can say with a degree of certainty that the judges at both tribunals had similar ideas as to which crimes were graver. They regarded war crimes and crimes against humanity as much graver than crimes against peace. Crimes against peace being a new type of international offense, the judges seemed unwilling to hand down capital punishment.

Crimes Against Peace

Finally, the question about crimes against peace – whether this type of offense can legally and successfully be prosecuted – it’s a question that has been discussed by the working group of the International Criminal Court today, whose statute is coming up for review this year. So, this question can be answered by these legal experts much more satisfactorily than by me, since I lack expertise in this matter. But I should like to concur that this is an important question.

Mochizuki: Thank you very much. You’ve all been waiting patiently, but, as Professor Yang said, since our two speakers came from so far away, and there’s so much knowledge about this issue here, I wanted to give them a full opportunity to explain their views. But now, I’d like to open up the floor to questions. And I think what we’ll do is take questions and then our two speakers can then respond, aggregate those questions and then make a single

response. Please keep your question succinct and please say to whom you want to address your question.

Q&A

Questioner: I’d like to ask Professor Totani, you mentioned that the records were kept secret. That surprised me. I mean, after all, so many decades have elapsed already. Isn’t there a way that these records would be open by now?

Questioner: Thank you. My question is really to both of the presenters. One of the things that strikes me from both presentations is how much political judgments affected the Tokyo Tribunal from beginning to end. And therefore, if there is a lesson for us today, an attempt to have some kind of abstract sense of justice, clearly this would suggest that there’s a problem in applying that.

And I have one other question, and that is that we know there were a number of people who were declared or were detained as Class A war criminals who were released without being tried. Can you explain why that happened and how that happened?

Questioner: I was wondering how many of us here actually were in Tokyo when this transpired, this notable experiment. I was. I worked for a time in the international prosecution section. The idea that this is going to reeducate or educate the Japanese on how bad little boys they have been – that was totally unsuccessful, I can assure you. They had other things to worry about in 1946, ’47 and ’48, that was to get some food for the family, and such a trial was an interesting sideshow.

I would like to ask them, why is Judge Pal's rationale always conveniently ignored? There is just the majority opinion, and even that was divided. Judge Pal's ideas, I think, are far more valid in the whole totality of things than the majority. And also, you know, you'd like to dismiss victors' justice, but let's face it, let's reverse this, and I'd ask you this question in all seriousness: If the trial had gone a different way – that it was held in Washington, D.C., alright, and the Japanese assembled their little cronies, and sat in judgment of the American political leadership, I don't think the American people would find that particularly amusing. They would say "Yes, we understand what goes on, it's a rigged operation," alright? I think that would be the case, would it not?

And my third and last question, let's put it this way – this judgment is always aimed at Japan, but I ask you, why haven't the historians asked this of others? In the Japanese case, how worse were they in doing what they did – and I'm not saying they did everything good, they did many bad things, I admit that, many, many bad things. But, compared to the Dutch, the British, the Americans in the Philippines, the Chinese conduct against their own people – how does that compare now? And I don't think these rules that you say are wonderful – they were never expected to be applied to England, the U.S. and any of the Western Allies. They just apply them to small countries. Is that not correct, politically?

Questioner: Just a question for both speakers. Would there really have been a war crimes trial in Tokyo if crimes against peace was not the centerpiece in the political argument for having it? If it

was just war crimes against humanity, there were already military trials that went on in '46 and '47, I believe, in Singapore and elsewhere.

Questioner: Yes, I was just going to follow up on the previous question. In Alexis Dudden's book, "Troubled Apologies," she actually talks about the introduction of the argument by the defense that the United States committed comparable crimes, and therefore the Japanese should be let off the hook. I'm curious what role that argument plays today in the discourse in Japan – whether that comes up frequently in the arguments about victor's justice?

Mochizuki: Well, we have a lot of questions on the table. Professor Totani, do you want to take a first stab at them, and then Professor Higurashi.

Totani: Yes, thank you all for your valuable questions. As for the first question about records being kept secret, I may have misrepresented the facts. Actually, the records were available from the outset, but the point I was trying to make was that the Japanese Imperial Government, towards the end of the war, attempted to destroy wartime records in order to obstruct the Allied war crimes investigations, which anyone would do if you knew that war crimes investigations were pending. That's the point I was making. As for the trial records, they were available from the outset – not in published form necessarily, but they were available for those who were interested in looking at them.

Mochizuki: But what about the discussions among the judges? Are those available? So, not the proceedings, but...

Totani: Oh, sorry. Well, I haven't seen those records regarding sentencing. I have seen other internal memos by the judges, but... Perhaps Professor Higurashi has something to add to this.

About the Class A war crimes suspects, I think Higurashi-sensei's much better equipped to answer this question, so I will leave it with him.

Flaws and Legacies

I appreciate your questions concerning issues surrounding the criticism of victors' justice. The criticism that victors protected themselves from any prosecution points to a structural problem of the Tokyo Trial. I think this was one of the greatest weak points at the Tokyo proceedings as well as at Nuremburg, especially in terms of impressing the public with the idea of fairness. The same kind of criticism is raised even against the present-day tribunals, because there is always politics involved in the making of any international trials. But at Nuremburg and Tokyo, the problem was much more pronounced. Because of the way in which the war was concluded, the German leaders as well as the Japanese leaders had little choice but to entrust the Allied governments with the framework of war crimes trials.

As for the point concerning Justice Pal's opinion being dismissed, his lengthy dissenting opinion has been received widely in Japan as a more authoritative judgment than the majority judgment. The debate in Japan, in this regard, is actually a little bit different. Some argue that Judge Pal's dissenting opinion was a

valid one, it is one position that one can take.

The point I was making was not necessarily that the Tokyo judgment was an impartial, perfect judgment. It's rather that, if you dismiss legal principles that are upheld by the Tokyo Tribunal, there are far-reaching consequences, meaning, because the Tokyo judgment is built on what the Nuremburg Tribunal established, and because the Tokyo rulings do constitute the foundation of international humanitarian law – how it developed thereafter – you'll have to take these matters into consideration. Basically, I'm trying to put things in perspective so that we can have multiple ways of understanding, assessing, and determining the historical significance – problems, as well as strengths – of the Tokyo proceedings. Professor Higurashi?

Uncharged Suspects and MacArthur

Higurashi: As far as the Class A suspects, there were 25,000 Japanese war crimes suspects who were arrested, and approximately 100 are considered the Class A suspects. And so, these Class A suspects were the ones who were the potential targets of the Tokyo Trial. So, the tentative decision was made to try the remaining Class A suspects in subsequent trials, but the British did not want to do that. The British were, from the start, skeptical about the idea of an international trial, but as a result of the intentions or the decision made by the United States, the British did decide to participate in the Tokyo Trial, even though they didn't want to. But in October 1947, the British said to the State Department that they

would not participate in further international trials.

Another thing we can think about is that General MacArthur – many people in Japan had thought of the Tokyo Tribunal as “MacArthur’s Tribunal,” and many people still think this today about the Tokyo Trial. However, in fact, the case is that General MacArthur was against the International Tribunal in Tokyo. He thought that the U.S. Military Commission should try Tojo and his cabinet members for murder, and that the Commission should only be composed of judges from the United States. And as far as Pearl Harbor was concerned, the people who decided to undertake the Pearl Harbor attack could be tried for murder, without changing international law. And that was MacArthur’s idea, so there were many different opinions about what to do, but what finally occurred is that the decision was made to have an international trial in Tokyo in the model of Nuremberg, and that’s the Tokyo Tribunal.

Now, MacArthur was disgusted at the conception of the Tokyo Tribunal, but it was MacArthur who started things rolling, but the decision that came out of the tribunal was something that was independent of MacArthur. The whole proceeding was not under the control of MacArthur, so MacArthur was tired by the end of the trial and didn’t want to see a continuation of that. He did urge that only an international court would be able to try crimes against peace in the case of Japanese major war criminals, owing to the provisions of SWNCC 57-3.

As far as the Class A suspects who were not charged – there were many who were not accused. Nobusuke Kishi and a

couple of other people who later became important people in the Japanese government were to be charged for Class B and C war crimes – mainly violations of the rules of war, but they were not charged in the end. And a reason for not having the trial is that GHQ abandoned charging the remaining suspects, not being able to get a guilty verdict in light of the judgment of the Tokyo Tribunal. Tojo and six leaders were convicted and sentenced to death. Some of the Japanese people do feel that this is “victors’ justice,” partly because it looks that way, but if you look at the judges, it’s more of the fact that from 1947 it was clear that they would not be able to come to a single conclusion for the entire tribunal. And so, there were a lot of ups and downs during the trial, and that’s what led to separate opinions of the minority judges.

More on Crimes Against Peace

And then, as far as crimes against peace, the question that was asked – I am in agreement with the questioner. When you look at the Nuremberg trial, the purpose of that was to try people who were responsible for the invasion, and that was the American decision, that’s what they wanted to see happen. The Americans were determined to have a trial to try the people who were responsible for the invasion or the aggression. This is the Nuremberg doctrine, and this doctrine was applied to the Tokyo Trial. In Tokyo, some governments other than the United States were more interested in trying atrocities or conventional war crimes, rather than crimes against peace. And in Nuremberg, as things began to work out, there was more attention paid to barbaric

acts during the war, and less attention paid to crimes against peace.

Totani: I failed to respond to a few questions about crimes against peace. One question was whether or not the Tokyo Trial would have happened if crimes against peace had not been the centerpiece of the trial. I am in complete agreement with Dr. Higurashi. As he just pointed out, it was an American top priority, not necessarily the priority of its allies. I think this latter point is quite important. It would be reasonable for us to assume that while going along with the American policy proposal, Britain and other Allies – Australia, in particular – went to Tokyo not only because they wanted to hold the highest-ranking Japanese political and military leaders accountable for aggressive war but also for their responsibility for widespread atrocities.

Victors' Justice and Legitimacy

Going back to the issue of victors' immunity – how it affected the Japanese perception of the trial, or rather, how it has shaped our assessment of the Tokyo Trial. There are two ways of dealing with this issue. On the one hand, you can take the position that if the victors and vanquished were not going to be tried equally, one cannot find any legitimacy in the prosecutorial effort led by the victors only – that's one position. Another position is to understand that war crimes prosecution inherently is selective; that it requires political will in order for any prosecutorial effort to take place; and that the trials always have some shortcomings. In other words, one might take the position that prosecutorial imbalances are a *given*. And then, one may take a step further to look at the

substance of the trial – whether or not *in substance* what took place in the court of justice constituted victors' justice.

Depending on which position you take, your assessment on the Tokyo Trial would be very different. If you take the former position, then Nuremburg can't be valid, the Tokyo Trial can't be valid, and any other international or national criminal trials that have the same structural shortcomings can't be valid. If you take the latter position, you may have more varied, different assessments.

Mochizuki: Thank you very much. Sorry that we don't have more time to keep discussing these issues, but I just want to say that this is an ongoing project, and I want to thank the Japan-U.S. Friendship Commission for their continuing support for this project. We will probably have another public program on this in the fall, so we'll let you know when that happens, and we'll continue this discussion. I also want to thank the Sasakawa Peace Foundation USA for co-sponsoring this event with us. And then, most of all, I want to thank our panelists, Professor Higurashi, Professor Totani and Professor Yang. So if you would join me in thanking them. Thank you all for coming.

About the Speakers

Dr. Yoshinobu Higurashi is Professor of Japanese political history and foreign policy in the Faculty of Law, Economics and the Humanities at Kagoshima University. He received his B.A. from Rikkyo University in 1986, and Ph.D. from Gakushuin University in 2000. He is author of *Tokyo Saiban no Kokusai Kankei* (The Tokyo War Crimes Trials and International Relations, 2002), which received the Yoshida Shigeru Prize. His most recent books are *Tokyo Saiban* (The Tokyo War Crimes Trials) and *Tokyo Saiban wo Tadashiku Yomu* (Correctly Reading the Tokyo War Crimes Trials, co-authored with Kei Ushimura, both 2008). Other works include his translation of Arnold C. Brackman's *The Other Nuremberg* into Japanese, and his supervision of the Japanese edition of John G. Roos' *In a Prison Called Sugamo*.

Dr. Yuma Totani is Assistant Professor of history at the University of Hawai'i at Manoa. She received her Ph.D. from the University of California at Berkeley in 2005 and was a post-doctoral fellow at the Reischauer Institute of Japanese Studies, Harvard University. Her publications include "*Tokyo saiban ni okeru senso hanzai sotsui to hanketsu: Nankin jiken to sei doreisei ni taisuru kokka shidosha sekinin o chushin ni*" ("The Prosecution of War Crimes and the Judgment of the Tokyo Tribunal: Focusing on the Responsibility of State Leaders for the Nanjing Incident and Sexual Slavery"), in *Gendai rekishigaku to Nankin jiken (Modern Historical Studies and the Nanjing Incident)*, Kasahara Tokushi and Yoshida Yutaka, eds., 2006); and *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008).

About the Discussant

Dr. Daqing Yang is Associate Professor at George Washington University, where he specializes in the modern history of Japan and East Asia. In 2004, Dr. Yang was appointed a Historical Consultant to The Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group at the U.S. National Archives, and in fall 2006 he served as the Edwin O. Reischauer Visiting Professor of Japanese Studies at Harvard University. Dr. Yang grew up in Nanjing, graduated from Nanjing University, and received his Ph.D. from Harvard University. He co-edited *Contentious Issues in Sino-Japanese Relations: Toward a History Beyond Borders* (in Chinese and Japanese) as well as *Rethinking Historical Injustice and Reconciliation in Northeast Asia: the Korean Experience*. His book *Technology of Empire: Telecommunications and Japanese Expansion, 1895-1945* is forthcoming.

About the Moderator

Dr. Mike Mochizuki is Associate Professor of Political Science and International Affairs at George Washington University. He holds the Elliott School's endowed chair in Japan-U.S. relations in memory of Gaston Sigur. Previously, Dr. Mochizuki was at the Brookings Institution where he was a senior fellow. Before that he was with RAND where he served as co-director of the Center for Asia-Pacific Policy. He has taught at the University of Southern California and at Yale University. He received his Ph.D. in political science from Harvard University. Some of his recent publications include *Japan in International Politics*, *The Okinawa Question and the U.S.-Japan Alliance* and *Crisis on the Korean Peninsula*. He is currently working on a book entitled *The New Strategic Triangle: the U.S.-Japan Alliance and the Rise of China*.