The Tokyo Judgment and the Rape of Nanking

TIMOTHY BROOK

The Japanese assault on the city of Nanking in December 1937 was one of many incidents that the International Military Tribunal for the Far East (IMTFE, 1946–48) examined in the course of judging the wartime leaders of Japan. What was referred to at the time as the “Rape of Nanking” has in the last several decades become a controversial marker of Chinese identity as well as a source of potent disagreement among Japanese over their nation’s history as a colonial power in East Asia. Within this controversy, the IMTFE trial in Tokyo has been used as a touchstone to confirm and deny all manner of claims concerning the incident. Those who feel aggrieved over Japan’s conduct toward China cite the evidence produced at the trial to authenticate the scale and brutality of the massacre (Eykholt 2000, 19–23). Those who feel that Japan and the emperor system have been unfairly blamed for the war in East Asia scour the trial proceedings for failures of logic and evidence that demonstrate to their satisfaction that the “Tokyo trial view of history” is nothing but anti-Japanese distortion and fabrication (Yoshida 2000, 111–14). For both sides, the Tokyo judgment is fuel for ideological fire.

Going back to the IMTFE documents on Nanking will not resolve which interpretation is “true.” But it can serve another purpose, which is to understand how the tribunal chose to interpret the Rape of Nanking as part of its strategy to determine Japan’s war criminality. The incident mattered at the IMTFE not only because atrocities were committed in Nanking but also because it could be made to produce narrative effects that had legal consequences. Taking account of the judicial environment within which the tribunal operated is thus quite as important in an evaluation of the adequacy of the Tokyo judgment on the Rape of Nanking as is examining the issues of substance that the court considered. The IMTFE was not a fact-finding commission, after all; it was a military tribunal convened to hear charges against individuals. The judicial environment of the IMTFE determined how the

Timothy Brook (tim.brook@utoronto.ca) is Professor of History at the University of Toronto. This essay was first drafted for the student conference “Memories of Nanking: Toward a Global Consensus” at Washington University, St. Louis, in November 1999. It was presented in revised form as a Henry Y. W. Fong Lecture at the University of Victoria in November 2000. Research for the project on Chinese wartime collaboration from which this essay stems was supported by the Social Sciences and Humanities Research Council of Canada.

The IMTFE was not the only tribunal to hear charges concerning Japanese misconduct at Nanking. On the other military tribunals in East Asia, see Piccigallo (1979) and Iwakawa (1995).

tribunal could deal with Japanese misconduct at Nanking. While it imposed constraints on how the story of the war could be told and in whose favor, it also made a judgment, however problematic, possible. If, in addition, the judicial framing of the case has made the Tokyo judgment vulnerable to challenge, that is to the advantage of those who wish to understand better the possibilities and limits of war crimes adjudication. The task I take up in this essay is to inquire into the impact of the judicial context on the uses to which the IMTTE put the Rape of Nanking in the course of forming a judgment, and the objections to which these uses gave rise. I am not under the illusion that a combined legal and discursive analysis of the Tokyo trial will settle this sadly perennial Sino-Japanese disagreement once and for all, since its real sources lie elsewhere. But a less encumbered understanding of the Tokyo judgment might move both sides away from resting their arguments on the IMTTE and toward exploring other means of coming to terms with their differences.²

War Crimes Trials

The origins of the military tribunals convened after the end of the Second World War go back to a meeting in 1942 in London, where representatives of the Allied Powers met to deliberate on the idea of prosecuting enemy individuals for war crimes. The London Agreement changed how wars thereafter would be concluded: not with instruments of surrender but with criminal prosecutions. Leaders of defeated nations would no longer be summarily executed as they might have been under earlier dispensations, but made to answer in a court of law for charges of conspiring to commit “crimes against peace,” specifically “the waging of a declared or undeclared war of aggression.” So too, defeated soldiers would be prosecuted for “conventional war crimes,” such as murder and deportation, and for the newer category of “crimes against humanity.”³ The final moment in the story of a war was thus displaced from the

²The current conflict between some Chinese and some Japanese regarding Japan’s responsibility for war damage may be seen in part as an exercise in enhancing difference, through which each side hopes to gain a windfall in national stature or ethnic integrity. Such windfalls work against the effort of contemporary human rights discourse to “thin out” the particularities of identity separating national or ethnic groups so that the claims of one group may be balanced less antagonistically against the claims of another (Hesse and Post 1999, 30–31). Those who enter the debate over the Rape of Nanking generally do so, instead, to “thicken” their irreducible conceptions of who they are and who they think the others are, packing their separate narratives of the event with particularized cultural identities and exclusive collective memories that celebrate the nation and dream of a cohesive ethnic community that probably never existed. The recent suggestion of Tanaka Masaaki (2000, 53) that Chinese may derive pleasure from sexual assaults whereas Japanese “have never found such acts amusing” is an unfortunate case in point. So long as “those who wish us to remember very different things” decline to engage in the sort of democratic dialogue needed to fashion a more inclusive account “that resonates in the personal experience of all who lived through the period” (Osiel 1999, 250), the Tokyo tribunal will continue to be used to promote difference. On the difficulty of bridging that difference, see Yang (2000).

³Class A war criminals were charged with “crimes against peace,” defined in the Tokyo Charter (Article 5) as “the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Class B war criminals were guilty of “conventional war crimes,” that is, “viola
tions of the laws or customs of war.” Class C war criminals were charged with “crimes against humanity,” identified as “murder, extermination, enslavement, deportation, and other
signing of an armistice to the signing of a judicial decision, from a postbattle ceremony to the ritual of court.

This displacement has altered the way in which we narrate wars. In the post-Durkheimian culture of law that prevails in liberal polities, courts are not Delphic sites of natural judgment reaffirming fundamental community values but arenas of debate in which different narratives compete for the court’s approbation. This is not to say that matters of substance fade from scrutiny; but courtroom verdicts depend as much on the quality of story that can be told to explain the facts entered in evidence as on the facts themselves. In war crimes trials, victors and losers alike are called on to narrate their different histories of a conflict. The prosecution seeks to demonstrate that the losers lost not merely because they were defeated on the battlefield but because their cause was unjust and their means illegal. The defense must then make its case by challenging that narrative, if possible giving a counternarrative that construes the acts and intentions of the defendants in a light other than that under which they were placed by the prosecution, and so demonstrate that these acts and intentions were not criminal.

In the postwar trials of the late 1940s, which heard cases against only one side, the prosecution’s story always carried greater authority. The nations that convened them hoped that their confirmations of the victor’s account would constitute an official history of the war that could dominate the historical consciousness of victor and defeated alike. The defeated, however, did not prove receptive to the judgments of the postwar courts. The Nuremberg judgment appears to have done better in this regard than the Tokyo judgment, though not because these tribunals differed significantly in their law or constitution. More important to their unequal reception was their timing. The Nuremberg judgment was reached expeditiously while public support for trying and executing war leaders was still high, whereas the Tokyo trial dragged on for two and a half years. By its midway point in the summer of 1947, James T. C. Liu, prior to establishing his reputation as a Song historian, observed that the trial had become a “second-rate show” that no longer commanded public interest (1947, 279). Not only was popular tolerance for the interminable proceedings flagging, but the political environment that had made the tribunal possible was dissolving under the growing pressure of the Cold War (Horowitz 1950, 574; Brode 1997, 176, 199). Nuremberg was recognized as the representative judicial act ending the war, while Tokyo slipped from sight. The proceedings and judgments were not published, and the jurists who thought they were breaking new legal ground fell

inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” On the early debates over the definition of war crimes, see UNWCC (1948, 180–87). The Tokyo tribunal was disinclined to define or use “crimes against humanity” and simply lumped these together with “conventional war crimes.” On the use to which these categories were put at Tokyo and Nuremberg, see Beigbeder (1999, 47–48).

“David Cohen has identified as the principal difference between the judgments Tokyo’s failure to define a standard of individual responsibility that would limit the loose application of the charge of conspiracy. Unlike Nuremberg, which examined the specific roles that individuals played in particular events, the Tokyo judgment was based on “a historical narrative of the unfolding of this conspiracy rather than an examination of the defendants’ conduct.” The tribunal’s strategy “was not to delineate clearly the culpable conduct of each defendant considered as an individual, but rather to establish participatory linkage between each defendant and a historical flow of collective activity” (1999, 60–61).
silent after 1953. Japanese reluctance to acknowledge war responsibility, and Chinese war weariness compounded by the political complications of the Communist seizure of power in 1949, further eroded the authority of the Tokyo judgment. Since then, scholarly opinion has concurred in this negative evaluation, drawing attention to such issues as the political peculiarities of the American occupation, doubts about the tribunal’s validity in law, and procedural shortcomings (Riley 1957; Minear 1971; Dower 1999).

More recently, Mark Osiel has brought critical theory to bear on the subject of war crimes adjudication to suggest a different way of approaching the Tokyo judgment’s failure to win support: the narrative it told was not persuasive. That failure was rooted in what he terms the “dramaturgical” decision of the prosecution not to bring the Japanese emperor before the court. Although General Douglas MacArthur believed that indicting Hirohito would destabilize the Occupation and undermine American interests in the Pacific, the nonappearance of Japan’s formal wartime leader meant that the tribunal was obliged, in Osiel’s nice phrase, “to attempt a staging of Hamlet without the prince” (1997, 139). The longer-term effects of this discursive decision were unanticipated, and huge. Nuremberg’s condemnation of Hitler opened to ordinary Germans the possibility of rejecting what Germany had done during the war, which they did in the 1960s when Germany undertook criminal prosecutions against lower-level agents of the Nazi regime. The trials united younger Germans in disgust at what their elders had done and in repudiation of that period in their collective history. In contrast, the decision to keep Hirohito out of the Tokyo trial closed off the possibility that younger Japanese would be moved to reject what the imperial government had done during the Shōwa era, until challenged to do so from outside (206). The consequences of this discursive failure have been twofold: the Tokyo judgment has united some Japanese in rejection not of their leaders’ actions but of the court’s judgment, and it has united Chinese in the conviction that Japan has still to bear its full “legal burden” for what it did in the war (Chang 1997, 225).

In the struggle between these two positions, each side tells the story of the Japanese takeover of Nanking differently. This is not surprising, given the charge that an atrocity bears: a singular event that can summarize or recapitulate the diffuse conduct of an enemy, and from which it is possible to demonstrate criminal liability for the entire conflict. To be effective, though, the atrocity must be nested within a larger narrative to which it imparts coherence. In the case of the Rape of Nanking, two different logics were available to make the events of the war cohere around this atrocity and both were effective in determining the outcome. The Chinese used the incident to epitomize all Japanese misconduct in China: it was made to stand as the

1Several IMTFE participants published studies during and immediately after the trial, e.g., Evans (1947), Pal (1949), Quentin-Baxter (1949), Horowitz (1950), Röling (1953). The only study to appear after 1953 is a doctoral dissertation in political science which is harshly critical of the IMTFE’s application of “an ill-defined law to disputable facts” (Riley 1957, 198). The IMTFE came back into the ken of legal scholars in the 1970s; see Lewis (1979, 139–45).

2The Chinese quest for justice rides on considerable emotional disturbance. Iris Chang characterizes her anxiety that the memory of the Rape she received from her parents might not survive their generation as panic, and her fear that a full history will never be published as terror (1997, 10, 200). Such emotions indicate the degree to which the Rape of Nanking has become implicated in the contemporary identity-formation of younger Chinese outside China. They may also betray an uneasy awareness that an ethnically channelled memory is a weak base from which to build an identity that can be projected beyond ethnic lines into the larger representational field of moral landmarks such as Auschwitz and Kosovo.
greatest and most representative atrocity, casting all other incidents into shadow. The Americans, on the other hand, wanted a different structure of coherence. For them, the event served as a linchpin for the argument that Japan conspired to commit war crimes throughout the region from 1937 to 1945. The Rape of Nanking in the American telling was the first of many atrocities. Evidence from Nanking was sufficient to convict two Japanese leaders for allowing the massacre to happen, as Chinese hoped it would, but it also served to bolster a larger American narrative that would ensure convictions for Japan’s conduct in the Pacific.7

In the course of revisiting the Tokyo judgment, I have found my most perceptive guide to be one of the justices on the Tokyo bench, Radhabinod Pal (1886–1967) (see figure 1). Of the five separate opinions (four dissenting, one concurring) issued alongside the majority judgment, Pal’s was the most devastating in rejecting the core charge at Tokyo, that Japan had waged an aggressive and therefore illegal war. Given this rejection, he had to refuse to go along with the bench’s findings on the Rape of Nanking. Pal did not deny that the incident was atrocious, but he did argue that the victors had no right to judge the losers for atrocities Japanese soldiers may have committed in China. His opinion is an extraordinary exercise in legal reasoning and should be regarded as a landmark in the history of twentieth-century international law. Although his arguments against the validity of the Tokyo judgment have been assessed as sound (Riley 1957; Kopelman 1991), they were dismissed at the time as politically motivated and have not been examined with the attention they deserve.8 In postwar scholarship outside Japan, Pal’s dissenting opinion has incited assessments that stand in polar opposition to each other. At one extreme, it is admired as the sole reasoned statement emanating from a court that otherwise dispensed only victor’s justice (Minear 1971). At the other, it is dismissed as a politically motivated simplification that shows utter contempt for the victims of Japanese aggression. (Herbert Bix refers to Pal as “an outright apologist for Japanese imperialism” [2000, 595].) My method in this essay is to mediate between these extremes, to the extent that that is possible, appreciating the jurisprudential value of Pal’s judgment while at the same time acknowledging without prejudice that extrajudicial factors shaped it just as much as they shaped the opinions of the judges at the opposite end of partisanship on the Tokyo bench. If I choose to make selective use of his arguments in this essay, it is because they have led me to an alternative place from which to observe the legal and discursive practices of the tribunal and so to reassess the adequacy of its judgment.

1Another issue at the IMTFE that received different, but parallel, narrative constructions by the Chinese and the Americans was Japanese drug trafficking. Although the indictment did not specify drugs, the prosecution introduced evidence regarding trafficking “as one of the means by which unlawful war was waged” (IMTFE 1946–48, 170). The judgment used the issue in both interests, satisfying Chinese by condemning Japan for “the debauchery of the Chinese people,” but going on thereafter to stress what it called Japan’s “far more sinister” promotion of “a world-wide drug traffic” (IMTFE 1948a, 49164). The IMTFE deliberations on opium are touched on in Brook and Wakabayashi (2000, 18–19, 152–53, 339–40, 360); see also Riley (1957, 141).

2Pal’s opinion has been put to partisan use in Japan. As soon as the Occupation ended, Tanaka Masaki, one-time secretary to Matsui Iwane, published Japanese translations of Pal’s opinion, both partial (Pal 1952a) and full (Pal 1952b), to challenge the Tokyo judgment. The back cover of his most recent contribution to the massacre denial literature (2000) shows him posing beside a dramatic monument to Pal in Kyoto. Pal continues to be lionized by the Japanese right as the lone voice of impartial justice. The 1998 movie, Paraido: unmei no toki (Pride: the fateful moment), which honors Tōjō Hideki for refusing to betray the emperor, casts Pal in a sympathetic role.
The Rape of Nanking at the IMTFE

The Tokyo indictment consisted of fifty-five counts. The first thirty-six were labeled "crimes against peace," the next sixteen "murder," and the final three "war crimes and crimes against humanity." The prosecution wrote the Japanese attack on Nanking into the indictment as Count 45. According to the categories in the indictment, this was a charge of "murder," not a "crime against humanity." Count 45 charged that twelve of the Japanese defendants "on the 12th December 1937, and succeeding days, by unlawfully ordering, causing and permitting the armed forces of Japan to attack the City of Nanking in breach of the Treaty Articles mentioned in Count 2 hereof and to slaughter the inhabitants contrary to international law, unlawfully killed and murdered many thousands of civilians and disarmed soldiers of the Republic of China, whose names and number are at present unknown" (IMTFE 1946, 11).
The prosecution anticipated that Japanese misconduct in Nanking would secure convictions and brought forward much evidence to implicate the twelve named in Count 45. As the trial proceeded, though, the target narrowed to two people: Matsui Iwane, an old China hand in the army who had been brought out of retirement to command what became the Central China Area Army (CCAA) until February 1938; and Hirota Kōki, who was foreign minister until May 1938. Count 45 was not the only count pursuant to which evidence regarding Nanking was introduced at the trial. In fact, that count soon disappeared from view, and the bench in the end chose not to rule on it (IMTFE 1948a, 49771). Instead, the prosecution applied evidence from Nanking to support the section of the indictment on “conspiracy to commit conventional war crimes and crimes against humanity,” specifically Counts 54 and 55. Under Count 54, Matsui and Hirota, among others, were charged with “having conspired to order, authorize or permit” their subordinates to “commit breaches of the laws and customs of war.” Count 55 charged them with having “violated the laws of war” by having “deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof” (IMTFE 1946, 13). Convictions for the Rape of Nanking were thus argued on general rather than specific grounds.

The Judgment on Matsui Iwane

This evidence weighed most heavily against General Matsui Iwane, commander-in-chief of the forces that took Nanking. In both his affidavit and cross-examination on 24–25 November 1947 (IMTFE 1946–48, 33811–33921), Matsui denied that he “ordered, caused, or permitted” his troops to destroy the city or butcher its population. This refutation of Count 45 was generally accepted, but it would not be sufficient to relieve him of the charge that he had tacitly allowed his soldiers to run amuck, or that he had done nothing to discipline their conduct. He had two defense strategies, and he relied on both at different times. The first was to go on the offensive and deny that atrocities had been committed in Nanking, from which it followed, therefore, that he could not be held responsible for something that did not occur. At certain times, he attempted to use this defense in a restricted capacity, as when he declared, “I do not know of any fact of Chinese women and children being killed within the

9The principal source of prosecution evidence was Hsiü (1939) (reprinted in Brook 1999), a collection of sixty-nine documents from the International Committee for the Nanking Safety Zone that the Chinese government distributed to stimulate international support for China’s struggle against Japan. Substantial portions were read into the war crimes record (IMTFE, 1946–48, 4508–36). The prosecution solicited additional evidence by asking some of the American members of the International Committee to testify in person or by affidavit (4456–63, 4467–79). The International Committee was pivotal in shaping the tribunal’s perception of Japanese conduct during the capture of Nanking: the bench’s reconstruction of the event in its final judgment closely follows that account (reprinted in Brook 1999, 257–67).

10Count 45 was one of forty-five, including all counts under the heading of “Murder,” on which the bench declined to rule. In the case of Count 45, it was because the charge was phrased in terms of conspiracy. The tribunal reasoned that Section II, Article 5(a) of the Tokyo Charter “does not confer any jurisdiction in respect of a conspiracy to commit any crimes other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes” (IMTFE 1948a, 48431).
walls of Nanking” (IMTFE 1946–48, 33866). His second defense strategy was to admit that atrocities may have happened but that he could not be held responsible for them. Two alternative logics stemmed from this second line of defense. The stronger was that atrocities occurred but that he was unaware of them at the time. The other tack was to admit that he had some knowledge of troop misconduct but that he lacked either the opportunity or the capacity to intervene. In either case, the point of vulnerability in his defense was knowledge, not action: the less he knew, the less he might be held responsible for what happened. This put Matsui in the difficult position of deciding how much knowledge he should to admit to and remaining consistent in that admission. Slight knowledge might mitigate the degree of his responsibility, yet it would be difficult to know only a little about something this extensive, especially as Matsui was in Nanking in mid-December while the atrocities were occurring. The fuller his knowledge of the Rape, however, the more persuasive the prosecution’s reasoning that he should have stopped it.

Matsui’s defense oscillated among these contradictory postures of no, little, or some knowledge while seeking to privilege the limits of his knowledge over the extent of his action. Even his declaration that no women or children were killed within the walls of Nanking was couched as an assertion about his knowledge, not about whether such killings had actually occurred. Matsui’s evasions attracted the attention of the prosecution, which devoted almost half of its cross-examination to trying to sort out what he did and didn’t know. Under this pressure, Matsui conceded that incidents may have occurred and that he acquired some knowledge of them during the week he was in Nanking in December. When asked to explain why this information did not appear in his affidavit, he said that he put in the affidavit only such information as he had received in an official capacity. “As far as I remember,” he stated, “no reports were made in my capacity as Commander-in-Chief of the CCAA, official or unofficial.” Nor, he said, did the consular staff in Nanking inform him that foreigners on the International Committee for the Nanking Safety Zone were lodging daily complaints about the conduct of the Japanese Army (IMTFE 1946–48, 33879, 33851). This became yet another line of defense: that he was obliged to act on only official knowledge; rumor of misconduct was not sufficient to require his response.

The deaths that Matsui acknowledged in his affidavit as having occurred during the taking of Nanking were as a consequence of military engagement with the enemy—and thus in his view not to be construed as war crimes. He allowed in his prepared statement that “a great number of Chinese soldiers and civilians were killed or wounded by bombs, artillery shells and rifle bullets during the Nanking campaign” but defended himself against the charge of committing war crimes by denying that a massacre had been planned. “Nothing can be further from the truth than the slander that the staff of the Japanese Army ordered or tolerated the above deaths” (IMTFE 1946–48, 33824). As for Chinese civilian deaths, Matsui insisted that his knowledge was based entirely on what he learned from one conversation with refugees, which he vaguely noted took place in a temple on the top of a mountain he could no longer identify (IMTFE 1946–48, 33861). A last-minute question from the bench probed his knowledge from a different direction by asking whether, after the event, he heard of Japanese soldiers being court-martialled for their misconduct in Nanking. “I did hear at the time that two or three cases were being tried in Shanghai,” Matsui

This bold assertion has become a prominent element in the massacre denial literature, e.g., Tanaka (2000, 34–37). For a lively description of Matsui on the stand, see Guo (1995, 172–86).
admitted. To weaken the implication that he had not acted responsibly, he added that he attempted to get more information after being relieved of his command, but “as the documents in question had been burned and were missing, I was unable to carry it any further and I was unable to ascertain the actual figures.” He thus interposed one more layer of ignorance between himself and the event (IMTFE 1946–48, 33858–59).

At this point in the proceedings, as the acting president of the tribunal was turning to other matters, Matsui spoke up on his own account to say that “the offenses for which these men were tried were rape, robbery, looting, outrages and murder” (IMTFE 1946–48, 33919–20). It is not clear what he intended by making this unsolicited—and potentially damaging—interjection. Was it to acknowledge that misconduct did occur but that it was dealt with according to the procedures of military law? As he was not asked to elaborate, Matsui managed to get through his testimony without ever making an unambiguous statement about the extent of his knowledge of atrocious conduct, skating dexterously between the claims of knowing nothing of what was going on and knowing something—though not in sufficient detail, or in an official capacity, to make him duty-bound to investigate. He appeared to believe that he could adhere to any of these postures and still relieve himself of liability for having failed to act effectively to halt the atrocities.

In its later summation for the defense, Matsui’s counsel argued that the attack on Nanking was a defensive response to the “offensive campaign” that China was preparing against legitimate Japanese interests in Jiangsu and Zhejiang provinces.

“Unless the Japanese occupied the Nanking base for the time being, it seemed difficult to maintain peace in Central China as a whole and secure our interests therein. Such being the case, the Japanese Government, in order to restore peace of the whole area south of the Yangtze, determined to attack Nanking” In other words, the attack was not aggressive and not unjustified. Counsel also argued mitigating circumstances, observing that the CCAA mounted the attack “in a hurry under many difficulties. But this Army, being originally organized to secure the region around Shanghai, was in its setup and maintenance defective.” In addition, the withdrawal of the Nationalist Army created “an uncontrollable situation” that could not be blamed on the Japanese forces. Counsel also reiterated Matsui’s insistence in his affidavit that he gave instructions for an orderly capture of the city. When he entered Nanking for the first time he heard of “a few offenders of breach of military discipline and morality and he was greatly hurt, so that he ordered strict compliance with his former orders.” He subsequently responded to “the rumour of the unlawful acts of the Japanese Army in Nanking” when this reached him in Shanghai, demanding the perpetrators be punished and the victims compensated. According to his lawyers, then, Matsui had extensive knowledge of the disaster in Nanking but availed himself of every possible means to right the situation. In preference to Matsui’s own defense of relative ignorance, his counsel rested its case on reasonable action. Apparently they did not worry whether this switch compromised Matsui’s defense, for beyond it always stood

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12Matsui also insisted that his position in the chain of command over the two armies involved in the operation did not give him the power to investigate or intervene: “in the strict legal sense I did not conceive myself as having the power to give specific orders—orders in detail with regard to the maintenance of military discipline” (IMTFE 1946–48, 33883).

10Matsui’s counsel consisted of Ito Kiyoshi, Jôdai Takayoshi, and Floyd Mattice. The language and logic of the summation suggest that the Japanese were its principal authors, contrary to what was assumed to have been American domination of defense strategy (Röling 1953, 6).
the larger assertion that "Matsui's operations in Shanghai and Nanking were within the category of war in self-defense" (IMTFE 1948b, 37–38, 46, 56, 59).

Near the end of the summation, Matsui's counsel made a surprising move toward a new line of defense by asking that the charges against Matsui be set in a broader context:

The losses and damages then inflicted on human lives and material things in Nanking, are almost insignificant when compared to those which the principal cities of Japan suffered in consequence of the war. More so, would it be, if compared to the undescribable horrors to which countless innocent Japanese women and children and other civilians in Hiroshima and Nagasaki were subjected by the atomic bomb. (IMTFE 1948b, 98)

The rhetorical device of setting Japanese civilian losses at Hiroshima and Nagasaki against Chinese civilian losses is given direct statement here in the IMTFE transcripts for the first time, to my knowledge. The defense had attempted to introduce evidence regarding the atomic bomb in its general submissions on 3 March 1947 but was overruled (IMTFE 1946–48, 17654–62). Although the *tu quoque* defense of using an atrocity on one side to cancel out an atrocity on the other was not allowed in the context of the law governing the tribunal, it was a popular trope, at least in Japan, for balancing the losses Japan inflicted with those it suffered. As if sensing that this approach might not win a reprieve, Matsui's counsel closed their summation with two defenses specific to Nanking. One was that much of the evidence, being based on fear, misjudgment, and rumor, was exaggerated. The second, in some contradiction with the first, was that Chinese bore much of the responsibility for the violence and destruction. This would include Chinese women, who, counsel alleged, approached Japanese soldiers and cried rape later (IMTFE 1948b, 99, 101–108).

As commanding officer at the time of the Rape of Nanking, Matsui was too closely associated with the incident, especially in Chinese eyes, to be excused for his part in the incident. Whatever the general had or hadn't done, and whatever his counsel did or didn't argue, was unlikely to deflect the IMTFE from holding him responsible for what happened in Nanking. The bench dismissed the first eight of the nine counts against Matsui, holding that he had not conspired to wage crimes against humanity or even to commit atrocities at Nanking (Count 54), but it judged that he was guilty of failing to act in such a way as to prevent their occurrence (Count 55). "The Tribunal is satisfied that Matsui knew what was happening" declared the judgment, showing that the defense of partial knowledge had not worked. But he "did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known, and as he must have known" (IMTFE 1948a, 49816). Matsui's knowledge, combined with his failure to act commensurately with that knowledge, amounted to criminal negligence. On this count alone, Matsui was condemned.

The Judgment on Hirota Kōki

Matsui was not alone in being found guilty for failing to take effective action. The IMTFE also condemned Hirota Kōki under the same count, among others. Hirota was foreign minister at the time the CCAA occupied Nanking. The prosecution
argued that Hirota, whose ministry received information regarding atrocities in Nanking from its consulate there, should have intervened more strenuously with the War Minister to see that these atrocities were halted. Failing to get an adequate response from that ministry, he should have brought the matter to the cabinet. As Hirota declined to file an affidavit with the court or testify in his own defense, his case could be dealt with only through other witnesses (IMTFE 1946–48, 30036).

The burden of making the prosecution case fell to the British assistant prosecutor, A. S. Comyns Carr, particularly through his cross-examination on 3 October 1947 of Ishii Itarō, the head of the East Asian Bureau in Hirota’s ministry. When Ishii came to Hirota’s defense by testifying, “He told me quite frequently to lodge serious warning to the authorities concerned in the War Ministry,” Carr countered, “but we know that that had produced no effect” (IMTFE 1946–48, 29992).

Carr’s aggressive refutation of Ishii’s attempt to show that Hirota had acted responsibly was accepted in the majority judgment, though by only the narrowest margin.14 The majority judged that, as he knew about the atrocities, he bore the responsibility of pressuring the War Minister to address the problem and failed to do so:

The Tribunal is of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.

(IMTFE, 1948a, 49791)

Hirota’s complicity in this matter was far less important to his overall conviction, however, than his earlier role in cabinet decisions to wage war, as it was he who stepped in as the new prime minister in the wake of the abortive military coup of 26 February 1936, which effectively put the army in control of the government. (He lost his post when the army withdrew its support a year later.) Hirota’s conviction on Count 55 was controversial as soon as it was announced. Among those who objected was Robert Craigie, who as British ambassador to Tokyo had written a note of protest to Hirota on 16 December 1937 regarding attacks on British ships and nationals in Nanking. He wrote at once to the Foreign Office urging his government to intervene on Hirota’s behalf. “It looks to me,” he stated in his letter, “as if, through Russian and possibly Chinese misrepresentation, a serious miscarriage of justice may occur in this case unless immediate action is taken.” Craigie suspected the Chinese government of having pressured the IMTFE to secure more than one conviction for the Rape of Nanking. The Foreign Secretary referred the appeal to a member of his staff for comment. After consulting with Comyns Carr, who had managed to get Craigie’s written testimony for the defense thrown out earlier that year, his staff person judged that Hirota had been intimately involved in working out the plan for Japanese aggression during his prime ministership, as charged in the other counts on which Hirota was found guilty. The Foreign Secretary accordingly saw no point in raising

14Röling (1948, 209), in his dissenting opinion, argued that Hirota was too removed from the chain of command to bear responsibility and that he did intervene adequately, as evidence of which Matsui and some eighty staff officers were recalled in February 1938. Cohen offers a concurring but differently argued interpretation (1999, 62–65).
Hirota's culpability under Count 55, as justice was served by his convictions on two other, more general counts.15

By enlarging the concept of war crimes to make failure to prevent war crimes a war crime itself, Count 55 constituted a major innovation in international law.16 The Dutch judge, Bengt Röling, the colleague most sympathetic to Pal, understood the criminalization of omission as more critical for gaining convictions at Tokyo than at Nuremberg, “because here it was less a question of orders to commit war crimes given on high authority, but rather of constant criminal practice both on land and sea” (1977, 1:xv). Omission was needed to make the argument of conspiracy work, especially at Tokyo, given that there was no Hitler to whom military aggression could be unequivocally traced. Even had Hirohito been indicted, it would have been difficult in the wake of the Nuremberg judgment to present him as another Hitler, given the constitutional limitations on his power and the ambiguity of the documentation regarding his role in decision-making. While the decision not to charge the emperor is generally understood as having been based on American concerns to ensure the stability of the Occupation (Dower 1999, 459–60), it is worth noting that Carr thought it better not to put the emperor on trial for fear that claims that he was misinformed or misled might acquit him (Riley 1957, 85). At any rate, given Hirohito’s absence, the IMTFE had to argue that Japan’s “far-reaching plans for waging wars of aggression and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man.” They had to be conceived as “the work of many leaders acting in pursuance of a common plan for the achievement of a common object” (1948a, 49768). With a final “high authority” at the top missing, the tribunal was hard-pressed to rely on conspiracy to convict the upper leaders without the concept of omission. Omission worked fatally against Hirota and Matsui.

Pal’s Dissenting Opinion

After a nine-member bench for the IMTFE had been set up, the United States invited the Philippines and India to appoint two additional representatives. India sent a justice from the High Court of Calcutta, Radhabinod Pal (his home village today lies on the Bangladeshi side of the India-Bangladesh border that runs through Bengal). He reached Tokyo on 14 May 1946 and made his first appearance at the tribunal

15Public Record Office (PRO), FO 371/69833, F16327/48/23: R. Craigie to O. Sargent, 18 November 1948; minute by D. J. Cheke, 19 November 1948. Craigie’s note of protest appears in the IMTFE record (IMTFE 1946–48, 9451–55). Regarding Comyns Carr’s objection to the admissibility of Craigie’s written answers to questions posed by the defense and introduced to challenge the charge of conspiracy, see p. 37013.

16The precedent for omission was the Military Commission that Douglas MacArthur convened earlier in Manila to try the Japanese commander in the Philippines. Yamashita Tomoyuki was convicted and executed for being negligent in preventing the forces under his command from committing offenses about which he knew nothing. As an American study of this trial notes, “Never has a military leader been prosecuted for an incident when he has neither ordered, condoned, nor even been aware of the atrocity in question” (Taylor 1981, 221). The concept of criminal liability in situations where there is a legal duty to act has gained considerable ground since the Second World War, most prominently in the provisions concerning victims of international conflict in Protocol I Additional to the Geneva Conventions (1977). The concept of omission in civil and international law is surveyed in Boulesbaa (1999, 9–15).
three days later, several weeks into the proceedings.\(^{17}\) As a latecomer, Pal did not regard himself as bound by the agreement the original nine made before his arrival to deliver a unanimous judgment, as the bench at Nuremberg chose to do. His decision opened the way for four other separate opinions.\(^{18}\) As he had to return to Calcutta several times to care for his ailing wife, Pal missed substantial portions of the trial, including the cross-examination of Matsui in November 1947, but he did not regard his absence as disqualifying him from delivering a judgment.\(^{19}\) And that judgment was severe. In his dissenting opinion, which numbers 1,235 pages, Pal lays out a host of objections to the majority judgment. They range from problems with procedure and rules of evidence to the constitution and jurisdiction of the tribunal, and beyond that as well to matters of substance and finding of fact.\(^{20}\) These objections led Pal to find none of the accused guilty.

Pal insisted that the IMTFE was tainted from the start by the Tokyo Charter, under which it was convened. Article 1 called for “just and prompt trial and punishment of the major war criminals in the Far East” without actually restricting the nationality of those who could be indicted. The clear intention was to charge only Japanese, however, as Article 2 specified that the members of the tribunal should be drawn from “the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines,” excluding both Japan and neutral countries (Ginn 1992, 261). Pal objected fundamentally to assigning judges from the victor nations to sit in judgment over the defeated.\(^{21}\)

\begin{quote}
It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing the victor cannot give to the vanquished is justice. At least, if a tribunal be rooted in politics as opposed to law, no matter what its form and pretenses, the apprehension thus expressed would be real, unless “justice is really nothing else than the interest of the stronger.”
\end{quote}

\(^{22}\)IMTFE 1948, 1232\(^{22}\)

Having the victors punish the losers might satisfy military procedure, but victor’s justice fell short of the judicial ideals Pal believed should be nurtured at this momentous point in the development of international law. Triumphant militaries might execute those against whom they had fought, but a court could not put itself

\(^{17}\)PRO, FO 371/57424, U2331/5/73; “Inclusion of Indian Judge: Tokyo.”

\(^{18}\)The other justices to file separate opinions were Henri Bernard of France, Delfin Jaranilla of the Philippines, Bengt Röling of the Netherlands, and William Webb of Australia. Beigbeder (1999, 73) argues that Pal’s decision to break ranks with the rest of the Tokyo bench “seriously weakened the value and impact of the tribunal’s findings and sentences” on international law; on the other hand, it may prove to have enriched case law on war crimes adjudication.

\(^{19}\)Section I, article 4(c) of the Tokyo Charter provided for such absence without disqualification. Verbatim transcripts allowed judges to review the sessions they missed.

\(^{20}\)Some of Pal’s objections are discussed in Riley (1957, 109–76); Minear (1971, 63–70, 130–33, 155–58); Hosoya (1986); and Röling (1993, 28–32).

\(^{21}\)Shortly after the trial, Röling expressed similar anxieties, noting that the nations from which the judges were selected had “a strong interest in using a post-war trial to establish certain events, to whitewash themselves, to blame others,” such that “it was quite impossible to achieve the detachment one likes to observe in judges.” He would have preferred sharing the bench with judges from neutral nations: “They would have been a constant element of objectivity, and often during our deliberations in chambers, I regretted their absence, which would have prevented things, which could, too easily now, go unchallenged” (1953, 5).

\(^{22}\) Portions of Pal’s judgment are reprinted in Brook (1999, 269–97); this passage appears therein on p. 294.
in the same relationship to the accused. The Japanese defense lawyers perceived the same problem. At the outset of the trial, the counsel for former Prime Minister Tōjō Hideki attempted to challenge the constitution of the court by impugning the partiality of every appointment to the bench, alleging prior interest in each case (Evans 1947, 4:323). He began with its president, William Webb, who as Australia's war crimes commissioner had personally investigated war crimes in New Guinea in 1945, thus making him both prosecutor and judge (UNWCC 1948, 121, 143, 387). Webb summarily dismissed the objection.25

The partiality of the bench, in Pal's view, created a predisposition to find guilt. The IMTFE was mounted on the assumption that someone should be made responsible for the terrible disasters that the winning side had suffered. Reviewing the history of scapegoating since the First World War, Pal noted that people had come to demand punishment when a despised military leader was defeated (1948, 1063). Even if the accused were guilty, Pal argued, that guilt had to be proved rather than adduced on the basis of prior moral reasoning and a misplaced idealism in the capacity of the international community to administer justice. As he expressed his caution in a later publication, "the burning of many a Joan may thus only need half an hour: but several centuries would always be needed to find out the truth." Single-minded pursuit of what appears to be the truth without due procedural caution undercuts the possibility of attaining it, for "every truth, however true in itself, yet taken apart from others becomes only a snare." The greater task is not assigning guilt but "enlarging the human community so that the principles of order and justice should govern the international as well as national community" (1955, viii).

The presumption of guilt in turn predisposed the tribunal to tolerate procedural shortcuts. Pal was particularly concerned that the bench had not upheld the highest standards of evidence. He found the court too ready to admit second- and third-hand testimony that could not be corroborated. It did so on the authority of Article 13 of the Tokyo Charter, which allowed that "the Tribunal shall not be bound by technical rules of evidence" and might "admit any evidence which it deems to have probative value."24 Pal worried that this product of military expediency with regard to evidence let in dubious testimony regarding atrocities, which could be expected to be animated by powerful emotions that always favored the prosecution's case. "Excited or prejudiced observers," as he put it, might well be tempted to relate more than they actually saw, or to present in highly colored ways. A salient example is his criticism of the testimony of two Nanking Safety Zone witnesses brought before the court, Dr. Xu Chuanyin and John Magee. "Both these witnesses have given us horrible accounts of the atrocities committed at Nanking," Pal acknowledged. "It is, however, difficult to read this evidence without feeling that there have been distortions and

25The quality of the bench was not enhanced by its actual members, none of whom was well acquainted with the law relevant to the case. "An impressive array of legal talent but certainly not the best available in any of the countries represented" was Riley's assessment (1957, 54). Pal appears to have gained his impressive command of international law as the trial proceeded. Least qualified was the Chinese appointment to the bench, Mei Ru'ao, a foreign affairs advisor to the Legislative Yuan who was trained in law in Chicago but had no prior experience as a judge.

24Section IV, article 13(c), subsection (1) permitted the admission of a state document "without proof of its issuance or signature"; subsection (4), of "unsworn statements" in a private document. The wording on rules of evidence was taken verbatim from Article 13 of MacArthur’s “Special Proclamation” governing the Military Commission in Manila that convicted Yamashita (Taylor 1981, 137). MacArthur's idea of justice, being military and retributive, was unconstrained by compunctions about cutting legal corners to expedite convictions.
exaggerations.” After reviewing many points of inexact testimony about rapes and suicides, Pal commented: “I am not sure if we are not here getting accounts of events witnessed only by excited or prejudiced observers.” Both witnesses gave testimony on the basis of observations “of the most fleeting kind,” and the court should have scrutinized them more carefully for credibility. “All the irrelevancies of rumours and canny guesses became hidden under a predisposition to believe the worst, created perhaps by the emotions normal to the victims of injury” (1948, 1065, 1068–69). This predisposition did not create a sound basis on which to pass judgment.

Behind Pal’s objections to the IMTFE’s constitution and procedure lay a stronger argument, that adequate law relevant to the charges did not exist. As he stated bluntly in a later publication, the Tokyo Charter “did not define the crime in question,” nor was it “within the competence of its author to define any crime.” More broadly, he argued that “no category of war became criminal or illegal in international life” prior to this war (1955, 186). The prosecution justified this charge by citing the Kellogg-Briand Pact, or Pact of Paris, of 1928, which renounced the use of war as national policy except in self-defense. This agreement, it reasoned, made aggressive war illegal.23 Pal, on the other hand, did not regard the pact as being “within the category of law,” nor was he persuaded that this or any other international agreement in effect as of 1937 specified that war was illegal. The Tokyo Charter simply made war criminal after the fact; its invocation of a concept of a “war of aggression” in Article 5(a) was convenient invention. Pal also insisted that “the individuals comprising the Governments and functioning as agents of that Government incur no criminal responsibility in international law for the acts alleged.” In the context of finding fault for the Rape of Nanking, he observed: “War is hell. Perhaps it has been truly said that if the members of the government can be tried and punished for happenings like this, it would make peace also a hell” (1948, 1109).

Pal phrased his objection to the prosecution’s application of the Kellogg-Briand Pact in terms not only of its inadequacy as law, but as well of its misprision of substance. He agreed with the defense claim that Japan had not been pursuing a war of aggression, nor had it used war aggressively as “national policy”; rather, it had waged a war of self-defense. Western nations had been pressuring Japan for decades prior to the outbreak of war with such force that Japan had to strike back in order to survive. Moreover, Anglo-American interference in the conflict between China and Japan had been “in defiance of the theory of neutrality and of the fundamental obligations that the law of nations still imposes upon non-belligerent Powers” (1948, 978). However much Japan had breached the principle of sovereign inviolability in its conduct in China, that breach did not justify other states’ becoming involved. Pal got around the Chinese claim that Japan had compromised its sovereignty by characterizing the conflict between them as an “internal” matter in which both sides had legitimate interests that they had the right to defend when threatened.

Finally, Pal made the same double argument of invalidity both in law and in substance with regard to the prosecution’s assertion that the Japanese leaders had engaged in a conspiracy to wage war. The prosecution staked its overall case against Japan’s leaders on this charge, claiming that all of Japan’s aggressive actions in East Asia between 1928 and 1945 were linked in a vast and comprehensive conspiracy in

23The legal jurisdiction of the Kellogg-Briand Pact was contentious in the early deliberations of the United Nations War Crimes Commission. China argued with Czechoslovakia and Australia, against Britain and the United States, that the Pact signalled a general understanding in international law that aggressive war was a criminal act; see UNWCC 1948, 182–83.
which every act and decision confirmed what had preceded it and led inexorably to the next. The majority judgment agreed with this interpretation. Once in control in Japan, “the conspirators carried out in succession the attacks necessary to effect their ultimate object that Japan should dominate the Far East” (IMTFE 1948a, 49765). Pal disagreed with this construction. Besides arguing that international law had not determined that conspiracy to wage war was illegal, he could find no evidence of conspiracy in the facts presented before the tribunal. “The alleged conspiracy which the prosecution has attempted to trace and describe is one of the most curious and unbelievable things ever seemed to be drawn in a judicial proceeding,” he declared. “A long series of isolated and disconnected events covering a period of at least fourteen years are marshalled together in a hodgepodge fashion; and out of this conglomerate the prosecution asks the Tribunal to find beyond all reasonable doubt that a ‘common plan or conspiracy’ existed to accomplish the objectives stated in the indictment’ (1948, 354). The evidence of conspiracy was thus circumstantial. As he reminded his fellow judges, “for our present purpose, it is not for us to see whether or not the events and their spread could be justified. We are now only to see whether the happenings could be explained otherwise than by the existence of a conspiracy” (980). An alternative explanation was indeed available if one accepted that Japan’s survival was under threat. International politics may have forced Japan into a foreign policy that was consistent, but this did not mean that the Japanese government was conspiratorial in pursuing that policy. The victor nations wanted conspiracy as a net through which none of Japan’s highest politicians, bureaucrats, or officers could escape; it also justified the desperate measures of the American total-war response, from fire-bombing to atomic detonation.

Pal on the Rape of Nanking

At several points in his long dissenting opinion, Pal addressed the charges arising from the Rape of Nanking.26 He did not deny that the Japanese soldiers had acted evilly in Nanking, stating unequivocally that “the evidence is still overwhelming that atrocities were perpetrated by the members of the Japanese armed forces against the civilian population . . . as also against the prisoners of war” (1948, 1069). He accepted that injury had been done, but those who perpetrated the atrocities were not before the bench, and those who were before the bench could not be held criminally responsible for what the soldiers had done. To do so was to put the incident to retrospective moral use. He flagged his objection to this manipulation by refusing to capitalize the word “rape,” installing it in scare quotes when he had to use it, and adopting the Japanese euphemism, “the Nanking Incident.” These discursive markers signalled his refusal to accept the prosecution’s interpretation of the event and so to resist the conclusions that it was asking the bench to draw.

Pal’s objection to convicting Japanese leaders for the Rape of Nanking followed from his general rejection of the tribunal’s constitution and law as invalid. Although he could have rested his case there, he was more than willing to respond to the particularities of the prosecution’s treatment of the incident. He took issue first of all with the argument that a military leader must be expected always to exercise effective

control over troops in the field. He cited Matsui’s own testimony that attempts were made several times to bring the undisciplined soldiers to heel. Matsui’s failure to be effective Pal attributed to a breakdown in the “machinery” of military organization, not to the general’s inaction. The responsibility of other leaders was even more remote: “as members of the government, it was not their duty to control the troops in the field, nor was it within their power so to control them.” He argued that a leader is “entitled to rely on the competency” of his field officers and should not be obliged to bear legal responsibility for every action of the soldiers under him so long—and this is the limiting condition—as he had fulfilled his “duty to take such appropriate measures as were in his power to control the troops under his command” (1948, 1109, 1112). Pal thus sided with Matsui’s counsel in allowing that he knew what was happening in Nanking, as well as with Matsui’s own testimony that he acted in such a way as to show that atrocities against civilians were not policy.

Pal treated Hirota’s conviction on Count 55 much more briefly, for if Matsui was exonerated of criminal responsibility for the misconduct of CCAA troops, then Hirota, at much greater physical remove from the battlefield and the chain of command, had even less responsibility. Pal accepted Ishii’s evidence regarding Hirota’s intervention with the War Minister as sufficient to show that he had acquitted himself adequately.

Pal’s critique of the prosecution’s arguments had to do not only with what actually happened in Nanking in December 1937, but also with the discursive burdening of the incident. He perceived that the prosecution did not target the event purely as an incidence of criminal activity but mobilized it as a key event in a series of actions going back at least to 1928 that were conspiratorially tied. In the prosecution’s telling, the assault on Nanking was the point at which Japan’s domination in East Asia shifted from its earlier phase of encroachment backed by the use of force when necessary (1928–37) to its later phase of sustained aggression. From December 1937 to August 1945, Japanese atrocities composed into a unified and conspiratorial whole. This analysis certainly reflected Sino-American opinion at the time, to judge from an editorial published on 10 November 1945 in the English-language Shanghai daily, The China Press, which blamed “the whole Japanese political, religious and military system” for the war: “The terror that was brought forth by that system during the past eight years started with the rape of Nanking and reached its climax last spring when the United States forces tightened their ring around Manila.” The Tokyo judgment concurred in this analysis (IMTFE 1948a, 49763–66) and applied it in its evaluation of Japanese atrocities, noting that “from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy.” The bench reasoned that these atrocities could only have been committed because they were “wilfully permitted” (49592). In other words, every murder and rape subsequent to December 1937 could be derived from the murders and rapes committed in Nanking: all were linked in a long chain of atrocities that demonstrated consistency and hence conspiracy.

From Pal’s perspective, the prosecution was not just examining military misconduct in Nanking to gain convictions for Matsui and Hirota; they were using it to construe “similar atrocities . . . perpetrated subsequently in several other theaters of war” as conspiratorially tied to Japan’s refusal to do anything about the “atrocious conduct of the Japanese Army” in Nanking (1948, 1096). The prosecution thus installed the incident as the moment of origin for a coherent series of “similar atrocities” stretching out across Southeast Asia and into the Pacific. The continuity that the prosecution alleged between the Rape of Nanking and subsequent atrocities
satisfied that the misconduct was consistent and must have emanated conspiratorially from the central government. Pal regarded it as a discursive fabrication.

The underlying goal of the American-dominated prosecution in creating this narrative of continuity from 1937 to 1945 was to bring the mistreatment of American servicemen in the Pacific within the same category as the brutalization of Nanking residents. This connection was built into the original indictment, for Count 44 (directly preceding the count citing Nanking) charged the accused with the wholesale murder of both prisoners of war and civilians of the countries opposed to Japan, thereby unifying the two categories of victims, regardless of location or nationality, as a single object of judicial address. Finding Japanese guilty for their actions against Chinese in Nanking thus entailed that they be found guilty for their actions against Americans in the Pacific. Atrocities in one place were inseparable from atrocities in all other places and Nanking was the moment at which such connections could be retrospectively discovered. Pal categorically rejected that “such offenses were committed pursuant to any government policy. There is no evidence, testimonial or circumstantial, concomitant, prospectant, retrospectant, which would in any way lead to the inference that the government in any way permitted the commission of such offenses” (1948, 1108). There was no conspiracy, and Nanking was not the place to anchor it. What happened in the Pacific had no necessary or legal connection with what happened in Nanking: each atrocity charge stood, and fell, on its own merits.

The Politics of Pal’s Dissent

Pal’s dissenting opinion was warmly received in Japan. To IMTFE defense lawyer Kondō Giichi, Pal’s refusal to join in the punishment of Japan marked him as the only genuine advocate of world peace on the tribunal (Pal 1952a, preface). Reception in other quarters was less positive. His fellow judges were not surprised, but the governments sponsoring the trial were. When the head of the British liaison mission in Tokyo hastened to figure out what had happened, he was told by the Canadian judge, Stuart McDougall, that Pal had decided against joining in any condemnation of the accused from the time he first arrived in Tokyo.27 In his telegraph to the Foreign Office, the British official reported that Pal regarded the IMTFE judgment as “an attempt to achieve political ends with the appearance of legal justice.”28 Pal makes this very point in the conclusion to his opinion, in which he implies that the tribunal was set up “only for the attainment of an objective which was essentially political, though cloaked by a judicial appearance” (1948, 1231). Pal’s charge that the tribunal

27This is confirmed in Pal (1966, 97). Although McDougall concurred with the majority judgment, in his internal communications with Ottawa he was fiercely critical of the IMTFE for its procedural mistakes, ignorance of precedents, and overall lack of principled jurisprudence. He asked to be withdrawn but was persuaded by his government to remain so as not to embarrass Canada’s allies; see Stanton (2000, 392–94); also Brode (1997, 198–99). After the trial, McDougall wrote privately to MacArthur asking that the sentences on Togó and Shigemitsu, the Japanese ambassador to Britain in 1938–41, be reduced; his appeal was rejected (PRO, FO 371/69834, F16646). McDougall also joined the four judges who filed dissenting opinions to meet with MacArthur on 23 November and ask that all death sentences be commuted (Dower 1999, 628 n. 34).

was hostage to politics found no support from his colleagues on the bench. Indeed, it
so offended the Filipino judge, Delfin Jaranilla, that he wrote a concurring opinion
reaffirming the reasonableness of the legal logic underpinning the majority findings.
If Pal refused to accept the law laid down in the Tokyo Charter, specifically with
respect to the illegality of aggressive war, Jaranilla reasoned, he should never have
take the oath of office under the charter in the first place. He also bluntly dismissed
Pal’s view that individual leaders could not be held responsible for Japan’s wartime
court as “absurd” (1948, 31).

In India, where anti-imperialist anger looked at other targets than Japan, public
opinion went in Pal’s favor. There was speculation in the British Foreign Office that
the Government of India might have directed Pal in his decision, but all the GOI
representative had recommended during diplomatic consultations with the British
government prior to Pal’s appointment was that no death sentences be handed down.
In another communication two weeks later, the British representative speculated that
the newly independent Indian government may have wanted him to file a dissenting
judgment “for political reasons,” presumably to embarrass India’s erstwhile colonial
masters. This suggestion was dismissed in the Foreign Office on the grounds that
even Krishna Menon, the negotiator for the Indian National Congress in Europe,
found the judgment disquieting. 29 But many Indians applauded what Pal had done,
to British alarm. As another Foreign Office official candidly noted, “there is no doubt
that Mr. Pal’s views are representative of a large section of Indian opinion. Many
Indian papers have endorsed his judgment.” 30 So did Indian legal opinion, which
tended to dismiss the tribunal as purely a war measure, doubting it had any validity
in law and even in some cases wondering why Pal bothered building such extensive
arguments against it. As one caustic commentator put it, “to a mere lawyer the trials
appear as crude and ineffective attempts at clothing the sword with something like a
wig, and he should let such attempts pass without further comments” (Basu 1949,
30).

Pal continues to enjoy a positive posthumous reputation in India, most notably
at the hands of his fellow Bengali, the psychoanalyst and cultural critic Ashis Nandy.
In an appreciative essay, Nandy attributes Pal’s judgment to his training in Hindu
law, which “shuns binary oppositions” and distrusts the moral simplicity of assigning
all blame to one party in a dispute involving two. 31 Rather than his experience in
“the culture of modern international law,” Nandy argues, it was “his long exposure
to the traditional laws of India,” combined with a sense of “Asian solidarity” within
the “larger Afro-Asian context of nationalism,” that caused Pal to dissent from the
judgment of the majority (1996, 53–54, 65, 71). Bracketing the international with
the local, and the conflictual with the consensual, is an attractive cultural move, but
it is one that curiously obscures Pal’s politics, casting his anti-imperialism as a second-
order expression of his Hindu consciousness rather than a first-order sign of his
political commitments.

29PRO, FO 371/69834, F17460: “Judgment and sentences delivered by the members of
the IMTTE on the major Japanese war criminals,” 25 November 1948.
30PRO, FO 371/69834, F17460: comment of W. B. Ledwidge, 17 December 1948,
appended to A. Gascoigne, “Judgment and sentences delivered by the members of the Inter-
national Military Tribunal.”
31Nandy’s reading of Pal as a heroic figure bridging the historical cusp between colonialism
and independence—as “both an Indian and a Victorian trying to transcend the moral dichot-
omy of the age” (1996, 80)——reflects Nandy’s own desire to bridge the civilizational polarities
that colonialism has imposed on the postcolonial intellectual (see Nandy 1983).
I would prefer to take Pal’s anti-imperialist politics at face value, not as a cultural sign of something else. For his politics had real-world correlates, as his Dutch colleague Bengt Röling learned in conversations with him after the trial. According to Röling, Pal accepted Japan’s slogan of “Asia for the Asians” and regarded the war as just because it was waged “to liberate Asia from the Europeans.” More interestingly, he also revealed that he had been an admirer of the Indian National Army (INA) during the war (Röling 1993, 28–29). The INA was the force the Japanese recruited from Indian troops after the fall of Singapore in 1942 and sent against the British on the India-Burma border in 1943. As an educated Calcuttan who supported the INA at least retrospectively, Pal shows himself to have shared the widespread Bengali sympathy for the radical nationalist Subhas Chandra Bose. A prominent leader of the Indian National Congress, Bose was the figure around whom crystallized radical opposition to Mohandas Gandhi’s moderate position within Congress. Bose regarded Gandhi as hopelessly mired in capitulations and compromises with the British, which, he felt, would forever keep India from crossing the threshold of independence (Sen 1997). After the Second World War was underway, Bose broke with Gandhi, turning first to Germany, then to Japan, to seek support for an armed independence struggle against Britain. He hoped the Japanese-organized INA would become the revolutionary force that would drive the British out of India. Had he not died in an airplane crash off Taiwan before the war was over, the British government would have arraigned him on charges of treason, as it did many of the Indian officers and soldiers who joined the INA or the Indian detachments that fought alongside the Germans. Indian opinion at the war’s end regarded Bose as a martyr for the cause of Indian independence, and many revered him as Gandhi’s equal. I offer this background to alert the reader of Pal’s judgment to the obvious, which is that he brought to the tribunal views of conflict, occupation, and war historically grounded in the colonial context in which he lived. He used legal argument to excuse the charges against Japan’s leaders, but it was a political logic of anti-imperialism that directed him to do so.

There is a second element to Pal’s politics that shaped his legal opinion, and that is his view that the dropping of atomic bombs on civilian targets was the greatest atrocity of the war. An evaluation of the atomic bomb was not within the tribunal’s mandate, but Hiroshima and Nagasaki cast a shadow across much of Pal’s text. And lest the reader fail to notice the shadows, Pal appended a gallery of atomic-victim photographs to his judgment when he had it published privately in Calcutta in 1953 (Pal 1953). Pal first treats the atomic bomb in the context of arguing against the contention that preparation for war was considered a crime before the Second World War. Dubious of the newly popular homily that the bomb had made war unthinkable, Pal argues that those who dropped the bombs did not do so to enlarge the human community, but were callously making use of an atrocious weapon before it had been declared illegal (1948, 138). Later in his opinion, he sizes Japanese and American

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32 An American source claimed that Pal visited the condemned men in Sugamo Prison after the trial was over and praised them for what they had done to liberate Asia (Brackman 1987, 344); this dramatic story has not been corroborated.

33 The Intelligence Bureau of the Government of India in the summer of 1945 reported several cases of Indian military personnel writing and chanting slogans simultaneously honoring Gandhi and Bose as the leaders of the Indian National Congress (British Library: Government of India, Home Department, R/3/1/330, pp. 31, 103). Nandy (1996, 65) alludes to the unity between Gandhians and Boseans by noting that Nehru served as defense counsel at the trial of three INA officers. For Pal’s positive assessment of Gandhi, see Pal (1966, 84–85).
atrocities up against each other and finds the “decision to use the atom bomb” the worse offense (1948, 1090). Moving on to the fate of downed American bomber pilots, whose interest the prosecution narrative was intended to serve, he again pits their mistreatment against “the havoc which can be wrought by the indiscriminate launching of bombs and projectiles,” both conventional and atomic, and judges the Americans as having inflicted the greater damage. He also slyly cites the opinion of an American jurist that the atomic bomb, rather than making war unthinkable, only changed its rules (1948, 1202). Excluding American war conduct from the scrutiny of the tribunal meant that the dropping of the atomic bomb remained outside its jurisdiction. Had the IMTFE been prepared to face “the implications of atomic explosion,” Pal observes in the concluding section of his judgment, the outcome of the tribunal would have been completely different (1948, 1234): it would have meant a judgment on all parties, not Japan alone. Such a judgment would have required a different account of the war than what the prosecution offered, and a different legal jurisdiction than what prevailed.

Do Pal’s opinions imply a radical politics? As noted, his antipathy for colonialism arose out of his own experience as a colonial subject of the British Empire in the politically charged wartime environment of Bengal. This antipathy signals a firm anti-imperialism, though perhaps not anything more than what Pal would have shared with other educated lawyers who lived and worked at the highest level of the Indian colonial elite. Despite his admiration for the INA as an anti-imperialist force, Pal’s opposition to British rule appears to have remained within the conservative political framework of Gandhian ideology, which called for the indigenization of state power, not for a class-based revolution. Opposition to atomic warfare in the postwar period carried a distinct political charge against the United States and what were seen as its neocolonial aspirations in Asia. And when measured according to the standards of the other justices who sat on the Tokyo bench, Pal’s anti-imperialism does indeed appear to be political radicalism, but, of what sort? Pal is radical in holding out hope that a new world order will someday replace prewar colonialism. But it is the radicalism of colonial elites engaged in pursuing peaceful transition to postcolonial state power, not the radicalism of agrarian socialism or peasant revolution. It calls for national unity in the face of colonial oppression, not for the creation of a new society; a new world order, not an end to world orders.

The foundation for Pal’s anti-imperialism is the very ideological posture that European colonialism itself generated, the polarity of East and West. Both in India and internationally, Pal analyzed the world wholly in terms of this polarity. According to this understanding, he saw that his role as an Easterner was to support the East in its struggle to resist and separate itself from the West. This orientation runs through his dissenting judgment, but it becomes quite explicit in his speeches and writings from a triumphal return he made to Japan in October 1966, the year before he died. In these texts he declares himself to have been an admirer of Japan ever since his schooldays. Japan has been the only Asian nation that has consistently stood up against the West, he declares, the only Asian nation that, as he puts it, has had “the spirit of independence that can say ‘no’” to the West. He calls on the Japanese people “once again to establish respect for the spirit of the East” and to resist “the present flood of global Westernization” by drawing on the distinctive ancient traditions at the base of “Eastern civilization.” The only truly international world order will be one in which East and West coexist in a genuine “give and take,” not one in which the West triumphs over or subsumes the East (Pal 1966, 47, 82–83, 102).
East–against–West provided Pal with a potent political fulcrum and gave his resistance to colonial and neocolonial domination ideological coherence. There is no reason to expect, however, that his critique of Eurocentrism should lead to radical alternatives to the forms of state and class hegemony that took form under colonial rule. His radicalism remains at the level of an anti-Orientalist critique of international politics and law, and does not question the conservatism that reaffirms the essentiality of the East to which Pal must belong. Elizabeth Kopelman has observed the same tension in his legal logic, in which he combines a conservative legal positivism that refuses to innovate beyond existing law with a radicalism that regards the politics within which a court operates relevant to the adequacy of its findings (1991, 411–22). The tension internal to Pal’s politics remains latent until a choice between them has to be made, as it does, for example, when in the context of examining Japan’s presence on Chinese territory in the 1930s he allows that Japan had just cause to complain of injury while China did not. When legal principles are invoked to uphold the claim of one party and reject the same claim of another, Pal’s radicalism appears to shift from principled to opportunistic. That said, Pal’s politics neither proves nor scuttles the adequacy of his dissent. What it does do is help us read the contradictions between legality and morality in his judgment, contradictions that get him into difficulties from which even his agile legal mind cannot fully extricate him, as we shall now see.

The Adequacy of the Tokyo Judgment

The majority on the Tokyo bench made a judgment regarding the criminality of Japan’s war in East Asia and the Pacific that they understood as adequate in substance and law. The Rape of Nanking furnished evidence of this criminality. It satisfied the Chinese interest that Japanese leaders suffer retribution for the atrocities Chinese endured not just in Nanking but throughout occupied China. It also satisfied the American interest that Japanese leaders be punished for the violent treatment of their soldiers in the Pacific. Nanking provided both with a dramatic backdrop against which to tell their stories of the war: stories that overlapped and reinforced each other in large part because the concept of criminal conspiracy made all the events from 1928 to 1945 cohere in a unified narrative of atrocity and aggression. It was a narrative of divergence, conflict, and victory that persuaded the majority on the bench to hold Japan responsible for the war.

Radhabinod Pal did not agree on any of these points. The exclusion of Western colonialism and the atomic bomb from the court’s consideration signified for him the failure of the IMTTFE to provide anything other than an opportunity for the victors to retaliate against their former enemies (Pal 1948, 139–40). He challenged the majority judgment over a host of procedural matters, but these challenges rested on a much longer historical framework for narrating the responsibility for the war in East Asia and the Pacific. Rather than limit its view to Japan’s actions between 1928 and 1945, as the Tokyo judgment did, Pal’s counternarrative moved Japan onto a global field and into a world history that featured European colonialism as the defining faultline of East Asian history. In the Tokyo narrative, Nanking was the terrible turning point, Matsui loomed large as the military leader who presided over the descent into atrocity, and Hirota was the key figure who failed to stem the tide back in Tokyo. In Pal’s counternarrative, by contrast, Nanking was an unfortunate incident
that signified nothing beyond itself, Matsui’s conduct of little consequence to larger issues, and Hirota of no significance whatsoever. The incompatibility of these narratives points in turn to the incommensurability between the two postcolonial futures that Pal and the other ten judges imagined for Asia: one out of, and the other still in, the shadow of Western imperialism.

Pal’s dissenting opinion is more persuasive when he chastises the IMTFE for inadequacies in the procedures by which testimony was entered and witnesses examined, in the precedents that the prosecution cited to justify convictions, and in the failure of the charter to define aggressive war. It is less persuasive when he files substantive rather than legal objections, since in every concrete case he turns doubt about evidence to his consistent advantage. At one point, he could dismiss the charge that Japan was acting conspiratorially in Manchuria by noting that the evidence that Japanese had assassinated the Manchurian warlord Zhang Zuolin in 1928 was too “shrouded in mystery” to prove the charge (1948, 984). Yet at another point he could turn around and dismiss the claim that Hirota had failed in his duty to halt the massacre by declining to doubt Ishii’s testimony that Hirota intervened frequently with the War Ministry. Reading through Pal’s findings of substance, one gets the uneasy feeling that he would have found a way to construe the evidence in whatever way would parry every charge of Japanese misconduct or dereliction of duty, and that he was not averse to, or even aware of, contradicting his own logic in doing so. Thus, while urging that Japanese leaders could not be held responsible for the conduct of their soldiers, he implied that American leaders should have been indicted for atrocities their soldiers committed. While declining to find Japan guilty of waging aggressive war, he indicated that the Allied Powers were guilty of committing aggression in Asia. And while wanting to put the West on trial for its “recourse to the sword” (1948, 279), he refused to construe Japan’s actions in Asia as imperialistic and declined even to hint that Japan should have laid down its own. There may have been no place for colonized Asians in the IMTFE war story that led ineluctably from the Rape of Nanking to the hanging of Hirota and Matsui, but there was certainly no place for Chinese (or Americans) in Pal’s story of Asian liberation.34 His dissenting opinion is a logical Mobius strip into which there is no point of entry from any other perspective, and from which there is no exit other than by abandoning the narrative. And yet the same could be said for the majority judgment, which simply confirms the prosecution’s story in every detail.

Despite these shortcomings, Pal’s dissenting opinion is a landmark document in the history of twentieth-century jurisprudence on war crimes adjudication, notably for arguing that unilateral justice is an inadequate base for applying international law. The most recent stage in that history is the current ongoing ratification of the United Nations International Criminal Court (ICC). The ICC is usually regarded as the heir of the Nuremberg judgment, and in particular of the Holocaust, which helped to bring into force the concept of universal jurisdiction (Goldstone 2001). But I would suggest that the ICC also owes something to the caution of Radhabinod Pal. Pal was not opposed to the idea of prosecuting war crimes, but he believed that in 1948 “the international community has not as yet reached a stage which would make it expedient

34The popular sense among Chinese and Americans of exclusion from this liberation narrative is reflected in an editorial reaction in The China Press (20 June 1946) to Tojo’s statement in a news agency interview that Japan had fought the war to free Asia: ‘If Tojo still believes this, then it would be well for him to stand trial in Nanking, Manila or Singapore. He could then discover the ‘gratitude’ felt for the Japanese ‘liberators.’’”
to include judicial process for condemning and punishing either states or individuals.’” Later, as a member of the International Law Commission in Geneva in the 1950s, he continued to argue against his well-meaning but idealistic fellow jurists that “at the present formative stage of the international community, *even justice* in matters [pertaining to war crimes] is not possible’ (1955, 187, vii). What he termed “even justice” was possible only under the condition of universal jurisdiction, and during the Cold War that condition was simply not available. As he argued in Geneva:

The economic inter-dependence of the world places us under the obligation, and offers us the possibility of enlarging the human community so that the principles of order and justice should govern the international as well as national community. We are driven to this task by the lash of fear as well as by the incitement of hope. But we cannot expect to achieve this object by one single jump. We shall have to face all the old problems of political organization on the new level of a potential international community . . . . Where there is no possibility of even justice—and there is none and there cannot be any in the near future in the present case—the effort [of building an international judicial system] must wait. Loyalty to the sense of justice demands confidence in the possibility of its attainment.

(1955, viii-ix)

Whether the ICC can embody Pal’s “equal justice” will not be known until it begins to exercise its jurisdictional claims. Only then will we see whether the court lives up to the internationalist ideal for which Pal loyally held out, in the face of the “flaming urge for justice” that motivated his Euro-American peers in the world of international law to make do with deeply flawed institutions for bringing crimes against humanity to trial.

The high procedural standard to which Pal worked should more than balance the charge that he dissented over the Rape of Nanking for narrowly political reasons. His legal and constitutional objections to the IMTFE take us closer to the core problems of war crimes adjudication than does the blithe assertion of the majority on the Tokyo bench that justice had been served; and his challenge to the prosecution’s narrative of a just and appropriate victory helps us read their judgment with a critical awareness of how the Rape of Nanking was used to win convictions for Matsui and Hirota that would be unlikely to stand up in a war crimes tribunal today. Pal’s dissent reminds us that the adequacy of the Tokyo judgment, and of its findings on Nanking, cannot be assessed in terms of the number of convictions it produced or the quota of retribution it conferred on behalf of those who suffered terrible losses in the war. Justice, as Pal suspected, is a much more difficult project. Its adequacy can be measured only in terms of the validity of the laws invoked and the success with which the rights of the defendants are protected. This is what a court does, and what the IMTFE, in retrospect, failed to do.

It is not enough, however, to evaluate the adequacy of a judicial decision in terms of the procedural standards in operation at the time, if our purpose is to understand how the decision was reached and framed as it was. Adequacy depends enormously on public reception. Because the Tokyo judgment was not delivered to a public sharing a unified opinion, its chances of winning universal authority were weak from the start. Two separate constituencies pulled in opposite directions. Those who desired that Japan’s leaders be punished accepted the majority judgment as adequate, almost regardless of the legal reasoning produced to get there, and saw (and still see) no purpose to Pal’s objections. Those who could not detect anything at the IMTFE but
victor's justice were not persuaded by what they read in the majority judgment, and regarded (and still regard) Pal as the sole voice of reason. Since that time, of course, the criteria for retrospectively determining adequacy have shifted. Recent concern over what is seen as Japan's failure to acknowledge responsibility for atrocities in Nanking, for example, has weakened support of the first constituency for the Tokyo trial. Some argue that the IMTFE did not go far enough in its judgment, while others prefer to affirm the majority judgment as it stands, fearful that a successful challenge to its adequacy, especially one that invokes Pal, will release Japan from any legal responsibility for the conduct of its troops in China during the war.

The debate over the adequacy of the IMTFE may never end, for future interpretations of the history of Japan's armed interventions in East Asia and the Pacific will continue to generate other ways to narrate this history. As the narrative changes, so too will the judgment. The value of bringing narrativity into our analysis is to make us aware that court judgments, though we might wish to endow them with the force of truth, have no epistemological status outside the courtroom. The Tokyo judgment on the Rape of Nanking can be regarded no differently. The majority relied on the narrative that the prosecution brought forward, and considered it adequate to assign criminal responsibility for what happened in Nanking to Matsui and Hirota. Whether the judgment was adequate in relation to evolving standards of international law will continue to be a matter of debate among those who seek to improve jurisprudence on war crimes. What actually happened in Nanking in December 1937, however, remains beyond the capacity of any court to determine or resolve. If the resolution sought is reconciliation, other means will be needed to construct it.

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