RICHARD H. MINEAR

Victors' Justice

Tokyo War Crimes Trial

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Dedicated to the many Americans whose
opposition to the war in Indochina has
made them exiles, criminals, or aliens
in their own land.

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PREFACE

FEW Americans know much about the Tokyo trial. Most people have only a vague memory that a trial took place and that its verdict corroborated our convictions about the dastardly and criminal nature of Japan's wartime leadership and policies. My major concern in writing this book has been to challenge this prevailing image of the trial, to demolish the credibility of the Tokyo trial and its verdict. Of necessity my task has been primarily a negative one, but I hope it is not without its positive aspects. There is great value to be gained from understanding past mistakes, especially, perhaps, our own.

I write primarily for an American audience, but this book will also be read in Japan, and many of my Japanese friends will be unhappy with it. For ideological or personal reasons Japanese scholars have stayed away from the trial. Where some coverage was unavoidable, they have tended to affirm the validity of the trial and its verdict. Apparently, they fear that denigration of the trial will lead to a positive reevaluation of Japan's wartime policies and leadership.

The relation between denigration of the Tokyo trial and resuscitation of Japan's wartime policies and leadership is not a necessary one, but the potential for mischief is obvious. For this reason I should like here to remove any doubt among my readers—Japanese or American—about my own purposes. Paraphrasing the statement of James B. Scott, legal advisor to the American delegation at Versailles in 1919: "I do not hold a brief for Tojo. I do hold a brief for justice, even to my enemies."

The Tokyo tribunal found Tojo guilty and sentenced

him to death by hanging. It is my contention that he was legally innocent. But my brief for Tojo stops there. The Tokyo tribunal dismissed the claim that the Japanese government had been motivated by considerations of self-defense. It is my contention that considerations of self-defense played an important role. But my brief for Japan's prewar policies stops there. Many Japanese acts on the continent of Asia before and during the war are as repugnant to me as current American acts in Indochina.

Despite my attack on the trial, I have not sought for or found scapegoats. Robert H. Jackson, Joseph B. Keenan, President William Webb, General Douglas MacArthur: all of these men I have criticized sharply, but I have not made scapegoats of them. The major share of the blame for the Tokyo trial lies with the assumptions, the world-view, all these men held in common. As my final sentence states, in punishing the Japanese leaders we fooled ourselves. It is this delusion I attack, and I hope I have done so without creating new delusions. John W. Hall has written recently: "We need to rethink the causes of the Pacific war from what can only be described as a tragic view, one which takes no comfort in scapegoats and offers no sanctuary for private or national claims of moral righteousness. . . ." Professor Hall's comment I endorse entirely.

The current American concern with American war crimes in Indochina presents a second point at which misunderstanding may arise. I am fully in favor of conventional war crimes trials, as in the case of Lieutenant Calley. Such trials are essential to American honor and to the discipline and pride of American armed forces. Moreover, as Brigadier General Telford Taylor and others have

suggested recently, certain American military policies in Vietnam—free-fire zones, saturation bombing, and the like —are of highly dubious legal character. Presumably, at least two American presidents and their civilian and military advisors could be held responsible. Such action I favor strongly.

But when the issue is not conventional war crimes but aggression, when it is the whole course of American policy and indeed the history of Indochina and East and Southeast Asia, then I must demur. A tribunal convened today to consider these issues might come closer to the truth than did the Tokyo tribunal after World War II. That would be child's play. But how close is close enough? And would any such judgment be truly useful? The attempt to establish legal guilt—not for atrocities, but for the war itself—would be politically convenient and satisfying. Moreover, we have today what was lacking in 1945: precedents, the precedents of Nuremberg and Tokyo and the Eichmann trial. But there are both good and bad precedents. The Tokyo trial is a bad precedent, bad enough, I suggest, to cast doubt on the Nuremberg precedent as well. The wiser course would be to return to the international law of the period before 1945, when atrocities were considered justiciable but the issue of aggression was not.

The war in Vietnam has affected all of us in one way or another. This book is in large part the result of its effect on me. Let me explain.

I attended high school and college in the 1950's. I pursued my graduate studies in the 1960's. My college generation was not noted for its activism. Graduate training further encouraged timidity: a careful, modest choice of

thesis topic; constant concern for "scholarly tone" and objectivity; and a preoccupation with the non-ideological facets of scholarly life. Not only did I see no major problems in the postwar relations between the United States and Japan, but I also considered concern with problems so nearly contemporary to be journalistic, unscholarly, unhistorical. I was happy to leave the field to the political scientists, and it seemed odd that they should find it a rewarding object of study.

The war in Indochina changed all that. For one thing, it soon became obvious from my study of the American involvement there that very little about American policy was right. Could American policy be enlightened regarding Japan when it was so benighted about Vietnam? Very likely not. For another thing, my study of American policy in Vietnam raised in my mind grave suspicions about the concerns of political science, or at least of the political scientists writing on Vietnam. Samuel Huntington, Douglas Pike, Ithiel de Sola Pool, Frank Trager: surely it was not coincidental that the hawks, the ideologists, were nearly all political scientists. If American policy drew support as it did from their scholarship, then it was simply too dangerous to leave recent history—of Vietnam or of Japan—to their tender mercies.

Finally, the lack of public outcry against the Vietnam war (until very recently) represented a failure of education, a failure all the more inexcusable in a time of flourishing area studies. Area studies were flourishing, but only in the universities. Specialists talked primarily to specialists about problems of largely academic concern. The new learning of these specialists penetrated but little into the non-academic consciousness.

Vietnam turned my scholarship in a political direction. It led me to reexamine the recent history of America's relations with Japan. It encouraged me to write on a subject of interest outside the academic world. It emboldened me, once I had started on the Tokyo trial, to adopt a polemical tone.

I started on the Tokyo trial with a vague awareness that all was not right. I had read Justice Pal's dissent some years earlier, and my intention at first was to prepare a reader, a sampling of opinion about the trial designed to make Justice Pal's opinion available more widely. My intended neutrality, fraudulent from the first, dissolved as the case against the Tokyo trial emerged in its major outlines.

This book is political scholarship. It is political in its choice of subject. It is political in its tone. It is political in the implications I draw for the present day. Earlier American studies of the postwar scene were also political, but in a different way: in their very neglect of such issues as the Tokyo trial. Consider for a moment these facts. First, all the essential ingredients on which this book rests were available in 1949, twenty-two years ago. Although confined to a handful of major libraries, the records of the trial were in the public domain, accessible without special permission. Second, Justice Pal's opinion was published privately—in India, to be sure—in 1953, eighteen years ago. Third, Paul W. Schroeder published his *The Axis Alliance and Japanese-American Relations* in 1958, thirteen years ago. In that book he called for scholarly attention to the trial and expressed his own sense that the trial was a travesty. Finally, none of the essential research demanded any foreign language.

Surely there must be an explanation for this neglect of the Tokyo trial. To me it lies partly in the factors I have cited about my own graduate training. The Tokyo trial was recent history; it was peripheral to a serious and scholarly interest in the cultural and intellectual history of Japan; it was too big a topic for a fledgling graduate student to tackle. It was also a political topic, an uncomfortable one, better left alone.

Yet neglect is no solution, and errors of omission come back to haunt us. Area specialists owe it to the larger public to concern themselves at least part of the time with topics of immediate relevance to American policy. They should address themselves frequently not to their scholarly peers, but to the general public. They should deal not only with the successes that may teach us little, but also with the failures that may teach us more. Surely we know enough about the bright side of recent Japanese-American relations. It is time now to study the reverse course of the Occupation, the conclusion of the peace with Japan, the Mutual Security Pact, Okinawa. It is my hope that this study of the Tokyo trial will encourage others to turn their talents to these problems.

The Tokyo trial is a failure that can instruct us. I have written this book in the belief that an awareness of the absurdities and the inequities of the Tokyo trial will help us to rethink some of our assumptions about American policy in Asia, about Japan, and about Indochina.

For criticism of the manuscript I am indebted to: Carl Boyd, Albert M. Craig, David E. Green, Harold Josephson, Nagao Ryuichi, and Edwin O. Reischauer. George A. Furness, defense counsel at the Tokyo trial, read the man-

uscript with great care just before it went to press. These individuals have contributed greatly to this book. Nevertheless, the views I have expressed are mine, and I bear sole responsibility for them and for errors of fact and interpretation.

It is a pleasure to acknowledge also those who facilitated my search for materials: Philip P. Brower of the MacArthur Memorial Bureau of Archives, Norfolk, Va.; Lewis C. Coffin of the Library of Congress; Edith Henderson of the Harvard Law Library; Inoue Tadao and Toyota Kumao of the War Crimes Materials Room of the Japanese Justice Ministry; Sara D. Jackson and John Taylor of National Archives; Myres S. McDougal of the Yale Law School; Muramatsu Michio of the Law Faculty of Kyoto University; and James T. Patterson of Indiana University. The Research Foundation of the Ohio State University supported my writing during the summer of 1968. Finally, I am grateful to R. Miriam Brokaw of Princeton University Press for her unstinting efforts on my behalf.

Kyoto, May 1971 RICHARD H. MINEAR

VICTORS' JUSTICE

The Tokyo War Crimes Trial

NOTE ON JAPANESE NAMES

Japanese names throughout are given in Japanese order, that is, the family name precedes the personal name. Diacritical marks have been removed from the text but are available in the Index.

I.

INTRODUCTION

> I think we can say that to some extent the Tojo trial itself provided a wholesome example of a concept of Anglo-Saxon justice.
>
> —Joseph B. Keenan, 1949

> In the last analysis, this trial was a political trial. It was only victors' justice.
>
> —Tojo Hideki, December 1948

THE Tokyo trial opened on May 3, 1946. At 9:30 a.m. the marshal cried: "The International Military Tribunal for the Far East is in session and is ready to hear any matter brought before it." The Tokyo trial was underway.

The opening ceremonies took place in the auditorium of the old Japanese War Ministry. This very large room had been remodeled carefully, both to give dignity to the setting and to facilitate photographic coverage of the trial. But something was not quite right. In its very first article covering the trial, *Time Magazine* compared the setting unfavorably with Nuremberg: "Nuremberg's impresarios had used simpler furnishings, relied on the majesty of the concept to set the tone." By contrast the Tokyo trial was theatre, and its klieg lights suggested "a Hollywood premiere." But premiere it was not. The Tokyo trial, wrote *Time*, "looked . . . like a third-string road company of the Nuremberg show."[1]

[1] *Time*, May 20, 1946, p. 24.

The high bench included seats for eleven justices. Each justice represented one of the nations whose allied efforts had brought Imperial Japan to defeat and the present accused to the dock. But on that opening day only nine seats were filled; two justices had not yet arrived. The same nations were also represented by associate prosecutors, who together formed an International Prosecution Section.

Across the room from the bench was the dock. The dock had seats for twenty-eight defendants. Twenty-six were present now, and the final two would arrive in time for all of them to plead innocent that afternoon. They had once been very powerful men. Fourteen of the twenty-eight had held the rank of general in the Imperial Japanese Army. Seven of these had served as War Minister; nine had held wartime commands. Most conspicuous among them was Tojo Hideki himself, Prime Minister and War Minister at the time of Pearl Harbor and during most of the war and for a short period chief of the Army General Staff to boot. The Imperial Japanese Navy was represented by three admirals. Among the civilian defendants were five career diplomats. They included Hirota Koki, Foreign Minister from 1933 to 1936 and Prime Minister from 1936 to 1937, and Shigemitsu Mamoru, Foreign Minister during 1943 and 1944. There were also three bureaucrats, one politician, and one propagandist, the ultranationalist Okawa Shumei. They had once been powerful, but stripped of their uniforms and titles and sitting in the dock, they did not look awesome. Next to their husky American M.P. guards, they seemed insignificant indeed. Some thirty-odd lawyers, all but nine of them Japanese, had assembled in their defense. The aid of more American

lawyers had been promised, but many had not yet arrived in Tokyo.

Sir William Webb of Australia, President of the Tokyo tribunal by order of General Douglas MacArthur, opened the proceedings on that May morning by describing an affirmation, signed beforehand by all nine justices then present, to "administer justice according to law and without fear, favor, or affection." He continued: "To our great task we bring open minds both on the facts and on the law."[2] Joseph B. Keenan of the United States, Chief of Counsel by order of President Harry S. Truman, then introduced the Indictment. Late that afternoon all defendants pleaded "not guilty."

So began the Tokyo trial. No one expected that the trial would be over soon, but few of the actors in the drama could have foreseen in May 1946 that the Tokyo trial would last fully two and one half years. Eight hundred and eighteen court sessions on 417 days; testimony from 419 witnesses and from 779 affidavits; and seven months for the justices to compose their judgment: all this would elapse before the International Military Tribunal for the Far East reconvened in the same room on November 4, 1948 to hear the verdict read and the sentences pronounced. The verdict would be guilty, though not precisely as charged. The sentences: death by hanging for seven men, including Tojo and Hirota; life imprisonment for sixteen; twenty years' imprisonment for one; and seven years' imprisonment for Shigemitsu. The propagandist Okawa had been deemed unfit for trial, and two defend-

[2] *Proceedings of the International Military Tribunal for the Far East* (mimeo; hereafter *Proceedings*), pp. 21-22.

ants had died during the long proceedings. The cases against these three had been dismissed.

1. War Crimes Trials after World War II

Trials for war crimes were a conspicuous feature of the immediate postwar world. In Europe, the Nuremberg Tribunal was only the most famous of many trials. In the Pacific as well, the Tokyo trial was only one of many. Some 5,700 Japanese were tried on conventional war crimes charges, and 920 of these men were executed.[3] But the Tokyo trial was the showpiece, for the defendants here were the leaders of the defeated Japanese state and its armed forces. These were the most illustrious defendants, and the crimes alleged against them were the most serious: not simply conventional war crimes, but crimes against peace and crimes against humanity.

But what precisely were crimes against peace and against humanity? The Allies themselves had not been sure until after Germany's defeat. Prior to 1945, Allied proclamations had called for the punishment of enemy

[3] Kojima Noboru, *Tokyo saiban*, 2 vols. (Tokyo: *Chuo koron*, 1971), II, 225. Kojima gives no source for his figures, which are substantially higher than some other figures available. (For example, *Facts on File*, IX [1949], 339H.) But Inoue Tadao of the Japanese Government's Ministry of Justice (War Crimes' Materials room) confirms the correctness of Kojima's figures. The figure for total individuals put on trial is from Inoue and cannot be fixed precisely, since some individuals underwent two or more trials.

In addition to the war crimes procedures, an administrative purge removed over 200,000 Japanese at least temporarily from political activity. John D. Montgomery, *Forced to be Free* (Chicago: University of Chicago Press, 1957), p. 26; see also Hans H. Baerwald, *The Purge of Japanese Leaders under the Occupation* (Berkeley: University of California Press, 1959).

war criminals; before 1945, "war criminals" presumably referred to men guilty of conventional war crimes, those deeds covered under the various conventions signed at The Hague and in Geneva. In 1945, however, "war criminals" took on a new meaning.

Meeting in London in the summer of 1945 to draw up a charter for the Nuremberg Tribunal, the Big Four decided that the leaders of Nazi Germany would be tried not only for conventional war crimes, but also for two new crimes: those against peace and against humanity. Crimes against peace meant ". . . planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Crimes against humanity were ". . . inhumane acts committed against any civilian population, before or during the war. . . ."[4] Thus, when the Nuremberg Tribunal got under way in November 1945 the Nazi leaders in the dock stood accused not only of atrocities against foreign military and civilian personnel but also of planning and waging aggressive war and of inhumane treatment "before or during the war" of German Jews.[5]

[4] Text of the Nuremberg Charter in "International Conference on Military Trials," Department of State Publication No. 3080 (Washington: U.S. Government Printing Office, 1949; hereafter *London Conference*), pp. 422-428.

[5] The Nuremberg judgment rejected the prosecution's attempt to include prewar treatment of German Jews in the category of crimes against humanity. The relevant passage of the judgment reads: "To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the tribunal. The tribunal is of the opinion that, revolting and horrible as many

The major Allied concern (China excepted) throughout World War II had been with Nazi Germany, not with Japan. It was only when the European war had ended and when the Japanese defeat was imminent that the Allies publicly announced their intention to prosecute Japanese war criminals. The Potsdam Declaration of July 26, 1945 read in part: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. . . ."[6] Much like the early Allied pronouncements vis-à-vis Germany, the term "war criminal" presumably meant someone guilty of conventional war crimes, such as the maltreatment of prisoners of war. (The London Conference reached agreement two weeks after Potsdam.) But as at Nuremberg so at Tokyo, the enemy leaders were to find themselves under indictment primarily for crimes against peace and against humanity.

The Allies had promised stern justice, but in 1945 ". . . no treaty, precedent, or custom determined by what method justice should be done."[7] Given this situation, the Allies could choose between executive action and judicial proceedings. Great Britain's initial preference was for executive action. As one early aide-mémoire stated: ". . .

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of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime." *Trial of the Major War Criminals before the International Military Tribunal,* 42 vols. (Nuremberg, 1947-1949), XXII, 498.

[6] Text in *Judgment of the International Military Tribunal for the Far East* (mimeo, November 1948; hereafter *Judgment*), pp. 3-4; Robert J. C. Butow, *Japan's Decision to Surrender* (Stanford: Stanford University Press, 1954), pp. 243-244.

[7] Robert H. Jackson, "Preface," *London Conference,* p. v.

H.M.G. are . . . deeply impressed with the dangers and difficulties of this course [judicial proceedings], and they . . . think that execution without trial is the preferable course." Not only would a trial be "exceedingly long and elaborate" and open to being misunderstood by the general public, but also the present state of international law did not permit a full statement of Nazi transgressions. Many of these transgressions, the paper stated, ". . . are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law."[8]

The American position was just the reverse. The U.S. Government opposed executive action in the following words: "While it [executive action] has the advantage of a sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations. This would encourage the Germans to turn these criminals into martyrs, and, in any event, only a few individuals could be reached in this way." Consequently, while acknowledging "serious legal difficulties" surrounding a judicial proceeding, the U.S. Government favored such a course: "We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover,

[8] "Aide-Memoire from the United Kingdom, April 23, 1945," in *London Conference,* p. 18. See also Samuel I. Rosenman, *Working with Roosevelt* (New York: Harper & Bros., 1952), pp. 542-545. Rosenman was Roosevelt's special envoy to the British in the spring of 1945. He reports that the British leaders were "determined in their opposition to a trial—they wanted to take the top Nazi criminals out and shoot them without warning one morning and then announce to the world that they were dead." He also reports that in 1947 Churchill expressed to him a change of heart: "I think the President was right and I was wrong."