PAL'S DISSENT – THE TOKYO TRIAL IN RETROSPECT ©.

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INTRODUCTION

The International Military Tribunal for the Far East (IMTFE) is the lesser known postwar counterpart to the International Military Trial (IMT), commonly referred to as the Nuremberg Trials. Using Nuremberg as a precedent, 28 of Japan's former military and civilian leaders, including wartime Prime Minister Tōjō Hideki, were charged with three categories of crimes - crimes against peace (Class A), conventional war crimes (Class B) and crimes against humanity (Class C). Eleven judges from various Allied nations were hand-picked, including three Asian judges, to judge the accused. While the Nuremberg Trials lasted for ten months, the IMTFE would go on to span two and a half years and comprise of forty-nine thousand pages of court transcripts. With an additional thirty thousand pages tendered in evidence, it all culminated in a 1218-page judgement, much larger than the 270-page Nuremberg judgement. Despite its enormity, ever since the trial commenced in 1946 debate over its legitimacy and fairness has raged on amongst historians and legal scholars, both in Japan and elsewhere. In fact, three of the eleven justices submitted dissenting opinions condemning perceived flaws in the judicial process and a further two, including the Presiding Justice, submitted separate opinions. Controversially, all the accused, save two who died and one who was declared mentally unfit, were found guilty. Seven of them were sentenced to death and sixteen to life imprisonment.[1] Despite the dissenting and separate opinions of the Bench, the immediate consensus amongst Japanese intellectuals was that the trial represented a way in which Japan could break free from the grip of the militarists who led her into war.[2] More recently however, scholars have evaluated the trial more critically, pointing out it omitted other Japanese atrocities, such as human experimentation and forced prostitution, as well as ignoring atrocities committed by the Allies. Finally, there is a small group of scholars who refer to the trial as victor's justice, viewing the trial as a sham on account that it wrongly

[1] Marius B. Jensen, *The Making of Modern Japan*, (HUP 2000) pp 673

[2] Madoka Futamura, "Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective" 2011 Vol 9(29) *The Asia-Pacific Journal* < https://apjjf.org/2011/9/29/Madoka-Futamura/3569/article.html> accessed 15 September 2017

portrayed Japan as the aggressor, charged the defendants with *ex post facto* crimes and exaggerated or flat out fabricated atrocities.[3]

PAL'S JUDGEMENT

Pal had been absent from the previous agreement in which the Justices agreed they would submit a unanimous judgement and agree to abide by the tribunal's charter. While much of the Bench had varying degrees of reservations over the charter, it was Pal who sensationally broke away from the other Justices. His judgement, which he compiled in his hotel room as evidence was still being presented to the court, consequently missing 109 of 460 court days, held that the flaws within the charter itself and the alleged lack of evidence implicating those standing before the court meant that the only recourse was to drop all charges. He declared: "I would hold each and every one of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted on all those charges."[4]

His reasoning behind this was fourfold – the charges of crimes against peace, which included conspiring to wage aggressive war, and crimes against humanity, introduced in Nuremberg to, among other things, cover Nazi crimes against German citizens, were, in his eyes, *ex post facto*. Pal argued waging an aggressive war or conspiring to do so had not been a crime under international law any time before or after 1941. The basis of the prosecution's case was found in the Pact of Paris 1928, which outlawed war as an instrument of state. Pal disagreed, suggesting that the Pact was little more than a gentlemen's agreement for it did not explicitly criminalise the waging of aggressive war or hold individuals accountable, concluding "the law will perhaps be found to be that only a lost war is a crime."[5]

Secondly, Pal disagreed with the term "aggression", noting it was incredibly subjective. "No term", he argued, "is more elastic or more susceptible of interested interpretation (…) than aggression."[6] This, he suggests, was because it was the victor who defined what constituted aggression. Furthermore, he argued the Allies themselves were guilty of Class A war crimes – a reference to the centuries of colonisation of Asia by the European powers. He argued, that while certain Japanese colonial acts were "reprehensible", Japan had merely imitated and

[3] Kitamura Minoru & Lin Siyun, *The Reluctant Combatant: Japan and the Second Sino Japanese War* (UPA 2014) xvii-xix
[4] Radhabinod Pal, *Dissentient Judgement of Justice Pal* (Kokusho- Kankokai, Inc 1999) 697
[5] Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (PUP 1971) 54
[6] ibid 59

emulated the Western empires, noting it was the West who coined the euphemism "protectorate."[7] In fact, Pal went as far to suggest that much of Japanese colonial policy was motivated largely by feelings of self-defence. He argued Japan had a vested interest to protect its legitimate claims in China from the ongoing civil war, the Chinese National Boycott, and the rise of Chinese communism.[8] This too was a consequence of their imitation of the West.

Thirdly, Pal argued the Allies themselves had also committed Class B and C war crimes. Pal noted in his dissenting judgement that it was hypocritical for the Allies to apply the same crimes used to convict war criminals in Nuremberg as the use of the atomic bomb was "the only near approach to the directives… of the Nazi leaders during the second world war."[9] The London Charter stipulated that "violations of customs and war" included the "wanton destruction of cities" not justified "by military necessity."[10] The Allies maintained the atomic bombs were "justified by military necessity" as it shortened the war and subsequently saved lives. In response to the justification offered by the Allies, Pal illustrated the criminal nature of the loosening of the atomic bombs by comparing it to Kaiser Wilhelm II's justification for the Rape of Belgium in 1914:

> "My soul is torn, but everything must be put to fire and sword; men, women and children and old men must be slaughtered and not a tree or house be left standing. With these methods of terrorism… the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years."[11]

Pal added: "It is yet to be seen how far we have been alive to the fact that world's present problems are not merely the more complex reproductions of those which have plagued us since 1914."[12] Pal believed that if the use of the atomic bombs, as well as Allied conduct as a whole, were exonerated, then the problems arising from this war would inevitably re-emerge in the future. Pal's belief was that the tribunal should have judged all crimes committed in the war, not just those perpetrated by the Japanese, as doing so would have meant the tribunal could have served as a universal critical evaluator of war itself.

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[7] Nakajima Takeshi, 'The Tokyo Tribunal, Justice Pal and the Revisionist Distortion of History' (2011) Vol 9(44) The *Asia-Pacific Journal* < https://apjjf.org/2011/9/44/Nakajima-Takeshi/3627/article.html> accessed 15 September 2017

[8] ibid 4 at 302

[9] Ibid 621

[10] Tsuyoshi Hasegawa, "Were the Atomic Bombs Justified?" in Yuki Tanaka & Marilyn B. Young (eds) *Bombing Civilians: A Twentieth Century History* (The New Press 2009) 131

[11] ibid 4 at 620

[12] Timothy Brook, "Radhabinod Pal on the Rape of Nanking", in Bob Tadashi Wakabayashi (eds) *The Nanking Atrocity, 1937-38*, second edition, (Berghahn Books 2017) 169

Finally, while acknowledging that Class B war crimes had existed by the time the accused had allegedly committed them, he held that those who were responsible had already been punished in local war crimes trials across the Pacific.[13] Though this part of his reasoning is somewhat complicated and he seems to have back pedalled on certain issues, specifically on the concept of negative criminality. This inconsistency can be exemplified by the fact that he acknowledged Prime Minister Tōjō Hideki was responsible for the abuse of prisoners of war, a crime for which he was later convicted. He reaffirmed that the abuses were a "mere act of state", which were "not criminal *per se*" and that he "would not make him criminally liable for it."[14] Yet elsewhere in his judgement he stated that "Japanese commanders were legally bound" to prevent atrocities.[15] Perhaps he believed the government was a separate entity from the military, though such an interpretation would be wrong as much of the cabinet was comprised of military and naval officers. Additionally, it may well have been that Pal genuinely saw no evidence implicating Tōjō of inaction or suggesting the atrocities could have been "foreseen" by the accused. Pal concluded, "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."[16] The Allies' reliance on negative criminality may have been because none of the defendants were accused of having personally committed atrocities. Instead, critics allege they were charged of having *conspired* to "order, authorise and permit" atrocities so to ensure convictions.[17]

The charge of conspiracy tied all the other charges together. The reliance on conspiracy can be seen by the fact that only 8 of the 22 defendants at Nuremberg were convicted on conspiracy charges, while in Tokyo it was 23 of the 25 defendants. The prosecution alleged that the conspiracy to wage war went as far back to a 1927 document known as the so-called Tanaka memorial – which has since been found to have at least been slightly fabricated – that outlined Japan's alleged intention for world domination. The prosecution also alleged that the Nanking massacre of late 1937 to early 1938 was part of this conspiracy to subdue Asia and that all other subsequent atrocities could be traced back to it.[18] Pal held that "no conspiracy either "of a comprehensive character and of a continuing nature", or of any other

[13] ibid at 628
[14] ibid 669
[15] ibid 631
[16] ibid 12 at 162
[17] ibid 5 at 67
[18] Kitamura Minoru, *The Politics of Nanjing: An Impartial Investigation* (UPA 2007) 3

character and nature was ever formed, existed or operated during the period from January 1, 1928 to September 2, 1945 or during any other period."[19]

Pal's views on the retroactive nature of crimes against humanity largely echoed that of the American Federal Judge Charles E. Wyzanski's criticism of the Nuremberg Tribunal. Wyzanski argued, "There is no citation of any particular international convention which in explicit words forbids a state or its inhabitants to murder its own citizens, in time either of war or of peace. I know of no such convention."[20] Similarly, Pal's argument that aggressive war did not constitute a war crime was not new. This had previously been expressed by British legal scholar Arnold MacNair in 1944 who argued the Pact of Paris "did not convert a state into a *caput lupinum*" and that "launching aggressive war[s] are *lega lata* not 'war crimes.'"[21]

PAL'S DISSENT IN COMPARISON TO THE DISSENTING JUDGEMENTS OF JUSTICE RÖLING AND JUSTICE BERNARD

Nonetheless, the rest of the Bench were in broad disagreement with Pal's judgement. The other two Asian Justices, the representative of the Philippines, Justice Jaranilla, and the representative of China, Justice Mei, were particularly appalled at this perceived defence of Japanese aggression. Both Justices were from countries that had endured intense atrocities at the hands of the Japanese, with Justice Jaranilla himself being a survivor of the notorious Bataan Death March.

Justice Röling of the Netherland agreed with Pal that the atomic bombings violated existing international conventions and that "'crimes against peace' were not regarded as true crimes" before the trial.[22] His argument was that if it was in fact a crime, it was only a crime in *statu nascendi*. However, Röling concurred with the Nuremberg judgement that crimes against peace were the "supreme international crime", for all other crimes committed in the war could be traced back to these violations. Röling defended the IMTFE's decision to apply *ex post facto* law on the basis that the judgement of the tribunal should reflect a desire to prevent future conflict, arguing the trial's "innovation" in applying crimes of aggression to international law,

[19] ibid 4 at 562
[20] Charles E. Wyzanski, "Nuremberg: A Fair Trial? A Dangerous Precedent", (*The Atlantic* April 1946) <https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/> accessed 19 November 2017
[21] Kitamura & Lin xvi
[22] ibid 5 at 53

even if there was no legal precedent, was necessary.[23] Röling had also expressed profound disagreement with some of the sentencing, such as the conviction and execution of Hirota Kōki, the civilian Foreign Minister of Japan. Negative criminality, he felt, should have narrowed to three elements: knowledge, power and duty.[24] He concluded that the trial had wrongly emphasised Hirota's power over atrocities committed by the army, which itself was a result of an ignorance of the Japanese political structure wherein the army was an independent entity.[25]

Justice Bernard of France, whose views largely fell in line with Justice Röling's, dismissed the prosecution's reading of the Pact of Paris, yet he also disputed Pal's claim that the concept of aggressive war did not exist. In his own dissenting judgement, by appealing to the notions of natural law, Bernard argued, "There is no doubt in my mind that such a war of aggression is and always has been a crime in the eyes of reason and universal conscience".[26] Bernard was also fiercely critical of the concept of conspiracy, arguing "no direct proof" was presented to the court that showed the defendants had formed a plot "on a known date, at a specific point (…) to assure to Japan the domination (…) of some parts of the world."[27] Instead, Bernard argued, the evidence suggested there was a shared desire by the political and intellectual elite to dominate other parts of South East Asia, but this did not answer the question of criminality. While he signed the majority judgement, he emphasised the lack of defence guaranteed to the defendants, adding that, had the same violation of principles occurred in any other court, it would have resulted in the whole procedure being nullified. He concluded, "A verdict reached by a tribunal after a defective procedure cannot be a valid one."[28]

[23] B. V. A, Röling & Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peace Monger*, (Polity Press 1994) 98-99
[24] ibid 5 at 71
[25] Gideon Boas, "Command Responsibility for the Failure to Stop Atrocities", in Yuki Tanaka & Timothy L. H. McCormack (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff Publishers 2011) 166
[26] ibid at 5 53
[27] ibid 133
[28] ibid 163

MODERN INTERPRETATIONS OF PAL'S DISSENT

Academics have since attempted to explain the reasoning behind Pal's dissenting judgement. Japanese historian Ienaga, while agreeing with his contention that only the atomic bombs closely resembled the crimes of which the defendants in Nuremberg were convicted of, argues Pal's judgement was compromised by his anti-communism which led him to justify Japan's invasions as a response to encroaching Soviet and Chinese communist influence in the region.[29]

Similarly, Yuma suggests his deflection of responsibility for the war and atrocities stemmed from his belief that Japan had been fighting a war of liberation and had been an avid supporter of the so-called Greater East Asia Co-Prosperity Sphere.[30] In fact, throughout the trial, he referred to Japan's occupied territories as "Greater East Asia." This was reiterated by Röling, who felt Pal had been the only authentic Asian judge as he had been supportive of the idea that Japan was "[liberating] Asia" and that he wholly believed in the Japanese slogan of "Asia for the Asians."[31]

To justify her claims that Pal supported Japan's war effort, Yuma cites his visit to Sugamo prison after the war in which he is alleged to have shared his criticisms of the trials with convicted Class B war criminals. There, he allegedly stated that the local courts, in which they had been convicted, were shams and that none of them had committed any crime.[32] To Yuma, this alone proves that Pal genuinely believed Japan committed no atrocities in the war. Yet it contradicted his earlier Judgement in which Pal admitted that the evidence was "overwhelming" that "devilish and fiendish" atrocities by the Japanese army had in fact occurred.[33] It is possible that there was a translation error.[34]

Brook, in agreement with Yuma, emphasises that throughout the trial Pal questioned the credibility of the witnesses. Regarding witness testimony relating to the Nanking massacre, he wrote that it was "difficult to read this evidence without feeling that there have been distortions and exaggerations (…) I am not sure if we are not here getting accounts of events witnessed only by excited or prejudiced survivors."[35] Takashi disagrees with Brook's analysis, arguing Pal was not suggesting the witnesses were intentionally lying to the court, or that

[29] Ienaga Saburo, *The Pacific War 1931-1945* (Pantheon Books 1978) 201
[30] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (HUP 2009) 226
[31] ibid 23 at 28
[32] ibid 30 at 227
[33] ibid 3 at 619
[34] ibid 32
[35] ibid 12 at 160-161

he was in any way trying to minimise the scale of the atrocities, but that he felt those exposed to trauma tended to rely on rumour and speculation or otherwise exaggerate their account.[36]

Nakajima on the other hand attempts to place Pal's condemnation of the trial's flaws in the context of his humanist and pacifist dharma philosophy. His judgement's critique of Allied imperialism and his belief that all the accused were not guilty did not stem from an alleged belief that Japan was innocent of aggression or committed no war crimes. On the contrary, Nakajima claims that European and Japanese imperialism were both equally morally reprehensible. His abhorrence to imperialism was borne from his staunch pacifist beliefs. Nakajima further argues that his opposition to introducing *ex post facto* legislation was because of his belief that in doing so "international society would not be bound by a common understanding against war".[37] In this sense, Pal's condemnation of both sides was born from his idealism that by not applying *ex post facto* laws the tribunal could potentially create an international community bound together by a revulsion against war. This is an argument similar to that of Justice Röling's defence of the tribunal's application of *ex post facto* laws.

PAL, "JAPAN'S INNOCENCE" AND THE ATTEMPT TO ALTER HISTORICAL MEMORY

The trial has become a source of anger and resentment for Japanese neo-nationalists, who have as a result venerated Pal. This was illustrated by his memorial at the Yasukuni Shrine, whom they believe declared Japan innocent. In *On Japan's Innocence: The Truth on the Trial*, originally published in 1952, writer Tanaka Masaaki invoked Pal's dissenting judgement to argue the trial was an example of "white people" victimising "coloured people."[38] As the title suggests, he reaffirmed Japan was innocent, that only the Allies committed war crimes and that Japan had waged a war of liberation. Pal, however, never once claimed Japan was innocent, at least not in public. For instance, in his judgement he condemned the Japanese puppet state of Manchukuo, calling it a political farce.[39] Tanaka also invoked Pal's judgement to justify his denial of the Nanking massacre, though aside from being sceptical of some witness accounts, Pal acknowledged "there is no doubt that the conduct of the Japanese soldiers at Nanking was atrocious and that such atrocities were intense for nearly three weeks

[36] Takashi Yoshida, *The Making of the "Rape of Nanking": History and Memory in Japan, China and the United States* (OUP 2006) 50-51
[37] ibid 7
[38] ibid 7 at 52
[39] ibid 7

and continued to be serious to a total of six weeks."[40] It is likely Tanaka wilfully distorted Pal's judgement, as he was later found to have tampered parts of one of the defendant's diaries, General Iwane Matsui, in 900 places to prove the Nanking massacre did not happen.[41] Since the 1990s there has been a spike in historical negationism in Japan to exonerate the defendants. One of the most recent publications, *Fallacies in the Allied Nation's Historical Perception as Observed by a British Journalist*, written by Henry Scott Stokes, the former Tokyo bureau Chief of the New York Times and other major newspapers, reiterated much of Tanaka's arguments and quickly sold over 100,000 copies in Japan. He writes "Japan is still under the historical influence of the historical view of the Tokyo Trials. Japan was labelled as a criminal nation which was guilty of "crimes of aggression" and the "Nanking massacre". It is vital, therefore, to get rid of the falsehood of the "Nanking massacre" (…) and the nonsensical Tokyo Trials".[42]

This sentiment does not only come from non-fiction writers, but is shared with high ranking conservative politicians too. The former defence minister, Tomomi Inada, wrote "We should be focused on conquering the historical perspective created by Tokyo war crimes tribunal."[43] Additionally, the former Chief of Staff of the Japanese air force, Toshio Tamogami, claimed "The Tokyo Trials tried to push all the responsibility for the war onto Japan. And that mind control is still misleading the Japanese people sixty-three years after the war."[44] To the neo-nationalists, the trial was not only a judicial farce that wrongly blamed Japan for the war and fabricated atrocities, but that it continues to permeate in the Japanese psyche.[45] Consequently, Pal becomes central to breaking away from this perpetual "IMTFE-syndrome". By using Pal's dissenting judgement, the neo-nationalists believe they can alter the current "masochistic" collective memory of the war.

[40] ibid 4 at 624
[41] Kimura Takuji, "Nanking: Denial and Atonements in Contemporary Japan", in Bob Tadashi Wakabayashi (eds) ibid 334
[42] Henry Scott-Stokes, *Fallacies in the Allied Nation's Historical Perception as Observed by a British Journalist* (Hamilton Books 2017) 83
[43] The Asahi Shimbun, "Inada: Courage urged to conquer history dictated by war tribunal", (*Asahi Shimbun*, 12 June 2017) < http://www.asahi.com/ajw/articles/AJ201706120043.html> accessed 27 March 2018
[44] Toshio Tamogami, "Was Japan an Aggressor Nation?" (*Ronbun*, 2008) <http://ronbun.apa.co.jp/images/pdf/2008jyusyou_saiyuusyu_english.pdf> accessed 27 March 2018
[45] ibid 3s at xx

CONCLUSION

Pal's hostility to the trial can be explained by his anti-Western colonial sentiments, his pacifism and his objection to the use of *ex post facto* legislation. Pal believed that by judging both the Japanese and Allies, the tribunal could have critically evaluated war itself and set a more profound legal precedent. Instead, he felt, the tribunal only served to reinforce the Old Order of the imperial status quo. Some academics have alleged he was supportive of Japan's war effort, though this is debatable and based on hearsay, while neo-nationalists promoting historical negationism have misconstrued his arguments to justify their denial of atrocities. Clearly, Pal's arguments were conflicting, exemplified by stating those in authority had an obligation to prevent atrocities, then maintaining the crimes the defendants were accused of having committed were mere acts of state. Several of the Justices, namely Bernard and Röling shared similar concerns about the judicial process of the trial, though despite the differences between the Justices, only Pal argued all charges should be dropped. Pal's judgement is particularly pertinent to today's shift to transnational justice, where international criminal tribunals are no longer a rarity.