The Tokyo Trial and the Japanese Scholarly Debate on 'Crimes against Peace'

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I. Introduction

This year marks the 70th anniversary of the end of the Second World War. Shortly after the conclusion of the war, two international criminal tribunals were convened in Nuremberg and Tokyo. These two trials, the Nuremberg trial and the Tokyo trial, are often regarded as twin institutions in being the first international tribunals which have prosecuted and punished political and military leaders for crimes under international

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law. However, the Japanese counterpart to the International Military Tribunal (henceforth IMT) at Nuremberg, the International Military Tribunal for the Far East (henceforth IMTFE), as it was formally named, did not receive much attention in the international scholarly debate in the following decades and was often degraded to a mere footnote to the Nuremberg proceedings. Interestingly, the Tokyo trial and its main legal issue – the notion of crimes against peace – remained relatively unstudied even among Japanese legal scholars for a long time.

Through the course of this short study, I will only briefly touch upon some features of the trial, its proceedings and the judgment itself (*sub* II.).[1] I will concentrate on the center-piece of the scholarly debate, the crimes against peace (*sub* III.), and the reaction to and perception of this legal concept in Japan during and after the Trial, until today (*sub* IV.). A special focus shall be put on the views of Japanese *legal* scholars, as their discussions are more or less unknown outside Japan.[2]

I will try to demonstrate that even though this topic has been (and still is) largely ignored or discussed in a very emotional manner in Japan, some legal concepts which are now generally recognized in international criminal law were already anticipated by some Japanese scholars more than 60 years ago.

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1) For a comprehensive legal analysis see Philipp Osten, *Der Tokioter Kriegsverbrecherprozeß und die japanische Rechtswissenschaft*, Berlin: 2003, *passim*; Neil Boister/Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford: 2008, *passim*.

2) For an overview of the scholarly debate among German jurists in the wake of the Nuremberg trial see Thomas Weigend, '"In general a principle of justice": The Debate on the "Crime against Peace" in the Wake of the Nuremberg Judgment', 10 *Journal of International Criminal Justice* (2012), pp. 41 *et seq*.

II. Overview of the Tokyo Trial

The Allied powers established a special international tribunal in the capital of Japan in order to put on trial the wartime leaders of Japan. The principal charge against them was that they had participated in the planning and execution of aggressive war in the Asia-Pacific area. Based on an order by the Supreme Commander of the Allied Powers in Japan, General *Douglas MacArthur*, the Charter of the IMTFE was drafted by the International Prosecution Section; it was modeled on the Nuremberg charter, but with some adjustments, as we shall see. The charter was publicized as an attachment to a "Special Proclamation" of the Supreme Commander on 19 January 1946 and constituted the formal legal basis for the establishment of the IMTFE.[3] It included the three categories of crimes applied in Nuremberg, i.e. besides crimes against peace, conventional war crimes and crimes against humanity. The tribunal was composed of 11 judges, appointed by the signatories of the Instrument of Surrender (with the addition of India and the Philippines), with each country also appointing a member of the prosecution section.

The court proceedings commenced on 3 May 1946, when the indictment was read in open court; prior to this, the President of the tribunal (Sir *William F. Webb* from Australia) had opened the trial with the words "...There has been no more important criminal trial in all history".[4] The proceedings of the Tokyo trial against 28 defendants indicted as "Class A" (or major) war criminals turned out to be far more

3) The Special Proclamation and the Charter of the IMTFE are reproduced in Neil Boister/Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford: 2008, pp. 5-6, 7-11.

4) The Proceedings of the Tribunal in Open Session, in: R. John Pritchard/Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-two Volumes*, New York: 1981, Vol. 1, p. 21.

time-consuming than those of its predecessor at Nuremberg. This was – along with the unfamiliarity of most Japanese defense lawyers with Anglo-American adversarial proceedings – largely due to language-related problems, in particular the immense difficulties encountered in providing translation and interpretation between the two official courtroom languages, English and Japanese.[5] Furthermore, the number of sessions and witnesses were double those held in Nuremberg, resulting in a duration of the proceedings more than twice (nearly three times) as long as the Nuremberg precedent. Having lasted for two years, the court hearings ended in April 1948; writing the judgment took the judges another half a year. The trial ended on 12 November with the rendering of the verdicts and the pronouncement of the sentences. All defendants were found guilty; seven were sentenced to death, 16 to life imprisonment. The judgment was not unanimous. Five judges wrote separate opinions, including two dissenting opinions, which, however, were not read out in court.[6] The death sentences were executed shortly after the end of the trial, on 23 December 1948. The defendants sentenced to imprisonment were all set free soon after the end of the American occupation in 1952, with the last prisoner being pardoned in 1956.

Through the public trial proceedings, held in open session, the Japanese people were able to gain access to substantial information about the devastating war for the first time. Consequently, by trying to determine the responsibility of the Japanese leaders for initiating and

5) In contrast to the simultaneous interpretation (in four languages) provided at Nuremberg, the trial at Tokyo was for the most part rendered in consecutive interpretation (in two languages), which further protracted the proceedings. For a recent analysis on the language problems at the Tokyo trial see Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial: A Sociopolitical Analysis*, Ottawa: 2010, *passim*.

6) The majority judgment and all separate opinions are reproduced in Boister/Cryer (eds.), *Documents on the Tokyo International Military Tribunal*, *supra* note 3, *passim*.

executing such a war, the Tokyo Trial also marked the starting point of Japan's confrontation with its past, a process that – to some extent – continues to this day. Therefore, in this respect, the Tribunal also has an important historical (and sociopolitical) significance, which, together with the general reaction of the wider public is, however, too complex to be sufficiently discussed in this study and can only be touched upon rudimentarily.

III. Crimes against Peace on Trial: Counts and Judgment at Tokyo

Crimes against peace were the central charge of the Tokyo trial and constituted the heart-piece not only of the court proceedings, but also of the ensuing scholarly debate. Unlike the Nuremberg charter (*cf.* Article 6 of the charter of the IMT), Article 5 of the charter of the IMTFE limited the scope of war criminals to be tried at Tokyo to those who "are charged with offenses that include Crimes against Peace". In other words: no defendant was prosecuted without a charge of committing crimes against peace. As a result, nearly all (24 of 25 remaining) defendants were found guilty of charges pertaining to crimes against peace.

While the Nuremberg IMT had only four counts for indictment, there were 55 counts in Tokyo, which were separated into three groups. In the first and most important group, the prosecution developed 36 counts pertaining to crimes against peace. The remainder of counts was indicted as "Murder" (group 2) – which was not provided for in the statute and eventually was dismissed by the tribunal – and as "Conventional War Crimes and Crimes against Humanity" (group 3). Interestingly, crimes against humanity were not dealt with separately but combined with conventional war crimes. Ultimately, no defendant was found guilty on singular charges of crimes against humanity. In comparison to this minimal focus on crimes against humanity, the focus on crimes against peace was far higher in the Tokyo trial than at Nuremberg. Or to anticipate a conclusion: as a consequence of this heavy focus on crimes against peace, the trial was examining "less *the way* Japan had conducted

the war but more *the reasons* why" Japan had conducted it.[7] From a strictly legal point of view, this made the trial more vulnerable. With the notion of aggressive war as its nucleus, crimes against peace was a clearly more problematic and much more disputed concept than conventional war crimes (and even crimes against humanity),[8] because it dealt directly with the nature and cause of war. This turned out to be considered one of the weaknesses of the trial; this point constituted the center of the debate at the trial and in the Japanese public and it is still raised by critics in Japan today. The central role of crimes against peace – in the eyes of some scholars – is the main reason why the Tokyo trial was and is more controversial than its Nuremberg precedent.

Crimes against peace were defined in Article 5 (a) of the charter of the IMTFE as follows:

> "Crimes against Peace: Namely, 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". [9]

This definition had been constructed on the Nuremberg model,[10] with one

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7) *Cf.* Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, London: 2008, p. 65.

8) The charges pertaining to war crimes did not raise much legal controversy at the Tokyo trial since they could be based on customary international law. By contrast, crimes against humanity was a novel concept, but the argument could be made that this category of crimes was but a re-iteration of general rules common to all civilized nations.

9) Italicized by the author.

10) For a recent analysis of the historical genesis of the concept of crimes against peace up to (and beyond) the Nuremberg trial see Kirsten Sellers, *'Crimes against Peace' and International Law*, Cambridge: 2013, *passim*.

remarkable difference: the words "*declared or undeclared*" were added to the term "war of aggression" in order to underline the understanding that the manner in which a war was commenced (or qualified by one of the belligerent parties, respectively) was immaterial to determining its legal character (i.e., as an international armed conflict).[11] It is interesting to note that a strikingly similar wording has also been adopted in the *Kampala* definition of the crime of aggression to amend the Rome Statute of the International Criminal Court ("regardless of a declaration of war").[12] Furthermore, the term "international *law*" ("a war in violation of international law, treaties, agreements or assurances...") was inserted in the definition, supposedly in order to highlight the understanding that the criminality of aggressive war had been established under international law itself.[13]

Of the 36 counts related to crimes against peace, five were conspiracy counts and the remaining 31 were substantive counts. Most of these counts were not examined in court and/or dismissed from the judgment, as the judges considered them repetitious and redundant. In particular, the judges decided to not consider the counts that fell under the category of "planning" and "preparation" on grounds that these counts were already subsumed under the conspiracy counts. Also, all counts that fell under the category of "initiation" were regarded as necessarily being included in the "waging" of a war. Thus, out of the 36 relevant counts, judgment was finally made on only eight counts. The first count was a conspiracy count;

11） Thus, the compliance (or non-compliance) with formal requirements for the declaration of war was irrelevant for the purpose of determining the aggressive (and therefore criminal) nature of a war. See Osten, *Tokioter Kriegsverbrecherprozeß*, *supra* note 1, p. 88.

12） Article 8 *bis*, paragraph 2, of the amended Rome Statute of the International Criminal Court (henceforth ICC); RC/Res.6, Annex I, of 11 June 2010.

13） *Cf.* Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Cambridge (Mass.): 2008, p. 81.

it epitomized all charges related to crimes against peace. It charged, in summation, that there had existed a grand plan or conspiracy to secure domination over the Asia-Pacific region by waging a war of aggression from 1928 to 1945, and that all accused had taken part in this plan or conspiracy in some form. This alleged conspiracy against world peace constituted the keystone of the indictment and was the most important single count in the Tokyo trial. The court (in its majority judgment) established that such a (single) grand conspiracy over 18 years did indeed exist. It also upheld seven substantive counts of crimes against peace, namely the waging of wars of aggression against China, the United States and five other nations. While holding that such aggression was criminal, the court, however, did not attempt to provide an express definition of "aggression". This, as we shall see, was conceived by critics of the trial as a decisive legal weakness. It leads us to the next part of this study.

IV. The Scholarly Debate on Crimes against Peace

The next (and main) issue to be examined is: How did Japanese scholars react to the trial?[14] In particular: How was the concept of crimes against peace discussed?

1. The Post-War Debate during and after the Trial

Already during the outset of the trial, the defense challenged all counts of aggressive war by questioning, in principle, the legality of the concept of crimes against peace and, thus, the jurisdiction of the tribunal itself. The

14) For a comprehensive analysis of the Japanese scholarly (and general) debate on the Tokyo trial see Osten, *Tokioter Kriegsverbrecherprozeß*, *supra* note 1, pp. 115 *et seq.*; Firippu Osuten [Philipp Osten], 'Tokyo Saiban to Sengo Nihon Keiho-gaku' (The Tokyo Trial and the Debate among Criminal Law Scholars in Post-War Japan), in: Yoshihisa Hagiwara (ed.), *Posuto Wo Shitizunshippu no Kosoryoku* (Designing Post-War Citizenship) (Tokyo: 2005), pp. 85-103.

defense attorneys claimed that the criminality of such notion was not recognized under international law; it would be tantamount to *ex post facto* legislation (retroactive application of new law) and therefore would violate the *nulla poena*-principle. Furthermore, they argued that an individual could not be made criminally liable for a war which was waged by the state (act-of-state doctrine).[15)]

The court rejected these motions, however, but did not present any in-depth reasoning of its own regarding these legal questions. Instead, the majority judgment, besides stating that it was bound and empowered by the charter, simply adhered to the Nuremberg judgment. In the words of the majority judgment:

> "In our opinion the law of the Charter is decisive and binding on the Tribunal. This is a special Tribunal set up by the Supreme Commander under authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. (...) In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter."[16)]

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15) The leading Japanese defense lawyer *Ichiro Kiyose*, who eventually became an influential politician in post-war Japan, challenged the jurisdiction of the court already on the fourth day of the trial proceedings (13 May 1946). His famous motion is reproduced in his memoirs *Hiroku Tokyo Saiban* (Private Notes on the Tokyo Trial), Tokyo: 1967 (reprinted 1986), pp. 53 *et seq*.

16) Judgment of the International Military Tribunal for the Far East, in: R. John Pritchard/Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-two Volumes*, New York: 1981, Vol. 20 (The Judgment, Part A, Chapter II, The Law, (a) Jurisdiction of the Tribunal), pp. 48435-48436.

Furthermore, the majority judgment explicitly stated that regarding the legal validity and criminality of crimes against peace it referred to and relied entirely on the legal reasoning presented in the Nuremberg judgment, rather than to offer any new interpretations and thereby "open the door to controversy by way of conflicting interpretations" in such fundamentally important questions of law:

> "In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions."[17)]

As indicated previously, some judges felt uncomfortable with this approach taken by the majority. The most famous dissenting opinion was written by the Indian Judge *Radhabinod Pal*, who took a defiant position towards almost all findings made by the majority judgment. He thought that aggressive war had not become punishable under international law and that conspiracy did not constitute a recognized category of imputation (or mode of participation) under international law; therefore, in his view all charges pertaining to crimes against peace fell beyond the scope of jurisdiction of the tribunal.[18)]

The above-mentioned arguments of the defense lawyers and Judge *Pal* formed the argumentative basis for most critics of the Tokyo trial in the years after the tribunal. One of the most famous among them was the law professor *Kenzo Takayanagi* (1887-1967), who was also a member of the defense counsel at the trial. He had studied at Harvard, in Chicago and London and held a chair for constitutional law and international law at the

17) *Ibid*., Judgment, p. 48439.

18) Pal's dissenting opinion is reproduced in Boister/Cryer (eds.), *Documents on the Tokyo International Military Tribunal*, *supra* note 3, pp. 809-1426.

(formerly Imperial) University of Tokyo since 1921, being one of the foremost experts on Anglo-American law in Japan. He pointed out the legal weaknesses of the tribunal and regarded the trial as a form of victors' justice which could only have a negative precedential impact. *Takayanagi* compared the prosecution's view that punishment of aggressive war "follows the needs of civilization and is a clear expression of the public conscience"[19] with the abolishment of the principle of legality in Nazi Germany (through the notion of "gesundes Volksempfinden"/sound popular conscience) as follows:

> "As a matter of fact, such a vague principle when it actually operates in the administration of criminal justice is just as cruel and as oppressive as the penal doctrine which characterized the Third Reich".[20]

On the other hand, it is interesting to note that the majority of contemporary academics and commentators in Japan expressed overall positive views of the Tokyo Trial, in spite of their awareness of the many legal short-comings of the tribunal. The leading criminal law scholar of the time, *Shigemitsu Dando* (1913-2012),[21] held that the notion of crimes against peace (as well as crimes against humanity) could be regarded as rooting in the general principles of international law, which themselves could be perceived as a manifestation of natural law. Such manifest natural law could therefore be applicable as "positive law in the process of

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19) The Proceedings of the Tribunal in Open Session, in: R. John Pritchard/Sonia M. Zaide (eds.), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-two Volumes*, New York: 1981, Vol. 2 (The Case for the Prosecution), p. 435.

20) Kenzo Takayanagi, *The Tokio Trials and International Law: Answer to the Prosecution's Arguments on International Law Delivered at the International Military Tribunal for the Far East on 3 & 4 March 1948*, Tokyo: 1948, pp. 11-12.

making".[22] Thus, these categories of crime were to some degree susceptible to doubts in the light of the principle of legality. However, in his view the strict application of this principle in international law in the same traditional understanding as in domestic criminal law was not feasible considering the present (transitional) state of development of international law, even if this seemed desirable in principle. It would contradict the purpose of the principle of legality if it would be interpreted and used in order to protect those who abused the state's power:

> "In the sphere of international law, in particular the law concerning war crimes, this law by itself is construed in order to restrict the unjust exercise of state power; in its relationship vis-à-vis the state power, one might even argue that this law [i.e., international law re. war crimes] is based on the same theoretical grounds as the principle of legality in domestic law."[23]

Therefore, in light of the ultimate purpose of establishing and fostering world peace, some modifications of the principle of legality were necessary in order to enable the judicial recognition of individual criminal responsibility under international law:

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21) *Dando*, who was an associate professor of criminal law at the (formerly Imperial) University of Tokyo at the end of the war, was appointed full professor in 1947 and eventually became the most influential criminal law scholar in post-war Japan. Being strongly influenced by German legal doctrine, he also had a keen interest in American criminal procedure. He briefly taught at Keio University in 1974, before being appointed judge at the Japanese Supreme Court (until 1983). For further details see his autobiography *Waga Kokoro no Tabiji* (The Journeys of My Heart), Tokyo: 1986, pp. 393 *et seq.*

22) Shigemitsu Dando, *Senso Hanzai no rironteki Kaibo* (A Dogmatic Analysis of War Crimes), first published in: *Choryu* Vol. 1 Nr. 7 (1946); reprinted in: *Keiho no kindaiteki Tenkai* (The Modern Development of Criminal Law), Tokyo: 1948; amended and extended edition Tokyo: 1952 (quoted here), p. 172.

23) *Ibid.*, p. 167.

> "To simply apply sanctions against a state (as such) which has initiated an illegal war would only have a very limited effect. It is absolutely imperative to also punish those individuals who were the driving force behind the initiation of the war."[24)]

Dando eventually – as the first and only legal scholar in Japan (up to the present day) – established three purposes of punishment in international criminal law: (1) a general deterrent effect of preventing future wars of aggression, (2) a special deterrent (and retributive) effect vis-à-vis the individual perpetrator (who's apprehension prevents him from initiating another war and thus secures society), and (3) the ultimate purpose of realizing justice, thereby shaping the public conscience of the international community (and strengthening faith in the international rule of law) and thus indirectly contribute to world peace.[25)]

Similar views were also expressed by the very influential criminal law scholar *Seiichiro Ono* (1891-1986). He was purged from his chair of criminal law at the (formerly Imperial) University of Tokyo in 1946 (for his ultra-nationalist publications during the war),[26)] where he had been the

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24) *Ibid*., pp. 173-174.

25) *Ibid*., pp. 174-175. Besides these crucial questions of substantive law, *Dando* also took keen note of the criminal procedure characteristics of the Tokyo trial, which was strongly influenced by the (for Japanese jurists at that time unfamiliar) adversarial Anglo-american procedural system. He was particularly impressed by the role of the defense lawyers and the passionate defense displayed by the American lawyers at the Tokyo Trial who were assigned to the Japanese defendants by the United States after the trial started (*ibid*., p. 177). The adversarial system, as demonstrated for the first time in Japan in the Tokyo trial, later also influenced the post-war reform of the Japanese Criminal Procedure Act (*Keiji-sosho-ho*) – in which *Dando* played a leading role. *Dando* repeatedly stressed the "educational" function of the Tokyo trial in this regard, even in his last years; *cf*. Shigemitsu Dando, *Hankotsu no Kotsu* (The Essence of the Spirit of Defiance), Tokyo: 2007, *passim*.

academic mentor of *Dando*. He became an attorney and later resumed teaching at a small private university. He also temporarily acted as an assistant defense counsel at the Tokyo trial (for the defendant *Oka*). *Ono* pointed out that the principle of legality was a fundamental principle of justice, but not the only principle of justice and by far not an absolute principle. He also – with view to the preceding Nuremberg Judgment – held that the legal grounds for individual criminal liability of leaders of an aggressive state under international law could be compared to the (generally accepted) legal concept of making representatives of juristic persons criminally responsible for certain offenses committed by the legal entity as such:

> "War is generally conceived as an act conducted by states; it is, however, obvious that such a war is planned, prepared, initiated and carried out by individuals, and it is not theoretically impossible to attribute criminal responsibility to such acts of individuals. This resembles the concept of criminal responsibility of individuals for certain actions of a juristic person." 27)

The leading authority on international law in Japan at that time, *Kisaburo Yokota* (1896-1993), was also favorably disposed toward the Tokyo trial. *Yokota* held a chair in international law at the (formerly Imperial) University of Tokyo, became the first Japanese member of the International Law Commission of the UN (in 1956) and was appointed president of the Japanese Supreme Court in 1960. He was also entrusted with the coordination and supervision of the translation of the (majority)

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26) On the life and work of *Ono* see Osten, *Tokioter Kriegsverbrecherprozeß*, *supra* note 1, pp. 131 *et seq.*; Osuten [Osten], Tokyo Saiban, *supra* note 14, pp. 89-90, 92-94.

27) Seiichiro Ono, 'Nyurunberugu-Hanketsu no Horitsu Kenkai' (The Legal Conclusions of the Nuremberg Judgment), in: *Horitsu Shinpo* Nr. 734 (1946), p. 40.

judgment of the Tokyo trial from English to Japanese. In his assessment of the trial, *Yokota*, in essence, emphasized the "revolutionary" significance of the trial for the future development of international law in what he regarded as a transitional period in which the traditional notion of "war crimes" (i.e., violations of *ius in bello* etc.) necessarily had to be re-adjusted in order to incorporate the planning and execution of a war of aggression (i.e., *ius contra bellum*).[28] With regards to the criminality of waging an aggressive war, he rejects the criticism concerning *ex post facto* law (i.e., the alleged retroactive punishment of crimes against peace) and argues as follows:

> "The question is whether the act under consideration possesses a substantial criminal character, and whether there are any legitimate reasons for the act to be punished".[29]

If there are sufficient substantial reasons, such substance should not be ignored on grounds of legal technicalities such as a purely formalistic understanding of the principle of legality (which does not necessarily have the same scope of applicability in international law). Thus, as long as the *crime* itself is manifested sufficiently (i.e. in international treaties renouncing war, in particular the *Kellogg-Briand* Pact of 1928), the *punishment* in its character as a concrete sanction for a specific illegal act does not necessarily have to be stipulated *a priori*. [30]

Yokota endorses the complete adherence of the majority judgment of the Tokyo trial to the legal reasoning of the Nuremberg judgment, as this consistency reinforces the precedential value of both trials for the development of international law.[31] Several years after the tribunal, he again held that "the character of aggressive war as an international crime

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28） Kisaburo Yokota, *Senso Hanzai-ron* (A Treatise on War Crimes), Tokyo: 1947, pp. 3 *et seq*., 130 *et seq*.

29） *Ibid*., p. 5 (preface).

30） *Ibid*., pp. 131, 136 *et seq*. (italicized by the author).

has been established beyond doubt (...)."[32]

Overall, the views and arguments put forward by these first scholars of the Tokyo trial can be summed up as follows. Against the background of democratizing reforms under the American occupation, the general view of the trial was positive and optimistic; the trial was regarded as an "important step forward" in international law. The legal concept of crimes against peace was deemed as justified or even necessary and also legitimate on legal grounds. The principle of legality was re-conceptualized in order to advance the higher cause of justice and dismiss a narrow, formal or technical understanding of legality.

2. The Post-Occupation Time (1950s to 1970s)

Shortly after the end of the American occupation (and censorship),[33] some former defense attorneys published critical assessments of the trial, maintaining that it was tantamount to a pseudo-legal farce.[34] In the decades following the end of the American occupation, the Tokyo trial, however, gradually faded away as subject of *legal* debate among law scholars in Japan.

Among the Japanese people, general apathy towards the trial increased. In the light of the Vietnam War and the reported atrocities there, disillusionment spread among the academics. The developments of realpolitik in the Cold War era provided a fertile field for critics of the trial, who saw themselves confirmed in their view that the tribunal was

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31) Kisaburo Yokota, *Senso Hanzai-ron* (A Treatise on War Crimes), 2nd edition, Tokyo: 1949, pp. 305-306.

32) Kisaburo Yokota, 'War as an International Crime', in: *Grundprobleme des Internationalen Rechts. Festschrift für Jean Spiropoulos*, Bonn: 1957, p. 460.

33) The American military occupation ended with the San Francisco Peace Treaty, which came into effect in 1952 and restored Japan's sovereignty.

34) See for example the account published by the former assistant defense counsel (of the defendant *Shimada*) and legal historian Masajiro Takigawa, *Tokyo Saiban wo Sabaku* (Judging the Tokyo Trial), Tokyo: 1953, *passim*.

essentially a one-sided victors' justice imposed on the vanquished nation. Accompanying this kind of criticism, a new self-perception of the Japanese as victims of the war took hold in the public debates to some degree (i.e., through the memories of the Allied air raids on cities such as Tokyo and the dropping of the atomic bomb on Hiroshima and Nagasaki).

The Tokyo trial and its legal problems completely disappeared from the memory and focus of research of criminal law scholars (even those who had initially conveyed positive assessments of the trial, such as *Dando*), whereas international law scholars became reluctant to conduct research on such a politically mined field of law.

3. From the 1980s to Today

After decades of scholarly neglect, a revival of interest among academics towards the Tokyo trial took place in the early 1980s. Until then, the tribunal had, in sum, either been ignored in general or debated emotionally (and ideologically) among a rather limited circle of academics concentrating on the veracity of the tribunal's historical record, i.e. whether Japan had conducted aggressive wars and committed war crimes or not. During the 1980s, however, attempts to overcome this kind of dualisms in the (more often than not irreconcilable) debate and to re-investigate the Tokyo trial from a broader perspective started to emerge. Unlike the majority of the early trial analysts, who – as we have seen – had evaluated the trial positively, and the trial critics, who rejected the tribunal as a pseudo-legal farce, this new post-war generation of scholars and today's researchers focus on the trial's "universal" significance or the general lessons that could be learned from it.

In this renaissance of studies on the Tokyo trial, at first historians (such as *Kentaro Awaya*) played a central part, drawing on a large number of newly available trial-related records. They introduced new aspects in the debate on the Tokyo trial by shedding light on historical facts which had not been thoroughly examined in the trial or which had been omitted for political reasons, such as the biological war-fare unit 731 or the so-called "comfort women" who were recruited as sex laborers by the

Japanese military in the Asian countries occupied by Japan, along with the problem of the Emperor's culpability. In essence, they criticized the tribunal for its historical selectivity and its failure to establish accountability for some of the gravest Japanese war crimes; thus, the Tokyo trial is perceived as being insufficient or even an obstruction to coming to terms with the past.[35)]

In contrast, representing the opposite position in this revival of scholarly debate are those researchers, who – to some degree also drawing on newly available or so far overlooked records related to the Tokyo trial – are partially re-voicing the early criticism of the trial based on new facts (or re-interpretations). Historians and political scientists such as *Yoshinobu Higurashi* attempt to re-construct the political dimension of the trial (in the light of international politics) by analyzing the political processes which led to the installation of the trial and influenced the way it was conducted and concluded.[36)] Also in this realm are the publications of *Kei Ushimura*, who re-assesses the trial in the light of comparative cultural (and literature) studies and focusses on the (supposedly negative or problematic) intellectual impact and legacy of the Japanese war crimes trials.[37)]

The most recent generation of scholars – interestingly, mainly female researchers educated abroad such as the historian *Yuma Totani* and the

35) See for instance Kentaro Awaya (with NHK reporters), *Tokyo Saiban e no Michi* (The Path to the Tokyo Trial) [Publishment accompanying a documentary series of the Japanese public broadcasting corporation NHK under the same title], Tokyo: 1994, p. 212; Kentaro Awaya, 'The Tokyo Trials and the BC Class Trials', in: Klaus Marxen/Koichi Miyazawa/Gerhard Werle (eds.), *Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland*, Berlin: 2001, pp. 39 *et seq.*

36) Yoshinobu Higurashi, *Tokyo Saiban no Kokusai-Kankei: Kokusai Seiji ni okeru Kenryoku to Kihan* (The International Relations Surrounding the Tokyo Trial: Power and Norms in International Politics), Tokyo: 2002, *passim*.

37) *Cf.* Kei Ushimura, *'Bunmei no Sabaki' wo Koete* (Beyond the 'Judgment of Civilization'), Tokyo: 2001, *passim*.

political scientist *Madoka Futamura* – , however, again attempts to re-assess the legal significance of the Tokyo trial. This re-assessment takes place in the light of the quantum jump-like progress in the field of international criminal justice that occurred in the years following the end of the Cold War, leading up to the establishment of the two *ad hoc*-tribunals of the United Nations for the former Yugoslavia and Rwanda and ultimately to the International Criminal Court (ICC). These researchers (again, mostly historians, not legal scholars), in sum, attempt a reappraisal in particular of the findings of the Tokyo tribunal regarding the legal doctrine of individual responsibility for crimes against peace. In their view, the prohibition of aggressive war in modern international law and the – at that time still only nominal – inclusion of the crime of aggression in the jurisdiction of the ICC[38] in order to punish individual perpetrators reaffirms and underlines the long-term legal significance of the trial on the way to furthering international rule of law.[39]

Such kind of reappraisal is correct in its assessment that today's order of international criminal law to some extent resembles the initial aims and ambitions of the Tokyo trial at its outset and confirms some legal findings of the judgment. However, such an assessment reveals the tendency of resorting to a largely result-oriented method of argumentation, as it is not always able to provide sufficient proof of a causal impact of the Tokyo judgment on the establishment and further development of specific legal institutes of modern international criminal law. On the other hand, it is of course appropriate to say that the Tokyo trial, although for the most part remaining in the shadows of its Nuremberg counterpart, has generally

38） *Cf.* former Paragraph 2 of Article 5 of the Rome Statute of the International Criminal Court, now deleted in accordance with RC/Res.6, Annex I, of 11 June 2010. The crime of aggression is now defined in Article 8 *bis* of the Rome Statute.

39） See Totani, *Tokyo War Crimes Trial*, *supra* note 13, p. 4 *et* pp. 259 *et seq.* See also – for a slightly less affirmative view – Futamura, *War Crimes Tribunals*, *supra* note 7, pp. 13 *et seq.*, 147 *et seq*,

contributed to codifying new legal principles and constitutes the starting point of the international criminal justice system.

In this context it also seems noteworthy that the recent reappraisal of the trial, although primarily conducted by a young generation of Japanese scholars,[40] was – due to their affiliation with American and British universities – initially publicized entirely in English and thus took place completely outside of Japan (with so far only very limited domestic repercussions). In a strict sense, it may even be inappropriate to describe this debate as a "Japanese" debate.

V. Concluding Remarks

In conclusion, perhaps the most notable characteristic of Japan's (scholarly and general) debate about the Tokyo trial and crimes against peace is the contradictory (and binary) way in which the significance (or futility) of the trial has been discussed in the past seven decades. Looking back upon this debate, the most surprising finding is that some of the most subtle and visionary assessments were publicized by legal scholars during or shortly after the trial. The legal reasoning and perspectives adopted by this first generation of scholars anticipated the long-term significance of the novel legal concepts applied by the tribunal. They proved to be far ahead of their time. With regards to crimes against peace, no convictions for this crime (or the crime of aggression) have so far taken place after Nuremberg and Tokyo. Thus, these scholars may have been "over-optimistic" about the future progress of prosecuting leaders of aggressive war, but they accurately perceived the contribution of the Tokyo trial to the general development of criminalizing aggressive war under international law and to the establishment of an international criminal justice system to adjudicate such crimes.

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40) Outside of Japan, some detailed legal deductions can also be found in the recent analysis of the tribunal by Boister/Cryer, *The Tokyo International Military Tribunal*, *supra* note 1, *passim*.

It should, however, not be overlooked that while such assessments of the first generation of scholars have "generally stood up to the test of time, they have found virtually no place in public remembrance of the Tokyo trial"[41] and are almost forgotten today, even among legal academics.[42] Furthermore, a too one-sided focus on the most problematic of the three crime categories adjudicated at the Tokyo trial, the crimes against peace, has blurred the view on other legal findings of the judgment, in particular regarding conventional war crimes and modes of individual imputation (such as "command responsibility"), which deserve closer scholarly attention.[43] Thus, the scholarly debate in the aftermath of the trial did not give rise to the emergence of an elaborate international criminal law scholarship in Japan. Rather to the contrary, criticism pertaining to victors' justice has influenced the Japanese post-war debates more decisively and has prevented the legal legacy of the trial from taking firm roots in Japan. It seems to me not inappropriate to say that this constitutes a major quandary of the Tokyo trial and its perception in Japan up to this day.

41） Totani, *Tokyo War Crimes Trial*, *supra* note 13, p. 261.

42） Japan's present-day legal academics display a certain reluctance to conduct research on the Tokyo trial; today's legal scholars prefer to focus on the current flow of international criminal law and for the most part only take up contemporary legal issues related to the ICC or the *ad hoc*-tribunals.

43） *Cf.* Osten, *Tokioter Kriegsverbrecherprozeß*, *supra* note 1, pp. 82-83; Firippu Osuten [Philipp Osten], 'Tokyo Saiban ni okeru Hanzai-Kosei-Yoken no Saiho – Shoki-Kokusai-Keiho-Shi no Ichi-Danmen no Sobyo' (Elements of Crime at the Tokyo Trial: A Study in the Early History of International Criminal Law), in: *Hogaku Kenkyu* (Keio University Law Review) Vol. 82 No. 1 (2009), pp. 315-338.