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Justice on Trial:The International Military Tribunal for the Far East Reevaluated, 1946-1956

BABOVIC, ALEKSANDRA

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博士学位論文

論文題目：Justice on Trial: The International Military Tribunal for the Far East Reevaluated, 1946-1956

（試される正義：極東国際軍事裁判の再評価 1946-1956 年）

神戸大学大学院法学研究科
専攻：政治学専攻
指導教授：簑原俊洋
学籍番号：135J036J
氏名：BABOVIC ALEKSANDRA
提出年月日：２０１８年１月１０日

ABSTRACT

The present research will argue that the IMTFE, considered as a strategic legalism tool, can be explained only when placed within broader context of the Allied powers' postwar policies both at international and regional level. Japan ascendance to the role of Western ally and its strategic value did not result in the prompt release of Class A war criminals, quite the contrary, it reached a deadlock in which legalism no longer played a strategic role. This issue exposed the inconsistencies in US expectations regarding Japan's rearmament and started to inhibit progress on the important security agenda in US-Japan diplomatic relations. The dynamics of US-Japan negotiations regarding the Class A war criminals within the broader war criminals agenda, as it will be shown, placed in the hands of Japanese government a powerful tool to instigate its own visions of security vis-à-vis the US. Consequentially, the IMTFE and Class A war criminals which once represented the symbol of Japanese defeat started to become an asset for Japan in its efforts to achieve postwar reintegration. Hence, the justice meted out at IMTFE changed its quality in that from a strategic tool placed in the hands of the victorious allies it became a strategic tool placed in the hands of Japan, a defeated party in war.

KEY WORDS: the IMTFE, justice, international order, war criminals, legalism, clemency and parole

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INTRODUCTION

On November 22, 2017, the International Criminal Tribunal for the Former Yugoslavia (ICTY) convicted General Ratko Mladic, the former Bosnian Serb commander to life imprisonment on counts of genocide, crimes against humanity, and war crimes. It was the last missing piece that would allow Tribunal to wind down its activities and "close [a] dark chapter in Europe" twenty-four years after the war. Yet, beyond the moral, ethical, and social conundrums still animating politicians and populace in the Balkans, arises a more important question of, 'what manner of things has been perpetuated?'. In other words, did the policies behind international criminal tribunals and their ever-improving laws and jurisprudence, centered on the non-use of force and protection of humanity, contribute to the preservation of an international order based on peace and stability through consistent application of these very postulates? Can dark chapters of history be closed by a judicial verdict? Not only have heads of states, government officials, and the highest ranking military officers been tried for one or several international crimes, but international criminal justice as an entity in and of itself been many times on trial on counts of questionable legality, impartiality, fairness, consistency, and effectiveness, to name a few.

A similar problem surrounds the historic case of criminal justice that had been meted out to Japanese civilian and military leaders at the end of World War Two by the Allied powers through the International Military Tribunal for the Far East (hereafter IMTFE) widely known as the Tokyo Tribunal. Together with the International Military Tribunal at Nuremberg (IMT) it represents the first institutional manifestation of the idea that war can amount to not only an illegal, but also a criminal act allowing for individual responsibility of its main perpetrators. The immediate postwar premise that the war crimes tribunals would constitute an integral element of the peace-making process after 1945 had been tested in these two tribunals. It has been applied somewhat intermittently since the establishment of

the ad hoc tribunals by the United Nations Security Council to respond to civil wars in the former Yugoslavia and Rwanda, only to gain a stronger foothold with the establishment of the International Criminal Court (ICC) as a permanent institutional mechanism of international criminal justice. Still, "the supreme international crime"[1] tried exclusively at the above-mentioned international military tribunals—crime against peace or aggressive war—has remained poorly defined, therefore this ambiguity has enabled states to "opt out" from its use.

The IMTFE or the Tokyo Tribunal was established on May 3, 1946, and symbolically set up in rooms of the Imperial War Ministry to prosecute twenty-eight Japanese military and civilian leaders for waging aggressive war in Asia-Pacific region. From the perspective of the defendants, who held the prominent positions in the Imperial Japan, they performed official duties in serving their country's interests and the Emperor, but failed to win the war for which they were being prosecuted. In the eyes of the victors and victims, these men were criminals who ought to be severely punished for planning, waging, and instigating aggressive war, and the atrocities inflicted upon the civilians and prisoners of war. On September 2, 1945, Japan signed the Instrument of Surrender by which it accepted the unconditional surrender and military occupation by the Supreme Commander Douglas MacArthur for the Allied powers (US, Britain, Australia, Soviet Union, Netherlands, New Zealand, Canada, France, China, Philippines and India) each represented within the international prosecution section and panel of judges. Terms of the Potsdam Declaration of July 26, 1945 contained a provision on the stern justice to be meted out to all war criminals which posed the legal basis for the war crimes program in Japan. In a hurry to start criminal trials in Japan, as they had already been underway in Germany, the IMTFE Charter, modelled upon the IMT Charter concluded by the Big Four at London, was unilaterally proclaimed by the Supreme Commander on January 19, 1946. The other Allies got the

[1] Nuremberg Judgement, October 1, 1946, 25.

chance to adopt policy decisions and amend the Charter within the scope of the Far Eastern Commission (FEC) seated in Washington. The defendants were provided with two defense counsels each, one Japanese defense counsel of their own choice, and an American who was there to help the defense in providing knowledge and clarifications on the Anglo-Saxon legal practice with which the Japanese were not familiar. In 1945, these were groundbreaking changes for international law and an exercise of traditional statecraft which considered war to be a political act of state, not a criminal one. The initial occupation plans were designed to perform disarmament, demilitarization, and democratization which would allow Japan to reintegrate a newly created postwar international order, open and multilateral in nature.[2] The planners of these initial occupation policies envisaged that Nationalist China would emerge as the US ally in the region, not Japan.[3] These initial miscalculations on China becoming the US ally were to be rectified only from 1949 with the Communist China winning the civil war and the outbreak of Korean War which made the US presence in the region through its military basis in Japan indispensable. In the 1950s Japan became the US pivot against the Communist-bulwark which placed the matters of the Japanese rearmament, presence of US basis in its territory at the top of diplomatic agenda, especially following the strategy of military containment introduced by President Dwight D. Eisenhower. After signing the Peace Treaty in 1951, Japan actively pursued reintegration into international institutions such as the World Bank, IMF, GATT, and ultimately the UN, which would help rebuild its economy and enhance its international prestige.

Present-day international criminal justice has become mainly preoccupied with the application of humanitarian regimes—regulating state and non-state actors' behavior in times of both war and peace—and excelled at further development and refinement of crimes against humanity, war crimes, and genocide, thus addressing mass atrocity. Although the

[2] Iriye Akira, *Japan and the Wider World: From Mid-Nineteenth Century to the Present* (New York: Longman, 1997), 100.

[3] Ibid., 101.

present predominant legal, political, and societal discourse displays unquestionable support and impulse in applying human rights and humanitarian regimes whenever the political willingness and strategic interests are present, the era of World War Two was a time of total war with less concern toward the humanitarian aspects of war. The momentum of brutalization of entire societies and cruelty of its participants gained such a momentum that the laws of war, although in vigor at that time, were disregarded or were inept to respond to the complexity of events. Invariably, in words of Brian Orend, every war is a "nasty business which, ultimately, calls forth more vice than virtue,"[4] and this applies to the case in point— the Pacific War. Despite the normative distinction between aggressive and defensive wars, ethically, such differentiations do not stand – if the ultimate test of morality is killing, then every war is immoral.[5] At the outset, it is necessary to clarify that the present research does not question the veracity of Japanese atrocities, weight their morality, nor exculpates or justifies the behavior of wartime leaders in Imperial Japan. Rather, by adopting a posture of "moral minimalism," it remains focused on understanding the *mentalité*, political decisions, international dynamics of the postwar period in which the prosecution of crime of aggressive war or crimes against peace took place.

Contrary to the trial records of the International Military Tribunal at Nuremberg that were almost immediately published by its Secretariat in separate volumes from 1947 to 1949, the IMTFE records were lying in obscurity until the 1980s. The classic works about the Tokyo Tribunal lies between the extreme views that qualify its justice as "victors' justice" or "justice of civilization." The volume *Victors' Justice* by Richard Minear published in 1971 offers a fierce critique of the Tribunal's legal postulates that were bluntly violated by American engagement in the Vietnam War. Minear rejects the legality of norms and procedural rules that were created *ex post facto* by the victorious Allies in order to get rid of

[4] Brian Orend, *The Morality of War* (Peterborough: Broadview Press, 2006), 247.
[5] Larry May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008), 339.

Axis leaders and assign the ultimate responsibility for the Pacific war to the Japanese top brass. The selection of the members of the Tribunal was not merit based, but rather politically motivated to create a group of individuals who would be willing to carry out the postwar goals set by their respective governments and the Supreme Commander Douglas MacArthur — thus being prejudicial to the impartiality of justice and due process of law. He strongly argues that victors' justice was blind to the similar atrocities committed and brutality used by the Allied powers to achieve victory. The rationale behind the Tribunal required seventeen years of Japanese history to be rewritten in order to fit the dominant narrative of Japan's conspiracy to wage aggressive war, which resulted in history being profoundly flawed and simplified. In the author's words, the historical complexities leading towards the Pacific War could not have been grasped by the legalistic framework.

On the opposite spectrum of Minear's reasoning stands the work of Japanese historian, Awaya Kentarō, whose book *Tōkyō saiban e no michi* criticizes the Allied powers for their half-hearted effort in prosecuting Japanese war crimes as well as the Allies' crimes against the Japanese such as atomic bombing and firebombing which fell into oblivion. As he contends, the probative evidence for these crimes—bacteriological tests and vivisections, sex-slavery, opium and drug war—was available throughout the Trial while the former Japanese colonies were omitted from the bench. From the 1980s, with declassification of archives in the US, Japan, New Zealand, Australia, a new potential was born for the research field to thrive and produce expanded, yet more balanced narrative about the Tokyo Tribunal. Departing from the extreme views, series of books by Japanese historian Higurashi Yoshinobu, based on archival materials from the Allied powers' countries and Japan, offer a new perspective on the Trial as a place of diplomacy, an institutional framework where the postwar international order was negotiated and created to reflect new balance of power. This approach allowed for a broader perspective, both thematically and temporally, while his analysis transcends the legal framework and embraces a broader perspective of the

Tribunal. As a part of the same effort the work of Yuma Totani, Japanese historian based in the US, stands out as an important contribution for its extensive new evidence that it brought to light which had transformative effect upon the conventional knowledge regarding specific themes of the Trial such as—the disharmonies of the work of the prosecutorial unit, non-evidence based criteria for the selection of the defendants, the existence of abundant evidence about Japanese atrocities in its former Empire at the time of the Trial, and legal incompetence of the members of the Court.

As the archives in the former Japanese colonies and certain Allied powers' countries were made available only from the 1990s, it is logical that the researchers' focus was exclusively placed upon the Tokyo Tribunal. As a consequence, other important trials of lower rank Japanese military officials for violations of laws surrounding armed conflicts or *jus in bello,* performed in national courts of the Allied powers for crimes committed against their prisoners of war (POWs) and populace in the former colonies, were rather marginalized. The proliferation of publications on these trials that extend beyond the 1950s offer a better understanding of the former Japanese Empire and acknowledge the existence of a more inclusive and contrasted view of the Allied powers' war criminal justice effort that does only revolve around the Tokyo Tribunal which had enjoyed the position of a war criminal trial star. The Class BC trials are the theme that the present research explores only obliquely. The 2017 multi-authored volume *Japanese War Criminals: The Politics of Justice After the Second World War* offers findings on the Japanese Class BC war criminals, tracing their fate from their prosecution to their release, which are complementary to the method and findings of the present work.

In the immediate post-war period, political and intellectual milieu in Japan, as well as its public opinion predominantly held onto *Tōkyo saiban shikan* or "the Tokyo Tribunal view of history," is considered to have a "masochistic" view when it comes to war responsibility. Another view that gained momentum from the 1970s was shaped by the dissenting opinion

of Indian Justice Radhabinod Pal whose argument was singled out and made to fit revisionist historical narratives. His dissenting opinion discusses the war of aggression as *ex post facto law*, stresses the defective procedure, partiality of justice at Tokyo thus implying that all defendants should have been acquitted. Pal's dissent has further been arbitrarily distorted to serve the rightist discourse in Japan, which has been on the rise since the 1990s. This view justifies Japan's Great Asia War and refutes the legal validity, and subsequent verdict by the Tokyo Tribunal. Prime Minister Shinzo Abe's visits to Yasukuni Shrine–where the Class A war criminals were enshrined in 1978– manipulates war apologies to further his agenda. Along with this, his involvement in the ultra-nationalist kindergarten scandal in 2017 represents the most recent aspects of the current climate of historical revisionism.[6] In that sense, the Tokyo Tribunal has been a timely and important topic for being a part of Japan's present political, security, and social discussions, including its diplomatic relations with Southeast Asian neighbors.

The present work contributes to the existing body of research by shedding light on the Tokyo Tribunal in several aspects. First, it observes the Tribunal as politico-legal event, thus addressing its nature through discussing the postulates on which international criminal justice rests as a precursor for proper understanding of the Tribunal. The concept of international criminal justice has been evaluated in strict terms, against justice administrated in domestic courts or ideally as entity free from interference of politics. However, international criminal justice not only touches at the core of the sacred domain of state sovereignty that is to punish its citizens, but cannot be born without political support of its sponsor states. They use their political values and formulate broader policies that are supposed to be channeled through the creation of international tribunals, their mandates,

[6] Christopher Hughes, *Japan's Foreign and Security Policy Under the 'Abe Doctrine'* (New York: Palgrave MacMillan, 2015), 72.

and norms thus pointing out the idea that justice is not an end in itself.[7] Whether states will prosecute atrocities committed by parties involved in war is not a result of consistent practice, but rather careful calculations of self and collective interest which introduces the idea of international law being "architecture of political compromise."[8] American political philosopher, Judith Shklar, in her discussions on legalism introduces a general idea that "law is politics […] but not every policy is legalistic."[9] Legalism as ideology[10] argues for a strict dichotomy between law and non-law. It observes law as a space where citizens are free of arbitrary acts of government, thus providing for stability and certainty within the social order. Legalism, in her view, is "the policy of justice," a "form of political action," thus never isolated from the essential components of politics– power, prudence, and expediency.[11] Principle of legality–*nullum crimen, nulla poena sine lege* or "no crime without law"–supports this idea. However, faced with public outrage at the Axis atrocities, the grand scale of human, economic, and military devastation caused by the Second World War, the victorious Allies felt compelled to create a new, *ex post facto* law that would allow for criminal punishment of leaders they considered responsible before the law, believing they would avoid the judgment of the past and provide for the brighter future by outlawing war. In these exceptional circumstances, the call to act came from the suitable opportunity and intention to avoid what is in Kantian words called "blood guilt" or *blutschuld* which is implied complicity from ignoring crimes. [12] The concept of legalism in endeavors of criminal justice was further refined by Johnathan Bass who described it as "liberal states' belief in the rule of law" and moral urge that perpetrators of atrocities ought to be punished. This view

[7] Jackson N. Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century,* (London: Rienner Publishers, 2004), 10.

[8] Jackson N. Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century,* 10.

[9] Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge: Harvard University Press, 1986), 144.

[10] Legalism as ideology is referred to in the sense that it defends the law from the world of politics, without its proponents acknowledging that in claiming so they are also positioning themselves among political values. see more in Shklar, *Legalism: Law, Morals and Political Trials*, 8.

[11] Shklar, *Legalism: Law, Morals and Political Trials*, 126, 143.

[12] Jonathan N. Choi, "Early Release in International Criminal Law," *The Yale Law Journal* 123 (2014): 1812.

of legalism does not recognize the lack of consistency in application, and even misuse, of legalism by the same liberal states due to geopolitical or material concerns that pertain to the domain of power. To remedy the latter purely liberal view of legalism, Peter Maguire offers a more appealing explanation of the policies underpinning international criminal tribunals that he denominates as *strategic legalism* – that is "use of law and legal arguments to further larger policy objectives, irrespective of facts or moral considerations."[13] Somewhat similar argument has been recently developed by Zachary Kaufman who denominates international criminal justice as an exercise of *prudentialism*[14] which explains the international criminal tribunals as the product of "case-specific balancing of relevant politics, pragmatics, and normative beliefs."[15] Kaufman's argument appears to be more refined and the term *prudentialism*, defined in multitude of ways, has been understood as choice of action that best serves one's interests without moral considerations, or it could be added, at least not as its main motive. These two approaches are relevant to the effect that they add a realist component, that is power and national interest, thus contrasting the liberal notion of legalism which entails the consistency and commitment to the rules of law. However, in case of *strategic legalism* and *prudentialism* normative beliefs are unstable and unpredictable when applied to the realm of international relations. However, the term prudentialism involves prudence or cautiousness in decision-making which, according to the present research, did not reflect the Allied powers' choices at all times. For the reasons pertaining to semantics, the term *strategic legalism*, borrowed from Maguire, will be used as it allows for a better understanding of the coherence and utility of legalistic policies used by the Allied Powers in relation to their larger diplomatic and political goals for postwar Japan.

[13] Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001), 8.
[14] Zachary D. Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics and Pragmatics* (New York: Oxford University Press, 2017), 58-60.
[15] Zachary D. Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics and Pragmatics*, 58-60.

Second, the analytical grid takes into consideration the factor of time when looking at different stages of the international military tribunals. Political goals, values, and intentions professed in the moment of their establishment, investigative phase, and later, trial phase, adjudication, and finally, execution of sentences phase which entails releases and pardons before the serving of the full sentence do not coincide. These "behind the curtain" realpolitik considerations to which tribunals are submitted, in a more or less subtle way,[16] are not visible on the institutional record of the tribunals which makes "the true story of these institutions rather incomplete."[17] Due to this "compartmentalization"[18] of the trials it is difficult to assess "the nature, intent, and impact of the political decisions which created, administered, and ended these trials"[19] under a single label of victors' justice or justice of civilization. In case of the Tokyo Tribunal, its establishment period reflected the power dynamics, principles, and goals of the immediate postwar international order which in turn dramatically transformed throughout the Trial as the regional dynamics of the Cold War took precedence over lofty goals proclaimed in 1945. Events ought to be analyzed within the context peculiar to them—circumstances, timing, culture—which act as transformative forces guiding actors' intentions and decisions at a given moment.[20] The power of context is inextricably related to making sense of concepts, institutions, actors, decision-making process and the present research aims to emphasize the evolving circumstances that were reflected in the very unfolding of the international justice in Tokyo.

Third, the story behind the Tokyo Tribunal does not end with the delivery of the majority judgment. Certainly, it implied the institutional closure of the Tribunal's activity, but what came after—the execution of imposed sentences is often disregarded piece of the

[16] M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", *Harvard Human Rights Law Review* 10 (1997): 12.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Malcolm Gladwell, *The Tipping Point*: *How Little Things Can Make a Big Difference* (New York: Little, Brown and Company, 2002).

puzzle. The execution of sentences phase also involves parole, clemency, or pardon before the complete execution of the sentence by the prisoner. In the practice of modern international criminal tribunals, it has rather become a rule, than exception that convicted war criminals would be released by default after having served two thirds of their sentence.[21] In the case of the IMTFE, it was not the composite part of the program, although its Charter did grant to the Supreme Commander, Douglas MacArthur "the power to approve, reduce or otherwise alter any sentence" imposed by the Tribunal, the formal system of clemency and parole was not formally established until 1950. The rationale behind the clemency and parole system was meant to be a corrective to initial injustices in sentencing, but more importantly to adapt to the increased strategic value of Japan which transitioned from a foe to a friend. This post-Trial or post-institutional aspect of the IMTFE has been rather neglected and left out in assessing the overall quality of the Allied powers' justice that falls behind the dominant analysis which conflated trial process and adjudication into their assessment of the Tribunal. Yet, the inclusion of the post-institutional phase of the IMTFE bears potential to shed a new light onto the nature and meaning of justice administered at Tokyo that has a property of being evolving, in motion rather than static in character. The extent literature overlooked this theme when examining the IMTFE project, with the exception of Higurashi Yoshinobu whose book *Tōkyō saiban* offers a chronological analysis of the Tribunal and does include a section on the release of the Class A war criminals. The present research draws its conclusions on the quality of justice rendered by the IMTFE by prioritizing the establishment and the execution of sentences stages of the Tribunal as being the most revealing of the Allied Powers' evolving intentions and dilemmas that were mirrored upon, what can be called the end product—criminal justice at the IMTFE. This approach adds a new layer of meaning to the extent political, legal, and historical narratives surrounding the Tribunal presented by its main stake holders—the

[21] Jonathan N. Choi, "Early Release in International Criminal Law," 1791.

Allied Powers, post-war Japan, and victims—each using different phases of the Tribunal at their convenience in gauging the war criminal trials program in Japan.

The workings behind the establishment of the IMTFE are important to the effect that it shows that the Allies, under the US preeminence, placed criminal justice within a much broader context than purely organizing institutionalized revenge. After seven years of isolation, different from Japan's nineteenth century like isolationism, "locked in an almost sensual embrace with its American conquerors,"[22] the post-institutional phase of the IMTFE brings into the equation the independent Japanese government that became a stakeholder in the war crimes program. In other words, by restoring independence, Japan became an active participant in the last phase of the IMTFE project which, in addition to changed geopolitical regional outlook, altered its nature and purpose in comparison to the initial phase of its establishment. Paradoxically, the IMTFE project as an occupation policy extended well beyond 1952 when Japan was pursuing a rather active policy trying to bring about its own goals and reintegrate into the transforming regional and international frameworks.

For what purposes did the Allied powers establish the International Military Tribunal for the Far East? In what way did the Japan's newly acquired role of a Western ally change the nature and pace of the post-institutional phase of the IMTFE? To what extent did the demands for Class A war criminals' release gain prominence in US-Japan diplomatic relations? Did the early release of prisoners have transformative role upon the overall quality of justice discharged at IMTFE?

The present research will argue that the IMTFE, considered as a strategic legalism tool, can be explained only when placed within broader context of the Allied powers' postwar policies both at international and regional level. Japan ascendance to the role of Western ally and its strategic value did not result in the prompt release of Class A war criminals, quite

[22] John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton and Co., 1999), 21.

the contrary, it reached a deadlock in which legalism no longer played a strategic role. This issue exposed inconsistencies in the US expectations regarding Japan's rearmament and started to inhibit progress on important security agenda in the US-Japan diplomatic relations. The dynamics of the US-Japan negotiations regarding the Class A war criminals, as it will be shown, placed in hands of the Japanese government a powerful tool to instigate its own visions of security vis-à-vis the US. Consequentially, the IMTFE and Class A war criminals which once represented the symbol of Japanese defeat started to become an asset for Japan in its effort to achieve the postwar reintegration. Hence, the justice meted out at IMTFE changed from a strategic tool placed in the hands of the victorious allies to a strategic tool placed in the hands of a defeated party in war.

The argumentation is based on findings from the archival documents predominantly from the United States National Archives related to the work of the US government agencies which had to strike a delicate balance between the war criminal policies and other strategic goals; International Conferences in the interwar and war period which set in motion the establishment of the Tribunal; the Far Eastern Commission which played an important role in amending the occupation policies and enhancing the international experience at the Tribunal; the International Prosecution Section which played instrumental role in elaborating historical narrative of Japan's aggressive war and refining the newly created law; Clemency and Parole Board which was the main body in charge of the release of Japanese war criminals; the Allied representatives meetings in Washington which revealed the Allies' deliberations behind decision-making process in relation to the release of the IMTFE convicts. Findings in relation to the Japanese side of the story draw in part on the archival documents of the Ministry of Foreign Affairs and Ministry of Justice which, each in their own right, played an instrumental role in the process of releasing war criminals and authoritative secondary sources which addressed parts of the clemency and parole process.

Before proceeding to the organizational aspects of the present thesis, it is important to clarify few points. The term justice is used to designate international criminal justice which consists in international criminal law application by the Tribunal from its establishment to the release of the convicted war criminals. Although the Class A war criminals or major war criminals were convicted by the IMTFE, after the occupation, the campaign for the release of the BC war criminals somewhat merged with the efforts for the release of Class A war criminals. In many instances the release process of war criminals encompassed both A and BC classes which made it methodologically difficult to clearly differentiate between the two, but in the later decision-making process this distinction would become apparent as the Class A criminals would involve all of the interested Allied powers taking a common decision. In this sense, their paths occasionally converge and diverge.

The present thesis is a work of diplomatic history that aims to place the Tokyo Tribunal within the broader framework of US-Japan diplomatic relations which dramatically evolved over the period covered by the analysis. The occasional insights into the lower level placed actors aims to offer a better understanding of how policy choices adopted at the top level, mainly preoccupied by politics, principles, emotions, and exigency,[23] had to compromise with facts, law, and objectivity[24] once they reached execution stage within the IMTFE. Also, the trajectory of the IMTFE from being placed on a high-level politics, passing through mid-to-lower level agencies (Ambassadorial, Clemency Parole Board) with its eventual resurgence of the top diplomatic level in 1955 was reflected in the narrative and political relevance of personas involved. The events are analyzed to reflect the dominant political ideas of the time in which they took place, whereas connections made with the present date similar events are made with intent of showing the evolution of principle or consequences of

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[23] James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948," (PhD diss., University of British Columbia, 2012), 212. https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0072876 (accessed November 14, 2017).

[24] Ibid.

past choices that had been made. In order to respect the nature of phenomenon studied which also pertains to the legal domain, minor parts of the present work address and discuss technical legal points and principles. This duality surrounding the Tokyo Tribunal is reflected in the agency of second generation of lawyers-statesmen personified by Henry Stimson, Robert H. Jackson, John Foster Dulles, who were concerned with legal justifications, without moral or legal grounds, and lower-level jurist-politicians, who were part of the IMTFE representing justices and lawyers with sense of pragmatism, ready to bend their legal ideologies and convictions in order to implement policies they were assigned.

The first chapter looks at the establishment phase of the IMTFE as closely related to the 1919 Versailles Conference and interwar period when the ideas about war as a crime first appeared. Furthermore, it looks at the IMT at Nuremberg and IMTFE as projects aimed to complement the illegality of war enshrined in the UN Charter and serve as a deterrent for the future aggression, thus preserving the status quo. On a regional level, the IMTFE was designed to represent an international framework that would allow for the Allies, predominantly the US, to impose harsh occupation policies, provide a historical narrative of the Pacific War, and educate the Japanese. The second chapter deals with the IMTFE judgement, its dissident and separate opinions which represented a platform for competing narratives on Japanese history and legal guilt as well as missed chances to rectify the harsh judgment imposed upon the Class A war criminals. It demonstrates how the changing geopolitical situation showed the need to abandon harsh occupation policies and decide the fate of the IMTFE war criminals leading to the conclusion of the peace treaty which would reflect this shift. The third chapter delves into the institutional dynamics of the clemency and parole process within both the US and Japan, which were both internally divided on the approach to be taken with respect to the Class A war criminals and repercussions it would have for the IMTFE legacy; pointing out at the persistent divisions between the Allies regarding the IMTFE clemency and parole system; in that aspect it reveals that the IMTFE

remained deeply connected to the IMT in Germany in both establishment and release phase; it shows the instrumental role of Japanese public opinion which made war criminal problem rise to prominence from emotional and social one to political and diplomatic level. The fourth chapter demonstrates how the Hatoyama and Kishi cabinets skillfully used the war criminals question to secure concessions from the US regarding the rearmament, and secure the parole and final release of the Class A war criminals, some of whom would be politically engaged and reintegrated into the society free of war criminal stigma, and eventually honored as spirits with their enshrinement to Yasukuni. Changes in other Allies' policies towards Japan also contributed to their release, including the influence of the Communist China and the USSR, which although excluded from the release process, still found a way to exert influence upon the main entrepreneurs behind IMTFE project. An important aspect this chapter reveals is how the internal divisions within the US government and complete unresponsiveness of the clemency and parole board, which was driven by the imperative to preserve the judicial character of the war crimes program, stripped the legalistic policies which became detrimental to the US larger security objectives of their strategic character.

CHAPTER 1: A Foundational Story: Behind the Scene of the International Military Tribunal for the Far East

1. In the Shadow of the Paris Peace Conference: Foundational Primer for the Post-World War Two War Criminal Program

The war to end of all wars did not live up to its expectations, however it did set into motion important changes to the international order, shifts in power dynamics - not only confined to European theater - but extending to the Asia-Pacific region, and international dialogue among the great powers regarding the premises upon which the new order should be based.[25] The 1919 Paris Peace Conference represented an important venue for victorious nations (America, Britain, France, Italy, and Japan) to divide war gains, to organize a new international order that would preserve the status quo and punish the defeated. The peace settlement involved, to a certain degree, a reluctant introduction of international law as its preserving agent. The consequences of the important decisions and choices made in 1919 would have immediate impact upon the developments of the interwar period, and most importantly, percolate all the way into the post-World War Two peace settlement. The war marked the end of the Ottoman Empire, "the sick man of Europe," and the Austro-Hungarian Empire giving birth to new independent nations, which started positioning themselves around the victorious European powers, their new patronizing states. Although, the main theater of the Great War was Europe-centered, it had important repercussions for East Asia, a bastion of European imperialism, and Japan who had already started emerging as a regional hegemon in the 1890s-1920s.

Following its victories in the First Sino-Japanese and Russo-Japanese wars in 1895 and 1905 respectively, Japan gained not only important spheres of influence in Manchuria and Korea, but rose as an important force that "asserted greater political, economic, and cultural

[25] Tosh Minohara, Tze-ki Hon, and Evan Dawley, eds., *The Decade of Great War: Japan and the Wider World in the 1910s* (Leiden: Brill Academic Pub, 2014) ix.

influence within Asia."[26] In the eyes of the US and certain European states, Japan, "a great and ambitious nation,"[27] posed a threat and was seen a potential challenger to the Western-led regional order that had been built on the ashes of the Chinese regional domination.[28] The Great War propelled Japan into a position of economic and military power among White nations at Versailles which it proudly assumed as the only Asian power to participate in the formation of new international order.[29] In the aftermath of the Great War, Japanese foreign policy, under Foreign Minister Uchida Yasuya, stayed faithful to the Meiji era imperatives of Japan, cooperating within the multilateral framework with the Western Powers, principle of non-intervention in China, and the protection of Japanese interests in Manchuria.[30] Nevertheless, it is important to mention that Japanese foreign policy had derailed from these principles and its traditional course on two occasions, under Foreign Minister Kato Takaaki and Prime Minister Terauchi Masatake cabinet, as they used military force to elicit territorial concessions. In particular, Takaaki's Twenty-One Demands presented to China in January 1915, by which Japan tried to gain similar rights to those that European powers already had, threatened to violate China's territorial and administrative integrity; while Terauchi's Siberian intervention in August 1918, in contravention to the agreed rules, was interpreted by the US as Japan's effort to secure exclusive control of northern Manchuria and Siberia. These represented the first examples of Japan's expansionist aspirations.[31]

At Paris Peace Conference, the Japanese delegation became aware of its limited chances for territorial and economic expansion in the region due to the European powers' spheres of influence. They came to the negotiating table with initially uncompromising demand on one point: the recognition of Japanese special rights in Shandong province. As the demand for

[26] Ibid.,3.
[27] Ibid., 63.
[28] Ibid.
[29] Ibid., ix.
[30] Ibid., 65.
[31] Tosh Minohara, ed., *The History of US-Japan Relations: From Perry to the Present* (Singapore: Palgrave MacMillan, 2017), 54-57.

the annexation was met with disapproval from other great powers and Wilson —who wanted to break away from the old diplomacy that involved unequal treatment of third countries and secret alliances — the Japanese delegation changed its strategy by presenting its cause in a way to appeal to Wilson's idealism. In the end, Wilson accepted the Japanese demand for governing the ex-German possessions, contrary to the proposed joint governance with other powers, with promise to give extensive rights and better treatment to the Chinese which was to be subsequently negotiated. In addition, the Japanese blamed the Western Powers for the current situation in China by which they scored extra points that would make President Wilson succumb to their proposal.[32] Despite his plea against colonialism and the opposition of all members of his delegation, he saw value in what he thought would reshape the existent great power structure in East Asia, ensure the successful conclusion of the Peace Treaty, and secure the League of Nations project.[33] The consequences of this concession that others qualified as a "terrible mistake"[34] would be visible only later in the interwar period.[35] More importantly, this shift resulted in Japan drifting apart from its old and traditional ally, Britain, and gravitating towards more cooperation with the US which was championing the new principles. America was the only nation that did not possess an explicit sphere of influence in the region—it did not offer open support for the great powers system in the region—yet it benefited from rights and privileges as a favored nation.[36] What presented as an opportunity for the US-Japan rapprochement was their shared interest in penetrating the order dominated by European powers.[37] While at the end of the nineteenth century the US was slowly joining the Big

[32] Ibid., 184-85.
[33] Ibid.
[34] Ibid., 187.
[35] Ibid., 188.
[36] Ibid., 179.
[37] Ibid.

Powers, in 1919 the rise of the US to preeminence was evident against European continent that suffered unparalleled human, material, and military losses.[38]

In essence, the new peace settlement was supposed to keep "Germans down, the Americans in, and Russians out."[39] For Germany, stripped of its colonies and burdened with heavy reparations, this was a punitive peace which will breed the revisionism in the interwar period — and later constitute one of the most valuable lessons to the Allied Powers in the aftermath of the World War Two. The question of whether the Germans and their allies should be and in what way punished for starting the Great War was entrusted to the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties within the scope of the preliminary Peace Conference. The entente powers were clearly divided, Great Britain and France supported his prosecution, while the US - cool-headed and out of reach of the direct war experience - refuted his prosecution as it considered statesmen business should be out of reach of judicial authorities for an offense that was clearly of a moral, but not a legal character. As well, President Wilson was more consumed with the League of Nations project than organizing trials, which would be equal to a pure act of revenge. The Report issued by the Commission was important in two aspects: it attributed the responsibility for waging war to Germany and rendered the immunity of heads of states obsolete for violations of laws of war and humanity.[40] In 1919, Wilhelm II was not recommended for prosecution as the Report observed lack of legal basis and considered the matter suitable for study by statesmen and historians.[41] The Articles 227, 228, and 229 of the Paris Peace Treaty vaguely stated his responsibility for "a supreme offense

[38] Benjamin A. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford: Oxford University Press, 2016), 152.

[39] Kirsten Sellars, *Crimes Against Peace and International Law* (Cambridge: Cambridge University Press, 2015), 3.

[40] Aleksandra Babovic, "The International Order After the Great War and the Creation of International Military Tribunal for the Far East (IMTFE)" (paper presented at the Second EAJS Conference, Kobe, September 26, 2016).

[41] Ibid.

against international morality and sanctity of treaties,"[42] the provision that was not defined and thus deprived of all substance, and ordered his apprehension for the trial which never took place as he escaped to Holland.[43] Lord Chamberlain questioned the efficiency of potential trials given the time length needed to convene the tribunal, investigate the crimes, and prosecute numerous German war criminals. After the passions of war would subside, he thought, the Allied war criminal program would face reduced interest in justice being served and lose support of public opinion.[44]

Of particular interest to the present study are reservations lodged by the American and Japanese delegations at Paris.[45] The US legal stance evidenced the duality of the American foreign policy towards the application of international norms, which underwent a dramatic shift, as will be shown later, in the last days of the Second World War. Ironically, the Japanese stance towards the international criminal law was marked by continuity as the similar arguments have been advanced against the Tokyo Tribunal by the Japanese from 1946. The American reservations exposed the novelty of the idea of an international tribunal and appropriateness of the national commission[46] to prosecute the offenders of laws of war and humanity to punish those who committed criminal acts. This led to the point of negative criminal responsibility which implied that that person of authority who failed to prevent or repress the violations of others—he should have had knowledge of or ability to prevent—liability criteria which would be hard to prove.[47] The Americans also advanced the lack of the legal precedent and state practice for the prosecution for initiating war which would lead to *ex post facto law*, the immunity of heads of states, who can only be liable before

[42] Cherif M. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Law Review* 10 (1997): 19.

[43] Babovic, "The International Order After the Great War and the Creation of the International Military Tribunal for the Far East (IMTFE).

[44] Ibid.; Jonathan G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunal* (Princeton: Princeton University Press, 2000), 105.

[45] *Violations of the Laws and Customs of War: Report of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities*, Conference of Paris, (Oxford: Clarendon Press, 1919).

[46] Ibid.,

[47] Ibid., 72.

their national courts not before a foreign jurisdiction, which is essential component of state sovereignty.[48] The Japanese delegation shrewdly formulated its reservations around the issue of "victors' justice." They opposed the negative criminality and criminal liability of senior leaders that was problematic for their institution of the Emperor, and even asked for the elimination of words "heads of the state" from the report.

The 1921 Covenant of League of Nations defined as its main task to deter war or prevent or stop any armed conflicts or threat of armed conflicts (Article 11) by using economic sanctions as means of pressure rather than instruments which were of coercive character (Article 16).[49] The League was devoid of any concrete and effective measure to prevent or deter war, especially when the United States and the Soviet Union were not its member states. In the 1920s the legal momentum to prevent war or define aggression under the banner of *jus contra bellum* developed in response to the League Covenant which lacked robustness – Treaty of Mutual Assistance of 1923 held that war of aggression was an international crime that ought to be stopped by mutual assistance while Geneva Protocol of 1924 focused on its prevention through judicial and arbitrational methods.[50] Contrary to this movement to delegitimize aggressive war, it did not enjoy wide support and was not established in international law.[51] The 1928 Kellogg-Briand Pact which would be discussed in the following section distinguished itself in that it aimed to prohibit unilateral use of war while it allowed for war as a collective action against the aggressor.[52] The subsequent invasions in the 1930s were the first signs of the failure of postwar peace settlement and other instruments to prevent or stop war which was reflected by 1931 Japanese invasion of Manchuria on the occasion of which Henry L. Stimson, secretary of state, in reference to the

[48] Ibid., 75-76.

[49] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Berkeley: University of California Press, 1958), 39-40.

[50] Sellars, *'Crimes against Peace' and International Law*, 19.

[51] Ibid., 23.

[52] Ibid., 25.

Pact denounced Japan "as lawbreaker"[53] and advocated the "non-recognition" of the situation created in contravention to Nine-Power Treaty and the Kellogg-Briand Pact.[54] In protest to the conclusions of Lytton report, issued by the commission approved by League's Council to investigate Japanese intervention in Manchuria, that proposed solution detrimental to what Japan considered its vital interests—that is demilitarization of the region and placing its autonomous government under Chinese sovereignty[55]—Japan left the League in 1933.

According to Hersch Lauterpacht, prominent British international lawyer and afterwards, justice at the International Court of Justice, although the Pact did not have any "teeth," its importance lied in diffusing the idea that war, which was previously used as an instrument to alter the status quo and international law, became illegal with the exception of wars fought in self-defense or as a collective sanction against the aggressor.[56] The instances of military expansion in the 1930s—Japan invaded Manchuria in 1931, Italy invaded Ethiopia in 1936, and Germany invaded Poland in 1939—leading up to the outbreak of the Second World War would indeed evidence that the legal innovation was still in the realm of the ideas, that were still not ripe to gain the support and observance from nation states which once again chose to settle their differences by military force.

2. Building Blocks of New Postwar International Order: War as Illegal and Criminal Act

The ideas and dilemmas released by the Great War regained their value as World War Two was nearing its end in favor of the Allied powers and the need to lay the grounds of a new peace settlement appeared on the horizon. The kernel of the allies' argument, stemming from 1919 international order failures, was that both Germany and Japan would not be

[53] Ibid., 33.

[54] Tosh Minohara, ed., *The History of US-Japan Relations: From Perry to Present* (Singapore: Palgrave MacMillan, 2017), 87

[55] Ibid., 59.

[56] Sellars, *'Crimes against Peace' and International Law*, 43.

pastoralized, but occupied following the unconditional surrender; demilitarized, democratized, its elites reeducated, and only then, reintegrated into the new international order. Regarding the punishment, Winston Churchill, who was a strong advocate of legalistic solutions for the main villains of Great War in 1915, disillusioned with the power of law to settle political and historical issues, preferred summary executions of few of the Axis leaders who bore the most responsibility for the war.[57] During the war, President Franklin D. Roosevelt had already made oblique warnings about the punishment of the Axis "guilty barbaric leaders," in his speech at the Casablanca Conference in February 1943, or more directly referred to the efforts of the Allied powers to put an end and punish the Japanese aggressive war at the Cairo Conference in November 1943. The reasons behind these low-key statements regarding the punishment of Axis leaders were the absence of concrete policies for war crimes program and the fear of retaliation against the prisoners of war captured by the Axis.[58] In planning the course of action for the final days of war at Quebec in fall 1944, Churchill and Roosevelt consulted on the question of prosecuting the major war criminals. The British plan, drafted by Chancellor Lord Simon, played a decisive role in swaying President Roosevelt towards a political solution as memorandum and concluded that "it could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy."[59] The summary executions were tempting as the leaders were aware of the fastidious process that the investigation, apprehension, and the trial could entail. Ironically, in October 1944, Joseph Stalin who was delighted at the opportunity to reap the benefits of the Soviet entry in the war against Japan, opposed summary executions and suggested that the world would be more impressed if the Axis leaders would be sentenced to life-imprisonment following a

[57] Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2002), 2.

[58] Aleksandra Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946," (master's thesis, Kobe University, 2015), 20.

[59] Memorandum by the British Lord Chancellor Simon, London, September 4, 1944. FRUS, 1944. *Conference at Quebec,* Washington: Government Printing Office, 1972, 92.

legal procedure [60] — this was the Soviet version of legalism that was purely based on political criteria which established the guilt of the defendants, who were simply executed or imprisoned without any procedural rights.[61]

The end of 1944 marked a fierce battle with the US government between the Secretary of Treasury, Henry Morgenthau Jr. whose Jewish roots heavily weighted in his proposal for pastoralization of Germany and Secretary of War Henry Stimson, seasoned lawyer and "defender of laws and constitution,"[62] who argued for legal methods in shape of the war crimes program. Although Morgenthau had the president's ear at the time of the Quebec conference, the leaking of passages from his vengeful report to the press sealed its destiny as it was met with public indignation. In January 1945, President Roosevelt had a change of heart regarding the war crimes trials and decided to offer his support to Stimson as he acknowledged its added value laid in generating "historical record"[63] of the atrocities. The War Department, under the Stimson's leadership, John McCloy and Judge Advocate General Myron Cramer, who later joined the IMTFE as the US Justice, started making sketches of what would later become the war crimes trials program for both Germany and Japan. The purpose of the trials was not vengeance, but prevention. The legal character of the program was to be ascertained by the guaranty of minimal procedural rights for the defendants, but the process was to be spared of legal technicalities, often found in domestic criminal system, as its architects correctly observed. Promptness was indispensable in order to avoid "making martyrs of the individuals punished."[64] Despite this awareness, the IMTFE will be greatly impeded by protracted trials which not only prejudiced the defendants for its

[60] Prime Minister Churchill to President Roosevelt, Telegram, London, October 22, 1944. FRUS 1945. *Conferences at Malta and Yalta,* Washington: Government Printing Office, 1955, 400.

[61] Higurashi Yoshinobu, *Tōkyō saiban no kokusai kankei: kokusai seiji ni okeru kenryōku to kihan* (Tokyo: Bokutakusha, 2002), 79.

[62] Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (New York: Harper and Brothers, 1948), xxii.

[63] Ibid., 585-586.

[64] Bass, *Stay the Hand of Vengeance*, 157.

rules of evidence that impeded defense,[65] but also succeeded in making victims out of criminals for its lengthy procedure and harsh sentencing. The image of the convicted criminals as victims would become even more palpable during the post-trial stage of the execution of sentences where the legal minutiae surrounding clemency and parole process attracted the public anger and burdened US-Japan postwar relations.

The United Nations Charter, the final product of the postwar settlement adopted on June 26, 1945, in its Article 2 paragraph 4 prohibited "threat or use of force against sovereignty, political independence, and territorial integrity of any state." This "juridification"[66] of war in the sense that the law intervened to regulate the use of force came as a fruition of pre-World War Two progressive ideas of placing "crude political power" within the framework of "law and morality."[67] The intent was to preserve the postwar status quo by outlawing its violation to the dissatisfaction of many "have-not states."[68] The war criminal tribunal came to complement this juridification of war by criminalizing the initiation or waging of aggressive wars as concluded at the London Conference on August 26, 1945[69] which drafted the Charter of International Military Tribunal at Nuremberg (hereafter IMT).[70] Although the IMT and IMTFE were institutionally distinct entities created for two fairly different war theaters, the importance of validating the Axis leaders' criminal responsibility for aggressive wars as well as newly created norms was their common goal. War crimes programs in both Germany and Japan would evolve in a quite different way, but this shared political goal of preserving the validity of the Allied powers' legal endeavors would permeate into the late

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[65] Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), 122-123.

[66] Aleksandra Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," *Kobe Law Review* 49 (2015), 5, n16.

[67] Ibid.

[68] Frederick S. Dunn, *Peace Making and the Settlement with Japan* (Westport: Greenwood Press, 1963), 9-11.

[69] For more details on the negotiations leading to the IMT Charter see Sellars, *'Crimes Against Peace' and International Law*, 84-112; London Conference, Report of Robert H. Jackson, United States representative, to the international conference on military trials (Washington: Department of State, 1949).

[70] London Conference, Report of Robert H. Jackson, United States representative, to the international conference on military trials (Washington: Department of State, 1949)., 5.

1950s until the last prisoners were released on clemency and parole. The IMT Charter, which was created on a nominally contractual basis between the Big Four at London — the US delegation was instructed to be uncompromising on definition of crimes and procedure[71] — served as a model to the US when it crafted the IMTFE Charter. It is important to have a glimpse into the process of its creation that divulged the US legal position which was heavily rectified from the one opposing any criminal trials for the heads of state by international tribunals it had advanced in 1919. At London, the Soviet and French delegations that at first disagreed on placing the charge of aggressive war at the heart of the Tribunal's jurisdiction, finished by consenting to it under the promise that it would only be applicable to instances of the Axis aggression.[72]

Robert H. Jackson, American Justice at the Supreme Court and Chief Prosecutor at IMT, was another important and influential figure who propelled the development of the US legal position which recognized the criminality of aggressive war based on the 1928 Kellogg-Briand Pact. He served as principle of individual criminal responsibility for aggressive war disregarding the traditionally respected immunity of heads of states and defense of superior orders. In a report to President Truman, who succeeded late President Roosevelt, Jackson stressed that the change in circumstances ushered in a new era in the growth and use of international law, which, in Wilsonian spirit, ought to be "a real expression of our moral judgment."[73] The novelty was that the law was meant to be used as a tool of politics, in that it allowed for the needed expedience. American legal stance was qualified as "relatively simple and non-technical"[74] and immune to "sterile legalisms."[75] It was highly influenced by

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[71] The Assistant Secretary (McCloy) to the Secretary of State, Memorandum of Conference of the Secretary of State July, 26, 1945, FRUS, *The Conference in Berlin (The Potsdam Conference)*, Washington: Government Printing Office, 1960, 423.

[72] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2008), 21.

[73] Justice Jackson's Report to President on Atrocities and War Crimes, June 7, 1945. http://avalon.law.yale.edu/imt/imt_jack01.asp (accessed on March 13, 2016)

[74] Ibid.

[75] Ibid.

the work and advice from Sir Hersch Lauterpacht, who was at that time, professor of international law at the University of Cambridge. Jackson was also personally convinced that war of aggression constituted a punishable crime under international law.[76]

The decision to pursue war criminal trials based on these newly announced principles were, in the eyes of Stimson, a victory for American legalism and his personal triumph over policy of isolationism that reigned in the US during the interwar period. The charge of aggression, which was severely disputed by European powers, was also a necessary package designed to support the actions of the Roosevelt administration[77]. These powers were an abandonment of neutrality[78] and lend-lease as well as justification for "perpetuating American internationalism,"[79] that guaranteed US economic and military assistance.[80] Contrary to wars fought prior to the Treaty of Versailles, which punished nation for losing the war, the German Empire and subsequently Germany and Japan would be punished for having started one.

3. The IMTFE as a Venue for Legislating Process

The legal basis for the establishment of the IMTFE was contained in the Article 10 of Potsdam Declaration of July 26, 1945 according to which, "[the Allied powers] do not intent that the Japanese shall be enslaved as a race or destroyed as nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."[81] The text of the Declaration did not include any reference to the position of the

[76] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946), 57.

[77] Sellars, *'Crimes Against Peace' and International Law*, 88-89.

[78] Ibid., 44. Jackson defended the interpretation of the "qualified neutrality" in the light of the Kellogg-Briand Treaty – aggressive wars made the traditional postulates of neutrality doctrine, that is unquestionable absolute neutrality of states in any instance of war, inadmissible as the signatory states had the duty to militarily attack the aggressor.

[79] Ibid.

[80] Ibid.

Emperor, for which the Japanese asked assurances and was reflective of transition in views on Japanese occupation policies from those who were Japan hands and proponents of moderate policies, such as George Blakeslee, Hugh Borton, and Joseph Grew, acting secretary of state, as opposed to his successor Dean G. Acheson who advocated harsher occupation policies towards Japan.[82] Before the Tribunal was established, there existed the conflict between the State-Navy-War Coordinating Committee (SWNCC)[83] and State Department as to the degree of the US role in the IMTFE establishment - "the US lead"[84] thesis and "the Allied Powers' cooperation"[85] thesis respectively. In October 1945, in order to avoid the stigma of being exclusively an American tribunal, it was agreed that the Tribunal's international character should be respected, but that the US position would prevail in case of disagreement between the Allied Powers, a decision closer to the US lead thesis.[86] It is important to note that the directive of Joint Chiefs of Staff (JCS) discussed the possibility of organizing exclusively American tribunal to try Hideki Tōjō's cabinet for the Pearl Harbor Attack, in case of complications involving the participation of other Allied Powers (delays or refusals), which was in the end dropped in favor of its international character that would give the tribunal more legitimacy.[87] The judges were appointed by the Supreme Commander upon the recommendation from military and civilian representatives of the Allied powers, while the international prosecution section (IPS) was under the authority of the SCAP, and each country was to provide for its representatives. In order to

[82] Edward D. Beauchamps, ed., *History of Contemporary Japan Since World War II* (New York: Routledge, 2011), 165.

[83] The SWNCC was a Subcommittee was at the origin of the most important directives regarding the occupation policies for the Axis powers representing balanced views between civilian and military officers that were to be approved by the President. It can be observed as an embryonic form of National Security Council (NSC).

[84] Aleksandra Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946)," 46.

[85] Ibid.

[86] Ibid., 47.

[87] Ibid., 52.

guarantee the international character of the Tribunal, the Far Eastern Commission (FEC)[88] was instituted in Washington on December 26, 1945 where all the nations represented at the IMTFE were given the opportunity to challenge the US views in formulating and recommending the policies that effect the Japanese occupation.[89] FEC directives were reformulated in concrete policies by the US government and then transferred to the Supreme Commander, while in case of urgent matters regarding policies that were not the subject of FEC directives, the US government was allowed to issue interim directives to the SCAP.[90] This institutional mechanism and the authority vested in SCAP to mete out the stern justice gave the US preeminence regarding the establishment process in comparison to other allies, thus allowing it to proceed more quickly as it was rushing against the clock to establish the Tribunal, the IPS, and open the trials. A mid-January target date proved rather unrealistic.[91] Almost six months into the IMT proceedings, on January 19, 1946 the IMTFE Charter was born, following MacArthur's special proclamation which was grounded in the Instrument of Surrender, the Potsdam Declaration, and the Moscow Conference.[92] The Commonwealth nations, especially Australia, were eager to assert their view of the postwar Japan, which clung onto more punitive policies that were rooted in fears of Japanese invasion and a revived militarism. In a stark contrast stood the position of Britain, which was preoccupied with its postwar recovery that heavily depended upon the US. This relationship was reflected in its rather modest position regarding the occupation of Japan.[93]

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[88] Far Eastern Advisory Commission (FEAC) was established on October 30, 1945 where other Allied Powers were represented (Us, Britain, Australia, New Zealand, Canada, the Netherlands, France). As the body was purely advisory in character, Stalin refused to participate. Subsequently, the Soviet Union would join FEC which had decision-making role, although a limited one.

[89] George H. Blakeslee, "The Establishment of the Far Eastern Commission," International Organization 5:3:1951, 503.

[90] Ibid.

[91] CINCAFPAC Advisor to Joint Chiefs of Staff, December 9, 1945 in RG59, State Department Internal Correspondence.

[92] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"54.

[93] Higurashi, *Tōkyō saiban kokusai kankei: Kokusai seijini okeru kenryoku to kihan* (Tokyo: Bokutakusha, 2002), 190-191.

The international experience surrounding the IMTFE, other than the official diplomatic channels, was more tangible within the IPS, established in December 1945, where teams from the Allied countries, whose representatives, primed by different legal cultures, expertise, and temperaments, would be compelled to work together in order to satisfy the overall goal of preparing the case against the Japanese leaders. The first to arrive to Tokyo on December 10, 1945 was the American team headed by Joseph B. Keenan, the chief prosecutor in Tokyo, whose reputation and expertise stood in stark contrast with his counterpart in Nuremberg, prominent Justice Jackson. Keenan's appointment was not completely based on his expertise. He was considered a second rate choice but had strong political connections with the late President Roosevelt and FBI's Edgar Hoover which secured him the position.[94] President Truman considered him to be a man who could get things done, hence the task of prompt and efficient prosecution of Japanese leaders responsible for aggression.[95] Keenan was successful in garnering the financial support of the Senate for the executive New Deal projects, of which the Tokyo Tribunal was an example.[96] Upon the arrival, the team was faced with the realities on the ground, such as the lack of direct evidentiary documents, the overwhelming mass of documents that needed to be translated, read, and analyzed along with the interrogations that needed to be organized resulted in disorganization and inefficiency. In early February, the Allied powers' prosecutors joined the IPS, British prosecutor A. S. Comyns Carr, Australian prosecutor Alan J. Mansfield, Brigadier Quilliam from New Zealand, Henry G. Nolan from Canada, and Hsiang Che-Chun from China, but neither the indictment or the list of defendants were ready. The draft indictment contained charges related to Pearl Harbor attack, in which Tōjō figured as the only defendant, and the Japanese government was added among the Allies as

[94] Ibid., 263.

[95] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"88.

[96] Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operation in the East, 1945-1951* (Austin: University of Texas Press, 1979), 10.

the interested party in prosecuting wartime Japanese leaders for aggression. The Commonwealth prosecutors were appalled at the extremely poor state of affairs and were under the impression that the American version indictment was far too "contrary to the Tribunal's goal of cultivating the public sense of responsibility for national policy" by placing the ultimate guilt for war upon the wartime Japanese government thus confirming the omnipresent view among the Japanese that their leaders deceived them.[97] Under the lead of Comyns-Carr the Commonwealth prosecutors would capitalize[98] upon the Keenan's poor leadership skills to challenge the US preeminence and organize prosecutorial work that would allow for the indictment and list of defendants to be completed as soon as possible.[99] Contrary to the instructions from Washington, it seemed that the members of the American prosecutorial team forgot about the crucial time factor and expeditious trials which was reflected in their remarks addressed to the British prosecutor for "too much of a tendency to keep an eye on the clock and the other on Nuremberg."[100] The reasons behind the importance of time factor was succinctly expressed by almost prophetic words of Comyns-Carr "[that] from the very day on which the Nuremberg trial is over, world interest, as distinct from the purely Japanese interest, in the whole subject of International Trials, will fall to the vanishing point."[101] The work of the IPS was additionally delayed and complicated by the late arrival of French, Soviet, Chinese, and Philippine prosecutorial teams, although Keenan thought that the Russian arrival would alleviate "the growing world atmosphere of friction."[102] While the Soviet prosecutor Sergei A. Golunsky requested the addition of new names to the defendants lists, other teams asked for amendments of the

[97] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"93.
[98] Ibid., 94.
[99] Ibid., 93.
[100] Memorandum from Higgins to Keenan, February 27, 1946, IPS07-13, "General Policy," RG331.
[101] Memorandum from Comyns-Carr to Keenan, February 25, 1946, IPS07-13, "General Policy," RG331.
[102] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"95.

particulars.[103] The final version of the indictment was presented to the Tribunal only on April 26, 1946. However, after this moment, the trials would considerably slow down, the presentation of cases in phases, interrogations, and collection of evidence would take toll on the expected expeditious character of the proceedings as prosecutor Quilliam noted in early June "all the sense of urgency was gone."[104]

In 1945, President Roosevelt acknowledged the usefulness of the war criminal trials as a method for generating "historical record."[105] As the reports on the Japanese atrocities upon the POWs saw the light of the day, the American public opinion turned to violent hatred and outrage towards the Japanese. Along with this, in 1945 the US government was placed under scrutiny for its share of responsibility in failure to prevent the Pearl Harbor attack. The Congress established the Pearl Harbor Committee to investigate facts and circumstances leading to the attack. The rumors surrounding late President Roosevelt's responsibility for provoking the attack due to his unwavering intention of drawing the US into the war which were refuted in the final report issued in June 1946. At the time when the grounds of the IMTFE project were laid down, the establishment of Japan's guilt by the Tribunal for conspiring and waging aggression against the US appeared useful for placing the stigma of war responsibility elsewhere.

From all the treaties that were created in the interwar period aiming at limiting or preventing war, the 1928 Kellogg-Briand Pact was the most widely supported one as signed by the most of the established nations in the world, including Japan. As such, it served the Allied Powers as a raw material in creating the new category of crime, war of aggression, which was to be applied to wars pursued by Germany and Japan. The contracting states

[103] Sellars, *'Crimes Against Peace' and International Law*, 202.

[104] July 20, 1946, Entry, Quilliam Diary cited in James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948," (PhD diss., University of British Columbia, 2012), 66. https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0072876 (accessed November 14, 2017).

[105] Stimson and Bundy, *On Active Service in Peace and War*, 585-586.

condemned "recourse to war for the solution of international controversies"[106] and renounced "war as an instrument of national policy in their relations with one another,"[107] according to its Article I. States agreed that "the settlement or resolution of all disputes and conflicts of whatever nature or whatever origin" should always be settled by peaceful means as stipulated in Article II. Following the logic of the provisions, unilateral war as means of national policy was limited, "whether on "just or unjust grounds."[108] Nevertheless, the Pact was silent on collective actions related to war, civil wars, and war with states non-signatories.[109] Further interpreted in the light of its Preamble, the purpose was to preserve the status quo which could be altered only by peaceful means; in the contrary the signatory-state would be "denied the benefits"[110] provided by the Treaty, meaning that other signatory states were given a free hand in waging war against it.[111] The pact did not define aggression or outlaw war, or provide any judicial or arbitration mechanisms for its prevention. The reservations logged by states abounded and reflected position that the Pact does not limit the exercise of the sovereign states' inherent right to self-defense which was to be arbitrarily decided in face of necessity or circumstances which was confirmed by Secretary Kellogg in his speech before the American Society of International Law.[112] It is interesting to note that the Japanese government heavily stretched its understanding of the right of self-defense, implying that the protection of its "lifeline" in China would fall within the category,

[106] General Treaty for Renunciation of Wars as an Instrument of National Policy, Paris, August 27, 1928, League of Nations Treaty Series No. 2137. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf (accessed July 26, 2016)

[107] Ibid.

[108] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 8.

[109] Ibid.

[110] General Treaty for Renunciation of Wars as an Instrument of National Policy, Paris, August 27, 1928, League of Nations Treaty Series No. 2137. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf (accessed July 26, 2016)

[111] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 8.

[112] Ibid; Richard Minear, *Victors' Justice: Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), 51.

although lying outside of Japan's territory.[113] Great Britain went further in claiming that self-defense not only could be exercised in cases of an all-out aggression confined to its border stretching all the way to its Empire, but also certain regions of special interest. It alluded to Egypt, that although it gained independence in 1922, the Britain claimed that it maintained "'special relations with it over the Suez Canal."[114] It implied that any interference or questioning of this special relation could trigger the war in self-defense.[115]

The Pact, however, did not establish the individual criminal responsibility of individuals. Until 1945, international law was an instrument for governing interstate relations, overlooking individuals who were rather invisible to it. Heads of states enjoyed functional immunity from criminal prosecution, by virtue of state equality and dignity, for the duration of their mandates in performing an act of state which is related to their official duty. In 1945, the principle of individual criminal responsibility for heads of state was established, and later on, confirmed by the judgments handed down at Nuremberg and Tokyo, thus eroding the old rules related to the aforementioned functional immunity. If the aggressive war was prohibited, as established by the Pact, then analogously those who plan, initiate, and wage it are to be found responsible for it. This was in complete opposition to the US position in 1919 as mentioned earlier.

4. Hegemonic History of Pacific War: Japan as Aggressor

[113] Ibid.
[114] Sellars, *'Crimes Against Peace' and International Law*, 30.
[115] Ibid.

"Prosecutors and defense attorneys are not compelled by any statutory mandate to write history […] However, all parties to a trial have an interest in advancing the most persuasive legal argument possible, and some have come to see historical evidence as assisting them in that goal."[116]

With all these legal precedents and an ongoing trial at Nuremberg, the IPS at Tokyo had an important task to prepare the case against Japanese leaders based on the central charge of crime against peace or waging aggressive war. In doing so, the IMTFE was fulfilling another important goal: to confirm the law at Nuremberg[117]. Dean Acheson explicitly instructed this as he said "it is most important that the procedure and principles of the Tokyo Tribunal, as well as definitions of crimes, should harmonize with those adopted for the prosecutions in Germany."[118] In other words, the prosecution was supposed to prepare the case that will show how the Japanese war was aggressive in all its instances — starting from January 1, 1928 all the way to September 2, 1945 and directed against the Allied powers. This linearity that would have been lost had the US organize an exclusively American tribunal to try the Tōjō cabinet for the Pearl Harbor attack. According to the Indictment, the war started by Japanese invasion of Manchuria in 1931 was an outright violation of the 1922 Nine-Power Treaty in which Japan organized a puppet state, stationed military troops, and built war potential, which the Soviet team qualified as preparation for an attack against the Soviet Union. Thus, the two-week border clash at Lake Khassan in 1938 and three-month long clash at Khalkin-Gol River, on the border between Mongolia and Manchuria, were qualified as "undeclared aggressive wars"[119] by the Soviets whereas in fact these were mere incidents that ended in peace settlement. Subsequently the Neutrality Pact was signed between Japan

[116] Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), 70.

[117] Sellars, *'Crimes Against Peace' and International Law*, 185.

[118] The Undersecretary of State (Acheson) to the Director of Office of Far Eastern Affairs (Ballantine), Washington, September 6, 1945, FRUS, 1945. The British Commonwealth and the Far East, Vol.6, Washington DC: Government Printing Office, 1969, 921.

[119] Sellars, *'Crimes Against Peace' and International Law*, 224.

and the Soviet Union in 1941.[120] On September 22, 1940, Japan and France signed an agreement after the Japanese invasion of the northern part of Vichy's Indochina in order to cut the flow of arms and fuel it was providing to China. Few days later, the indictment went on to state, Japan signed the Tripartite Pact with Nazi Germany and Italy in pursuance of the plan to dominate Asia-Pacific, its sphere of influence.[121] According to the indictment, the stronghold in French Indochina was used as a base for Japan to carry out surprise attacks against British Commonwealth nations of Singapore, Malaya, Hong Kong, Shanghai, and then Philippines, Thailand.[122]

From the outset, the IPS was put in a difficult situation due to the lack of direct evidence against the Japanese leaders; not only the evidence was dispersed all over the former Japanese Empire, but the government documents in Japan were destroyed during the war, in the firebombing of Tokyo, or destroyed by the government in the last days of war, when the defeat was imminent. On the contrary, the conditions in Germany were friendlier to the prosecution of IMT members who had the record of Nazi plans and atrocities available, in addition to these policies coming from a unified center of command. British prosecutor Comyns Carr's words are illustrative on this point "the whole Japanese situation is infinitely more complicated than the German for the purpose of prosecution, as all the politicians, soldiers and sailors were all squabbling and double-crossing one another all the time."[123] The prosecutors in Tokyo became convinced of Japan's guilt[124] and with deep understanding of the grander policies behind the IMTFE, which many of them considered capable of changing the history, they committed to the creation of new law. The legal solution that came as a glue to the issue of fast-changing cabinets and dispersed theaters of battle was the

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[120] Ibid.; Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II*, 93.

[121] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 9.

[122] Neil Boster and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgement* (New York: Oxford University Press, 2009), 43-45.

[123] Comyns Carr to Shawcross, March 19, 1946 cited in Sellars, *'Crimes Against Peace' and International Law*, 190-191.

[124] Sedgwick, "The Trial Within," 179.

doctrine of conspiracy, borrowed from the Anglo-Saxon municipal law. Legally, the conspiracy concept was elastic, as it required only participation of individuals aspiring towards a similar goal.[125] This all-encompassing property made it suitable for Japanese aggression, which was consisted of distinct theaters of battle that all fused under the overarching goal of waging aggressive war.

This method promised to render the task of preparing the case easier as the act of aggression perpetrated by different regimes fit into the common plan to wage aggressive war whereas the lack of direct evidence for individual responsibility was circumvented by leaders' simple participation in it, not the actual commission of crimes. In other words, "a defendant may be guilty of conspiracy even though he did not authorize or actually participate in the perpetration of the ultimate unlawful act or acts or in the preceding illegal means, as long as they failed to expressly withdraw from the evil combination."[126] Conspiracy served as a method for proving guilt of Japanese leaders for all three crimes – aggressive war, war crimes, and crimes against humanity. For instance, Article 5 of the IMTFE Charter defined aggression as "planning, preparing, and waging a war of aggression in violation of international law and treaties" or the "participation in common plan or conspiracy for accomplishment of any of the foregoing."

Aware of the risk of placing the prosecutorial success exclusively on a single charge of conspiracy, the prosecution decided to secure the chances of defendants being prosecuted in case the overall or single conspiracy was insufficiently established due to the complexity of the Japanese situation, and introduced an additional four counts of conspiracy to be prosecuted as a statutory crime. Each phase of the war in the period between 1931-1945 was to be represented by the individuals on key decision-making positions in a cabinet. There

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[125] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 11.

[126] Philip Sands, ed., *From Nuremberg to the Hague: The Future of the International Criminal Justice* (Cambridge: Cambridge University Press, 2003), 6 cited in Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 11.

were seventeen cabinets and sixteen prime ministers during this period, leaders acted in opposition, and many decisions were more reactive than a product of policy continuity. Illustratively, the first count of the Indictment read that the common plan or conspiracy in which Japanese leaders occupying different position in distinct phases took part was "to secure military, naval, political, and economic domination of the East Asia and of the Pacific and Indian Oceans and all of countries and islands therein and bordering thereon" and "wage declared or undeclared war or wars."[127] This count, according to prosecutor Solis Horwitz, was meant to establish responsibility of different ministries in the government, and then implicitly individuals who participated in it.[128] The words "declared or undeclared" wars were inserted in definition of crime of aggression in the Charter in order to cover for the controversy over the Japan's declaration of war prior to the Pearl Harbor Attack as well as for the incidents or clashes which in the absence of formalities did not change the aggressive nature of war. The second and third count covered China, while count 4 was encompassing all other Allied Powers. The last count of conspiracy went beyond the Asia-Pacific theater to encompass the conspiracy to dominate the whole world with other Axis powers, according to the prosecution, as evidenced by the Tripartite Pact.[129]

In the words of Japanese historian Akira Iriye, designation of the World War Two in Japanese literature as a "Fifteen-Year-War" or "the Asia-Pacific war" crated confusion about the nature and scope of the war that took place in that part of the world. Otherwise, the war could be framed as distinct periods and theaters of combat against China, the Commonwealth countries, the US, and the Soviet Union.[130] The minutes of IPS also show that the prosecution had difficulty connecting the aggression in China in the 1930s to other

[127] Neil Boster and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgement*, 43-45.

[128] Sedgwick, "The Trial Within," 174.

[129] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 11.

[130] Akira Iriye and Waren Cohen, ed., *American, Chinese, and Japanese Perspectives on Wartime Asia, 1931-1935* (Wilmington: Scholarly Resources, 1990), 223-234.

phases of war as they pondered over whether it ought to be distinguished from other phases. The prosecution was presented with documents consisting of studies, publications, treaties from different periods of Japanese history. Many of them emanated from Japanese prewar history out of which they tried to make sense and build the story of Japanese aggression. In face of difficulty to corroborate their narrative of conspired aggression with the direct evidence, these documents were supposed to help trace the origins the Japanese militarism well beyond World War Two. This way, the prosecution was writing a highly distorted version of history that was to fulfill a mission of proving the guilt of the defendants, which many prosecutors felt strongly about.[131]

Nuremberg Charter crimes against humanity constituted a separate category of crime as it was created for German milieu where the Nazis committed crimes against their own population. Transposed by the way of the Charter to Tokyo, it proved inadequate for Japanese context and consequentially, it was merged together with conventional war crimes. Even though certain crimes presented by prosecutorial teams could have entered into category of crimes against humanity, the prosecution relegated them to serve as evidence to substantiate the main charge of crimes against peace.[132] More precisely, the documented atrocities were used to show patterns of atrocities and their similarity, which would indicate that they were part of a larger policy adopted and ordered at the top level. The crimes against populations in occupied lands such as, deportation and enslavement; murder, torture, rape, destruction of private property, and forced labor were only enumerated as to support the supreme crime of crime against peace.[133] The Chinese prosecution team documented the Rape of Nanking which took place in December 1937, but they mostly relied on affidavits. The interrogation of the defendants pointed at the impossibility of

[131] Sedgwick,"The Trial Within," 66.

[132] Babovic, "Japan's Share of Responsibility in World War Two through Legal Lenses: Selective and Exclusive Justice at IMTFE," 13.

133 Ibid., 93.

controlling little disciplined Japanese troops, which engaged in murder, rape, or looting, with support of field commanders. Negative criminality was introduced to compensate for the lack of the direct evidence about the Japanese leaders' knowledge regarding the atrocities.[134] The last two counts of the Indictment, fifty-three and fifty-five established individual criminal responsibility for direct participation in the common plan or conspiracy to "order, permit, or authorize"[135] the entire command chain, from ministers, commanders to local units, to commit atrocities against populations in occupied areas and negative criminality which established responsibility by omission or disregard of duty to prevent the atrocities.

5. Strategic "Forgetting": The Allied Powers' Crimes Obscured

"The record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it our lips as well…(a)nd let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here in judgement." [136]

The justice at Tokyo did not fulfill the quality of being universal as many crimes committed against the local population in former Japanese colonies and by the Allied powers against Japan were omitted from the Trial. The lack of political will, pragmatic aspects of organizing such trials, and larger goals to be attained by the IMTFE resulted in their omission from the Trial's version of history. It should be emphasized that the Trial had been staged by countries who still had colonies which meant that the needs of colonials did not rank high on their agenda. It would be odd to expect the victorious nations to prosecute their "crimes"

[134] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"93.

[135] Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgement*.

[136] Trial of Major War Criminals, Nuremberg, 51; 85 cited in Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, New York: Cambridge University Press, 2005, 197; 206.

committed against the defeated nations, but it is important to address them as they reflect the selective character of the international criminal justice. The fact that they did not earn their place in the Indictment resulted in the Allied Powers not carrying moral stigma, burden of which Japan and Germany have borne to this day.

The existence of sexual brothels and widespread practice of sexual enslavement was evidenced to be the composite part of Japan's war strategy in Southeast Asia as extensively documented by the Australian national office. Victims of sexual enslavement were from the countries not represented at the IMTFE bench or that were still looked upon as colonial subjects (China, Korea, Japan, Philippines, and Thailand). In practice the *ad hoc* international criminal tribunals tend to prosecute crimes committed against the civilians of the states the main powers behind the tribunal patronize. In 1945, the Allied Powers' governments gave clear instructions of what were the priorities for the war crimes program — to promptly and efficiently prove the charge of aggressive war against the Japanese leaders, all the rest was an extra. These atrocities were not prosecuted at IMTFE and later on, given the cold war realities they lost importance in the flurry of the Korean War during which new war crimes and crimes against humanity were committed, the issue was brushed off. Since the post-Cold War era, so the issue has been revived and it served as a powerful political and emotional issue for the Korean government to exploit in its diplomatic relations with Japan.

The knowledge about Unit 731 that carried out human experimentations for the purposes of the development of biological weapons was an open secret in the diplomatic, but also prosecutorial circles. The Unit was part of the Kwantung Army's Epidemic Prevention Section which operated in Central China and along the borders of Mongolia and the USSR under the lead of Colonel Lieutenant Ishii Shiro, also known as "the Ishii organization."[137] The military involved with Unit 731 were all acquitted because the US

[137] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"14-15.

army was eager to acquire their scientific and technological findings on this new kind of weapon which was object of the GHQ General Staff investigation. Daniel Sutton and Colonel Thomas Morrow, Keenan's assistant, travelled to Chinese cities of Shanghai, Chongqing, and Nanking to gather the indispensable evidence which proved to be a rather frustrating and unfruitful[138] endeavor as the local authorities proved to be uncooperative and persons who were in a position to give court testimony were scarce.[139] Both interrogators briefed Keenan on the findings on biological warfare in China in report and private exchanges. Morrow insisted on the importance of getting Ishii for an interrogation as it could demonstrate that Japan used prohibited means of warfare,[140] soon afterwards Morrow was appointed back to Washington. When Sutton presented the case of poisonous serum testing of Unit 1644 (Nanking-Tama Unit), Justice Webb was dismissive and it was decided that no additional evidence would be introduced.[141] The members of the Organization, including Ishii himself, were interrogated earlier in January 1945 by the GHQ General Staff, but they provided scarce information claiming that the experiments were conducted independently from the Imperial Japanese Army leaders or the Emperor. As they were promised immunity from prosecution in exchange for their finding, they at least all made sure to remain secretive about the level of authority which ordered and authorized the experimentations, but most of all to shield the Emperor from any connection with it.[142] It can be said that the investigation for the prosecutorial purposes was nominal in nature, as the higher military goal of gathering military intelligence, which would be an important addition to the US biological warfare program started in 1942, was prioritized at the outset. This is one of many

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[138] China Press, "Morrow Concludes China Tour, Gathered Evidence for the Trial," April 10, 1946, Section 14, Folder 60, MSS1, Virginia Historical Society. http://lib.law.virginia.edu._imtfe/content/item-1-china-press-april-10-1946 (accessed August 4, 2015)

[139] Sedgwick, "The Trial Within," 118.

[140] Babovic, "Justice on Trial: The Establishment of International Military Tribunal for the Far East (1945-1946),"79.

[141] Ibid.

[142] Keiichi Tsuneishi, "Reasons for the Failure to Prosecute Unit 731 and its Significance," in Yuki Tanaka, Tim McCormack, and Gerry Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011), 191.

examples where the morality and justice of the Allied Powers gave way to the temptations on the ground pertaining to exigency and politics.

Paradoxically, two weeks after the London Conference on the occasion of which the Allied Powers created a new law defining crime against peace, war crimes, and crimes of humanity, the US which assumed high moral lead in war used the pre-eminent weapon of mass destruction against Japan while the Soviet Union entered the war against Imperial Japan, in the moment its defeat had already been imminent, with motivation to obtain in just a few days maximum gains with applying minimal military effort. The use of atomic weapons by the US was "excused" by the need to bring an end to a protracted war in the Asia-Pacific theater and the fact that the explicit prohibition to use nuclear weapons in international law did not exist. On the one hand, Japan was as unlawful belligerent in the sense of the Kellogg-Briand Pact which virtually made it an outlaw, a non-beneficiary of *jus in bello* rights in the war, which in turn freed victim states of the obligation to observe *jus in bello* rights in war against Japan.[143] Thus unrestricted warfare was implicitly allowed for the purpose of taming the aggressor. On August 9, 1945, after the bomb was dropped on Nagasaki, the Japanese government sent one and only time a protest note to the US government evoking the unlawfulness of the indiscriminate weapons which caused *unnecessary suffering*[144] to the civilians, thus violating one of the fundamental principles of laws of war. The atomic bombs were not directed against military targets, but caused mass atrocities on a scale incomparable to any other atrocities in the Pacific theater. The note

[143] Sellars, *'Crimes against Peace' and International Law*, 178.

[144] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague October 18, 1907; in the Annex to the Convention, Article 23 (e) reads that it is forbidden "to employ arms, projectiles, or material calculated to cause unnecessary suffering." https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=61CDD9E446504870C12563CD00516768 (accessed on July 13, 2017)

made reference to prohibited weapons such as poisonous gas,[145] which Japan used in China, in comparison to which nuclear weapons were ultimately disproportional. The argument that the nuclear blasts would end the war were false, as the firebombing of Japanese cities continued well into the mid-August which caused severe material and human losses in Japan. In his opening speech at the IMTFE Prosecutor Keenan framed the atomic bombing in terms of just war theory "We admit that great force and violence, including the Hiroshima bomb, have been employed by the Allies, and we make no more apology for that that does a decent, innocent citizen [whose] family employ the use of force of prevent his life being taken by an outlaw."[146] Although Keenan took quite cold and optimistic outlook on the bombings, certain members of the IPS and judicial cohort were deeply disturbed by the judicial silence on it and the scale of devastation they witnessed once they arrived in Japan.

The reverberations Russo-Japanese had upon their relations were reflected in the extent mutual wariness and the long-felt desire by the Soviets to revenge their loss.[147] On April 13, 1941, the two nations concluded the Neutrality Pact that was to expire in April 1946. Despite the assurances, the Soviets gave to the Japanese that they would not harbor the Allied military troops on its soil, the 1944 Moscow Conference showed the Soviet mala fides in negotiating the Soviet entry into the war against Japan and the recuperations of its interest in Manchuria, in exchange for providing Siberian basis for the US, which was formalized in Yalta in February 1945.[148] The Soviets refused to mediate the end of the war between Japan and the Allied Powers and on August 9, 1945 Soviet troops invaded Manchuria. The UN

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[145] Yuki Tanaka, "The Atomic Bombing, The Tokyo Tribunal and the Shimoda Case: Lessons for the Anti-Nuclear Movements," in Yuki Tanaka, Tim McCormack and Gerry Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* 304-305.

[146] Opening Statement given by Joseph B. Keenan, the Chief of Counsel of the prosecution, before the Tribunal on Tuesday, June 4, 1946, Roy L. Morgan Papers, Box 3, University of Virginia Law Library, http://imtfe.law.virginia.edu/collections/morgan/3/4/prosecution-opening-statement (accessed November 2, 2014).

[147] William F. Nemo, *Behind a Curtain of Silence: Japanese in Soviet Custody, 1945-1956* (Westport: Greenwood Press, 1988), 7.

[148] Sellars, *'Crimes against Peace' and International Law*, 231.

Charter draft Article 103 disposes that in case previously concluded treaties and obligations are contrary to the object and purpose of the Charter, the latter should prevail. The Soviet entry was justified as the collective military effort against the aggressor under the Covenant.[149] The Soviet invasion into Manchuria was accompanied by indiscriminate commission of war crimes and crimes against humanity against the local population - Chinese, Koreans, Russians, and Japanese. The Soviets captured one and a half a million Japanese civilians and prisoners of war who were taken to Siberia and Central Asia where they suffered from cruelties inflicted upon them – exposed to Marxist-Leninist indoctrination, forced into hard labor, or imprisoned. These civilians and prisoners of war would constitute an objection of serious contention between Japan and the Soviet Union until 1956 which will be observed in later chapters.

6. The Emperor Hirohito as the Japanese Kaiser and Selection of the IMTFE Defendants

"Without historical context, individual criminal acts do not appear to make sense."[150]

The Emperor was the only constant in the erratic cabinet changes during the war, with leaders who did not share the same policies and views. Despite the initial SWNCC directive of October 27, 1945 which read that "Hirohito was not immune from arrest, trial, and punishment as a war criminal."[151] On January 24, 1946 MacArthur warned that the Emperor was the instrument for effective governing of Japanese people, that his removal threatened popular upheaval which would call for not only more troops to keep the order, but also

[149] Boris Trainin, Russian legal scholar, whose work infused the legal philosophy of Justice Jackson, author of *Hitlerite responsibility under international law* explained the Soviet view on the aggression by making distinction between just and unjust war. Wars of liberation fit the category of collective self-defense in terms of assistance to the state prejudiced by the aggressor

[150] Richard Ashby Wilson, *Writing History in International Criminal Trials*, 2011, 70.

[151] War Department to SWNCC, "Apprehension and Punishment of War Criminals in the Far East," Memorandum, September 29, 1945 in Makoto Iokibe, ed., *The Occupation of Japan*, Part 2: US and Allied Policy, 1945-1952, microfiche, 2-A-105.

setting civil service members as they might lose support of Japanese officials. This, he contended, would be not only costly, but might halt the democratic reforms and give way to Communist ideas, which desperate masses would be receptive of. On June 18, 1946, Chief Prosecutor Keenan announced that the Emperor would not be tried and instructed his staff to fabricate a story and find evidence indicating his passive in the decision-making to which he was coerced by the pre-made Cabinet decisions. However, this was not consistent with the conspiracy charge which disposed that as long as the defendant did not withdraw from the position of power covering the seventeen-year period, he was considered guilty. The non-prosecution of the Emperor relieved the Japanese, but at the same time "it sent out ambiguous messages to the Japanese understanding of war responsibility, indicating paradoxically that it rested with both everybody and nobody."[152]

The IPS was pressured to select thirty defendants from fifty Class A suspects faced with lack of evidence in case of which they used all sorts of documents to establish some sort of evidence. The US intelligence reports, studies on Japanese history, militarism, politics, secret and industrial societies, diaries, hearsay evidence would be all admissible. Slow and inefficient work under Keenan prompted Comyns-Carr to organize Executive Committee which would select the defendants by a majority vote of associate prosecutors. The war criminal suspects' files were in competition which further rendered the process painful, but the new criteria was based on how representative the individuals were of the key phases of aggression, their membership in the key agencies in Imperial government, and the degree of their cooperation with the IPS. Some defendants were discretionary included at the special request of the allies. For example, Yoshijiro Umezu, Kwantung army commander and Mamoru Shigetmitsu, US diplomat to USSR, were included at the USSR request and Kenji Doihara, although the evidence was lacking, was added with promise of the Chinese

[152] Gerry Simpson, "International Criminal Justice and the Past," in Gideon Boas, William A. Schabas, and Michael P. Scharf, eds., *International Criminal Justice: Legitimacy and Coherence* (Cheltenham: Edward Elgar Publishing, 2012), 137.

prosecution team that it would provide it at later date. without having enough evidence against them, but promising they would provide them, which had never happened.

A great number of civilian and military leaders (listed as military officers of high and low rank, members of ultra-nationalistic organizations, members of Imperial Rule Assistance Association, and industrial conglomerates who gave their support to the war effort were considered to be detrimental to the process of democratization and were removed from the public office by SCAP directives in January 1946.

CHAPTER 2: Road Towards the San Francisco Peace Treaty: Fate of the War Crimes Program and Japanese War Criminals

1. Dissipating Legal Narratives of the Class A War Criminal Guilt: The IMTFE Judgement

The IMTFE project was designed to provide for legislation that would maintain peace in the newly created international order, make historical record, and administer retribution for Japanese misdeeds. The IMTFE judgement or its majority judgement represents the dominant legal, political, and philosophical thought of the judicial body that was mainly driven by Anglo-American forces which was uncompromisingly committed to pragmatism in the context of the postwar expediency. Yet, the dissenting opinions by the minority group not only challenged legal, political, and historical record provided by the judgement but also opened the door to a more ambiguous and fragmented views of Japanese aggression and war responsibility.

After two years, on February 10, 1948 the IMTFE brought its hearings to a close. After that, in the period from November 9 to 12, 1948 the Tribunal read the majority judgement and sentences. Contrary to the initial post-surrender political context of urgency and high expectations put on the Tribunal to expediently deliver its judgement, "the prosecution, judges, and defendants enjoyed the luxury of time."[1] The IMTFE President, Justice Webb said that the judgement was not reached unanimously by the eleven-member tribunal, but that Justice Pal dissented from the majority opinion, while Justices Röling and Bernard dissented in part, and Justice Jaranilla and Webb lodged their separate opinions, although they concurred with the majority judgement.[2] The dissents and separate opinions were not

[1] Sandra Wilson, *Japanese War Criminals: The Pursuit of Justice After Second World War* (New York: Columbia University Press) 2017, 84.

[2] Neil Boister and Robert Cryer, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgements* (Oxford: Oxford University Press: 2008), 626.

read in the courtroom, but the President promised that they would be incorporated in the official trial record.

The majority judgement represented the IMTFE's dominant or intended version of history, almost entirely produced by the prosecution's indictment. The international criminal tribunals tend to make certain choices in producing history, they tend to favor linear, over-determined narratives infused the view of Great Powers or sponsoring states– they produce "hegemonic history;"[3] as opposed to a more fragmented and ambiguous historical narrative that offers a deeper understanding of forces behind the events. Justice Pal's dissenting opinion is instrumental in offering another, contested view of events, framed through the lenses of anti-imperialism. In that sense, the IMTFE trial record harbored not only the victors' side of the story, but also the alternative versions of the Pacific War, and Japanese leaders' responsibility for it. The IMTFE judgement, representing a sum of big and lesser chunks of the legal and historical narrative—a fragmented view—provided the Japanese government and people, especially those leaning to the right-wing and with revisionist tendencies, with legal opinion to capitalize upon in their rebuttals of the legality of the Trials, the aggressive war, and the war responsibility. Pal's dissenting opinion remains a dissenting opinion indeed, standing aside from the majority verdict, yet it has gained authority in framing the legal and historical debate on war responsibility. In Japan, it is referred to as *Pāru hanketsushō* or Pal's judgement[4], instead of dissenting opinion. His dissenting opinion has been distorted to refute not only the responsibility of Japanese leaders for waging aggressive war, but the Japanese nation more generally. Justice Pal was respected judge at the Calcutta High Court, interestingly without delivering a single dissenting opinion in his practice, and well-versed in Hindi and Anglo-Saxon law. Prior to

[3] Gerry Simpson, "International Criminal Justice and the Past," 140-141 in Gideon Boas, William A. Schabas, and Michael P. Scharf, eds., *International Criminal Justice: Legitimacy and Coherence* (Northampton: Massachusetts, 2012).

[4] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2008), 233.

his appointment to the Tokyo Tribunal, Pal did not have any background in international law; his international judicial career started in 1952 with his appointment to UN International Law Commission.[5] Since he joined the tribunal, he did not hide his inclination towards dissent. When his dissenting opinion went public, it caused indignation to Jawaharlal Nehru, Indian prime minister, who did not want to side with it as it did not reflect the opinion of the government of which he informed the interested counties.[6]

His dissenting opinion is relevant on few points. First, he criticized the crime of aggression and crimes against humanity as instances of *ex-post facto*[7] *law* he considered would rather encourage aggression in the future than prevent it and secure peace. It can be argued that his point has been valid as law did not succeed in preventing wars in the post-World War Two period—the concept of self-defense has been constantly stretched to justify instances of use of force—wars in Iraq and Afghanistan are cases in point. Second, his overly expansive view of self-defense comes as a contradiction to the previous point as he contended that states had arbitrary right to decide on the circumstances under which they could exercise their right to self-defense as long as such decision was animated by a genuine belief or *bona fide*.[8] In his view, this entailed that valid justifications for triggering right to self-defense, even proactively, could be "inhospitable international environment,"[9]economic, political, ideological threats.[10] Under his premises, Japanese invasion of Manchuria was not an instance of aggression, but self-defense due to the spread of communism, boycott of Japanese goods, harsh sanctions the US and Britain imposed upon Japan, their support for

[5] Yuma Totani, "Japanese Receptions of Separate Opinions at the Tokyo Trial," The Council on East Asian Studies, Yale, April 7, 2015, 17.

[6] Totani, *The Tokyo War Crimes Trial*, 223.

[7] John Pritchard, ed. *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 105 (New York: Edwin Mellen Press, 1998), 35-73.

[8] Pritchard, *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 106, 473.

[9] Totani, *The Tokyo War Crimes Trial*, 219.

[10] Ibid.

Chiang Kai-shek which befall within ideological and economic motives;[11] although he did not imply that Japan was under a threat of imminent attack. As noted earlier, this was the view of many states that lodged their reservations to the Kellogg-Briand Pact. Third, he partially refuted the Yamashita standard or command responsibility doctrine of military commanders on the grounds of negligence or omission for the actions of troops on the field, he rather considered that the liability stem from acts that superior "could reasonably have prevented."[12] The leaders, including the Japanese leaders, could not have been responsible for acts committed by lower military ranks and their superiors upon which the stern justice had already been meted out by the Allies' under Class BC crimes. Hence, he refuted counts of war crimes on which the defendants were accused. Furthermore, Pal refuted the concept of conspiracy as non-existent category of crime in international law. Japan's decision to attack the US, according to the evidence adduced, was a part of an overall conspiracy, but political decision following the diplomatic negations and the receipt of Hull note which as he says "cornered Japan."[13] The Pal's convoluted dissent was profoundly anti-Western and anti-imperialist in his proposals as he assigned the guilt for "Japan's aggression" in Manchuria to the colonial practices of the Western Powers, which it was trying to mimic, and whose policies propelled Japan to defend itself which was consistent with international practices at the time, alluding to the long-time practiced Western imperialism. In this respect, Pal's view somewhat deviates from legalistic and flows into political discussion that goes along the reasoning of classical realism.[14] According to Pal, the Allied Powers were protective of their interests in narrowest of terms, they cemented the current state of

[11] John Pritchard, ed. *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 105, 123-131.

[12] Pritchard, *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 108, 1111.

[13] Pritchard, *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 108, 1038-1039.

[14] Yoshinobu Higurashi, *Tōkyō saiban* (Kodansha: Tokyo, 2008), 272.

international affairs thus taking away the possibility of "have-nots" states to alter dissatisfying conditions for the sake of peace, referring to colonies.[15]

Pal thought the Allies' motives for creating the new charge were highly suspect– especially considering their own history of violence towards the non-Western nations. Instead of promoting universal values, these nations were perhaps deploying it to serve their own narrow interests, such as maintaining the status quo– "the very status quo," he noted, "which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders."[16] He drew particular attention to the American chief prosecutor Robert Jackson's statement at Nuremberg that "whatever grievances a nation may have, however objectionable it finds the status quo, aggressive war is an illegal means for settling those grievances of for altering those conditions."[17] To Pal this amounted to "the paralysis of international affairs, and by implication the criminalization of the struggle against colonialism,"[18] which he considered unsustainable as colonies "cannot be made to submit to eternal domination only in the name of peace"[19]

Pal's 1,235 pages long dissent, against 1,444 pages long majority opinion, meshed his anti-colonial bias with some sound legal conclusions which reflected legal philosophy of positivism in opposition with natural law legalism that dominated the majority IMTFE members. His conclusions were not that Japanese leaders were morally or politically innocent, but innocent from the point of view of international law in force at the time of its establishment. Equally, Japanese atrocities, "devilish and fiendish,"[20] were not refuted, but the evidence adduced was judged as non-probative. It can be concluded that Pal's dissent, primarily directed against the European Powers which pioneered colonialism, somewhat

[15] Kirsten Sellars, *'Crime Against Peace" and International Law* (Cambridge: Cambridge University Press, 2015), 235.

[16] Sellars, *'Crime Against Peace" and International Law*, 237.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Pritchard, *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 106, 609.

toned down Japan's expansion, although it did imply that it shared the moral responsibility for colonialism, but not a criminal one.[21]

On the other hand, French Justice Bernard and the Dutch Justice Röling who lodged their partial dissent to the majority judgement did not side with Pal on colonial remarks as they "accepted the assumptions of European superiority engendered by colonial rule."[22] French Justice was a colonial magistrate and his appointment was motivated by the cautiousness of the French government to control the information regarding French atrocities in Indochina from appearing before the Tribunal— it was important to "rectify their image to appear more worthy of the era that came to its end."[23] While Justice Bernard was more sensitive to procedural and probative rules,[24] in his dissent he agreed to the legality of crime against peace, but on entirely different legal grounds than the majority judgement group.[25] Justice Röling's dissented from the finding that the interwar pacts and resolutions, specifically Pact of Paris outlawed war in the sense that waging illegal war was criminal for which he considered that judges were not obliged to follow the Charter if its provisions were contrary to international law.[26] As Justice Pal did, he criticized the *ex post facto* law adopted at London Conference. He did consider that wars ought to be prevented in the future by taking incremental legal steps "based on appropriate and reasoned foundations and progressively codified precedents."[27] Another important point, later found in the separate opinion of Justice Webb was the immunity of the Emperor whom he considered to be the main instigator of the Pacific War while the defendants at the dock

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[21] Pritchard, *The Tokyo Major War Crimes Trial: With an Authoritative Commentary and Comprehensive Guide*, Vol 106, 483.

[22] James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948," (PhD diss., University of British Columbia, 2012), 259. https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0072876 (accessed November 14, 2017)

[23] Esmein, "Le juge Henry Bernard au Procès de Tokyo," *Vingtième Siècle* 59 (Juliet – Septembre 1998): 4.

[24] Sedgwick," The Trial Within," 211.

[25] Totani, "Japanese Receptions of Separate Opinions at the Tokyo Trial," 21.

[26] Ibid., 210.

[27] Ibid.

were his subordinates.[28] The three dissenters remained unswayed in their formalism, personal convictions, and ideologies and had to cohabite with the majority group which was more pragmatic in that its judges with preference for positivism completely acquiesced to the natural law-infused indictment prepared by the prosecution.[29]

The majority judgement cohort of justices came to Tokyo imbued with deep sense of pragmatism, postwar urgency, and conviction that the IMTFE had an important role to play not only in exercising retribution against the Japanese, but also for the future, by confirming the new law. It could have been expected that in the last institutional stages of IMTFE, the floor would be given to the impartial justices, yet this was another group of legalists with the sense for pragmatism. British Justice Patrick dogmatically assented to the idea that "the only reason for setting up this portentous institution [the Tokyo Tribunal] was to declare that war was a crime and that individuals could be held responsible for it."[30] The bench's "triumvirate"[31] represented by British Justice Patrick, US Justice Cramer, and New Zealand Justice Northcroft were the pragmatists who tried to reconcile the discrepancies between legal philosophies and commitments to justice as they considered the IMTFE as a valuable project which merited transcending the differences for the sake of punishment in the context of postwar exigency. The Commonwealth faction railed against the justices who questioned or disagreed with the legality of the Charter who "should have declined to accept office under it."[32] Justice Northcrofth was anxious that the divisions of the bench would be the setback for the outlawry of war, but that "the sharp dissent from Nuremberg must be disastrous."[33] Justice Bernard from dissenting faction refuted such views in an unblushing manner. For him, the role of judge was to examine the law of the Charter with right to refuse

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[28] Higurashi, *Tōkyō saiban*, 267.
[29] Ibid., 208.
[30] Sellars, *'Crime Against Peace" and International Law*, 235.
[31] Sedgwick," The Trial Within," 208.
[32] Justice Northcroft's words, March 18, 1947 cited in Sellars, *'Crime Against Peace" and International Law*, 235.
[33] Ibid.

to apply it in case of disagreement with it.[34] The IMTFE President Justice Webb was notorious for its arrogance, inflexibility, and authoritarian behavior towards other justices as he believed that he ought to be the one to write the majority judgement while others were supposed to agree or disagree with him. Even in his interactions with Supreme Commander, Webb was very protective of the judicial body from outside incursions; he insisted that the judges should be left to act independently in their interpretation of the Charter or any other activity pertaining to their duties.[35] Besides bad temper, Justice Webb's previous post of the President of Australian War Crimes Commission in 1943 was problematic in respect to integrity and impartiality. The Commission, set up to investigate Japanese war crimes in New Guinea, Burma, and Thailand, produced numerous reports he had authored which certainly gave him solid pre-conceptions on Japanese leaders' war guilt. In his short separate opinion, he stressed that as the Tribunal failed to prosecute the Emperor who was the main responsible for waging aggressive war, the sentences of other defendants could possibly be reduced.[36] Other members of the Tribunal did not question this as, despite not being directly involved in similar activities, they came with strong personal convictions of the Japanese guilt and mission to advance international law.[37] Philippine Justice Jaranilla was survivor of Bataan Death March and prisoner of war in Japanese hands. In his separate opinion, he lamented the leniency of the sentences which were disproportional to the gravity of the crimes committed thus marring the deterrent effect of the IMTFE project.[38] Soviet Justice Zaryanov was a member of the USSR Supreme Court and had a poor conduct of English despite which he managed to become quite engaged in the work of the Bench, contrary to

[34] Sellars, *'Crime Against Peace" and International Law*, 235.

[35] Nortcroft to Nash, March 5, 1946 in Robin Kay, ed., *Documents on New Zealand External Relations Volume II: The Surrender and Occupation of Japan* (Wellington: Historical Publications Branch Department of Internal Affairs, 1982), 1531.

[36] Higurashi, *Tōkyō saiban*, 267.

[37] Sedgwick, "The Trial Within," 232.

[38] Sedgwick, "The Trial Within," 203.

the dominant views in the literature,[39] by being committed to the IMTFE objectives and exercising a great degree of flexibility. Given the Cold War tensions, ironically, "he proved instrumental in cementing the majority in Tokyo."[40] The fact that the majority judgement sentenced seven IMTFE defendants to death by hanging has been often invoked as one of the manifestations of victors' justice at Tokyo. And yet, not all of the judges were in favor of gallows out of fear it might be seen as vindictive. American Justice Cramer unwaveringly defended the idea that punishing criminals by death following the law was "a matter of justice, plain and simple."[41]

The judicial process was primarily led by Anglo-American jurists who were prepared to exercise a strong sense of pragmatism and commitment to the IMTFE project which was based on natural law legal tradition. These individuals performed a role of "jurist-politicians" as they were involved in matters not only pertaining to international law, but also international politics. The case of British who were ready to disregard the impartiality of the judicial body, in order to avoid ridicule for failing to prosecute Japanese militarism or meet the prestige of Nuremberg is exemplary on the point. The knowledge that other judges were questioning the law of the Charter was unsettling to Alvary Gascoigne, British political representative to Tokyo, who was ready to go as far as to appeal to MacArthur and Webb for help. In the end, Justice Patrick discouraged him to the effect that if would be inappropriate to expose differences between the judges publicly, and took initiative upon himself "to try to convert his colleagues to the vital necessity of their pronouncing judgment on the basis of the Nuremberg findings."[42] Although, they exercised a considerable degree of independence, justices went along the lines of ideas forged by the lawyer-statesmen.

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[39] Ibid.," 199-201.
[40] Ibid.
[41] Ibid., 207.
[42] Sellars, *'Crime Against Peace" and International Law*, 235.

2. The Internationality of the IMTFE Questioned: Mercy Denied to the Class A War Criminals

The scope of the present research extends beyond the judgement but before it delves into the changing geopolitical aspects which transformed the fate and stance of the IMTFE convicts, it is important to look at two occasions on which their sentences could have been reduced.

The majority judgement sentenced seven defendants (Kenji Doihara, Hirota Kōki, Seishirō Itagaki, Heitarō Kimura, Matsui Iwane, Akira Mutō, Hideki Tōjō) to death sentence by hanging, Shigenori Tōgō received 20-year sentence, only Mamoru Shigemitsu received 7-year sentence, while the rest of the defendants were convicted to life in confinement. In their separate opinions, four justices expressed their opinion that the sentences should have been more lenient. Justice Pal found all defendants non-guilty, Justice Röling agreed to the death sentences of all defendants, except for Kōki Hirota who was opposed to the aggression and personally negotiated the cessation of atrocities with War Minister Hajime Sugiyama; instead of him, he recommended Shimada who had violated laws of war, while Shunroku Hata, Hirota, Kidō, Shigemitsu, Tōgō should all have been acquitted as their guilt had not been proven.[43] President Webb considered death sentences to be a harsh punishment in view that "the main leader" in crime, the Emperor, had been granted immunity and suggested commutation from death sentences to life imprisonment. Webb observed that they were old and no longer impressive and that "it may prove revolting to hang or shoot such old men."[44] Justice Bernard found them all not guilty due to the defective procedure, not because he believed that crime of aggression was not criminally punishable.[45]

The Tribunal did not have an appellate body, but the IMTFE Charter, unilaterally proclaimed by MacArthur did contain a provision, Article 17, according to which the

[43] Higurashi, *Tōkyō saiban*, 266.
[44] Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), 162.
[45] Ibid., 163.

Supreme Commander for the Allied Powers had the authority "to review or otherwise alter sentence except to increase severity." Later, however, FEC adopted policy directive, emanated from British and Australian delegation, which was meant to amend the IMTFE Charter, more precisely to limit the Supreme Commander's discretion in altering judgement and sentences by imposing obligation to consult with members of Allied Council for Japan (ACJ)[46] or representatives of other powers in Japan prior to adopting any such decision.[47] The idea behind was to keep MacArthur's authority preponderance in check by "intergovernmental agreement on part of powers concerned."[48] The final version of the amended IMTFE Charter of April 26, 1946 did not translate FEC amendments regarding the judgement and sentences alteration, leaving its Article 17 intact. Aside from judges' opinion regarding the review of the sentences, the IMTFE defense counsels appealed to MacArthur to exercise his authority of judicial review urging that "we must not ourselves be guilty of atrocities against the law and justice."[49] Beverley Coleman, defense counsel who resigned in mid-1946, personally pleaded that MacArthur should consider the possibility of consulting the United Nations International Court of Justice which could provide an advisory opinion on the criminality of aggressive war prior to committing any injustices regarding the sentencing of the defendants.[50] Three days after the petitions were filed, the Allied Council for Japan hurriedly set the meeting between MacArthur and diplomats from the countries represented at IMTFE. Diplomats' positions reflected legal positions of their justices–France, proposing clemency, India proposing commutation of death sentences, while Australia left it

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[46] The Allied Coucil for Japan (ACJ) was established in Tokyo to allow the US, Britain, the Soviet Union, and China to consult the Supreme Commander, however devoid of any decisive power and with meetings scheduled for every two weeks.

[47] FEC 007/7, "The Trial of Japanese War Criminals," April 26, 1946 in Makoto Iokibe, ed., *Occupation of Japan: Planning Documents, 1942-1945* (Tokyo: Maruzen), microfiche, 4-A-3.

[48] Sedgwick, "The Trial Within," 282.

[49] Minear, *Victors' Justice: The Tokyo War Crimes Trial*, 161.

[50] FEC, Letter from Beverly M. Coleman to General Douglas MacArthur, November 11, 1948 in RG 43, General Records, March 1946-1949, Box 1.

to the discretion of the Supreme Commander.[51] In his pompous speech MacArthur decided to keep his deferential stance towards the judicial work and decided to uphold all the sentences. Although he did not believe in criminal punishments for war of aggression, he had probably decided to maintain the sentences given the postwar idealism and sentiment that authors of aggressive wars should be sacrificed for a better world.[52]

Before the seven defendants were sent to gallows, they appealed before the US Supreme Court for a writ of habeas corpus. The idea was instigated by the defense counsel which claimed the IMTFE to be "a creation and enterprise of the Executive of the United State and the military authorities thereunder."[53] By defying the international character to the IMTFE and bypassing the SCAP, the action on behalf of the IMTFE defendants provoked responses from the nations represented at the Tribunal which came to justify and save its "international" appeal. When the case got before the Supreme Court, its justices were evenly divided between a group of four who believed that the Japanese war criminals should get their case heard, and another group of four who believed that the Court had no jurisdiction based on the Constitution to decide on the matter. Justice Robert Jackson, former Chief Prosecutor at Nuremberg, decided to cast a tie-breaking vote in favor of the Court deciding whether it could hear the case.[54] On December 20, 1948, the Supreme Court decision refuted its jurisdiction to "review, affirm, set aside, or annul" the IMTFE judgement and sentences imposed upon Japanese citizens.[55] Justice William O. Douglas who was in the group that refused the petitioners to file for a writ observed that this new type of military tribunals was out of judicial scrutiny, leaving them with an absolute power, while the prisoners did not benefit from the right of appeal for which they had to appeal to the mercy of the executive.[56]

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[51] Minear, *Victors' Justice: The Tokyo War Crimes Trial*, 160-161.

[52] Ibid., 168-169.

[53] FEC, Minutes, Committee No. 5, War Criminals, Minutes, 13th Meeting, December 10, 1948 in RG 43, General Records, March 1946-1949, Box 1.

[54] Minear, *Victors' Justice: The Tokyo War Crimes Trial*, 170.

[55] Ibid.

[56] Ibid.

Justice Douglas observed that the Tokyo Tribunal is not a judicial, but political question, describing the Tokyo Tribunal as instrument of military power of the executive.[57] The Supreme Court episode touched upon the extent delicacy and ambiguity surrounding the question whether the Tokyo Tribunal was an American tribunal or international tribunal given its unilateral proclamation by MacArthur which the defense counsel saw as a loophole to be exploited in order to change the sort of the IMTFE defendants. However, the IMTFE was rooted in international instruments such as the Cairo Declaration of December 1, 1943, the Potsdam Declaration of July 26, 1945, the Instrument of Surrender of September 2, 1945, and the Moscow Declaration of December 26, 1945.[58] The Tribunal practically gained its "internationality" with the power granted to Far Eastern Commission to adopt policy resolutions, although of an arguable reach, were to be transmitted through State-War-Navy Coordinating Council (SNWCC) to SCAP, and with the arrival of other countries' prosecutors, judges, defenses who will try to challenge the US leading role. The refusal by the Supreme Court to sit in judgement on the IMTFE case was a show of awareness that such an interference would play havoc with the Allied war criminal program in Far East. Notwithstanding its international character, "the chain of command from the US government to SCAP was unbroken," held the Court. In this way, the Supreme Court affirmed that there was "no serious doubt […] that the tribunal is dominated by American influence."[59] MacArthur's decision to suspend the execution of sentences waiting for the decision, after he had initially decided to uphold the sentences, further exacerbated the issue of American dominance in the IMTFE.

The participation of the Allies' countries, other that the US, to the IMTFE was adding to their prestige and power which the US unilateralism sometimes tended to jeopardize, but

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[57] Ibid., 171.
[58] Sedgwick, "The Trial Within," 280.
[59] US Supreme Court, *Hirota v. MacArthur*, 338 US 197 (1948), https://supreme.justia.com/cases/federal/us/338/197/case.html (accessed on September 20, 2017)

for which they were ready to unite and assert throughout all stages of the IMTFE. The Commonwealth countries, in particular New Zealand, framed the defendants' appeal to the US Supreme Court as a "threat" to all the countries represented at the IMTFE.[60] The British were more confident in dealing with this unpleasant matter—although the Supreme Court affair might be observed as a result of the unilateral proclamation of the IMTFE Charter by the SCAP, the Supreme Commander was embodying the medium to carry out the decisions on behalf of the Allied Powers enshrined in international instruments establishing the Tribunal. Douglas MacArthur was not an American in Japan, but the "embodiment of the Allied cooperation,"[61] concluded the British. The Russians were angry at MacArthur's decision to suspend the execution of sentence and wait for the Court's decision on the admissibility of the case which amounted to violation of the US commitments pursuant to the Potsdam Declaration and the IMTFE Charter.[62]

With MacArthur's order given to the US Eight Army to execute the seven Class A war criminals, the window of opportunity to rectify and balance out the majority judgement's sentences which represented the views of six judges out of eleven came to a closure. MacArthur reluctantly used his prerogative to make sure that the IMTFE project, already endangered not only by the time factor, but also by internal workings of its members who were not always ready to bend their legal, ideological, and political convictions. In 1949, the US diplomacy regarding the international criminal program slowly started to shift its focus to the urgencies dictated by the tumultuous geopolitical environment in the Far East. Japan started emerging as a valuable ally and consequentially the US diplomacy would, nominally, be committed to the goal of clearing the war criminals' issue. And yet, once more dominated by institutional cleavages and dilemmas regarding the politico-legal character of the war

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[60] Sedgwick, "The Trial Within ," 281.
[61] Ibid., 280.
[62] Ibid.; 282-283; FEC, Minutes, Committee No. 5, War Criminals, Minutes, 13th Meeting, December 10, 1948 in RG 43, General Records, March 1946-1949, Box 1.

criminal program in the Far East, it would have to compromise with directly interested Allies some of which, in the meanwhile, became the enemies.

3. The Class A War Criminal Suspects and Subsequent Tokyo Trials

On January 8, 1948, the US started the Trial of Ministries Case in West Germany which is specific for its prosecution of diplomats, bureaucratic leaders, and fifth-columnists on counts of crimes against peace. It was the first time since the IMT rendered its judgement on October 1, 1946 that the national court took the task up to prosecute individuals for crimes against peace. More importantly, given the changing diplomatic and geopolitical outlook, it was the last chance to get prosecutions for "the supreme crime." The judgment rendered in the Ministries case, which almost coincided with the IMTFE judgement, was handed down on October 7, 1948 convicting five individuals for crime against peace.[63] Telford Taylor, former Chief Counsel at IMT, commended the reached consistency in judgement observing that "the judgement is more important than those which ended nearly four years ago […] it proves that we still mean in 1949 what we meant in 1945."[64] After that date, the question of the Class A war criminal suspects who had been held in confinement for almost three years without a trial became a pressing issue, although there had been some preliminary discussions in various venues.

Already in 1947, Keenan urged his American team to prepare files on the fifty Class A war criminals still in confinement in which British prosecutors also took part, somewhat hesitantly, as they did not want to support the policies of protracted detention without a trial. In September 1947 about a half of that number was released. At this time, Britain also voiced its intention not to take part in any subsequent international criminal tribunals in the Far East and anticipated that the US would take similar position. FEC older policy decision

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[63] Peter Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2001, 163.
[64] Ibid.

FEC 007/3 required that the individuals suspected of crime against peace were supposed to be prosecuted by an international tribunal which pointed at the need of amending the said policy decision. The revision entailed putting the amendment before the FEC which would give space to the USSR delegate to oppose it and uncompromisingly call for international trials which both British and Americans thought was to be avoided at any cost.[65] Alternative explored was to place some of the Class A war criminals for trials under the BC class war criminals which was one of the programs under the jurisdiction of Alva Carpenter, Chief of GHQ Legal Section.[66]

In March 1948, Chief Prosecutor Keenan appeared before the FEC recommending the release of the Class A war criminal suspects where he touched upon the purpose of the IMTFE, political and financial aspects against subsequent trials, and the general unwillingness of the IMTFE members to sit for another round of international trials. The war crimes trials program was funded by the Department of Army that was faced with considerable financial restrictions.[67] The IMTFE project was time consuming, costly, and required immense effort due to difficulty of finding probative evidence, obtaining cooperation from the parties involved, and the need to study massive number of documents.[68] In case the FEC governments wanted to organize subsequent international trials, they would have to organize them independently, appoint a new prosecutor and panel of judges which might result in lack of uniformity with the IMTFE. In short, Keenan strongly advocated the closure of the institutional basis for the prosecution of the Class A war criminal suspects, to the effect that the IMTFE prosecution had been exemplary.[69] The

[65] Memorandum of Conversation, by Miss Katherine B. Fite of the Office of the Legal Advisor (Fahy), Washington, August 6, 1947 in FRUS, *Far East,* Volume VI (Washington: US Government Printing Office, 1972), 279-280.

[66] Ibid.

[67] Awaya Kentarō, "Selecting Defendants at the Tokyo Trial," in Yuki Tanaka, Tim McCormack, and Gerry Simpson, eds., *Beyond Victors' Justice: The Tokyo War Crimes Trials Revisited* (Martinus Leiden: Nijhoff, 2011), 57.

[68] FEC, Transcript of Minutes, Committee No. 5, War Criminals, Minutes, 9th Meeting, March 31, 1948 in RG 43, General Records, March 1946-1949, Box 1.

[69] Ibid.

chief prosecutors' stance ought to be placed in a broader context of shifting policies which moved from their emphasize on occupation and punishment to democratization and conclusion of a peace treaty. In 1948, Washington decided to bring halt to harsh occupation policies imposed by GHQ, including the protracted IMTFE trials which, in precarious economic and political conditions in Japan, threatened to turn public opinion against the Allies which could potentially represent a fertile ground for the Communist cause.[70] George F. Kennan, Director of Policy Planning Staff, repudiated the IMTFE trials as "the hocus-pocus of a judicial procedure," completely inadequate form of punishment that should have taken "place as an act of war, not justice."[71] In other words, it would have been more efficient and effective to have shot the captured Japanese leaders than to organize political trials, well suited for historians and international politicians, not lawyers which rather endangered the US image and have nothing to do with domestic legalism. Kennan believed that the trials lost the attention of the public opinion which started to observe the defendants as victims enduring "humiliating ordeals."[72]

In October, 1948 the New Zealand delegation proposed FEC 314 which would constitute a basic document open for discussion to other members with the main goal of releasing the Class A war criminal suspects under investigation for crime against peace category and setting the target date of June 30, 1949 for the cessation of war criminal trials for all classes of war criminals.[73] While the released Class A war suspects would be able to engage in public life, resume office, and have their property restored, their eventual trial for lesser crimes would not be precluded.[74] The document was proposed in view that the two years were sufficient to fulfill general goals of the trial and punish a representative number of

[70] "Explanatory Notes by Mr. George F. Keenan," March 25, 1948 in FRUS, 1948. The Far East and Australasia, 1948, 717-719.

[71] Ibid.

[72] Ibid.

[73] FEC, Minutes, Committee No. 5, War Criminals, Minutes, 10th Meeting, October 11, 1948 in RG 43, General Records, March 1946-1949, Box 1.

[74] Ibid.

individuals in both classes,[75] after which "justice would take its natural course."[76] This raised few objections among the FEC members as they considered that the target dates outside of Japan would scrutinize the pace of investigations and prosecutions of national courts which would be stigmatized for eventual delays. For example, Australian government, in particular worried about its capacity to meet the target date. The representatives of the Netherlands and Philippines worried that rushing to terminate the trials would give impression to their public opinion, still inflamed over Japanese aggression, that the war criminals would escape the punishment.[77] The Chinese proposed that FEC 314 should take form of recommendation as it would imply that the member states have a moral obligation to terminate their trials by the target date whereas in case of policy decision, a dissent or abstinence from it, would imply no obligation at all.[78]

In December 1948, the SCAP released seventeen Class A war criminal suspects upon the recommendation received from the IPS in accordance with FEC 007/3. Among the released were Kishi Nobusuke, Minister of Commerce and Kisaburo Ando, Minister of Home Affairs, both serving in the Tōjō cabinet. In 1950, the Soviets urged the US Secretary of State Dean Acheson to organize new international trials which would try the Emperor Hirohito and high military ranks for the most serious crimes against humanity. Khabarovsk trials that were held on December, 25-30, 1949 by the USSR to try twelve Japanese military and physicians on counts of preparing and using bacteriological weapons in pursuing their aggressive war against the Soviet Union, in particular Nomohan Incident in 1939, and China. These trials were meant to correct the IMTFE trials,[79] in which the Soviets exercised limited influence, for not developing strong case for crime against peace against the USSR, non-

[75] Ibid.

[76] FEC, Transcript of Minutes, FEC, 146th Meeting, March 31, 1949 in RG 43, General Records, March 1946-1949, Box 1.

[77] Ibid.

[78] Ibid.

[79] Valentyna Polunina, "From Tokyo to Khabarovsk: Soviet War Crimes Trials in Asia as Cold War Battlefields." In Kerstin von Lingen, eds., *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956* (London: Palgrave Macmillan, 2016).

prosecution of the Emperor, and biological warfare. The Soviet justice served as a supportive platform for its Cold War diplomacy by using propaganda and geopolitics.[80]

4. SCAP Parole System and War Criminal Policies

Before the occupation ended, the SCAP Legal Section established the SCAP Clemency System by means of Circular No. 5 based on the US Federal system on March 7, 1950. Prisoners were able to earn "good time" credit for observing prison rules and regulations and pre-trial detention credit, thus allowing them to reduce their sentences and become eligible for parole, after serving one third of the sentence or fifteen years in case of life sentence and sentence exceeding forty-five years. This mechanism will serve as a model for clemency and parole system established in post-occupation Japan. Not only the Circular did not mention any institutional link with the FEC or ACJ, but also did not make a distinction between the classes of war criminals which implied that the IMTFE defendants could be paroled under the newly established system without consultation with the representatives of other countries. Again, the SCAP was exercising the sole authority for the execution of the IMTFE sentences on behalf of the Allied Powers[81] to the effect that China and Soviet Union would protest the inability to influence the process. The intensifying Cold War rivalry only meant one thing—that the US could no longer act on the behalf of the Allied powers in the same way it did in the immediate postwar period which only led to provocations and extended debates mainly by the Soviet Union. With its refusal to sign the Peace Treaty with Japan in 1952, the USSR lost voice in the clemency and parole process of Class A war criminals, and yet, as will be shown in later chapters, it found a way to exert considerable influence over the process.

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[80] Ibid.

[81] FEC, Minutes of Meeting, FEC, 191st Meeting, April 20, 1950 in RG 43, Records Related to FEC, Minutes of Meetings, February 1946-1949, Box 3.

The Chinese mission in Japan was suspicious about the SCAP parole system as it contended that it amounted to the modification or alternation of the original sentence thus requiring consultation of the Allies.[82] They invoked MacArthur's speech in which he announced his decision to retain sentences established by the Tribunal which was now altered by the SCAP parole system. The US did not heed as the parole system was administrative method, widely practiced in democratic societies, which only represented the change of the manner in which the sentence was executed.[83] Along the similar lines, the USSR dissatisfaction revolved around the fact that the measure was unilateral, that the SCAP ought to consult and obtain agreement of other nations as the IMTFE was international tribunal and requested the revocation of Circular No. 5.[84] The Article 17 of the IMTFE Charter did not allow for the premature release of the Class A war criminals. Already in the 1950s, it became evident that the issue of war criminals could potentially become fastidious, and that as such, it should be left to the past as soon as possible. Just before the outbreak of the Korean War, U. Alexis Johnson from State Department Far Eastern Bureau expressed this idea as follows: "I hope that one of these days we may be able to relegate questions concerning war criminals into the historical past where it so well belongs, particularly at this moment when we are looking toward the re-instatement of Japan into the family of nations."[85] Mamoru Shigemitsu, who was included at the indictment at the Soviet request and received seven-year sentences was the first Class A war criminal to be paroled by the SCAP parole system and ready to go back to the public life.

5. The Peace Treaty with War Criminals: Friends or Foes?

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[82] FEC, Minutes of Meeting, FEC, 193rd Meeting, May 18, 1950 in RG 43, Records Related to FEC, Minutes of Meetings, February 1946-1949, Box 3.

[83] Ibid.

[84] Message, Acheson, State Department to SCAP, August 30, 1950 in NARA, RG 84, Japanese War Crimes Cases, Box 26.

[85] Letter, U. Alexis Johnson, Department of State, Far Eastern Bureau to William J. Sebald, US Political Advisor to Japan, June 23, 1950 in in NARA, RG 84, Japanese War Criminals, Box 1.

In the first two years, the initial occupation policies towards Japan were almost exclusively delegated to General MacArthur, a highly authoritative persona, who wanted to play the central role in rebuilding Japan. As a part of aggressive demilitarization process the former Japanese leaders were prosecuted within the IMTFE and around 210,000 wartime officials were purged by the directive for the removal of undesirable personnel from public office of January 4, 1946,[86] while the military structure was dissolved. In 1946, the GHQ Government Section, headed by Courtney Whitney pushed for more radical reforms that were imposed to the Japanese government, and often out of touch with Japan's peculiar geopolitical environment. As a part of these reforms, Japan adopted amendment to Article 9 of the Constitution in 1946 that allowed Japan to exercise right to self-defense, as its initial interpretation was construed to eliminate the right to aggressive and defensive wars. Despite this change, only during second term of Prime Minister Yoshida will this interpretation take root. In addition, comprehensive economic reforms — agricultural land reform, removal of zaibatsu, the Anti-Monopoly act, growth of entrepreneurs and economic groups —gave impetus to much needed efficiency and growth.

With Premier Yoshida in office the main focus of the occupation was economic development and integration within the global market and concluding peace treaty in view of restoring independence. The advance of Communists in Chinese civil war and the increasing rivalry with the USSR made the US slowly pivot towards Japan as reflected in NSC-13/2 which included Japan within George F. Keenan's "containment" policy whereby the US committed to building a thriving economy in Japan. The 1949 brought many changes in the political outlook of East Asia as Chinese Communists took power while the USSR was on a par with the US nuclear capabilities which only increased the awareness of President Truman of Japan's strategic value and importance of its place within the Western camp once

[86] Tosh Minohara, ed., *The History of US-Japan Relations: From Perry to Present* (Singapore: Palgrave MacMillan, 2017), 116.

it regained its sovereignty. Furthermore, the outbreak of Korean War swayed Truman from Keenan's economic containment strategy towards Paul H. Nitze's costly "military containment" which entailed the increases in the US defense budged and military buildup. This placed US military bases in Japan at the heart of the US Cold War strategy and Yoshida decided to allow their presence once occupation ended as he saw value in Japan having its security guaranteed by the US while it could focus on rebuilding economy. Japan reaped the economic benefits from the Korean War by the way of special procurements contracts, but at the same time, due to the decline in the number of US forces, decided to establish National Police Reserve in 1950 for both domestic security purposes and future Japanese rearmament. Many politicians in Yoshida's entourage advocated rearmament, but Yoshida decided to go another way around—prioritize stable political system, recover economy, regain independence and only then, rearm.

In 1947, the US officials had already started pondering about the type of a peace treaty that should be concluded with Japan. One of the questions put before the drafters, other than burning questions related to security and reparations, was what would be the fate of Japanese war criminals once the occupation came to an end. During the occupation, Sugamo Prison was under the control of the US military which meant that once Japan regained its independence there would be institutional void related to the management of war criminals. The Americans knew that there was a widespread belief among the Japanese that once the Peace Treaty was concluded, the war criminals would be released as their sentences would have expired as the trials were part of occupation that thereby ended.[87] However, the automatic release after the occupation was not an option as the Allies wanted to validate the legal character of war crimes program that had been completed and justify the costly and fastidious prosecution process. Otherwise, the automatic release would damage the legal

[87] Draft Basic Civil Affairs/Military Government Criteria Among Those to be Encompassed in a Japanese Peace Treaty, War Department, August 29, 1947, FRUS, *Far East*, Volume VI, Washington: US Government Printing Office, 1972.

basis of the trials, proceedings, sentences, and be embarrassing to the Allies. The war crimes program validation was of the utmost importance. In countries such as the Netherlands, Australia, and Philippines which bore the brunt of Japanese atrocities feared that their public opinion would be unsettling if their government allowed for the outright release of Japanese war criminals. The negotiations leading towards the conclusion of the Peace Treaty were of multilateral character which brought into perspective the Allies' disparate and competing visions on what kind of peace should be concluded with Japan.

The Allies were well aware that the lack of a clear clause regulating the conditions for the execution of the sentences imposed by the tribunals by the Japanese government after the occupation might end up in Italian war criminal scenario.[88] The fate of Italian war criminals prosecuted by American and British military tribunals was not regulated by provisions of the peace treaty the two allies signed with Italy in 1947. Despite the oral assurances given by the Italian government that it would ensure that the war criminals would carry out the full term of their sentences or will not be released earlier without the Allies' approval, Italy ended up releasing its war criminals in violation the informal agreement that existed.

In 1947, Allies could somewhat agree that the provisions of the peace treaty with Japan should be harsh and restrictive. Hugh Borton, Japan hand from the State Department's Far Eastern Affairs Bureau, drafted a peace treaty with provisions on war criminals that obliged Japan to fully carry out the sentences imposed by the tribunals and gave no power to it over clemency process. Interestingly, the Borton's draft envisaged that the issue of clemency could be settled by an independently established diplomatic body which would comprise with the representatives from the FEC. This implied that the issue of clemency would be settled within a diplomatic framework rather than a legal one which would designate the

[88] "The Effect of Blanket Clemency for Italian War Criminals on NA's Position Regarding Post-Treaty Clemency for Japanese War Criminals," April 5, 1950 in NARA, RG 59.

end of the war crimes program as a "political solution." The British Commonwealth nations, the Philippines, and China all feared the resurgence of Japanese militarism and thus advocated hard line towards Japan and the peace settlement.[89] As noted earlier, one of the main forces behind the change in the US foreign policy towards Japan in 1948 was George Kennan who argued that the only way to prevent Japan's fall into the Communist orbit was to build strong economy and political stability. This meant that the initial harsh and disruptive occupation policies had to be terminated in favor of economic growth and aid to Japan to which President Truman acquiesced and which NSC 12/3 reflected as a part of economic containment policies. From 1949, the evidence of Soviet military dominance, the defeat of Chinese Nationalist government, the Chinese entry into the Korean War in addition to precarious social and economic situation in Japan swayed the key decision makers in Washington towards more liberal and tolerant policies towards Japan and the peace treaty.[90] The draft treaties produced in 1950 evidenced this change by draft Article 14 which allowed Japanese government the power to vary sentences subject to the prior approval of the interested governments.[91]

The progress towards finding a common ground between the Allies came with the appointment of John Foster Dulles by President Truman, who was in charge of negotiations. The main obstructers to the liberal peace treaty terms and minimal limitations were Australia and New Zealand which were fearing Japan more than they feared the Soviet Union.[92] The main issue for them was the absence of restrictions upon Japan's rearmament. John Foster Dulles, participant at the Versailles Peace Conference, as noted earlier, was deeply marked by the lessons of punitive peace and insisted that peace ought to be generous

[89] Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War* (New York: Columbia University Press, 2017), 155.

[90] Frederick S. Dunn, *Peace Making and the Settlement with Japan* (Princeton: Princeton University Press, 2016), 59-62, 172-188; Michael Schaller, *The American Occupation of Japan: The Origins of the Cold War in Asia* (Oxford: Oxford University Press, 1985), 122-140;

[91] "Commentary of Draft Treaty of Peace with Japan," in NARA, RG59.

[92] Dunn, *Peace Making and the Settlement with Japan*, 125.

and with minimal restrictions.[93] Dulles achieved breakthrough with the Commonwealth nations a week prior to the Peace Conference with the conclusion of Australia, New Zealand, and US Security Pact (ANZUS) which alleviated their fears of Japanese militarism.[94] Following the same logic the US met the fierce resistance of Australia and New Zealand regarding the introduction of war guilt clause to the peace treaty. Dulles considered that public denouncement of Japan's war guilt for waging aggressive war, especially in view of their cooperation under the occupation and the Korean War, would be contrary to the aim "to turn Japan into a viable and peace-loving nation"[95] and met with general dissatisfaction in Japan. The final compromise was achieved by introducing the clause whereby the Japanese government accepts the judgements thus tacitly accepting the war guilt.[96] In relation to the Japanese government role in the clemency process, it was granted the faculty to recommend, but the final decision rested with the Allied Powers or interested country contrary to earlier drafts in which Japan and the Allied Powers had a "joint" decision in deciding the variation of sentences.

The Japanese government also authored its versions of a peace treaty starting from 1950 and later on, as the negotiations progressed they were asked to participate more actively in the drafting process by expressing their opinions or seeking amendments. The most extreme demand was to grant a general amnesty to the Japanese war criminals which was unacceptable to the Allies. The Japanese government, notably Ministry of Foreign Affairs adopted a cautious approach in dealing with war criminals, they sought to appear as a country that cherishes its international obligations and accordingly, did not object to the provisions under which it accepted the judgements or had a faculty to recommend the

[93] Wilson et al., *Japanese War Criminals*, 159-160.
[94] Ibid.
[95] Ibid., 161.
[96] Higurashi, *Tōkyō saiban*, 337.

release instead of decision-making power to be shared with the Allies.[97] On the other hand, the Ministry of Justice believed that the process of clemency would be accelerated following the formalities around the signature and ratification of the peace treaty or that the Allies would simply accept the recommendations from the Japanese government for the release. Although aware of the tough stance taken by the Commonwealth countries mainly, many Japanese officials, especially the ones from the Foreign Ministry Treaty Bureau mistakenly believed that the US would exert influence upon all other countries regarding their decisions as well as be expeditious in their efforts to clear the prison. As the system of parole mentioned earlier already existed during the occupation, it was only expected that the end of occupation would considerably speed the matter up.

[97] Ibid., 347-348.

CHAPTER 3: Clemency and Parole System for Japanese War Criminals: The Allied Powers' Quest to Save the Face of Justice

1. Decentralizing Justice: The Three-Men Board, NOPAR, and the Pursuit of Divergent Goals

The clemency and parole are legal categories that are borrowed from domestic legal systems. The Allied powers were already familiar with mimicking domestic law in their legal undertakings as it has been earlier demonstrated with the introduction of the crime of conspiracy into the IMTFE Charter. The goal of early release in domestic law prioritizes reducing costs and preventing recidivism, while the international criminal tribunals are rather concerned with retribution of the most serious crimes and reconciliation between enemy parties after or during the conflict.[1] The transposition of these domestic legal practices into the practice of international criminal tribunals can have perverse effects—mitigation of guilt and dissatisfaction of victims—for their lack of transparency and dilution of the original illegal act.[2] Parole is an encouragement for the prisoners to show good behavior and participate in rehabilitative programs, its main goal being rehabilitation. In the practice of modern international criminal tribunals, the war criminals found themselves automatically released to unconditional, unsupervised parole after they have completed two-thirds of their sentence, contrary to domestic parole where they are under conditional release and supervision. In contrast, clemency is rarely used in domestic law, it exercises "error-correcting"[3] role, allowing for sentence adjustment in the light of the changed circumstances, and is often politically motivated.[4] The main criteria for early release in international criminal tribunals is not primarily based on the newfound evidence that

[1]Jonathan H. Choi, "Early Release in International Criminal Law," *The Yale Law Journal* 432 (2014), 1789.
[2] Ibid.
[3] Ibid., 1801.
[4] Ibid., 1802.

mitigates the guilt or cooperation after sentencing, but rather repentance, the gravity of crimes committed, or probability of recidivism.[5]

The importance of discussing the aim of clemency and parole, extensively used in the stage of execution of the IMTFE sentences, lies in pointing out at the meaning that this process had for its key stakeholders – the Allied governments, post-war Japan, and victims. The clemency and parole does not emanate from the realm of interpersonal forgiveness, it is public institutionalized form by which officials accord "forgiveness" to the wrongdoer.[6] The prerogative to grant clemency and parole pertains to the executive, veiled in monarchical privilege[7], exercised in discretionary manner almost "disregarding the declared law," and it becomes "a form of legally sanctioned alegality."[8] Thus, the subject of these revisionary practices is different– "in forgiveness, it is the victim; in clemency it is the official; in repentance it is the wrongdoer."[9] The clemency and parole system as such represent an institutional forgiveness, forgiveness by law, where the main actors were high-level officials, and hence without any repercussions regarding forgiveness originating from the victims of war—which became one of the valuable political assets for elites in Beijing and Seoul to exploit when it comes to Japan's war responsibility.

After the Peace Treaty came to effect, the SCAP parole system was abolished and contrary to the high expectations of the Japanese elite, populace, and prisoners themselves, releases based on clemency and parole process of Sugamo inmates started to stagnate. Given that the fate of Class A war criminals was in hands of the majority governments represented

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[5] Ibid. The author discusses early release in international criminal law that has started with the IMT at Nuremberg and IMTFE, to become more refined with the practice in modern international criminal tribunals - ICTY, ICTR and ICC. Although he makes distinction between historical cases of criminal justice in Nuremberg and Tokyo as solely based on political and geopolitical grounds, his discussion is relevant as the similar dilemmas could be traced in the parole system applied in the respective cases.

[6] Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest*, Oxford: Oxford University Press, 1989 cited in Austin Sarat and Nasser Husain, eds., *Forgiveness, Mercy, and Clemency, Mercy, and Clemency* (Stanford: Stanford University Press, 2007), 5.

[7] Austin Sarat and Nasser Husain, eds., *Forgiveness, Mercy, and Clemency*, 6.

[8] Austin Sarat and Nasser Husain, eds., *Forgiveness,* 7.

[9] Ibid., 11.

at the IMTFE, the release of Class BC war criminals who were subjected to decisions of respective government which prosecuted them in national court, was promising to be a less burdensome path.

Months into Japan gaining its independence, no specific procedure or framework was set forth to harbor the decision-making process of the majority governments represented on the IMTFE regarding the Class A war criminals. The SCAP Legal Section strongly advised the State Department officials to establish a venue for informal coordination between the representatives of interested governments, requiring them to assure the preservation of the judicial and legal character of the process.[10] More precisely, the British proposal that the Committee should be exclusively composed of ambassadors was to be rejected as it threated to stain legal character of deliberations with rather political and diplomatic outlook. The stubborn obsession of the United States with extending the legal character to all ensuing stages of sentence execution and at every level of decision-making was already palpable. The legality and legitimacy of the war crimes programs in both Germany and Japan had to live up to legal standards until its very end. At the outset, it was decided that individual decisions of the Allied powers regarding the recommendations related to the Class A war criminals received from the Japanese government should not be directly communicated to Japan[11] in order to maintain unity and avoid displaying any potential disagreements.

In May 1952, the State Department assistant legal advisor for the Far Eastern Affairs, General Conrad E. Snow discussed the modus operandi to be devised for reaching US decisions regarding the Japanese recommendations for clemency and parole for war criminals. It was of the utmost importance to make decisions that go in line with the words of the Potsdam Declaration of July 26, 1945 related to Japanese war criminals that "stern justice should be meted out to all war criminals." Any disregard of this principle threatened

[10] Note, SCAP, Legal Section to Department of State, March 27, 1952 in NARA, RG84, Japanese War Criminals, General Files, Box 26.

[11] Ibid.

to enflame the public opinion, especially those who were personally or indirectly aggrieved by Japanese cruelties inflicted upon the prisoners of war. More generally, the lofty ideal that animated the American architects who led the Allied powers' war crimes program back in 1945—that was to ensure that the quality of American justice in the war criminal tribunals would be preserved—was as relevant in the closing phase of the program.[12] General Snow had a distinguishing career as a military and lawyer. He was a member of Justice Owen J. Roberts Advisory Board for Clemency established after the war to mitigate the sentences of court-martialed soldiers which had been considered too harsh in the light of the new geopolitical developments.[13] His experience in clemency and parole matter was further boosted by his appointment as one of the prominent figures of the Loyalty-Security Board which dealt with Senator Joseph R. McCarthy's accusations of the Communists' infiltration into, among other pores of American political establishment, State Department. Later on, he sat on the Advisory Board on War Criminals in Germany in 1950, appointed by John J. McCloy, High Commissioner for Germany[14] granting the reduction of sentences that were considered "excessive" and thus required some dose of leniency, on a strictly legal basis, for German minor war criminals convicted by subsequent American Nuremberg trials.[15] This extensive legal expertise made him rank high among the candidates for the position of the chair of Clemency Parole Board that had been envisioned. Furthermore, his professional link to East Asia was established as he had served as a legal counsel to the American representative on the Far Eastern Commission (FEC) which was formulating policy decisions to General MacArthur until its dismantlement in 1951. According to his legal

[12] Working Papers, A Board of Clemency and Parole for War Criminals, From Conrad Snow to the Legal Advisor, May 9, 1952, NARA, RG220, Box 1.

[13] Harry S. Truman Presidential Library & Museum, Transcript of Oral History Interview with Conrad E. Snow, Richard D. McKinzie, July 2, 1973, 6-7. https://www.trumanlibrary.org/oralhist/snowce.htm#transcript (accessed on August 14, 2017)

[14] Ibid., 11.

[15] Ibid., 15-16. According to the interview transcript, the Advisory Board for Clemency in Germany or the Peck Board had forty days to review thousands of pages of transcripts of the trials and other legal documents in order to examine the suitability of the sentence.

advice, clemency as a judicial solution would address the cases in which sentences are inappropriate to the crimes committed (unfairness of the sentence, mitigating circumstances, health, family conditions of the prisoner, or his conduct) while the parole would serve to end confinement that no longer served its purpose (conduct of the prisoner or nature of his crime).[16]

A few months before the establishment of the Clemency and Parole Board (hereafter CPB), the US Embassy in Tokyo proposed to the Secretary of State via telegram[17] its initiative to undertake the clemency and parole process. The Embassy level process would allow for the clemency and parole process that had started under the now disbanded SCAP Legal Section be overturn smoothly to an unofficial board of senior embassy officers that would put recommendations before the ambassador. The American Ambassador Robert Murphy considered that the proposed setting would spare the release process of unnecessary public attention and avoid this issue becoming of great magnitude, which appeared likely to ensue should the President be involved in the process. Although the State Department gave a consideration to this idea, Dean Acheson rejected it out of concern that it might be received with criticism among the Japanese for being reminiscent of the "pattern of occupation"[18] as well as the complication it would introduce to a necessary coordination of procedures related to the treatment of war criminals in Japan and Germany.

On September 4, 1952, President Truman established the CPB for war criminals by the Executive Order 10393.[19] The Board was meant to operate independently from the State Department. It consisted of three-members designated from the Department of State, the Department of Defense, and the Department of Justice–Conrad Snow, Roger Kent, and

[16] Working Papers, A Board of Clemency and Parole for War Criminals, From Conrad Snow to the Legal Advisor, May 9, 1952, NARA, RG220, Box 1.

[17] Telegram, Murphy, American Embassy, Tokyo to Secretary of State, July 31, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[18] Telegram, Secretary of State to American Embassy, Tokyo, August 23, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[19] Working Papers, CPB, NARA, RG220, Box 1.

James V. Bennett–respectively each appointed by the president. The composition was meant to reflect a delicate balance between different aspects that the CPB activity touched upon – related to foreign policy, international law, and treaty commitments (State Department), authority over the military courts which tried the war criminals (Ministry of Defense), and legal expertise in criminal law and matters related to clemency and parole (Ministry of Justice).[20] The CPB would become one of the main bodies in the decentralized decision-making process for the release of the war criminals that was to investigate cases for which the Japanese government requested clemency or parole via the US Embassy in Tokyo. The IMTFE war criminals were also to be included into deliberations of the CPB.

In October 1952, Ambassador Murphy, reputed as "a skillful troubleshooter,"[21] indicated that the CPB should proceed swiftly with processing the eligible cases in other to somewhat appease the war criminals issue fraught with danger of turning the public opinion against the United States.[22] He warned that the emotional heights and Japan's diplomatic animosity against the Soviet Union, for illegally retaining Japanese POWs, should serve as an indicator of how sour can US-Japan relations possibly turn. Although situations were of a different nature, humanitarian concerns were their common point. Indeed, the US was stubborn enough to gamble on the successful solution of what it considered a judicial problem, which the Japanese, in turn, considered to be an emotional one.

Similar dangers were voiced in other venues, including the CPB. Few months into its mandate, on January 8, 1953, Roger Kent, general counsel of the Department of Defense, wrote in his resignation letter to the President that "present program is in fact a political one involving clemency and release rather than parole, because we have delegated vital

[20] Report of the Clemency and Parole Board for War Criminals, Minutes, January 15, 1953, NARA, RG220, Box 1, folder: Minutes CPB, M-12.

[21] Martin Weil, "Robert D. Murphy, Diplomat, Advisor to Presidents, Dies," Washington Post, January 11, 1978. https://www.washingtonpost.com/archive/local/1978/01/11/robert-d-murphy-diplomat-adviser-to-presidents-dies/ca989305-de2d-457d-be31-2bf2f12391be/?utm_term=.e8f5bb4de395 (accessed on March 3, 2017).

[22] Foreign Service Dispatch No. 654, US Embassy Tokyo to the Department of State, October 2, 1952, NARA, RG220, Box 1.

elements of the parole system to the Japanese."[23] In his opinion, the program was detrimental to the US interests, but also impractical and ill designed to fulfill "political considerations [that] dictate that Japanese war criminals should be released within a short time– possibly a year."[24] He lamented that the US had already abandoned its commitment to justice when it decided to commute death sentences of the war criminals who committed the most heinous crimes and abandoned the further prosecutions after June 25, 1950, thus showing "the Japanese that we [the US] respect the realities of international relations."[25] In an almost prophetic tone, Kent warned that the protracted detention of Japanese war criminals carried risks to seriously turn the Japanese against the US and to the advantage of the Russians, given that the Japanese Communists heavily capitalized on the existence of the war criminals issue. As long as this matter remained unresolved, the US would not be able to benefit from the situation and its relations with Japan would suffer, as he put it, "while the issue of prisoners held by Russia somewhere in Siberia may get cooler, it is certain that the issue of war criminals held by Japanese jailers in Japanese prisons will get hotter."[26] Kent's final advice offered the unpopular solution in the form of general amnesty, a strategic move that would "liquidate Japanese war criminal program before opposing positions are publicly crystallized as they are now in Germany."[27]

2. The Yoshida Cabinet: A Timid Approach towards the Class A War Criminals

The SCAP Legal Section sought to assure than in serving their sentence Sugamo inmates would receive "no better or no worse" treatment than the ordinary domestic felons and in

[23] Repercussions on the German problem? Enclosed Letter of Resignation from Roger Kent to the President, Minutes, January 14, 1953, NARA, RG 220, Box 1, folder: Minutes CPB, M-12.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.

accordance with the minimally accepted international standards.[28] In addition, they wanted to secure that the power to grant clemency, parole, or reduction of sentence would stay with the Governments concerned.[29] And yet, the Japanese, well before the independence date, used the SCAP's Circular No. 5 to draft several versions of law that would allow for a domestic legal basis for managing various aspects of the clemency and parole process for all categories of war criminals—authority accorded to the Japanese government by Article 11 of the Treaty of Peace. In crafting the text of the law, the Japanese interpretation of the Article 11 opted for the most general terms possible which meant that there was no obligation upon Japan regarding the manner in which the sentences were to be executed, thereby giving them free hands to implement their own general prison laws in instances that were not prescribed in the provisions of the special law on war criminals. Bothered by the fact that the Peace Treaty left "war criminals," as maintained by the terminology of the victors' verdicts, in independent Japan, the drafters tried to remove the war stigma by favoring terms such as "inmates" over "prisoners"[30] or "detention house" over "prison."[31] The goal was to get over with the issue as soon as possible while maintaining large room for maneuver. The final version of the Japanese Law No. 103 of 1952 that was deemed acceptable by the US government served as the main guideline for National Offenders' Prevention and Rehabilitation Commission (hereafter NOPAR), established within the Ministry of Justice (hereafter MOJ), in presenting its recommendations for the release of war criminals to the interested governments via the Ministry of Foreign Affairs. This made the whole process of execution of sentences institutionally fragmented and burdensome. Regarding the Class A war criminals, although the process was displaced from the IMTFE, which represented a

[28] Ibid.

[29] Background Information Re Japanese Law 103 of 1952 "Concerning the Enforcement of Sentences, the Granting of Clemency Etc. In Accordance with the Provisions of Article 11 of the Treaty of Peace." In Records of CPB in NARA, RG220, Box 1.

[30] Ibid.

[31] Ibid.

multilateral and international institutional experience, the further process would not loose of its international character. Once presented to the CPB, recommendations for the Class A war criminals were to be discussed among the legal representatives of interested governments in Washington. Prior to that, the Japanese officials, especially the ones from the Ministry of Justice (MOJ) repeatedly made sure that the US fully understood the Japanese position. It is important to stress that the Ministry of Justice (hereafter MOJ) was one of the main proponents of the "quick release" view regarding the war criminals.

On October 6, 1952 Mr. Saito, Chief of Japanese Protection Bureau for Judicial Affairs, visited the CPB in Washington to convey the seriousness of the state of affairs regarding the war criminals in Japan by raising several points. First, that the public opinion had been gaining strength as the main driving force behind the requests for general clemency for all war criminals which formed into a solid movement. In the light of the overall "spirit of trust and reconciliation" that the Peace Treaty exuded, it was expected that the recommendation by the Japanese government would lead to an automatic acceptance of general clemency by the interested governments having in mind that the sentences imposed immediately upon surrender were harsh. The financial and moral hardship of war criminals' families added up further drama and exacerbated the emotional aspects of the issue. Second, stagnation of the process further discouraged and frustrated the prisoners who thought that they endured harsh sentences only for obeying superiors' orders and committing acts whose criminal nature they were not aware of. Mr. Saito's inadvertently discredited the war crimes program by pointing out that as the purpose of punishment–that is maintenance of peace and deterrence of wars–was accomplished, the detention of war criminals who had already served seven years was no longer justifiable, and contrary to humanitarian considerations.[32] Mr. Hagen, former Chair of SCAP's Parole Board, considered the popular movement for

[32] Minutes, October 6, 1952, NARA, RG 220, Box 1, folder: Minutes CPB, M-1 through M-30.

release of war criminals to be contrary to the Peace Treaty, while his general impression, not incorrect one, was that the Japanese passed well beyond war and war guilt. Later throughout October 1952, the NOPAR recommended clemency and parole for Class A war criminals urging for their release by invoking the key points of the Prime Minister Churchill's "Two Freedoms" speech, delivered in Dover in 1951 to legitimize their cause—"[…]t is in our interest and duty […] to bolt out and sweep away the hatred and vengeance[s] [*sic*] of the past." From the NOPAR perspective, the protracted detention of Class A war criminals, who personified the main actors behind the war, lost its meaning and no longer had contribution to make which was illustrative of how blatantly the Commission comported itself towards the post-trial legacy of the IMTFE. On the occasion of the entry into force of the Peace Treaty, the Ministry of Justice granted minor Japanese criminals a general and special amnesty, reduction of sentence, and restoration of rights[33] to celebrate Japan's newly gained independence and send a strong signal that the Allies could do the same with the war criminals as the war era was officially behind Japan. The Commission believed that there should be no discrimination against war criminals in the words of National Offenders' Prevention and Rehabilitation Commission's Chairman Matsusuke Shirane.[34] In the Commission's document, Shirane specified that the sympathies of the public opinion in Japan were not exclusively directed towards the BC war criminals, but were also shifting towards the Class A war criminals. The new story that the responsibility for war should not rest only upon their shoulders, but be shared "by the Japanese nation as a whole" was gaining acceptance and momentum.[35] For different reasons, the US and other Allies were not quite ready to give a follow-up to the Japan's government requests for a

[33] Matsusuke Shirane, "Decision on Recommendation on Release by Clemency of A Class War Criminals," October 20, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[34] Ibid.

[35] Matsusuke Shirane, "Decision on Recommendation on Release by Clemency of A Class War Criminals," October 20, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

special treatment, in form of amnesty, clemency or parole, for 12 Class A war criminals.[36] The CPB was aware of the difficulties that any action on behalf on the Class A war criminals at that moment would create diplomatic difficulties for the Allies in reaching a majority decision, agitate their constituencies, have negative repercussions for the counterpart war crimes program in Germany, and in general compromise the whole effort and wipe out the seriousness of crimes prosecuted. Hence, the Class A war criminal file was left to lie dormant.[37]

The Japanese government displayed a rather disparate interest in the release of the war criminals. The Ministry of Foreign Affairs was a defender of the "gradual release" view regarding the release of war criminals. Their interaction with foreign governments' representatives resulted in a greater level of awareness about certain governments' adamant opposition to the release of the war criminals.[38] As there were many other sensitive issues to deal with in the immediate post-occupation period, Yoshida chose to exercise prudence in not provoking agitation both at home and abroad over the issue of war criminals that were not regarded as ordinary felons, but were accused of the most heinous crimes.[39] In the atmosphere of political uncertainty brought by the political comeback of influential politicians, previously purged under the occupation, such as Hayato Ikeda, Primer Minister Yoshida dissolved the Diet on August 28, 1952 and organized the general elections in October 1952. This opportune political move was motivated by Yoshida's awareness of his little coordinated opposition consisting of political figures who wanted to oust him from power. In that atmosphere and to appeal to the growing demands of the public opinion for the release of the war criminals, Chief Cabinet Secretary Hori Shigeru announced that recommendations for release would be sent to various governments. In addition, the

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[36] Minutes, November 20, 1952, NARA, RG 220, Box 1, folder: Minutes CPB, M-8.
[37] Minutes, December 11, 1952, NARA, RG 220, Box 1, folder: Minutes CPB, M-10.
[38] Higurashi Yoshinobu, *Tōkyō saiban* (Kodansha: Tokyo, 2008), 359.
[39] Ibid.

pressures from the Diet for the release of war criminals were intensifying. In August 1952, Foreign Minister Katsuo Okazaki tried to elicit the release of war criminals [40] by linking it to the anniversary of Japan's acceptance of the Potsdam Declaration which defined the terms of Japan's surrender and posed the legal basis for the establishment of the war crimes program. Given the occasion, he requested the grant of general clemency or amnesty release of all BC Class criminals, with the exclusion of Class A war criminals who were linked to the Tokyo Tribunal.[41] U. Alexis Johnson from the State Department's Far Eastern Bureau considered the demand unfortunate in that it could escalate into political issue and be negatively received by the American press and public opinion which believed that justice had been done in Tokyo.[42] The decision-makers in the US refused to readjust their legalistic policies when it came to the war crimes program. In November 1952, on the occasion of the investiture of Crown Prince, the Japanese government sent telegrams to all concerned governments asking for the general release of Class A war criminals and expressing concern that the public pressure placed upon Yoshida which could also be targeting the US. Few lines in the telegram displayed the Japanese government assertiveness in stating that Class A war criminals "had been imprisoned for seven years and the purpose of punishment was accomplished[43]" hence openly questioning the sentences imposed by the IMTFE. In the same way the Japanese seized every occasion to stress the domestic aspects of the issue,[44] the US also decided to instrumentalize their public opinion which would "not tolerate indiscriminate mass releases,"[45] and insist that Japanese demands perturbed the parole

[40] Telegram, Murphy, American Embassy, Tokyo to Secretary of State, August 21, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[41] Memorandum, "Japanese War Criminals," Mr. Hawley, August 14, 1952 in NARA, RG84, War Criminals – General Files, Box 28.

[42] Ibid.

[43] Memorandum, "Japanese Embassy Requests for Special Clemency to War Criminals on Occasion of Investiture of Crown Prince Akihito," November 7, 1952 in NARA, RG84, War Criminals – General Files, Box 28.

[44] Telegram, Secretary of State to American Embassy, Tokyo, November 10, 1952 in NARA, RG84, Box 1.

[45] Telegram, Mr. Robert D. Murphy to Secretary of State, November 10, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

system, which was based on examining cases on individual basis with low-level publicity.[46] Another line of defense used was that if the Class A war criminals were released, it would have repercussions for all BC Class war criminals.

In December 1952, Justice Minister Takeru Inukai appeared before the plenary session of the Lower House—the day the resolution for the release of the war criminals was passed—and presented the government's efforts for parole or amnesty of the Class A war criminals, to which governments of China and India consented which was received with the applause from the Diet members.[47] Farseeing Ambassador Murphy warned the State Department that the continuous incarceration of war criminals could lead to constant pressures from Japan for their release. To support this belief, he drew attention to Mamoru Shigemitsu, a member of the Lower House of Representatives who was expected to become one of the leading figures in Japanese politics and who openly opposed the clemency and parole system and argued for general amnesty as he considered trials were "defective and committed injustices."[48] Shigemitsu, and not erroneously, predicted that judicial solutions due to their "tediousness" would have negative repercussions for US-Japan relations and that the resentment because of the incarceration was widespread.[49]

On December 24, 1952, the Japanese Diet approved the amendments to Law No. 103 which allowed the prisoners to be released for "provisional parole" for unspecified special circumstances up to fifteen days, renewable for additional fifteen days (Article 24) and without reference to the interested Governments. In other words, as there were no limits set for the number of renewals prisoner could apply for under "provisional parole," war criminals could stay outside indefinitely. The US saw these vague provisions as highly

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[46] Ibid.

[47] Dai-15 Kokkai Honkaigi Dai-11, December 9, 1952. http://kokkai.ndl.go.jp/SENTAKU/syugiin/015/0512/01512090512011a.html (accessed on September 4, 2017)

[48] Letter of Robert Murphy from the American Embassy in Tokyo to Conrad Snow, October 27, 1952, NARA, RG220, Box 9.

[49] Ibid.

problematic from the point of view of Article 11 of the Peace Treaty and questioned the Japanese good faith in carrying out its terms.[50] Ambassador Murphy warned that "[t]his Japanese Amendment […] opens door to wide-spread release of war criminals under guise of emergency conditions in violation of Article 11 of the Peace Treaty."[51] In this sense, the measure was oblivious to negative consequences it could produce for the Allied powers' countries, and most importantly the US which aimed to base the program on careful judicial review of each case and prevent its further politicization. In response, the US pressed the Japanese government to ensure that no extension of provisional parole beyond five days that had been already granted should be approved without referral to the interested government,[52] while in case of emergency provisional paroles, the US Embassy would have authority to grant the final approval.

Another reason for Yoshida's prudence was the erroneous understanding that the Class A war criminals represented a benchmark for the whole war criminals release issue, as these were the most notorious cases that, if liquidated, would set in motion the final settlement on the war criminal question.

3. Deep-rotted Divisions and Power Play Between the Allied Powers Continued in the Post-IMTFE Stage

The clemency and parole process similarly to the IMTFE establishment process, which involved the coordination between the Allied powers, was not immune from their inter-relational dynamics and geopolitical considerations. Although the IMTFE has often been portrayed as an American Court, in reality it was an international experience where other interested countries tried to challenge the US lead. The US outnumbered other interested

[50] Deptel, Murphy, American Embassy, Tokyo to Secretary of State, January 6, 1953 in NARA, RG84, War Criminals – General, Box 28.

[51] Telegram, Murphy to Secretary of State, December 30, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[52] Ibid.

countries when it came to the war criminals tried under the US authority and held in Sugamo prison. Hence, it was the expectation of the Japanese government that the release pace set by the US would be followed by other countries.[53] However, despite the occasional considerations for speeding up the process of release by granting clemency or amnesty, the US was attached to the preservation of the judicial character of the procedure, hoping that it would not become a political one, in a manner that did not really help the acceleration of processing cases of other countries involved. The dynamics of diplomatic relations between Japan and the countries represented on the Tribunal was in great measure influencing the progress on the war criminal matters, including the Class A war criminals. The meetings between the governments represented at IMTFE also served as a scene for venting and settling their diplomatic differences arising from the ongoing Cold War.

The first point of contention was the participation of governments which did not sign and ratify the Peace Treaty with Japan. The participation of governments represented on the Tribunal in reaching the majority decision for the release of the war criminals was stipulated by the Article 11 of the Peace Treaty on a basis of their representation on the Tribunal. However, the Article 25 was formulated to preclude the application of the Peace Treaty terms onto non-signatories and hence implied their inability to vote in the decision-making process regarding the release of war criminals. In the initial deliberations, the British proposed that the fate of major was criminals, as the Class A war criminals were otherwise called, whose actions were predominately related to the USSR and China should not be settled by majority governments in Washington, but rather dealt with on a bilateral basis between Japan and the respective countries. The Britain pondered whether China might be included in the majority governments' decision-making as Japan signed the Peace Treaty with the Nationalist Government of China or whether China, USSR, and India should be left

[53] Dispatch, John M. Steeves, American Embassy, Tokyo to State Department, October 2, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

out as they were not signatories of the Peace Treaty with Japan.[54] In November 1952, the Japanese government approached India to support the clemency for twelve Class A war criminals, which India accepted. In spring of 1953, the Japanese Foreign Ministry informed India that as it was a non-signatory to the Peace Treaty, its right to vote should be transferred to Pakistan which was successor state to the British India. India was not really interested in Japan's major war criminals issue, but rather in using this occasion to give a vent to its frustration and dissatisfaction over the Britain excluding it from consultations to the advantage of Pakistan which was included in the majority deliberations.[55] The State Department saw the inclusion of Pakistan, previously not represented at the Tribunal, as unwise whereas it saw a strategic value in including the three other governments, especially the USSR. The Soviet negative stance towards the release could not affect the majority decision, but would generate a more valuable result of increasing resentment towards the Russians in Japan.[56] In the note sent to the Secretary of State, the Indian government explained that it reserved its right of participation in the clemency process based on its representation at the IMTFE even after its independence in 1947. The note stressed that both Britain and Pakistan agreed that after the partition India was solely entitled to assume memberships to international organizations and treaties.[57] The US decided to comply with the UK request in its reply to Indian government in asserting that Article 25 of the Treaty precluded India from participating, while Pakistan, according to international law, was entitled to be granted rights and obligations that belonged to British India as participating

[54] Memorandum of Conversation, "Implementation of Article XI of the Peace Treaty with Respect to War Criminals Sentenced by the IMTFE, June 15, 1952 in NARA, RG84, Japanese War Criminals, General Files, Box 26.

[55] Telegram from Murphy of American Embassy Tokyo to Secretary of State, April 15, 1953, NARA, RG220, Box 1.

[56] Memorandum, Department of State, "Governments Entitled to Participate Under Article 11 of the Peace Treaty in Decision with Respect to War Criminals Sentenced by the IMTFE," April 29, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[57] Telegram from Mills of American Embassy, New Delhi to Secretary of State, April 28, 1953, NARA, RG220, Box 1.

on the Allied side in war against Japan.[58] The advanced legal explanations were ambiguous and not quite correct but truly reflected the Cold War and postcolonial mentalities.[59] Prime Minister Nehru was infuriated at the ill treatment of India and the fact that Britain agreed with other countries that Pakistan could also pretend to be legal successor of British India which it qualified as outright violation of international law.[60] The concern was that the language of the reply would have repercussions on other diplomatic questions where the argument that Pakistan was a successor state to India could be advanced to India's disadvantage.[61]

Differences in diplomatic outlooks on postwar Japan and domestic factors in respective countries were factors that introduced complications in terms of pace and method of releasing the war criminals. The Commonwealth countries and the Dutch held particularly conservative positions. The British considered the Japanese government tactic in demanding the general amnesty imprudent in view of the British sailors' incident that stressed Anglo-Japanese relations in the second half of 1952. The officials in London were livid at the harsh sentences that the Japanese authorities imposed upon the two drunk British sailors who were convicted for robbery and violence against the taxi driver, who had his money returned and who was not assaulted with weapons.[62] Initially sentenced to two and a half years' imprisonment, the British sailors were eventually released in November 1952. In the negotiations for Japan's accession to GATT, the British decided not to offer their support despite the pressures coming from Washington. The British did recognize the status of Japan

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[58] Working Papers Reg A, B, + C War Criminals, Folder 1, Dispatch from Robert W. Zimmermann, American Embassy to London to State Department, July 28, 1953 in NARA, RG220, Box 1.

[59] James Burnham Sedgwick, "The Trial Within: Negotiating Justice at the International Military Tribunal for the Far East, 1946-1948," (PhD diss., University of British Columbia, 2012), 334. https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0072876 (accessed November 14, 2017)

[60] General Working Files, Robert Trumbull, "War crimes issue still irks Nehru," *The New York Times*, October 5, 1954, NARA, RG220, Box 5.

[61] G. D. Anderson, Commonwealth Relations Office, London to L. Cole, New Delhi (5 August 1954), NZ Archives, EA W2619 54 106-3-39 Part. Cited in James Burnham Sedgwick, "The trial within: negotiating justice at the International Military Tribunal for the Far East, 1946-1948,"334.

[62] Sandra Wilson, Robert Cribb, Beatrice Trefalt, Dean Aszkielowic, *Japanese War Criminals: The Politics of Justice After the Second World War* (New York: Columbia University Press, 2017), 185.

as an important and significant partner, however it kept a suspicious eye on its rearmament and frustratingly searched for the way to engage with it, especially since its preponderance in Asia Pacific region had been challenged by the US.[63] Such British attitudes ought to be placed within the larger context of its position being relegated to a secondary role in the postwar international order where it no longer belonged to the premier league in which the US and the USSR dominated. Hitherto, the British were bothered by the US-sponsored Japanese rearmament and US-Japan "unhealthily intimate bonds."[64] Furthermore, the signing of ANZUS Treaty in 1951 resulting in Australia and New Zealand exclusive military alliance with the US was regarded as international indignation to the Britain.[65] Lord Hankey, the UK cabinet secretary throughout the world wars, and author of *Politics, Trials and Errors*, published in 1950, emerged as a vocal critic of the post-World War II war crimes trials in both Japan and Germany. On July 31, 1952 he wrote to the Editor of *The Times* that "the war crimes trials now proposed by the Chinese" are just "poisoning peace with no benefit to anyone."[66] In an unapologetic style, he insisted that "[t]he allies should admit that Nuremberg and Tokyo had not fulfilled the hopes of their originators, and should adopt a policy of liquidation."[67] He proposed that general amnesty be given to German and Japanese war criminals and that the exclusive authority over the release process should be transferred to their respective governments. He further pointed out to the fact that the Britain had never tried any of its military for crimes against peace and crimes against humanity which implied that it did consider them to be punishable crimes. Hankey challenged the principle of command responsibility and called the UK to take initiative in promoting the return to the "Edmonds-Oppenheim rule" which excluded individual criminal responsibility for soldiers

[63] Makoto Iokibe, Caroline Rose, Tomaru Junko, and John Weste, eds., *Japanese Diplomacy in the 1950s: From Isolation to Integration* (Abingdon: Routledge, 2011), 35.
[64] Iokibe et al., eds., *Japanese Diplomacy in the 1950s*, 36.
[65] Ibid., 36.
[66] The CPB, Minutes, October 27, 1952, folder: Minutes, M-6 in NARA, RG 220, Box 1.
[67] Ibid.

who in following order of their governments and commanders violated norms of international law.[68]

Australia was one of the Commonwealth countries that was slow to readjust to the view of Japan as the Cold War ally of the West. The war memories and Japan's colonial past continued to play a significant role in feeding feelings of suspicion in Canberra which lead to its unwillingness to allow any form of clemency or a major concession for the Japanese war criminals. The domestic hatred against Japan was running high which gave the Australian government a powerful pretext to initiate or agree to any breakthroughs on the war criminal question. Justice William F. Webb of Australia, the presiding judge at the Tribunal appointed by General MacArthur, notorious for its domineering posture and his previous involvement into war crimes investigations in Australia, made sure that Australian and British interests were imposed at the courtroom. Upon his return to Australia, he gave an interview which reflected his racial and suspicious stance towards Japan as follows: "Australians are not deceived by the veneer of democracy too facilely assumed by the Japanese under American tutelage,"[69] and he resolutely added that White Australia can be safe and thrive keeping powerful states close and in fostering good relations with its neighbors. The Netherlands government's position was mainly dominated by stagnation in Japan's compensations towards the Dutch internees, the popular anti-Japanese sentiment, and the general dissatisfaction with the way in which the worst atrocities were prosecuted which were linked to the degree of Dutch responsiveness towards the evolution of the clemency and parole program.[70] Regarding the Class A war criminals, the Dutch government first considered that they should not receive better treatment than the BC Class

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[68] Ibid.

[69] "Warning on Japan," *Sidney Morning Herald,* December 7, 1948. cited in Sedgwick, "*The Trial Within*," 316.

[70] Dispatch, John M. Steeves, American Embassy, Tokyo to State Department, October 2, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

war criminals,[71] a position that was soon to change. The French government was ready to grant parole or clemency to all Class A war criminals who were over seventy years old or in consideration of the extent of their contribution to the aggressive policies in the desire to bring a quick solution to the problem which was objectionable to the CPB which was concerned with considering each case on its merits.[72]

The method of notifying the Japanese government on the decisions regarding the Class A war criminals brought into focus among the Allies' representatives in Washington the question to what degree should the Japanese government be informed about their governments' positions or deliberations leading to the final decision. The United States wanted to preserve the right to include its government's individual position in each case, after stating the majority decision, in order to be able to distinguish itself from other governments in case of negative majority decision. The UK, on the other hand, argued that the decisions reached by the majority of governments should be communicated to Japan *en bloc*, in reference to consultation among its participants, "thus relieving the governments in minority of the onus attached to their position."[73] It was of the utmost importance that the Allied powers' deliberation process remain secret and out of reach of the Japanese government— that is, reasons behind the majority decision or the nature of the Allies' deliberations regarding the Japanese government applications for clemency and parole.[74] The notes regarding the release of Class A war criminals were to be kept low-profile and not publicized in the Allied powers' capitals as it risked to provoke public clamor, but was allowed to be the subject of press coverage in Tokyo. The UK, the Netherlands, and New

[71] Summary of Meeting, November 5, 1953, of Representatives of IMTFE Governments with Respect to Class A War Criminals in NARA, RG84, War Criminals – General, Box 28.

[72] Memorandum for the Record, Mr. Pelletier, French Embassy, Mrs. Dunning, March 2, 1953, NARA, RG220, Box 1.

[73] Memorandum, Department of State, "Governments Entitled to Participate Under Article 11 of the Peace Treaty in Decision with Respect to War Criminals Sentenced by the IMTFE," April 29, 1952 in NARA, RG84, Japanese War Criminals, Box 1.

[74] Summary of Meeting, February 19, 1953 of Representatives of interested governments on procedure to deal with Class A war criminals, NARA, RG220, Box 1.

Zealand decided they would not use the faculty of individual decision,[75] and the British decided to press the US to rectify its position as "the US going alone" would complicate other countries' relations with Japan, and consequently make the respective governments less willing to support the US policies towards Japan, such as rearmament.[76] The British wanted to further muddle up the decision-making process by adopting a code of standard to use in preliminary consultations in order to reach unanimous position, a proposal that the US and Commonwealth countries opposed outright. The US was of the view that such technicalities would be an unnecessary waste of time that would "leave a problem involving delicate political relations with the Japanese in a state of continued irresolution."[77] For the US it was obvious that as the whole process would be confidential "the Japanese would [not] be able to play politics"[78] in manipulating Allied governments' opposing views.

At the same time the Allied powers were deciding on the basic framework for decision-making and interacting with the Japanese government in 1953, the Japanese press carried headlines such as "12 Class A War Felons May Be Paroled" by *Mainichi* and "US Offers Plan to Secure Release of 12 War Criminals" by *Nippon Times* which offered the garbled account of the conversation General Snow had with Jun Tsuchiya from the Japanese Embassy in Washington on the matter even before the Japanese government's press release. The Snow did promise that once received the Class A war criminals' applications would be given priority, but that after the President's approval, they would be discussed with other governments concerned.[79] The Japanese press enthusiastically reported that the US would be glad to assure the release of the Class A war criminals and that it was representing the views of the other eight governments. In order to remedy the confusion that was created among

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[75] Memo for Ambassador, "Class A War Criminals Conference," Jules Bassin, March 3, 1953 in NARA, RG84, War Criminals – General, Box 28.

[76] General Working Files, copy of report from Mr. Dunning, "Loose Ends with respect to Class A War Criminals," April 10, 1953, NARA, RG220, Box 5.

[77] General Papers Re A, B, + C War Criminals, From Kenneth Young, Direction of Northeast Asian Affairs to Arthur R. Ringwalt, American Embassy to London, June 3, 1953 in NARA, RG220, Box 1.

[78] Ibid.

[79] Telegram from Dulles to American Embassy Tokyo, March 25, 1953, NARA, RG220, Box 5.

other representatives in Tokyo, the US Embassy sent assurances to other governments that the news were false.[80]

In the same period, decisions of the Allies were carefully weighed against their possible repercussions for the war crimes program in Germany. Although, the IMFTE and IMT were not linked institutionally in a direct way, their connectedness was visible in the political goals they were aiming to fulfill– this bond will not fade away until the dismantlement of the both programs.

4. Together in Law and Politics: The Post-trial Phase of War Crimes Program in Japan and its Repercussions for Germany

In 1952, the West Germany was preparing to ratify the Bonn Agreements which were the equivalent of the Peace Treaty in Japan. On March 10, 1952, Joseph Stalin tried to prevent the rearmament of West Germany by proposing the reunification of Germany and organizing free elections.[81] These attempts failed, but they benefited the West German government in increasing their confidence in negotiations leading to the ratification of the Bonn Agreements with the US. Contrary to the Article 11 of the Peace Treaty that clearly states that Japan accepts the judgement and sentences imposed by the IMTFE, Article 6 and Article 7 of the contractuals restoring German sovereignty were formulated in a way that they devised a way for the West German government to contest legal validity of judgements delivered in the Allied war crimes program. Article 6 set the basis for the establishment of the clemency and parole board, comprised of not only the Allied powers' representatives, but also Germans, which in its activities should refrain from "calling into question the validity of the convictions."[82] Article 7 imposed an obligation upon Germany and its legal and judicial institutions, in explicit terms, to endorse legal validity and authority of the

[80] Telegram, Murphy, American Embassy, Tokyo to Secretary of State, March 26, 1953 in NARA, RG84, War Criminals – General, Box 28.
[81] Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001), 238.
[82] Ibid., 239.

Allied powers' criminal tribunals. Curiously, Article 6 contained a clause limiting the application of the provisions of Article 7 for the matters it dealt with—in other words, the board did not have to accept legal validity of court's judgements.[83] Some time before the ratification, Heidelberg Jurists Circle,[84] a powerful lobby group promoting rejection of legal authority and verdicts delivered by all Allied powers' tribunals, recommended that the war crimes tribunals should not be recognized, a policy line that was endorsed by both the Bundestag and German Chancellor Konrad Adenauer.[85] From the outset, the US talks about German rearmament did not sit well with the idea of top ranking military being held as war criminals in German prisons. As early as 1952, by linking German defense contribution to the release of German war criminals as pre-condition,[86] Germans gained a wild card they could use in their negotiations with the Allied powers. However, the Mixed Parole Board planned for Germany would be put on hold as the ratification of the contractuals by the French National Assembly dragged on which heavily frustrated both Americans and Germans.

Meanwhile, waiting for the conditions to be fulfilled for the Mixed Parole Board to come to life and in face of fall 1953 Bundestag elections that threated to punish Adenauer and his coalition partners given that the war criminal questions did not budge, Secretary of State John Foster Dulles proposed appeasement in form of interim parole board[87] while the US military authorities would shift their stance to adopt a more liberal policy towards the war criminals.

However, in Germany the US organized War Crimes Modification Board in 1949 and the Advisory Clemency Board, the so called Peck Panel, that granted clemency in cases where

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[83] Ibid.

[84] Ibid., 235. Otto Kranzbühler, defense counsel at Nuremberg, was one of the prominent figures behind this plan.

[85] Ibid., 238.

[86] Ibid.

[87] Telegram, Department of State to Tokyo, April 10, 1953 in NARA, RG84, War Criminals – General, Box 28.

such grounds existed and harmonized the differences in sentencing existent between the subsequent Nuremberg trials.[88] In 1954, the Japanese government complained that German war criminals had been released much quicker than the Japanese without taking into consideration that such system had already existed prior to the establishment of the Mixed Clemency Board in late 1953. The official stance of the US government was that the clemency and parole systems in both countries would be treated equally and without any discrimination.[89] However, both Germany and Japan would keep an eye on the developments regarding the release of war criminals in their theaters and would try to play on the differences in the release pace against the US.

The election of President Dwight Eisenhower in November 1952 placed rearmament on the top policy agenda, a policy shift that supported more liberal views towards the treatment of war criminals held by his Secretary of State, John Foster Dulles, belonging to the third generation of lawyer-statesmen.[90] This shift was endorsed by the officers from Political Affairs of State Department who promoted expediency and greater leniency of the clemency and parole system as they observed "the problem as political one, and not as juridical or moral one."[91] However, over time the President Eisenhower's rather conservative stance regarding the issue will pose an additional hurdle which will obstruct the initiatives to release the war criminals.[92]

As a result, the State Department officers, especially the ones from political and legal affairs, were divided by an internal struggle regarding which course of action would be the most appropriate for the final phase of war crimes program. In a similar manner, institutional rivalry was also dividing the US in 1945 when the deliberations on the war

[88] Peter Maguire, *Law and War*, 213.

[89] Telegram, David K. E. Bruce, American Embassy, Paris to HICOG Bonn, August 26, 1952 in NARA, RG84, War Criminals – General Files, Box 28.

[90] Peter Maguire, *Law and War*, 243.

[91] Peter Maguire, *Law and War*, 242-244.

[92] Memorandum of Telephone Conversation, Department of State, November 10, 1954 in *FRUS*, 1952-1954, China and Japan, Vol IV, Part 2.

crimes tribunals establishment took place—State Department and Department of Treasury were in fierce competition for advancing policies of war crimes trials and summary executions of war criminals respectively. The State Department memo summarized the general amnesty policies for Japanese BC Class war criminals that had been recommended by Ambassador Allison and was scheduled to be further discussed by the Department's legal and political officers for Far East and Europe for the purpose of coordination between the two clemency programs. The note observed that the State Department's German officers displayed opposition to any form of amnesty given that they tried to implement a proper judicial system for clemency and parole. Those arguing for amnesty thought that consultations would be detrimental to the desired fast solution to the "war criminal business"[93] which they considered "an unnecessary exacerbation in US-Japan relations."[94] Prior to the meeting convened to discuss the amnesty for Japanese war criminals, John Auchincloss, State Department legal adviser, discussed the detrimental repercussions of the Allison's proposal in a secret memo he sent to the US Embassy in Bonn. He highlighted that political solution would "undermine, in retrospect, the entire war crimes program,"[95] while it would boost the far right in Germany, arise questions before the US Congress, and agitate the public opinion. His note reflected a view in complete opposition to the lawyer-statesmen's view that "what could be justified legally, did not have to be justified morally."[96] He thought that the uneasy questions of principle should be raised and bluntly pondered his view: "The men now serving sentences for war crimes are doing so because we believed at one time that they deserved to be punished for what they did. Do we still believe this, or do we not? If we do not, then we should release the men as soon as possible […] If we believe it, we should stick to it, for to act against it would be cynical, if our

[93] The Weekly Notes for Tokyo, December 5, 1953 in NARA, RG 84, Japanese War Criminals, Box 1.
[94] Ibid.
[95] State Department legal advisor John Auchincloss to Geoffrey Lewis at the US Embassy in Bonn, January 28, 1954, RG59, Box 16 cited in Peter Maguire, *Law and War: An American Story*, 253-254.
[96] Peter Maguire, *Law and War: An American Story*, 253.

purpose were to gain a political advantage, or weak, if our purpose were to avoid political pressure."[97]

Ambassador Allison met the State Department representatives on February 16, 1954 to discuss his proposal regarding the US policy towards the war criminals in view of granting amnesty or "take some action less than amnesty"[98] in case of Japanese war criminals as he was conscious of the repercussions this policy shift might have in German theater. Mr. Herman Phleger, the legal advisor, Mr. John M. Raymond, German officer, and Mr. James Bonbright, deputy assistant secretary for European Affairs, refused the proposal for an amnesty as it "would be observed as a concession to strong German desires, and to that extent it would prove a gratification to the Germans and a source of political benefit to us."[99] They also pointed out that the Department of the Army who held the German war criminals in custody had conservative views regarding the parole system and would not be willing to go as far as the Allison's proposal. It was generally agreed that the liquidation of war criminals question would be beneficial, but that the decision should be weighed against the public opinion and overall policy needs towards Germany and Japan.[100] It was concluded that speeding up the release within the CPB would not be acceptable to German officers in State Department. Interestingly, the German counterparts to Class A war criminals in Germany—seven prisoners convicted by the IMT at Nuremberg, detained in Spandau Prison at Berlin, under the four Allied powers' authority were not included in the parole program in Germany and served their sentences until the very end, with two exceptions.

5. Impossible to Ignore: Influences of Public Opinion, Public Figures and Organizations

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[97] Ibid., 254.

[98] Memorandum, "General Amnesty for Japanese War Criminals," February 16, 1954 in NARA, RG84, War Criminals – General Files, Box 28.

[99] Ibid.

[100] Wilson et al., *The Japanese War Criminals: The Politics of Justice After the Second World War*, 187

The Peace Treaty gave impetus to Japanese public opinion, private, religious, and municipal organizations to ask for the release of Japanese war criminals. The associations of war criminals' families and relatives were the first to mobilize and gain the support of the press and media in their cause. The media will become one of the main driving forces "in the war criminals' rise to prominence as a political and social issue."[101] Contrary to the case of Germany where the government's interest in war criminals fate came organically as the elites had never really accepted the authority and judgement of the IMT at Nuremberg which was the wide-spread belief among the population, in Japan it was the popular movement that propelled the government's action for the release, especially in the first months after the occupation. The general view of the Japanese people was that the ongoing detention of war criminals was not consistent with the newly signed Peace Treaty; they were regarded as "relics of the defeat" that ought to be eliminated. It is important to note that even the Allied Powers were aware of the possibility of this outcome in 1945 when they urged for the expedite prosecution of the major war criminals who could start gaining reputation of martyrs as the passions of war cooled down. It could be said that the same concerns were shared from 1952 by the Allies, especially the US which needed rearmed Japan as its ally in the Cold War. What's more, the perception of collective war guilt to be shared on a national level, rather than individual guilt established by the military tribunals started to emerge. The editorials referred to *Japan* paying its debt to the world community, not only the *war criminals*.

With Japan regaining its independence, the press censure disappeared which gave space to new narratives and stories to be told about war criminals and war experience.[102] At the beginning, this freedom was scarcely explored as the articles questioning the quality of justice, the legality of the military tribunals under the rubric of victors' justice were rather

[101] Ibid.
[102] Ibid.

occasional and articles related to atomic bombings and related crimes against humanity were seldom.[103] In the words of John M. Steeves, political counselor at the US Embassy in Tokyo, the press was extensively reporting on vociferous criticism towards the legal principles, sentences, and authority of the military tribunals coming from the Class BC war criminals in Sugamo prison.[104] Unrepentantly, press accounts expressed their belief that they should have never been prosecuted, "that they were taking responsibility for Japan's defeat on behalf of the Japanese people,"[105] and urged for their immediate release. Invoking "superior orders" to advocate for their innocence, and expressing strong disillusionment with the military organization they reportedly sent letters to young officers from the Public Security Force "asking them how they could be so stupid to enlist."[106] In the first years, the Class A prisoners were rather left out of the press as they refused to be interviewed, according to the Embassy dispatch. They remained peaceful and confident in that before the Class BC war criminals were released, their cases could not be considered.[107] A more credible reason can be found in a rather ambiguous popular position towards them. First and foremost, they were the main characters behind planning and wagging war of aggression, thus brining Japanese people to the brink of misery and poverty for which they deserved to be punished. This view rooted in the Tokyo Tribunal version of events, enshrined in the majority judgement, remained unchallenged by the harsh censure during the occupation. The fact that there were classes of war criminals and that these tried at Tokyo were Class A was self-explicatory – "they were the worst."[108]

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[103] Foreign Service Dispatch, John M. Steeves, US Embassy Tokyo to the Department of State, October 2, 1952, NARA, RG220, Box 5.

[104] Ibid.

[105] Wilson et al., *The Japanese War Criminals: The Politics of Justice After the Second World War*, 189.

[106] Utsumi Aiko, *Sugamo purizun*: senpantachi no heiwa undō (Tōkyō: Yoshikawa Kōbunkan, 2004), 147-48 cited in Ibid., 195.

[107] Foreign Service Dispatch, John M. Steeves, US Embassy Tokyo to the Department of State, October 2, 1952, NARA, RG220, Box 5.

[108] Wilson et al., *Japanese War Criminals: The Politics of Justice After the Second World War*, 191.

The differentiation between the war criminals was visible in the Diet debates. On July 30, 1953 Naruse Banji, the representative of the Socialist Party, during his talk regarding the amendment to the Pension Law, said that he had sympathy for the BC Class war criminals while he stressed that it should be made clear that the Class A war criminals were the responsible ones for the Pacific War, although they were not prosecuted domestically.[109] Later in 1954, the same amendment was debated regarding the possibility that the families of executed war criminals and those who died in prison could benefit from the same financial support that the families of war dead had received.[110] Considerable portion of the Japanese society was concerned about the rise in prominence of the war criminals, their victimization, which cast a shade onto Japan's war guilt, and was potentially dangerous for postwar Japan, a peaceful and democratic country.[111] Social aspect of the war criminal problem, various forms of discrimination they suffered or difficulties in finding employment, the families of deceased or executed war criminals who remained without financial support, and the financial misery of families of Sugamo prisoners were underreported by the press and representative of these less empathetic parts of the society.[112] The general empathy for war criminal's suffering and families that was gaining powerful momentum throughout 1953 had slowly started having a spillover effect upon the views of the Class A war criminals as well. Thousands of petitions that were sent to foreign representatives and governments by private associations, prefectural assemblies, and war criminal families mainly asking for the release of the BC Class War Criminals, also started including the thirteen Class A war criminals into their demands.

One of the postwar pioneers of historical revisionism was Tanaka Masaaki, who was editor of the paper of the Great East Asian Association, the organization whose chairman

[109] Dai-016 Kai Kokkai Honkaigi Dai 29, July 30, 1953.
[110] Higurashi, *Tōkyō saiban*, 360.
[111] Wilson et al., *Japanese War Criminals: The Politics of Justice After the Second World War*, 193-194.
[112] Ibid., 194.

was General Matsui Iwane, the IMTFE defendant sentenced to death in 1948.[113] In his book with had misleading title *On Japan's Innocence: The Truth on Trial,* published right after the media censure was terminated, he accurately summarized the Justice Pal's dissenting opinion.[114] However, the title was highly problematic as it implied Japan's innocence. Pal's opinion was not applicable to all Japanese war criminals, but was applicable to the Class A war criminals. In his dissent, he did find that the Class BC war criminals bore criminal responsibility for atrocities they had committed. The term "innocence" related to the Class A war criminals was established from the point of view of the international law in force at that time which did not strip them of their moral responsibility.[115]

In early 1953, there was a general feeling that the government did not do enough for the war criminals which encouraged various associations and influential public figures to appeal stronger for their release not only within Japan, but also extended their demands to foreign embassies, and governments, including Presidents Truman and Eisenhower. The end of the occupation removed restrictions that SCAP purge directives placed upon the public and military officials in Imperial Japan which brought them back into the political life. Many of these figures had a personal or institutional link to the Tokyo Tribunal and other military tribunals which was foundation of their commitment to the war criminals' release cause. Some among them, felt guilt as they were not the ones prosecuted, purged, or incarcerated which made them feel as they ought to return a favor to their fellow, less fortunate colleagues.[116] Furthermore, what made others bandwagon was that the political, social, and emotional aspect of the war criminals question made it a fertile ground for politicians for gathering political votes. Mamoru Shigemitsu, former Class A war criminal

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[113] Nakajima Takeshi, "The Tokyo Tribunal, Justice Pal and the Revisionist Distortion of History," *The Asia-Pacific Journal*, Vol 9, Issue 44 No 3, October 31, 2011. http://apjjf.org/2011/9/44/Nakajima-Takeshi/3627/article.html (accessed June 13, 2016)

[114] Ibid.

[115] Ibid.

[116] Wilson et al., *Japanese War Criminals The Politics of Justice After the Second World War*, 196.

convicted by the IMTFE and released in 1950 by the SCAP Parole System, became the chairman of the Progressive Party or Kaishintō in 1952. Among the released Class A war criminal suspects were Nobusuke Kishi, member of the Liberal Party elected to the Diet in 1953, Genki Abe, a candidate for general elections for Lower House in 1952; Ryōichi Sasakawa, who was indirectly involved in Japan's postwar politics by helping political parties and businesses as a highly influential and wealthy businessman. From persons institutionally related to the work of the IMTFE was Ichirō Kiyose, General Tōjō's defense attorney, formerly purged by SCAP, returned to politics as a secretary-general of Kaishintō.[117]

On December 16, 1952, the National Convention for the immediate release of the war criminals was held and attended by many of the above-mentioned public figures and others, such as Shūmei Ōkawa, the Class A defendant dismissed during the Trial as mentally unfit, and later released form the mental hospital in 1948. They provided their support for the Declaration that was adopted on this occasion and which openly challenged the Trial.[118] The Declaration rejected the legal grounds of the Tribunal as contrary to international law and treaties, "unilateral judgements as revengeful"[119] and based on flawed investigations which only brought indignation and sorrow to the Japanese. The detained war criminals represented an impediment to Japan's reintegration to the postwar international relations read the concluding paragraph of the Declaration.[120]

One of the most influential private groups that worked on behalf of the war criminals was the Association for Relief of War Criminals, whose director was Chūichi "King Kong" Hara, admiral in Japanese Imperial Navy, who was prosecuted for war crimes in an

[117] Ibid.

[118] Dispatch from the American Embassy in Tokyo, Purpose of the People's Convention on Immediate Release of War Criminals (Translation), January 13, 1953, NARA, RG220, Box 5.

[119] Ibid.

[120] Ibid.

American military tribunal in Guam and released from Sugamo on April 19, 1951.[121] In 1953, he was appointed by the Ministry of Justice as an advisor to the Chief of the Rehabilitation Bureau, his functions mainly consisting of preparing parole applications of war criminals for the Allied powers' governments and helping rehabilitation of the released war criminals. At the same time the Ministry of Justice decided to organize vocational guidance program for war criminals in Sugamo Prison which aimed to be a way for them to earn money, made available from the Ministry of Finance funds, which was promised to be given to them as a reward after their release.[122]

The ultranationalist groups such as Young Men's Association for Japanese Reconstruction or *Nippon Kenseikai* on whose agenda release of war criminals was ranking high pressed the government, foreign representatives, and organized gatherings.

Other than many Americans of Japanese descent who used their influence to promote the resolution of the Japanese war criminal issue, among influential Americans who travelled to Japan was E. Stanley Jones, Methodist Christian Missionary. In his letter to General Snow, he rightly observed that "the whole affair has spilled over from judicial to the political and to the human […] This can no longer be looked as a merely judicial affair and confined to that area."[123]

By the end of 1953, while the sympathy for war criminals reached new peaks, the situation in Sugamo was becoming critical with loose discipline and threats of mass escape.[124] In the words of one prison official, reported by *The Mainichi* "if the prisoners should try to escape, we would just have to stand aside and let them pass; if the government wants to stop them with guns, let armed troops do it."[125] In September 1953, the Sugamo

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[121] Working Papers Re A, B, +C War Criminals, Folder 1, Dispatch from William Leonheart, American Embassy Tokyo to State Department, Legal Advisor, July 6, 1953 in NARA, RG220, Box 5.

[122] Ibid.

[123] Letter E. Stanley Jones to Edward Snow, April 24, 1953, NARA, RG220, Box 5.

[124] General Files 1952-1958, Walter Simon, "Fear Escape of War Criminals in Jap Prison, "September 19, 1953 in in NARA, RG220, Box 5.

[125] Ibid.

Prison Committee concluded that there was a lack of understanding among people regarding the distinction between the Class A and Class BC war criminals which had been hindering the release movement. The petitions were no longer enough in order for the movement to finally transition from social to political one in order to gain vigor. The Committee expressed frustration at the "stubborn" war criminal problem in relation to the US and Britain, which are linking the release of war criminals with the Korean War and Japanese rearmament. The hopeful part of the report was the encouragement to exploit the strengthened Japan's international stance under the peaceful offensive by the USSR and Communist China in order to make the US and Britain speed up and settle the war criminal problem.[126] Although the issue of war criminals had not yet reached its peak on the political agenda, both Japan and the US were pondering over the possibility of using the war criminals release as a trump card in dealing with each other.

6. All Paths Leading to the Release: Behind the Curtain of "Legalism"

The classification of war criminals into A and BC Classes created confusion during the post-trial process as its main stakeholders created different expectations for each group. As it had already been previously mentioned, the Class A war criminals were considered to be "the worst ones" by the Japanese public opinion and by the Japanese government. Nevertheless, the classification only indicated the type of the crime and the rank of its perpetrator, not the seriousness of the crime. In addition, terms such as "major" war criminals (Class A) and "minor" (Class B) war criminals were self-evident for the public and created further confusion for ordinary people who had constantly compared them. Accordingly, Class A referred to the crime of aggression that was committed by the individuals occupying the top-ranking civilian or military positions. In 1945, it was of utmost importance for the Allied

[126] General Files, 1952-1958, "Gist of the Enforcement of the Last Release Movement Policy, Sugamo Management Committee," September 1, 1953 in NARA, RG220, Box 5.

powers to mete stern justice to individuals whose names were sound to the public—Hideki Tōjō was another Japanese equivalent, besides the aforementioned Emperor, who was compared to the German Kaiser who had escaped the responsibility for war in 1918. However, among the BC war criminals, facing justice for conventional war crimes and crimes against humanity, were those guilty of crimes such as vivisections and bacteriological testing which were considered to be among the most heinous crimes. In this regard, for the majority of the Allied powers' governments the Class A war criminals were not necessarily the most problematic or worst criminals to deal with. In other words, the release of the Class A war criminals was not a *sine qua non* of the release of the Class BC criminals. These misunderstandings were source of frustration and confusion that stressed the unfolding of the clemency and parole program on both sides.

1953 was the year when the CPB received the first recommendations for the release of Class A war criminals from the Japanese Ministry of Foreign Affairs —notably for Jirō Minami, Shunroku Hata, and Takasumi Oka. In March 1953, the former IMTFE Chief Prosecutor Joseph Keenan was in a private visit to Tokyo where he met with the Prime Minister Yoshida, other officials, and received an audience with the Emperor.[127] The encounter naturally led to the discussion on the war criminals, albeit not officially. The Japanese press reported that the US government requested ex-Prosecutor's views on the war criminals' parole which were to be decisive on the matter. In his grandiloquent like manner Keenan said that "almost all of the twelve [Class A war criminals] can be released without danger to world peace."[128] Ironically, Keenan was still framing the narrative around the golden age Class A war criminals in terms of world peace whereas the peace promised to be maintained and war crimes deterred, by the UN Charter and war criminal tribunals in 1945 respectively, had been usurped in not so faraway battlefields of the Korean Peninsula. Few

[127] From American Embassy Tokyo to the Department of State, April 9, 1953, NARA, RG220, Box 28.
[128] Ibid.

months later, Keenan visited the CPB where he voiced his opinions on Class A war criminals with respect to their rank and potential threat they posed to the postwar Japan. Although the IMTFE obviously failed at reeducating the Japanese, General Snow's notes[129] of the meeting captured Keenan's candid view of what goals the Trial was meant to fulfill—it was not so much about the deterring effect, but rather it was used to "inform Japanese people of how they got into war," and "to reduce effect of exulted function of defendants on the people."[130] These words meet the above-presented challenges of the prosecution to convict the representatives of each phase of the war faced with meagre evidence; in that context the multiple criteria they used looked for their rank, reputation, and visibility during the war. In Keenan's evaluation Minami and Araki were described as not "rabble-rousing" which recommended them for clemency, while he held some reservations for Hata due to the high rank he held in the Army. As the only Field Marshall Hata was one of the key figures in China phase of the Trial—convicted of negative criminal responsibility and war crimes committed on a large scale and over a long period of time by his troops in China—although his conviction was made upon *prima facie* evidence.[131] Kenryō Satō, Lieutenant General, who had never held the highest-level cabinet or army posts and Okinori Kaya, Minister of Finance, both Tōjō's protégés were recommended for clemency as not "fanatic and war promoters." Among those approved for clemency by Keenan was Naoki Hoshino, one of the prominent entrepreneurs and political figures in Manchukuo and later chief of cabinet in the Tōjō Cabinet as he would be "of more use outside prison." Interestingly, Keenan suggested a careful reexamination of one of the most important defendants at the Trial, the Lord Keeper of the Privy Seal and advisor to the Emperor, Kōichi Kido as he thought that "he might have been wrongfully prosecuted." In 1947, Keenan cross-examined Kido in order to

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[129] General Snow's notes regarding Appearance of Chief Prosecutor Keenan on June 8, 1953, General Files, NARA, RG220, Box 5.

[130] Ibid.

[131] Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge (Massachusetts): Harvard University Press), 2008, 187-89.

elicit from him any information about the Emperor's role in decision-making process preceding the Pearl Harbor attack which he thought would support the larger occupation policy of exonerating the Emperor from criminal responsibility. Initially, his cross-examination was supposed to be conducted by Comyns-Carr, the British Prosecutor at the IPS, who was in charge of studying Kido's dossier, but in the last moment Keenan bluntly took over without any prior preparation or consultation with other members of the IPS, thus ruining the opportunity for getting important information from "this intelligent and formidable witness."[132] The rest of Class A "villains," according to Keenan: Kingorō Hashimoto, who was branded as unrepentant "fanatic war monger," Shigetarō Shimada, Navy Minister during the Pearl Harbor attack, Takazumi Oka, Navy Vice-Admiral, who was depicted as bitter fanatic, Hiroshi Ōshima, former Japanese Ambassador to Germany, who was described as "the most dangerous man in confinement," and Teiichi Suzuki, Army General were all listed as more or less potentially dangerous.

In 1953, as the anti-US climate was reaching a new climax, the rumors that the Communist China and the Soviet Union were willing to repatriate the Japanese war criminals in their possession further frustrated the Allied powers' legalistic plan for the release of war criminals. To be more precise, the Japanese prisoners of war (POWs) were prosecuted in Communist China Trials in the 1950s where their main purpose was to reeducate the Japanese, contrary to the Allied powers' criminal courts that dwelled on retribution; in the Soviet Union, they were held in concentration camps, while few of them were adjudicated in the Khabarovsk trial. As neither Communist China nor the USSR signed the Peace Treaty with Japan, they had a liberty to organize their own trials. All the Japanese captured by the both countries were referred to as "war criminals," not prisoners of war. This strategic move potentially had serious ramifications at various levels. On the one hand,

[132] Yuma Totani, *The Tokyo War Crimes Trial,* 36-38.

it would add more fuel to the already enflamed Japanese public opinion against the US—their ally which was slacking its pace of releasing the war criminals behind its legalistic policies—while the Communist countries showed benevolence in dealing with the Japanese. This situation contrary to the common sense and logic gave powerful political tool to the leftist and neutralist elements in Japan to gain more sympathies among the population.[133] The refusal to grant clemency to Class A war criminals Araki and Minami could be evaluated against the Communist magnanimity.[134] The members of the Japanese House of Representatives met with Walter Robertson and Robert J. G. McClurkin in September 1953 to communicate their fears and urge the US to further speed up the release since the Communist threat loomed large.[135] On October 12, 1953 the Japanese Red Cross helped repatriate 1274 Japanese "war criminals" from Moscow, among which were military and civilians.[136] According to the data held by the Ministry of Foreign Affairs of Japan, there were 68,000 Japanese prisoners of war and civilians in hands of the Soviets and Chinese who were serving their sentences as war criminals. The situation became more precarious with both Philippines and China pardoning and releasing war criminals[137] which created the impressions that the Asians did their part, but not the Americans. Furthermore, the releases of North Korean and Chinese Communists who had been captured and their non-prosecution for atrocities committed against the Americans and United Nations' POWs was one of the first failed tests of the postwar international criminal law principles which had been adopted in 1945. What's more both the illegality of waging war, its criminality, along with war crimes and crimes against humanity were eroded by the more pressing matters

[133] General Files, 1952-1958, Memorandum of Conversation, Department of State, September 25, 1953 in NARA, RG220, Box 5.

[134] Weekly notes, November 7, 1953 in NARA, RG 84, Japanese War Criminals, Box 1.

[135] General Files, 1952-1958, Memorandum of Conversation, Department of State, September 25, 1953 in NARA, RG220, Box 5.

[136] The Weekly Notes for Tokyo, Department of State, November 21, 1953 in NARA, RG 84, Japanese War Criminals, Box 1.

[137] *Mainichi*, Editorial, "War Criminal Issue," January 11, 1954 in NARA, RG84, War Criminals – General Files, Box 28.

were awaiting and no country wanted to get embroiled in another round of fastidious criminal proceedings. The UN General Assembly Resolution condemning, in vague and unspecified terms, the atrocities against Americans and the UN POWs was released only to appease the Congress and public opinion at home.[138]

The recommendations for clemency of Minami, Araki, and Hata were discussed between the Allied governments' representatives in November, 1953. The US supported clemency on the grounds of old age and health for Minami and Araki, who were to be supervised by the attorney general of Japan, but the postponement of Hata's case for a later date as he was convicted on counts of war crimes (BC Class) to which the Netherlands, Pakistan, and France all concurred.[139] The Commonwealth countries formed a conservative block that opposed any form of clemency suggesting they would agree to a temporary release for a hospital treatment, upon which they should return back to prison.[140] The UK and Australia were opposed to clemency, even on the grounds of old age which they considered to be insufficient according to their domestic law– the most they could offer is to eventually agree to release the three on parole in 1959. The Australian position was particularly conservative not only because of the suspicions harbored towards Japan and their popular opinion being hostile to the Japanese, but also because their criminal system only recognized medical parole and reduction of sentence, hence they were careful about establishing precedents. Australians did not heed much about the fear the US felt as a response to the peaceful offensive by the USSR and "opposed what seemed like US effort to force the issue."[141] In January 1954, a special medical parole was approved by the majority

[138] Telegram, Dulles to American Embassy, Tokyo, October 30, 1953 in NARA, RG84, War Criminals – General, Box 28.

[139] Weekly notes, November 7, 1953 in NARA, RG 84, Japanese War Criminals, Box 1.

[140] Ibid.

[141] General Working Files, Dispatch from Ottawa, December 1, 1953, Dispatches regarding Class A war criminals, November 25, 1954, NARA, RG220, Box 5.

governments only for Minami, 78 years old who left Sugamo prison, while Araki, 75, was left for later consideration.

Months prior to the official Prime Minister Yoshida's visit to the United States scheduled for November 10, 1954, the Japanese Embassy in Washington was laboring hard to persuade the US government to prepare some tangible policies that would speed up the release of the war criminals. The Embassy Officer Takeuchi pointed at the speedy clearing of German prisons which was frustrating to the Japanese government as well as the unrest among the war criminals confined in Sugamo that could potentially escalate in the absence of some ameliorations.[142] At this point, the war criminals were becoming assertive in demanding political solution to the issue as they had a clear awareness "that public opinion was an important force behind them, not Yoshida or the US."[143] Ambassador Allison urged Secretary of State Dulles to seize the opportunity and find US offered solution to the problem, before it was too late. In Allison's words "failure to attack this problem effectively is bound to cause our broader interest here to suffer increasingly."[144] He rightly observed that "the Japanese attitude was hardening on number of fronts"[145] in light of utmost irritation around the static issue of war criminals and the Bikini Atoll incident. Finally, he warned that this might be the last opportunity to take the maximum benefit of the present situation "at no tangible cost to us [the US] something of value for Yoshida to show for his visit."[146] The US could objectively promise to speed up the release of considerable number of war criminals while the remaining ones, those who committed the most heinous crimes, could never be paroled or at least, not in the near future.

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[142] Working Papers Re A, B, + C War Criminals, Folder 2, Telegram from Allison to Secretary of State, May 21, 1954 in NARA, RG220, Box 9.
[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] Ibid.

In 1954, an important change brought about the solution that would speed up the release process while preserving the veil of legality that was of the utmost importance to the US and some of its allies. The expedite judicial review solution was a victory for the legalists in the US government against the repeated calls for granting amnesty or pardon from the Embassy and various State Department officers that was rejected on the grounds that it would nullify the legality of the war crimes program. Anyhow, it was a step forward towards resolving the anti-US "psychological climate not conducive to Japanese cooperation."[147] The US reviewed the CPB parole procedure in responding to the pressures and repeated warnings coming from the Political Division of the US Embassy in Tokyo. It was suggested that "the US government should elaborate a policy or concept as to the time limit in which the war criminal problem can be liquidated."[148] On July 12, 1954 the President approved the CPB proposal for the change in the basic rules governing parole mechanism—one third of sentence for those with sentences in duration of 30 years or over and 15-year rule for lifers—which resulted in an all-encompassing 10-year rule which allowed all prisoners to become eligible for parole after having served 10 years of their sentence.[149] In addition, upon the recommendation of the State Department, the CPB agreed to review all the cases and recommend them to the President,[150] with the exception of the Class BC hard core cases, by the end of 1955 which meant that the war crimes program would be almost liquidated.[151] If the old rules were to remain, the lifers, all of the Class A war criminals, would only become eligible for parole in 1961.

[147] Working Papers Re A, B, + C War Criminals, Folder 2, From Mr. McClurkin to General Snow, June 13, 1954 in NARA, RG220, Box 9.

[148] Memorandum from Kenneth T. Young, Department of State to General Snow, March 24, 1953, NARA, RG220, Box 5.

[149] Working Papers Re A, B, + C War Criminals, Folder 2, Draft Yoshida Paper, Japanese War Criminals, October 19, 1954 in NARA, RG220, Box 9.

[150] Working Papers Re A, B, + C War Criminals, Folder 2, From Mr. McClurkin to General Snow, June 13, 1954 in NARA, RG220, Box 9.

[151] Ibid.

Simultaneously, during 1954, all of the ten remaining Class A war criminals were recommended for clemency by the NOPAR, four of them based on old age, as they were over seventy years old, while the remaining seven were the ones the most involved in aggressive war policy line according to the Board. The Board recommended that in the absence of credible medical record justifying earlier release on medical parole, all the cases would become pending.[152] Recommendations for special medical parole for Hata, whose medical situation was worsening, and Oka, who was not seriously ill, were thorn in the eye to the CPB as they were convicted of BC war crimes, which could have repercussions for BC war criminals and involved in Pearl Harbor attack respectively.[153] For these cases, the CPB required the veracity of Japanese medical reports to be confirmed by an American doctor. Ambassador Allison strongly discouraged this course as it could be interpreted by the Japanese government as questioning of their good faith in applying Article 11 of the Peace Treaty and would create situation reminiscent of the occupation days.[154] Especially so in the light of the death of Bikini Atoll victim Aikichi Kuboyama and the fact that other governments did not ask for such double confirmation which would additionally enrage the Japanese. In the end, the chairman of the board acquiesced, but still on his own initiative forwarded the Japanese medical report to an army doctor through the US Army Judge Advocate General (JAG) for a comment.[155] The US did not reach the decision on the two, "but not to make impression of dragging their feet," before the other allies, they attributed the non-decision to the resignation of their Department of Justice Board member.[156] Contrary to Japanese expectations, the US was not always setting example for other countries in simply approving the recommendations, quite the opposite. The US Embassy in Tokyo

[152] Memo, "Clemency of Seven Class A War Criminals," P. Brumby to Mr. Parsons and Mr. Bassin, May 28, 1954 in NARA, RG84, War Criminals – General, Box 28.
[153] General Working Files, October 6, 1954, NARA, RG220, Box 4.
[154] Telegram, from Allison to Secretary of State, September 25, 1954 in NARA, RG 84, Japanese War Criminals, Box 1.
[155] Weekly Notes to Tokyo, October 2, 1954, Jules Bassin in in NARA, RG 84, Japanese War Criminals, Box 1.
[156] Ibid.

feared that if such information leaked to the Japanese, it would come at the high cost for the US. Both Hata and Oka were granted a special medical parole by the majority vote from which the US eventually decided to abstain.[157]

In November 1954, the Allied governments were slowly starting to act in concert regarding the Class A war criminals—the ten-year rule was proposed by the New Zealand delegate and the US as a legal basis for their parole thus making them eligible in 1955 or beginning of 1956 the latest.[158] The most conservative governments, Australia and Britain were opposed to this proposition while France, Pakistan, the Dutch which supported early clemency and release agreed to these more liberal policies regarding the Class A war criminals. Australia was willing to follow the US lead as long as it did not have to be the initiator, due to its domestic concerns.[159] For the Dutch, the Class A war criminals could be processed quicker as the justification for its Parliament and public opinion could be provided "under considerations of international nature."[160] The remaining task was for the Allied powers' respective government to formulate their positions with respect to individual cases keeping in mind the ultimate goal that was "to dispose of this problem as rapidly as possible."[161]

In words of J. Graham Parsons, Officer of the US Embassy in Tokyo, during his visit to Washington in November 1954, Yoshida missed his chance to achieve more tangible results regarding the war criminals issue which was not of primary importance for him. Instead, he considered this topic should be left for discussion to lower level officers who accorded much

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[157] Minutes, October 25, 1954, NARA, RG 220, Box 1, folder: Minutes CPB, M-64.

[158] Working Papers Re A, B, + C War Criminals, Folder 2, Summary of Meeting of Representatives of Interested Governments on Class A War Criminals, November 22, 1954 in NARA, RG220, Box 9.

[159] Working Papers Re A, B, + C War Criminals, Folder 2, From Peaslee to Secretary of State, July 9 in 1954 in NARA, RG220, Box 9.

[160] Working Papers Re A, B, + C War Criminals, Folder 2, Summary of Meeting of Representatives of Interested Governments on Class A War Criminals, November 22, 1954 in NARA, RG220, Box 9.

[161] Ibid.

more attention to it.[162] Although Yoshida's modest efforts regarding war criminals' release did not score high among his diplomatic achievements, things were taking their natural course—intransigent Japanese public opinion, the crumbling of Yoshida's political base, and an overall anti-US climate that took root—as the US was finally gaining sobriety regarding the war criminals issue. It became clear that the war crimes program would have to get the tint of political and finally take more seriously into consideration the diplomatic and geopolitical aspect of its relation with Japan. The war criminals question and the insistence on its judicial character were taking toll on the implementation of other important policies, especially related to defense.[163] The Assistant Secretary for East Asia and Pacific Affairs Robertson acknowledged that together with the State Department Legal Advisor, Phleger, who previously vigorously protested a political solution, the issue will be brought to the attention of the Secretary of State.[164]

[162] Letter, Informal, J. Graham Parsons, US Embassy Tokyo to Mr. Noel Hemmendinger, Office of Northeast Asian Affairs, December 21, 1954 in NARA, RG 84, Japanese War Criminals, Box 1.

[163] Memorandum for the Files, American Embassy, Tokyo, December 20, 1954 in NARA, RG84, War Criminals – General Files, Box 28.

[164] Memorandum for the Files, American Embassy, Tokyo, December 20, 1954 in NARA, RG84, War Criminals – General Files, Box 28.

CHAPTER 4: Japan and Releasing of the Class A War Criminals: New Understanding of Japan's War Responsibility

1. Cleaning up the Class A War Criminals: Medical Parole and the Allied Powers' "Benevolence"

The medical parole was the only way in which the Allied powers could effectively justify the release of Class A war criminals on humanitarian grounds, but also show themselves as compassionate and merciful towards aged and sick men they did not want to see dying in prison. In its recommendations for clemency of the Class A cases who were over 70, the Japanese government advanced clause from its Code of Criminal Procedure of 1948 according to which the execution of sentence for prisoners who are at least 70 years old could be stayed on the moral grounds. However, not all the Allies were willing to accept the Japanese Criminal Code clauses, but advanced their own as an impediment for casting their favorable vote. The US position was quite prudent when it came to medical parole, the Board was favorable to casting vote for reasonable requests, but it deplored that the Japanese government in many cases failed to demonstrate the detailed medical condition or ailment of the Class A war criminals as they were not all old and sick. The Board concluded that granting them all medical parole would be a farce.

Sadao Araki is the case in point, whose application dragged on for two years due to the stark opposition from the Commonwealth governments. As the initial application for Araki did not comprise a medical report or any information indicating ailment, his dossier was placed together with the other Class A war criminals who were considered for clemency or regular parole. French government was the most flexible as it was prepared to grant special treatment to Class A war criminals over 70 – Minami, Araki, Hata, Shimada, and Kido.[1] The US was concerned that the group releases would jeopardize the proper procedure of

[1] Memorandum for the Record, Mr. Pelletier, French Embassy, Mrs. Dunning, March 2, 1953, NARA, RG220, Box 28.

reviewing each case on its merits. In November 1953, during the governmental consultations, the Commonwealth nations were all opposed to any form of clemency based on old age proposing 1959 as the year to consider parole for the Class A war criminals who were not applying for medical parole. According to Australian penal system, life sentences were considered as 21 years with remission of one-third for good behavior which would reduce the sentence to 14 years, hence the prisoner would become eligible in 1959.[2] In October 1954, the Canadian government proposed that as Araki was not involved in the aggressive policies after 1939, whereas others were, he could be distinguished from other Class A war criminals.[3] At that time, the US representative proposed that the system of parole, the ten-year rule approved by the president, could also be extended to Class A war criminals who were all serving life sentences.[4] In February 1955, the Secretary of State Dulles complained to Bassin in Tokyo that the NOPAR medical reports were out of date which posed difficulties in deciding the cases and fed the idea that an American doctor should examine the prisoners directly.[5] The State Department entered into all sorts of legal technicalities to support these requests. In case of medical examination of applicants by an American doctor, the State Department explained that the Japanese Law No. 103 contained a provision under which the Japanese government should allow the interested government to send an official to inspect the conditions of the execution of sentence and interview the prisoner.[6] In March 1955, the NOPAR provided a medical report for Araki, 78, that diagnosed him with kidney atrophy due to arteriosclerosis and prognosis was not bright—"recovery is slow and the prospect of

[2] Summary of Meeting, November 5, 1953, of Representatives of IMTFE Governments with Respect to Class A War Criminals in NARA, RG84, War Criminals – General, Box 28.

[3] Summary of Meeting, October 5, 1954 of Representatives of Interested Governments on Class A War Criminals in NARA, RG 84, Japanese War Criminals, Box 1.

[4] Ibid.

[5] Dulles, Department of State to Bassin, American Embassy, Tokyo, February 14, 1955 in NARA, RG 84, Japanese War Criminals, Box 1.

[6] State Department to American Embassy, Tokyo, September 10, 1954 in in NARA, RG 84, Japanese War Criminals, Box 1.

recovery extremely poor" concluded the report.[7] On June 14, 1955 the Allies' representatives agreed to grant a special medical parole to Araki.[8] Furthermore, in Hata's application the NOPAR deliberately understated the offenses committed, at his request, in order to make a strong case for clemency and parole.[9] The US was calculating its position in anticipation of other allies' votes, concretely the CPB agreed that in case of the casting vote, the chairman should oppose clemency, while in case the majority was pro-clemency, he should align.[10] In that sense, the US was not necessarily setting an example for others, but was using the positions of other governments to secretly preserve its time-consuming legalistic policies, a time credit that the US had already started to lose.

The medical parole requested for Shigetarō Shimada was pending as the defense member of the Board considered that it would be difficult to release him on a medical parole given the serious offenses he was involved with as Navy Minister.[11] The member referred to Shimada's support for policies of killing survivors of sunken ships, although this offense did not gain prominence at the IMTFE, for which his subordinates pleaded guilty in *United States of America v. Hisashi Ichioka, et. al* in Yokohama Trials.[12] Together with Kingorō Hashimoto, he was described as "bad eggs," and as they did not suffer from any serious illness, the prospects they would be released were slim in 1954. In his letter to the Embassy in Tokyo, Director of Northeast Asian Affairs from State Department Noel Hemmendinger deplored the almost set in stone rigidity of the US war crimes program: "it was extremely unfortunate that our position is so inflexible [w]hile the other Governments are developing more liberal attitudes as a result of our pressures, our position is remaining static."[13] This rigidity was reflected when in March 1955 Shimada was granted a medical parole by the

[7] Records of CPB, Class A War Criminal, Araki Sadao, March 4, 1955 in NARA, RG220, Box 1.
[8] CPB, Minutes, June 20, 1955, Minutes, NARA, RG 220, Box 1, folder: Minutes CPB, M-78.
[9] CPB, November 2, 1953, NARA, RG 220, Box 1, folder: Minutes CPB, M-41.
[10] Ibid.
[11] Minutes, November 29, 1954, NARA, RG 220, Box 1, folder: Minutes CPB, M-66.
[12] General Working Files, November 17, 1954, NARA, RG220, Box 5.
[13] Letter, Mr. Noel Hemmendinger, Office of Northeast Asian Affairs to J. Graham Parsons, American Embassy, Tokyo, December 3, 1954 in NARA, RG 84, Japanese War Criminals, Box 1.

majority vote of the interested governments, on the occasion of which the US did not vote and stayed aside as it could not reach position on the case.[14] Hashimoto, although recommended for medical parole by the NOPAR and despite the fact that he had already been hospitalized in 1952, diagnosed with gastric ulcer which might have later developed into cancer, was not granted medical parole. Released on parole in September 1955, he died soon after on June 29, 1957 of a lung cancer.[15] It is possible that the same way as in case of Shimada, his military record— the top-ranking military officer responsible for his troops' war crimes in USS Panay Incident and portrayed as a staunch promoter of a military control over government, and aggressive war policies through his membership in the Imperial Rule Assistance Association—weighted against the unclear or suspicious diagnosis on his medical record in the deliberations of the CPB.

2. The Hatoyama Cabinet and the Shifting Policies: *Jyūnen Hito Mukashi*

The major shift took place with the Hatoyama administration that finally dealt with the war criminal issue on the top government level contrary to the previous years where it had been almost exclusively relegated to the lower level where the respective embassies and the CPB were in charge with slight interventions of the State Department and the President Eisenhower. In 1955, Allison warned against the pressure placed upon Japan to increase its defense spending which would backfire on the US and introduce a considerable resistance to the establishment of the solid foundations for a long-term cooperation.[16] Japan was deeply frustrated for not being an equal that could "influence US policy to same degree as major NATO powers"[17] and pursue policies that are in line with its national interest rather

[14] Minutes, April 4, 1955, NARA, RG 220, Box 1, folder: Minutes CPB, M-73.

[15] Records of CPB, Class A War Criminal, Hashimoto Kingoro, Telegram from MacArthur, American Embassy Tokyo to Secretary of State, July 18, 1957 in NARA, RG220, Box 9.

[16] Telegram From the Embassy in Japan to the Department of State by Allison, Tokyo, January 10, 1955, FRUS 1955-1957, *Japan,* Volume XXIII, Part 1 (Washington: United States Government Printing Office: 1991).

[17] Ibid.

than "result of external pressures."[18] This bred a feeling among the Japanese of their country being treated "as second-class nation."[19] The shift in the US policies was to primarily focus on building a solid political and economic basis in Japan which would bring improved confidence and sense of responsibility and hence become its bouncing off place for a more robust military buildup.[20]

On December 10, 1954 Ichirō Hatoyama was elected the Prime Minister thus ousting Yoshida from power. This change in power would not only have the major repercussions for Japanese foreign policy, but also for Japanese war criminals, including the Class A. In his address before the Diet on January 21, he talked at the very beginning about his intention to finally resolve the deploring issues of repatriation of the Japanese detainees from abroad and war criminals still detained in Sugamo by appealing to the countries concerned.[21] Prime Minister Hatoyama was determined to urge the US government to speed up the release of the war criminals meant to be eligible for parole only in 1959 by considering reduction of sentence. He argued that the US public opinion, often advanced as an excuse by America to justify the reluctance in the release process, should understand that ten years after the war, the Japanese were eager to liberate themselves from the remnants of war and ensure the general release of prisoners and their full freedom which proved to be impossible under the present parole system. During the same month, Foreign Minister Shigemitsu voiced his stance on foreign policy priorities which were the return of Okinawa and resolution of war criminals issue. Shigetmitsu did not hide his deep frustration with the inequality reigning the US-Japan relation—"it is truly distressing to see the scars of the war before our eyes at a time when cooperation with the democratic, free nations is being stressed."[22]

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[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Dai 021 Kaikokkai Honkaigi Dai 5-gō, January 21, 1955.
http://kokkai.ndl.go.jp/SENTAKU/sangiin/021/0512/02101220512005a.html (accessed August 3, 2017)
[22] CPB, Clemency Efforts in 1955, "Shigemitsu to talk about Foreign Policy," *Kyodo*, January 21, 1955 in NARA, RG220, Box 9.

The general elections planned for February 27, 1955 brought before the US, specifically the Secretary of State Dulles, the question of the timing when the decision regarding the release of Japanese war criminals could be announced to provide maximum benefits to the US. Ambassador Allison suggested that as it was expected that the conservatives would win two-thirds of the seats, the announcement before the elections would not contribute to the strengthening of the conservative position and might also be plagued with accusations of American ulterior motives. This option lost appeal to the fact that all the parties across the political spectrum were also eager to see war criminals released as they considered it "as politically motivated and unwarranted influence in Japan's internal affairs."[23] Allison favored the announcement to be given after the elections as a strategic move that would set the US off to a good start in its interaction with the new government and clear the current anti-US environment of tensions so that the negotiations on more important matters could finally take place.[24] The anxiousness over the possibility that the Soviets could offset the US in releasing Japanese "war criminals" before elections prompted Allison to ask the government to make a final decision as soon as possible.[25] To the disappointment of the State Department officers in charge of the Far East, Dulles refused the recommendation to announce the release of all Class BC war criminals as he thought it would provoke negative reactions on the German side considerations of which still actively managed to "prejudice" a more resolute steps on the Japanese side.[26] Solution that was contemplated was to place the definite authority of granting parole and clemency upon the CPB which would remove the President from decision-making chain and speed up the process. However, McClurkin was rather pessimistic that all war criminals could be released

[23] Working Papers Re A, B, + C War Criminals, Folder 2, Telegram from Allison to Secretary of State, February 1, 1955 in NARA, RG220, Box 9.

[24] Ibid.

[25] Ibid.

[26] Letter, Robert J.G. McClurkin to Allison, February 4, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

by the end of 1955 having in mind "the legal approach that dominated the thinking of the Board,"[27] but decided to stay engaged in pressing further for the resolution of Japanese war criminal questions when such opportunity arose.[28]

The amendment to the executive order which would delegate the presidential prerogative to make final decision regarding the grant of clemency and parole to the CPB stopped the stream of paroles for few months which further frustrated the Japanese.[29] This decision was deemed necessary in light of relieving the President of such burdensome procedure and in view of other considerations in two countries' relations[30]—one of them being that the clock was ticking for the Americans to show some tangible results on the war criminals agenda. Although the CPB acquired the authority to act independently, there was no major evidence that the release process was moving forward which seriously started to press and worry the less and less understanding officials from the US Embassy in Tokyo and State Department, who represented the first line of defense against the Japanese pressures, and prompted them to urge for some concrete rules or measures that would be in line with intended improvement in relations with Japan.[31] In May, the CPB set the target date, the end of 1956, by which the decisions regarding the BC Class war criminals should be made, except for the hard core category.[32] For its part, the CPB almost commended itself for the principled and legalistic approach the American war crimes trial program in the Far East had taken.[33] Regarding the Class A, the CPB announced that only one Class A war criminal,

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[27] Ibid.

[28] Ibid.

[29] General Working Files, Memorandum, From Mr. Hagen, CPB, to Mr. Snow, FE, May 12, 1955, NARA, RG220, Box 5.

[30] Working Papers Re A, B, + C War Criminals, Folder 2, Letter from Herbert Brownell, Jr., Attorney General to the Secretary of State, February 21, 1955 in NARA, RG220, Box 9.

[31] Letter, J. Graham Parsons, American Embassy, Tokyo to Mr. Noel Hemmendinger, Office of Northeast Asian Affairs, March 14, 1956 in NARA, RG84, War Criminals – General Files, Box 28.

[32] General Working Files, Memorandum, From Mr. Hagen, CPB, to Mr. Snow, FE, May 12, 1955, NARA, RG220, Box 5.

[33] Ibid.

Kenryō Satō, would be eventually paroled in 1956, thus implying that the remaining ones would be paroled throughout 1955.

In February of the same year, the officer from the Japanese Ministry of Justice Yokomizo travelled to the US to discuss the issue of war criminals with State Department Officers in charge of the Far Eastern Affairs William Sebald and Richard Finn. At this point, the Japanese started expressing frustration over the pace of the US release of German war criminals while the Soviets were ready to release all of the war criminals in their custody. At this point, in a lack of any better answer, Sebald framed his argument legalistically that the Soviet prosecutions of the Japanese for war crimes were not undertaken on any valid international basis.[34] Complaints were coming from the Foreign Ministry Office regarding the discrepancies between the Japan and Germany—throughout 1954 two thirds of German war criminals were released against only one fifth of the Japanese.[35] Under Shigemitsu, the efforts of the Ministry of Foreign Affairs took shape of a diplomatic offensive. On August 15, 1955, on the occasion of the tenth anniversary of the end of war, the Foreign Ministry sent a verbal note to the US requesting the release of war criminals from Sugamo.[36] The recommendation for the release was prepared by the NOPAR which expected the postwar decade to bring a halt to and remove all the vestiges of the war era and principally release the war criminals from confinement. This would be a stepping stone to the deeper and more mature relations between the two countries. Symbolically, this initiative was in line with the Japanese saying *jyūnen hito mukashi* or “ten years make an epoch” which implied that at this turning point past should be released so that the new basis could be laid for an improved

[34] Working Files Re A, B, + C War Criminals, Folder 2, Memorandum, Japanese War Criminals, February 16, 1955 in NARA, RG220, Box 9.

[35] Letter, Ryuiji Takeuchi, Minster in charge of European and American Affairs Bureau to Graham Parsons, American Embassy, Tokyo, February 3, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

[36] Working Papers Re A, B, + C War Criminals, Clemency Efforts in 1955, Dispatch from Embassy in Tokyo to Board of Clemency and Parole, August 15, 1955 in NARA, RG220, Box 9.

future.[37] On June 3, Shigemitsu expressed what he saw as a major impediment to improved US-Japan relations by saying that "Japan wants to cooperate with the US, but with war criminals still kept in Sugamo, their families and relatives are hardly likely to feel cooperative,"[38] as reported by *Yomiuri*. Eikichi Araki, Governor of the Bank of Japan and the first postwar Japanese Ambassador to the US, also believed that the bilateral relations could not be "cemented" without clearing the war criminals' problem which would in return have dramatic impact upon the Japanese attitude towards the US.[39] On July 19, 1955, the House of Representatives passed a resolution urging for the release of all "war prisoners" or *senso jukeisha*[40] referring to those detained in Soviet Union and war criminals problem in reference to the Allied powers which should be finally concluded a decade after the end of the war. Tadanori Nagayama, in his speech giving the reasons behind the adoption of the resolution, made a reference to inmates who were seventy or over seventy whose detention was being inobservant to humanitarian considerations. He used the opportunity to refute the Tokyo Tribunal that he called "an arbitrary court" and "revengeful measure" which was contrary to international law and human rights, thus an offense to legalism cherished by civilized nations.[41]

At the end of August 1955, Shigemitsu's week-long visit to the US where he met with the Secretary Dulles and other officials was instrumental for discussing key matters burdening the bilateral relation. During these talks, in informal manner, Kishi expressed his view on what he considered the main impediments to the healthy US-Japan relations —that is, military bases in Japan, lack of independence in making its own defense budget and issue of

[37] Working Papers Re A, B, + C War Criminals, Folder 3, "Decision on a recommendation for general release of war criminals," (Translation), Matsusuke Shirane, NOPAR, July 25, 1955 in NARA, RG220, Box 9.

[38] Working papers Re A, B, + C War Criminals, Folder 3, Dispatch form Windsor G. Hackler, American Embassy to Tokyo to State Department, July 1, 1955 in NARA, RG220, Box 9.

[39] Ibid.

[40] Kokkai kaigiroku, Shūgiin, Honkaigi, dai-43-gō, July 19, 1955. http://kokkai.ndl.go.jp/SENTAKU/syugiin/022/0512/02207190512043a.html (accessed September 23, 2017)

[41] Ibid.

contributions to the US forces, and finally the detention of war criminals.[42] Unashamedly, Kishi made a remark to the US officials that "he and the Foreign Minister had spent some time in Sugamo Prison and could not but be emotionally concerned in obtaining the release of those still in prison as soon as possible,"[43] and expressed his hope that "the United States would take a "bold stand" and settle this problem once and for all."[44]

On the last day of Shigemitsu's visit to the US, *Asahi* and *Sangyo Keizai* reported, in reference to Reuters dispatch, that the Australian Foreign Minister Richard G. Casey revealed that the US and other countries agreed to adopt a more "lenient"[45] attitude towards the war criminals and gave the US "a considerable free hand"[46] in resolving the issue during the ongoing negotiations with the Japanese. On September 8, 1955, the representatives of the Allied powers' governments once again discussed the adoption of the ten-year rule for Class A war criminals that had been previously proposed by New Zealand and the US. France and Pakistan, in view of their interest for a prompt liquidation of the war criminals issue offered their support for the proposal. The Dutch representative expressed his disapproval of adopting any rules or "automatic system of parole" which would prejudice the judicial review of each parole application on individual basis, and said his government would agree to consider the Class A war criminals eligible for parole after they have served ten years of their sentence. The Dutch were the last line of resistance among the eight allies. They feared that the automatic release on parole for the major Japanese war criminals would make them adopt the same decision regarding the still confined Japanese minor war criminals and German war criminals they held. In the words of the officer from the US Embassy in Hague, the Dutch held "bitter personal memories" and it was politically difficult for them to justify

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[42] Memorandum of a Conversation, Department of State, August 31, 1955, FRUS 1955-1957, *Japan,* Volume XXIII, Part 1, Washington: US Government Printing Office, 1991, 107.

[43] Ibid.

[44] Ibid.

[45] Working Papers Re A, B, + C War Criminals, Folder 3, Telegram from Parsons, American Embassy to Tokyo to Secretary of State, August 29, 1955 in NARA, RG220, Box 9.

[46] Ibid.

any such lenient position before its Parliament and public opinion.[47] The New Zealand representative considered that the Dutch were just acting for the record and as the decision would be adopted by the majority governments, it would not be as harmful for them.[48] In the end, the governments agreed that the rules by which the majority decision was achieved and the vote should remain secret when the decisions for the Class A war criminals' parole were notified to the Japanese government,[49] among others not to hurt the results of the negotiations related to the Dutch civilian internees compensation.[50] On September 17, 1955 the representatives unanimously granted parole to Kaya, Hashimoto, and Suzuki after having completed ten years in confinement.[51] *Asahi Evening News* dedicated its front page to the release of the three Class A war criminals, reporting that despite "Shigemitsu's personal pleas,"[52] the allies refused the wholesale release pointing finger at the Dutch due to "bitterness at war crimes and inadequate reparations."[53] Hoshino was paroled on December 13, 1955, while Kido and Ōshima were released three days later, after being granted parole by the allies, while the Netherlands abstained from taking vote.[54]

The governments agreed that no special restrictions, other than those already existing under the Japanese law, would be imposed upon the parolees.[55] The Japanese Embassy tried to press for Satō's earlier release by manipulating the dates of his arrest, but to no avail, and as had been previously mentioned, he was paroled only on March 31, 1956 which meant that Sugamo was finally cleared of the Class A war criminals. However, Sugamo was still

[47] Telegram, Mr. Ronhovde, US Embassy, Hague to American Embassy, Tokyo, August 30, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

[48] Telegram, Department of State to American Embassy, Hague, August 25, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

[49] Summary of Meeting of Representatives of Interested Governments on Class A War Criminals, September 8, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

[50] Telegram, Mr. Ronhovde, US Embassy, Hague to American Embassy, Tokyo, August 30, 1955 in NARA, RG84, War Criminals – General Files, Box 28.

[51] CPB, Minutes, September 26, 1955, NARA, RG 220, Box 1, folder: Minutes CPB, M-84.

[52] Working Papers Re A, B, + C War Criminals, Folder 3, Telegram from Allison to Secretary of State, September 13, 1955 in NARA, RG220, Box 9.

[53] Ibid.

[54] CPB, Minutes, December 19, 1955, NARA, RG 220, Box 1, folder: Minutes CPB, M-89.

[55] Working Papers Re A, B, + C War Criminals, Folder 3, Summary of meeting of representatives of interested governments on Japanese Class A war criminals, December 6, 1955 in NARA, RG220, Box 28.

inhabited by the "hard core" BC war criminals which committed such heinous crimes that the CPB could no longer find the appropriate basis for their parole.

The secretary of state recommended that the CPB be abolished which the Board observed as an end to the judicial procedures regarding the Japanese war criminals: "if there exist political or diplomatic problems that render desirable a termination of the present judicial solution of the war criminal program and the substitution of a political solution, the Board has no objection."[56] Harumi Takeuchi, section chief of American Bureau of the Japanese Foreign Ministry worried that the release of the Class A war criminals, considered to bear greater responsibility for war that those on the "working level, without the simultaneous release of the Class BC war criminals "hue and cry" was to take place in Japan.[57]

3. Criminals to Men: The Diplomatic Success of the Kishi Cabinet

Kishi's election in February 1957 came as a gift to the American elite and diplomats for his proactive stance towards Japanese rearmament. In the words of Ambassador MacArthur II, he was the man "he could 'do business' with,"[58] and hence urged Washington that it had to seize the opportunity to respond to the Japanese demands for change resulting from a deep sense of frustration and subordination emanating from the unequal security treaty, Okinawan issue, and trade restrictions with China. Already in 1954, he was "an American favorite"[59] for the position of the prime minister, but conservatives chose Hatoyama instead. Ironically, Kishi was the middleman in connecting the military with the zaibatsu in order to secure investments for the industrial development of Manchuria, Tōjō's Minister of

[56] December 27, 1955, Report of Clemency and Parole Board for War Criminals, NARA, RG 220, Box 1, folder: Minutes CPB.

[57] Letter, J. Grapham Parsons to Robert J.G. McClurkin, September 10, 1955 in NARA, RG 84, War Criminals – General Files, Box 28.

[58] Schaller, *Altered States: The United States and Japan Since the Occupation* (New York: Oxford University Press, 1997), 130.

[59] Schaller, *Altered States : The United States and Japan Since the Occupation,* 76.

Commerce and Industry at the time of Pearl Harbor attack who signed the declaration of war against the US, and a golfing partner of Joseph Grew.[60]

On March 31 1956, almost all of the allies' countries, even the most conservative ones expedited the release process. The Netherlands and Australia both cleared Sugamo from the war criminals they had prosecuted while the Communist China had repatriated a large number of Japanese war criminals. Only the US, technically Japan's closest ally, was unable to release one hundred thirty-three remaining criminals, fifty of which were under consideration for parole. Under the ten-year rule, many of them were eligible for parole, but the CPB refused to consider their cases or to reduce their sentences to make them eligible still on the grounds of the gravity of crimes committed.[61] In the eyes of the Japanese the US was gaining the reputation of being "warden of Sugamo."[62] In the light of Okinawan land issue and discrimination of Japanese textiles, the prospects for amelioration of their bilateral relation only looked bleak.[63]

Given that fact that the German Mixed Parole Board had German members, Shigemitsu urged the US to consider transferring the right to grant clemency and parole for the still imprisoned war criminals in Sugamo to the Japanese government.[64] This was refused on the grounds that such action would have consequences for German war criminals who would likewise have to be released. It would further complicate the matter from point of view of the need to revise the provisions of Bonn-Paris conventions and thus place the revision before the Congress that had already been unsupportive of paroles for Dietrich and Peiper;[65] and in relations to Germany which placed the utmost importance to the resolution of the

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[60] Schaller, *Altered States: The United States and Japan Since the Occupation,* 124.

[61] Records of CPB, General Files, 1952-1958, Conrad E. Snow to Robert Upton, March 16, 1956 in NARA, RG220, Box 6.

[62] Telegram, Allison to Secretary of State, June 30, 1956 in NARA, RG84, War Criminals – General Files, Box 28.

[63] Ibid.

[64] Records of CPB, General Files, 1952-1958, Memorandum Shigemitsu to Allison, Tokyo, March 18, 1956 in NARA, RG220, Box 6.

[65] Joachim Peiper was sentenced to death in the Dachau trials in Germany for his involvement in the Malmedy Massacre in 1944, however his sentence was commuted to life imprisonment.

criminals issue.[66] The Germans and Japanese kept an eye on the pace and method of release of war criminals by the US in both nations and constantly drew comparisons in order to get concessions. For instance, in Japan, out of 800 war criminals sentenced by the US, 133 remained in prison as of March 1956, while in Germany out of 665, only 31 remained.[67] The CPB kept refusing Allison's urges to release all of the BC Class criminals to whom it retorted that the Board "can't just be moved about like a chess in handing of the cases," and that if political solution was to be implemented it should be done under someone else's guise.[68]

The public activity of released Class A war criminals was attracting attention. *Yomiuri Shimbun* editorial reported about radio lectures given by Araki, Hashimoto, Suzuki, and Kaya which were "reminiscent of wartime atmosphere." Hashimoto was planning to come back to political life, while Araki stated that "Japan was not defeated in a sense" thus appearing as if they left their responsibility for war the day they left Sugamo.[69] The editorial took a rather critical approach in stating that they should exercise prudence in what they do and say as "their patriotism in the newly created postwar political circumstances were unnecessary"[70] and that now when the Japanese people left the most of their war memories behind "the words of Class A war criminals may serve them like narcotics."[71] In November 1955, Araki's article "Recollections of my life in Sugamo prison," appeared in the monthly magazine *Bungeishunjū*, exposed the lax treatment of prisoners in Sugamo which alarmed the representatives of the allies and once again cast doubt upon the good faith of the Japanese government in carrying out the Article 11 of the Peace Treaty. Prison life in Sugamo somewhat emulated life in Japanese society as the prisoners were entertained by

[66] Records of CPB, General Files, 1952-1958, Richard D. Kearney, Assistant Legal Adviser for Far Eastern Affairs to Mr. Noel Hemmendinger, Disposition of Japanese War Criminals, June 12, 1956 in NARA, RG220, Box 6.

[67] Records of CPB, General Files, 1952-1958, Memorandum Shigemitsu to Allison, Tokyo, March 18, 1956 in NARA, RG220, Box 6.

[68] Records of CPB, General Files, 1952-1958, Memorandum, July 3, 1956 in NARA, RG220, Box 6.

[69] "Released War Prisoners Held Talkative," *Yomiuri Shimbun*, Editor's Note, April 16, 1956.

[70] Ibid.

[71] Ibid.

kabuki plays, concerts, and baseball games aimed to distract them from daily misery and resentment according to his account. Inmates were offered vocational guidance and allowed leave of absence for thirty days which many of them used to get employment. In the words of the article, Class A war criminals were given a better treatment that others, and Araki hoped than the remaining prisoners would be released soon. Representatives of the allies, especially Britain and Australia, were irritated by these stories as that meant that monthly reports they received from Sugamo were deceitful and that the attitude of the Japanese government now threatened "to harm the parole program."[72] While Araki was himself defensive in that his account was distorted, the Ministry of Justice, the Prison Officers all refuted the veracity of the stories as "exaggerated," while the Foreign Ministry's War Criminals Office was worried about repercussions this might have for the remaining Class BC war criminals detained in Sugamo. The US Embassy in Tokyo advised other representatives to take no action as the Japanese government was expected to put an end to this kind of statements which were bad for its reputation. Araki was also reported to have bitterly criticized his trial and blamed "the late President Roosevelt for 'inveigling' Japan into war.[73]

Roy L. Morgan, the former IPS American chief interrogator, in 1955-1956 occupying the position of the advisor to the Japanese Prime Minister, was informed that Hayato Ikeda, Takeo Miki, Nobusuke Kishi and Ichirō Konō, were determined in helping Hatoyama remain in power after April 1956. One of the prewar senior politicians the group was promoting for the Diet membership and potentially as Hatoyama's successor, was the paroled Okinori Kaya, Finance Minister in Tōjō Cabinet and member of technical committees at both London Naval Conference in 1930 and Geneva Disarmament

[72] "Felon story repudiated by Gaimusho," *Nippon Times,* October 16, 1955 in NARA, RG 84, Japanese War Criminals, Box 1.

[73] "Calls Trial Disgrace," *Washington Post*, May 2, 1956, NARA, RG220, Box 6.

Conference.[74] In an interview for *Mainichi* in 1957, Morgan who worked on Kaya's dossier admitted that his choice was solely guided by his cabinet position at the time of the Pearl Harbor attack and that there were other candidates who could have been added instead.[75] He went on further to say that in later stages of the trial the evidence was adduced about his opposition to war, up until the receipt of the Hull Note which was read by the Japanese as an ultimatum. Morgan's account as a former IMTFE American associate prosecutor eased the war responsibility stigma that had been placed upon Kaya who was at that time active as a consultant in industrial circles, government, and planned on engaging into politics again by running in the electoral campaign for the Diet.

In 1956, Japanese frustration over the non-repatriation from Communist China and the USSR, along with the US dragging its feet over the remaining war criminals peaked—it meant "Japan's inferior international standing,"[76] a feeling of being treated as a "second class" power, a feeling that Japan had suffered from at the end of World War I. The Japanese government's progress on rearmament and defense issues and its anti-Communist cause were directly impeded by the war criminals issue that in the eyes of the Japanese mind "symbolize[d] national sacrifices for guilt incurred by the entire Japanese nation."[77] The release of the Class A war criminals provoked criticism of lesser war criminals still being imprisoned testifying to the persistence of the afore-mentioned confusion between the two classes. In Japan's understanding the Japanese military and civilian leaders who plunged Japan into a war they lost and the atrocities their troops committed were considered to be "forgiven" and "cleared" the day the US and Japan signed the treaty of reconciliation which over the course of time, due to their protracted detention, made them appear as national

[74] Letter, "Political Situation – Japan," Legal Attache, US Department of Justice to the Ambassador, January 3, 1956 in NARA, RG 84, Japanese War Criminals, Box 1.

[75] Ernest Hobrecht, "Prosecutor Admits Kaya Was Found to Have Opposed War – Postnote To Tokyo War Crimes Trial," *Mainichi*, May 7, 1957 in Records of CPB, Class A War Criminal in NARA, RG220, Box 5.

[76] Intelligence Report, "Japanese sentiment for release of war criminals," Department of State, Office of Intelligence Research, June 14, 1956, NARA, RG220, Box 6.

[77] Ibid.

martyrs, and not the war criminals. Subsequently, for Japanese elites this issue represented an essential irritant and "psychological impediment"[78] to military buildup that would allow Japan to contribute to the free world and cherish its commitments. Even the Japanese who supported the rearmament could no longer understand the US foreign policy incoherence in demanding Japan to rearm, but at the same time keeping the Japanese as war criminals in Japanese prisons.

The Japan-Soviet negotiations scheduled in the end of 1956, further added drama among Washington's officers, Robertson was particularly worried that the normalization of Japan-Soviet relations would lead to unconditional amnesty for Japanese "war criminals" which would have detrimental impact upon the US diplomatic stance towards Japan.[79] Despite their territorial issues, the USSR and Japan resumed their diplomatic and trade relations in December 1956. During the same month, the Soviets returned 1,025 former prisoners to Japan after commuting their sentences and claimed that all prisoners were released to which Japan did not agree. Allegedly, there were more 10,000 Japanese prisoners somewhere in USSR.[80] Other than Stalin's thirst for revenge towards Japan, the Soviet attitude towards the issue of Japanese war prisoners can be placed within the broader context of decline of Japanese Communist Party since 1949, need for labor to carry out Stalin's modernization programs, and overall dissatisfaction with the US occupation of Japan.[81] Nevertheless, by this time, as expected the US looked bad in the eyes of its ally.

The newly elected Prime Minister Kishi required the US to grant pardon for all Class A war criminals as he had plans for some of them, principally for Kaya to engage politically as noted above. The pardon was ruled out as a solution as it would jeopardize the war criminal problem and cause public indignation. The options under consideration for the US were

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[78] Ibid.

[79] Records of CPB, General Files, 1952-1958, Memorandum, Department of State, Japanese War Criminals, October 3, 1956 in NARA, RG220, Box 6.

[80] William F. Nimmo, *Behind a Curtain of Silence: Japanese in Soviet Custody, 1945-1956*, 83-97.

[81] Ibid.

termination of their parole supervision or reduction of sentences to time served. This request did not come out of concern that as parolees they would be constrained to assume public office, which was the case under Japanese criminal code, but having in mind that the Japanese considered the IMTFE judgements to be "foreign judgements," these usual restrictions would not be applicable as they were not considered as war criminals under the Japanese domestic law. Eisaku Satō, the Diet member and Kishi's younger brother, in his meeting with Ambassador MacArthur II emphasized the importance of clearing the paroled war criminals of "criminal stigma," and wiping out their guilt so that the source of anti-American feeling can be removed.[82] Satō was primarily pleading for civilians, singling out Kaya as a close friend and advisor to Kishi, while he was ready for a sell-out the Class A military so that the civilians could reclaim their honor and banish their war guilt.[83] Kaya made a successful comeback to public life in both political and financial circles as a "senior," colleague who was entitled to a support from his subordinates to "regain his 'rightful place,'"[84] the same way Kishi did when he was released from prison; this revealed deep rooted "pattern of thought" and political culture of loyalties among the Japanese elite.[85] He was expected to run for a seat in Lower House with LDP support, and in the future, to replace Ikeda to the position of Minister of Finance.[86]

Until the CPB was abolished, on December 3, 1957, it held the position that the distinction could be made between the civilians and the military among the Class A war criminals from which it would be possible to reduce sentences to time served for the former, and terminate parole supervision for the former having in mind the serious nature of the crimes they had perpetrated. This would mean that Kaya, Kido, and Hoshino would have

[82] Records of CPB, General Files, 1952-1958, Memorandum by R.H. Lamb, War Criminals, From American Embassy Tokyo, May 13, 1957 in NARA, RG220, Box 6.

[83] Ibid.

[84] The Rehabilitation of Okinori Kaya, Class A War Criminal, US Embassy Tokyo, William B. Coolidge, June 19, 1957 in NARA, RG 84, Japanese War Criminals, Box 1.

[85] Ibid.

[86] Ibid.

their sentences reduced, while the remaining eight would have their parole supervision terminated only.[87] The State Department particularly worried about the interpretation of the term "termination of parole supervision," as they wanted to avoid the possibility of the Japanese interpreting it as if the parolees were discharged of their sentence.[88] The US again took special care at this stage not to jeopardize in any way the judgement and sentences imposed by the IMTFE—it was ready to go with the alternative option, as the other governments were likely to go further.[89] However, in that case the Japanese government would be placed in an unfavorable political position as it would have to amend Law No. 103 that allowed for parole supervision only for the duration of sentence, which meant that their sentences would have to be reduced. Another facet of the problem was that suspending parole supervision for the Class A war criminals, but continuing it for the Class BC would be troublesome.[90] As the general elections in Japan scheduled for May 1958 approached, the US was hurrying to liquidate the war criminals problem "in time to give Kishi record of final accomplishment on at least this one troublesome problem"[91] while the Japanese Embassy was under pressure to rebrand, Prime Minister's friend Kaya for the upcoming elections.[92] When the CPB was abolished, the Japanese government formed a new board, independent from NOPAR, that assumed the CPB role of recommendation for clemency and parole for the remaining 45 Class BC war criminals to the Secretary of State.[93] The Board wanted to settle the war criminals issue as soon as possible to which the US did not oppose, as after all,

[87] CPB, Minutes, October 21, 1957, NARA, RG 220, Box 1, folder: Minutes CPB, M-111.

[88] Records of CPB, General Files, 1952-1958, Telegram, American Embassy Tokyo to Department of State, July 9, 1957 in NARA, RG220, Box 6.

[89] Records of CPB, General Files, 1952-1958, Telegram, MacArthur, American Embassy to Tokyo to Secretary of State, July 12, 1957 in NARA, RG220, Box 6.

[90] Records of CPB, General Files, 1952-1958, Telegram, MacArthur, American Embassy to Tokyo to Secretary of State, July 30, 1957 in NARA, RG220, Box 6.

[91] Records of CPB, General Files, 1952-1958, Memorandum, Thomas S. Estes, Office of Professional Responsibility to Mr. Hagen, CPB, January 21, 1958 in NARA, RG220, Box 6.

[92] Ibid.

[93] Records of CPB, General Files, 1952-1958, Telegram, Dulles to American Embassy Tokyo, December 19, 1957 in NARA, RG220, Box 6.

Japan was supposed to rehabilitate these criminals into their society.[94] Graham Parsons from the US Embassy in Tokyo made a remark that this persistent matter "created disproportionate political problems that we [the US] did not want to have."[95] Although not directly related, this rather favorable move by the US government in respect to the Japanese war criminals coincided with the lenient sentence pronounced by the Japanese court in the Girard case which was also adding strain to US-Japan relations throughout 1957.

The Japanese government made request to other interested governments for the reduction of sentences to time served for all Class A war criminals. The Canadian representative questioned the reasons for such demand in view of lax restrictions that had been placed upon parolees and the French government was concerned about the repercussions that treating the major Japanese war criminals as a group, and not on an individual basis, would have for IMT major convicts in Spandau.[96] On April 7, 1958, the Allied Powers agreed to comply with all Japanese requests thus putting an end to the IMTFE saga. In his reply note, Japanese Foreign Minister Aiichirō Fujiyama related to the Class A war criminals as *A kyū kankeisha* or Class A related persons instead of *A kyū senpan* Class A war criminals.[97] This is how the Japanese Class A war criminals ceased being stigmatized as "lawless international wrongdoers"[98] which allowed them to leave their wartime criminal record behind and subsequently the severe social stigma they were exposed to.

4. Men to Spirits: Transforming the Understanding of the Class A War Responsibility

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[94] Memorandum, "Japanese War Criminals," November 27, 1957 in NARA, RG84, War Criminals – General (1957), Box 28.

[95] Ibid.

[96] Memorandum, "Class A War Criminals," November 5, 1957 in NARA, RG84, War Criminals – General (1957), Box 28.

[97] Yuki Takatori, "'Equal Punishment for All' – Japan's View of the Tokyo Tribunal," *Virginia Review of Asian Studies* 17 (2015): 12.

[98] Ibid.

The fast transition from the Pacific War strategy to the Cold War strategy created confusion within the US administration which was also reflected in dilemma surrounding the release process of war criminals.[99] The Class A war criminals were all released on parole and then had their sentences reduced, there was no pardon involved, thus their sentences were not invalidated from the point of view of the allies. However, the fact that they were released and thus cleared from war stigma does imply that domestically they were no longer responsible, they were forgiven. The IMTFE judgement had been observed as a foreign judgement, imposed as a part of the occupation, which, for the Japanese, lost meaning after the occupation ended. This duality between the war guilt perceived as being cleared in a domestic context, but still existent in international arena by the virtue of Japan's acceptance of the IMTFE judgement caused ambivalent attitudes towards the subject of war responsibility. For Japanese, that pertained to an old era, that Japan was slowly surpassing as it regained its place in international relations as the Western ally. Especially so, in the 1960s which was the era of economic prosperity for Japan in which the concepts of "prewar," "militarist Japan," no longer resonated with the society, and consequently, war criminals which were an inseparable part of that era had no longer any meaning in the newly created circumstances.[100] During the same period, debates about the nature of the Pacific War were animating the press which was divided between aggressive and self-defensive nature of the war.[101] The prevalent view was still that of the aggressive war which called for the avoidance of war and pacifist stance to infuse the dominant historical narrative thus extending the rationale of the Tokyo Tribunal's judgement.[102] In 1970, Zhou Enlai and Kim Il-sung fiercely accused Japan of its militaristic revival and for becoming "a dangerous force

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[99] Yoshinobu Higurashi, *Tōkyō saiban* (Kodansha: Tokyo, 2008), 388.
[100] Higurashi, *Tōkyō saiban*, 386-387.
[101] Ibid.
[102] Ibid., 388.

of aggression in Asia."[103] They went further on to accuse Prime Minister Satō of serving US imperialistic ambitions in Vietnam War, conspiring new war against North Korea, and having pretentions to seize Taiwan.[104] In the same year, Richard Minear's *Victors' Justice* publication refuting the legal, historical, and procedural validity of the IMTFE further reinvigorated views of the far-right that Japan fought a self-defensive war and should no longer subscribe "to the Tokyo trial view of its history" which was met with strong criticism from the leftist who at that time still considered that the Tribunal is a symbol of peace and that war responsibility should not be negated. On October 17, 1978, the seven Class A war criminals were secretly consecrated to Yasukuni Shrine. Yasukuni Shrine commemorates the spirits of the IMTFE defendants, it is "ideologically loaded"[105] as it revers the war dead as Shinto gods thus glorifying Japanese imperial past.[106] In domestic arena, it constantly gives rise to debates about the meaning of war crimes trials and in international realm, it provokes suspicion about Japan's stance towards its war responsibility and the Tribunal's verdict it had accepted by the virtue of the Peace Treaty.

CONCLUSION

[103] Schaller, *Altered States: The United States and Japan Since the Occupation*, 229.
[104] Ibid. 229.
[105] Barack Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Cambridge: Harvard University Press, 2015), 313.
[106] Ibid.

The first international criminal tribunals established on ad hoc basis by the UN Security Council after the IMT and IMTFE precedents were the International Criminal Tribunal for ex-Yugoslavia (ICTY) and International Military Tribunal for Rwanda (ICTR). The tribunals established in the 1990s completely misunderstood the role that IMTs played in the immediate postwar period and thus overestimated what international tribunals can and cannot do.[107]

The Tokyo Tribunal is surrounded by Japan's myth of victors' justice and the Allied powers' myth of harsh retribution under the rule of law. In certain aspects, those features are indeed rampant–prosecution of atrocities committed exclusively by Japan and death penalties imposed upon the seven defendants respectively–but there is considerably more complexity to the Trial than these over-simplifications uncover.

The Tokyo Tribunal pivoted on crime against peace not on war crimes and crimes against humanity. National courts that prosecuted BC war criminals addressed these crimes and thereby complemented the work of the Tribunal. In that sense, the Allied powers made a deliberate choice to not include these atrocities into the historical record produced by the Tribunal whose judgement represent the dominant historical narrative. From that aspect, the IMTFE entrepreneurs bear the part of responsibility for the non-prosecution of crimes committed against the former Japanese colonies and their non-representation at the Tribunal. The Japanese revisionist and right-wing leaders have used that silence as an excuse for ignorance and insensitivity in dealing with its Southeast Asian neighbors. This insensitivity stems from the centrality given to the IMTFE which not only contained diverse narratives on the Japanese leaders' war guilt, but also had "institutionally" forgiven the Class A war criminals for their misdeeds.

[107] Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001), 212.

Regarding the overall criminal aspect of the crime of aggression that the Tribunal sought to deter, it can be assessed as a failure in light of interventions and proxy wars that took place in the 1950s and for which no leader was held responsible. The crime of aggression has been only introduced in the Charter of the International Criminal Court at Hague (the Rome Statute), but it is still out of applications while all its powerful member states opted out from its application. The present-day military actions by states, unilateral or collective, have stretched the norms governing the use of force under the UN Charter and its Article 51 regulating its exception of self-defense to the point that there are highly contested pre-emptive self-defense wars (war in Iraq) and humanitarian interventions (war in Kosovo) which at time of their commission took form of aggression in disguise. The change that the end of World War II brought is that states whenever they resort to use of force they hire the best international lawyers to find justifications in international law.

The IMTFE project, understood as extending well into 1956, as an example of retribution for waging aggressive war, or at least, challenging the status quo stood against the background of great powers' colonialism, engagement in proxy wars, and interventions which deeply eroded the Tribunal's legality and legitimacy. Already in November 1954, the United Nations General Assembly where the project of codification of international criminal code, based on Nuremberg principles, was discussed, the US delegate Charles H. Mahoney explained that "the project for a code of crimes under international law in today's world is impractical and inappropriate;"[108] while it refused the possibility that its citizens could be subjected to international agency which would apply the said code.[109]

[108] General Working Files, "Are We Men or Murderers?," *The Saturday Review*, February 19, 1955, NARA, RG220, Box 5.

[109] Ibid.

The Tribunal produced a "highly schematic and simplified histories"[110] in which the antecedents of conflict […] are elided.[111] Laws are unable to write history, yet the records of IMTFE are full of poorly patched historical narratives construed around weak and indirect evidence which was interpreted in the light of colossal amount of studies, documents, and treaties used by the prosecution.[112] Illustratively, "great men" theory purported by the tribunal eliminates all other individuals or circumstances that led to the atrocity. In 1919, the Versailles Commission refused the prosecution on the basis of authorship pointing out at complex, multifaceted circumstances leading to war. The prosecution of a group of civilian and military leaders and the non-prosecution of other sectors of society at IMTFE, such as industrialists and secret societies, which supported the war effort meant that the responsibility was shared within few and nobody else which does not reflect the complexities leading to the Pacific War and the war effort more generally. Law cannot address war complexities in a way other disciplines, such as history, can, therefore "the history writing" role discharged by default by the Tribunal proved to be rather a failure, contrary to the expectations it was initially expected to fulfill. The dialogue within Japan regarding the meaning of the Empire and war did not happen which is the void that the IMTFE verdicts are fulfilling. Framing Japanese security through militarism and pacifism are also reflections of the IMTFE judgement's legacy, that can be placed within the initial harsh occupation policies, which in hindsight proved to have been not so strategic and forward seeing. Even in the context of contemporary precarious security environment that Japan's faces, many believe that the Article 9 of its Constitution should not be amended as it represents the institutionalized version of Japanese remorse for the past militarism which

[110] Gerry Simpson, "International Criminal Justice and the Past," in Gideon Boas, William A. Schabas, and Michael P. Scharf, eds., *International Criminal Justice: Legitimacy and Coherence* (Cheltenham: Edward Elgar Publishing, 2012), 134-35.

[111] Ibid.

[112] Richard Ashby Wilson, *Writing History in International Criminal Trials* (New York: Cambridge University Press, 2011), 1.

can be assessed as naïve and out of touch with current necessities and geopolitical realities. There is a dichotomy between the level of Japanese military might and its acceptance and discussion within the Japanese society.

The criminal tribunals are a part of larger policies and serve to advance goals of sponsoring states and those they choose to patronize and protect. In the first place, strong political, strategic reasons and will are needed in order to bring them to life which explains why not all the cases of international crimes are referred to international criminal institutions. The strategic legalism that was discussed earlier will be applied to the particular state or leaders, but there is no guarantee that it will be consistently applied to other states which engage against the "aggressor" and interpret the same norms as to legitimize their use of force or accompanying crimes.

The international criminal tribunals cannot preserve peace and offer reconciliation. They can acknowledge interests of certain victims and punish leaders for their ideas, mistakes or actual crimes, but they cannot offer the protection of victims. They cannot make a complex historical record or establish the truth, they can make judgements of an event, offer a narrative of a story that is further to be rectified and challenged. They can advance norms and their application, but cannot guarantee their sustainable and universal application. They may educate political elites not to recur to the violence again, but they can also create resentment at the political and social level thus creating tensions and making peace precarious. Their reach is limited as well as the role they can play while their reputation has been damaged as they continue to appear as "circumstantial" and "occasional" instruments of peace in hands of the most powerful states. This shows the need to further study the military tribunals at Nuremberg and Tokyo which still bear considerable resemblance with present day criminal tribunals which are often surrounded by idealism and morality that once they put into practice become exercise of power against the status quo challengers.

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