

Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, Oxford, 2008), ISBN 978-0-19-927852-7, 358 pages

REVIEWED BY NAOMI HART AND BEN SAUL\*

Despite the explosion of scholarly interest in international criminal justice over the past two decades, there has long been relative inattention to its institutional roots in the Asia-Pacific region. In this important new book, Neil Boister and Robert Cryer revisit the work and legacy of the Tokyo International Military Tribunal ('Tokyo Tribunal'). In reappraising its jurisprudence and historical significance, they do not set out to self-consciously rehabilitate the Tokyo Tribunal by putting a positive spin on it or by wholesale rejection of charges that it was an instrument of 'victors' justice'. Rather, they seek to remedy the dearth of scholarship on the Tokyo Tribunal<sup>1</sup> (compared to its Nuremberg cousin and later ad hoc international criminal tribunals) by finely reassessing its contribution and relevance to international law.<sup>2</sup>

The authors suggest two main reasons why the Tokyo Tribunal has eluded scholarly attention. First, the authors correctly pinpoint a degree of Eurocentrism in the production of international legal scholarship. Western scholars have tended to be more familiar with the European war and its protagonists than its Asia-Pacific equivalents,<sup>3</sup> and the Japanese language scholarship about the Tokyo Tribunal is not well known outside Japan. Secondly, and uncomfortably for the Western powers, one judge — Pal, the most vociferous dissenter — condemned atrocities by the Allies (especially the use of the atomic bomb), distinguishing the Tokyo Tribunal from Nuremberg's exclusive allocation of wrongdoing to the Axis powers.<sup>4</sup>

In re-examining the Tokyo Tribunal, the authors interrogate, but largely support, the Tokyo's Tribunal's findings in relation to its own jurisdiction. The authors conclude that it had a sound basis in Japan's acceptance of the Potsdam Declaration (of July 1945) in its instrument of surrender of August 1945.<sup>5</sup> The Tribunal rejected defence submissions that

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<sup>1</sup> Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press: 2008), 1.

<sup>2</sup> Ibid 2. Elsewhere in this Journal, Emmi Okada, in her article 'The Australian Trials of Class B and C Japanese War Crime Suspects, 1945–51', similarly re-evaluates the Australian national post-war trials of many Japanese suspects, finding that those trials 'in many respects fell short of the international law standards of justice that we have evolved today, and yet, at least in a great majority of cases, there was nevertheless a notable exercise of legalistic restraint and an effort to achieve procedural integrity ... that would belie a simplistic view that the Australian trials were nothing more than vengeance disguised as law'.

<sup>3</sup> Boister and Cryer, above n 1, 2, 301.

<sup>4</sup> Ibid 324.

<sup>5</sup> Ibid 20–2, 48.

Japan's surrender was conditional and did not allow for the tribunals envisaged by the Potsdam Declaration or, at least, for jurisdiction to extend to acts committed all theatres of war. Instead, the Tribunal found that the Allies had ultimate and unreviewable power to interpret the scope and effects of Japan's instrument of surrender.<sup>6</sup> One wonders, of course, whether such acceptance can truly be considered consensual in circumstances where the Allies had demanded, and were militarily capable of securing, Japan's unconditional surrender.

The Tribunal also denied that it was essentially an American tribunal rather than an international one, by finding that General MacArthur was acting as an agent of the Allies collectively.<sup>7</sup> The Tribunal further accepted that international law permitted victorious powers to try their adversaries,<sup>8</sup> although the authors note that the rhetorical salience of this criticism should caution framers of subsequent tribunals against appearing to exact victors' revenge.<sup>9</sup> The Tribunal further rejected arguments that it lacked subject-matter jurisdiction because the crimes enumerated in its Charter were not crimes under international law. Instead, in a bold stroke for the rule of law, the Tribunal decided that it would simply refrain from convicting defendants of crimes that did not exist, irrespective of their Charter basis.

While accepting the soundness of the Tribunal's conclusions, the authors criticise the Tokyo Tribunal for its often summary dismissal of objections to jurisdiction, which served only to undermine the Tribunal's credibility and perceived impartiality. The authors observe that although the International Criminal Tribunal for the former Yugoslavia ('ICTY') thoroughly dealt with objections to its own jurisdiction, the tribunals for Rwanda and Sierra Leone have mimicked the ill-advised practice of dealing with them perfunctorily.<sup>10</sup>

The more problematic aspect of the Tokyo Tribunal's preparatory work, according to the authors, was its selection of the defendants. They contend that the selection was both overly broad (as Japanese officials were charged merely by virtue of their position, without reference to the nature or extent of their individual involvement in the war effort) and too narrow (as many prominent Japanese military and political figures, including the Emperor, as well as individuals who had engaged in biological and chemical warfare, were not charged).<sup>11</sup> These shortcomings, as well as the fact that nobody participating in the Allied war effort was prosecuted, undermine the Tribunal's legitimacy.<sup>12</sup>

In terms of the fairness of the Tokyo Tribunal's criminal procedure, the authors support various well-known criticisms: defendants had no right to be present at trial; there was no protection against contamination in cases with more than one accused; English translations of documentary evidence were inconsistent or ambiguous; judges were often

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<sup>6</sup> Ibid 40–7.

<sup>7</sup> Ibid 28–32, 36–7.

<sup>8</sup> Ibid 32–5.

<sup>9</sup> Ibid 325.

<sup>10</sup> Ibid 48.

<sup>11</sup> Ibid 53–72.

<sup>12</sup> Ibid 73.

withdrawn or replaced part-way through trials; and credible judicial bias was exposed through questioning by the Bench.<sup>13</sup>

Even so, the authors properly contend that these shortcomings do not render the Tokyo Tribunal a worthless topic of inquiry. Some of its procedures, such as its flexible and non-technical approach to admitting evidence, continue in modern tribunals.<sup>14</sup> More importantly, the Tokyo Tribunal can provide lessons for the framers of subsequent tribunals in crafting more robust procedural guarantees.<sup>15</sup>

For the authors, one of the most important and under-explored contributions of the Tokyo Tribunal is its impact on developing the jurisprudence on substantive crimes and conceptions of criminal liability. They reject assertions that the Tribunal either copied the Nuremberg judgments so closely that it added little value to the jurisprudence, or its conclusions were so fractured and inconsistent that no cohesive conclusions can be derived from them.<sup>16</sup>

As regards crimes against peace, the Tokyo Tribunal affirmed the Nuremberg finding that there was a valid prohibition under international law on wars of aggression, which could be punished retrospectively.<sup>17</sup> Unprovoked attacks to acquire territory constituted aggression and could attract not only state, but individual, liability.<sup>18</sup> The Tokyo Tribunal found that an individual breached this prohibition if they 'shape[d] and influence[d]' a war of aggression, departing from Nuremberg's substantially more onerous requirement that an individual must have 'control[led] and direct[ed]' the war to be liable.<sup>19</sup> The authors prefer the Nuremberg approach — which has been adopted by subsequent tribunals — since the Tokyo approach renders liable too many individuals with relatively remote involvement in the war.<sup>20</sup>

In relation to the crime of murder, the Tokyo Tribunal accepted that killings as part of an illegal war constituted murders.<sup>21</sup> The authors agree with those judges who dissented from this conclusion on the basis that the *lex specialis* that prevails during wartime — the law of armed conflict applicable in all conflicts (whether legal or illegal under the *jus ad bellum*) — grants belligerents the right to engage in hostilities that may result in killings, provided that they comply with the laws of war.<sup>22</sup> They applaud subsequent tribunals' decision to discard this category of crimes, commenting that murders should instead be punished only when they can be characterised as war crimes or crimes against humanity.<sup>23</sup>

As for war crimes, which received less attention than crimes against peace,<sup>24</sup> the Tokyo Tribunal largely adopted Nuremberg's definitions and interpretations. It also, however,

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<sup>13</sup> Ibid 85–102.

<sup>14</sup> Ibid 309–10.

<sup>15</sup> Ibid 102, 309–10.

<sup>16</sup> Ibid 303–5.

<sup>17</sup> Ibid 120–1, 151.

<sup>18</sup> Ibid 122–50.

<sup>19</sup> Ibid 151–3.

<sup>20</sup> Ibid 152–3, 308–10.

<sup>21</sup> Ibid 154.

<sup>22</sup> Ibid 168–74.

<sup>23</sup> Ibid 173–4.

<sup>24</sup> Ibid 175.

established several rules that have been adopted by subsequent tribunals. For example, the ICTY has accepted that *de facto*, rather than *de jure*, control over armed forces may attract liability for war crimes; and that it is not a defence that a commander did not know of a situation where that lack of knowledge was the result of negligence.<sup>25</sup>

Concerning criminal liability, the authors discuss the Tribunal's finding that civilians can be liable under the principle of command responsibility<sup>26</sup> and argue that the Tribunal did not give adequate consideration to relevant defences.<sup>27</sup> The authors' most damning analysis, however, relates to the Tribunal's acceptance that conspiracy to commit crimes against peace attracted international criminal liability.<sup>28</sup> First, there was — and remains — no consensus that conspiracy to commit an international crime is punishable,<sup>29</sup> an issue that indeed has dogged American military commissions at Guantanamo Bay since 2001. Further, even if liability did exist, the Tokyo Tribunal abdicated its responsibility to assess every individual defendant's culpability. Instead, it uncritically adopted the prosecution's narrative of a Japan committed to expanding territorially over several decades and attributed liability based on defendants' position in the state apparatus.<sup>30</sup>

Concerning sentencing, the authors argue that sentencing practices were underdeveloped and have evolved significantly since the Tokyo Tribunal. That Tribunal did not have a distinct sentencing phase, did not consider aggravating or mitigating factors, and was offered minimal guidance by its Charter as to appropriate sentences.<sup>31</sup> Moreover, the Tribunal did not provide reasons for its wholly discretionary sentencing.<sup>32</sup> The statutes of modern tribunals offer sentencing guidelines, including how tribunals should account for mitigating and aggravating factors, and do not allow capital punishment.<sup>33</sup> Other than the precedent it established for imposing life imprisonment for war crimes, which has been subsequently adopted,<sup>34</sup> the Tokyo Tribunal's primary function is as a point of contrast to modern sentencing practices.

In summarising its legacy, the authors argue that the Tokyo Tribunal's significance transcends its technical impacts on jurisprudence and procedure. First, it provided an opportunity to gather and catalogue vast documentary sources on the Asia-Pacific War, potentially serving an invaluable historical purpose.<sup>35</sup> Its achievement of this purpose was, however, limited: the judgments were often inconsistent in their factual conclusions and judges were highly selective in the evidence they accepted, resulting in either demonising or eulogising Japan's role in the war.<sup>36</sup> The fact that the Emperor was never prosecuted and

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<sup>25</sup> Ibid 303–8.

<sup>26</sup> Ibid 227–36, 307.

<sup>27</sup> Ibid 236–43.

<sup>28</sup> Ibid 212–21.

<sup>29</sup> Ibid 212, 244–5.

<sup>30</sup> Ibid 218–21.

<sup>31</sup> Ibid 247–69.

<sup>32</sup> Ibid 270.

<sup>33</sup> Ibid 270.

<sup>34</sup> Ibid 270.

<sup>35</sup> Ibid 311, 314.

<sup>36</sup> Ibid 311.

that Japanese crimes against Asians (in Korea, China and the Philippines) went unpunished,<sup>37</sup> render the historical record woefully incomplete.<sup>38</sup>

Nonetheless, the authors contend that the Tribunal is ripe for analysis because it reflects the ongoing historical debates about Japan's culpability in the war,<sup>39</sup> even if it did not provide a comprehensive or accurate chronicle of it. While the Tribunal was designed to serve an educative purpose in Japanese society, its didactic promise remains unfulfilled: deep divisions and ambiguities persist in Japan about the country's culpability. The Diet's numerous apologies contrast with nationalistic appeals for a 'correction' of the historical narrative and the disparate responses to official visits to the Yasukuni shrine.<sup>40</sup> The value of studying the Tokyo Tribunal lies in uncovering the origins and meanings of these debates.

Neil Boister and Robert Cryer have made an important and timely contribution to re-evaluating the Tokyo Tribunal. Their research is meticulous and wide-ranging (including Japanese sources), their reasoning nuanced and rigorous, and their conclusions persuasive. They acknowledge the flaws of the Tribunal, while emphasising its salutary dimensions. Their book is of historical importance, but is not limited to history: it provides lessons about the purposes and nature of international criminal justice during a time of its rapid expansion and evolution. This book is fine scholarship and essential reading for anyone concerned about where international criminal law has come from — and where it is headed.

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<sup>37</sup> *Ibid* 203.

<sup>38</sup> *Ibid* 312–3.

<sup>39</sup> *Ibid* 313–4.

<sup>40</sup> *Ibid* 315–24.