

Commentary

'70 YEARS LATER: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST' - AN OVERVIEW OF THE INTERNATIONAL CONFERENCE HELD BY THE INTERNATIONAL NUREMBERG PRINCIPLES ACADEMY 17-19 MAY 2018

Xiao Mao * *Yingxin He* ** *Wanlu Zhang* *** *Qingyang Luo* ****

Introduction

The conference, held by the International Nuremberg Principles Academy (the “Nuremberg Academy”) on 17-19 May 2018, marks the 70th anniversary of the delivery of the judgment of the International Military Tribunal for the Far East (the IMTFE), also known as the Tokyo Trial or Tokyo IMT. The Tokyo Trial was established in 1946 under the Special Proclamation of General MacArthur, the Supreme Commander of Allied Powers, for the purpose of “meting out stern justice” to Japanese war criminals as required by Potsdam Declaration and consented by Japan via the Japanese Instrument of Surrender.¹ The proceedings lasted for 3 years, tried 28 defendants, and produced valuable records on prosecuting international crimes at an international level.² The final reading of the last part of the judgment was concluded on 12 November 1948.

As introduced by Mr. Klaus Rackwitz and Dr. Viviane Dittrich, the Director and Deputy Director of the Nuremberg Academy, respectively, the aim of this conference is to highlight the historical importance and lasting relevance and impact of the judgment in terms of substantive law and the trial with regard to procedural challenges and advancements. The conference was held in Courtroom 600, the place where the judgment of the Nuremberg International Military Tribunal was rendered. It is an ideal setting to advance matters related to accountability and the fight against impunity and address the past, present and future of international criminal law.

This commentary is a brief review of the views of the speakers with a special focus on what research questions on the Tokyo Trial and international criminal law are worth further study.

*Xiao Mao, Mphil Candidate at University of Oxford, the United Kingdom.

**Yingxin He, Phd Candidate at University of Göttingen, Germany.

*** Wanlu Zhang, Phd Candidate at Leiden University, the Netherlands.

****Qingyang Luo, LLB candidate at Shanghai Jiao Tong University, China.

¹The documents are available in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, OUP 2008, p. 5.

²For some recent works revisiting legacies of Tokyo Trial, see Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff 2010; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, OUP 2008; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press 2008; 东京审判研究中心 (Research Center for Tokyo Trial Studies) (ed), *东京审判再讨论* (Tokyo Trial Revisited), Shanghai Jiao Tong University Press 2015.

Opening Remark

Mr. Klaus Rackwitz,³ Director of International Nuremberg Principles Academy, gave an opening remark. Presenting in his official capacity, he firstly pointed out the significance of the legacies of the trials held both in Nuremberg and Tokyo which represent the foundation of the modern international criminal law. He then emphasised the contribution of the Tokyo Trial with regard to both the substantive law and procedural challenges and advancements. Revisiting the trial is of great importance in shaping the present and the future of international criminal law. It manifests the universal idea that the war criminals should not be executed summarily but should be brought to trial for prosecution. Lastly, he expressed gratitude to those experts from multiple disciplines, including law, history and social sciences, who discuss key aspects of the Tokyo judgment and the trial in question.

Dr. Micheal Koch⁴ secondly gave a concise and insightful speech. After providing an overview of the development of international criminal law, he commented that the situation of international criminal law was ‘under pressure and even under attack’, quoting the German Chancellor’s words. He hoped that by looking back to the origin of international criminal law, it can give us encouragement, new strength and faith.

Dr. Navy Pillay⁵ then gave a remark on how to learn legacies from past trials. Recognising the Tokyo Trial as a stepping-stone for international criminal law, she also pointed out the criticism and challenges faced by the Tokyo Trial at that time. The Tokyo Trial was established for prompt and just prosecution of war criminals. Article 1 of the Tokyo Charter establishes the right of fair trial and rules on admission of evidence. However, it also faces criticism and challenges. It addresses crimes that were not as firmly defined as they are currently and many of the rules applied at the trial remain debated today. Despite the problems, the Tokyo Trial sent the important message that serious atrocities were unacceptable and should never be committed again. Besides, it was implied both in the Nuremberg and Tokyo Trials that fighting impunity and ensuring accountability were vital to achieve sustainable peace nowadays.

Dr. Thomas Dickert,⁶ President of the Higher Regional Court of Nuremberg, compared the Tokyo Trial to the Bavarian Constitution.⁷ The Tokyo Trial, together with the Nuremberg Trial, marks the origin of modern international criminal law, while the Bavarian Constitution establishes the Free State of Bavaria, as opposed to a state of monarchy. Both are examples of the aim to achieve peace through law, more specifically, to achieve sustainable peace through addressing atrocities with peaceful measures.

³Mr. Rackwitz had served in the International Criminal Court as the Senior Administrative Manager of the Office of the Prosecutor and in the European Union’s Judicial Cooperation Unit as Administrative Director of Eurojust. He has lectured for several years at the Universities of Köln and Düsseldorf and the Technical Academy of Wuppertal.

⁴ Dr. Michael Koch has been appointed Legal Advisor and Director-General for Legal Affairs at the Federal Foreign Office. Since then he held different positions: German Ambassador to Pakistan and Special Representative of the Federal government for Afghanistan and Pakistan. Also, he is the chairman of the Foundation Board of the International Nuremberg Principles Academy.

⁵ Dr. Navy Pillay was appointed as a judge to the International Criminal Tribunal for Rwanda, where she served for a total of eight years, including four years as President. Later she served at the International Criminal Court for five years. She also plays an active role in numerous human rights organizations and serves as the President of Advisory Council of the International Nuremberg Principles Academy.

⁶ Dr. Thomas Dickert is President of the Higher Regional Court of Nuremberg. He represents the Free State of Bavaria in the Foundation Board of the International Nuremberg Principles Academy.

⁷ Nuremberg is a city in the German state of Bavaria.

The last opening remark was given by **Mr. Nasser Ahmed**,⁸ the City Councillor of Nuremberg, representing the Mayor of the City of Nuremberg. He mentioned that commemoration of the anniversaries of the Nuremberg and Tokyo Trials is like the adoption of the Rome Statue in history, making it clear that peace is achieved through law. He then links the trials to the history of Nuremberg. The city, with both facets as the headquarter of perpetrators of mass atrocities and the establishment of individual criminal responsibility, can play a role in the present and future prosperity as the city of human rights.

Keynote Address

After the opening remark, **Professor Yuma Totani**⁹ was invited to address “Historiography of the Tokyo trial: The Past, the Present and the Future”.

The Keynote Address was started by the tribute to the scholars’ accomplishments in Tokyo Trial research. The assessment of the Tokyo Trial underwent a big change in the past two decades. It came from being unknown in the West to today where the Tokyo Trial, alongside the Nuremberg Trials, are recognized as foundations of international criminal justice. Those who have assumed the leading role in this field are historians, who delved deeply into archives across the world—since the late-1970s, brought to light voluminous internal records of the International Prosecution Section, internal memoranda of the Tokyo Trial judges and the Allied diplomatic records—and carried out empirical, well-grounded research using these vast archival materials.

By summarising the widely published books and the years of dedication of scholars, Professor Yuma is confident that the exploration of the legacy of Tokyo Trial will continue, and more and more people will come to understand the significance of the Tokyo Trial. She then discussed the areas that remain underexplored. Denying that research of the Tokyo Trial is saturated, Professor Yuma suggested three sets of unsolved questions and considered the merit of research collaboration between the disciplines of law and history going forward.

Firstly, the Tokyo Trial provides a precedent for the recognition and enforcement of the principle of individual responsibility for international crimes. Some theories of responsibility were introduced at the trial based on the evidence. For example, General Matsui was held criminally responsible for atrocities committed in Nanking due to his failure to properly supervise his subordinates. However, many other theories of liabilities were left unaddressed. It remains unclear why other government officials (e.g. the Ministers of Foreign Affairs) can be held responsible based on the doctrine of command responsibility.

The second underexplored issue is the governmental structures of Japan during the warring period. This issue arose as a result of the theory of government responsibility raised by the prosecution during the Tokyo Trial. The prosecution had the burden of establishing not only the legal doctrine but also the structure of Japanese government at that time. In order to address the

⁸ Nasser Ahmed was, prior to running for the City Council in 2014, Chairman of the Jusos in Nuremberg – the Social Democratic Party’s (SPD) Youth Division. Since 2015, he is Vice-Chairman of the local SPD. In the City Council of Nuremberg, he acts as a specialist for issues of public transportation and is Senior Advisor to his faction on sports policy.

⁹ Professor Yuma Totani is a historian of modern Japan and a researcher of World War II in Asia and the Pacific. Besides teaching at the University of Hawaii and being a Visiting Fellow at the Hoover Institution, Stanford University, she is an industrious scholar who undertakes a series of multi-year research and book publications including *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II (2008)*; *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence (2015)* and so on.

criminal responsibility of the accused, the prosecution had to answer the question of what sort of power was vested in the positions held by the accused in the first place. The prosecution acquainted the judge with the three-layered structure of Japanese government at that time: the formal structure of the government as defined by Japanese laws, the informal structure developed by custom, and a super structure of the government which grew in 1930s to meet the emergency of war. These structures form a complex structure of the distribution of power in Japan, while the model of legal analysis on the Tokyo Trial provided by Professor Neil Boister in this regard is not enough.

Thirdly, the jurisprudence is still left underexplored. The judgment of the Australian judge, for example, was not made public. In his unpublished judgment, he conducted a detailed examination of the relevant evidence establishing the individual criminal responsibility of each of the accused and he drafted detailed judgments in this regard. The majority judgment's analysis of evidence is insufficient, very short and not persuasive. As a comparison, the Australian Judge Webb wrote a lot on evidentiary issues. His opinion is thus worth further analysis.

Opening Dialogue

Professor Yasuaki Onuma¹⁰ from the University of Tokyo sent a video message to begin this dialogue. He firstly affirms that the Tokyo Trial supplements the principles established in the Nuremberg Trials. Secondly, the historical narratives written by the court is questionable. The majority opinion attracted many attacks while Judge Pal's dissenting opinion was praised by many people. This requires further analysis. The majority opinion, despite some problems in its quality, contributes to educational purposes; as a comparison, despite the positive views, there is no doubt that Judge Pal's is flawed. Thirdly, not only Japanese generals but also Japanese people are responsible for the crime against peace. The impunity of Japanese soldiers has a negative impact on Japanese society. Finally, he hoped that the research should be conducted by an interdisciplinary approach, as the Tokyo Trial has so many aspects (e.g. legal, political, social, jurisprudential aspects). He also argues for fighting against the ignorance of Asian perspectives on the Tokyo Trial. Much of the criticism of the Tokyo Trial was based on a western-centered framework. By delivering Asian perspectives on the Tokyo Trial, such western-centric approach can be challenged.

Professor Robert Cryer¹¹ and Natthias Zachmann¹² then deepen the questions raised by Professor Onuma. They firstly dived into the legacy of the Tokyo Trial from the legal and historical perspective. The issues they discussed, among others, included: given the fact that we have so many different opinions, can we speak of a singular legacy of Tokyo Trial? Could it benefit the court more if the judges come to a coherent conclusion? If the victims are European people, will the use of chemical weapons be prosecuted? Why did it take so long for the Tokyo Trial to be considered of interest and importance?

¹⁰ Professor Yasuaki Onuma's specialization areas are international law, law and politics in international society, human rights, Tokyo War Crimes and so on. His widely publications include *International Law in Transcivilization World; The Tokyo War Crimes Trials*.

¹¹ Professor Robert Cryer is Professor of International and Criminal Law at the University of Birmingham. His expertise is in international law and criminal law. He has written and spoken on both areas extensively. He is the co-author (with Neil Boister) of *the Tokyo International Military Tribunal: A Reappraisal*.

¹² Professor Urs Matthias Zachmann is Professor of Modern Japanese History and Culture at the Free University of Berlin since 2016. His fields of specialization are the history of Northeast Asia's international and transcultural relations, the history of political ideas and the history of law, particularly international law in this region.

Panel I - The Tokyo Judgment: Origins and Relevance

Panel I opened the two-day conference with an overview of the origins of the Tokyo Trial and the relevance of the Tokyo judgment in the development of international criminal law as well as in regional society. Chaired by the historian **Dr. Annette Weinke**¹³ (Friedrich-Schiller-Universität Jena), this panel consisted of scholars from different backgrounds who conducted an interdisciplinary dialogue of history, Japanese studies and law.

Professor Kerstin von Lingen¹⁴ (Universität Wien; Ruprecht-Karls-Universität Heidelberg) presented her research “Establishing the Tokyo Tribunal: Transcultural justice at Tokyo” in which she depicted the Tokyo Trial to the audience through a wide collection of historical materials.

The presentation highlighted the impact of different values represented by the different nations who participated in the establishment and operation of the tribunal. This feature of “transcultural justice” can be observed through a few special characteristics of the Tokyo Trial. For example, the selection of judges was difficult due to, on the one hand, the unwillingness of many suitable candidates to undertake this mission, and on the other hand, the political interests of the nominating nations. Besides that, the International Prosecution Section, which was composed of teams sent by each nation, and the Japanese-US mixed defense team also reflected the impact of the various participants.

Von Lingen then moved to the five fields of friction caused by the difference in the cultural, linguistic, political and legal traditions. First, the personnel management was a difficulty throughout the trials - from the everyday routines of accommodation and food to the friction between the legal professionals and diplomatic staff within the national teams. The second problem was the language barrier: no judges and mostly no prosecutors spoke Japanese at all; communications among the judges were also not optimal because two judges did not speak English. Third, different legal cultures clashed in the determination of a prosecuting strategy, and the deliberation among judges, to a large extent, ended up with an Anglo-American domination. Fourth, the management of the trial did not go smoothly due to the growing discord on the bench and the difficulties in translations. Lastly, the speaker turned to an observation of the social life of the staff. They managed to overcome the Cold War realities and shared the feeling of “otherness” in Tokyo.

As a conclusion, von Lingen suggested that the Tokyo Trial is not a product of the ‘dominating West’, but rather a result of multiple interventions from a broader variety of transcultural justice.

Dr. Beatrice Trefalt¹⁵ (Monash University) asked audiences to turn their attention to the place

¹³ P.D. Dr. Annette Weinke is Assistant Professor/Privatdozentin at the History Department of Friedrich-Schiller-University in Jena, Germany, and Co-Director of the Jena Center of 20th Century History.

¹⁴ P.D. Dr. Kerstin von Lingen is a historian and a researcher. Currently, she is the 2017/18 Visiting Professor at the Institute for Contemporary History at the University of Vienna. From 2013-2017, she led an independent research group at Heidelberg University at the Cluster of Excellence “Asia and Europe in a Global Context” entitled “Transcultural Justice: Legal Flows and the Emergence of International Justice within the East Asian War Crimes Trials, 1946-1954” supervising four doctoral dissertations on the Soviet, Chinese, Dutch, and French war crimes trials policies in Asia, respectively. Her latest book is *Transcultural Justice at the Tokyo Tribunal: The Allied Struggle for Justice, 1946-48* (Brill, 2018).

¹⁵ Dr. Beatrice Trefalt is Associate Professor of Japanese Studies in the School of Languages, Cultures, Literatures and Linguistics at Monash University, Australia. A co-author with Wilson, Cribb and Aszkielowicz of *Japanese War Criminals: the politics of Justice after World War II* (Columbia University Press, 2017), she has written also on the French prosecution of war crimes trials, the repatriation of Japanese war criminals from Philippines, Japanese veterans and the battlefield experience of Japanese

where the Tokyo Trial took place with her presentation “Remembering the Tokyo trials, then and now: The Japanese domestic context of the Tokyo Trial”.

The presentation was structured in three parts and focused on how the Japanese audiences perceived the Tokyo Trial in different historical contexts. The first critical context was the Occupation Japan (the “Occupation”) where the Tokyo Trial was established. As the re-education of the Japanese people is one of the core aspects of the Occupation, the Tokyo Trial was merged into Japanese people’s everyday lives and through mass media. The Japanese public gained access to the censored information about the war for the first time and reshaped their knowledge of the recent history. It is also notable that the changes in the attitudes towards the Occupation in general affected their attitudes towards the trial and the accused.

After the release of the Tokyo judgment and its execution, the attitude toward the Tokyo Trial changed as the focus of the Japanese audience shifted to other incarcerated war criminals in other post-war tribunals. The public showed sympathy with these generally lower-ranking prisoners because they were reported to be faced with more severe conditions and less fair trials than the A-level criminals in the Tokyo Trial, but expiated the guilt of the nation to the same extent.

The last context discussed by Trefalt was the context of war commemoration in the 1970s and beyond. The enshrinement of the war criminals convicted in the Tokyo Trial at the Yasukuni Shrine revealed a rejection of the Tokyo Trial, but this rejection must be seen in the context of the ongoing demands of bereaved families to resume the Yasukuni Shrine to a national institution. No matter how this gesture is interpreted, it aggravated the polarisation in the views of the war. It also suggested that the narratives during the Occupation period did not convince the Japanese audiences completely. The impartiality of the trial was questioned while the tribunal was still in operation and the negative impression was reinforced by the inequities between the different categories of war criminals.

Professor Diane Orentlicher¹⁶ (American University) provided an input to this panel from the legal perspective through her remarks on “genesis: The Tokyo tribunal’s legal origins and contributions to international jurisprudence as illustrated by its treatment of sexual violence”.

Orentlicher first pointed out that the Tokyo Trial’s legacy was acknowledged by legal scholars, but it was only until recently that its distinctive values in international criminal law were elaborated in the academia. One of the reasons why the Tokyo Trial has been overshadowed by Nuremberg is that the Tokyo Trial “echoed” the Nuremberg trial to a large extent. Another reason for its lower prominence in international criminal law is that the Tokyo Trial is widely perceived as an American institution, while the Nuremberg trial is deemed as a multilateral project. Besides the American domination in the drafting of the Charter, the operation of the tribunal was significantly influenced by two powerful Americans: US General MacArthur, who had the formal authority over the tribunal and Chief Prosecutor Keenan, who steered the prosecution policy and strategy. After this brief overview on the legal foundations of the Tokyo Trial, Orentlicher illustrated the prosecution of crimes of sexual violence as an example of the legacy of Tokyo Trial to the international criminal law today. In the Tokyo Trial there were at least two convictions of war crimes for the failure to take appropriate measures to stop rapes, among other atrocities, which signified a clear progress from the missing of any prosecution of crimes of sexual violence in

civilians in the Pacific.

¹⁶ Professor Diana Orentlicher is Professor of International Law at American University. She has been described by the Washington Diplomats as “one of the world’s leading authorities on human rights law and war crimes tribunals.” She has lectured and published widely on issues of transnational justice, international criminal justice, business and human rights, and other areas of public international law.

Nuremberg. However, the Tokyo precedent does not receive the level of recognition it deserves, rather, commentators today would focus on its flaws: the lack of explicit recognition of rape as a war crime or as a crime against humanity and the neglect of the crime of sexual enslavement. Despite some imperfections, the Tokyo Tribunal did leave a valuable legacy by including relevant evidence into its official record, as well as serving as a lesson on how to avoid the same failures in the future.

Following these three speeches, an **open discussion** was conducted, which provided a closer insight into the origins and relevance of the Tokyo Trial, including the US participation, the collaboration of the 11 judges on the bench, the legal characterisation of crimes of sexual violence, women's participation in the trial and the depiction of the trial in the Japanese pop culture.

Panel II – Comparative Analysis: The Nuremberg and Tokyo International Military Tribunals

Panel II revisited the Tokyo Trial through a comparative analysis with its counterpart in Nuremberg, which created an interesting connection of the theme and venue of the conference. By presenting a souvenir from the Tokyo Trial, the Chair of this panel, **Professor Diane Marie Amann**¹⁷ (University of Georgia), gave her remarks on the notion of legacy and opened the roundtable discussion.

Professor David M. Crowe¹⁸ (Chapman University, Elon University) gave the first speech in this panel on “The Tokyo and Nuremberg IMT trials: origins, proceedings and verdicts”.

In order to understand the Tokyo Trial, one has to understand the whole dynamic of the American Occupation of Japan, which was very different from the four-power occupation in Germany, both in their goals and approaches. After a brief discussion on McArthur's role in the decision-making, Crowe analysed the role of the Chief Prosecutor Keenan, especially his strategy of choosing defendants who could represent the nature of the Japanese criminality. Another difference between the Tokyo and Nuremberg trials is the publication of the trial transcriptions. Largely due to political reasons, there were no published transcriptions of the Tokyo Trial until the early 1980s.

Professor Gerry Simpson¹⁹ (London School of Economics and Political Science) presented two arguments in this panel, the first on the Tokyo Trial itself and the second on the coinage “Tokyoberg”.

¹⁷ Professor Diane Marie Amann holds the Emily & Ernest Woodruff Chair in International Law and is Faculty Co-Director of the Dean Rusk International Center at the University of Georgia School of Law. To further her scholarship on the roles women played in the postwar trials at Nuremberg, she is currently Visiting Research at the Oxford University Faculty of Law's Bonavero Institute of Human Rights and Visiting Fellow at Oxford's Mansfield College.

¹⁸ Professor David M. Crowe is Presidential Fellow at Chapman University and Professor Emeritus of History and Law at Elon University. He is currently writing *Raphael Lemkin: The Life of a Visionary*, while his *Stalin's Soviet Justice: 'Show' Trials, War Crimes Trials, and Nuremberg* will be published by Bloomburly later this year.

¹⁹ Professor Gerry Simpson is Professor of International Law at the London School of Economics and Political Science (LSE). He is the author of *Great Powers and Outlaw States* (Cambridge, 2004) and *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity, 2008). Recent publications include *The Hidden Histories of War Crimes Trials* (ed. With Kevin Heller) (Oxford University Press, 2013); *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited* (ed. with Yuki Tanaka and Tim McCormack) (Martinus Nijhoff, 2011) and *Who's Afraid of International Law* (eds, Raimond Gaita and Gerry Simpson) (Monash University Press, 2017).

The first argument was that the Tokyo Trial embodies the classic intension in international criminal justice between the enthusiasts and the skeptics. Judge Röling and Judge Pal represented the skeptics in Tokyo, while the other wing led by Judge Patrick represented the enthusiasts. More deeply, the Tokyo Trial represents the anxieties that we have about the international criminal justice itself—about ending impunity, the consolation of victims and the idea of telling the history to perform “didactic legalism”.

In his second argument, Simpson explained that the concept of “Tokyoberg” mashes together the postwar moments, and questions the commonplace of regarding Tokyo as a copy of Nuremberg by putting Tokyo in front of Nuremberg. Considering the two trials together also reveals some current issues in the international criminal justice: the relationship between a treaty-based tribunal and a non-treaty-based one; the relationship between permanence and *ad hoc*-ness; whether international criminal justice is fundamentally an European project or a project applied by Europeans which also contributes to legalism elsewhere. In the end of his presentation, Simpson pointed out that power tries to bring law back to politics and history, and it is a tradition of introspecting international criminal justice as well.

Professor David Cohen²⁰ (Stanford University) elaborated on the topic of “Nuremberg and the Tokyo double standard”.

Cohen noted that many scholars who criticise the Tokyo Trial fail to make equal criticisms of Nuremberg. There are a few examples of the double standard. First, while Tokyo was criticised for its subject matter omissions, the Nuremberg Trial also neglected the systematic forced prostitution and policy-driven rapes. Second, the extended jurisdiction in Tokyo Trial from 1928-1945 often attracts criticism, however, the timeframe under consideration of conspiracy in Nuremberg started even earlier, in 1919. Third, both trials were used extensively in the American occupation propaganda and education. Fourth, in the Tokyo judgment, convictions required *mens rea* and the knowledge of the criminal organization, while under the principle of collective responsibility in the Nuremberg Charter, new members of the indicted organisations were also made criminals. Fifth, Tokyo is criticised for not including the people in the courtroom but it was likewise the case in Nuremberg. Moreover, both Tokyo and Nuremberg did not apply the conspiracy theory properly. Lastly, the criticism towards Judge Webb could be unfair because his draft judgment actually went much further than the Nuremberg judgment or the majority judgment at Tokyo in the analysis of legal issues and the systematic application of the theory of liability to each accused.

Dr. Zachary D. Kaufman²¹ (Harvard University) brought the discussion back to the Tokyo Trial itself with his remarks on “Modern implications of the Tokyo tribunal’s subject matter omissions”.

Neither of the tribunals managed to try all the crimes in World War II and these omissions are worthy of a further examination. Kaufman focused in this panel on the omission on human

²⁰ Professor David Cohen is Director of the WSD Handa Center for Human Rights and International Justice at Stanford University, where he is WSD Handa Professor in Human Rights and International Justice and Professor of Classics. He publishes in the fields of human rights, international criminal law and transitional justice. His latest book, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence*, co-authored with Professor Yuma Totani, will appear in October 2018 in Cambridge University Press.

²¹ Dr. Zachary D. Kaufman is Senior Fellow at the Harvard University John F. Kennedy School of Government’s Carr Center for Human Rights Policy and Lecturer in Law at the Stanford Law School.

experimentation in the Tokyo Trial. The United States government offered immunity to over 3600 government agency positions and scientists who were involved in the human experimentation in the Japanese Army Unit 731, which led to a failure to address this subject matter in the Tokyo Trial. Recently, more and more materials on Unit 731 are discovered and publicised. Kaufman suggested that although it may be too late to establish culpability, certain steps should be done to promote awareness of the issue and to acknowledge the roles of Japan and the United States in conducting and covering up these atrocities: both countries should declassify the remaining documents relating to the experiments and make a formal apology.

Robert Cryer²² (University of Birmingham) delivered the last presentation in this panel titled “now and then: the contemporary relevance of the Nuremberg and Tokyo IMT”.

Cryer stated that the legal, historical and political legacies of the Nuremberg Trial are much more acknowledged than those of the Tokyo Trial. The Tokyo Trial basically followed the Nuremberg precedent for the following reasons: they did not want to fragment the international law; there was some pressure to support Nuremberg; and the General Assembly Resolution 95(1) already affirmed the Nuremberg Principles. In fact, the Tokyo Trial had a stronger legal basis than Nuremberg. Secondly, in order to get over evidential difficulties, commander responsibility was developed more in Tokyo than in Nuremberg. The obstacles in getting hold of the documents and judgments in the Tokyo Trial also contribute to the lack of attention to Tokyo. In conclusion, Cryer deemed the Tokyo Trial as the more interesting one between the two trials: great but flawed.

During the following open discussion, the panellists shared their insights on the concept of “victor’s justice”. Amann recalled the criticism of the Nuremberg Trial with regard to the due process and legality issues during the time of the trial. It is interesting to notice that these critiques have been lost over time, and Tokyo became targeted as a result of victor’s justice. Cohen noted that there has been massive literature on this topic, but it may not be the most productive discussion about Nuremberg and Tokyo because there are many other issues beyond political and judicial controversies. Crowe raised the point that despite the difficulties, there was, in fact, more effort in Tokyo than in Nuremberg to conduct a fair trial. Kaufmann emphasised the failure to address the usage of nuclear weapons by the United States in the Tokyo Trial, which constituted a clear distinction between Nuremberg and Tokyo and placed Tokyo under criticism regarding fairness. Cryer questioned the tendency to use victor’s justice as a synonym for “show trial” by which the trial is assumed to be unfair simply because of the identity of the actors. Some of the criticisms must be re-evaluated today, considering the objective difficulties in controlling a large bench of 11 judges, in translating between English and Japanese and in time management. Simpson then raised the question: who is going to perform the justice, if not the victors. Therefore, what is truly worth consideration is what kind of justice they perform and in which condition they perform it. We should recognise the value of the Tokyo Trial for its variety and for the fact that it allowed many judges to have radically different views.

Panel III Crimes within the Tokyo Charter: Crimes against Peace, War Crimes and Crimes against Humanity

²² Professor Robert Cryer is Professor of International and Criminal Law at the University of Birmingham. His expertise is in international law and criminal law. He has written and spoken on both areas extensively, amongst other places, in the UK, China, Australia, New Zealand, and Germany. He has also published on the law of war crimes in Asia, in particular he is the co-author (with Neil Boister) of *the Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008) and of various articles on international crimes, criminal law and international law more generally.

Panel III addressed the crimes within the Tokyo Charter. The panel was chaired by Dr. Nobuo Hayashi.²³

Professor Philipp Osten²⁴ (Keio University) presented “definition and scope of crimes in the Tokyo Charter”. He made a general introduction of crimes falling within the scope of Article 5 of the Tokyo Charter which modifies certain details as compared to the Nuremberg Charter. He then discussed the applicability, interpretation and possible relevance of these concepts to following the development of international criminal law. The Tokyo Charter is modelled on the Nuremberg Charter, but the definition of crimes differs in several aspects, which influenced the way they were applied in the Tokyo Trial.

Firstly, the crimes against peace are established for the purpose of prosecuting aggression. However, the majority judgment refrained from providing a clear definition of aggression and it provided no legal reasoning of its own other than relying on the Nuremberg Judgment. The definition of crimes against peace has one modification compared to the definition in the Nuremberg Charter, i.e. it proclaimed that an unlawful war can either be ‘declared’ or ‘undeclared’. The adding of ‘undeclared war’ makes it possible to prosecute aggression against China.

Secondly, the novel concept of crimes against humanity played a minor role in the Tokyo Trial. It is not considered as an independent concept of crime. The counts of the Tokyo Indictment include crimes against peace, murder (this charge was not provided by the Charter and was dismissed by the court), war crimes and crimes against humanity, while the judgment is limited to crimes against peace and war crimes. Compared to the Nuremberg Judgment, the definition of crimes against humanity in the Tokyo Charter deleted acts committed against any civilian population and extended to crimes against persons which did not fall within the scope of conventional war crimes. Besides, the Tokyo Trial did not prosecute crimes against humanity committed on the territory under the control of Japan (e.g. Taiwan). In addition, the Charter required a nexus between crimes against humanity and war crimes, which further narrows down its applicability. Thus, practically, no pre-war crimes against humanity could be tried in the Tokyo Trial.

Finally, the notion of conventional war crimes did not give rise to much controversy at the Tokyo Trial. The most significant aspect in this regard is the modes of liability for war crimes. The doctrine of superior responsibility, or command responsibility, was applied and further developed in the Tokyo Trial.

He then raised several underexplored questions, as an example, whether a possible hierarchy among the international crimes exists, whether the Tokyo Trial can provide any guidance in this regard, and whether the three crimes applied at Tokyo Trial could serve as valid precedents. Based on his analysis, Osten suggests that we should be careful with using the Tokyo Charter and Judgment as a precedent.

²³ Dr. Nobuo Hayashi specializes in international humanitarian law, international criminal law, *jus ad bellum*, international weapons law, and public international law. He has produced significant work on military necessity, as well as the law and ethics of nuclear weapons.

²⁴ Professor Phillip Osten (Dr. iur. Humboldt University, Berlin) is Professor of Criminal Law and International Criminal Law at Keio University, Tokyo. He received legal education at Humboldt University, Berlin and at Keio University, Tokyo. His main field of research is international criminal law. He has conducted research on the history of international criminal trials and published a book on the Tokyo International Tribunal in German.

Dr. Wolfgang Form²⁵ (Philipps-Universität Marburg) specifically addressed “war crimes and crimes against humanity at the Tokyo Trial”. He started with the definition of war crimes provided by Oppenheim’s International Law, which implies that a lot of people can be responsible for war crimes, including government officials, commanders and civil societies. However, the Tokyo Trial divided the cases into Class A, B and C cases, and only Class A cases involving Cabinet members and other senior officials fell into the jurisdiction of the Tokyo Trial. This is an important difference from the prosecution of war crimes in Europe. He then discussed the forms of responsibility as provided in Article 5 of Tokyo Charter, and specifically mentioned how the judges relied on the framing of “conspiracy” in the Charter to rule out several counts in the indictment. Another issue related to war crimes is the starting point of armed conflicts. The judgment treated the starting point of the armed conflict for the purpose of determining war crimes the same as the beginning of the act of aggression. This echoes the modern view of armed conflicts which require no declaration of war.

As for crimes against humanity, the term ‘humanity’ was mentioned many times in the judgment while ‘crimes against humanity’ as a crime was not accepted by the majority judgment to convict the accused. However, when it comes to convicting certain defendants, like Shigemitsu, the relevant parts in judgment were framed in a way similar to finding the accused responsible for crimes against humanity.

In his remarks, Dr. Form raised several questions: If the court did accept crimes against humanity, will the sentence be different? Was it wise to include crimes against humanity in the Tokyo Charter? As it was created based on the situations in Germany, can similar situations be found in Asia?

Professor Donald M. Ferencz²⁶ (Middlesex University) delivered the last presentation in the panel with the topic “criminalising aggression: from Nuremberg to Tokyo to the Hague”.

One of the most controversial issues at Tokyo Trial is whether the prosecution of aggression violated the principle of *nullum crimen sine lege*. The 1928 Kellogg-Briand pact is insufficient to criminalise aggression as it provides for no enforcement mechanism. However, as put by the Prosecutor Robert Jackson at the Nuremberg Trial, no one can deny that what the Nazis did, constituted violations of law and deserved sanction. He also noted that the United States played an important role in prosecuting aggression, but it is unclear why the crime of aggression was prosecuted at the Tokyo Trial. Is it related to the attacks on Pearl Harbor?

During the following **open discussion**, questions were brought on the forms of liability for prosecuting aggression, the issue of retroactivity, the creation of jurisdiction through executive power, the legitimacy of proceedings and sentencing, and so forth.

Panel IV Crimes Specifically Addressed within the Tokyo Judgment

²⁵ Dr. Wolfgang Form is Lecturer in Political Science, Criminology and Peace and Conflict Studies at the Universities of Marburg, Kiel and Wolfenbüttel. In 2003, he co-founded the International Research and Documentation Center for War Crimes Trials in Marburg and has served as its Research Director since then.

²⁶ Professor Donald Ferencz is Visiting Professor at Middlesex University School of Law in London and Research Associate at the Oxford University Faculty of Law’s Centre for Criminology. He was a nongovernmental advisor to the ICC Assembly of States Parties’ working group on the crime of aggression.

The fourth Panel on crimes, specifically addressed within the Tokyo Judgment was chaired by Judge Raul Pangalangan²⁷ (the International Criminal Court). He specifically addresses the importance of adopting the method of comparative international criminal law.

Professor Marina Aksenova²⁸ (IE University) looked at the judgment based on the perspective of today, rather than that of 1948. There are three main features of the judgment. Firstly, it adopts a fact-based approach with seemingly little discussion of law. However, Professor Aksenova emphasised that there is law in the facts. Secondly, the Tokyo Judgment is longer than the Nuremberg Judgment although shorter than contemporary ones. Thirdly, it lacked focus on individual criminal responsibility. She then discussed groups of issues adjudicated at the Tokyo Trial that are relevant today: the grand conspiracy count, the individual instances of aggression, the war crimes, and the modes of participation and sentencing.

Professor Robert Cribb²⁹ (Australian National University) discussed the ‘treatment of prisoners-of-war and civilian internees in the Tokyo Trial’ based on his finding in his new book published in 2017. From a historical perspective, he made comparison between experience of women, children and prisoners of war in the detention camps in Java, Burma and China. Half of the accused were charged with war crimes for their treatment of detainees and prisoners of war. He also addressed the arguments on command responsibility with a special focus on the evidence used to prove these crimes.

Professor Urs Matthias Zachmann³⁰ (Freie Universität Berlin) talked about “Japanese responses to the concept of individual criminal responsibility during the IMT/TFE”. In Japan, the Tokyo Trial was considered the starting point of the discussion of international law. But actually, such discussion started much earlier and shaped Japan’s response to the Tokyo Trial. Japan made international lawyers a profession in the 19th century (much earlier than the German society did). As for prosecuting war criminals, there had already been a discussion of establishment of war crimes tribunal in Japan when it won the war, but the accused would be the captured enemy soldiers. Therefore, the Japanese people already had some thoughts about international criminal law and the establishment of criminal tribunals, which is quite relevant for the discussion of individual criminal responsibility for the Japanese defendant.

²⁷ Judge Raul Pangalangan was elected to the International Criminal Court in 2015. Until then he taught constitutional law and public international law as Professor of Law and Law Dean at the University of Philippines. He has also taught, inter alia, at Harvard Law School and the Hague Academy of International Law and has lectured on international humanitarian law for the International Committee of the Red Cross.

²⁸ Professor Marina Aksenova is Professor of Comparative and International Criminal Law at IE University in Madrid. Her Ph.D. thesis “Complicity in International Criminal Law” was published with Hart in 2016. In addition to her academic qualifications, Professor Aksenova worked for the defence teams at the International Criminal Tribunal for the former Yugoslavia, Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia and in an arbitration department of White and Case LLC.

²⁹ Professor Robert Cribb is Professor of Asian History at the Australian National University. He has previously taught at the University of Queensland, Leiden University and Griffith University. He is the author (with Sandra Wilson, Beatrice Trefalt and Dean Aszkielowicz) of *Japanese War Criminals: The Politics of Justice after Second World War* (2017).

³⁰ Professor Urs Matthias Zachmann is Professor of Modern Japanese History and Culture at the Free University of Berlin since 2016. Before that, he was the Handa Professor of Japanese-Chinese Relations at the University of Edinburgh, Scotland (2011-2016). In 2013, he published a monograph (in German) on the development of international legal thought in Japan, 1919-1960.

Panel V Procedural Obstacles Faced by the Tribunal

The fifth panel, chaired by Judge Sang-Hyun Song³¹, dealt with procedural obstacles faced by the tribunal.

Professor Elizabeth Borgwardt³² (Washington University in St. Louis) discussed “the power of process at the Tokyo Trial: whose evidence, whose atrocity?”. The procedural issues discussed included who may be heard and under what circumstances, rules of evidence, bias and perception of bias, etc. The relevant standards at that time were developed in courts established by military commission and with respect to treatment of aliens, which were a pretty low standard. This raised the question of which standard of fairness should be used to assess the Tokyo Trials. The court’s legitimacy was also questioned due to the lack of acquittals as the possibility of acquittals is a major criterion differentiating political trials and legal trials.

Professor Kayoko Takeda³³ (Rikkyo University) presented “trial and error in the interpreting and translation procedures during the Tokyo Trial”. She focused on the use of Japanese interpreters in the trial from a perspective of translation and interpreting studies.

Lisette Schoute³⁴ (Ruprecht-Karls-Universität Heidelberg) discussed “the selection of judges and Dutch representations at the IMTFE”. She started with a background on the importance of selection of judges. She then made a comparison between the selection of judges in the Permanent Court of International Justice and the Tokyo Trial. Finally, she specifically discussed the role of the Dutch judge at the trial.

Dr. Milinda Banerjee³⁵ (Ludwig-Maximilians-Universität München) focused on “decolonization in transnational optics: India and the Tokyo Trial”. He argued that a lot more research is needed on the Tokyo Trial. He questioned why most of the research on this topic only treated Judge Pal as a representative of India. He argued that the entire trial was about colonialism and more attention should be given to fighting against colonialism in any parts of the world.

Panel VI-Judgment and Post-Judgment Developments

The sixth session, dealing with post-judgment developments, was introduced by moderator, Professor Wenqi Zhu.³⁶ He spoke of the post-war trials in China in 1946 and 1956 and introduced the issues of clemency, pardons and amnesties arose in the period after the Tokyo

³¹ Judge Sang-Hyun Song is Member of the Advisory Council of the International Nuremberg Principles Academy. He was President and Judge of the International Criminal Court from March 2009 through March 2015. For more than thirty years, Judge Song has taught as a professor of law at Seoul National University Law School, beginning in 1972.

³² Professor Elizabeth Borgwardt is Associate Professor of History and Law at Washington University in St. Louis. She served as the Richard Anne Pozen Visiting Professor of Human Rights at the University of Chicago in 2012 and in 2013 she was Cummings Foundation Fellow at the Center for Advanced Holocaust Studies at the US Holocaust Memorial Museum Archives.

³³ Professor Kayoko Takeda is Professor of Translation and Interpreting Studies at the College of Intercultural Communication at Rikkyo University, in Tokyo, Japan.

³⁴ Lisette Schouten is completing her Ph.D. in History at the Cluster of Excellence “Asia and Europe in a Global Context” of Heidelberg University. Her research focuses on Dutch war crime trial policy in the Netherlands East Indies and Japan, 1945-55.

³⁵ Dr. Milinda Banerjee is Ludwig Maximilian University Research Fellow from 2017 to 2019, as well as Assistant Professor at the Department of History at Presidency University of Kolkata, India.

³⁶ Professor Wenqi Zhu is Professor of International Law, Renmin University of China as well as Director of the Institute of International Criminal Law and the International Humanitarian Law Institute. In relation to international criminal law and humanitarian law, he published many books in Chinese.

Trial.

Prof. Sandra Wilson³⁷ (Murdoch University) focused on the controversies with respect to clemency after the Tokyo Trial. She presented that clemency was not accepted initially because the punishment of the most serious crimes was envisaged to be permanent for the purpose of respecting the victims and noted that clemency can be a backdoor for ‘dirty politics to get into the way of clean law’. Nonetheless, Article 11 of the San Francisco Treaty recognised the possibility to grant clemency and China, Australia, and the UK did so. She explained that the status of the Cold War and the normalisation of bilateral relationship contributed to the practice of pardoning. Prof. Wilson also mentioned the bureaucratic process of conditional early release in Germany after the Nuremberg trial.

Dr. Narelle Morris³⁸ (Melbourne Law School) first briefly introduced the failure to prosecute Australian war criminals after the Second World War. Dr. Morris furthermore addressed the lack of equal duty among judges in the International Military Tribunal for the Far East (IMTFE). She referred to Appleman’s book, *Military Tribunals and International Crimes*, and addressed the inappropriate judicial performances at the Tokyo Trial, including Justice Webb’s tempestuous conditions.

Ms Valentyna Polunina³⁹ (Heidelberg University) gave an interesting insight into the Soviet Khabarovsk Trial for Japanese medical crimes from 1932 to 1945. According to Polunina, due to the Soviet inability to prosecute the Japanese, the Russians established a court in Khabarovsk, by the means of a decree, to correct the Tokyo Trial. The Khabarovsk court dealt with the Japanese biological sabotage against the Soviets. The trial was intended to provide precedent for later proceedings against senior Japanese officials. Article 1 of the decree concerned the crime of aggression but there was no specific reference to war crimes and/or crimes against humanity. Polunina presented that all accused at the Khabarovsk Trial pleaded guilty for the research and experimentation activities with human subjects and bio warfare field trials. She also mentioned that due to the lack of international observation, the Khabarovsk Trial attracted criticism that the proceeding was more show than trial.

Dr. Franziska Seraphim⁴⁰ (Boston College), elaborated on the topic of ‘loser’s justice’. She compared the post-war situations of Germany and Japan, addressing that Germany was provided with more and more responsibility by American military authorities in rehabilitation, whereas it was not the case for Japan. Furthermore, Dr. Seraphim highlighted that Japan and Germany came to take ownership of the Allied program in a remarkably similar fashion through the mobilisation of domestic regime and rose to the challenges of upholding international human rights. Germany opened up and got integrated into the Western Europe whereas Japan was somehow standing alone in East Asia. She specifically argued that the history of the Cold War should be taken as an

³⁷ Professor Sandra Wilson is Professor and Academic Chair of History at Murdoch University, and Fellow of the Asia Research Centre. She is a specialist on modern Japan, with a research focus on Japanese society and politics in the 1930s and 1940s, the history of Japanese nationalism, and Japanese war crimes.

³⁸ Dr. Narelle Morris is Senior Lecturer in the Curtin Law School, Curtin University and Honorary Research Fellow in the Asia Pacific Centre for Military Law, Melbourne Law School.

³⁹ Valentyna Polunina completed her Ph.D. at the Cluster of Excellence “Asia and Europe in a Global Context” at Heidelberg University, where she studied the Soviet war crimes trial at Khabarovsk and the question of prosecuting bacteriological warfare after World War II.

⁴⁰ Dr. Franziska Seraphim is Associate Professor of History at Boston College and the author of *War Memory and Social Politics in Japan, 1945-2005* (Harvard, 2006). Her research is on public memory, historical justice and social movements in Asia.

activist tool to proceed the discussion rather than a mere background to contextualise past events.

Panel VII-Marking the Ongoing Impact: From Tokyo to the Hague

Panel VII addressed the impact of the Tokyo Trial on contemporary international criminal law and was presided over by Ambassador Stephen J. Rapp.⁴¹

Judge Daqun Liu⁴² (the United Nations Mechanism for International Criminal Tribunals) first elaborated on the conspiracy of the most serious crimes in international criminal law being an inchoate crime rather than a mode of liability. He discussed that a Joint Criminal Enterprise (JCE) needs to satisfy three criteria: a common plan, members' participation in designing the crime, and a shared intent among all participants. He also addressed the problems of impunity due to the immunity enjoyed by heads of state, taking the example of Emperor Shōwa's families abetting the atrocities in Nanking. Judge Liu finished the speech by emphasising the concept of 'regional ownership' of the Tokyo Trial.

Judge Kuniko Ozaki⁴³ (the International Criminal Court) endorsed the significance of the Tokyo Trial and other tribunals' judgments in the daily practice of the International Criminal Court (the "ICC"), a treaty-based permanent court. She discussed that the procedural law of the two IMTs at Tokyo and Nuremberg is based on military law and common law, allowing more admission of documentary evidence than in the ICC proceedings. According to Judge Ozaki, the threshold of effective control in establishing command responsibility in the Yamashita case in the Tokyo Trial is lower than in the Lubanga case in the ICC.

Prof. Keiko Ko⁴⁴ (Nanzan University) mentioned that an initial concern was about Article 9 of the Japanese constitution, according to which Japan cannot issue any law on war. However, with respect to international humanitarian law, Japan passed the 2004 implementing laws of the Geneva Conventions which opened the door to ratifying the Rome Statute. Furthermore, Professor Ko highlighted that the ongoing process of revising Article 9 of the Japanese constitution concerns more *jus in bello* rather than *jus ad bellum*, though the Tokyo Trial has hardly ever been mentioned in Japanese parliamentary debates.

Discussion and Conclusion

The conference was an opportunity for the speakers and the audience to review the importance and legacies of the Tokyo Trial and to reveal questions worthy of further research. Previously, the legacies of the Tokyo Trial were largely overlooked. This may be because the Tokyo Trial came second to the Nuremberg Trial, or its judgment was not as publicly available as that of the latter, or it was considered to be essentially unfair.

⁴¹ Ambassador Stephen J. Rapp is visiting professor of human rights at Georgetown University and Global Prevention Fellow at the Simon-Skjoldt Center for the Prevention of Genocide

⁴² Judge Daqun Liu is Judge at the United Nations Mechanism for International Criminal Tribunals and former Vice President and Judge of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).

⁴³ Judge Kuniko Ozaki is the Second Vice-President of the International Criminal Court (ICC). She is currently sitting on the case of Bosco Ntaganda and will continue to sit on this bench until the completion of the case.

⁴⁴ Professor Keiko Ko is Professor of International Law at Nanzan University and a Refugee Examination Counselor in Japan, presented Japanese government's preparation work for the accession to the Rome Statute.

However, the discussion in the conference showed that none of the reasons above could support the disregard of this important trial in the history of international criminal law. For the first reason, indeed, in many parts of the judgment, the Tokyo Trial followed the reasoning of the judgment of Nuremberg Trial in order to avoid conflicting jurisprudence,⁴⁵ while some aspects of the Tokyo Trial were innovative (eg. command responsibility⁴⁶ and murder charges⁴⁷) and even had more enduring influence than the Nuremberg Trial (eg. debates on aggression⁴⁸). Concerning the second reason, the first-hand resources of the Tokyo Trial were available thanks to some databases⁴⁹ and scholars.⁵⁰ Regarding the third reason, although it would be criticised that ‘Tokyo ... was a precedent that legal history can only consider with a view not to repeat it’,⁵¹ this does not suggest overlooking the Tokyo Trial but rather learning lessons from it.⁵² To disregard the Tokyo Trial simply on the ground that it was unfair is short-sighted. As a comparison, Yamashita,⁵³ notorious for failure to respect the principle of personal culpability, is still cited frequently as the first case of command responsibility.⁵⁴ The Tokyo Trial, established on the basis of the proclamation of a joint organ of states, is an international criminal court⁵⁵ and therefore its judgment, by definition, represents internationally authoritative, albeit not necessarily conclusive, statements as to certain rules of international law and should not be given less attention than decisions of municipal courts - the latter constituting no more than state practice and *opinio juris* on the part of the forum states.⁵⁶ Therefore, there is no reason that can justify overlooking the Tokyo Trial. As addressed above, the speakers in this conference raised many issues for further research and it is hoped that this conference as well as this commentary can inspire more research in this regard.

⁴⁵ Transcript 48439, available upon subscription at: <http://tokyotrial.cn/> (accessed on 25 July 2018).

⁴⁶ X. Mao, ‘Omission Liability for War Crime Charges in International Military Tribunal for The Far East’ *IJLLJS 2017-4*, p. 36, at: http://ijlljs.in/wp-content/uploads/2017/02/Omission_Liability_for_War_Crime_Charges_in_International_Military_Tribunal_for_The_Far_East.pdf (accessed on 25 July 2018).

⁴⁷ N. Boister, ‘The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?’ *JICJ* 2010-8, pp. 439-46.

⁴⁸ K. Sellars, ‘The Legacy of the Tokyo Dissents on “Crimes against Peace”’ in Claus Kress and Stefan Barriga (eds), *The Crime of Aggression: A Commentary*, CUP 2016, p. 113; Xiao Mao, ‘Substantive or Jurisdictional? The Nature of Tokyo Charter and the Legality Challenge for Prosecuting Aggression at the Tokyo International Military Tribunal’, *Journal of East Asia and International Law* 2018-11(2), pp. 435-452.

⁴⁹ eg Tokyo Trial Databases, at: <http://tokyotrial.cn/> (accessed on 25 August 2017); 东京审判资源库 (Tokyo Trial Resource Platform), at: <http://mylib.nlc.cn/web/guest/djsp/index> (accessed on 25 July 2018).

⁵⁰ N. Boister & R. Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, OUP 2008.

⁵¹ M.C. Bassiouni, R.A. Falk & Y. Onuma, ‘Nuremberg Forty Years After’, *PASIL* 1986-80, p. 64.

⁵² N. Boister, ‘Aggression at the Tokyo War Crimes Trial’ (2007), at: https://ir.canterbury.ac.nz/bitstream/handle/10092/737/12607990_Boister.pdf?sequence=1 (accessed on 25 July 2018).

⁵³ *US v Yamashita* 327 US 1, IV LRTWC 1 (1946).

⁵⁴ N. Boister & R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, OUP 2008, p. 3.

⁵⁵ R. O’Keefe, *International Criminal Law*, OUP 2015, p. 89.

⁵⁶ *Idem*, p.110.