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Panel Session

Current judicial interpretations about "Tokyo" and "Nuremberg" Tribunal, and comparative historicizing of war criminals tribunals studies

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My name is Kensuke Shiba. I'm honored by the preceding introduction. I feel that today's international symposium is of major significance. Having studied the Nuremberg trials as a historian, I have a few comments on the papers delivered today.

From a historical perspective as well, I felt that Judge Liu's talk, in particular, was of extraordinary importance, as it was founded on modern legal practice. For some time we have been discussing the Nuremberg and Tokyo trials; considering how the Nuremberg trials have been perceived in Germany, it seems that a movement toward reconsidering the image of the trials as a whole appeared in the late 1980s or just before the end of the Cold War. In fact, something that I emphasized in my own book (*The Nuremberg Trials*, Iwanami Shoten, 2015) is there were other Nuremberg trials that have been entirely forgotten. Immediately after the International Military Tribunal, 12 other Nuremberg trials were conducted in the same Nuremberg Court by the United States (US) military. These trials were held for each of the occupied zones, delegated by the four countries on the Allied Control Council (US, Britain, Soviet Union, and France) that supervised Berlin after the defeat of Germany, with the US military conducting trials in Nuremberg, which brought together prominent leaders, including a considerable number of cabinet ministers (other than the Nazi administration cabinet ministers judged at the International Military Tribunal); that is, defendants equivalent to those at the International Military Tribunal. There were 22 defendants in total at the Nuremberg International Military Tribunal (generally referred to as the "Nuremberg Trial"); in addition, judgments were passed on 177 defendants at the 12 other trials conducted by the US Army, known as the "Subsequent Nuremberg Trials" (officially the "Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10"). In Germany of late, especially among historians, the Nuremberg trials are considered to be the International Military Tribunal plus the 12 subsequent trials, making for a total of 13 trials, as is tacitly understood from the use of the plural form. However, the subsequent trials had in fact been forgotten for some reason until recently. Today, from the perspectives of International Criminal Law or the international code of criminal procedure, experts are gathering to review the Tokyo and Nuremberg trials further; in the case of the latter, however, based on the above issues, I feel that the approach thereto must emphasize the subsequent trials alongside the International Military Tribunal and include the subsequent trials when making a comparison with the Tokyo trials as well. In Germany, even laypeople seem to be developing an awareness of a more complex image of the Nuremberg war criminal trials. In my comment on today's lectures, I hope to begin by confirming these points with regard to those with interest in Japan's trials of war criminals.

First, Judge Liu points out that regarding the issue of crimes against peace and that of conspiracy to plan and execute an aggressive war in the Nuremberg and Tokyo trials, there were far more defendants who were found guilty in the Tokyo trials, which were in one sense more important. While the issue of conspiracy was connected to the criminal concept of Joint Criminal Enterprise (JCE) highlighted in the war criminal trials at the "new war" stage after the Cold War, Judge Liu notes that JCE is not found in the regulations of the international criminal courts, providing a detailed introduction to the issues in actual trial procedures that remain mostly unrecognized in Japan today. Regarding these issues, I would be grateful if Judge Liu, as a practitioner in the field, could give us more details as to why they have been used in verdicts delivered in connection to the enforcement of personal responsibility and turned into precedents. I am curious as to why the issue of JCE was raised today, given that it is not found in the regulations of the current international criminal courts.

Moreover, regarding crimes against women, which were discussed today, it was specified that, ultimately, regulations

against rape were not included in the regulations of crimes against humanity in the post-World War II Charter of the International Military Tribunal. In contrast, as a noteworthy point from the 1990s and thereafter, Judge Liu emphasized that although this issue was discussed on a grand scale in ad-hoc war criminal courts, contemporary restrictions or limitations (including the indifference to gender balance itself at the time of the International Military Tribunal) led to its omission at the time. However, I feel we must note that at the tribunal held under Control Council Law No. 10, rape was included in the regulations of crimes against humanity.

Next, as regards today's primary topic, that of how to pass on the legacy of Nuremberg, particularly in the sense of the heritage of the Nuremberg International Military Tribunal, the starting point thereof, Dr. Dietrich gave an extremely important talk. She first quoted from the well-known opening statement by US Chief of Counsel Robert Jackson at the International Military Tribunal to the effect that the tribunal was one of the most significant tributes that power had ever paid to reason; once again confirming its symbolic expression of staying the hand of vengeance and voluntarily submitting captured enemies to the judgment of the law as well as giving appropriately distinct emphasis to Jackson's belief in the point that the Nazi regime had unleashed an aggressive war and that this conspiracy was the key point to the prosecutors' closing arguments. While the role of Jackson in the International Military Tribunal may have become historically relativized in comparison to how it was once seen, I would like to add that Jackson himself later looked back on this opening statement as being the most important duty of his life, and that it was developed as such through considerable tension and meticulous preparation.

Professor Totani's talk strongly suggested an intent to focus on the legal development of individual aspects within the Tokyo trial hearings, reshuffling, in one sense, the common image of the trials among us: the view or situational theory of a concentrated focus of interest on the process by which the Tokyo trials were established (the "path to the Tokyo Tribunal") within the nature of the current historical evaluation thereof. With regard to the Nuremberg trials as well, conventionally, we tend to think of their history as their "establishment" through the development of the discussions among the Allies, particularly among the four primary countries, as well as of the confrontations and schemes among various relevant parties, until finally the trials were established; or in the form of a history of the defendants featuring a lineup of the major players such as Goering on a stage in the form of the Court. However, we may also apply to the Tokyo trial the concept raised today that the most important thing is to consider the conflict between legal principles as a specific development of such detailed criminal justice, leading us to feel that we are taking on a more complete view of such wartrial scenes. Germany has finally perceived each view of the subsequent trials, and so when we consider this in connection with the current state of historical research, beginning its approach to the overall image of the Nuremberg trials, my honest first impression was a certain shock with great impact. Professor Totani's angle of approach is connected to the principles of trials in the wider sense, especially insofar as it can be called a method of focusing on innovation in arguments on the pursuit of war crimes.

Even in comparative trial theory, at first, the overwhelming opinion was that the Nuremberg trials served as a model for the Tokyo trials, including their Charter, with a central focus on the unilateral influence or effect of the former on the latter; conversely, commentator (panelist) and some other historians highlighted the effect (for example, the application of the category of "forbearance") of the Tokyo trial on the Nuremberg (subsequent) trials, within a bi-directional reciprocal influence. Professor Cohen made an important point in today's talk about why there was such a difference in perception, based on an image of the trials that could almost be called "sisterly" rather than a comparison of the two (in connection with the potential for issue disclosure of "transitional justice," which came to be recognized from the late 1980s and the range and limits of the theory of the culture of memory as regards the extent to which war and political violence crimes engraved in memory contributed to war criminal trials; commentator considers this a significant turning point at which the connection to the situation in Chile after the deconstruction of the Allende regime cannot be ignored in the case of Germany).

I apologize for any rambling in my comments on today's discussion above. Kindly refer to my paper on the "Current status and future issues of the study of the Nuremberg trials," in *The report on Japan's war responsibility* (91), winter 2018.

Responses to Questions

As to this question, there was a high-quality transformation in public interest in Germany from a state of little recognition of interest in the Nuremberg trials, we might even say a dramatic change, in which an important factor was the structural change, German unification, as pointed out before by Professor Ishida, which made a significant difference. However, when the judgments on the crimes of the East Germans were carried out, after that unification, the West Germans first lost their balance in consideration of the major significance of the judgments in

Nuremberg, creating the awareness that with regard to Nazi crimes, far greater than those of East Germany, Germany itself had not carried out sufficient judgment, and that conversely the Nuremberg trials and their significance had been ignored and forgotten. In this regard, the same thing can be found with careful attention to the memoirs of President Weizsaecker, for example. There is a well-known line in the Speech at the Ceremony Commemorating the 40th Anniversary of the End of the War that says "anyone who closes their eyes to the past is blind to the present"; the speaker of these words to his people refers, in these memoirs written more than 10 years after the unification of Germany, to the source of reflection being the imbalance between the pursuit of Nazi criminals and that of East Germany. Weizsaecker's reflections were made some time after he had stepped down as the President. He was effectively the first to point out this issue; his words are likely to have been carefully considered.

By the way, regarding the aforementioned subsequent trials, in connection to personal responsibility, for example, the doctors' trial was conducted first among the 12 trials (as Trial No. 1), and involved serious issues concerning medical ethics such as human experimentation. The issues were also closely involved with the organizational structure under the Nazi regime in which chief military physicians and Schutzstaffel (SS) physicians controlled the German national medical association; the code of medical ethics derived from these trials is now a guideline of cautionary principles as the Nuremberg (Medical) Code for doctors around the world. Although this is not a part of the United Nations' confirmed Nuremberg Code as derived from the International Military Tribunal, it is taken seriously as noted above in the medical world. Significantly, in the subsequent trials, the doctors on trial included not only governmental officials but also officials of criminal organizations such as the governing Nazi Party and SS. It should also be emphasized that the subsequent trials clarified the connection between corporate crimes and the aggressive war policy of the Nazi regime. Regarding corporate crimes in this sense, if we go back in the modern history of Germany to the World War I, there were indigenous capitalists who were active in Roechling in the Saar Basin territory bordering Germany and France. The Roechling company carried out economic pillage against France during the World War I and was put on trial in France thereafter, but eventually the investigation came to an end. However, Roechling once again committed war crimes and was put on trial in World War II; they were found guilty not in the US Army's Subsequent Nuremberg Trials but in trials conducted in France under the Occupying Army at Baden-Baden. This became a model for the Subsequent Nuremberg Trials by the US military with regard to the Krupp, IG Farben of Auschwitz, and Flick companies. In fact, in the Flick trial (Trial No.5), the personal responsibility of the businessman was highlighted by the prosecutors. One of the major issues of the trial was the extent to which an accusation of personal responsibility could be made. Whether based on the principle of personal responsibility or on that of the lack of exemption from personal responsibility based on orders from above, this "Nuremberg Code" has been significantly positioned and highly lauded for the first time in the history of war crimes trials. However, in the Nuremberg trials, the question of personal responsibility with regard to the preparation, start, and execution of an aggressive war was basically applied to the leaders and then individuals engaged in key government services (people in important positions in government and military affairs), whereas with regard to the issue of its expansion to the top management of major munitions companies and economic leaders, in the case of the Flick trial, the defense was insistent that a businessman was an individual ("violation of international law by an individual is not a priori") and on the existence of a public/private separation; however, the court's judgment negatively interpreted the question of whether an individual, especially a private individual, can be directly bound by international law, differing from the prosecutors, which overall favored the defendants. As for the verdicts, in the end, for the subsequent trials as well, the personal responsibility of industrialists was called out by the prosecutors but went no further. However, a look at the particulars suggests that issue awareness in this form, if anything, became prolific. Therefore, as shown in the research of Professor Cohen, the issue of command responsibility itself, even before the Nuremberg trials, has a lineage that goes back historically to the military regulations of the German army and the acts of an individual, even as far back as the end of World War I, must conform to the various principles of international law, as confirmed in the first chapter of my work on the Nuremberg trials, "The Forgotten War Criminal Trials" (the Leipzig Trials constituting "independent" war criminal trials by a defeated Germany after the World War I). However, the history of the Leipzig Trials themselves, not to speak of anything related to Versailles within the Nuremberg trials, has been treated as irrelevant and forgotten. With attention to these issues as well, the history of war crimes research must be more than ever "historicized" in the sense of historical continuity.