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Theories of Individual Responsibility at the Tokyo Trial

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Preliminary matters

In this brief presentation, I will take up one of the important historical legacies that arise from the Nuremberg and Tokyo Trials: the application of the principle of individual responsibility to establish the accountability of state leaders for international offenses.

The principle of individual responsibility, in a word, means that there is no impunity for anyone who commits a crime irrespective of one's positions in the government or the military. This principle was articulated in the Charters of the Nuremberg and Tokyo Tribunals, and was passed onto post-cold-war tribunals, such as ICTY, ICTR, ECCC, and ICC. There was one notable exception with the application of this principle in the case of the Tokyo Trial, however; Emperor Hirohito was not included in the group of accused because of a highest-level political decision of the Allied Powers to withhold his name from criminal proceedings. This state of affairs created an impression that, notwithstanding the enunciation of the principle of individual responsibility, the Allied Powers' international justice operated in such a way as to treat a certain individual as falling outside the purview of that principle. This impression, in turn, resulted in sending contradictory messages about the Allied justice to the people of Japan and to the international community. It remains a matter of controversy as to whether or not the Allied Powers should have put Emperor Hirohito on trial. It also remains a major challenge for the international community today to determine how to deal with a head of state who is believed to be responsible for genocide, crimes against humanity, etc., but whose trial could bring about a host of complicated political problems.

The present presentation will not dwell on the issue of the non-prosecution of Emperor Hirohito but instead offer a summary of the prosecution and defense cases concerning those 25 individuals who were put on trial at Tokyo.

The prosecution and the defense cases at Tokyo

Let us first take a look at the theories of responsibility as advanced by the prosecution.

In the bill of indictment, two types of theories of responsibility are articulated. One is the doctrine of criminal conspiracy. As a theory of individual responsibility, this doctrine is a peculiar one in that it enables the conviction of an accused on grounds that there existed a common plan, agreed upon by two or more persons, to commit a crime, and that, on account of participation in the common plan, an accused can be held criminally liable even if he or she did not have any direct part in the commission of the crime. It was a contested issued at the time of the Nuremberg and Tokyo Trials as to whether or not the doctrine of criminal conspiracy could validly apply at international criminal tribunals. In the debates and studies on the Tokyo Trial since, criticisms have been frequently voiced about the use of conspiracy. Yet it is important to note that this theory applied to only 9 counts out of a total of 55 that were included in the indictment. If one is to focus solely on those parts in the court proceedings and the judgment that relate to conspiracy, one will not be able to get the whole picture of the Tokyo Trial.

The theories of responsibility that applied to the remaining 46 counts are those kinds that can be distinguished from the doctrine of criminal conspiracy, and that can be found in conventional criminal-law literature, namely, those theories by which an accused can be held liable for a crime on grounds of

"commission," or *sakui* in Japanese, i.e. the actual commission of a crime, and "omission," or *fusakui* in Japanese, i.e. the culpable failure to discharge one's duty in relation to the occurrence of a crime.

By illustration, let us take a look at the theories of individual responsibility that applied to two principal counts on conventional war crimes in the Tokyo indictment. By "conventional war crimes," I am referring to ill-treatment, forced labor, etc. of prisoners of war and civilian internees, and massacre, torture, rape, and other types of atrocities against civilians in occupied territory.

One of them (count 54) reads that the accused "ordered, authorized and permitted" the members of the Japanese armed forces, POW camps, military and civilian police forces to commit war crimes. From the wording of "ordered [and] authorized," it can be said that this count in principle seeks to hold the accused accountable for war crimes on the basis of "commission."
Another one (count 55), meanwhile, reads that the accused "being by virtue of their respective offices" responsible for securing the observance of the laws and customs of war, "deliberately and recklessly disregarded their legal duty," thereby failing to prevent war crimes by the members of the Japanese armed forces etc. The phrase, "deliberately and recklessly disregarded their legal duty," indicates that the prosecution sought to hold the accused accountable for the occurrence of war crimes based on "omission." Count 55, by the way, refers to the positions held by the accused as "their respective offices." This is indicative of the prosecution's attempt to seek accountability for war crimes of not only military commanders who belonged to the military chain of command, but also high-ranking government officials.

Let us now explore which, specifically, were the episodes of war crimes for which the accused were alleged to have been individually responsible.
One of the appendices to the bill of indictment contains "particulars of breaches," whose length falls a little short of four pages. It lists fifteen types of war crimes that allegedly were commonplace occurrence at combat zones and occupied territories, between 1931 and 1945. For instance, murder, beating, torture, and rape of civilian internees and prisoners of war are listed as falling under one broad category of "inhuman treatment." Deportation and enslavement are also named as recurrent types of war crimes.
It is worth noting that, the prosecution at the Nuremberg Trial, too, appended to their version of the indictment a list of particulars of breaches. What is included there, however, is not a list of types of offenses that were common-place occurrence, but rather, the description of specific episodes of crimes. The description also contains the numbers of victims and other statistical data. The indictment at the Tokyo Trial includes none of these kinds of information. How does one explain these differences?
The answer may be sought in the difficulties that the Allied Powers confronted during war crimes investigations prior to the trials.
In the European theater, after the launching of invasion operations at Normandy, the Allied Powers carried out further counteroffensives while, at the same time, confiscated the German records that documented criminal conduct of Nazi Germany. The situation was different in the Asia-Pacific theater. During the two-week hiatus between the acceptance of the Potsdam Declaration on 14 August 1945 and the signing of the Instrument of Surrender on 2 September the same year, the Japanese government and military authorities burned documents in their possession in large quantity and, alternatively, stashed them in secret locations. There were also instances that, prior to the arrival of the Allied investigators, individual military units at theaters of war hid physical evidence of crimes and concoct false stories about the circumstances of the crimes. These actions complicated the ensuing Allied war crimes investigations.
That said, there were documents that survived the destruction. Some government and military records concerning war crimes were, in fact, uncovered by researchers many years later. However, when preparing for the Tokyo Trial in the early months of the Allied occupation of Japan, the prosecution at Tokyo had insufficient time and human resources to investigate the extant documents. What is more, the prosecution understood its principal mandate as collecting evidence relating to "crimes against peace." Consequently, the evidence collection relating to war crimes was significantly delayed. Evidentiary materials on war crimes did begin arriving from various former theaters of war, that is, at around the time of the start of the Tokyo Trial.
Under those circumstances, the kinds of evidentiary materials that the prosecution managed to collect were mostly "crime-base evidence," which drew largely on the records of national war crimes trials that the Allied authorities concurrently operated elsewhere, or the so-called Class BC war crimes trials. "Crime-base evidence" is the kind of evidence that serves to document the occurrence of crimes, but stops short of linking specific accused to documented instances of crimes. The prosecution at the Tokyo Trial made use of crime-based evidence with the goal to substantiate the geographical distribution and recurrence of the types of war crimes listed in the indictment. Based on such

documentation, the prosecution sought to make it possible for the judges to make inferences of "order," "authorization," "permission," or, alternatively, the culpable failure to discharge one's duty. This was the prosecution's main strategy in its method of proof.

In addition to crime-base evidence, the prosecution also presented some "linkage evidence." "Linkage evidence" is the kind of evidence that helps establish the link between an accused and episodes of crimes, on ground of either "commission" or "omission."

For instance, General Tōjō Hideki, who had served as prime minister and concurrently army minister during the Pacific War, admitted that prisoner-of-war labor was put to use for the construction of the Burma-Siam Railway under his direction, and that he was aware of the poor treatment meted out to prisoners of war in the railway construction areas. These kinds of admission could serve as critical "linkage evidence," to establish the guilt of accused Tōjō.

Another representative type of "linkage evidence" as introduced by the prosecution is the record of diplomatic communications between the Allied and Japanese governments. It reveals that the Japanese government received protests and inquiry notices regarding mistreatment of Allied prisoners of war and civilian internees repeatedly. The names of successive foreign ministers of Japan, including accused Hirota Kōki, Tōgō Shigenori, and Shigemitsu Mamoru, are prominently shown in those documents, as they were the ones in charge of receiving and replying to protests and inquiries coming through the diplomatic channels.

In addition, both the prosecution and defense witnesses brought out that complaints from the Allied governments were circulated not only within the Ministry of Foreign Affairs, but also that they were transmitted to other government agencies, such as the Ministry of the Army, the Ministry of the Navy, the Ministry of Home Affairs, etc. Upon request from the Ministry of Foreign Affairs for cooperation, officials of the army and navy ministries disussed the incoming Allied complaints and queries, and had the military units concerned conduct investigations. These kinds of evidence carried great weight as "linkage evidence," as they could establish the guilt not only of those successive foreign ministers whose names appeared prominently in the diplomatic communications, but also other individuals who were not expressly named, but who held high-level positions in those ministries that received inquiry notices, and who exercised jurisdiction over prisoner-of-war administration. The accused that came within this category included the former navy minister Shimada Shigetarō; the former chief of the Naval Affairs Bureau of the Ministry of the Navy, Oka Takazumi; and former successive chiefs of the Military Affairs Bureau of the Ministry of the Army, Mutō Akira and Satō Kenryō.

Now, how did the defense respond to the prosecution's case as outlined above? To summarize the main points, the defense acknoweldged that the principle of individual responsibility did indeed apply to the charges of conventioanl war crimes, and they generally regarded, that criminal liability on grounds of "commission" and "omission" were valid. Furthermore, the defense rarely disputed the credibility of the crime-base evidence that the prosecution presented. As for linkage evidence, the defense admitted, for instance, that complaints from the Allied governments were indeed circulated among various government agencies.

However, the defense disputed the prosecution's allegations that the accused were individually accountable for specific instances of war crimes. Counter-arguments by the defense boil down to the following four points:

1) Even if war crimes by the members of the Japanese armed forces were commonplace occurrence as alleged, the accused had no knowledge of them.
2) The accused knew the occurrence of some instances of the crimes, but, under the Japanese domestic law, he was vested with no legal duty to take steps to address such problems.
3) The accused knew the occurrence of the crimes, and also had the duty under the Japanese law to take ameliorative steps, and he did in fact discharge his duty.
4) The accused knew the occurrence of war crimes, and had the duty to take steps to address the problem, but he lost the ability to discharge his legal duty because of the adverse circumstances of the war.

These counter-arguments were made by a number of defense witnesses as well as the accused themselves (with the exception of ten, who declined to testify). At any rate, one can see that the issues the defense disputed in the courtroom centered on the factual question of whether or not the accused had the knowledge of the crimes and any legal duty to take ameliorative steps, and the legal implications of factual findings on that question.

This completes a brisk overview of the treatment of the principle of individual responsibility by the prosecution and the defense at the Tokyo Trial. What are we now to make of the portrait of the Tokyo Trial that arises from this overview? What we find here is the Tokyo Trial as a judicial event and a criminal trial, where theories of responsibility were argued at length, and where a wealth of evidentiary materials was admitted on the issue of

individual accused's responsibility for war crimes. This is a portrait rarely acknowledged in the existing debates in Japan on the Tokyo Trial. Given the fact that there was such a dimension in the Tokyo Trial, it is incumbent upon us to take a fresh look at it as an important episode of international criminal justice, and to assess its legacy and present-day significance as we mark the 70th anniversary of the Tokyo Judgment.