

THE TOKYO TRIBUNAL: HAD A GO AT, BUT CHOSE TO NOT UTTER A WORD OF PUNISHMENT

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Summary

Guided by the idea of elaborating a comprehensive concept of punishment in international criminal law, present theoretical explication is devoted to the most extensive reflections stemming from the contemplation of the landmark, following the Nuremberg Tribunal's activities, that represented a historical milestone for the international criminal justice, – the timeframe of the functioning of the Tokyo Tribunal. The main emphasis is focused on the goal of constructing a common context for the perception of punishment within the framework of the Tokyo Trial. It is established that the relevant challenge cannot be rationally addressed in a manner that is detached from the general sense of the Tokyo Tribunal as such. Derived from the general impression, the image of punishment by the Tribunal is found to be vulnerable to several principal challenges: 1) lack of independence in appreciation, typically in the benchmarking; 2) belittling of accomplishments; 3) the persistence of political scheming; 4) the cultivation of a paradigm of all-embracing criticism, leading to a forgetfulness, among others. Inappropriateness of interpretation of the operations of the Tribunal and the sentences it has imposed solely from the standpoint of total contempt, which ultimately undermines the foundations of international criminal justice was pointed out, and the necessity of further scholarly efforts to consider the severity and swiftness as cornerstones of the modern concept of punishment in international criminal law was outlined.

Key words: punishment, Tokyo Tribunal, Tokyo Trial, Tokyo War Crimes Trials, International Military Tribunal for the Far East, fight against impunity, international criminal justice, international criminal law.

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1. Introduction, or a brief prelude to the etiology of the *problematique*

Against the backdrop of the dramatic increase in interest in international criminal law and international criminal justice in the last decade (*Boister & Cryer, 2008b: xxxiii*) there has been an intensification of attempts to “return to the past for the sake of the present”. Sometimes for remembering (*Takatori, 2008: 78*), often for reopening (*Watanabe & Field, 2021*), revisiting (*Simpson, 2009; Tanaka, McCormack, & Simpson, 2010*), re-examining (*Walkinshaw, 1949: 299; Boister, 2014: 4*), rereading (*Dittrich, von Lingen, Osten, & Makraiová, 2020: i*) and reappraisal (*Boister & Cryer, 2008a*), but more frequently to fill the gaps (*Kaufman, 2013: 755*) by exploring (*Boister, 2014: 4*) what has not attracted a great deal of scholarly attention (*Sellars, 2010: 1092*) and yet least studied (*Kaufman, 2013: 795*), that has been virtually ignored (*Brackman, 1987: 22*) and remains largely forgotten (*Boister & Cryer, 2008b: xxxiii*). Usually in search of contemporary resonances (*Pritchard, 1995: 25*) and relevance (*Dittrich, von Lingen, Osten, & Makraiová, 2020: i*), although always for the own

unique reasons. Among all others, in this particular occasion, it is necessary to frame a general context for the comprehension of the phenomenon of punishment within the “Tokyo formation” as one of the earliest efforts towards meeting the requirement for “... a holistic account of punishment ...” (Stahn, 2019: 382) in international criminal law.

2. Nuremberg and Tokyo: an “illustrative comparison” or a “humiliating collusion”?

The very first, preliminary and superficial glance at the earliest attempts to comprehend the issues surrounding the Tokyo Trial (Liu, 1948: 168) reveals the origins of a rather caustic sense of disregard for literally everything that this International Military Tribunal seemed to dwell on (Comyns Carr, 1948: 150) or, at the very least, should have stood for (*International Military Tribunal for the Far East*, 1949: 184). Initially, and over time, this was most often expressed not just simply straightforward and openly (Minear, 1971: 3, 19), but even more declaratively, if not manifestly instead (Sellars, 2010: 1093; Guillemin, 2017). Indeed, though nowadays such considerations are voiced much more “diplomatically” (Boister, 2014: 4, 6) and not as directly as it used to be, so to speak, “between the lines”, and much less demonstratively (Daqun & Binxin, 2016: 50, 55), however still disparagingly enough (Boister & Cryer, 2008a: 1). Yet why would that happen? And how did it all end up in such a situation?

Apparently, the “breaking point” was the Tokyo Tribunal’s overall original positioning, which, in many ways, was most likely not entirely appropriate. It all began with what looked like a fairly harmless perception of it as a component of a unified and single process of punishment of major war criminals (Walkinshaw, 1949: 299) following the outcome of the World War II (Kaufman, 2013: 756) or, more specifically, as a certain logical continuation of the Nuremberg Tribunal (Totani, 2010: 147). Sometimes even to such an extent that it actually starts to be deemed as “Tokyoberg” (Simpson, 2020: 17). And pretty soon, this led to Tokyo finding itself, as it is commonly said, in the shadow of its “primordial predecessor” (Martinez, 2012: 43), willingly or involuntarily “doomed” to exist in a paired (and probably inseparable) tandem, in other words, within a paradigm of permanent correlation and contrast, which is inevitably accompanied by the abundance of constant references and appeals to the “Pioneer” (Beigbeder, 2011: 20).

Perhaps the winged phrase “verity is cognized in comparison” was taken far too verbatim, since absolutely all discourse concerning Tokyo, in fact, was (and is still at large) concentrating on the question, was it the same in Nuremberg (Sinuna, 1999: 59-60)? Of course, under the guise of good intentions to obtain comparativistic and prognostic insights, in the pursuit of seeking similarities and differences (Kaufman, 2013: 756), as well as in the endeavour to identify distinctive characteristics (Kaufman, 2010: 764), an alarming trend soon becomes increasingly evident. At the same time, the further it goes, though, the more, considering Nuremberg and Tokyo as one cohesive event (Simpson, 2020: 17), along with the likeness in their “designs, staffs and operations” (Kaufman, 2010: 755), Tokyo begins to be treated as a “sister institution” or a “twin tribunal” (Dittrich & Makraiová, 2020: 3), and before long, as an “Asian twin of Nuremberg” (Klaus, 2025: 322).

Nevertheless, the point is obviously not the label itself, but what lies beneath it. It is all about the attitude that is often projected in its connection. And clear vindication of this is its rapid transformation as distinctions in the “lengths, verdicts, and sentences” (Kaufman, 2010: 764) between the Tribunals were established. The astonishing is how radically, in an instant, the “primal warmth of family ties” has been swapped for a “sharp line of negative criticism”, presenting Tokyo merely as a “replica” of Nuremberg (Totani, 2010: 147), momentarily turning it

into the “other Nuremberg” (*Brackman, 1987: 27*), – “it’s less well-known sibling at Tokyo” (*Sellars, 2010: 1092*), distancing the not so long ago twins “far apart” (*Safferling, 2020: 427*) from each other.

As a result, this train of thought has rapidly elevated all critique to a kind of mantra that presents Nuremberg as a “noble exercise” and the “product of good lawyering”, whereas Tokyo as a “racist exercise” or the “product of revenge” (*Maga, 2001: ix-x*), which is more reminiscent of grotesque “shaming experience” (*Safferling, 2020: 431*) that only confirms the assumption that the “Nuremberg-Tokyo tale” has always been more of a study in “ugly contrast” than it was “decent comparison” (*Maga, 2001: x*).

3. International Military Tribunal for the Far East: between a “lesson learned” and “was there ever a lesson?”

It would be quite reckless to assume that such a fiercely controversial environment has a favourable effect on exploring Tokyo as a truly isolated, autonomous and self-sufficient phenomenon (*Totani, 2008: 214*). And even if all the negative aspects are put aside, it is not only about that. An approach is also involved. The method that is being used. It is the same here as it was in Nuremberg (*Hirsch, 1946: 312*). The blame for this, presumably, lies with the admonition that “... the world must profit in every way from the lessons of the Nuremberg trial ...” (*Brackman, 1987: 223*). Therefore, at this moment, and in a very reduced form, understanding the “Tokyo theme” boils down to “learning a lesson” (*Futamura, 2007: 12*), also known as “lessons learned exercise” (*Daqun & Binxin, 2016: xvii*). But then again here, nothing is that simple. Before clarifying whether the lesson has been learned, it is probably necessary to question what it consists of. However, this is not the starting spot either. Some go even further, wondering whether there was a lesson at all (*Cryer, 2018: 80*).

Reflecting on the matter, attitudes vary dramatically (*Takatori, 2008: 78*), ranging from strongly negative to somewhat positive (*Cryer, 2018: 102*) beliefs. For example, it has been argued that several lessons may be extracted from the major decision-making process, which was carried out “... primarily through the prism of a combination of political and pragmatic factors ...” (*Kaufman, 2013: 795*). Meanwhile, an alternative opinion suggests that “... some lessons can be learned from ...” three major limitations of the Tribunal, namely the impact of politics, non-accountability of states, and also personnel and financial constraints (*Daqun & Binxin, 2016: 55-56*). And what is more, there does seem to be a growing response and endorsement of the idea that the “... main lesson though must be related to the victor’s justice critique ...” (*Boister & Cryer, 2008a: 326*). However, is that truly it?

At this juncture, one might reasonably ask whether there is really nothing in the entire Tokyo’s “law story” (*Sellars, 2010: 1092; Boister & Cryer, 2008a: 328*) except a profound concern over all of its “imperfections”. Is there absolutely nothing else to be on the agenda besides genuine anxieties about “... numerous obstacles, shortcomings and criticisms ...” (*Dittrich & Makraiová, 2020: 1*)? Why has the spotlight suddenly shifted to the issues of selectivity and legitimacy (*Daqun & Binxin, 2016: 45*), legality (*Cryer, 2018: 97*) and procedure (*Green, 1989: 190*), and at what particular moment have all of that taken precedence over the “cause of justice” (*Totani, 2008: 208*) and a “... compromise between the Continental and the Anglo-American system ...” (*Walkinshaw, 1949: 300*)?

Such questions undoubtedly prompt the thought that an insightful lesson has been taught, but many, it seems, have failed to digest the science properly. And this is not about a dry statement of existing problems, but rather the core mission entrusted to the Tribunal, which many

have gradually relegated to the very background. This refers to the umbrella philosophy that “evil” must never go unpunished (*Maga, 2001: xiv*), that is, supposed to be the punishment of war criminals (*Boister & Cryer, 2008b: xxxvi, 79*).

4. “Punishment of war criminals” and “restoration of peace”: double standards of *realpolitik*

In the ardent pursuit of extracting universal wisdom and invaluable experience from the myriad of edifying lessons and exercises, in lieu of focusing solely on the issue of punishment of war criminals, the titanic efforts of scholarly minds are concentrated on the most thorough deliberation of how fair the Trial was (*Liu, 1948: 168; Yasuaki, 1986: 45*), and how well it complied with the highest of the highest standards of the rule of law (*Totani, 2008: 194; Walkinshaw, 1949: 363*). The deeper the dive progressed, the closer it came to suggesting that “... injustice had been done ...” (*Totani, 2008: 214*). The idea is being smoothly shaped that the Trial was unfair (*Boister & Cryer, 2008a: 325*) and the prosecutions were biased, politically motivated and manipulated (*Daqun & Binxin, 2016: 51, 52*). Such kind of a vision not only forms the basis of the argument that justifies the application of the censorious “show trial” label (*Boister, 2014: 3*), but also portrays the Trial as a farce (*Boister & Cryer, 2008a: 325*) that publicly expresses not justice, but brute force (*Boister, 2014: 6*), clearly signalling that it was “... an exercise in *realpolitik* [emphasis added] rather than accountability ...” (*Boister & Cryer, 2008a: 322*).

Thus, if the Tribunal itself was presented as the consequence of an “... arbitrary exercise of power on the part of the victorious nations ...” (*Cho, 1967: 313-314*), how then should the punishment be regarded? In this light, certainly exclusively as something that constitutes the satisfaction of a thirst for revenge (*Boister & Cryer, 2008b: 816*) over defeated Japan (*Green, 1989: 193*) and is conceived as collective responsibility on behalf of the nation as a whole (*Futamura, 2011: 3*). But unlike Nuremberg, it tends to be “more draconian” (*Boister & Cryer, 2008a: 260*) and the one that had no direct impact on post-war Japanese society (*Futamura, 2011: 1*). Moreover, it appears to lack sufficient power to persuade the vanquished (*Takatori, 2008: 92*) and, to that effect, is completely unsuitable for achieving the goal of the reconstruction of peace and trust among the war-torn nations (*Takatori, 2008: 92*).

What is considered more practical, in turn, is “exceptional pragmatism”, which revolves around setting the right priorities, – an ideology where peace is being put above everything else (*Matwijkiw, 2009: 24, 2, 1*). By treating it as an “... art of political compromise ...”, *de facto* literally sacrificing justice for its sake (*Cherif Bassiouni, 2000: 214, 218*), the support for the “... forgiveness and reconciliation ...”, instead of the use of criminal sanctions is being promoted (*Minow, 2019: 2*).

It is intriguing to observe how deliberate impunity (*Matwijkiw, 2009: 25*) is tolerated when it concerns the pursuit of the so-called “peace” (*Cherif Bassiouni, 2000: 229*), yet is aggressively contested when it comes to punishment of war criminals (*Hayashi, 2020: 103*), even if for the same reasons (which, in our humble opinion, is highly doubtful, by the way). Is this not a double standard? Does not that seem cynical (*Futamura, 2011: 13*), or at least hypocritical?

5. The Tokyo War Crimes Trial: from “neglect” to “oblivion”

This is rather ironic, as the entire situation appears to be no less extraordinary, given the whole plethora of fairly timid assumptions regarding what is widely noted as the highly ambiguous legacy of the Tokyo Tribunal (*Sellars, 2010: 1098; Ushimura, 2003*). Not surprisingly, though. How else could it be, when any attempt to “go beyond the established boundaries of understanding” ends in tentative guesses about the possibility of underestimating the Tribunal’s legacy if a trial is perceived as being unfair (*Boister & Cryer, 2008a: 326*)? What can be expected from doubts that at least some benefit can be derived from it (*Cryer, 2018: 80*)? From the uncertainty as to whether it can function as the “... building blocks of international criminal law ...” (*Boister, 2014: 4*)? What “... contribution to the field of international law ...” is there to speak of (*Cohen & Totani, 2018: 22*) if Tokyo’s reputation is being exposed as “... arguably tainted ...” (*Boister, 2014: 4*)? And finally, what impression should the Japanese people have of the “... possibilities and promises of international criminal justice ...” (*Cohen & Totani, 2018: 22*) if it is declared that “... war crimes prosecution was an issue of little importance ...” (*Futamura, 2011: 3*)? How will the punishment be perceived after this?

Even so, that is not all. It should be noted that behind the ostentatious tinsel of total denial and harsh statements about virtually every flaw in the Tribunal’s operation, there is an increasingly visible meticulous conveyance of a signal that effectively reinforces the narrative of the expediency of forgetting everything that happened there “... at the earliest possible moment ...” (*Schwarzenberger, 1950: 289-290*). Over the years, it is most probably that the relevant statement was understood quite literally, since the further it goes, the more one becomes ascertained how accurate and valid the idea is that, “... in truth, the IMTFE has simply been swallowed up by the biggest black hole in the history of the twentieth century ...” (*Brackman, 1987: 22*). Regrettably, that in the rush to forget, what must always be remembered (*Takatori, 2008: 92*) is also hastily erased from the memory.

6. Conclusions. The aftermath

There is no way to convey in words how curious the trajectory of reflections on the Tokyo Trial and the Tokyo Tribunal is (*Cohen & Totani, 2018: 21*). It is surprising how rapidly the path was trodden from the embrace of the holding of the trial in Tokyo as a remarkable international undertaking at the time (*Dittrich & Makraiová, 2020: 1*); an act of international justice, which was to be sent a very strong and powerful message to the international community (*Daqun, 2020: 91*) by punishing war criminals (*Boister & Cryer, 2008b: 816*); a trial that was a monument to fairness (*Boister & Cryer, 2008a: 74*), an “achievement in its own right” (*Totani, 2008: 214*), that contributed to international understanding and goodwill (*Comyns Carr, 1948: 151*); a trial which will be the verdict of history and a very real step toward bringing the world under a reign of law (*Walkinshaw, 1949: 363*); a Tribunal, which brought about not only a grand scale Indictment (*Pritchard, 1995: 28*), but also delivered a massive and most impressive Judgment (*Comyns Carr, 1948: 141*), desiring severe and swift punishment for the guilty (*Ju-ao, 2018: 2*) to a “... precedent that legal history can only consider with a view not to repeat it ...” (as cited in *Boister & Cryer, 2008a: 302*).

It is striking how precipitous the idea of making the accused accountable for their (*Ju-ao, 2018: 4*) horrible crimes (*Maga, 2001: 138*) and the inalienable obligation to punish the war criminals and suppress militarists (*Ju-ao, 2018: 120*) began to fold (*Ju-ao, 2018: 4*), ignored and was too quickly forgotten (*Maga, 2001: 138*).

In the current situation, it is hardly possible to limit oneself to a mere caveat of the "... planted seeds of distrust in the impression of the international criminal justice system ..." (Daqun & Binxin, 2016: 50). This is much more than that. It is about an encroachment on the philosophy of perceiving punishment of such crimes as imperative (Ju-ao, 2018: 20).

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