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## THE TOKYO TRIAL: Between Law and Politics

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The two previous speakers dealt with the Tokyo trial from a rather traditional point of view; this holds especially for Professor Ipsen, whose paper dealt in great detail with the technical legal problems presented by the trial. Therefore, I would like to limit my discussion of the legal technicalities of the trial and focus on the historical significance of the fact that the Allied powers adopted the method of an international military tribunal in passing judgment on Japan. Specifically, I want to address the issue of the relationship between law and history from a broad perspective, and to do this in terms of our present grasp of the meaning of the trial. Let me begin by enumerating what I view as major problems of the trial.

### **Victors' Justice**

First, the Tokyo trial was unfair. As at the Nuremberg trial, the Tokyo tribunal judged only the Axis power involved. Japan was not even allowed to raise as issues the actions of the Allied powers, which include the atomic bombing of Hiroshima and Nagasaki by the United States and the violation of the neutrality Pact of 13 April 1941 by the Soviet Union.<sup>1</sup> However, the fundamental condition that makes a law a law is its universal applicability. The attitude represented in the statement, "If you steal you are a thief, but I may steal with impunity,"<sup>2</sup> cannot hold for law. This aspect of unfairness—the fact that the tribunal had the character of a political trial—is one of the major factors leading to cynicism about the Tokyo trial. For many people, the Tokyo trial proved the maxim that "might makes right."

The political character of the trial is manifest in the treatment of the emperor, who under the Meiji Constitution bore ultimate responsibility for the war. The

tribunal not only failed to call the emperor to account for Japan's war of aggression, but did not even summon him as a witness. Most people who attack the trial for its political nature remain strangely silent on this point. But this is one issue that should be clearly raised.

It is also important to point out that the postwar conduct of the countries that judged the Axis powers in the trials at Nuremberg and Tokyo has seriously detracted from the significance of the Tokyo trial. Consider, for example, America's war in Vietnam, the Soviet Union's suppression of the Hungarian revolt, the Soviet invasion of Afghanistan, and the British-French expedition in the Suez Canal incident. From the standpoint of the legal principles of Tokyo and Nuremberg, it is quite obvious that the leaders of these countries should have been called to account for the illegal use of armed force. As you all know, however, this never happened.<sup>3</sup>

### **The Allied Powers' Arrogation of "Civilization"**

The structure of the postwar world is supported by the two superpowers, and I believe that the essential character of both the United States and the Soviet Union is self-righteousness. While preaching to others that wars of aggression are crimes, both nations have developed arsenals of nuclear weapons capable of destroying all of mankind several times over. Moreover, they persist in sending enormous numbers of troops to distant foreign countries. And on every occasion, they justify these actions in the name of the "Communist threat" or the "criminality of American imperialism." This is nothing but self-righteousness, and there is no doubt that this dogmatism on both sides has served to increase cynicism toward the Tokyo and Nuremberg trials.

There is also the issue of the extent to which the Tokyo trial was an expression of a norm consciousness shared universally by international society. As I will explain later, I believe that ultimately both the Tokyo trial and the Nuremberg trial did include something that embodied the norm consciousness of ordinary people. However, in terms of the process by which law is established, the charter of the International Tribunal for the Far East was promulgated under the sole authority of the supreme commander for the Allied powers, and no neutral countries were included in drafting it.

Moreover, the Tokyo trial took place during the final phase of traditional international law as it existed under a worldwide system of colonialism. As you know, Professor Röling, who is present at this meeting, was one of the judges at the Tokyo trial. Dr. Röling is among the international legal scholars I hold in greatest esteem, and I certainly do not want to be misunderstood on this point; but it is one of the significant facts of the Tokyo trial that a representative of the Netherlands, not an Indonesian, was appointed as a judge. Similarly, judges from England and France assumed seats on the bench instead of Malaysians or Vietnamese. And, "of course," there was no judge from Korea. Despite the fact that Asian peoples suffered the greatest damage in Japan's Greater East Asia War, only three of the eleven judges at the trial represented Asian countries.

Given the international law of the time, this situation was a matter of course. For Malaysia, Vietnam, and Korea were colonies. Still, it cannot be denied that

this "matter of course" poses a serious problem for those who would assert the universal nature of the Tokyo trial. Both at Nuremberg and at Tokyo, the Allied powers insisted that judgment was being rendered by "civilization." Certainly, many of the acts on which these tribunals passed judgment deserved censure, whether by the standards of Western or Eastern civilization. But the question still remains: Were the Allied powers in a position to arrogate to themselves the title of "civilization at large"?

### The Concepts of the Illegality of War and Leaders' Responsibility

Finally, as Professor Ipsen has pointed out, the "crimes against peace" and "crimes against humanity" applied at Tokyo and Nuremberg were unknown in international law at the time of the outbreak of World War II. Therefore, to treat them as crimes was a violation of the principle of *nullum crimen sine lege, nulla poena sine lege* [unless there is a law, there can be no crime; unless there is a law, there can be no punishment].

The majority opinion of the tribunal, as well as those who defend the trials, attempt to refute this criticism by insisting that crimes against peace, and related crimes, were already recognized in international law at the time of the outbreak of the war. However, this assertion is difficult to support. As I have demonstrated in my book *Sensō Sekinin-ron Josetsu* [Prolegomenon to a Theory of War Guilt], the logical structure of the concept of crimes against peace is a synthesis of the concepts of the "illegality of war" and "leaders' responsibility."<sup>4</sup> The illegality of war is based on the idea that war can be deemed illegal in principle under international law. Leaders' responsibility is the concept that the leaders of a state can be held accountable for acts of state that are negatively judged under international law. It is true that one of these, the illegality of war, had been established in international law by the time of the outbreak of the war.<sup>5</sup> However, this is not true in the case of leaders' responsibility.<sup>6</sup> Therefore, crimes against peace, which is a synthesis of these two, must be considered a new category of crime that came into existence only at the end of World War II. The same can be said of the concept of a "common plan or conspiracy to wage war."

The concept of crimes against humanity is somewhat different.<sup>7</sup> However, it was not known in international law at the time of the outbreak of the war, and in that regard it has the same problematic character as crimes against peace.

Of course, in origin, *nullum crimen* was a principle of human rights, intended to protect ordinary citizens from the enormous power of the state. For that reason, it is doubtful whether the leaders of a state, who are themselves in the seats of power in the state, can assert this principle in an international tribunal. However, if it is granted that *nullum crimen* is applicable to international law, it is then undeniable that the invocation of crimes against humanity at Nuremberg and Tokyo violated that principle.<sup>8</sup>

As I have suggested above, to the extent that we take as our criteria of judgment (1) the actions of the countries that sat in judgment on Japan, and (2) international law as it existed at the time of the trial, it is difficult to acknowledge any constructive value in the Tokyo trial.

However, is it axiomatic that the standards of countries whose own hands

are bloody and the state of international law at the time of the outbreak of World War II are the proper criteria for evaluating the Tokyo trial? It is precisely this question—the issue of our posture in evaluating the trial—that I want to address today.

### **The Problematic Nature of Blind Faith in Existing Law**

First, in regard to international law as a criterion of evaluation, it should be pointed out that international law is not immutable, not the same in all ages. In some cases, acts that are considered illegal in one age become legal in the next, and vice versa.<sup>9</sup> Moreover, international law does not govern all spheres of activity. In each age, there are acts totally unanticipated in the international law of that period. More important, the fact that an act is *legal* under the international law of a given period does not necessarily mean that it is *right*. Colonial rule, for example, was considered legal under traditional international law. Hence, until quite recently it was illegal under international law to provide support to people's liberation groups struggling for independence from colonial rulers. Such support was deemed unlawful interference in the internal affairs of the colonial ruler.

As this suggests, whether something is legal under the international law of a given period provides us with no absolute criterion upon which to make value judgments. Despite this fact, the great majority of those studying the legal aspects of Nuremberg and Tokyo have focused on the narrow issue of whether the trials were legal under international law as it existed at the time. I view this as a kind of closed mode of thinking—I should like to call it “faith in existing law”—in which the question of whether the trials were consistent with existing international law is seen not simply as one criterion among many, but as the sole criterion determining our evaluation of the trial as a whole.<sup>10</sup>

Thus, the fact that the great majority of legal evaluations take this approach—that is, whether the trials were in accord with existing international law—has exerted no small adverse influence on our grasp of the historical significance of the Nuremberg and Tokyo trials. Those who defend the trials have long been fighting an uphill battle, their arguments having little power to persuade ordinary people. On the other hand, critics of the trials are unable to reverse their judgments. The result is that the cynical view, “Might makes right,” becomes dominant.

### **Law and the Common Sense of Justice**

As I stated at the beginning of my paper, I believe that we should acknowledge frankly that the legal basis for the Tokyo and Nuremberg trials cannot be found in international law as it existed at the time. However, seen from a broader perspective, that admission is not necessarily damaging to the assessment that the trials were legal and legitimate. The problem of crimes against peace is a good example. I pointed out earlier that one of its two constituent elements, the concept of the illegality of war, had received general recognition in international society and had already been established in international law by the time of the outbreak of World War II. It is true that its second element, the concept

of leaders' responsibility, had not yet been recognized in international law. As a result, even though the decision to launch an illegal war was made by the leaders of a country, the responsibility for the war, under existing international law, was considered to reside in the country as a whole. In concrete terms, this responsibility took the form of war reparations, which were paid from the taxes collected from individual citizens.<sup>11</sup> The country's leaders bore no responsibility, even though it was their decisions that had led to the illegal acts.

In regard to crimes against humanity, traditional international law simply did not foresee that the leaders of a state might use the state apparatus in the systematic slaughter of an enormous number of the country's own citizens—but this is precisely what the Nazis did. These acts were in fact committed. Traditional international law was deficient in this respect and that deficiency had to be corrected.

I do not know how many of you here have studied the atrocities committed at Oświęcim (Auschwitz), in Nanjing [Nanking], and elsewhere during World War II. But what ordinary people first feel on learning of such atrocities is that they must not be tolerated. This reflects an extremely simple sense of justice. But it is precisely this simple sense of justice of ordinary people that is the ultimate *raison d'être* of law. In that sense, regardless of the undeniable formal flaws in the way this law was established, crimes against peace and crimes against humanity were a legal response to actions of the Axis powers that were in fact intrinsically intolerable, a reaction based on the universal sense of justice held by ordinary people.

### **Leaders' Responsibility and the Duty of Disobedience to Illegal State Orders**

In this way, the Tokyo and Nuremberg trials were meaningful in that they rectified deficiencies and defects in existing international law. For that very reason, they contain concepts that can play an important role in ordering international relations today. Among these ideas, the legal concepts most worthy of our attention are the concept of leaders' responsibility, discussed above, and the concept of "the duty of disobedience to illegal orders."

Traditional international law, established during the late nineteenth century and the early twentieth, took as its central principle the concept of the unity of the state as a single entity. Today, however, in the latter half of the twentieth century, this concept has been severely shaken by the rapid expansion of various human activities, economic relations, and information services that transcend national borders.<sup>12</sup> In the context of these trends, the concept of leaders' responsibility has an eminently modern significance. It dissolves the state logically into its constituent elements—national leaders and ordinary citizens—and holds the national leaders accountable for illegal acts of the state.

For example, South Africa's policy of apartheid is considered illegal under international law. According to traditional international law, the enforcement of apartheid would be considered an illegal act of the *state*, and legal sanctions would be applied against the *state*. However, were economic sanctions to be applied against the *state* of South Africa, the effect would be to impose hardship on the general population of the country, the majority of whom are black.

In short, the traditional conception of international law would have the ironic effect of creating hardship for the very people who are the objects of apartheid in the first place. If, on the other hand, the concept of leaders' responsibility is used as a basis for censure of and sanctions against the *government* of South Africa, international condemnation of apartheid can take place without the negative consequences suggested above.

On the other hand, the citizens of a country engaging in illegal acts should not cooperate in those acts. In today's world, all countries, even the most dictatorial, subscribe in principle to democratic forms of government. Thus, on a formal level the leaders of a country derive their authority from the will of the people. Therefore, it is necessary that the people not cooperate in illegal acts in order to establish grounds for arraigning government leaders—and not the people—for such acts. One cannot escape responsibility for cooperating in wars of aggression or in genocide by arguing that one was acting under orders. This means a repudiation of the idea that, as one member of the state, the individual is completely subsumed in the state. Accordingly, leaders' responsibility and the duty to disobey illegal orders, essentially two aspects of the same entity, deserve our attention as a concept capable of deconstructing the unity and absolute nature of the state.

### The Need to Confront Reality

The Tokyo and Nuremberg tribunals, by virtue of the fact that they took the form of trials, laid bare various shameful and horrible acts committed by the Axis powers. Of course, historical scholarship today has gone far beyond the two tribunals in uncovering such facts. However, what is important is that the trials in Nuremberg and Tokyo laid bare the facts of terrible atrocities and murder (at Auschwitz, for example) immediately after the end of the war. The significance of the trials in demonstrating the tragedy and the horror of war to our generation and future generations *with concrete factual evidence*—what in a broad sense we may call their educational function—cannot be emphasized too strongly.

It is highly doubtful that the collection and publication of factual data that took place during the Nuremberg and Tokyo trials could have occurred if the Allied powers had adopted a policy of summary execution (i.e., lining up suspected war criminals and shooting them), as was advocated in some quarters at the end of the war, or if Japan had conducted trials on its own. As a Japanese, I would like nothing better than to avert my eyes from the acts the Japanese army committed on the Chinese mainland; but facts are facts. In the end, there is no alternative for us but to proceed on the basis of these facts.

This is related to a point I raised above: the problematic nature of taking the actions of the former Allied powers, who themselves have blood on their hands, as our criteria of judgment. Even those who criticize Nuremberg and Tokyo would probably not go so far as to say that Germany and Japan did nothing wrong, nor could they. The number of people killed in the Nanjing [Nanking] Incident may be smaller than the number stated by the Tokyo tribunal. But even if the number was smaller, the fact that Japanese troops slaughtered innocent Chinese citizens in Nanjing will not go away. The Soviet Union massacred Polish

citizens in the Katyn Forest, and the United States dropped atomic bombs on Hiroshima and Nagasaki. But the fact that Nazi Germany systematically murdered six million Jews still remains.

### **Japan's Peace Constitution: Something to be Proud of**

When it comes to pointing out the unfairness of the Tokyo trial, I share the perception of those who criticize the trial. The problem, however, lies in the value judgments to which this perception leads. To say "you too have done wrong, so I should be forgiven my sins" reveals, I submit, only a bleak poverty of spirit. If the actions of various countries, and especially those of the two superpowers, betray Nuremberg and Tokyo, we should use the trials as weapons in challenging these actions. Such challenges have in fact taken place, in the Stockholm trial of US conduct in Vietnam, and in the International Peoples' Tribunal on Israel's invasion of Lebanon. And these trials were conducted by ordinary citizens without power or government authority. I believe that it is precisely these responses that realize the historical significance of the Tokyo trial—and precisely these responses that are of greatest importance for Japan.

Japan launched wars of aggression, and judgment was passed on it at the Tokyo tribunal. However, when viewed in the spirit of the Tokyo trial, postwar Japan has, by means of its peace constitution, conducted itself in a manner far superior to the former Allied powers. This is a fact in which we Japanese can take pride among peoples of the world.<sup>13</sup>

Flawed as it may be, the law established by the Tokyo trial is law, and therefore the countries that sat in judgment on Japan should be judged by the same law. In fact, Japan—with its past history of war and its present accomplishments as a peaceful nation—has the right to accuse the superpowers of actions that endanger world peace. I believe that this is the way to assume responsibility for past wars of aggression. In short, it is our historical duty.

Despite repeated demands from the United States to rearm itself, Japan has kept its military expenditures at a low level in international terms. Moreover, despite its highly sophisticated industrial base, Japan has achieved its present economic prosperity and social stability almost entirely without exporting weapons. These facts should lend great persuasive force to our efforts to criticize the international conduct of the United States and the Soviet Union.

### **Issues the Tribunal Did Not Address**

In conclusion, I would like to touch briefly on matters that were not directly addressed at the Tokyo trial, and again these concern Japan's historical responsibility. As I stated earlier, the Tokyo tribunal was a trial in which the Allied powers, themselves not without guilt, judged the leaders of Japan, who, all things considered, should certainly have been held accountable. Thus, the trial did not address the issue of the responsibility of the Japanese people. Moreover, Japan's right to exist as a colonial power was negated by World War II, but this issue was also not taken up at the trial. This is closely related to the fact that there was no Korean representative on the tribunal, as I mentioned earlier.

However, in at least one respect the Fifteen-Year War that began with the

Manchurian Incident was historically inevitable. That is, in a sense, it was an inevitable outcome of the path that Japan had taken since the formation of the Meiji regime. World War II was a final reckoning for Japan's "original sin" of the modern era—"leaving Asia, joining Europe" [*datsu'a nyūō*]. In this sense, the Fifteen-Year War was by no means carried out only by the defendants at the Tokyo trial; it was something for which the Japanese people as a whole were accountable, in which all Japanese were involved.

As a result of World War II, Japan's leaders were brought to judgment at the Tokyo trial. And at the same time, our status as the colonial ruler of Korea and Taiwan, which was a result of Japan's post-1868 policy toward Asia, was negated. We had to pay reparations to Korea and the countries of Southeast Asia. These historical facts were not addressed directly at the Tokyo trial, but I think they should occupy an important place in our consideration of the International Military Tribunal for the Far East. Thank you very much. [Applause.]

CHAIR: Thank you very much. Professor Ōnuma follows Professor Ipsen in pointing out that there are various problematic aspects of the Tokyo trial. Having recognized these problems, he goes on to discuss the stance we should adopt in evaluating the trial. He suggests that international law has changed in the past and will continue to change throughout history. If we consider the trial in this light, it is possible that the fact-finding carried out by the tribunal and the principles applied in judging these facts can have a positive function in limiting future wars. Legal scholars speak of *lex ferenda* and I think Professor Ōnuma has addressed the trial from this perspective—that is, the possibility of creating new law.

I would now like to ask our two discussants, Professor Paik and Professor Okuhara, for comments on the papers. Professor Paik, you have the floor.