

“Japanese Receptions of Separate Opinions at the Tokyo Trial”

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*This paper has been written in preparation for Cohen & Totani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (forthcoming). This paper does not constitute a chapter in the forthcoming book, but some of its findings will be incorporated.

On the early afternoon of November 12, 1948, Justice Sir William F. Webb, member for Australia and president of the International Military Tribunal for the Far East at Tokyo, Japan, finished reading the judgment and verdicts. Before announcing the sentences to individual accused, he let it be known to all present in the courtroom that the judgment and verdicts thus delivered did not reflect the unanimous decision of the eleven-member tribunal. “The Member for India dissents from the majority Judgment and has filed a statement of his reasons for such dissent,” he announced, and “the members for France and the Netherlands dissent as to part only from the majority Judgment and have filed statements of their reasons for such dissents.” The member for the Philippines, too, submitted a separate opinion although his was concurring with the majority. Webb himself filed another. “Generally, I share the view of the majority as to facts,” he stated, but he produced a separate opinion to express his own reasoning “for upholding the Charter [of the Tribunal] and the jurisdiction of the Tribunal and of some general considerations that influenced me in deciding on the sentences.”¹ In short, the decision of the Tokyo Tribunal was split between the majority opinion of eight justices and five

¹ Neil Boister and Robert Cryer, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), p. 626.

concurring and dissenting opinions. Webb informed that the defense counsel's prior request for the reading of separate opinions in the open court was denied. However, he assured that all the separate opinions would be included in the official record of the trial and that they would become "available to the Supreme Commander [for the Allied Powers], to Defense Counsel and to others who may be concerned."²

Duly distributed in immediate days following the conclusion of the international proceedings at Tokyo (the "Tokyo Trial" hereafter), separate opinions caused much stir among those Japanese who had direct access to them, including the twenty-five defendants themselves. The dissenting opinion by the Indian member (in which all defendants were found not guilty of any charges, based on broad-ranging legal and factual reasons) especially received enthusiastic responses. General Matsui Iwane, who was convicted and sentenced to death by hanging in connection with the Rape of Nanking, confided to Hanayama Shinshō, a prison chaplain at the war criminals' compounds at Sugamo, Tokyo, that the dissenting opinion by Justice Radhabinod Pal "articulated our position in full and, as might be expected of an Indian, he looks at things from the philosophical standpoint." General Itagaki Seishirō, who was a former staff officer of the Kwantung Army that instigated the invasion of Manchuria in 1931 and who was convicted of multiple counts of crimes against peace and war crimes, spent three days reading Pal's dissent and was "extremely impressed," so much so that he composed two poems in its appreciation.³ Shigemitsu Mamoru, who served as foreign minister in the

² Ibid.

³ Ushimura Kei, "'Paru hanketsu' to sengo Nihon" [The Pal judgment and postwar Japan], in Ushimura Kei, *"Sengo sekinin" ron no shinjitsu: sengo Nihon no chiteki taiman o danzu* [The truth about the "postwar responsibility" debates: Criticism of intellectual idleness in postwar Japan] (Tokyo: PHP Kenkyūjo, 2006), pp. 151-2.

second half of the Pacific War and who was similarly convicted of crimes against peace and war crimes (but received an unusually light sentence of seven years in prison), also read Pal's dissent and reached the conclusion that this text was "a must read [*hitsudoku no sho*]." He observed that this dissenting opinion was an articulation of the judge's fearless commitment to the principle of justice and that of neutrality, the latter quality ostensibly representing the national trait of modern-day India, the then emerging leader of the Third World.⁴

Similar views were expressed elsewhere. In their retrospective account of the Tokyo Trial, a group of court reporters for *Asahi shinbun* (the *Asahi Newspaper*) – a leading center-to-left national daily – remarked that "the majority judgment in its first read gave an impression of falling within the bounds of the prosecution's opening statement." By contrast, "the dissenting opinion by the Indian member Justice Pal outstripped the majority judgment in terms of its volume, its retention of a high level of discernment as regards its quality, and its taking on of certain characteristics as a critique of civilization; all in all, one cannot help but feeling that this is the very thing to be regarded as the rightful historical document [*korekoso tadashiku rekishiteki bunken*]." The *Asahi* reporters did not forget to note the importance of other separate opinions, especially the ones submitted by the French justice Henri Bernard, the Dutch justice B.V.A. Röling, and the president of the tribunal Webb. Their opinions, too, "carried considerably interesting materials," the *Asahi* reporters maintained, and "it is by no

⁴ *Ibid.*, pp. 158-9.

means a small matter to contemplate the ramifications of these minority opinions having not been read [in the courtroom].”⁵

What were the “considerably interesting materials” in the separate opinions that the Japanese newspaper reporters were referring to? How did the Japanese public receive the opinions by these justices? How about Pal’s dissenting opinion? Why did the Asahi reporters maintain that this particular piece set itself apart from the rest of judicial opinions arising from the Tokyo Trial? The purpose of this paper is to address some of these questions by exploring the Japanese-language publications on the five separate opinions.

Dissemination of the separate opinions

It was known to the Japanese public contemporaneously that the Tokyo Trial ended in split decisions, but it took more than a decade for the translation of all five separate opinions to gain broad circulation. A comprehensive Japanese-language sourcebook of the separate opinions was published by the Asahi Newspaper in 1962 under the title, *Tōkyō saiban, gekan* (The Tokyo Trial, vol. 2). This publication consisted of a summary of the majority judgment (including some excerpts); full texts of separate opinions by Bernard, Pal, and Webb; excerpts from separate opinions by Jaranilla and Röling; and a short introductory statement for each separate opinion.⁶ *Tōkyō saiban* was part of the expanded, two-volume edition of the reportage that the Asahi Newspaper court reporters had originally published at the time of the Tokyo Trial. The eighth and the last

⁵ Asahi shinbun hōtei kishadan [The Asahi Newspaper Court Reporters], ed., *Tōkyō saiban* [The Tokyo Trial] (Tokyo: Tōkyō saiban kankōkai, 1962), vol. 2, p. 47.

⁶ *Ibid.*, vol. 2, p. 54.

installment of the original reporting, published in 1949 as *Hanketsu-hen* (The volume on the judgment), contained no more than brief summaries and excerpts of the decisions at the Tokyo Trial due to limited pages allowed for the series.⁷ The 1962 edition was a considerable improvement from the previous edition and constituted an important milestone in the study of the Tokyo Trial, since it was the first of its kind that carried in Japanese translation a near complete set of all five separate opinions.

In the intervening years, a full translation of the majority judgment had already come in print (in 1949).⁸ But no effort to publish the separate opinions in either English or Japanese materialized in the ensuing decade, that is, with the exception of Pal's dissenting opinion.⁹ A group of individuals who had been closely associated with accused Matsui launched publicity campaigns to establish Pal's credentials as the only justice qualified to adjudge the case against the Japanese defendants at the Tokyo Trial. They mass-circulated versions of Pal's dissenting opinion for that purpose, touting it as *shinri no sho* (the "Truthful Judgment") that advanced the so-called *Nihon muzairon* (the "Japan-Is-Not-Guilty Thesis"). They also invited over to Japan the Indian justice himself to have him play a proactive role in building his image as the staunch advocate of world peace, justice, and the rule of law. The publicity campaigns proved to be a huge success. During his visits of Japan in 1952, 1953, and 1966, Pal pleased his hosts by willingly taking part in an array of media events whereby he reportedly befriended with Japanese

⁷ Asahi shinbun hōtei kishadan [The Asahi Newspaper Court Reporters], ed., *Tōkyō saiban* [The Tokyo Trial], 8 vols. (Tokyo: Nūsusha, 1946-1949).

⁸ Mainichi shinbunsha [Mainichi Newspaper], ed., *Kyokutō kokusai gunji saibansho hanketsu* [The judgment of the International Military Tribunal for the Far East] (Tokyo: Mainichi shinbunsha, 1949).

⁹ For the discussion of Justice Pal's post-trial tours in Japan and their impacts on the Japanese understanding of the Tokyo Trial, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Asia Center, 2008), chapter 8; and Nakazato Nariaki, *Paru hanji: Indo nashonarizumu to Tōkyō saiban* [Justice Pal: Indian nationalism and the Tokyo Trial] (Tokyo: Iwanami shinsho, 2011).

convicted war criminals and bereaved families; condemned the self-righteousness of the West; expressed rage over the seeming meekness of the people of Hiroshima in criticizing the victors' use of atomic bombs; and advocated the "Asian" ideals of solidarity, law, justice, and world peace as alternatives to their Western counterpart. Pal's public persona as a jurist-pacifist of Asian origin grew in sufficient importance that he was chosen in 1966 to be the recipient of the First Order of the Sacred Treasure (*kun ittō zuihōshō*) from the Government of Japan, which Emperor Hirohito personally presented, in recognition purportedly of the Indian justice's unique contribution to promoting law and world peace.¹⁰ Memorial sites that celebrated Pal's words and deeds came to dot the Japanese archipelago after his death in January 1967, the latest of which being a new memorial stone built in 2005 at the precinct of the controversial Yasukuni War Shrine in central Tokyo. Pal's dissenting opinion, in this manner, gained popularity and came to define the postwar Japanese debates on the Tokyo Trial.

When seen against this backdrop, the publication of the Asahi reporters' *Tōkyō saiban* can be understood as a corrective to the existing imbalances in the Japanese knowledge about the Tokyo Trial. It went beyond the narrow focus on Pal's dissenting opinion and promoted instead comparative assessments of all five separate opinions and the majority judgment. This publication suffered certain editorial shortcomings, however. For one thing, it carried only a fraction of the majority judgment for the stated reason that the main argument was already well known to the Japanese people.¹¹ It also omitted some sections from the separate opinions produced by Jaranilla and Röling. No satisfactory

¹⁰ Nakazato, 2011, p. 227.

¹¹ Asahi shinbun hōtei kishadan, 1962, vol. 2, p. 54, see *supra* note 5.

explanation was given for these omissions. Jaranilla's separate opinion was short enough to have caused no editorial problems had it been printed in full. Röling's separate opinion was possibly deemed too lengthy to be printed in its entirety, but this scenario is unlikely. The editor of the volume was prepared to adopt special typesetting to reproduce Pal's dissenting opinion in full, that is, by using double columns and narrower line spacing. (Pal's dissenting opinion is nearly five times as long as Röling's.) This course of action was taken despite the fact that Pal's dissenting opinion had already enjoyed broad circulation in various versions in the preceding decade. One can only surmise that the Asahi reporters attached importance to reproducing Pal's dissent because of great authority it had come to assume in the Japanese understanding of the Tokyo Trial. It is still unclear, however, as to why the same accommodation could not have been made to other less known – but by no means less important – separate opinions.

Tōkyō saiban provides a short introductory statement for each separate opinion to familiarize the readers with its unique features in comparison to the majority decision as well as other separate opinions. The highlighted points can be summarized as follows. With regard to Webb's separate opinion, the Asahi reporters introduced it as an "interesting piece" that offered a useful window through which one could appreciate "the main concerns of the Tribunal," that is, an array of legal controversies that arose in connection with the charges of crimes against peace. The discussion of the emperor's culpability also stood out to the Asahi reporters as a unique feature of Webb's separate opinion. While acknowledging that Webb touched on "the issues of the emperor [*tennōron*]" for the limited purpose of presenting it "as a material piece concerning the sentences of the accused," the Asahi reporters found his comments "highly suggestive

[*ganchiku ni tomu*].”¹² Having stated so, however, they stopped short of elaborating in what regard, exactly, Webb’s comments merited the readers’ attention.

The separate opinion by Jaranilla, too, drew attention of the Asahi reporters as being “of considerable interest” for a unique stance the Philippine justice took on certain points of law and fact. Especially noteworthy were the following: (1) that he gave full and unqualified endorsement to legal principles arising from the Nuremberg Trial, i.e. the legal principles subsequently applied at the Tokyo Trial; (2) that he deemed the Allied use of atomic bombs as justifiable from the military standpoint, or “a means is justified by an end,” as he put it¹³; (3) that he criticized Justice Pal’s defiance of the Charter of the Tokyo Tribunal, deeming his action as “exceeding of authority [*ekken*]”; and (4) that he disapproved of the sentences rendered by the majority justices, which he found too lenient.¹⁴ The Asahi reporters did not take any position for or against any of these issues as if to maintain the position of a neutral observer. Yet they took exception with Jaranilla’s opinion on atomic bombs. Voicing dissent, the Asahi reporters disputed with

¹² *Ibid.*, p. 164. In his separate opinion, Webb expressed his disapproval of capital punishment against the convicted Japanese war criminals for the reason that Emperor Hirohito, the wartime superior of the defendants, was excluded from war crimes prosecution. “This immunity of the Emperor, as contrasted with the part he played in launching the war in the Pacific, is I think a matter which this Tribunal should take into consideration in imposing sentences,” Webb wrote, and went on to state that “a British Court in passing sentence would, I believe, take into account, if it could, that the leader in the crime, though available for trial, had been granted immunity.” If capital punishment must be imposed due to the gravity of offenses for which the accused were convicted, he still believed that the exemption of Hirohito from trial should be taken into account so that “the prerogative of mercy” be exercised to spare the lives of those sentenced to death. Boister and Cryer, 2008, p. 683, see *supra* note 1.

¹³ The Asahi reporters are commenting on the following passage in Jaranilla’s concurrent opinion. “If a means is justified by an end, the use of the atomic bomb was justified, for it brought Japan to her knees and ended the horrible war. If the war had gone on longer, without the use of the atomic bomb, how many more thousands and thousands of helpless men, women and children would have needlessly died and suffered, and how much more destruction and devastation, hardly irreparable, would have been wrought?” Boister and Cryer, 2008, p. 655, see *supra* note 1.

¹⁴ Asahi shinbun hōtei kishadan, 1962, vol. 2, pp. 176-7, see *supra* note 5.

the Philippine justice's views and contended that the use of unconventional weapons, including atomic bombs, had been outlawed in the existing body of international law.¹⁵

The Asahi reporters expressed less enthusiasm in introducing Bernard's separate opinion, which they heard to have been "written in a rush" and which was not guided by any careful writing plan "like the Pal Judgment." But they still gave some credit to Bernard's dissent on the following points: (1) that the charges of crimes against peace may be deemed valid based on natural law and *not* the Pact of Paris of 1928 (thus disputing the legal position taken by the Nuremberg Tribunal and by the majority justices at the Tokyo Trial); (2) that it advanced an important critique of the theories of liability that the majority justices adopted relative to war crimes; (3) that it criticized procedural shortcomings of the Tokyo Trial; (4) that it denounced the exemption of Emperor Hirohito from criminal prosecution; and (5) that it criticized the alleged opacity of the judges' deliberation process.¹⁶

With respect to Röling's dissenting opinion, it is introduced as a relatively lengthy piece whose scope of dissent, however, was quite limited. Its main goal was to record the Dutch justice's points of dissent for the possible remission of sentences. Another feature that stood out to the Asahi reporters about Röling's dissenting opinion was an in-depth analysis of factual issues relative to crimes against peace, which, at times, gave sympathetic treatment to the defendants' counter-arguments on the charges of aggression (such as those justifying the Japanese invasion in China). The Asahi reporters appeared to take pains not to portray Röling as a Japan apologist, however, as they were quick to

¹⁵ Ibid., p. 177.

¹⁶ Ibid., p. 194.

point out that the Dutch justice minced no words in denouncing the “Greater East Asia Co-Prosperity Sphere,” the vision of empire with which the wartime Government of Japan justified its war effort. Röling wrote – and the Asahi reporters quoted from his dissenting opinion – that “[d]uring the years of occupation, Japan not only failed to fulfill the pledges based on the principle of amity and assistance, but did not even live up to the rules of conduct as formulated in the Hague Convention based on the principles of decent belligerency.”¹⁷

Having highlighted these words, however, the Asahi reporters still speculated that Röling might have had some pro-Japanese sentiments or that he was at least sympathetic to Hirota Kōki, a former diplomat and the only civilian defendant who was convicted and sentenced to death.¹⁸ “It is not entirely unwarranted to conjecture that Justice Röling wrote this dissenting opinion to save Hirota from the death penalty,” the Asahi reporters commented, and added that “while it is perhaps unrelated to the present issue [*honron towa mukankei de arōga*],” Hirota had once served as ambassador to the Netherlands and that “rumor has it that a flower named ‘Hirota Tulip’ [*Hirota chūrippu*] still exists in the said country.”¹⁹ By this passing remark, the Asahi reporters appear to imply that Röling was favorably disposed to leniency for Hirota because of friendship Hirota had putatively cultivated with the Dutch people in earlier years.

The Asahi reporters introduced Pal’s dissenting opinion in a manner quite unlike any other separate opinions. Instead of maintaining the stance of a neutral observer, they

¹⁷ Boister and Cryer, 2008, p. 742, see *supra* note 1; Asahi shinbun hōtei kishadan, 1962, vol. 2, p. 219, see *supra* note 5.

¹⁸ For Hirota’s brief biographical information and verdict, see Boister and Cryer, 2008, pp. 64-5, 603-4, see *supra* note 1.

¹⁹ Asahi shinbun hōtei kishadan, 1962, vol. 2, p. 219, see *supra* note 5.

praised the dissenting opinion for its bold and thoroughgoing denunciation of the majority opinion. They particularly noted (1) that the Indian member refused to be bound by the Charter of the Tokyo Tribunal and criticized the victor nations for the “exceeding of authority [*ekken*]” by its issuance; (2) that he analyzed the historical literature of international law “with thoroughness [*amasutokoro naku*]” before reaching his definitive conclusion on points of law; (3) that when assessing the charges of conspiracy, he delved into the modern history of Japan since the time of *kaikoku* – the opening of Japan to the Western world in the mid-nineteenth century – through the Pacific War with “clarity and discernment [*kaimei, dōsatsu*]”; (4) that he “criticized scathingly [*koppidoku hihyō*]” the tribunal’s unfair application of the rules of evidence; and (5) that as regards war crimes, he investigated the facts in “minute detail [*kokumei ni*]” and “set forth his argument concretely [*gutaiteki ni tenkai*]” to reach reasoned verdicts of not guilty.²⁰ Above all, the Asahi reporters praised Pal for his ability to think *beyond* the Tokyo Trial when contemplating the future of world peace, justice, and the rule of law. The Asahi reporters quoted from the last segment of Pal’s dissenting opinion in this connection, which partly read as follows:

The name of justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation. The world is really in need of generous magnanimity and understanding charity. The real question arising in a genuinely anxious mind is, “can mankind grow up quickly enough to win the race between civilization and disaster.”²¹

²⁰ Ibid., pp. 346-7.

²¹ Boister and Cryer, 2008, p. 1425, see *supra* note 1; Asahi shinbun hōtei kishadan, 1962, vol. 2, p. 347, see *supra* note 5.

The Asahi reporters attached importance to the quote above, commenting that this particular passage urged one to turn one's attention to "the real big issues of international society."²² By so stating, the Asahi reporters appear to trivialize the importance of the Tokyo Trial and the majority judgment.

Assessments of the five separate opinions similar to those expressed by the Asahi reporters were repeated in other contemporaneous publications. *Kyōdō kenkyū: Pāru hanketsusho* (Collaborative research: The Pal judgment), 2 vols., is one such example. Published 1966 by Tokyo saiban kenkyūkai (the "Tokyo Trial Research Group," a government-appointed group of researchers for analysis and assessment of the Allied war crimes trials²³), *Kyōdō kenkyū* comprised a complete translation of Pal's dissenting opinion and six analytical articles on its historical context and significance. The purpose of this publication appears to have been to improve public access to Pal's dissenting opinion (the two-volume publication came in print as a pocket-size edition) and also to give it scholarly treatment. However, its handling of Pal's dissenting opinion is not entirely dispassionate or impartial. The preface to *Kyōdō kenkyū* introduced Pal's dissent as "the 'Truthful Text' that will endure in history in perpetuity [*eien ni rekishi ni nokoru 'shinri no sho'*]" on account of its offering a bold opinion on world peace, justice, and the rule of law from the standpoint of "Eastern philosophy [*Tōyō tetsuri*]." The research

²² Ibid.

²³ Tōkyō saiban kenkyūkai [The Tokyo Trial Research Group], ed., *Kyōdō kenkyū: Pāru hanketsusho* [Collaborative research: The Pal judgment], 2 vols. (Tokyo: Kōdansha gakujutsu bunko, 1984). This was originally published in 1966. The research group was appointed by the Ministry of Legal Affairs in June 1964 to analyze and assess the records of war crimes trials that the ministry had collected in preceding years. The research group continued its activities until March 1969. For more information regarding this group, see Nakazato, 2011, pp. 215-25, see *supra* note 9.

group particularly praised Pal for his open condemnation of the American use of the atomic bombs “without regard to the potential threat to personal safety.” The courage that the Indian member purportedly demonstrated in his dissenting opinion impressed the members of the research group so much that they concluded Pal as being “comparable” to the towering seventeenth-century jurist of international law, Hugo Grotius.²⁴

Despite these laudatory remarks, however, members of the research group had certain misgivings about the quality of Pal’s dissenting opinion. Nakazato Nariaki’s path-breaking study of Pal’s biography, *Paru hanji: Indo nashonarizumu to Tōkyō saiban* (Justice Pal: Indian nationalism and the Tokyo Trial) (2011), shows that some, in fact, expressed in private unflattering views on both stylistic and substantive issues of the dissenting opinion.²⁵ For instance, Ichimata Masao, a scholar of international law, complained about the poor organization of Pal’s dissenting opinion, such as the repetitiveness and redundancy of arguments, and the frequent use of bulk quotations without much regard to their readability or materiality. He also expressed doubts about the significance of Pal’s dissenting opinion in the field of international law. He predicted that, while this dissenting opinion surely had some merits, it probably would be ignored in the larger scholarly community.²⁶ A former navy officer and another member of the research group, Toyoda Kumao, commented that all the those who gained familiarity with Pal’s argument found it not only agreeable but also “slightly flattering” (*sukoshi kusuguttai*, lit. “slightly tickling”) because – according to Nakazato’s interpretation – Pal defended the legality of the Japanese invasion of China and other neighboring countries

²⁴ Tōkyō saiban kenkyūkai, 1984, vol. 1, p. 3, see *supra* note 23.

²⁵ Nakazato, 2011, pp. 220-3, see *supra* note 9.

²⁶ *Ibid.*, p. 221.

far more adamantly than the defense lawyers themselves had done in the courtroom.²⁷

Another member of the research group, Bandō Junkichi, added that Hayashi Fusao, an author and a Japan apologist who was known for popularizing the “Affirmation-of-the-Greater-East-Asia-War Thesis [*dai Tōa sensō kōteiron*],” had not studied Pal’s dissenting opinion well enough to make his case more compelling.²⁸ These comments did not converge onto any systematic critiquing of Pal’s dissenting opinion, but they show that the members of the research group did not have a very high opinion of the dissenting opinion even though they referred to it in public as the “Truthful Judgment” of enduring consequences.

A number of books and articles that celebrated Pal’s dissenting opinion in the similar manner as the Asahi reporters’ *Tōkyō saiban* and the Tokyo Trial Research Group’s *Kyōdō kenkyū* came in print in ensuing decades, and they remain highly influential in the Japanese debates on the Tokyo Trial. Not entirely satisfied with the established knowledge of Pal and his dissenting opinion, however, some scholars took new lines of inquiry into the the life of the Indian justice and his dissenting opinion. Three scholars deserve mention. One of them is Higurashi Yoshinobu, a leading scholar of the Tokyo Trial in Japan today. Higurashi made his debut in the field in the late 1980s when he published several research pieces that explored international politics, law, and diplomacy surrounding the Tokyo Trial. One of his earlier publications, “*Paru hanketsu saikō: Tōkyō saiban ni okeru bekkō iken no kokusai kankyō*” (Rethinking the Pal judgment: The international environment of the separate opinion at the Tokyo Trial)

²⁷ Ibid., p. 222.

²⁸ Ibid.

(1993), investigated the circumstances of Pal's appointment to the Tokyo Tribunal, his relationship with other members of the tribunal, the substance of Pal's dissent, and its impacts on the British and Indian foreign policies. The main scholarly contribution of this piece was that it elucidated two contradictory intellectual currents that ran through Pal's dissenting opinion. One of them is narrow legalism – or “legal empiricism [*hō jissshō shugi*]” to use Higurashi's words – and the other is a strand of anti-Western imperialism. Higurashi argues that “[i]n Pal's logic, there is an intermingling of the minute legal technicality [on the one hand] and pronounced politicization [on the other],” and this co-mingling of contradictory ideas “confuses the observers.” Consequently, an interpretive position one takes could be at variance with another depending on which aspect of “these constitutive elements” one would attach importance.²⁹ Pal's dissent may thus be regarded as a doggedly legalistic judicial opinion that advanced conservative interpretations of the law, *or* a political tract that offered a heavy-handed critique of Western imperialism.

Ushimura Kei, a professor of comparative literature and intellectual history at the International Research Center for Japanese Studies, shed additional light on the second of the two intellectual currents that are pointed out in Higurashi's article. In his book, “*Bunmei no sabaki*’ o koete: *Tai-Nichi senpan saiban dokkai no kokoromi*” (Beyond the ‘trial in the name of civilization’: A reading of the war crimes trials against the Japanese) (2000),³⁰ Ushimura drew upon the existing scholarship on Orientalism and argued that

²⁹ Higurashi Yoshinobu, “Paru hanketsu saikō: Tōkyō saiban ni okeru bekkō iken no kokusai kankyō” [Rethinking the Pal judgment: The international environment of the separate opinion at the Tokyo Trial], in Itō Takashi, ed., *Nihon kindaiishi no saikōchiku* [Reconstruction of the modern history of Japan] (Tokyo: Yamakawa shuppansha, 1993), p. 399.

³⁰ Ushimura Kei, “*Bunmei no sabaki*” o koete: *tai-Nichi senpan saiban dokkai no kokoromi* [Beyond “the trial in the name of civilization”: A reading of war crimes trials brought against the Japanese] (Tokyo: Chuokoron shinsha, 2001).

the core issue of the dissenting opinion was not so much to advance the so-called “Japan-Is-Not-Guilty Thesis” (for which Pal’s dissenting opinion is now known) as to question the validity of the Western *paradigm* on civilization.

Nakazato Nariaki, a professor emeritus at the University of Tokyo and a scholar of the modern history of South Asia, explored Pal’s intellectual biography in relation to twentieth-century Bengali nationalism. Pal is commonly known in the existing Japanese-language historical literature as a Gandhian pacifist, but Nakazato’s study cast doubts on this assumption. In his definitive account of Pal’s intellectual biography, Nakazato shed light on Pal as a typical Bengali jurist of his time who (1) identified himself with the Bengali colonial elite known as the *bhadralok*; (2) aligned closely with the anti-communist, radical Hindu nationalist movement in the region of Bengal; and (3) was generally unsympathetic to the plight of the Chinese people under Japanese military control. On the last point, Nakazato observed that the Bengali elite in those years tended to identify itself with a powerful Asian nation such as Japan while commonly holding China with contempt for its relative weakness. This, in Nakazato’s opinion, is “an expression of the colonial elite’s warped consciousness.”³¹ Given the prevailing intellectual current of the Bengali elite, and given the ideological stance of Pal personally, Nakazato found no surprise when Pal defended the Japanese war policy vis-à-vis China and insisted on its legality.

In addition, Nakazato’s study questioned the common belief that Pal was a qualified jurist in international law. Biographical records rather showed no evidence that Pal had any expert knowledge in relevant fields prior to joining the Tokyo Tribunal. Pal

³¹ Nakazato, *Paru hanji*, pp. 136-7, see *supra* note 9.

did make a career as an international-law jurist after the Tokyo Trial, by way of accepting the nomination to serve as a member of the International Law Commission of the United Nations. (He served in the commission since 1952 until his death in 1967, which included acceptance of appointment to serve as the commission's chair between 1958 and 1962.)³² Even so, Nakazato's study brought out that Pal made no constructive contribution to furthering the development of the international criminal justice system while serving in these capacities at the United Nations. Pal generally abstained from voting when the commission deliberated new proposals that aimed at consolidating the legal principles arising from Nuremberg and Tokyo in statutory form. If anything, he *opposed* such proposals on grounds that the international community had not developed sufficiently to guarantee fair trial to accused persons at international criminal trials. According to Nakazato, the image of Justice Pal that emerged from the records of proceedings at the International Law Commission was "a jurist who had scant interest in issues of peace or human rights but extremely sensitive on the issues of state rights."³³

As the studies of Pal's dissenting opinion gained greater depth in the second- and third-quarter century of the postwar period, fresh research initiatives that shed new light on the historical significance of the majority decision and other separate opinions gathered some momentum. B.V.A. Röling, formerly the Dutch member of the Tokyo Tribunal, was one of the contributors in the new initiatives. He was one of the three dissenting justices who expressed deep misgivings about the laws applied at the Tokyo Trial, especially those pertained to crimes against peace. However, he came to refashion

³² Ibid., p. 173.

³³ Ibid., pp. 183.

himself as a peace activist and a major proponent of the Nuremberg and Tokyo legacy in the post-trial period. The post-trial transformation in Röling's intellectual outlook is evidenced in the special lecture he delivered at an international symposium of the Tokyo Trial, held at the capital city of Japan in 1983 to mark the 35th anniversary of the Tokyo Judgment. Röling stated during his lecture that "[n]otwithstanding several negative aspects of the verdicts of Nuremberg and Tokyo, they did undeniably contribute to a legal development that mankind urgently needed." He went on to point out that the United Nations adopted the principles set out by the two tribunals thereafter. Consequently, "[t]he crime against peace has become an accepted component of international law."³⁴ When asked by the audience about his opinion regarding Pal who "adopted the dispassionate objectivity that informed his quest for peace," Röling replied that Pal's dissent was "a more or less belated reaction against the [Western] aggressive wars by which the [Western] colonial system was established centuries ago."³⁵ While expressing respect for Pal's position, Röling characterized Pal's opinion as backward-looking, failing to appreciate the contribution of the Tokyo Trial in strengthening the international peace mechanism. As he put it, "I think Pal's judgment is understandable if we look at the past, but not when we look at the future."³⁶ This remark is significant, as Röling was implicitly presenting to the Japanese audience an alternative to rallying around Pal's dissenting opinion in their commitment to pursuing the postwar pacifist ideal. Röling's version of pacifism did not appear to impress the Japanese audience, however, as his

³⁴ C. Hosoya, et al., ed., *The Tokyo War Crimes Trial: An International Symposium* (Tokyo: Kodansha International, 1986), p. 132. For the original Japanese, see Hosoya Chihiro, Andō Nisuke, and Ōnuma Yasuaki, eds., *Kokusai shinpojiumu: Tōkyō saiban o tou* [The international symposium: Investigating the Tokyo Trial] (Tokyo: Kōdansha 1984).

³⁵ Hosoya, *The Tokyo War Crimes Trial*, p. 152, see *supra* note 34.

³⁶ *Ibid.*, p. 153.

lecture elicited no follow-up comments on this particular point. Instead, he was made to field questions that demanded him to verify various procedural defects and misjudgments that were believed to have been committed at the Tokyo Trial.³⁷

Research initiatives in recent years pay attention to some other judges whose contributions to the making of the majority opinion and the separate opinions had been overlooked in the existing scholarship. Higurashi Yoshinobu can be credited once again in this regard. In his *Tōkyō saiban to kokusai kankei: Kokusai seiji ni okeru kenryoku to kihan* (The Tokyo Trial and international relations: power and norm in international politics), he explored archival materials from Australia, Britain, and the United States to bring to light the complex internal workings in which the majority justices coalesced while five justices chose the path of producing separate opinions. Higurashi's work showed (1) that the president of the tribunal Webb and the rest of the justices had a rocky relationship from early on, due partly to conflicting legal positions concerning crimes against peace, and due partly also to personality clashes; (2) that the possibility of split judgments was present from the start, because of the Indian member's stated intention to dissent since the time of joining the tribunal; and (3) that, after much soul searching, the British member Lord Patrick emerged as the key person in putting together the majority and preventing the tribunal from falling into utter disunity.³⁸

³⁷ Ibid., pp. 154-6. For other commentaries that shed light on the Japanese reception of Röling at the time of the international symposium, see also Ōnuma Yasuaki, *Tōkyō saiban kara sengo sekinin no shisō* [From the Tokyo Trial to thoughts on postwar responsibility] (Tokyo: Tōshinsha, 1987), p. 81; Hosoya Chihiro, "Tōkyō saiban Oranda daihyō hanji no shōgen" [Testimony of the justice representing the Netherlands at the Tokyo Trial], *Chūō kōron* (July 1983), pp. 142-3; and Bernard Röling, "Yuiitsu no bunkan shiikei hikoku, Hirota Kōki o saishin suru" [Reviewing the case of Hirota Kōki, the only civilian accused sentenced to death], *Chūō kōron* (July 1983), pp. 144-62.

³⁸ Higurashi Yoshinobu, *Tōkyō saiban no kokusai kankei: Kokusai seiji ni okeru kenryoku to kihan* [The Tokyo Trial and international relations: Power and norm in international politics] (Tokyo: Bokutakusha, 2002); Higurashi Yoshinobu, *Tōkyō saiban* [The Tokyo Trial] (Tokyo: Kōdansha gendaishinsho, 2008).

Nagai Hitoshi, a leading scholar of the Philippine war crimes program, has also contributed to the study of the Tokyo Trial by bringing back Justice Jaranilla into the picture. Titled, “Wasurerareta Tōkyō saiban Firipin hanji: Derufin Haranīrya hanji no shōgai” (The forgotten Philippine justice at the Tokyo Trial: The life of Delfin Jaranilla), Nagai’s research piece showed (1) that Jaranilla was a jurist of considerable legal experience in his home country; (2) that he was also a man of high social and political standing in the Philippine society; (3) that he was a survivor of the Bataan Death March; but (4) that despite falling victim personally to Japanese war crimes, Jaranilla maintained a high degree of professionalism and an attitude of impartiality throughout the court proceedings.³⁹ But Nagai also held that Jaranilla deviated from judiciousness once, where it concerned his opinion on atomic bombs. Believing that this type of aerial bombings constituted an international offense during World War II, Nagai faulted the Philippine justice for “block[ing] himself from making objective judgment as he was caught up in the [victim] mentality.”⁴⁰

Ōoka Yūichirō is a relative new comer in the study of the Tokyo Trial, but he made an important scholarly contribution by way of producing a biography of the French justice Bernard, titled, *Tōkyō saiban: Furansujin hanji no muzairon* (The Tokyo Trial: The not-guilty-thesis by the French justice) (2012). Ōoka was well positioned to undertake this particular book project, as he spent years in France as a journalist, was fluent in the French language, and had an in-depth appreciation of the French people,

³⁹ Nagai Hitoshi, “Wasurerareta Tōkyō saiban Firipin hanji: Derufin Haranīrya hanji no shōgai” [The forgotten Philippine justice at the Tokyo Trial: The life of Delfin Jaranilla], in Awaya Kentarō, ed., *Kingendai Nihon no sensō to heiwa* [War and peace in modern Japan] (Tokyo: Gendai shiryō shuppan, 2011), p. 350.

⁴⁰ *Ibid.*, p. 344.

culture, and politics. Based on extensive archival research and fieldwork, Ōoka brought to light Bernard's unique upbringing as a would-be Jesuit priest at his young age and his subsequent career as a prosecutor in French Africa prior to serving as a member of the Tokyo Tribunal. According to Ōoka, certain idiosyncrasies in Bernard's dissenting opinion can be explained partly by Bernard's insistence on representing the voice of France at the international arena on the one hand and, on the other, his propensity to position himself as a perpetual outsider vis-à-vis the mainstream. By illustration, Bernard affirmed in his dissenting opinion the validity of the charges of crimes against peace but on a legal ground entirely different from the one recognized by the judges representing the Anglo-American countries, thus continuing the time-honored French tradition of being a good "ally but without conforming [*dōmei suredomo dōchō sezu*]." ⁴¹ In the similar token, Bernard criticized the majority justices for allegedly faulty internal deliberation process but refrained from specifying the shortcomings, *thereby* straining the French alignment with its Anglo-American allies but never breaking it. In short, Ōoka found French exceptionalism as the defining characteristic of Bernard's dissenting opinion and its major intellectual contribution to the Tokyo Trial.

Concluding remarks

This paper has explored the Japanese-language historical literature on the Tokyo Trial in order to bring to light the Japanese assessments of the five separate concurring and dissenting opinions. It has been shown that the Japanese people gained familiarity

⁴¹ Ōoka Yūichirō, *Tōkyō saiban: Furansujin hanji no muzairon* [The Tokyo Trial; Not-guilty thesis by the French justice] (Tokyo: Bungei shinsho, 2012), pp. 22, 24.

with the gist of each separate opinion from early on but that substantive discussions have been quite limited. As of today, studies of the separate opinions remain under-developed despite the passage of nearly seven decades since the end of the Tokyo Trial. It is true that scholars such as Higurashi and Nakazato broke new ground in their cutting-edge research of Pal's intellectual biography. Nagai and Ōoka, too, contributed to broadening the horizon of the Japanese understanding of the separate opinions by bringing back into the picture Justices Jaranilla and Bernard respectively. It may be a matter of time, therefore, that new research initiatives will be taken, for instance, on biographies of Röling and Webb as well. However, it is also true that what has animated the Japanese research to date is the political or ideological aspect of these opinions and not the judicial one. The task that for the future researchers is to go beyond this type of limitations and produce a more balanced assessment of the separate opinions' contributions and shortcomings in the making of the Tokyo Trial.