

THE NUREMBERG TRIBUNAL V. THE TOKYO TRIBUNAL: DESIGNS, STAFFS, AND OPERATIONS

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I. INTRODUCTION

While much scholarly literature has been dedicated to describing the establishment, proceedings, and impact of the International Military Tribunal (IMT),¹ also known as the Nuremberg Tribunal, comparatively little has addressed similar aspects of the International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Tribunal.² In fact, some

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1. See, e.g., ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (1983); EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG* (1997); WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946* (1999); PETER HEIGL, *NUREMBERG TRIALS* (2001); MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* (1997); AIREY NEAVE, *ON TRIAL AT NUREMBERG* (1979); JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* (1994); *PERSPECTIVES ON THE NUREMBERG TRIAL* (Guénaël Mettraux ed., 2008); BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945* (1982); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG: THE UNTOLD STORY OF HOW THE NAZI WAR CRIMINALS WERE JUDGED* (1977); RICHARD W. SONNENFELDT, *WITNESS TO NUREMBERG* (2006); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1995). A search in LexisNexis on September 15, 2010, of "Nuremberg w/10 tribunal" in the "Law Reviews, CLE, Legal Journals & Periodicals, Combined" source returned 2900 hits.

2. See, e.g., NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* (2008); ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); TIM MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS*

scholars and practitioners completely overlook the IMTFE's existence, incorrectly referring to the United Nations (UN) International Criminal Tribunal for the Former Yugoslavia (ICTY), established by the United Nations Security Council (UNSC) in 1993,³ as the first international war crimes tribunal since the IMT.⁴

In order to begin to correct this gap in the important history of transitional justice⁵ institutions generally, and international war crimes tribunals specifically, this Article compares the twin immediate post-World War II (WWII) *ad hoc* tribunals, noting their similarities and differences, which are summarized in Figure 1. This Article is purely descriptive. I conclude in Part IV by offering some suggestions for future analysis.

II. SIMILARITIES

In many ways, the IMT and the IMTFE were similar. These parallels were deliberate, as the design of the IMTFE was based on that of the IMT. As a U.S. government (USG) policy paper of October 25, 1945, directed:

Any such plan [for an international military tribunal for the Far

(2001); RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); BERNARD VICTOR A. RÖLING, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER* (Antonio Cassese ed., 1993); YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* (1996); YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* (2008). A search in LexisNexis on September 15, 2010, of "Tokyo w/10 tribunal" in the "Law Reviews, CLE, Legal Journals & Periodicals, Combined" source returned 1136 hits.

3. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

4. For example, in an address before the United Nations General Assembly, Theodor Meron, an ICTY Appeals Chamber judge who served as that tribunal's president from 2002 to 2005, referred to the ICTY as "the first international war crimes chamber since Nuremberg . . ." Theodor Meron, President, Int'l Criminal Tribunal for the Former Yugo., Address to the United Nations General Assembly (Nov. 17, 2004), *available at* <http://www.icty.org/sid/8339>. *See also* Charles Trueheart, *New Kind of Justice: The International Criminal Tribunal for the Former Yugoslavia is the World's First War-Crimes Tribunal since Nuremberg*, *ATLANTIC MONTHLY*, Apr. 2000, at 80.

5. "Transitional justice" refers to both the processes and objectives of post-conflict societies employing judicial and/or non-judicial mechanisms to address past human rights violations. *See* Phil Clark, Zachary D. Kaufman & Kalypso Nicolaïdis, *Tensions in Transitional Justice*, in *AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION, AND RECONCILIATION IN RWANDA AND BEYOND* 381 (Phil Clark & Zachary D. Kaufman eds., 2009) (exploring tensions among some of the primary themes or goals of transitional justice: reconciliation, peace, justice, healing, forgiveness, and truth); Zachary D. Kaufman, *The Future of Transitional Justice*, 1 *ST. ANTONY'S INT'L REV.* 58 (2005) (providing an overview of transitional justice options).

East] should provide for the use of rules of procedures and the application of principles in accord with those adopted for use by the International Military Tribunal for Europe established by the Agreement executed 8th August 1945, except where change is necessitated by differing circumstances in the Far East.⁶

This Part focuses on those similarities, especially as they relate to the tribunals' designs, staffs, and operations.

A. *Designs*

The overall structure of each tribunal was the same: both were *ad hoc* international military tribunals. Both tribunals asserted primacy over all individuals suspected of committing atrocities within their jurisdictions—all other individuals could be tried by alternative means, such as national tribunals. Both tribunals also could and did impose the death penalty.⁷ The subject-matter jurisdiction of each tribunal was the same: crimes against peace, war crimes, and crimes against humanity. Neither tribunal permitted the defenses of sovereign immunity or requisite obedience to superior orders.⁸ Furthermore, both tribunals contained mechanisms to review and, within limits, alter the sentences—but not verdicts—imposed by their respective benches.⁹ In other words, both the IMT and the IMTFE were courts of first and last instance, triers of fact and passers of final judgment.

6. Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East (Oct. 25, 1945), *reprinted in* 1 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES xv (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

7. Charter of the International Military Tribunal art. 27, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter], *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>; Charter of the International Military Tribunal for the Far East art. 16, Jan. 19, 1946, TIAS No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27) [hereinafter IMTFE Charter], *available at* <http://www.jus.uio.no/treaties/04/4-06/military-tribunal-far-east.xml>.

8. IMT Charter, *supra* note 7, arts. 7, 8; IMTFE Charter, *supra* note 7, art. 6.

9. *See* IMT Charter, *supra* note 7, art. 29 (providing that sentences “shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof”); IMTFE Charter, *supra* note 7, art. 17 (providing that “[a] sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity”).

B. Staffs

Both the IMT and the IMTFE selected their respective senior staff from comparable pools. The prosecutorial and judicial staff of each hailed from a similar group of states: both sets were drawn from the victors of their respective theatres (whether European or Pacific) in WWII. However, as discussed in Section III.B, although the origins of those state groups were similar, their composition differed considerably.

C. Operations

Finally, the operations of both tribunals were similar in some ways. Both tribunals judged one defendant unfit for trial and had at least one defendant die during proceedings. Both tribunals also operated alongside other transitional justice methods, such as unilateral Allied *ad hoc* military tribunals and lustration,¹⁰ for addressing individuals suspected of committing atrocities within their jurisdictions.

III. DIFFERENCES

Despite the aforementioned similarities between the IMT and the IMTFE, the two tribunals differed significantly. The most important differences—again concerning the tribunals’ designs, staffs, and operations—are discussed in this Part. These differences between the tribunals are often attributed to their disparate circumstances. As Joseph Berry Keenan, the IMTFE’s chief prosecutor (called Chief of Counsel), and scholar Brendan Francis Brown argue, the differences between the IMT and the IMTFE were “not entirely a question of free choice . . . [they were] largely a consequence of diverse military, political, and social situations, leading to the overthrow of the power of Germany and Japan.”¹¹

A. Designs

The negotiations and other steps concerning the establishment of the IMT and the IMTFE reflect disparate trends and logistics. The IMT was preceded by a high-profile diplomatic

10. “Lustration” is the purging of criminals under a country’s previous regime. For a discussion of lustration after WWII, see generally CONSTANTINE FITZGIBBON, DENAZIFICATION (1969); Herman Schwartz, *Lustration in Eastern Europe*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 461 (Neil J. Kritz ed., 1995); Peter Siegelman, *The Problems of Lustration: Prosecution of Wrongdoers by Democratic Successor Regimes*, 20 LAW & SOC. INQUIRY 1 (1995).

11. JOSEPH BERRY KEENAN & BRENDAN FRANCIS BROWN, CRIMES AGAINST INTERNATIONAL LAW 1 (1950).

meeting, whereas the IMTFE was not.¹² The USG's public declarations that it would seek to hold Japanese suspected of committing atrocities accountable were less frequent than those the USG declared concerning Nazis. What public declarations regarding the Japanese the USG did make mostly occurred alongside its pronouncements concerning the Nazis.¹³ And those public declarations to hold Japanese war criminals accountable occurred relatively late compared to similar announcements about Nazis. As scholar Richard Minear observes, "[t]he major Allied concern (China excepted) throughout World War II had been with Nazi Germany, not with Japan. It was only when the European war had ended and when the Japanese defeat was imminent that the Allies publicly announced their intention to prosecute Japanese war criminals."¹⁴

The methods by which each tribunal was created were also different. Although both were established by executive agreements or orders, the IMT was created by an agreement among the victorious quadripartite powers of the European theatre of WWII, while the IMTFE was established by an order of the Supreme Commander of the Allied Powers (SCAP), U.S. General Douglas MacArthur.¹⁵

Unlike a later pair of contemporaneous tribunals, the ICTY and the UN International Criminal Tribunal for Rwanda (ICTR),¹⁶ which share an appeals chamber and, for the first several years of their existence, shared a chief prosecutor based in The Hague,¹⁷ the headquarters of the IMT and the IMTFE were completely

12. MINEAR, *supra* note 2, at 20 ("Long negotiations among the Big Four at the London Conference had produced the Nuremberg Charter. No similar conference preceded the promulgation of the Tokyo Charter."). See also YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 55 (1999).

13. Solis Horwitz, *The Tokyo Trial*, 28 INT'L CONCILIATION 474, 477 (1950) ("In striking contrast to the strong expressions of intent to prosecute and punish German war criminals there is a paucity of similar public declarations with regard to Japanese war criminals.").

14. MINEAR, *supra* note 2, at 8.

15. BRACKMAN, *supra* note 2, at 60.

16. On November 8, 1994, the UNSC established the ICTR to address the 1994 Rwandan genocide. See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602. For discussion of the ICTR's origin, operation, and controversies, see Zachary D. Kaufman, *The United States Role in the Establishment of the United Nations International Criminal Tribunal for Rwanda*, in *AFTER GENOCIDE*, *supra* note 5, at 229; Zachary D. Kaufman, *The United Nations International Criminal Tribunal for Rwanda*, in *THE ENCYCLOPEDIA OF TRANSITIONAL JUSTICE* (Lavinia Stan & Nadya Nedelsky eds., forthcoming 2011).

17. On August 28, 2003, the UNSC unanimously decided to divide the shared chief prosecutor for the ICTY and the ICTR into two separate positions. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

separate. The permanent seat and location of the first (and only) trial of the IMT were different, whereas they were the same for the IMTFE. The IMT's proceedings were held at the Palace of Justice in Nuremberg, Germany, even though the permanent seat of that tribunal was designated as Berlin.¹⁸ The IMTFE was held in the auditorium of the old Japanese War Ministry in the Ichigaya neighborhood of Tokyo, Japan, which was designated as the permanent seat of that tribunal.¹⁹ The Palace of Justice was much grander, which led some observers to argue that the IMTFE's venue was inappropriate and second-rate in comparison.²⁰

There were two key differences in the jurisdiction of the two tribunals. First, the IMTFE required a nexus between the crimes allegedly committed by defendants and "Crimes against Peace,"²¹ whereas the IMT required no such prerequisite for prosecution. If individuals sought by the IMTFE had not allegedly committed "Crimes against Peace," then they would have to be addressed through alternative transitional justice options.²² The other of these differences concerned the ability of each tribunal to declare groups or organizations to be criminal: the IMT could do so, whereas the IMTFE could not.²³

Although, as noted above, both tribunals contained sentence reduction provisions, the authorizing body of each varied. In the case of the IMT, the authority empowered with considering a reduction in the severity of sentences was the Control Council of Germany, an organization comprising the principal victors of WWII's European Theatre. By comparison, in the case of the IMTFE, the SCAP was singularly empowered to consider reducing the severity of sentences. However, MacArthur could not unilaterally order modifications to IMTFE sentences; by a directive of the Far Eastern Commission (FEC) (Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the U.K., the U.S., and the U.S.S.R.), he had to consult first with their representatives in Japan before exercising those powers.²⁴

There were differences in the number and type of official languages of the two tribunals. Both tribunals' charters required

18. IMT Charter, *supra* note 7, art. 22.

19. IMTFE Charter, *supra* note 7, arts. 1, 14.

20. MINEAR, *supra* note 2, at 3.

21. The IMTFE charter defined "Crimes against Peace" as "the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." IMTFE Charter, *supra* note 7, art. 5(a).

22. IMTFE Charter, *supra* note 7, art. 5.

23. IMT Charter, *supra* note 7, art. 9.

24. Horwitz, *supra* note 13, at 482.

them to conduct proceedings in or to translate official documents into a language that the defendants understood, as well as any other language the tribunal deemed necessary or desirable.²⁵ Perhaps counterintuitively, even though the IMTFE had more participating states representing a greater number of native tongues than the IMT, it had half as many official languages. The IMT's proceedings were conducted—and all official documents were produced—in English, French, Russian, and the language of the defendant (German),²⁶ whereas there was only one official language of the IMTFE, English, besides the language of the defendant (Japanese).²⁷ The IMT's languages were those spoken by the organizing authorities of the tribunal. A similar principle applied in the case of the IMTFE would have made translations and interpretations prohibitively unwieldy, so the participating states chose English as the only common language.²⁸

The charters of the IMT and the IMTFE differed on whether they explicitly prohibited complaints against their respective tribunal's legality, jurisdiction, and senior judicial staff. The IMT Charter declares: "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel."²⁹ The IMTFE Charter contained no similar prohibition.

Finally, there is a distinction between the names given to these two tribunals that were to adjudicate alleged atrocity perpetrators from Germany and Japan. The International Military Tribunal *for the Far East* includes in its title a geographic focus of that tribunal, whereas the IMT does not. One reason may be that when establishing the IMT, the Allies had not yet made a decision to establish a transitional justice institution to address the Japanese. A second possible reason is that the Allies considered the IMT to be the dominant and central of the two tribunals.

B. Staffs

The staffs of the IMT and the IMTFE differed considerably. For one, the size of and selection system for the benches were different. The IMT had four judges and four alternates. One judge and his alternate were directly appointed by each of the signatories to the IMT Charter, the Big Four (France, the U.K., the U.S., and the U.S.S.R.). By comparison, the IMTFE had eleven judges and no alternates. One IMTFE judge was nominated by each of the eleven states that participated in Japan's defeat and

25. IMT Charter, *supra* note 7, arts. 16(a), 16(c), and 25; IMTFE Charter, *supra* note 7, art. 9(b).

26. IMT Charter, *supra* note 7, art. 25.

27. IMTFE Charter, *supra* note 7, art. 9(b).

28. Horwitz, *supra* note 13, at 485, 488.

29. IMT Charter, *supra* note 7, art. 3.

was subsequently represented on the FEC, and was then confirmed by MacArthur.³⁰ So, compared to the IMT, the IMTFE's bench had almost three times as many seats and was represented by almost three times as many states (including all of those states that were represented at the IMT), and the states that were represented on the IMTFE's bench theoretically could not—as had those that were represented on the IMT's bench—directly select their judicial delegates.

The nationality of, and selection system for, the chief judges, who served as the tribunals' presidents, varied by tribunal. The IMT Charter ordered that the chief judge/president of that tribunal was to be selected by a majority vote among the IMT's judges; was to rotate for successive trials (of which there were none); and, if not already, was to be the representative of the state within whose territory a trial session was held (which it never was since the first and only trial was held in Germany).³¹ The IMT judges elected a Briton, Sir Geoffrey Lawrence, to be chief judge/president of the IMT. MacArthur appointed an Australian, Sir William Flood Webb, the Chief Justice of the Supreme Court of Queensland, to be the chief judge/president of the IMTFE.³²

The number and nationality of, and selection system for, the chief prosecutors varied per tribunal, as well. The IMT had four chief prosecutors, one from each of the Big Four signatories to the IMT Charter, and each of these states directly appointed its own chief prosecutor.³³ In contrast, the IMTFE had one chief prosecutor, an American (Keenan), whom MacArthur unilaterally appointed.

Additionally, there were differences between the number and nationality of, and selection system for, associate prosecutors. In the case of the IMT, just as with the chief prosecutors and judges, each of the Big Four organizing states could directly appoint its own associate prosecutors to assist their chief prosecutors. Although, as noted above, MacArthur appointed the chief prosecutor of the IMTFE, each of the "United Nations" that had been at war with Japan and subsequently comprised the FEC could appoint its own associate prosecutor to assist the chief prosecutor, subject to confirmation by MacArthur.³⁴ As with their respective benches, in comparison to the IMT, the IMTFE's International Prosecution Section represented almost three times as many states (including all of those that were represented by

30. MINEAR, *supra* note 2, at 4; HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 77 (1999).

31. IMT Charter, *supra* note 7, art. 4(b).

32. Horwitz, *supra* note 13, at 488; MINEAR, *supra* note 2, at 5; BALL, *supra* note 30, at 77.

33. IMT Charter, *supra* note 7, art. 14.

34. IMTFE Charter, *supra* note 7, art. 8(b).

associate prosecutors at the IMT) but could be rejected by MacArthur.

Finally, the tribunals differed in whether they included Americans as defense counsel. For the IMT, the USG did not provide Americans to serve as defense counsel alongside Germans, whereas for the IMTFE, the USG did provide Americans to serve as defense counsel alongside Japanese.

C. Operations

The most significant operational difference between the IMT and the IMTFE concerned their respective indictments. The IMT's indictment contained four counts, whereas the IMTFE's contained fifty-five. Additionally, the IMT's indictment charged twenty-four individuals and included six organizations, whereas the IMTFE's indictment charged twenty-eight individuals and did not include any organizations.

IV. CONCLUSION

The designs, staffs, and operations of the IMT and the IMTFE were clearly different in significant ways, calling into question just how accurate it is to describe them as "twin" tribunals.³⁵ However, these divergent features should not be overstated. The IMT and the IMTFE were both narrowly multilateral *ad hoc* military tribunals established to address the same general war and with limited jurisdictions but the power to impose the death penalty. These two tribunals were thus more similar to each other than they were to any other international criminal tribunals since, such as the ICTY, the ICTR, the Special Court for Sierra Leone (SCSL),³⁶ the International Criminal Court (ICC),³⁷ and the

35. See, e.g., YVES BEIGBEDER, JUDGING WAR CRIMES AND TORTURE: FRENCH JUSTICE AND INTERNATIONAL CRIMINAL TRIBUNALS AND COMMISSIONS (1940-2005) 257 (2006) (describing the IMTFE as "a twin" to the IMT).

36. On January 16, 2002, the UN and the Sierra Leone government jointly established the SCSL to address atrocities committed in Sierra Leone since November 30, 1996, the date Sierra Leone's president, Ahmad Tejan Kabbah, and the leader of Sierra Leone's Revolutionary United Front, Foday Sankoh, signed what would be a short-lived peace agreement. See The Secretary-General, *Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/2002/246 (Mar. 8, 2002) (containing, in App. II, the January 16, 2002 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone).

37. On July 17, 1998, 120 states adopted the Rome Statute, the treaty establishing the ICC, the world's first permanent international criminal tribunal. On July 1, 2002, the Rome Statute entered into force, after sixty states ratified it. See Rome Statute of the International Criminal Court, *adopted and opened for signature July 17, 1998*, 2187 U.N.T.S. 90.

Extraordinary Chambers in the Courts of Cambodia (ECCC),³⁸ all of which are civilian tribunals and were established with the involvement of the broader international community (whether through the UN or, in the case of the ICC, through a global conference) to address different conflicts, and none of which authorized capital punishment.³⁹

Future research concerning the IMT and the IMTFE should consider whether and, if so, how these two tribunals' similarities and differences affected their results, including their durations and judgments. Whereas the IMT's proceedings spanned less than one year (from November 20, 1945, to October 1, 1946), the IMTFE's proceedings took approximately two and a half years (from May 3, 1946, to November 12, 1948). As such, the IMTFE's trial overlapped with but lasted about three times as long as the IMT's.

The IMT convicted nineteen individuals, twelve of whom were sentenced to death (ten of whom were actually executed⁴⁰), while

38. On August 10, 2001, the Cambodian king, Norodom Sihanouk, signed a law, amended on October 27, 2004, establishing "the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea." See The Law on the Establishment of the Extraordinary Chambers as amended, available at <http://www.eccc.gov/kh/english/law.list.aspx>. On June 6, 2003, the UN and the Cambodian government reached an agreement, which entered into force on April 29, 2005, concerning the establishment and operation of the ECCC. The ECCC was established to address the atrocities committed in Cambodia between April 17, 1975 and January 6, 1979, during the Khmer Rouge's reign. See The Secretary-General, *Report of the Secretary-General on the Khmer Rouge Trials*, U.N. Doc. A/60/565 (Nov. 25, 2005); The Secretary-General, *Report of the Secretary-General on the Khmer Rouge Trials*, U.N. Doc. A/59/432/Add.1 (Nov. 29, 2004); The Secretary-General, *Report of the Secretary-General on the Khmer Rouge Trials*, U.N. Doc. A/59/432 (Oct. 12, 2004); The Secretary-General, *Report of the Secretary-General on the Khmer Rouge Trials*, U.N. Doc. A/58/617 (Dec. 3, 2003); G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (May 22, 2003) (containing, in the Annex, the Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea). For the complicated chronology of the establishment of the ECCC, see Chronology of Establishment of ECCC: Extraordinary Chambers in the Courts of Cambodia, <http://www.eccc.gov/kh/english/backgroundECCC.aspx> (last visited Sept. 15, 2010).

39. See generally WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* (2006); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (3rd ed. 2007); David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STANFORD J. INT'L L. 1 (2007); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2001-02).

40. Those sentenced to death by hanging were Hermann Wilhelm Goering (who committed suicide on October 15, 1946, two hours before his scheduled

the remainder were sentenced to various lengths of imprisonment (three to life imprisonment,⁴¹ two to twenty years imprisonment,⁴² one to fifteen years imprisonment,⁴³ and one to ten years imprisonment⁴⁴). The IMT acquitted three individuals of all charges⁴⁵ but did not sentence two individuals: one had committed suicide before the verdict⁴⁶ and one had been judged unfit for trial.^{47, 48}

By comparison, the IMTFE convicted twenty-five individuals, seven of whom were sentenced to death (all of whom were executed⁴⁹), while the remainder were sentenced to various lengths of imprisonment (sixteen to life imprisonment,⁵⁰ one to twenty years imprisonment,⁵¹ and one to seven years imprisonment⁵²). The IMTFE did not fully acquit any defendants and did not sentence three individuals: two died during the trial⁵³

execution), Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyss-Inquart, and Martin Bormann (who was tried, convicted, and sentenced in absentia, but was never apprehended).

41. Those sentenced to life imprisonment were Rudolf Hess, who died in prison in 1987; Walter Funk, who was released in 1957 and died in 1960; and Erich Raeder, who was released in 1955 and also died in 1960.

42. Those sentenced to twenty years imprisonment were Baldur von Schirach and Albert Speer, both of whom served their full sentences, being released in 1966. Schirach died in 1974 and Speer died in 1981.

43. The individual sentenced to fifteen years imprisonment was Konstantin von Neurath, who was released in 1954 (before serving his full sentence) and died in 1956.

44. The individual sentenced to ten years imprisonment was Karl Doenitz, who served his full sentence, was released in 1956, and died in 1981.

45. The individuals who were acquitted were Hjalmar Schacht, Franz von Papen, and Hans Fritzsche.

46. Robert Ley had committed suicide on October 25, 1945.

47. Gustav Krupp von Bohlen und Halbach had been judged medically unfit for trial.

48. On October 1, 1946, the IMT's president pronounced the sentences on the defendants. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, 587-89 (1948), *available at* <http://avalon.law.yale.edu/imt/10-01-46.asp>.

49. Those sentenced to death by hanging were Kenji Dohihara, Koki Hirota, Seichiro Itagaki, Heitaro Kimura, Iwane Matsui, Akira Muto, and Hideki Tojo.

50. Those sentenced to life imprisonment were Sadao Araki, Kingoro Hashimoto, Shunroku Hata, Kiichiro Hiranuma, Naoki Hoshino, Okinori Kaya, Koichi Kido, Kuniaki Koiso, Jiro Minami, Takazumi Oka, Hiroshi Oshima, Kenryo Sato, Shigetaro Shimada, Toshio Shiratori, Teichi Suzuki, and Yoshiji Umezu.

51. The individual sentenced to twenty years imprisonment was Shigenori Togo.

52. The individual sentenced to seven years imprisonment was Mamoru Shigemitsu.

53. Yosuke Matsuoka and Osami Nagano died during the trial, in 1946 and 1947, respectively.

and one had been judged unfit for trial.^{54, 55}

Social science literature, including that focusing on international institutions, has often explored the extent to which organizational form affects function and to which process affects outcome.⁵⁶ The differences in the lengths, verdicts, and sentences of the IMT and the IMTFE may be at least partially explained by their distinctive features. Additional research might help determine which characteristics of international criminal courts and tribunals contribute to their different results, and which may not. Such an exploration would further exemplify the intersection between the fields of international law and international relations.⁵⁷

54. Shumei Okawa had been judged medically unfit for trial.

55. On November 12, 1948, the IMTFE's president pronounced the sentences on the defendants. 103 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,854-58 (R. John Pritchard ed., 1981).

56. See, e.g., THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS (Barbara Koremenos, Charles Lipson & Duncan Snidal eds., 2004).

57. Dr. Anne-Marie Slaughter is a leader in exploring—and, as the current Director of Policy Planning at the U.S. Department of State, working at—the intersection of the fields of international law and international relations. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

FIGURE 1: COMPARISON OF IMT AND IMTFE

		IMT	IMTFE
LOCATION	PERMANENT SEAT	Berlin, Germany	Tokyo, Japan
	VENUE	Palace of Justice, Nuremberg	Auditorium of old Japanese War Ministry, Tokyo
JUDGES	TOTAL NUMBER	4 main + 4 alternates	11 main + 0 alternates
	SELECTION SYSTEM	Each of the Big Four directly appointed its own main and alternate judges	Each of the 11 states that was at war with Japan and then comprised the FEC nominated its own judge, confirmed by SCAP
	# AND LIST OF STATES REPRESENTED BY JUDGES	4 (1 main and alternate judge from each of the Big Four): - France - U.K. - U.S. - U.S.S.R.	11 (1 from each of the states that was at war with Japan and then comprised the FEC): - Australia - Canada - China - France - India - the Netherlands - New Zealand - the Philippines - U.K. - U.S. - U.S.S.R.
	NATIONALITY AND NAME OF CHIEF JUDGE / PRESIDENT OF THE TRIBUNAL	U.K.: Sir Geoffrey Lawrence	Australia: Sir William Webb
	SELECTION SYSTEM FOR CHIEF JUDGE / PRESIDENT OF THE TRIBUNAL	Chosen by majority vote among judges	Appointed by SCAP

PROSECUTORS	SELECTION SYSTEM	Each of the Big Four could directly appoint its own associate prosecutors	Each of the 11 states that was at war with Japan and then comprised the FEC could appoint its own associate prosecutors, subject to SCAP confirmation
	# AND LIST OF STATES REPRESENTED AMONG PROSECUTORS	4 (the Big Four)	11 (states that were at war with Japan and then comprised the FEC)
	# OF CHIEF PROSECUTORS	4 (one from each of the Big Four)	1
	NATIONALITY AND NAME OF CHIEF PROSECUTOR(S)	- France: François de Menthon and Auguste Champetier de Ribes - U.K.: Hartley Shawcross - U.S.: Robert H. Jackson - U.S.S.R.: Gen. R. A. Rudenko	U.S.: Joseph B. Keenan
	SELECTION SYSTEM FOR CHIEF PROSECUTOR(S)	Each of the Big Four directly appointed its own chief prosecutor	Appointed by SCAP
	SUBJECT-MATTER JURISDICTION	- Crimes against peace - War crimes - Crimes against humanity	- Crimes against peace - War crimes - Crimes against humanity
JURISDICTION	REQUIRED NEXUS WITH CRIMES AGAINST PEACE?	No	Yes
	ABILITY TO DECLARE GROUPS OR ORGANIZATIONS CRIMINAL?	Yes	No
	# OF COUNTS IN INDICTMENT	4	55

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DEFENDANTS	ORGANIZATIONS INDICTED?	Yes (6)	No
	# OF INDIVIDUALS INDICTED	24	28
	# OF INDIVIDUALS CONVICTED	19	25
	# OF INDIVIDUALS SENTENCED TO DEATH	12	7
	# OF INDIVIDUALS SENTENCED TO DEATH AND EXECUTED	10	7
	# OF INDIVIDUALS SENTENCED TO DEATH BUT NOT EXECUTED	2 (1 committed suicide and 1 was convicted and sentenced <i>in absentia</i> but was never apprehended)	0
	TOTAL # OF INDIVIDUALS SENTENCED TO IMPRISONMENT	7	18
	# OF INDIVIDUALS SENTENCED TO LIFE IMPRISONMENT	3	16
	# OF INDIVIDUALS SENTENCED TO 20 YEARS IMPRISONMENT	2	1
	# OF INDIVIDUALS SENTENCED TO 15 YEARS IMPRISONMENT	1	0
	# OF INDIVIDUALS SENTENCED TO 10 YEARS IMPRISONMENT	1	0
	# OF INDIVIDUALS SENTENCED TO 7 YEARS IMPRISONMENT	0	1

	# OF INDIVIDUALS ACQUITTED OF ALL CHARGES	3	0
	# OF INDIVIDUALS JUDGED UNFIT FOR TRIAL (CASE DISMISSED)	1	1
	# OF INDIVIDUALS DIED DURING TRIAL (CASE DISMISSED)	1	2
	MAXIMUM PUNISHMENT	Death penalty	Death penalty
JUDGMENT AND SENTENCE	SENTENCE REDUCTION PROVISION?	Yes, by Control Council for Germany, which could only lessen severity of punishment	Yes, by SCAP, who could only lessen severity of punishment
	DURATION OF TRIAL	Nov. 20, 1945 – Oct. 1, 1946 (less than 1 year)	May 3, 1946 – Nov. 12, 1948 (approx. 2.5 years)
MISC.	ESTABLISHMENT AUTHORITY	Executive agreement among Big Four	Executive order of SCAP
	# AND LIST OF OFFICIAL LANGUAGES	4: - English - French - Russian - language of the defendant (German)	2: - English - language of the defendant (Japanese)
	PROHIBITION AGAINST CHALLENGING TRIBUNAL OR SENIOR JUDICIAL STAFF?	Yes	No
	AMERICANS PROVIDED TO SERVE AS DEFENSE COUNSEL?	No	Yes