A NEW STUDY ON THE DEATH PENALTY VOTE AT THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, TOKYO

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Abstract

The popular view that the result of the voting for imposing death penalty at the Tokyo Trial was six to five needs to be qualified. First, only ten judges took part in the vote, as the judge of France Henri Bernard abstained. Second, voting results for the seven culprits who were sentenced to death varied, with some six to four and the others seven to three. For example, Hirota Koki should have received a voting result of six to four, while Tojo Hideki was sentenced to death by a vote of seven to three. Although the judges at the International Military Tribunal for the Far East, Tokyo differed in their opinions on certain specific issues, they all adhered to the principle of judicial independence faithfully, which warranted the legitimacy of their judgment on the basis of international rule of law.

***Key Words**: Tokyo Trial, Sentence, Death Penalty*

> "With what then will you recompense kindness? Recompense injury with justice, and recompense kindness with kindness. "
>
> ——Confucius

I. PREFACE

After the Second World War ended the International Military Tribunal for the Far East (hereinafter "the Tribunal") was established in Tokyo by the Allied Supreme Command. In accordance with the Cairo Declaration on 1st December 1943, the Potsdam Proclamation on 26th July 1945, Japan's Instrument of Surrender on 2nd September 1945 and Resolution of Moscow Conference of Foreign Ministers on 26th December 1945. According to the Charter of The International Military Tribunal for the Far East, the purpose of the Tribunal was for "the just and prompt trial and punishment of the major war criminals in the Far East" (Art.1). The Tribunal consisted of judges from 11 countries including the United States, China, the United Kingdom, Soviet Union, Australia, Canada, France, Netherlands, New Zealand, India and Philippines, and held trials for 28 major war criminals[1] who were prosecuted by the International

[1] Generally referred to as "Class A war criminals". During the trial, Matsuoka Yosuke and Nagano Osami died of illness, and the trial against Okawa Shumei were called to an end for he was found with

Procuratorial Department in the first batch. The court sessions opened on 3rd May 1946 and closed on 12th November 1948. It lasted for over two years and a half, during which the hearings were held for 423 days and the court called for 831 times, wherein 49,858 pages English trial memos and 1445 pages English judgments as showed in memos were produced, 423 witnesses were called, and 3915 items of evidences were admitted. Its scale was thus far larger than the more renown post-war international trial, namely the Nuremberg Trial. This trial of the century was held in Tokyo, so it was generally referred to as the Tokyo Trial.[2]

Time flies. Looking back, many questions related to historical facts still remain unclarified.

In the film *The Tokyo Trial*, directed by Gao Qunshu in 2006, the climax brings back the scene of conviction and the sentencing in the judges' meeting back then: Chinese judge Mei Ju-ao, after referring to the unanimous consent on defendant's culpability, forcefully argued for the legitimacy of imposing death penalty. He debated with the Judge of France Henri Bernard, the Judge of India R. M. Pal and President of the Tribunal Sir William Webb, and the debate was followed by an anonymous voting by all judges. In a breath-taking atmosphere, the eleven judges finally decided in favour of imposing death penalty by the voting result of six to five.

The film contains, however, two defects. First, with regard to the conviction: Not all judges in the scene agreed to the defendants' culpability, which can be evidenced by the Judge Pal's consistent stance that all defendants were innocent. Second, in terms of the actual sentencing. The film simplifies and blurs the procedural requirements of the complicated voting process for death penalty by the use of theatrical devices. Upon further research, many questions would quickly arise: Whether the voting result of six to five was generally applied to all the convicted war criminals, or merely to some of them? If it was the latter, how was the voting result for the other condemned criminals? What was the debate like which led to the voting result? And so forth. This article does not intend to criticize the director of the film. In fact, a voting result of six to five has been generally endorsed by Chinese academia, and other academics seemed to have never discussed the issues in details either due to the particularity of the questions or a difference in research

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"mental disease" and "remained unrecovered" upon judgment. Therefore, there remained only 25 criminals when the Tribunal read the final judgment.

[2] *See* YUANDONG GUOJI JUNSHI FATING TINGSHEN JILU (远东国际军事法庭庭审记录) [TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST] (Beijing & Shanghai: Comm. for Literature and Collections of Tokyo Trial eds., National Library of China Publishing House & Shanghai JiaoTong Univ. Press 2013).

interests. In this article, I question the popular view on six-to-five-votes, aiming to bring back to life the true situation of death penalty sentencing, while further sharing some personal insights and comments based on the historical evidence and in-depth analysis of them.

II. THE ORIGIN OF AND QUERIES ABOUT THE POPULAR VIEW

The view generally endorsed by Chinese academia, namely that death penalty is imposable by means of a six to five voting result, shall be traced back to Ni Jiaxiang's book *The Inside Story of Tokyo Trial*, published by Asian Century Press. The book was written and published in December 1948. Since the Tribunal only finished reading its judgment and announced that the court closed on 12th November, 1948, that might be the earliest work on the Tokyo Trial in China. The book devoted the following four paragraphs to the voting of whether to impose death penalty:

> "According to Judge Mei's explanation, whether to impose death penalty was the most heatedly debated topic among the eleven judges and they disagreed hugely with one another. The eleven judges represented eleven countries whose laws differed from one another on the imposition of death penalty, and so they themselves also held different views on death penalty.
>
> As both Soviet Union and New Zealand have abolished death penalty, judges representing these two countries naturally were against sentencing the war criminals to death passionately. The UK and Australia also partly abolished death penalty, and so judges representing the two countries were unwilling to vote for it, and Sir William even suggested that the war criminals should be banished to a deserted island instead. As for Judge Pal, he stuck to the view that all defendants should walk free. Consequently, when everyone came together to discuss the issue of death penalty at the judges' meeting, the debate was so intense that it got colour into everyone's face and steam into the room, and the final six to five vote for hanging did not come without difficulties indeed.
>
> Judge Mei continued: For that (the imposition of death penalty) I have spared no effort in bringing my fellow judges about, and for an entire week I was not able to sleep. If those criminals who led the Japanese army who invading China and committed crimes that were evil beyond comparison could not

> even be sentenced to death, I will be too shameful of myself to return to China and face my fellow Chinese men!
>
> We shall all remember that the repayment of our bloody debt definitely did not come with ease!"[3]

All subsequent introductions and research of the Tokyo Trial in China have followed as well as built upon the above account. For example Fang Jinyu's *The Judge of China at the Tokyo Trial*, which was the first article that introduced Mei Ju-ao and thus had a significant influence in China, wherein the author mentioned that:

> "The judges had not yet came to voting, but one can see from the concluding statements of the debate that only a minority of the judges supported imposing death penalty. What then? That final debate on sentencing had worried Mei Ju-ao so much that his hair all turned white, just as what happened to Wu Zixu when he was trying to pass Shao Guan. Indeed, the glory, life and death of the individual was of trivial importance, while for the debt of life owed to millions of Chinese people, a repayment must be sought! For one whole week, food became tasteless to the judge of China, and his bed no longer capable of providing any rest, as he spent days and nights negotiating with other judges. Much heart and thoughts he had gave, many words he had uttered, and finally the day for voting came. With a result of six to five, the International Military Tribunal of the Fast East passed the solemn judgment of sentencing culprits including Tojo Hideki, Dohihara Kenji and Matsui Iwane to death by hanging."[4]

However, returning to Ni Jiangxiang's book, two things invite further questioning:

First, the Judges' meeting had its regulations in secrecy. As a principle the Judges were not allowed to disclose or discover the

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[3] NI JIAXIANG (倪家襄), DONGJING SHENPAN NEIMU (东京审判内幕) [THE INSIDE STORY OF TOKYO TRIAL] 90-91 (The Asian Century Press 1948).

[4] Fang Jinyu (方进玉), *Dongjing Fating de Zhongguo Faguan* (东京法庭的中国法官) [*The Judge of China at the Tokyo Trial*], 6 LIAOWANGXINWENZHOUKAN (瞭望新闻周刊) [OUTLOOK WEEKLY] 42-44 (1986); *see also* Fang Jinyu (方进玉), *Dongjing Fating de Zhongguo Faguan Xu* (东京法庭的中国法官续) [*The Judge of China at the Tokyo Trial (sequel)*], 7 LIAOWANGXINWENZHOUKAN (瞭望新闻周刊) [OUTLOOK WEEKLY] 44-46 (1986). *Dongjing Fating de Zhongguo Faguan* is the earliest article on Mei Ju-ao that published in mainland China after 1949 and it was serialized on Outlook Weekly in volumes 6 and 7, 1986. Chinese literature on Tokyo Trial often refer to this article.

opinions or votes on either conviction or sentencing.[5]Accordingly, one must question which parts, in Ni Jiaxiang's account, were indeed the original words from Mei Ju-ao and which parts were the author's own add-ups only. The evidence for such clarification is yet lacking.

Looking to the memoir of Mei Ju-ao recorded in later years of his life, in the manuscript of the book *The International Military Tribunal for the Fast East*, we find that Mei Ju-ao only said the following:

> "Besides the judge of India who opined that all defendants are innocent and thus should be released, (a) certain judge(s) also opined that the Tribunal should not impose death sentence and use life imprisonment as the most severe penalty in sentencing, due to the fact that in the countries/country they represented, death penalty has been abolished already. Such a stance was not endorsed by the majority of judges, and thus the Tribunal still sentenced the seven defendant-culprits who held most of the criminal liabilities to death. Due to the fact that certain judges refused to vote for imposing death penalty to any of the defendants (including judges who stated that the death penalty clause should not be applied), and that a minimum vote of six is required for imposing any punishment, the number of defendants being sentenced to death at the Tribunal was far less than that of the Nuremberg Trial." [6]

We may note that despite explicitly talking about the position of the judge of India, Mei Ju-ao only used indefinite words like '(a) certain judge(s)' when referring to the opinions of other judges. He mentions not a single word with regard to the death sentences, that were passed by the voting result of six to five. Unfortunately the writing of the book *The International Military Tribunal of the Fast East*, which Mei Ju-ao started in 1962 and expected to finish in 1968, was interrupted by the Cultural Revolution, leaving only four out of the seven chapters completed.[7] The issue of sentencing was by then still in the writing plan.[8] Since Mei Ju-ao passed away in 1973, the

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[5] MEI JU-AO (梅汝璈), YUANDONG GUOJI JUNSHI FATING (远东国际军事法庭) [THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST] 48 (Law Press-China 2005).

[6] MEI JU-AO (梅汝璈),DONGJING DA SHENPAN–YUANDONG GUOJI JUNSHI FATING ZHONGGUO FAGUAN MEI JU-AO RIJI (东京大审判—远东国际军事法庭中国法官梅汝璈日记) [THE TOKYO TRIAL — A DIARY OF MEI JU-AO, MEMBER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST] 112 (Jiangxi Education Publishing House 2005).

[7] Mei Xiao'ao (梅小璈), *Postscript* to Mei, *supra* note 5, at 316.

[8] Mei, *supra* note 5, at 48. Mei Ju-ao said that he planned to discuss in detail "the statement of protest of President Webb and other judges, and the actual voting situation of conviction and sentence by the court". Such a plan can also reflect the complexity of the situation to a certain extent.

book was left unfinished. On top of that, most of Mei Ju-ao's diaries during the Tokyo Trial period were also lost in Cultural Revolution (the published diaries only include entries for the short period from 20th March, 1946 to 13th May, 1946).[9] Therefore, the detailed account of the sentencing from Mei Ju-ao who personally experienced the judges' meeting was not available to us, as least for now.

Second, according to Ni Jiaxiang, one among the eleven judges: If the Judges of the Soviet Union, New Zealand, UK, Australia and India had all voted against death penalty due to the fact that death penalty was abolished in their own countries, that entails the other six judges, namely Judges from China, US, France, Netherlands, Canada and Philippines must unanimously agree on imposing death penalty to achieve the given six to five voting result. However, referring to the dissenting judgments of Netherland's Judge Röling and France's Judge Bernard, one will instantly discern the complexity of the issue. One most salient example is Judge Röling's opinion that Hirota Koki is innocent.[10] As a matter of fact, Hirota was indeed sentenced to death by the Tribunal, which means that the opinion of the six Judges who were presumed to always vote unanimously for death penalty did not always come into agreement, while the other five Judges did not always vote against death penalty either.

Accordingly, the popular belief that death sentences were passed by six to five was not grounded by sufficient evidence and was logically problematic, and thus in need of careful re-examination.

III. THE HISTORICAL SETTING OF THE SENTENCING ISSUE AT THE TRIAL

The Tribunal was formed by judges from eleven countries: Sir William Webb, Judge of Australia who also acted as the president of the tribunal; John P. Higgins, Judge of the United States (resigned three months after the appointment and was succeeded by Gen. Myron Cramer); Mei Ju-ao, Judge of China; Lord Patrick, Judge of the United Kingdom; Gen. I.M. Zaryanov, Judge of Soviet Union; E. Stuart McDougall, Judge of Canada; Henri Bernard, Judge of France; B. V. A. Röling, Judge of Netherlands; E. Harvey Northcroft, Judge of New Zealand; R. M. Pal, Judge of India, and Delfin Haranilla who was the Judge of Philippines.[11]

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[9] *See* Mei,*supra* note 7, at 158.

[10] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 789 (Neil Boister & Robert Cryereds, Oxford Press 2008).

[11] Mei, *supra* note 5, at 59.

In accordance with the Charter of the International Military Tribunal for the Far East, the Tribunal "shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just." (Art.16), and in terms of procedure the convictions and sentences shall be made by a majority vote. (Art. 4(2)).

A. For or Against Death Sentences: The Sentencing Tendencies in Judicial Opinions

Judgment of the Tribunal found all 25 defendants guilty, while their individual sentences can be categorised into three categories or four classes:

1. Death by hanging. Seven defendants received such penalty, including Dohihara Kenji, Hirota Koki, Itagaki Seishiro, Kimura Heitaro, Muto Akira, Tojo Hideki, and Matsui Iwane.
2. Life imprisonment. Sixteen defendants received such penalty, including Araki Sadao, Hashimoto Kingoro, Hata Shunroku, Hiranuma Kiichiro, Hoshino Naoki, Kaya Okinori, Kido Koichi, Koiso Kuniaki, Minami Jiro, Oka Takasumi, Oshima Hiroshi, Sato Kenryo, Shimada Shigetaro, Shiratori Toshio, Suzuki Teiichi, and Umezu Yoshijiro.
3. Imprisonment. Two defendants received such penalty, which could be further categorised into two classes:
    a. Twenty years of imprisonment, for Togo Shigenori, and
    b. Seven years of imprisonment, for Shigemitsu Mamoru.

The judgment was drafted jointly by the majority Judges, namely by the Judges of the United States, China, Soviet Union, United Kingdom, Canada, New Zealand and Philippines. Apart from the majority judgment, five Judges released their separate opinions outside the court, among whom the Australian Judge delivered a Separate Opinion, the Filipino Judge a Concurring Opinion in addition to his contribution in the judgment drafting; Judges of France and Netherlands both delivered Dissenting Opinions, and the Indian Judge delivered a judgment on his own. Due to the confidential nature of the meetings of Judges, those published judgment and opinions are crucial first-hand materials for studying the conviction and sentencing opinions of the individual Judges. In the light of the focus of this article, I shall concentrate on the sentencing aspect of such materials.

For Sir. William Webb, since his lordship considered that no penalty could fully realise the purpose of punishment (which the Tribunal was established to fulfil), no unreserved support towards sentencing was ever fledged. At the same time, his lordship also

considered that the punishment proposed was neither disproportionately severe nor lenient, so there was no dissenting record from his lordship either. With regard to death sentence, Sir. William made two points. First, his lordship considered that the pains from being confined to a secluded place outside Japan for lifetime may be of more deterrence to the criminals than simply putting them to death, be it by hanging or gunshot. Second, the age of the criminals at the time of sentencing should be taken into consideration, as it would be inappropriate to sentence those elderly defendants to death.[12]

Judge Delfin Haranilla opined that some of the penalties imposed by the Tribunal were "too lenient, not exemplary and deterrent, and not commensurate with the gravity of the offence or offences committed".[13]

Judge Henri Bernard opined that the most condemnable crimes were committed by the Japanese police force and navy, although for which some defendants must take main responsibility, and the rest of the defendants were also guilty in that they obviously failed to discharge their humanitarian responsibilities towards the prisoners of war. Judge Bernard pointed out that although he could not force his own view into the adjudicating process, it was highly arguable whether it would be more appropriate to caution rather than punish, how the punishment could be more fair.[14]

Judge Röling's opinion can be learnt in three parts:

First, most of the punishment imposed was appropriate. In his opinion, six defendants were rightly sentenced to death: Dohihara Kenji, Itagaki Seishiro, Kimura Heitaro, Matsui Iwane, Muto Akira, and Tojo Hideki. Eleven defendants were rightly sentenced to life imprisonment: Araki Sadao, Hashimoto Kingoro, Hiranuma Kiichiro, Hoshino Naoki, Minami Jiro, Koiso Kuniaki, Kaya Okinori, Oshima Hiroshi, Shiratori Toshio, Suzuki Teiichi, Koiso Kuniaki and Umezu Yoshijiro.

Second, the Judge opined that three of the defendants who received life imprisonment should have been sentenced to death: Oka Takasumi, Sato Kenryo and Shimada Shigetaro.

Lastly, the Judge opined that five of defendants who received sentences upon conviction were actually innocent, which included Hirota Koki who received death penalty, Hata Shunroku and Kido

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[12] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 638-39.

[13] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 659.

[14] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 677.

Koichi who received life imprisonment, and Togo Shigenori and Shigemitsu Mamoru who received imprisonment sentence.[15]

Judge Pal opined that all defendants should be found innocent, and none of the charges in the indictment had been successfully established against them.[16]

In view of the opinions of the Judges mentioned above, a few points can be made regarding the issue of death penalty:

Four Judges, namely Judges of Australia, Philippines, Netherlands and India, have made their opinions very clear on death penalty, be it objection or support. In particular, the Netherlands Judge gave his opinion regarding death penalty for each defendant individually. The Judge who was more ambivalent towards death penalty was from France, while he did agree with the Australian Judge on one point, as he also maintained doubt in respect of the decision of not prosecuting the Emperor of Japan. Compared with Sir William who was senior in age and preferred subtler expression of opinion in view of his lordship's position as the president of the Tribunal, the Judge of France, Bernard, was rather outspoken with his doubt. He stated that the double standard of prosecution is against international justice.[17]From such a strong stance, it may be logically tenable to infer that that Judge Bernard was possibly against the death penalty. For, if one accepts that the Emperor of Japan should be allowed to walk free, it then becomes a matter of speculation whether it could still be justified to sentence the other war criminals to death (as the criminals were simply executing the orders of the emperor), not to mention that Judge Bernard was also sceptical about the judicial power of the Tribunal itself and the justification of the crimes against peace. In conclusion, we should be able to draw that Judges of Australia, France and India had been consistent in their objection against the imposition of death penalty.

B. Did domestic laws influence the vote?

Ni Jiaxiang, Mei Ju-ao and Kiyose Ichiro who acted as the defence lawyer for the Japanese war criminals, had all discussed the influence of the respective domestic laws of the Judges' home countries had on death penalty when it came to voting at the Tribunal. We have already mentioned the comments from Ni and Mei. As for Kiyose Ichiro, he mentioned that "since there was no

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[15] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 775.

[16] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 1422.

[17] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 675.

death penalty in the criminal law of Soviet Union, (the Soviet Judge) was against death penalty".[18]

There are certainly merits behind such association drawn between the judges' domestic laws and their votes on death penalty at the Tribunal, but a few caveats must be added. First, the Charter did explicitly provide the Judges with the power to impose death penalty when appropriate. Indeed, as the New Zealand Judge explained in the letter his honour sent to the New Zealand Prime Minister, that although there was no death sentence provided in the New Zealand criminal law, since he had consented to sit on the Tribunal, he should impose death penalty in accordance with the Charter.[19] Therefore, Judges of the Tribunal were not obliged to refer to their own domestic laws when adjudicating at the Tribunal. Other supportive evidence on this point included the dissenting opinion delivered by the Netherlands Judge, which was not a procedure allowed in the law of Netherlands.[20] Judge Röling himself was recorded opining that international law courts are different from domestic courts, so was international law from domestic law, and thus that what was effective according to domestic law might not be effective according to international law.[21]

Second, the attitude of the Soviet Union Judge. According to Judge Röling's impression of Judge I.M. Zaryanov, the latter was actually supportive of severe punishment, which put him in alliance with the Chinese and Filipino Judges. However, the Judge declared that he could not vote for death penalty at the time of sentencing, because Soviet Union had abolished death penalty. That, according to Judge Röling, "was actually rather against his (Judge Zaryanov's) nature and feeling".[22] Since the statement that "Soviet Judge did not vote for death penalty" was from the Netherlands Judge who actually sat in the meetings of the Judges, it has considerable evidential value indeed. However, it is submitted that such a statement should still be questioned because of the constant changes in Soviet criminal law regarding to death penalty, as well as the jurisprudential issue with the retrospective effect of law.

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[18] NANJING DATUSHA SHILIAO JI 67 (南京大屠杀史料集 67) [COLLECTION OF HISTORICAL DOCUMENTS OF THE NANKING MASSACRE 67] 176 (Zhang Xianwen et al. eds. Jiangsu People's Publishing, Ltd. 2010).

[19] NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL, 258-59 (Oxford Univ. Press 2008).

[20] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 680.

[21] *See* B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER 29 (Polity Press 1994).

[22] *Id*. at 29-30.

Looking from a historical perspective, whether to adopt death penalty or not in the Soviet criminal law was subject to constant changes in the first half of twentieth century. On 26th October, 1917, the Second Congress of Soviet Union passed an order that death penalty should be abolished. However, in light of the change of social circumstances, the Soviet Union Council of People's Commissars soon passed another motion on 5th September, 1918, which promulgated the decree of The Red Terror which brought back death penalty. Merely a little more than one year later on 17th January, 1920, the Central Executive Committee of Soviet Union again passed the motion of promulgating the decree on the Permanent Abolition of the Extreme Punishment (Execution by Shooting), in which it decided that the ordinary courts could not impose death penalty. Four months afterwards, in light of the military invasion of the Entente countries, Soviet Union reintroduced death penalty as an exceptional punishment in the 1922 Criminal Code of the RSFSR, and such arrangement remained effective till 1947. On 26th May, 1947, the Presidium of the Supreme Soviet promulgated the decree on Abolition of Death Sentence, declaring that the death penalty should be abolished in entirety during time of peace. However, in 1950 and 1954 respectively, the Presidium promulgated the decree Passing Death Penalty for Traitors, Spies and Counter-revolutionaries, and the decree on The Criminal Liabilities of Aggravated Murders, revalidating death penalty for treason, espionage, and aggravated murders.[23]

Since the Tokyo Trial (1946-1948) coincided with the period of time when Soviet Union experienced the change from maintaining death penalty to the abolition of it, it could only be said that while the Tribunal was adjudicating, Soviet Union happened to be in a time when death penalty was for that period abolished (1947-1950). During the Nuremberg Trial (1945-1946), the then Soviet Judge, Major-General Nikitchenko did support death penalty without doubt. One salient example of such attitude was that he stated in his dissenting opinion that life imprisonment was too light a sentence for Rudolf Hess, Deputy Fuhrer to Adolf Hitler, and argued for imposing a death penalty on him instead.[24] Both Soviet judges to the international military tribunals came from military background,

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[23] Zhao Bingzhi & Yuan Bin (赵秉志&袁彬), *E'luosi Feizhi Sixing Jiqi Qishi* (俄罗斯废止死刑及其启示) [*The Abolition of Death Penalty in Russia and Its Lessons*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Dec. 2nd, 2009), http:// www.legaldaily.com.cn/fxy/content/2009-12/02/content_1189986.htm.

[24] *See* GUOJI JUNSHI FATING SHENPAN DEGUO SHOUYAO ZHANFAN PANJUESHU (国际军事法庭审判德国首要战犯判决书) [JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL ON THE KEY GERMAN WAR CRIMINALS] 247-50 (Tang Zongshun & Jiang Zuo trans., World Affairs Press 1955).

which may result in certain similarities in their personal perception of law.

It should be noted that the crimes committed by the Japanese war criminals were before the abolition of death penalty in Soviet Union in 1947, which made it possible for the Soviet Judge at the Tribunal to refer to the 1922 Criminal Code of the RSFSR wherein death penalty was allowed. According to the principle of non-retroactivity of law (also bearing in mind the exceptions for human rights protection), it would be interesting to explore whether the Soviet Judge was indeed compelled to rule on refusing death penalty, or was it really out of his pleasure to rule, thus by reversing the principle of non-retroactivity of law, in favour of the defendants? In addition, as the only Judge who did not speak English and needed the assistance of interpreters, did Gen. I.M. Zaryanov experience any difficulty in expressing ideas and communicating with other Judges?[25] More laws and historical evidence are needed to answer those questions.

Lastly, I wish to reiterate that discussion in the present section is based on my own doubts upon studying the available evidence, and before evidence that would either validate or dismiss such doubts should appear, I would for the time being stand by the statement of Judge Röling.

C. Predictions of the Sentencing Results

In light of existing documentaries, Judge Röling mentioned explicitly that Hirota Koki, who was the Prime Minister and Minister of Foreign Affairs of Japan, was sentenced to death upon the voting result of six to five. Röling thought that the five against votes were from Judges of Australia, France, Soviet Union, India and himself. Notably, Röling at one point also mentioned that Judge Bernard did not participate in the voting for sentencing, while he still counted him for one of the against votes.[26] Therefore, to be faithful to facts, the number of Judges who voted should be counted as ten instead of eleven.

If we take that there were ten Judges voting, according to what we have learned from the above discussion, Judges of China and Philippines who were outspoken about their support of death penalty contributed two affirmative votes, while Judges of Australia and India made two votes against. If we add on one more from the Soviet

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[25] Mei Ju-ao talked about that most of the members of the court could speak English, with the Soviet judge as the only exception. But he also mentioned that the Soviet judge was accompanied by oral interpreter who was extremely fluent in English and a few translators who worked very efficiently, and so the judge's work was not affected by his limit of language. *See* MEI, *supra* note 5, at 63-64.

[26] *See* B.V.A. RÖLING & ANTONIO CASSESE, *supra* note 21, at 64.

Union Judge, then there were 3 votes against death penalty. Combining the clear opinion of Judge Röling, we can then conclude that the voting results for the seven defendants who received death penalty would come down to one of the following two possibilities: Six to four, such as the result for Hirota Koki, or Seven to three, such as the sentence for Tojo Hideki.

I have two reasons for giving Tojo Hideki as the example for a greater majority vote of seven to three: First, in the indictment filed by the prosecution, more than fifty charges were made against him, which was the most among all the war criminals being prosecuted. Second, the Tribunal ruled that the two categories of charges against him, namely crimes against peace and the conventional war crimes, were both established. The relevant part in the judgment surpassed the rest of the judgment both in terms of length and the degree of condemnation of language, declaring that Tojo Hideki, among many other crimes, was the head behind the plots of Kwantung Army, played a decisive role in attack on Pearl Harbour, must be held chiefly liable for Japan's waging unprovoked wars against neighbouring countries and be held liable as the government head for ill-treating prisoners of war and civilian internees.[27] Under such circumstances, it was likely that Judges representing US and the Commonwealth countries (including UK, Canada and New Zealand) which all suffered aggressive wars (be it their native land or subsidiaries) would reach an agreement on sentencing Tojo Hideki to death.

As to Dohihara Kenji, Itagaki Seishiro, Kimura Heitaro, Muto Akira and Matsui Iwane, the other five who were also sentenced to death, if the Judges of US, UK, Canada and New Zealand would also reach an agreement, then their sentencing voting would also be seven to three. If not, then we need more materials and analysis to find out among the five criminals who had been sentenced upon six to four votes.

IV. FURTHER THOUGHTS

The Tribunal started to read its judgment since 4th November, 1948, and the sentencing finished on the afternoon of 12th November On 10th November, the Chinese Prosecutor Hsiang Che-chun provided two pieces of information in his telegram correspondence with the then Chinese Minister of Foreign Affairs Wang Shijie. First, judging from the part of judgment already read, he considered that the Tribunal should have accepted the Chinese Prosecutors' case, and

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[27] *See* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS, *supra* note 10, at 623-25.

so the main culprits, including Dohihara Kenji, Itagaki Seishiro, Matsui Iwane, Tojo Hideki and the majority of other defendants would hopefully all be sentenced to death. Second, according to Hsiang and the Chief Prosecutor Consultant Ni Zhengyu's analysis of the prosecution's evidence, he predicted that possibly fourteen or fifteen defendants would ultimately be sentenced to death.[28]

However, his prediction was different from the actual judgment of the Tribunal, which reflected the complexity of sentencing at the Tribunal. The Tribunal had an assembly of Judges from eleven countries and across two major legal systems, civil law and common law. The two legal systems differ significantly from each other in many ways, and even within each legal system, quoting the comparative law scholars, "it is impossible for us to find two countries within civil law system which would use the same adjudicating approach and reach the same judgment, when it comes to the adjudication of a particular case at a particular court, applying particular laws". [29]Against such background, it should be recognised that the diversity of domestic laws, the peculiarity of international law, combined with factors like international politics, ethnic sentiments and religious culture, could both cause debates and disagreements at the Tribunal.

Indeed, there were many unsatisfactory aspects with the Tokyo Trial. For example, the Tribunal only completed the adjudication of the first batch of war criminals, while the adjudication for the rest of the criminals never happened due to the siding of US. Judge Mei Ju-ao once commented, that "they (the Japanese people) wonder, for all the Class A criminals, who committed similar crimes and deserved similar degree of condemnation, why some were sentenced to death by hanging or life imprisonment, while the others being completely exonerated, never being tried by a law court, not to mention receiving punishment by law? It is difficult to find a logical answer to such a question, and thus we are left to admit that the Tokyo Trial was exactly like the Nuremberg Trial, in that both of them only punished the criminals of war in a symbolic way". [30]It is noted that due to the ambivalent policy of US, which was adopted in view of the interests of US itself, that the Emperor of Japan was exonerated and the Japanese throne was preserved, which consequently left the Tokyo Trial muddy and incomplete, and the present state of the relevant issues in Japan problematic.

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[28] My thanks to Mr. Xiang Longwan who provided me with the copy of the telegram draft.

[29] J.M. Merryman, DALU FAXI (大陆法系) [THE CIVIL LAW TRADITION] 149 (GuPeidong & Lu Zhengping trans., Law Press-China 2nd ed. 2004), *see also* J.M. MERRYMAN, THE CIVIL LAW TRADITION (Stanford Univ. Press 3rd ed. 2007).

[30] Mei, *supra* note 5, at 168.

Moreover, during the trial, as China was heavily engaged in the heated civil war between Kuomingtang and Chinese Communist Party, the Republican government of China at the time was unable to accord sufficient attention or support. It was showcased in the diaries of the then government leaders that their prior concerns were indeed not with the Trial. In Cheung Kai Shek's diaries, according to Mr. Xiang Longwan who had access to them, there were only two relevant entries about the Trial. In the diary of the then Minister of Foreign Affairs Wang Shijie, there was only one brief account of the decision of Ministry of Foreign Affairs on sending Mei Ju-ao and Hsiang Che-chun to the Trial as representatives.[31] It was unfortunate for the Chinese state and people that the settlement of domestic conflicts had been prioritised over fighting against foreign intrusion on the national political agenda.

Despite the many unsatisfactory and regretful circumstances during the trial process, we must acknowledge that the Judges sitting at the IMT had faithfully adhered to the principles of judicial independence, regardless of their different opinions on certain substantive issues. In so doing, the Judges safeguarded the legitimacy of their subsequent judgment, rendering the Tokyo Trial another example of post-war international law adjudication alongside with the Nuremberg Trial upon the foundation of international rule of law. Chinese jurists like Judge Mei Ju-ao and Prosecutor Hsiang Che-chun who demonstrated exceptional legal expertise, political wisdom as well as their aspirations in safeguarding national interests by way of law, shall still be fondly remembered today, and in particular become inspiring models for Chinese citizens.

[31] WANG SHIJIE (王世杰), WANG SHIJIE RIJI 1 (王世杰日记 1) [DIARY OF WANG SHIJIE 1] 754 (Lin May-li eds., Institute of Modern History, Academia Sinica 2012).