

# Justice Radhabinod Pal and the Tokyo War Crimes Tribunal: A Political Retrospective of His Historic Dissent\*

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History does not exist without people, and whatever  
is described happens through and to people.<sup>1)</sup>

Geoffrey Elton, *The Practice of History*, 1967, 94.

The Tokyo War Crimes Tribunal (officially the International Military Tribunal for the Far East) was set up by an executive order of General Douglas MacArthur (1880–1964), the Supreme Commander for the Allied Powers in Japan, on January 19, 1946.<sup>2)</sup> The Charter set forth the constitution, jurisdiction and functions of the IMTFE. Earlier, on September 2, 1945, MacArthur had accepted the Japanese surrender, aboard the USS *Missouri*. The IMTFE began on May 3, 1946, and ended sixty years ago on November 12, 1948, when verdicts and the “majority opinion alone were read in open court and so became part of the transcript.”<sup>3)</sup>

There were three dissenting, separate opinions. Eleven Justices constituted the IMTFE: one each from Australia, Canada, China, France, Great Britain, India, The Netherlands, New Zealand, Philippines, Soviet Union and United States. The dissenting opinions were from Justice Henri Bernard (France), Justice Radhabinod Pal (India), and Justice Bert V. A. Röling (The Netherlands).<sup>4)</sup> Pal’s (1886–1967) lengthy dissent “argued for the acquittal on all counts of the accused Japanese wartime leaders.”<sup>5)</sup> His dissent “was as long as the twelve-hundred page majority” judgment.<sup>6)</sup> A leading historian, John Dower, comments: “SCAP did not permit Pal’s dissent to be translated.”<sup>7)</sup> Richard Minear writes: “Tanaka Masaaki . . . allege[d] that the Occupation authorities blocked the publication in Japan of Justice Pal’s dissent. An edited and translated version of Pal’s dissent by Tanaka, Masaaki was published as *Zenyaku: Nihon*

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*Muzai-ron* (Japan Is Not Guilty) in 1952. The Occupation ended on April 28, 1952.”<sup>8)</sup> Though, “he [Pal] asked Webb [Justice William Webb, Australian president of the IM-TFE] to have the entire text read in open court, according to the Indian practice. The majority voted to have only its existence announced, which Webb did on the day of the sentencing, November 12, [1948].”<sup>9)</sup> An appeal by the condemned men to MacArthur was rejected, while another to the Supreme Court of the United States was “dismissed for lack of jurisdiction” and the “men condemned to death were executed on December 23, 1948.”<sup>10)</sup> Dower remarks:

Perhaps the most striking aspect of the conduct of the bench, however, lay in the fact that the eleven justices *never* [italics added] collectively met in chamber to seriously discuss and deliberate the final judgment, no less how it should be argued and presented. Instead, as Röling described it, seven justices ‘just decided among themselves to write the judgement [*sic*]. . . . The seven organized the drafting, and presented the results to the other four as a *fait accompli* [original].’<sup>11)</sup>

Prominent among those handed guilty verdicts and ordered to be hanged, from our perspective, were, among others, General Tōjō, Hideki (General; Prime Minister and Army Minister, 1941–44) and General Matsui, Iwane (General, Commander-in-chief, Japan Forces in Central China, 1937–38). In all, seven men were condemned to be hanged. Sixteen defendants received life imprisonment, two died during trial, and “one was under psychiatric treatment at the time of the judgment.”<sup>12)</sup> Yet, Pal found none of them guilty in his rigorously argued, completely dissenting, opinion. Contrary to many reports, Pal was not trained in international law. He schooled himself on the subject on the bench.

There is little doubt that the “intensity” of Pal’s dissent and its controversial nature have made it of “enduring” interest to many legal scholars, historians, journalists, and others. Remarks ranging from, “In the course of revisiting the Tokyo Judgment, I [Brook] have found my most perceptive guide to be Radhabinod Pal. Pal’s was the most devastating [judgment] in rejecting the core charge at Tokyo, that Japan had waged an aggressive and therefore illegal war,” to “Pal’s dissent illustrates that the fundamental problem with the Tokyo trial was America’s attempt to make a moral and legal virtue out of a political necessity” undeniably show the impact of Pal’s judgment on international jurisprudence on war crimes tribunals.<sup>13)</sup>

This paper focuses on the politics of Pal’s dissenting judgment. Politics means “public or social ethics, the political principles, convictions, opinions, or sympathies of a person.”<sup>14)</sup> All these facets are connected with Pal’s religious beliefs, social upbringing, education, political events, and so on. The legal foundations of Pal’s judgment, or why as a consequence he acquitted on all counts the wartime Japanese leaders, or even the many legal controversies thereof are not addressed, neither are international law, or war crimes, or the Tokyo Trial itself, though it may well touch on them to complete the account. These aspects are fairly substantially and thoroughly documented, analyzed, and disputed by many legal scholars, historians, journalists, and academics.<sup>15)</sup>

Here the fundamental question is: Why did not Pal indict Emperor Hirohito (1901–

89) as a responsible party to what occurred in Japan, China, and Asia from 1926 to 1945? In answering this single concern, it is essential to examine: What was Pal's politics? How did his politics affect his judgment? What was Pal's judicial ethics? The year 1926 was the beginning of Hirohito's *Shōwa* (illustrious peace) era and "on 2 September [1945] . . . Foreign Minister Shigemitsu Mamoru [1943–45, condemned to 7 years imprisonment] signed the formal surrender document."<sup>16)</sup>

The basis of focusing the fundamental query of indictment of Hirohito rests on the fact that Hirohito was as responsible for the war, as those arraigned before the IMT-FE, and MacArthur's strategy to ensure Hirohito's survival could have been challenged by Pal.<sup>17)</sup> Dower lays bare MacArthur's plan:

On October 1 [1945], MacArthur received through [Brigadier General, Bonner F.] Fellers [MacArthur's military secretary and head of psychological warfare operations] a short legal brief that made absolutely clear that SCAP had no interest in seriously investigating Hirohito's actual role in the war undertaken in his name. The brief took as 'facts' that the emperor had not exercised free will in signing the declaration of war; that he had 'lack of knowledge of the true state of affairs'; and that he had risked his life in attempting to effect the surrender. . . . It ended with the following 'Recommendation': a. That in the interest of peaceful occupation and rehabilitation of Japan, prevention of revolution and communism, all facts surrounding execution of the declaration of war and subsequent position of the Emperor which tend to show fraud, menace or duress be marshaled. b. that if such facts are sufficient to establish an affirmative defense beyond a reasonable doubt, positive action be taken to prevent indictment and prosecution of the Emperor as a war criminal.<sup>18)</sup>

MacArthur is on record as saying: "every honor due to a sovereign is to be his," and he insisted that "he [Hirohito] not be tried and executed."<sup>19)</sup> William Manchester, a biographer of MacArthur, states: "Despite strenuous objections from the Russians and the British, the Supreme Commander had already struck his [Hirohito's] name from the list of defendants."<sup>20)</sup> In light of the contrived evidence presented by the prosecution, could Pal have called Hirohito as a witness and how was this legally admissible?

A prior question, which also answers the former, is: Was Hirohito a mere figurehead or was he, in his capacity as supreme military commander, executing his duties with all cognition? Historian Herbert Bix, referring to Yamada, Akira's book *Shōwa tennō no sensō shidō* (The Showa Emperor's war leadership), answers, "Yamada documents eleven major instances where the emperor was deeply involved in supervising the actual conduct of war operations."<sup>21)</sup>

Further, there are the Kido (Kōichi, Lord Keeper of the Privy Seal and chief confidential advisor to the Emperor between 1940 and 1945) diaries. They cover "the period from January 1, 1930 to December 15, 1945, and contained 5,920 entries."<sup>22)</sup> He was sentenced to life imprisonment as a "Class A" war criminal. Kido "voluntarily turned over to the prosecution his complete diary covering the entire period under investigation. This diary was not only the source of much valuable evidence but became the working bible of the prosecution and the main key to all further investiga-

tion.”<sup>23)</sup> The Kido diaries gave Pal the opening to call Hirohito as a witness.

An occasion for effective intervention by Pal was when Tōjō took the stand in late December 1947. Bix narrates: “Under questioning by Kido’s American defense attorney, William Logan, Tojo created a stir by inadvertently and indirectly implicating the emperor.

Logan: Do you remember even one example where Kido proposed something or acted against the emperor’s wish for peace?

Tojo: So far as I know, such an instance never arose. Not only that, no Japanese subject, let alone high official of Japan, would ever go against the will of the emperor.”<sup>24)</sup>

Tōjō’s testimony implicated the emperor and he was forced by Hirohito’s aides to retract “his error . . . which he did on January 6, 1948.”<sup>25)</sup> As a consequence, Hirohito could have been called as a witness to affirm or deny Tōjō’s testimony and explain his role in the process. This was yet another breach for Pal to thoroughly examine the Kido diaries.

Pal neither was the only person who could ascertain the veracity of the facts nor the only one with the authority to do so. However, Pal alone had the political courage, intellectual rigor, and simple audacity to defy MacArthur’s fiat.<sup>26)</sup> This does not imply that all the other justices were hapless victims of a significantly scripted “Showcase justice”<sup>27)</sup> by senior members of SCAP, with MacArthur’s knowledge. Yet, some justices certainly were not disposed to be effective in any meaningful manner in the proceedings. Dower describes how “the royalists and their American supporters engaged in . . . dressing the emperor in new clothes.”<sup>28)</sup> He illustrates the process of “open social fraternization” between the Imperial court and the upper echelons of the occupation staff:

Invitations were regularly extended to high occupation officials to participate in the [Imperial] court’s genteel pastimes. Geisha parties, cherry-blossom viewing on the palace grounds, bamboo-sprout hunts . . . became bonding places for high ranking members of the occupation force and [court elites] . . . though MacArthur himself never deigned to participate . . . but his wife and young son Arthur joined in happily. *So did the president of the Tokyo war-crimes tribunal [Sir William Webb, the Australian president] and the American head of the prosecution staff [Joseph B. Keenan], who were in the process of hanging or incarcerating some of the emperor’s most devoted servants [italics added].*<sup>29)</sup>

Pal was not party to such socializing, which could have compromised him at a later stage.

Why is a political retrospective of Pal’s judgment necessary? First, there is not a scholarly study which examines the questions posed. Second, the Pulitzer Prize-winning studies by Bix, *Hirohito and the Making of Modern Japan* (2000), and Dower, *Embracing Defeat: Japan in the Wake of World War II* (1999), throw fresh light on Pal’s dissent. Third, Dower, particularly, observes that “the link between the Indian justice’s

nationalism and legal ‘positivism’ in this regard [that is, Pal’s judgment] has, to my knowledge, never been duly closely explored.”<sup>30)</sup> These reasons validate a retrospective, political inquiry.

To a generation of Japanese, now quickly passing on, there are probably only two Indian names which resonate with deep meaning in their lives and psyche. They are Gandhi-*san* and Pal-*san*.<sup>31)</sup> The former refers to Mohandas Karamchand Gandhi (1869–1948), the architect of India’s nonviolent, political struggle for freedom and visionary moral philosopher-activist. Gandhi never visited Japan, but with the fall of Singapore on February 15, 1942, and the Bay of Bengal being left without any significant defences, the victorious Japanese forces came close to “the gates of India.”<sup>32)</sup> Then, Gandhi called upon every Indian to defend it with steadfast nonviolence, while advising the “Nazis, Fascists, or Japanese [that] instead of leaving India alone, [if they] choose to subjugate her, they will find they will have to hold more than they can in their iron hoof.”<sup>33)</sup>

The latter is Radhabinod Pal,<sup>34)</sup> the Indian judge on the IMTFE. Pal acquitted all the defendants. During the occupation, his *International Military Tribunal For The Far East: Dissenting Judgment* was proscribed in Japan, on the orders of MacArthur.<sup>35)</sup>

Why did not Pal indict Hirohito of war crimes? My rationale is explained in six main points. First, there is the *tu quoque* argument, or “You, also,” or “You’re another.” This is the element of mutual wrongdoing. A cursory perusal of Japanese media, print and visual, of this harrowing era will give a glimpse of the angst which Japanese experienced during World War II.

On March 10, 1945, a date which will also unequivocally “live in infamy,”<sup>36)</sup> Tokyo saw “300 B-29s drop 2,000 tons of incendiaries on one section of [the city]—a space seven-tenths the size of Manhattan—and in 2½ hours 100,000 people [were] ‘scorched and boiled and baked to death.’”<sup>37)</sup> United States Air Force General Curtis (“Iron Ass”) E. LeMay was charged by MacArthur to carry out the bombing. The Great Tokyo Air Raid, Fellers observed, was “one of the most ruthless and barbaric killings of noncombatants in all history.”<sup>38)</sup> Commenting on it, LeMay said: “I suppose that if I had lost the war, I would have been tried as a war criminal.” LeMay, targeted numerous Japanese cities for annihilation by bombing, continued “fortunately, we were on the winning side.”<sup>39)</sup>

Further, consider the public testimony in 2004 by former Secretary of Defense Robert S. McNamara, in the award-winning documentary film *The Fog of War* (2003) by Errol Morris, on the firebombing of Tokyo. McNamara, then an Air Force colonel, was chief statistician to LeMay. Essayist Roger Angell comments,

McNamara’s testimony cuts deepest when he goes back to the Second World War firebombing of Tokyo by the American Twentieth Air Force, whose high-altitude B-29 bombers, redeployed at five thousand feet, rained down incendiaries that killed at least eighty-five thousand civilians in a single night. This campaign was continued almost in secrecy against lesser targets . . . Sixty-seven Japanese cities were firebombed by the B-29s in the spring of 1945 and three hundred and fifty thousand civilians burnt to death—and *the war in effect won—well before Hiroshima* [emphasis mine].<sup>40)</sup>

McNamara testifies: “I was part of a mechanism that in effect recommended it.”<sup>41)</sup> He supports LeMay’s “perception that both of them would be prosecuted as war criminals if the war were to be lost, and blurted ‘What makes it immoral if you lose but moral if you win?’”<sup>42)</sup>

This single incident gives some insight into Pal’s thinking about the war, not to forget the bombing of Hiroshima and Nagasaki, on August 6 and 9, 1945, respectively, in which collectively 103,000 innocent civilians were killed. Pal undoubtedly grieved over the tragic loss of especially *civilian* lives in Japan and as to *who* were the actual war criminals in World War II, even prior to being appointed as a judge on the international tribunal. Pal, as Dower correctly stresses, “felt so strongly about the criminality of the use of the atomic bombs that when he published his dissenting opinion privately in India in 1953, he included as an appendix reproductions of twenty-five photographs of victims of and physical destruction in Hiroshima and Nagasaki that had appeared for the first time in Japan in the August 6, 1952 issue of the magazine *Asahi Gurafu* (Asahi Picture News).”<sup>43)</sup>

Pal, probably, was just as morally outraged at the gruesome Allied fire bombing of German cities, particularly Hamburg in 1943 and Dresden in 1945, and the massive loss of civilian lives. Writer Ian Buruma describes one such ghastly scene in his article “The Destruction of Germany”:

If they [RAF Lancaster bomber crews] were lucky enough to make it through the flak, however, the bomber crew would have seen something of the inferno they helped set off. Billows of smoke and flame would reach heights of six thousand meters. Essen, an industrial city in the Ruhr, was described by one bomber pilot as a huge cooking pot on the boil, glowing, even at a distance of more than two hundred kilometers, like a red sunset. Another pilot recalls: ‘This is what Hell must be like as we Christians imagine it. In that night I became a pacifist.’<sup>44)</sup>

The actual, sickening phrase used by the British Air Chief Marshall Sir Arthur Harris, also known as “Butcher” Harris, was “Hamburgerization” to flatten German cities by “the British by night, the Americans by day and the Soviets firing off their large guns called Stalin Organs.”<sup>45)</sup> Sardonic as it was even then, more so in retrospect, to the Japanese and particularly to Pal, each of these nations—Britain, the Soviet Union, and the United States—were sitting in judgment over the Japanese, as they did over the Germans. This was bare hypocrisy to Pal. His substantially reasoned and passionate, legal objections to such “justice” were writ all over his dissenting judgment. Hence, Tōjō’s sarcastic phrase “victor’s justice.”<sup>46)</sup>

It was with this righteous sense of fury that Pal pronounced, in his *Dissenting Judgment*, that the prosecutors were themselves guilty. For Pal, the decision of the American government to drop atom bombs on Hiroshima and Nagasaki was a prime example of a crime against humanity.<sup>47)</sup> Pal viewed the American bombing of Japanese civilians as a continuation of imperialism in the guise of “progress.”<sup>48)</sup> As a result, he wrote:

The feeling that ‘we are a unity of humanity, linked to all our fellow human be-



ings, irrespective of race, creed or color, by bonds which have been fused unbreakably in the diabolical heat of those explosions' might have been the result of these [atomic] blasts. But certainly these feelings were non-existent AT THE TIME WHEN [*sic*] the bombs were dropped. I . . . do not perceive any such feelings of broad humanity in the justifying words of those who were responsible for their use.<sup>49)</sup>

In his view the Allied bombings of civilians and cities, like the trial, were cut from the same American cloth. Consequently, in Pal's view neither were the indicted Japanese war criminals and nor was the Emperor guilty.

Pal's logic about the bombings is circuitous, digressive and unhelpful, especially when it comes from a justice as experienced in both the theory and practice of law. Pal was a "Professor of Law in the Calcutta University Law College between 1923 and 1936 [for 13 years] and a Judge of the Calcutta High Court from 1941 to 1943."<sup>50)</sup> In lucid and thought-provoking contrast is the argument that Mark Osiel, a professor of law, outlines in *Mass Atrocity, Collective Memory and the Law*. Osiel writes: "the wrongs done by X to Y neither excuse nor justify those done by Y to X. The bombing of Nagasaki *does not excuse or justify* [emphasis added] the Rape of Nanking, as all sensible people readily acknowledge."<sup>51)</sup> What was expected from Pal was "a compelling narrative that restrained the powerful temptations towards an interminable cycle of re-crimination and reprisal over the past."<sup>52)</sup>

Pal's counter-narrative could have explicitly condemned the suffering of common Japanese soldiers and "the cruel treatment of Western POWs, including civilians in Southeast Asia"<sup>53)</sup> at the hands Japanese militarists, headed by Hirohito. For instance,

Many Japanese soldiers were left to starve, abandoned by their leaders once the Americans had moved on. One of the great novels of the Pacific War, *Fires on the Plain* [1957], by Ooka Shohei, himself a veteran of that campaign, describes how the soldiers, crazed with hunger, ate their comrades' corpses. They called them 'monkeys.' Some of these 'monkeys' were shot by their own hungry officers.<sup>54)</sup>

Another example is, "In the course of the war 116,000 of 122,000 seamen serving Japan's pre-war merchant fleet were killed or wounded, mostly by American submarines," or that on "9 March 1945 [an] American bomber attack on Tokyo killed around 100,000 people, and rendered a million homeless."<sup>55)</sup> Who took responsibility for such horrendous acts in the first instance? Condemning Churchill, Roosevelt, or Truman is certainly forthright, but were not the Japanese leaders equally, morally responsible for the bloodbath? Where was Pal's outrage at these horrific massacres? As a result, many if not most, Japanese today plainly refuse to acknowledge their responsibility for Japan's war crimes.

Pal placed the onus wholly on the Allies. Do facts bear this out? As I have shown above, they do not. In this context, the pertinent challenge by Marek Edelman, the last surviving commander of the Warsaw Ghetto uprising of 1943, is instructive. Edelman calls us to think of "the risks we run by indulging to excess the cult of commemoration—and of displacing murderers with victims as the focus of attention."<sup>56)</sup> As to

these perils, political historian Tony Judt remarks, “A nation has first to have remembered something before it can begin to forget it. . . . Only after Germans had appreciated and digested the enormity of their Nazi past—a sixty-year cycle of denial, education, debate, and consensus—could they begin to live with it, that is, put it behind them.”<sup>57)</sup> In this sense, Pal’s renowned judgment does a distinct disservice to Japan and has made ordinary Japanese amnesiac about its own war crimes. The ugly side of Japan’s role in the war and accepting its responsibility is not found in Japanese textbooks or taught to Japanese students. Responsibility for this disquieting attitude lies to some extent with Pal who has now become a national embodiment of the “spirit of denial” and a darling of right-wing politicians who persist in denying war crimes by Japan, especially those committed in China where the Japanese army massacred between 50,000 and 300,000 civilians in the Chinese city of Nanking in 1937 and 1938 and causing antagonism among many Asian nations. Two recent examples typify this “spirit of denial” inspired in part by Pal. One, former Japanese Prime Minister Shinzō Abe visited Prasanto Pal, the son of Radhabinod, in Kolkata on August 24, 2007 and told him, “The people of Japan love Radhabinod Pal and still hold him in the highest esteem.”<sup>58)</sup> Two, there were mass protests against Japanese war crimes in Chinese cities “with 10,000 people marching in Shenzhen in the south” in mid-April 2005.<sup>59)</sup>

Second, it is well known that Pal was an Indian, but is equally important to know that he was a Bengali. He was born to a poor family in Shalimpur in the district of Nadia, now in Bangladesh. There are two aspects here, first, about Pal’s social status and its implications, and second, about Pals’ educational background. Both factors need clarity and correlation with his decision not to indict Hirohito. Political psychologist Ashis Nandy writes, “The Pals were Kumbhakaras, traditionally low-caste potters.”<sup>60)</sup> In India’s complex, caste structure Pal had to doggedly jump through many obstacles, social and financial, to achieve what he did. What needs to be explained is, how was Pal’s caste related to his religious belief and what relation did it have with his political outlook? As to the former, Leonard Gordon, a historian, elucidates,

The basic doctrine of Shaktism is that there is a power called ‘shakti’ underlying and energizing all reality. A female deity, who is usually a consort of Shiva—Durga, Kali, Chandhi, or Shakti—may be understood to embody and express this power and may thus be worshipped as the single and highest deity. This form of religion is widespread among the high castes of Bengal and among lower castes such as kumars [*sic*] [The correct Hindi word is *kumhār* which means potter]. . . . The concept of Shakti underlies a concept of physical strength.<sup>61)</sup>

In our context, Pal’s refusal to call Hirohito as a witness was that Pal bought into the Shinto belief that Hirohito was *kami* (God or deity),<sup>62)</sup> together with the American propaganda that “His (Hirohito’s) indictment will unquestionably cause a tremendous convulsion among the Japanese people, the repercussions of which cannot be overestimated. He is a symbol which unites all Japanese. Destroy him and the nation will disintegrate.”<sup>63)</sup> Regarding the latter, Pal’s *shakti* beliefs morphed into Hirohito’s mythical, mighty, divine status coupled with the puissant attribute of *kokutai* (national essence).<sup>64)</sup> All these aspects primed Pal to be a crypto-monarchist.



Most journalists and academics who have written about Pal easily assumed that his burning ambition and sheer determination gave him the impetus to seek education as means of social mobility. It is not known that Nadia, where Pal was born, was not just another revenue district. Historian Kalikinkar Datta comments,

In the midst of general confusion . . . a faint but perceptible stream of culture still flowed in certain parts of Bengal, especially in Nadia patronized by its ruler Maharaja Krishna Chandra. Nadia described as ‘the Oxford of the province,’ was a seat of Sanskrit learning, a centre of intellectual development.<sup>65)</sup>

Nadia’s educational status played a role in Pal’s upbringing as a lawyer and as someone who saw education as a tool for social mobility. Moreover, the fact that the “local rajah’s family took the financial responsibility for his [high school] studies . . . [and that] the family grew fond of Pal and even began to feed him as part of the daily ritual of feeding the poor,”<sup>66)</sup> must have created a deep sense of admiration and gratitude in the young Pal for royalty. As such, Pal’s earlier religious belief of divine power as manifested in a monarch and admiration of royalty, coupled with his latter training as an advocate and judge shaped an individual reticent to scrutinize religion, law, and monarchy. It would not be an exaggeration to say that all these facets, with their implications, would reveal themselves later in Pal’s life as a judge. His dissenting judgment, refusal to indict, call Hirohito as a witness in open court or *in camera* has early roots in his upbringing and educational ethos.

Why is it important to stress that Pal was a Bengali? He was born in 1886 in an India which was still very much under the British heel and a colony. When Pal was 19 years old and a college student, a political event took place in Bengal which must have moved him to deeply interrogate the motives of the British and awakened his political understanding about the harsh realities of colonialism. The event was the Partition of Bengal in 1905 by Lord Curzon, the British Viceroy of India (1899–1905). The event reverberated through India and started a firestorm of political protests. Bengal was partitioned because the British saw “a great political advantage in severing the eastern districts, which [were] deemed to be ‘a hotbed of the purely Bengali movement, unfriendly if not seditious in character.’ It was thought that partition would also weaken the tyrannical character of the press and the leaders of Calcutta.”<sup>67)</sup> The ostensible reason given to Indians by Lord Curzon was that partition was affected to give Bengalis a much better administration and to collect revenue. However, historical studies of the era by scholars show that the truth lay elsewhere. The plain fact was a united Bengal was deeply potent; a factious Bengal was politically toothless. The main purpose for partition was to split up and thereby weaken a solid body of opponents to British rule. Opposition to the partition of Bengal was formidable and organized on a vast scale, which sent the British reeling and ultimately trying to undo the folly, but the damage was done and lasting.

Here is what happened on the very day. “The day of partition [October 16, 1905] was celebrated throughout Bengal as a day of mourning. The poet Rabindranath Tagore left his seclusion to agitate, for the first and last time, actively and write songs for the occasion. As, poet, Ezra Pound said later, ‘Tagore has sung Bengal into a na-

tion.”<sup>68)</sup>

The impact of partition was felt so deep within every Bengali's psyche that it was considered as a “national insult”<sup>69)</sup> and it would not be an overstatement to say there was not a single Bengali in the presidency who was not touched by this act at a very personal level.

Though this single event may not have turned Radhabinod, the student, into a seething nationalist, yet the seed of anti-imperialism was sown deep in this young Bengali. Other events in time, such as, the “cold-blooded massacre” of hundreds of innocent Indians in 1919 at Jallianwala Bagh at Amritsar, Gandhi's movement of nonviolent non-cooperation in 1920, and the momentous ‘Quit India’ campaign led by Gandhi in 1942 would all further deepen Pal's anti-imperialism and have an impact on his political views. These facets of nationalism and anti-imperialism must be read into Pal's judgment. They would come to full bloom at the Tokyo Trial—forty-one years later.<sup>70)</sup> What is the evidence? Pal arrived in Tokyo approximately two months after the other members of the Tribunal and was accredited by MacArthur on May 16, 1946—having been admitted as the last judge on the Tribunal on October 7, 1945.<sup>71)</sup> By this time, preliminary proceedings had commenced and Pal refused to be bound by the unanimous decision of the original nine judges (all belonging to Allied countries) to abandon separate or dissenting opinions and publish one majority opinion. The decision was arrived in the absence of both Pal and Philippine Justice Delfin Jaranilla—the only other Asian—and is arguably justifiable. Nonetheless “the original document in the U.S. National Archives bears the signatures of all the judges except Pal. Nor was this an oversight. Pal arrived in Tokyo in May and Jaranilla in June. Yet the document bears Jaranilla's name and the initialed date ‘June 1946.’”<sup>72)</sup> Is not Pal's “intention to write a dissenting opinion” perplexing?<sup>73)</sup> Röling reveals, “I think that when he [Pal] joined the court, he knew from the very start that he would not find anyone guilty of anything.”<sup>74)</sup> What Pal immediately did on arrival was rightly astounding and paved the way for his dissenting judgment. Does not the decision to write a dissenting opinion even prior to carefully examining the evidence reveal shocking prejudgment? This was Pal's anti-imperialist and nationalist stance trumping his judicial obligation. It exposes him as a judge with a predetermined political agenda and no qualms in pronouncing it from the bench.

Third, another event occurred in 1905 that had a great impact on the minds of most Indians of that era. This was Japan's unexpected naval victory over Czarist Russia at the Tsushima Straits. This triumph was widely celebrated in colonial Bengal and Bengalis called it the first Asian victory over an European imperial power. Sumit Sarkar, a historian, writes that the Japanese victory “was ecstatically hailed by the Bengal press even children were given nicknames like Togo [Heihachirō, a Fleet Admiral in the Imperial Japanese Navy] or Nogi [Count Maresuke, a prominent figure in the Russo-Japanese War] after Japanese military leaders.”<sup>75)</sup> Here are the early origins of Pal's Pan-Asian ideology. A key tenet of Pan-Asianism was that Asians in one part of the world were responsible for the plight of other Asians. Japan's victory over Russia was hailed by Indians, particularly Bengalis, as the signal that Europe's imperial domination of Asia was reaching its nadir.

Together with this early admiration of the Japanese, there were warm cultural and

personal ties forged between the cultural nationalist Rabindranath Tagore (1861–1941), India's first Nobel laureate in 1913 and who had a vast following in his native Bengal and India as a whole, and the Japanese art historian Okakura, Kakuzō (1862–1913) who visited Calcutta in 1902 and became a dear friend of the entire Tagore family. This was a formidable cultural alliance between India and Japan which resonated in the heart of every Bengali. These ties pulled Tagore to repeatedly visit Japan in the early part of the twentieth century and make earnest pleas for Pan-Asianism and request for a stop to the militarism which was on the rise in Japan. These entreaties, sadly, fell on deaf ears and were a source of bitter disappointment to Tagore.

The early 1940s saw the formation of the Indian National Army which the Japanese recruited from Indian troops after the fall of Singapore on February 15, 1942 and sent against the British on the Indo-Burma border in 1943. As a nationalist, there is not much doubt where Pal's sympathies lay; in fact, he revealed to Rōling that he was an INA admirer.<sup>76)</sup>

Thus, Pal was in sympathy with Subhas Chandra Bose (1897–1945), a radical nationalist who broke with Mahatma Gandhi and the Congress on the nature of opposition to British rule. Bose first turned to Nazi Germany in 1941 for help to free India. When Hitler was not forthcoming, Bose sought Japan's help in 1943 for an armed independence struggle against Britain. He hoped that the Japanese-organized INA would become the revolutionary force that would drive the British out of India. Accordingly, Pal a nationalist easily accepted Japan's slogan of "Asia for Asians" and regarded the war as a means "to liberate Asia from the Europeans." 'Japan' evoked a powerful, liberating response for Pal as it did for many Indian nationalists, particularly Bengalis, and adherents of the philosophy of Pan-Asianism. Few, if any, Asians asked, if Japan was so keen to liberate Asia from foreign domination, then why did it behave so heinously in the Asian countries it conquered? How could Japan's vicious behavior toward civilians be explained, not to mention its brutal treatment of POWs? An example of Japan's much flaunted Pan-Asian policy is that:

On December 8 [1941] the first Japanese bombs fell on Singapore. On the eleventh their planes attacked Penang . . . No one in Malaya had seen a war in generations. Europeans, Malays, Chinese, and Indians turned out to watch, as if they were attending an air show on display. Curiosity turned to horror as the Japanese began strafing the crowds and spectators died by the hundreds. . . . [After the surrender] the Japanese would murder thousands, especially Singapore's overseas Chinese.<sup>77)</sup>

Buruma comments, "Japanese propaganda was soaked in racist language, promoting the Japanese as the Asian master race"<sup>78)</sup> and "'the Japanese practiced extraordinary refinements of inhumanity in the treatment of those thrown upon their mercy,' because 'their culture encouraged, even demanded' it."<sup>79)</sup> Does not this substantiate the disingenuousness of Pan-Asianism? Was Pal oblivious of such reports in the British press in India or was he deluded by the rapid, successful advance of Japanese forces in Asia? Gandhi, it should be underscored, "condemned the Japanese slogan of 'Asia for Asiatics' and even favored the boycott of Japanese goods as a mark of sympathy with

China.”<sup>80</sup>) By this time another prominent Indian nationalist Rash Behari Bose (1886–1945) had already set up a base in Japan to aid India’s independence movement and was helped in his efforts by Tōyama, Mitsuru, leader of the Amur River (Black Dragon Society) and a friend of foreign revolutionaries. All this was fairly common knowledge in the British press and among British diplomats who were making keen efforts to have Rash Behari Bose expelled. Why would not Pal have identified with these efforts to free his motherland by the Japanese?

Little wonder that “whenever Pal appeared in court, he unfailingly bowed to the defendants, whom he regarded as men who had initiated the liberation of Asia.”<sup>81</sup>) In fact, United Press Correspondent Arnold Brackman, who covered the trial, writes, “In his memoirs [General] Satō [Kenryō (1895–1975), Commander of the 37th Division, Thailand; sentenced to life imprisonment] . . . revealed that Pal had paid him a visit at Sugamo [the Prison where IMTFE convicts were incarcerated and the execution site of those sentenced to death] after the trial ended and told him, ‘You were the leaders of Japan. Through that leadership Asia was liberated. With that in mind, I express my [respect to the accused].’”<sup>82</sup>) Another account states, “The war time prime minister, Hideki Tojo, hanged as a war criminal after the Tokyo trial, even left a *haiku*, a brief poem, written in Pal’s honour before going to the gallows.”<sup>83</sup>) Pal was therefore not only a nationalist and a crypto-monarchist, but also a Pan-Asianist who had prejudged the Japanese war criminals as not guilty and it is through this prism that he viewed the IMTFE proceedings.

Fourth, it is a common legal norm that the appointed judge is present when the court is in session, except in extenuating circumstances. Should these be of a prolonged nature it is legal decorum to recuse himself from future proceedings. The “Charter of the IMTFE, unlike that of the Nuremberg Tribunal [1945–49] made no provision for alternate judges; when any member was absent, there was simply less than the full complement. This produced inconsistency in the rules of evidence; what was admitted depending largely on who was sitting that day.”<sup>84</sup>) This moved Webb to openly comment, “I would be deceiving you if I said that decisions did not turn on how the court was constituted from time to time.”<sup>85</sup>) Defense lawyer Owen Cunningham estimated “an aggregate of 466 judge-days was lost to the court.”<sup>86</sup>) Which judges’ conduct was most egregious? It was none other than “Pal (India)” who was absent for “109 days.”<sup>87</sup>) Lord Patrick (Britain) remarked that Pal’s absence was “the gravest blot that had yet stained the honour of the court.”<sup>88</sup>) Where was Pal? He was in India “at the side of his ailing wife in Calcutta [now Kolkata] . . . had missed half of the individual defenses.”<sup>89</sup>) Certainly, a husband had to be with his wife at such a vital moment. However, was not it equally incumbent on Pal to formally absent himself from his professional duties? Did not he know his absence would mar the historic trial? There is no easy answer except to say that the learned justice either lacked judicial decorum, despite being a professor of law and a judge for many years, or that Pal had his eye on history, or both. In any case, it shows Pal in a rather poor light and as an astute Realpolitician.

Fifth, at Hakone, not far from Tokyo, overlooking Lake Ashino, is the Pal–Shimonaka [Yasaburō (1878–1961)] memorial. The memorial, Nandy writes, “serves as a temple and memorial to Pal and the famous Japanese publisher Yasaburo Shimonaka . . . is

witness to the links that Japanese pacifism established with Pal's judgment."<sup>90</sup>) I visited the desolate place in the spring of 2003. On the way back to Tokyo, I wondered why the "founder of [the] publishing house Heibonsha"<sup>91</sup>) joined hands with an Indian judge and set up a joint memorial as a "witness to the links [of] Japanese pacifism"?<sup>92</sup>) Were Pal and Shimonaka pacifists? What role did Shimonaka play when Japan invaded Manchuria ("Mukden Incident") in 1931, where 500 Chinese were killed? If Shimonaka was indeed a pacifist, would not he be active in the cause? The records certainly did not show Pal was a pacifist or that he had participated in any of the movements of nonviolent non-co-operation either as a lawyer or as a judge, despite Gandhi's fervent pleas. These factors disturbed me. In the literature, Nandy is the only one who comments about the memorial<sup>93</sup>) and he does not probe these critical aspects. Why did Nandy accept the memorial at face value? Was Nandy, as Brook's candidly states, enhancing "the positive posthumous reputation in India . . . of his fellow Bengali?"<sup>94</sup>)

Searching for answers, I found an entry in the *Encyclopedia of Japan* under the title "Shimonaka Yasaburo." It read, "In the 1930s Shimonaka gradually adopted a more nationalistic stance, founding several rightist organizations, and after World War II he was purged by the Occupation authorities."<sup>95</sup>) Nationalism could and does forge pacifists, but rightists rarely do.

I then checked *The Transcripts of the Court Proceedings the IMTFE* and read to my utter dismay that Shimonaka was a "witness on behalf of the defense for General Matsui, Iwane" [Commander-in-Chief of Japanese forces in Central China, 1937–38. Sentenced to death].<sup>96</sup>) Shimonaka testified, "General Matsui and he [Shimonaka] established the Greater Asia Association [*Dai Ajia Kyō-Kai*] in 1933 . . . for the reconciliation between China and Japan . . . [and] had the object of carrying out Dr. Sun Yat-sen's Greater Asia Principle as its guiding spirit . . . Blood is thicker than water; China and Japan are brother countries."<sup>97</sup>) A rightist organization founded by Shimonaka was the Greater Asia Association, under the guise of expanding fraternal ties with China. Shimonaka concluded his defense testimony saying, "General Matsui loved China and the Chinese."<sup>98</sup>) If friendship with China was indeed so dear, then how could the Nanking Massacre take place? Does this stand to reason? Solis Horwitz, Assistant Prosecutor for the United States, comments, "Matsui, Iwane . . . played an active role as either founder, officer or advisor of a number of 'patriotic' societies advocating a program of aggressive wars."<sup>99</sup>) Shimonaka's sworn testimony speaks volumes for his alleged ties to pacifism, let alone his friendship with Matsui. Dower remarks, "The former general Matsui Iwane was given the death penalty solely on 'negative responsibility' grounds for having been derelict in preventing atrocities by troops under his command during the Nanking massacre."<sup>100</sup>)

Is it not quite a stretch of imagination to presume Pal was not aware of Shimonaka's testimony and his identity, especially since Matsui was a prominent indicted war criminal? Pal joining with Shimonaka and establishing a memorial raises more disconcerting issues about Pal's motives. Further, Pal repeatedly visited Japan after the trial as early as 1952, was decorated by the Japanese Emperor in 1966, and toured Japan giving lectures with Shimonaka. How is it possible to understand and explain Pal's dealings? Can a judge associate with a witness, no matter how noble the endeavor? Is

such behavior honorable? In this context, Röling's (R) conduct is illuminating:

C. After the trial was over, did you ever go back to Japan?

R. No, I didn't. Once some years after the trial, I received an invitation to go there, but I refused. I felt it improper to return to the country over whose leaders I had been sitting in judgement [*sic*].<sup>101)</sup>

The Hakone memorial carries the inscription that it promotes the "teachings of the great sage of the twentieth century Mahatma Gandhi."<sup>102)</sup> How can a rightist as Shimonaka and Pal who was not a pacifist or had anything to do with nonviolence "promote" Gandhi's teachings? Had not Pal read or had he forgotten Gandhi's cardinal dictum of "means and ends"? Gandhi was of the firm opinion that immoral means meant immoral ends.

Sixth, as explained earlier, the chief American Prosecutor Joseph Keenan was ordered not to indict the Emperor. Feller's brief to MacArthur, quoted earlier, explains the reasons. Could Pal be in the dark about all that was afoot to stop such an indictment and manipulate the evidence and witnesses? What was Justice Pal's ideology? What impeded Pal from subpoenaing Hirohito as a witness? Yet, he fearlessly took the other step of dissenting from the majority judgment and refusing "the 'politicization' of the Tokyo Trial—its infusion with crusading ideology of its American sponsors, who were striving to create an international legal community in their own image."<sup>103)</sup> These critical subjects have not been thoroughly examined by any scholar. In fairness to Pal the record shows that he noted "the hypocrisy of the Allied decision not to try the Emperor."<sup>104)</sup> Pal wrote, "The Emperor was implicated at every stage of the so-called conspiracy, but his trial and punishment would have been politically inconvenient for the Occupation authorities."<sup>105)</sup> If Pal was really convinced of the Emperor's implication, then did not honesty demand that Pal put his mouth where his convictions lay?

Pal's ideology was a combination of his illusive legal reasoning, ardent nationalism, beguiling Pan-Asianism, nascent crypto-monarchism, shocking lack of judicial ethics, and unshakable admiration of Japan. All these made him reluctant to interrogate Hirohito in open court. Also, Pal bought into the propaganda that Japan at that time could not hold without a central figure and the Americans would colonize the country, which they did successfully nonetheless. Being a colonial subject for a large part of his life, Pal knew well the travails of colonialism. Undoubtedly, Pal was a creature of the law and revered it. In Japan, given the time and the nascent democratic institutions, the emperor was the law. There was probably nothing else which would hold the country from anarchy, if monarchy was abolished. Ergo, Pal was legally diffident to confront Hirohito with the evidence and as such is his amazing, inconsistent and political judgment. How paradoxical it is that Pal loudly decried the political trial by the IMTFE, even as he blatantly politicized it himself.

In conclusion, it is edifying to reflect on what Tom Bingham, a Senior Law Lord from Britain, writes on judges and their behavior on and off the bench. Bingham emphasizes that, "The judge's duty [is] to administer justice 'without fear or favour, affection or ill will' [and it] plainly covers a wide range of ethical duties. If one were to at-



tempt a modern paraphrase, it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment.”<sup>106</sup>) Bingham persists, “It is now regarded . . . as a cardinal feature of judicial impartiality that the judge should be a political eunuch. If he was ever a member of any political party or organization, he must sever all ties on appointment. Thereafter he must do nothing which could give rise to any suggestion of political partisanship.”<sup>107</sup>) Was Justice Pal a political eunuch or a determined partisan? This political retrospective confirms that the second alternative cannot but be answered in the affirmative and the foregoing is substantial evidence against Justice Radhabinod Pal.

# Notes

- 1) Geoffrey R. Elton, *The Practice of History*, (Oxford: Blackwell, 1967), 94.
- 2) See John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, (New York: W. W. Norton and The New Press, 1999), 319. Also see William Manchester, *American Caesar*, (Boston: Little, Brown and Company, 1978), 450–56, and Dower, 39–54.
- 3) Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial*, (Princeton, NJ: Princeton University Press, 1971), 33.
- 4) *Ibid.*, 32.
- 5) Elizabeth S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial,” *New York University Journal of International Law and Politics* 23:2 (1991), 374.
- 6) Dower, *Embracing Defeat*, 450.
- 7) *Ibid.*, 633, see note 71.
- 8) Minear, *Victors’ Justice*, 33, see footnote 29.
- 9) Herbert P. Bix, *Hirohito and the Making of Modern Japan*, (New York: Harper Collins, 2000), 611.
- 10) Minear, *Victors’ Justice*, 33.
- 11) Dower, *Embracing Defeat*, 465–66.
- 12) Minear, *Victors’ Justice*, 31. Also see Solis Horwitz, Appendix B & C, “The Tokyo Trial,” *International Conciliation* 465 (November 1950), 578–583 and 584.
- 13) Timothy Brook, “The Tokyo Judgment and the Rape of Nanking,” *The Journal of Asian Studies* 60:3 (August 2001), 677; Kopelman, “Ideology and International Law,” 440.
- 14) *Oxford English Dictionary*, 2nd ed., Oxford University Press, CD-Rom Version, 2002.
- 15) See Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment*, (Calcutta: Sanyal, 1953); R. Pal, *Crimes in International Relations*, (Calcutta: University of Calcutta Press, 1955). Primary sources on the IMTFE are: R. John Pritchard, with an authoritative commentary and comprehensive guide annot., comp., & ed., *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East*, vols. 124, (Lewiston, NY: Published for the Robert M. W. Kempner Collegium by E. Mellen Press, 1998); R. John Pritchard and Sonia Magbanua Zaide, annot., comp., and eds., *The Tokyo War Crimes Trial*, vols. 22, (New York: Garland, 1981–87). Some significant secondary works and articles on the judgment are: Lord Hankey, *Politics, Trial and Errors*, (Chicago: Henry Regnery, 1950); Minear, *Victors’ Justice*; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–51*, (Austin: University of Texas Press, 1979); Saburō Ienaga, “The Historical Significance of the Tokyo Trial,” in C. Hosoya, N. Andō, Y. Ōnuma and R. Minear eds., *The Tokyo War Crimes Trial: An International Symposium*, (Tokyo: Kodansha, 1986), 165–70; Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, (New York: William Morrow, 1987); Kopelman, “Ideology and International Law,” 373–444; B. V. A. Röling, *The Tokyo Trial and Beyond: Reflections of a Peace Monger*, ed. and with an intro. by Antonio Cassese (Cambridge: Polity Press, 1993); Ashis Nandy, “The Other Within: The Strange Case of Radhabinod Pal’s Judgment of Culpability,” in *The Savage Freud: And Other Essays on Possible and Retrievable Selves*, (Delhi: Ox-

- ford University Press, 1995), 53–80; Dower, *Embracing Defeat*; Bix, *Hirohito*; and Brook, “The Tokyo Judgment,” 673–700.
- 16) Bix, *Hirohito*, 541.
  - 17) See Meirion and Susie Harries, *Sheathing The Sword: The Demilitarisation of Japan*, (London: Hamish Hamilton, 1987), 130. The Harries write, “Ultimately, however, the key to Hirohito’s survival was MacArthur . . . His [MacArthur’s] Military Secretary produced a memo: ‘From the highest and most reliable sources, it can be established that the war did not stem from the Emperor himself. He has personally said that he had no intention to have the War Rescript used as Tojo used it.’” (ibid., 130). As to MacArthur’s basis for ordering the International Prosecution Section not to include Hirohito’s name in the indictment, the Harries comment: “This cannot have been based on anything much more substantial than his [MacArthur’s] own intuitive assessment of Hirohito’s character; but was decisive.” (ibid., 131).
  - 18) Dower, *Embracing Defeat*, 297–98. Also see Haruo Iguchi, “Bonner Fellers and U.S.-Japan Relations, June 1945–June 1946,” *Journal of American and Canadian Studies* 20 (2002), 57–93.
  - 19) Manchester, *American Caesar*, 491.
  - 20) Ibid., 491.
  - 21) Herbert Bix, “Emperor Hirohito’s War,” *History Today* 41 (December 1991), 14.
  - 22) Brackman, *The Other Nuremberg*, 57. Also see Kōichi Kido, *The Diary of Marquis Kido, 1931–45*, (Frederick, MD: University Publications of America, 1984).
  - 23) Horwitz, “The Tokyo Trial,” 494.
  - 24) Bix, *Hirohito*, 604.
  - 25) Ibid., 604. The Harries tell us, “Hirohito was not even called as a witness. This did nothing to ease the task of the defence lawyers, and the manifest injustice to their clients—even though by their silence the defendants connived at it.” See Harries, *Sheathing The Sword*, 127, 128.
  - 26) Minear, *Victors’ Justice*, x–xiii. About the issue of MacArthur’s authority, The Harries write: “The Tribunal did not at that time regard itself qualified to question the source of its own authority—namely MacArthur’s power as Supreme Commander. There seems to have been some disagreement among the American defence counsel as whether or not they should question MacArthur’s power to create the Tribunal in the first place. . . . In January 1947, however, the gloves came off and Hirota’s U.S. Counsel tried to challenge MacArthur’s jurisdiction—only to have the motion dismissed by Webb as ‘political harangue.’” See Harries, *Sheathing The Sword*, 148.
  - 27) Dower, *Embracing Defeat*, 449. Dower comments, “The Tokyo trial was law, politics, and theater all in one.” (ibid., 461).
  - 28) Ibid., 300.
  - 29) Ibid., 301.
  - 30) Ibid., 632, endnote 65.
  - 31) The honorific suffix *-san* in Japanese is equivalent to “Mr.,” “Mrs.,” or “Ms.” It is not used to talk about oneself or someone from one’s own group, but when referring to a person outside one’s group.
  - 32) B. R. Nanda, *Mahatma Gandhi: A Biography*, (Woodbury, NY: Barron’s Educational Series, Inc., 1965), 233.
  - 33) T. A. Raman, *What Does Gandhi Want?* (New York: Oxford University Press, 1943), 55.
  - 34) “Radha Binod Pal,” *The Hindu*, January 11, 1967, [?].
  - 35) See Dower, *Embracing Defeat*, 633, note 71. Also see Pal, *International Military Tribunal for the Far East*.
  - 36) The phrase “a date which will live in infamy” was used by Franklin D. Roosevelt in his “Infamy Speech” to Congress on December 8, 1941. See <http://en.wikipedia.org/wiki/Infamy-Speech>. Accessed on August 22, 2008.
  - 37) Hiroaki Satō, “Great Tokyo Air Raid was a war crime,” *The Japan Times*, September 30, 2002, 17.
  - 38) Ibid.
  - 39) Richard Rhodes, “The General and World War III,” *New Yorker*, June 19, 1995, 48, quoted in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton, NJ: Princeton University Press, 2000), 8–9.
  - 40) Roger Angell “The Talk of the Town,” *New Yorker*, January 19, 2004, 31, 32. Also see: [http://en.wikipedia.org/wiki/The\\_Fog\\_of\\_War](http://en.wikipedia.org/wiki/The_Fog_of_War). Accessed on August 22, 2008.

- 41) Ibid., 32.
- 42) Ibid.
- 43) See Dower, *Embracing Defeat*, 633, note 72.
- 44) Ian Buruma quoting "So muss die Hölle aussehen," *Der Spiegel*, January 6, 2003, 39 in "The Destruction of Germany," *The New York Review of Books* 51 (October 21, 2004), 8.
- 45) Ian Buruma, review of *The Fire: Germany in the Bombing War, 1940–1945* and *Scenes of Fire: A View of the Bombing War* by Jörg Friedrich, *The New York Review of Books* 51 (October 21, 2004), 8–12.
- 46) Minear, *Victors' Justice*, 3. The term "victors' justice" attributed to Tōjō, Hideki is quoted by Minear from Tōjō's speech in December 1948: "In the last analysis, this trial was a political trial. It was only victors' justice." Ibid., 3.
- 47) Kopelman, "Ideology and International Law," 407.
- 48) Ibid., 408.
- 49) Ibid.
- 50) "Radha Binod Pal," *The Hindu*.
- 51) Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, (New Brunswick, USA, and London: Transaction Publishers, 1997), 130. Also see Katsuichi Honda, *The Nanjing Massacre*, Frank Gibney ed., trans. by Karen Sandness, (London: M. E. Sharpe, 1999).
- 52) Ibid., 131.
- 53) Ian Buruma, "The Cruellest War," review of *Retribution: The Battle of Japan, 1944–45* by Max Hastings, *The New York Review of Books* 55 (May 1, 2008), 26.
- 54) Ibid., 25.
- 55) Ibid., 24.
- 56) Tony Judt, "From the House of the Dead: On Modern European Memory," *The New York Review of Books* 52 (October 6, 2005), 16.
- 57) Ibid., 63.
- 58) *The Hindu*, August 24, 2007, <http://www.hindu.com/2007/08/24/stories/2007082460801500.htm>. Accessed on September 13, 2008.
- 59) "China rejects call for apology," *BBC News*, April 17, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4453055.stm>. Accessed on September 13, 2008. Also see Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II*, with a Foreword by John W. Dower, (Boulder, CO: Westview Press, 1996).
- 60) Nandy, *The Savage Freud*, 66.
- 61) Leonard A. Gordon, *Bengal: The Nationalist Movement, 1876–1940*, (New York: Columbia University Press, 1974), 80.
- 62) See D. C. Holtom, *Modern Japan and Shinto Nationalism*, rev. edn., Third Impression, (New York: Paragon Book Reprint Corp., 1963), 9, 10.
- 63) Bix, *Hirohito*, 568.
- 64) See Holtom, *Modern Japan*, 17–19.
- 65) Kalikinkar Datta, *Survey of India's Social Life and Economic Condition in the Eighteenth Century*, (Calcutta: Firma K. L. Mukhopadhyay, 1961), 13–14.
- 66) Nandy, *The Savage Freud*, 68.
- 67) S. Gopal, *British Policy in India, 1858–1905*, (Cambridge: Oxford Press, 1965), 269.
- 68) K. Kripalani, *Rabindranath Tagore: A Life*, 2nd and rev. edn., (New Delhi: Orient Longman, 1971), 113.
- 69) Sumit Sarkar, *Modern India, 1885–1947*, (New Delhi: Macmillan, 1995), 109.
- 70) Röling, *The Tokyo Trial and Beyond*, 28–29.
- 71) Kopelman, "Ideology and International Law," 391.
- 72) Brackman, *The Other Nuremberg*, 71.
- 73) Ibid.
- 74) Röling, *The Tokyo Trial and Beyond*, 29.
- 75) Sarkar, *Modern India*, 109.
- 76) Röling, *The Tokyo Trial and Beyond*, 28–29.
- 77) Christopher Bayly and Tim Harper, *Forgotten Armies: The Fall of British Asia, 1941–1945*, (Cambridge, MA: Belknap Press, 2005), 119, 132, quoted in Arthur Herman, *Gandhi & Churchill*, (New York: Bantam Books, 2008), 476, 478.

- 78) Buruma, "The Cruellest War," 26.
- 79) Hastings quoted in Buruma, *op. cit.*, 26.
- 80) Nanda, *Mahatma Gandhi*, 222.
- 81) Bix, *Hirohito*, 596.
- 82) Brackman, *The Other Nuremberg*, 344. Brackman says, Satō "was an unyielding and remorseless militarist . . . as commander in Indochina he approved directives on the transportation of prisoners of war and civilian internees, many of whom worked as slave labor on the Siam–Burma Railway." (*ibid.*, 411). "About 180,000 Asian labourers and 100,000 Allied prisoners of war (POWs) worked on the railway. Of these, around 90,000 Asian labourers and 16,000 Allied POWs died as a direct result of the project." See "Burma Railway," <http://en.wikipedia.org/wiki/Death.Railway>. Accessed September 13, 2008.
- 83) Nandy, *The Savage Freud*, 56.
- 84) Harries, *Sheathing The Sword*, 148.
- 85) *Ibid.*
- 86) *Ibid.*, 149.
- 87) *Ibid.*
- 88) *Ibid.*
- 89) Brackman, *The Other Nuremberg*, 339.
- 90) Nandy, *The Savage Freud*, 56.
- 91) "Shimonaka Yasaburo," *Encyclopedia of Japan*, <http://jochiac:jochiac@na.jkn21.com/cgi-bin/jkcsearch/common.cgi>. Accessed January 23, 2004.
- 92) Nandy, *The Savage Freud*, 56.
- 93) *Ibid.*, 56.
- 94) Brook, "The Tokyo Judgment," 691. Brook posits, "Nandy's reading of Pal as a heroic figure bridging the historical cusp between colonialism and independence—as 'both an Indian and a Victorian trying to transcend the moral dichotomy of the age' [Nandy, *The Savage Freud*, 80] reflects Nandy's own desire to bridge the civilizational polarities that colonialism has imposed on the postcolonial intellectual." *Ibid.*, 691; see footnote 31.
- 95) "Shimonaka Yasaburo," *op. cit.*
- 96) Pritchard, *The Tokyo Major War Crimes Trial*, vol. 68, The Case for the Defence, Tuesday 4<sup>th</sup> November –Friday, 7<sup>th</sup> November 1947, transcript page 32,689.
- 97) *Ibid.*, 32,690, 32,692, 32,694.
- 98) *Ibid.*, 32,698.
- 99) Horwitz, "The Tokyo Trial," 580.
- 100) Dower, *Embracing Defeat*, 459.
- 101) Röling, *The Tokyo Trial and Beyond*, 23.
- 102) Nandy, *The Savage Freud*, 56.
- 103) Kopelman, "Ideology and International Law," 375.
- 104) *Ibid.*, 373–444.
- 105) *Ibid.*, 427.
- 106) Tom Bingham, *The Business of Judging: Selected Essay and Speeches*, (Oxford: Oxford University Press, 2000), 74.
- 107) *Ibid.*, 77.