

Defending the Enemy: Justice for the WWII Japanese War Criminals

Elaine B. Fischel

Bascom Hill Books, 2009

Reviewed by David Lee

“On May 3, 1946, with the glamor of and artistry of a Hollywood premiere, the trial was underway.”

--Elaine B. Fischel, legal stenographer, at the opening of the International Military Tribunal for the Far East, p. 32.

The Americans clearly stated what they intended to do to Japan’s leadership following Japan’s surrender. The July 26, 1945 “Potsdam Declaration” pledged to mete out “stern justice” to “all war criminals”. The International Military Tribunal for the Far East opened in 1946 with indicting 28 former government officials and military officers. During the trial, two died and one was confined to a mental institution. “Stern justice” was carried out on the rest: executions and long prison terms.¹

Elaine Fischel (1921-2017) served as a legal stenographer and secretary for the defense during the International Military Tribunal for the Far East, the so-called “Tokyo Trial”. Returning to America, she earned a law degree and served as a lawyer in California. The title of her book suggests she will regale readers with the usually ignored defense’s case from the Tokyo Trial.

To the uninitiated, “Tokyo Trial” sounds supremely democratic: a trial by one’s peers presided by an impartial judge, presentation of evidence, cross-examination, and robust debate over legal precedent. In fact, there was nothing democratic in the “Tokyo Trial” at all. In apparent awe, Fischel blurts the “Tokyo Trial” was setup like a Hollywood production. While not stated, she suggests the Trial was held not to uphold the law but to serve as perverse entertainment, like Mao’s or Stalin’s show trials, or as vulgar “Two Minutes Hate” wrapped in a thin veil of legality.²

¹ Some Allies were disappointed that “stern justice” was not applied to the Showa Emperor. In written opinions presented after the trial, President of the IMTFE Sir William Webb and Justice Henri Bernard castigated occupation authorities for granting immunity to the Showa Emperor.

² Orwell, G. (1949). *Nineteen Eighty-Four*. <https://dn790002.ca.archive.org/0/items/NineteenEightyFour-Novel-GeorgeOrwell/orwell1984.pdf>

The defense's argument goes against the conventional wisdom reflected in today's mainstream media and school textbooks, that fascist-aggressors Japan and Nazi Germany engaged in a conspiracy of world domination.³ One will need to read elsewhere that the defense's case includes a frank exposition of Japan's political and strategic position during the pre-World War II era, of deeply entrenched European and American colonialism in Asia, a Russian Communist menace and intractable political instability in China. The defense's case has been brilliantly summarized elsewhere, such as historian Richard Minear's *Victors' Justice*.⁴ Justice Radhabinod Pal of India strenuously voice his objections to the entire proceedings in a massive volume.⁵

As one who sat in on the trial and assisted the defense's lawyers, Fischel could have further enlighten readers on the defense's courtroom strategy. But readers were warned very early on by Fischel that her book "is not a treatise on the legality of the trial or the lessons it may have taught." In fact, to Fischel, the real point of the Tokyo Trial is "visual indoctrination of the Japanese people with the American concept of democracy," that is, continued war against Japan via propaganda. Fischel chirps that the defendants were going to get a trial, "fair and without prejudice," that the "American judicial method almost demanded an adequate defense..." She forgets or was not told that head of the occupation, General Douglas MacArthur, and the Allies had already made up their minds to impose "stern justice" well before the final verdicts were read in 1948.

Readers will see that Fischel also had made up her mind as well, long before arriving in Tokyo. She was "bitter and uncompromising" in her "hatred of the Japanese people." While Fischel now regrets using "what is now considered a degrading term," her letters home is littered with "Jap" and "Japs". Fischel sniffs that it was "a term commonly used by Americans at the time." The term was indeed commonly used to degrade Japanese then—as it is today.⁶ Hard feelings against the Japanese persisted well after American victory over Japan—Fischel insisted on using "Jap" in her letters from Tokyo in a "intentional effort to assure my mother" and others who were incredulous that she was defending Japanese "war criminals".

Separately, in September 1945, General Yamashita Tomoyuki was charged by a US Military Commission in the Philippines of "unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by

³ <https://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A6.html>

⁴ Minear, R.H. (1971). *Victors' Justice: The Tokyo War Crimes Trial*. Princeton, NJ: Princeton University Press.

⁵ Pal, R. (1953). *International Military Tribunal for the Far East: Dissentient Judgement*. Calcutta: Sanyal. Reprinted: Tokyo: Kokusho-Kankokai, 1999. https://www.sdh-fact.com/CL02_1/65_S4.pdf

⁶ General John L. DeWitt's infamous 1943 "A Jap's a Jap" slur comes to mind. <https://text-message.blogs.archives.gov/2013/11/22/a-slaps-a-slap-general-john-l-dewitt-and-four-little-words/>

permitting them to commit war crimes".⁷ In December 1945, the Commission found Yamashita guilty and sentenced him to death. The US Supreme Court declined to overrule the Commission and President Truman denied Yamashita clemency. Military attorney A. Frank Reel wrote a very engaging account of his time as a member of Yamashita's defense team, describing in detail the harried preparation by the defense within short period of time allotted by the Commission, questioning witnesses and questioning the legal basis of the trial.⁸ By contrast, Fischel disposes of the Yamashita case in one sentence: "He was found guilty and hanged."

Her grasp of pre-war Japanese history can be summed up in a couple of her concurrently written sentences: "Those [Japanese] militarists took over Manchuria by the end of 1931," and by 1937, "The Japanese Army invaded China." "The atrocities," Fischel sobs, "were sickening". She echoes the horribly deficient history that most Westerners have imbibed up to the present day, that pre-war Japan was entirely "focused on war and expansion." Though she sat through the Tokyo Trial and interacted with defendants, 60 years later, Fischel nonetheless reflexively repeats the conventional wisdom. With this mindset, can readers expect from Fischel a balanced or neutral account of the Trial?

If, on the other hand, one wants to read about a privileged young American Jewish woman's extended vacation in post-war Japan, then this book is for you.

We do not use "privileged" as a modern social-political cliché. It does not appear Fischel was born into wealth. She grew up with a single mother and her older sister, managing to excel academically and was an accomplished tennis player and swimmer in high school and as an undergraduate at UCLA.⁹ Her application to the law school at UC Berkeley was declined, apparently not for her lack of educational achievement but for being "completely unsophisticated."

During her two and a half years in Tokyo as a legal stenographer, she had a maid to cook and clean for her, she dated well-to-do American military officers and traveled all over Japan for vacations in a government-supplied automobile. She even brought a new car in Japan, since it was "impossible" to buy in post-war America, and moved it with her back to the states at the end of her tour.¹⁰

⁷ Yamashita vs. Styer. 327 U.S. 1 (February 4, 1946)

https://www.worldcourts.com/imt/eng/decisions/1945.12.07_United_States_v_Yamashita.pdf

⁸ Reel, Frank A., (1949). *The Case of General Yamashita*. Chicago, IL: University of Chicago.

⁹ Readers should be reminded that a fraction of American women graduated from high school (about 30%) and fewer went to college (about 4%) in the 1940's. <https://nces.ed.gov/pubs93/93442.pdf>

¹⁰ Automobile ownership in the late 1940's was rarer than it is today. In 1948, there were about 280 cars per 1,000 Americans. Sixty years later, there were 842 cars per 1,000 American. In Japan, in 1955, there were about 2 cars for every 1,000 persons. <https://www.energy.gov/eere/vehicles/fact-962-january-30-2017-vehicles-capita-other-regionscountries-compared-united>

Fischel's Tokyo at the time was "astonishingly opulent considering how poor the city itself appeared as it dug itself out of the rubble." Fischel's social calendar was so filled, "I was invited to so many dances and parties ... The time came when an evening at home was something for which I yearned." Fischel was invited to stay at Marquis Kido Koichi's summer villa, but she objected because she didn't "like the Japanese beds". (So Kido's son scrambled to secure a Western-style bed. Kido himself was in prison during the Trial) She socialized with other Japanese Trial defendants, members of the Japanese elite, such as Mikimoto Kokichi, cultured pearl entrepreneur¹¹ and Mrs. Fritzi Burger-Nishikawa, Mikimoto's granddaughter-in-law and Olympic ice skater. She accepted invitations from Tokyo Trial Justices (Justices Sir William Webb and Bert Roling) and declined invitations of others (Justice Erima Norcroft). On several occasions, she associated with Emperor Showa's younger brother, Prince Takamatsu.

Fischel even found herself "swooning" over alleged "KGB" spy Herbert Norman, at the time head of the Canadian Legation (and married). It was Norman, Fischel asserts, that "persuaded" McArthur to arrest Kido as a "Class A" war criminal. She also stated that Norman wanted the Emperor to be "arrested and tried as a war criminal."

Food was "always so good and not so scarce at all," including "Chinese food," "fresh fruit" and hamburgers. Fischel feasted on a lot of steaks and plenty of *sukiyaki*, with "good beef" and vegetables. Readers should remember that the average Japanese daily caloric intake in 1946 was about 1,400 Calories. Before the war, the average intake was over 2,000 Calories for Japanese urbanites and about 3,000 Calories for farmers.¹² (During the 1940's, the average American daily caloric intake was between 3,200 and 3,400 Calories.) It was not until 1955 that Japanese daily caloric intake exceeded 2,000 Calories.

While attending (defendant) Admiral Nagano Osami funeral, Fischel noted the residing (Shinto?) priest's "funny" black hat" and chanting "vaguely reminiscent of animal sounds." She also claimed that General McArthur was "the first American to set foot in Japan." Given Fishcel's limited interaction with the Japanese, other than with servants and members of the Japanese upper strata, her basic notion that the Japanese were "evil, subhuman people," "focused on war and expansion" and relying on academic charlatan

¹¹ While offered oysters for lunch while visiting with Mikimoto, she declined due to Jewish dietary restriction against shellfish. Whether she declined to eat other non-kosher (*treif*) foods is not mentioned.

¹² Mori, H. (2022). Height is a measure of consumption that incorporates nutritional needs: when and what? *Annals of Clinical and Medical Case Reports* 9: 1. <https://acmcasereport.org/wp-content/uploads/2023/06/ACMCR-v9-1835.pdf> Nakayama, S. (1968). Long-term changes in food consumption in Japan. *The Developing Economies* 7: 220-232. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1746-1049.1969.tb00530.x> Lee, J.H. et al. (2022). United States dietary trends since 1800. *Frontiers in Nutrition* 8: 748847. <https://www.frontiersin.org/journals/nutrition/articles/10.3389/fnut.2021.748847/full>

Ruth Benedict¹³ for Japanese cultural insight, maybe readers will also come to the same conclusion as the admissions office at UC Berkeley law school: “completely unsophisticated”.

¹³ Watsuji, T. (2016). Queries on the Scientific Value of *The Chrysanthemum and the Sword*. [August 1949] *Classical Japanese Anthropology* 17:37. https://www.jstage.jst.go.jp/article/jrca/17/1/17_037/_pdf