Chapter 9

Justice Röling (The Netherlands)

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I. Röling in Tokyo: A Dignified Dissenter

Bernard Röling was appointed as a judge at the International Military Tribunal for the Far East (‘Tokyo Tribunal’) in his early 40s. He was the youngest judge at Tokyo. Röling was surprised at his appointment: he was neither an international lawyer, nor had he ever been to Japan. His sole qualification for appointment was that he had some expertise in the criminal law of the Netherlands East Indies. Nonetheless, Justice Röling made more than a minor mark in Tokyo, and can be said to have been the judge who left Tokyo with his integrity and independence of mind most firmly intact. Indeed, those who dismiss the Tokyo Tribunal often forget that Justice Röling was as much a part of the proceedings as some of the more notorious participants in the Trial.2

To understand Justice Röling’s role in the Tokyo Trial it is necessary to explain the nature of the tribunal to which he was appointed. The Tokyo Tribunal was set up pursuant to Japanese agreement to the Potsdam Proclamation of 26 July 1945.3 It was made up of representatives of the nine Allied signatories of the Japanese Instrument of Surrender,4 alongside India and the Philippines.5 The Tribunal tried high-level

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* A slightly different version of this chapter has been previously published as Robert Cryer, ‘Röling in Tokyo: A Dignified Dissenter’ (2010) 8 Journal of International Criminal Justice 1109.
1 See Bernard Röling and Antonio Cassese, The Tokyo Trial and Beyond: Reflections of a Peacemonger (1993) 19.
2 Interestingly, Justice Röling’s role is also almost ignored in Yuma Totani, The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II (2008), a work that is sympathetic to the Trial.
3 Potsdam Proclamation (Terms for Japanese Surrender), US–China–UK, signed 26 July 1945, 3 Bevans 1204.
4 The Allied signatories were Australia, Canada, China, France, New Zealand, the Netherlands, the United Kingdom, the United States and the USSR: see Instrument of Surrender by Japan, opened for signature 2 September 1945, 3 Bevans 1251, 1252 (entered into force 2 September 1945).
5 Charter of the International Military Tribunal for the Far East, signed in Tokyo on 19 January 1946, amended 26 April 1946, TIAS 1589, 4 Bevans 20, 27 (‘Tokyo Charter’).
Japanese civilian and military officials for Japanese activities in the Asia Pacific War, both for crimes against peace and war crimes.6

The Tribunal delivered its Judgment in November 1948. Alongside the Majority Judgment, there were two separate, but largely concurring – in result if not in reasoning – opinions7 and three dissents, one by the natural lawyer Henri Bernard,8 one by the primarily positivist Radhabinod Pal,9 and one by Röling. In his Dissenting Opinion, Röling explained his differences from the Majority – and from Justice Pal – in a manner that was both balanced and erudite, even if it was not always popular.10 Even so, his Opinion has much to be said for it, and his remarks, particularly about the Tokyo Tribunal itself, are evidence of a judge who sought to transcend the parochial view of both the prosecution and the defence, on both the law and the facts, and thus craft a judgment that has proved to be of lasting value in both the West and in much of Japan.

II. Röling on Jurisdiction

Turning first to the jurisdictional aspects of the case, Justice Röling disagreed with the Majority on two issues. The more general related to the basis of the Tribunal, which, as mentioned above, was based on the Potsdam Proclamation and the Japanese Instrument of Surrender. The war, which was ended by this Surrender, was that between Japan and China from 1931, and the other Allies from December 1941. This was an issue because the USSR sought to bring charges relating to the Lake Khassan and Nomonhan (Khalkin-Gol) incidents in 1938–39. Both conflicts ended in peace treaties, but were prosecuted as crimes against peace before the Tokyo Tribunal. The defence argued that these (and other) charges were outside the jurisdiction of the Tokyo Tribunal.11 The Majority, rather unconvincingly, disagreed,

10 As will be seen, Justice Röling disagreed with some aspects of the Majority Judgment. Unfortunately, for international lawyers looking back at the Trial, he did not make all of his scepticism public at the time. Justice Röling only published the parts of his Opinion which he felt might have an impact on General MacArthur when he came to review the sentences imposed by the Tribunal. See *Tokyo Major War Crimes Trial*, above n 1, Vol 109, Dissenting Opinion of Justice Röling, 1. Not that there is any evidence that MacArthur actually read the Judgment: see Boister and Cryer, above n 6, 261.
11 Inter alia, in Defence Motion, Paper No 54, 13 May 1946, submitted by Hiranuma Kiichirō, Matsuoka Yosuke, Shigemitsu Mamoru, Tōgō Shigenori, and Umezu Yoshijirō.