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"For the Sake of Justice Due": Debating Law and Morality in Justice Radhabinod Pal's Dissent in the Tokyo War Crimes Tribunal

by,

Norman K. Swazo
Professor of Philosophy
Department of History and Philosophy
North South University

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Debating Law and Morality in Justice Radhabinod Pal's Dissent in the Tokyo War Crimes Tribunal[1]

Norman K. Swazo
Professor of Philosophy
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ABSTRACT

Since the closure of the "Tokyo War Crimes Trial" in December 1948 via the judicial proceedings undertaken by the International Military Tribunal for the Far East (IMTFE), there has been continued debate about whether justice was done, whether merely "victors' justice" obtained in the majority judgment, whether both law and morality were reasonably engaged in a judgment that referenced both positive international law and natural law, whether it was legally and morally proper for the Tribunal to have excluded an examination of alleged war crimes on the part of the Allied Powers (i.e., for indiscriminate incendiary and atomic bombing of Japanese cities), etc. Most interesting in this trial was the entirely dissentient judgment rendered by Justice Radhabinod Pal (representative of India). Pal's judgment challenged the application of *ex post facto* positive law while positioning himself from the outset in a fundamental contestation of the legitimacy of the Tribunal. In this essay, these various issues are engaged with attention to Pal's judgment specifically and his concern for due process, thereby for a juridical disposition that would ensure justice due the defendants and the Japanese nation.

Keywords: IMTFE; Tokyo War Crimes Trial; Justice Radhabinod Pal; law; morality

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"A war, whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare. No pact, no convention has in any way abrogated *jus-in-bello*."
--Justice Radhabinod Pal

Preliminary Observations Concerning Law and Morality

At all times and in all places, war has been and will be ugly, repugnant for the inevitable yet regrettable loss of life of all combatants across all too numerous battlefields, for sure. However, even more so, all wars are abhorrent for the heightened suffering and deaths of innocent civilians and destruction of civilian infrastructures—euphemistically denominated

[1] An earlier version of this paper was posted as a preprint on ResearchGate (June 2023, DOI: 10.1314p/RG2.2.21554.52165): https://www.researchgate.net/publication/371475280_For_the_Sake_of_Justice_Due_Debating_Law_and_Morality_in_Justice_Radhabinod_Pal's_Dissent_in_the_Tokyo_War_Crimes_Tribunal

"collateral damage." Such consequences follow from battlefield actions despite a given military's presumed recognition of non-combatant immunity during armed conflict, in application of the doctrine of just war (*jus ad bellum, jus in bello*) and subsidiary rules of military engagement. The Second World War (WW2) yielded ample evidence of inordinate civilian casualties, including those consequent to intentional indiscriminate bombing campaigns (incendiary saturation bombing of both German and Japanese cities and the unprecedented atomic bombing of Hiroshima and Nagasaki) carried out by the Allied Powers in both the European and Pacific theaters of armed conflict.

In the case of the Pacific war with Japan, as Okamoto Mitsuo reminded, the nation suffered American air raids that "killed over 100,000 citizens in Tokyo overnight [on 10 March 1945]," following that with "continued firebombing over 60 of Japan's major cities such as Osaka, Yokohama, Nagoya, Kobe, Sendai, Fukuoka, etc., flattening these historic cities into ashes. Then Americans dared to drop atomic bombs on Hiroshima [8:15am on 06 August 1945] and Nagasaki [11:02am on 09 August 1945]."[2] Even then, indiscriminate bombing continued—"on 10 August 1945 […] the cities of Kumamoto and Miyazaki […] and Sakata […] two days later Kurume, Saga, and Matsuyama […] and on 13 August Nagano, Matsumoto, Ueda and Otuki were bombed. On 14 August, in addition to a massive attack on Osaka with 700 heavy one-ton bombs dropped from 150 B-29 bombers, Akita, Takasaki, Kumagaya, Odwara and Iwakuni became the victims of the last U.S. bombing raids

[2] Okamoto Mitsuo, "Peace Culture in Hiroshima," *The Proceedings of the Twenty-First World Congress of Philosophy*, Vol. 3, 2007, pp. 113-118, https://doi.org/10.5840/wcp2120073248, accessed 11 October 2021. Okamoto is Professor Emeritus, Department of International Politics, Faculty of Law, Hiroshima Shudo University.

of the Asia Pacific War."[3] The "Instrument of Surrender" officially ending the war was signed on 02 September 1945.[4]

Okamoto issues his judgment that the use of the atomic weapons on Hiroshima and Nagasaki that killed over 200,000 Japanese citizens "constituted a clear case of war crimes, as acts intended to annihilate two whole cities." But, as the historical record shows, the Allied Powers held military leaders of Nazi Germany and Japan accountable for war crimes in the Nuremberg Military Tribunal and the International Military Tribunal for the Far East (IMTFE, otherwise known as the Tokyo War Crimes Trial).[5] In these trials there was no legally grounded accounting of the Allied Powers for war crimes. Yet, it is undeniable as a matter of fact that, in planning and carrying out the indiscriminate incendiary and atomic bombing in Japan, the Allied military leaders surely *foresaw* and even *intended* large-scale and geographically widespread civilian deaths.[6] It is no surprise, therefore, that when duly recognized authorities of State declare a war is finally at its end, with good reason it may be objected that the champions of battle merely declare a *victors' justice*, according to which the

[3] Yuki Tanaka and Richard Falk, "The Atomic Bombing, The Tokyo War Crimes Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements," *The Asia-Pacific Journal*, Vol. 7, Issue 44, No. 3, 02 November 2009, pp. 1-20, https://apjjf.org/-Richard-Falk--Yuki-Tanaka/3245/article.pdf, accessed 13 October 2021. Tanaka's article here includes a commentary by Richard A. Falk, Emeritus Professor of International Law and Practice, Princeton University.

[4] According the to Instrument of Surrender, Japanese signatories did so "acting by command of an in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters…" In doing so, the government of Japan accepted "the provision set forth in the declaration issued by the heads of the Governments of the United States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics," i.e., "the Allied Powers." See facsimile digitized version of the "Instrument of Surrender," https://catalog.archives.gov/OpaAPI/media/1752336/content/harvest/1752336-00534/00534_2003_001_AC.jpg, accessed 17 October 2021.

[5] For overview, see "The Tokyo Trial," Peace Palace Library: The International Law Library, https://peacepalacelibrary.nl/research-guide/tokyo-trial, accessed 19 October 2021. A source for court documents is N. Boister and R. Cryer, eds. *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008).

[6] "According to the principle of double effect, sometimes it is permissible to cause a harm as a side effect (or 'double effect') of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end." Inasmuch as the destructive force of the atomic bombs was already known (e.g., consequent to American testing in New Mexico), there can be no legitimate appeal to the doctrine of double effect in the sense that mass civilian deaths and massive destruction of civilian infrastructure were foreseen but not intended. Clearly, even J. Robert Oppenheimer, the prominent scientist of the Manhattan Project, understood the power of the bomb when it was tested on 16 July 1945, having cited the *Bhagavad Gītā* to say, "I am become death, the destroyer of worlds." For philosophical explanation of the doctrine of double effect, see Alison MacIntyre, "Doctrine of Double Effect," *Stanford Encyclopedia of Philosophy* (substantive revision 24 December 2018), https://plato.stanford.edu/entries/double-effect/, accessed 18 October 2021.

ancient dictum "might makes right" is brought to the fore of complaint at the bar of justice. That is especially so when the judicial proceedings occur by way of *military* commissions or tribunals. Yet, it must be asserted that victors' justice is *not* justice; it is merely the *semblance* of justice.

For many engaged in historical critique of events that sought to bring closure to the WW2, it is victors' justice[7] that obtained in the post-war prosecution of Japanese "war criminals" in the proceedings of the IMTFE.[8] Others have taken a more balanced approach to the trial by focusing on the trial as a judicial proceeding.[9] While the semblance of justice may present itself in the garb of legality, thus to subvert real justice, there remains to us living later the task of *moral* critique of that posited legality, precisely for the sake of a moral duty to future generations to declare right from wrong, and thereby to declare the requisites of true justice when that is within our power of discernment. A document that is represented to be a posit or declaration of legality[10] is not always to be accepted as a repository of justice; for, there are laws that, though posited and legislated, are unjust by measures of morality (not to mention measures issued by public authority as witnessed in the issuance of conditions, reservations, and amendments as part of the usual instruments of ratification). One must, therefore, take to the pulpit to pronounce in the court of public opinion in the capacity of

[7] See Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971). An international symposium engaged the issue of victors' justice subsequently; see C. Hosoya, N. Ando. Y. Onuma, and R. Minear. Eds. *The Tokyo War Crimes Trial: An International Symposium* (Tokyo: New York, Kodansha International Ltd., 1986). For a more recent engagement of various issues in relation to the victors' justice critique, see Yuki Tanaka, Timothy L.H. McCormack, Gerry Simpson, eds. *Beyond Victors' Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Brill/Nijhoff, 2011). See within this volume: Fujita Hisakazu, "The Tokyo Trial: Humanity's Justice V Victors' Justice (pp. 1-21); Nakajima Takeshi, "Justice Pal (India)" (pp. 127-144); Yuki Tanaka, "The Atomic Bombing, The Tokyo Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements" (pp. 291-310); and Ian Henderson, "The Firebombing of Tokyo and Other Japanese Cities" (pp. 311-321).

[8] Nariaki Nakazato, *Neonationalist Mythology in Postwar Japan: Pal's Dissenting Judgment at the Tokyo War Crimes Tribunal* (Lanham MD: Lexington Books, 2016), opines (p. xv) that, "…the Nuremberg and Tokyo trials should be seen as historical events of a dual nature that cannot be reduced to either of the two easy stereotypes: an impartial trial (a trial of civilization) or a political trial (victors' justice)."

[9] See, e.g., David Cohen, Yuma Totani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (Cambridge: Cambridge University Press, 2019).

[10] At issue as a matter of legality is whether the Tokyo Tribunal adhered properly to the principle of legality, which makes *ex post facto* (retroactive) law or legislation impermissible as a matter of law.

amicus curiae (friend of the court) at the least, but also to do so more precisely in the capacity of *amicus iustitiae* (friend of justice). For, as Shubhangi Agarwalla reminded recently, while "The law envisages a court room as constituting a space that is free from politics and political considerations," there is ample reason to view the space of a presumptively authoritative adjudication of right and wrong, as in the case of the IMTFE, "as a place of competing ideologies"[11] precisely because of the operative terms of reference set according to the preferences of the Allied Powers. And, when ideologies compete in such a setting, there is ample probability that justice will be deferred and thus denied altogether, the semblance of justice finding itself in prominent display.

The Tokyo Tribunal charged the Japanese defendants with "crimes against peace" (36 counts), i.e., waging aggressive war, including "Japanese wars against China from 1931 onward, against the U.S.S.R. in 1938 and 1939, and the Pacific war in December 1941,"[12] without Japan having issued the customary official declarations of war as expected under terms of the Hague Convention of 1907. The language of the indictment was specific in declaring the defendants criminally liable individually for "conspiracy to secure the domination of East Asia and of the Pacific and Indian Oceans," the "domination of Manchuria," "domination of all China," and waging illegal war "against sixteen specified countries and peoples," subsequently "conspiring with Germany and Italy to secure the domination of the world by the waging of such illegal wars against any opposing countries." Other counts of murder and crimes against humanity were included for a total of 55 counts.

The presence of competing ideologies in the case of the Tokyo trial is clear from the exclusion of explicit consideration of both Japanese and American/Allied indiscriminate

[11] Shubhangi Agarwalla, "Reading the Political: What Justice Pal's Dissent at Tokyo Tells Us About the Present Moment," International Law & The Global South blog, 16 August 2020, https://internationallawandtheglobalsouth.com/reading-the-political-what-justice-pals-dissent-at-tokyo-tells-us-about-the-present-moment/, accessed 11 October 2021.
[12] A.S. Comyns-Carr, "The Tokyo War Crimes Trial," *Far Eastern Survey*, Vol. 18, No. 10, 18 May 1949, pp. 109-114, htttps://www.jstor.org/stable/3024579, accessed 17 October 2021.

bombing during the war. For example, as Yuki Tanaka has stated, "At the Tokyo War Crimes Tribunal, the issue of the indiscriminate bombing of many Chinese cities by Japanese Imperial Forces during the Asia Pacific War was never raised, despite repeated wartime condemnation by the US government of Japan's aerial attacks on Chinese civilians. It is obvious that the reason for not bringing this matter before the court lay in America's own conduct against Japanese civilians [not to mention against German civilians], which took the form of the most extensive aerial campaign against civilians, destroying sixty four Japanese cities with incendiary bombs and two with atomic bombs."[13]

The American authorities in any case preempted any Japanese postwar claims against the USA in Article 19 of the peace treaty concluded in September 1951 (which became effective in April 1952). Even so, in the "Shimoda case" filed in the District Court of Tokyo Japan in April 1955, the plaintiffs argued with reference to the atomic bombing of Hiroshima and Nagasaki that, "the dropping of these atomic bombs as an act of hostility was illegal under the rules of positive international law then in force (taking both treaty law and customary law into consideration)…"[14] Most significant in the pleading of the plaintiffs is the claim that, "the use of the atomic weapon was clearly prohibited by 'natural law' or the 'principle of international law' even if the positive laws could not have been applied to it."[15] In contrast, from the perspective of *moral (practical) rationality* and not (theoretical) legality, the defense's argument in the Shimoda case remains entirely problematic and objectionable. It argued, *inter alia* (as Tanaka summarizes it) that, "any weapon could be utilized no matter

[13] Tanaka and Falk, op. cit. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton: Princeton University Press, 2000), (pp. 8-9) cites American General Curtis LeMay to have remarked: "I suppose if I had lost the war, I would have been tried as a war criminal," reminding here that LeMay "targeted some sixty-three Japanese cities for annihilation by American bombing in World War II." LeMay added: "Fortunately, we were on the winning side." Bass opines later (p. 16), "…the phrase 'victors's justice' is in the end a largely uninformative one. The kind of justice one gets depends on the nature of the conquering state. The question is not whether we are looking at victors' justice. Probably. But *which* victor? And what justice?"

[14] Tanaka, ibid., p. 8.

[15] Tanaka, ibid., p. 9.

how destructive, lethal and inhumane it would be, *as long as there was no positive law or treaty to explicitly prohibit the use of such a weapon*."[16]

On that assertion atomic or thermonuclear weapons, in short, are not to be considered either legally or morally indefensible weapons. At issue here, of course, is the relative weight of applicable positive international law and natural law as measures of justice due. Natural law, in particular, has authority as a *jus gentium* (law of nations) that is not limited in scope or authority to that of the "declaratory tradition"[17] that constituted then extant positive international law. This defense position in the Shimoda case, with its appeal to the singular authority of positive international law, is contrary to the position taken by Togo Shigenori, the Japanese Minister of Foreign Affairs, who (referring to the Hague Convention) protested the atomic bombings in a note to the US government, stating: "it is the fundamental principle of international law in war time that belligerents do not possess unlimited rights regarding the choice of the means of harming the enemy…The use of such a weapon is a new crime against human culture"[18]—thus a crime that concerns the whole of humanity, and not to be construed merely as a crime against the people of Japan. There was some vindication of the plaintiffs' argument in the final decision taken by the court on 07 December 1963; for, "On the issue of legality, the judgment clearly stated that *the atomic bombing of Hiroshima and Nagasaki was a clear violation of international law and regulations respecting aerial warfare*."[19]

That judgment remained pertinent several decades later; for, as international law expert Richard A. Falk commented in his review of the Advisory Opinion issued by the International Court of Justice on 08 July 1996 on the question of the legality of the threat or use of nuclear weapons, "it would appear, at the very least, that the atomic attacks on

[16] Tanaka, ibid., p. 10; italics added.
[17] See here Dorothy V. Jones, "The Declaratory Tradition in Modern International Law," in Terry Nardin and David R. Mapel, eds. *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), pp. 42-61, and Joseph Boyle, "Natural Law and International Ethics," in Nardin and Mapel, pp. 112-135.
[18] Tanaka, ibid., p. 10.
[19] Tanaka, ibid., p. 13; italics added.

Hiroshima and Nagasaki, given the imminent defeat of Japan in August 1945, should be regarded as *violative of international law*, and quite independently of whether in the context of use there were parallel violations of rules and principles of international humanitarian law pertaining to discrimination, avoidance of unnecessary suffering, and proportionality."[20] That said, however, it remains troublesome that the Tokyo court conceded to the doctrine of "sovereign immunity," such that there could be no legitimate claim against individual American authorities, i.e., no means of contending individual criminal responsibility, contrary to assumed "precedent" of both the respective judgments of the Nuremberg Tribunal and the Tokyo Tribunal. Notwithstanding the court's decision, it is clear that if the bombings were illegal then they were also immoral on one or another account of moral/practical rationality and, therefore, an unprecedented breach of justice such as any authentic law of nations must presuppose or stipulate.

In view of the foregoing, it is important to understand that postwar actions are not only occasions for the expression of countervailing—and even prevailing—ideologies wherein victors' justice obtains as a seeming resolution to hostilities. As the Tokyo trial proceedings made clear, this was also an occasion for competing *discourses*. Ushimura Kei opines that the Tribunal's judgment "gave the people [of Japan] a Western interpretation of their modern history," to be regarded "in a broad sense as a product of Orientalism."[21] Orientalism as a methodological commitment, as Edward Said argued,[22] includes elements of racism and assumptions of ethnic superiority in the comparison of civilizations and contestation of culture, with the Eurocentric worldview championed by Western powers as if

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[20] Richard A. Falk, "Nuclear Weapons, International Law and the World Court: A Historic Encounter," *The American Journal of International Law*, Vol. 91, No. 1, January 1997, pp. 64-75, https://www.jstor.org/stable/2954141, accessed 13 October 2021. Italics added.

[21] Ushimura Kei, "Tokyo War Crimes Trial Reconsidered: Orientalism and Pal's Dissenting Opinion," *Bulletin of Meisei University*, Department of Japanese and Comparative Culture, 2000, pp. 66-71, mesei.repo.nii.ac.jp, accessed 12 October 2021. See also Ushimura's *Beyond the "Judgment of Civilization": The Intellectual Legacy of the Japanese War Crimes Trials, 1946-1949*, trans. Steven J. Ericson (Tokyo: International House of Japan, 2003).

[22] Edward Said, *Orientalism* (New York: Vintage Books, 1979)

it were universally imperative *vis-à-vis* those nations considered part of "the Orient." That would include those nations of "the Far East" such as Japan. Gary Jonathan Bass cites political philosopher Judith N. Shklar's observation [23] that, "When, for example, the American prosecution at the Tokyo Trials appealed to the law of nature as the basis for condemning the accused, he was applying a foreign ideology, serving his nation's interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order."[24]

For Said, Orientalism is "a style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident'." Thus both as a matter of *being* (i.e., who a people are, their sociopolitical and historical sense of identity) and as a matter of *knowledge* (i.e., how and what they know of reality as articulated in a worldview) the two differ significantly. For the Orientalist, the difference is such that it is the being and knowledge of the Occident, in contrast to that of the Orient, that is to be privileged in the contestation of cultures and thus in the contestation of discourses. That includes, necessarily, the contestation over the legitimacy of moral and legal discourses such as articulated in Western theories of morality and the Western legal theory that grounds positive law in general (and the corpus of international positive law in particular). Ushimura thus opines, the Tokyo Tribunal "enacted 'a Western style of dominating, restructuring, and having authority over' Japan—and many people accepted its version of events and attributions of responsibility."[25]

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[23] Judith N. Schklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986), p. 128.
[24] Bass, op. cit., p. 23.
[25] Ushimura Kei, "Pal's 'Dissentient Judgment Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion," *Japan Review*, No. 19, 2007, pp. 215-223, https://www.jstor.org/stable/25791314, accessed 12 October 2021.

The U.S. Department of State's Office of the Historian provides public notice that the Tokyo Tribunal was created "pursuant to a [January] 1946 proclamation issued by U.S. Army General Douglas MacArthur" in his role as "Supreme Commander for the Allied Powers in occupied Japan."[26] Indeed, that Office reports, "the IMTFE was not created by an international agreement" *per se*, but rather consequent to the Potsdam Declaration of 26 July 1945 between the USA and China, which specified that, "stern justice shall be meted out to all war criminals." That statement is salient to the subsequent Tribunal proceedings, since it was to be established as a matter of fact that the defendants were indeed "war criminals," that the definition and scope of "war crimes" was unambiguous, and that the prosecution of the case would indeed mete out justice and not be an occasion for vengeance of victor against vanquished.[27] Yet, the concept of 'war criminal' was by no means to apply to the military forces of the Allied Powers—they were automatically, tacitly, exempt.

As for the question whether the Tribunal was "lawfully constituted," it is important to distinguish between an "executive" and a "judicial" proceeding. For example, a *military commission* for the trial of war criminals falls in the former category. The U.S. Judge Advocate-General, commenting on the case of the military commission that tried Japanese General Tomoyuki Yamashita[28] (United States Military Commission, Manila, 08 October - 07 December 1945), stated, with reference to the question whether the U.S. Articles of War applied to the proceedings, "This Commission…is not a judicial body; it is an executive tribunal set up by the Commander-in-Chief—more specifically, the Commanding General, AFWESPAC—for the purpose of hearing the evidence on this charge, and of advising him, along with the Commander-in-Chief of the Armed Forces of the Pacific, as to the

[26] U.S. Department of State, Office of the Historian, "The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)," https://history.state.gov/milestones/1945-1952/nuremberg, accessed 11 October 2021.
[27] See Bass, *Stay the Hand of Vengeance*, op. cit.
[28] The record (United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. IV (London:His Majesty's Stationary Office, 1948), p. 19) shows that: "By stipulation, it was agreed that the accused was from 9th October, 1944, to 3rd September, 1945, Commanding General of Japanese 14th Army Group, including the Kempei Tei, or Military Police in the Philippine Islands."

punishment, in the event that the Commission finds the charge to be sustained. It is an executive body, and not a judicial body."[29]

In contrast to the authority associated with establishment of an executive body such as a military commission, it is generally recognized that General MacArthur had the authority to issue that proclamation along with the Charter that governed the IMTFE proceedings, thus the IMFTE constituted as a *judicial body*. This is clear from the Instrument of Surrender signed by Japanese authorities; for, therein all Japanese "civil, military and naval officials" were ordered "to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese government at his direction." This included "all proclamations, orders and directives deemed by the Allied Powers to be proper to effectuate [the] surrender…." MacArthur, acting as Supreme Commander, thus held legal authority under the Instrument of Surrender, as authorized by President Truman as Head of State, to establish the IMTFE by "special proclamation" (which also counted for its authority first as a "General Order"[30]), consistent with the Japanese agreement on terms of surrender "to carry out the provisions of the Potsdam Declaration in good faith." MacArthur, therefore, appointed judges to the IMTFE from the countries that had signed Japan's Instrument of Surrender: Australia, Canada, France, India, the Netherlands, the Philippines, the Soviet Union, the United Kingdom, and the United States. Accordingly, the Tokyo trial began on 03 May 1946 and concluded with a majority judgment finding the defendants guilty, pronounced in December 1948.

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[29] Ibid., as cited, p. 17. The prosecution held (p. 32), however: "The criminal laws, the customs, the laws generally of civilized nations, are construed to apply in the international field as a part of the Laws of War as well, wherever they bear any relation at all" and "under laws generally, any man who, having the control of the operation of a dangerous instrumentality, fails to exercise that degree of care which under the circumstances should be exercised to protect third persons, is responsible for the consequences of his dereliction of duty." Here individual criminal responsibility is thereby asserted.

[30] We are given to understand that this "General Order No. 1 Military and Naval" was "proposed by the Joint Chiefs of Staff and the Assistant Secretary of War," then approved by President Harry Truman on August 17, 1945. See here "SWNCC 21/8, Unconditional Surrender of Japan," 17 August 1945, State-War-Navy Coordinating Committee," National Diet Library Digital Collection, https://dl.ndl.go.jp/info:ndljp/pid/9898797?itemId=info%3Andljp%2Fpid%2F9898797&__lang=en, accessed 17 October 2021.

American historian Richard Minear's study of the Tokyo trial as an instance of victors' justice is essential for any retrospective assessment of the justice due in that trial. Minear's study is important for its engagement of the relation of the extant facts to the extant law, as he reminds of "problems of international law" at the time, "problems of legal process" followed in the trial, and "problems of history" that account for the geopolitical factors at play in those proceedings. It is thus that Minear challenged the "prevailing image of the trial"—i.e., that "its verdict corroborated our convictions about the dastardly and criminal nature of Japan's wartime leadership and policies"—and presented his assessment so as "to demolish the credibility of the Tokyo trial and its verdict." Minear's critique was directed not only at the victors but also at Japanese intellectuals, who, as he put it, "have tended to affirm the validity of the trial and its verdict"—"Apparently, they fear that denigration of the trial will lead to a positive reevaluation of Japan's wartime policies and leadership." Yet, the latter is not implied by any historical critique such as Minear carried out.

European and Japanese traditions of thought, including what we have as political ideology, are diverse and different, of course. Political ideology is a function of worldview. Thus, it is not surprising that political ideology would influence both the structure and the proceedings in the Tokyo trial. As far as Minear is concerned, "The major share of the blame for the Tokyo trial lies with the assumptions, the worldview, that [Nuremberg Tribunal Chief Prosecutor Robert H. Jackson, IMTFE Chief Prosecutor Joseph B. Keenan, IMTFE President William Webb, General Douglas MacArthur] … held in common."[31] Given the charges laid against those prosecuted, Minear demurs so as to endorse a different approach to prosecution were it to be done several decades later: "The wiser course would be to return to the international law of the period before 1945, when atrocities were considered justiciable but

[31] Minear, p. x. For information on the defendants and chief functionaries of the IMTFE, see "The People of the IMTFE," https://imtfe.law.virginia.edu/people, accessed 11 October 2021. Agarwalla informs us from the public record of the Trial that, "The IMTFE tried 28 former Japanese generals, admirals and politicians for acts committed between January 1928 and September 1945."

the issue of aggression was not."[32] The point is central to an assessment of justice due, because, Minear explains, "before 1945, 'war criminals' presumably referred to men guilty of conventional war crimes, those deeds covered under the various conventions signed at The Hague and in Geneva."[33] In short, the legal criteria would be fully *positivist* as a matter of legal philosophy, without appeal to a natural law tradition.

Even the British conceded at the time of the choice between (1) "executive action" (entailing summary execution of the Japanese war criminals without due process of trial) and (2) "judicial proceedings" that, the classes of crime being charged against the Japanese defendants were such that they "are not war crimes *in the ordinary sense*, nor is it at all clear that they can properly be described as crimes *under international law*."[34] However, when writing in 1949, A.S. Comyns-Carr (who served as "a member of the British prosecution staff during the Tokyo trial of war criminals") remarked, the Charters of both the Nuremberg and Tokyo Tribunals are to be construed as "declaratory of pre-existing international law."[35] The referent (as a matter of positive law) is the Kellogg-Briand Pact, Comyns-Carr opines, insofar as the Pact "has clearly made aggressive war unlawful." Problematic, nonetheless, is that this Pact, as Comyns-Carr concedes, "did not directly create a criminal offense."

With the prosecution of Nazi leaders at the Nuremburg Tribunal, "two new crimes" entered the scene of military adjudication—"those against peace and against humanity. Crimes against peace meant '… planning, preparation, initiation, or waging of a war of aggression, or war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.' Crimes against humanity were '… inhumane acts committed against any civilian population, before or during the war….'" These same categories of crime were prosecuted at

[32] Minear, p. xi.
[33] Minear, p. 7.
[34] Minear, p. 9, citing "Aide-Memoire from the United Kingdom, April 23, 1945," in *London Conference*, p. 18. Italics added.
[35] Comyns-Carr, "The Tokyo War Crimes Trial," op. cit.

the Tokyo trial, despite the ambiguity that doing so was *inconsistent with extant international law* and thereby an *ex post facto* prosecution. Robert H. Jackson understood this, clearly, when he presented his opening statement at the Nuremburg trial of Nazi war criminals. For, he reasoned, "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[36]

The operative assumption in Jackson's words is that indeed Power *should* and *would* normally be subject to the authority of Reason, thus that justice is not a matter of the exercise of brute force or vengeance but of law. But, the *practical rationality* here (as distinguished from theoretical rationality) is inescapably prejudiced by the military assessment of the prevailing Western powers, with the entirely novel insistence that international law should and would be utilized *ex post facto* "to meet the greatest menace" of the time, viz., "aggressive war." The problem was, of course, that extant international law had no provision for indictment of military or political leaders on the basis of a crime against the peace *per se* and specified as a crime of aggression. Indictment for the crime of aggression might be warranted under a form of legal reasoning, e.g., with reference to the Kellogg-Briand Pact of 27 August 1928 (General Treaty for the Renunciation of War as an Instrument of National Policy), which "in 1939 was in force between sixty-three States,"[37] with Japan one of the original signatories.[38] Japan, however, citing the words of US Secretary of State Kellogg, reminded that, "every nation is free at all times, and regardless of treaty provisions, to defend

[36] See "Opening Statement before the International Military Tribunal," 21 November 1945, Second Day, Part Four, in the Trial of Major War Criminals before the International Military Tribunal, Volume II, Proceedings: 11/14/1945-11/30/1945, English language text, Nuremburg: IMT, 1947, pp. 98-102, available at https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/, accessed 11 October 2021.

[37] See Document 2.13 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the UN International Law Commission, 02 August 1950, UN Document A/1316, 2 Y.B.L.L.C 374 (1950), as reproduced in Burn H, Weston, et al., *Supplement of Basic Documents to International Law and World Order*, 4th Edition (St. Paul MN: Thomson West, 2006), p. 267.

[38] See Philip Marshall Brown, "Japanese Interpretation of the Kellog Pact," *The American Journal of International Law*, Vol. 27, No. 1., January 1933, pp. 100-102, https://www.jstor.org/stable/2189787, accessed 12 October 2021.

its territory from attack or invasion, and alone is competent to decide whether circumstances require recourse to war in self-defence."[39]

As for crimes against humanity, this might have warrant at the time if interpreted and considered justiciable (in *sensu stricto*) only with reference to the Hague Conventions "Relative to the Treatment of Prisoners of War" (No. III), "Relative to the Protection of Civilian Persons in Time of War" (No. IV), and "Respecting the Rights and Duties of Natural Powers and Persons in Case of War on Land" (No. V) of 18 October 1907. But, to go beyond those Conventions at the time was to invent a novel interpretation that had no basis in international agreement, either in the sense of a specific treaty or the customary sense of "the law of nations" that would have explicitly included the Powers of the Far East, which simply was not the case. Indeed, it was Jackson's opinion that those of the Nazi leadership brought to dock at Nuremberg supported "a National Socialist despotism equalled only by the dynasties of the ancient East"—a comparison that manifestly negatively prejudiced the later indictment of the Japanese military leadership as individuals committed to a despotic dynasty, who therefore presumably prosecuted Japan's "aggressive" wars under the authority of Emperor Hirohito.

Minear's critique of the Tokyo trial and the way in which various problems of law, procedure, and history contributed to a failure of justice is pertinent to evaluation of the Tribunal's final judgment and the fact that there was dissent against the majority opinion. Notably, while concurring that aggressive war is a crime under international law, Justice Rölling of the Netherlands nonetheless disagreed with the way in which this category of crime was characterized in the majority's judgment. Then there was the exceptional dissent

[39] That said, Philip Marshal Brown commented, it is in view of Kellogg's "unreserved recognition of an undefined and unrestricted right of self-defence" that this particular treaty, "intended to abolish war has actually become a treat to justify war!"

of Justice Radhabinod Pal, whose opinion spoke critically to "the history and continuity of colonial hegemony in international criminal law and its institutions."[40]

Pal thereby engaged a point of critique not normally taken into account, viz., the very idea of colonial hegemony in international criminal law that was subject to reasonable critique from those nations who were subjected to colonial rule. Agarwalla expressed the above-cited opinion about political ideology in the court in view of Justice Pal's dissentient judgment, thus linking Pal's biography to his legal philosophy: "Pal's judgment," Agarwalla observes, "has been polarising. While some scholars have emphasised the markedly anticolonial nature of his dissent … others have even alleged that it was too naively pro-Japanese." "Born into a poor, 'lower caste' household in rural Bengal (now Bangladesh), in colonial India," Agarwalla writes, "Justice Pal had experienced imperialism as British colonialism." Thus, for Pal, "the IMTFE's apparent universalism was a charade," especially since the IMTFE "deliberately excluded Allied conduct from its purview."

Pal's objection to excluding the conduct of the Allied Powers from the Tribunal's review raises the question not only of military actions occurring under the category of conventional war crimes, including the indiscriminate saturation bombing of Japanese cities, but more importantly the indiscriminate atomic bombing of Hiroshima and Nagasaki. As he stated in his judgment, "It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war." Obviously, the referent here is the United States.

[40] Rohini Sen and Rashmi Raman, "Chapter 9: Retelling Radha Binod Pal," in Frédéric Mégret and Immi Tallgren, *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), pp. 239-259, https://doi.org/10.1017/9781108769105, accessed 12 October 2021.

For some, any effort to bring the Allied Powers to account in the context of the IMTFE was at once impertinent and misguided, i.e., it amounted to a fallacious *tu quoque* defense.[41] As Katerina Borrelli explains, "In international criminal tribunals, defendants who advance the [*tu quoque*] defence choose not to argue for their innocence, but rather seek to shift the spotlight on the crimes committed by the prosecuting authority or by the opposing side to the conflict, so as to delegitimize the entire prosecution as a form of 'victor's justice.'" There is, of course, dispute whether such a defense can be construed "legally legitimate," as Borrelli says, even as she argues it is "legally void."[42] At issue here, however, is the *moral* content of Pal's dissent, in contrast to the obviously legal elements of his judgment. (This issue shall be engaged more fully in what follows.) However, we should consider that Agarwalla's observation points to a question that has remained a matter of contention since the Trial's majority judgment was issued in December 1948, ostensibly to assure the international community and the Japanese people that (a) military leaders were being held accountable for their military aggression, war crimes, and crimes against humanity as a matter of "individual responsibility,"[43] rather than (b) the entire people of Japan as a nation being held accountable as a matter of a presumably demonstrable "collective guilt." The question that is elicited here is: *Was the justice due rendered in this trial?*

The Problem of "Justice Due"

Problematic in the post-WW2 era, as Agarwalla reports, is that "Japanese critics of the post War trials selectively choose passages from [Pal's] dissent to invoke a revisionist account of

[41] See, e.g., Katerina Borrelli, "Between show-trials and Utopia: A study of the tu quoque defence," *Leiden Journal of International Law*, Vol. 32, 2019, pp. 315-331, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/712A7F0DAFB646CFEA04D229DBECCF46/S0922156519000074a.pdf/between_showtrials_and_utopia_a_study_of_the_tu_quoque_defence.pdf, accessed 11 October 2021.

[42] Borrelli takes into account a view put forward by Sienho Yee, "The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment, *Chinese Journal of International Law*, Vol. 3, No. 1, 2004, pp. 87-134, https://doi.org/10.1093/oxfordjournals.cjilaw.a000519, accessed 11 October 2021.

[43] As the Office of Historian reports, "The Tokyo War Crimes Trials took place from May 1946 to November 1948. The IMTFE found all remaining defendants guilty and sentenced them to punishments ranging from death to seven years' imprisonment; two defendants died during the trial."

history." Even so, without concurring in such revisionist history, Agarwalla is correct to "contend that his dissent forces us to reconsider the dominant prevailing narrative about the progressive change in global politics, particularly as embodied in legal institutions." This is important in light of the fact that the legacy of the Nuremberg and Tokyo military tribunals is to provide a precedent for holding individuals legally accountable for the crimes adjudicated in those settings. The assumption has been that these tribunals secured requisite justice, yet that assumption remains contested. In 1948 the Japanese General Tojo Hideki asserted, "In the last analysis, this trial was a political trial. It was only victors' justice." In contrast to that opinion, in 1949 IMTFE Chief Prosecutor Joseph B. Keenan opined, "I think we can say that to some extent the Tojo trial itself provided a wholesome example of a concept of Anglo-Saxon justice."[44] Keenan's choice of words—'Anglo-Saxon'—is patently revealing. The contrast here is between two perceptions of justice, and whether real justice rather than its semblance was achieved in the trial is thereby contested.

The problem of justice, of course, is a matter of protracted philosophical and legal dispute for both philosophers and jurists. From a philosophical point of view, e.g., there is the important position articulated by moral philosopher Alasdair MacIntyre in his reputed book, *Whose Justice? Which Rationality?*.[45] MacIntyre reminded that we are inescapably faced with "conflicting conceptions of justice" that are part of "rival [and incompatible] theories of justice." That places before us the question: "How ought we to decide among the

[44] Keenan's invocation of "Anglo-Saxon" justice contrasts to Justice Pal's approach to legal philosophy. As Milinda Banerjee remarked (p. 69), "In Pal's view…what was needed was not only international criminal justice [as pursued by the Anglo- and American-jurisprudence] but rather a concept of global justice which could transcend the divisions of race and nationality. Impartial justice meted out by an international court of criminal justice was (as he notes in his Tokyo Judgment) a possible option, provided both victor and vanquished nations after a war submitted to this court." See Melinda Banerjee, "Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of his 'Indian' Legal Philosophy," in Morten Bergsmo, Cheah Wui Ling, and Yi Ping, eds. *Historical Origins of International Criminal Law*, Vol. 2, FICHL Publication Series No. 21 (Brussels: Torkel Opsahl Academic EPublisher, 2014).

[45] See Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988).

claims of rival and incompatible accounts of justice competing for our moral, social, and political allegiance?" As MacIntyre adds,

> It would be natural enough to attempt to reply to this question by asking which systematic account of justice we would accept if the standards by which our actions were guided were the standards of rationality. To know what justice is, so it may seem, we must first learn what rationality in practice requires of us. Yet, someone who tries to learn this at once encounters the fact that disputes about the nature of rationality in general and about practical rationality in particular are apparently as manifold and as intractable as disputes about justice.[46]

There we have the central thesis of MacIntyre's philosophical account: There are rival conceptions of justice and rival conceptions of practical rationality, such that we are faced unavoidably with the need to settle the inextricably linked questions *"Whose justice?" "Which rationality?"* when engaged by matters involving moral disputation, and that includes matters presenting with intercultural contestation of conceptual frameworks.

On the legal side of the question, there are those (e.g., H.L.A. Hart) who are satisfied with a positive account of law that excludes morality, i.e., legal positivism. Yet, in the philosophy and theory of law subsequent to the heyday of this doctrine, legal philosopher Ronald Dworkin has written consistently for a more robust conception of law, including what he calls "the phenomenology of adjudication,"[47] that allows for normative appeal and not merely concern for the letter of the law such as occurs in positivist legal philosophy.[48] As he

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[46] Ibid. p. 2

[47] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978). Dworkin is concerned to articulate the role of "principles" in the judicial task of adjudication of criminal responsibility. Thus, as Herlinde Pauer-Studer (in "Law and Morality under Evil Conditions: The SS Judge Konrad Morgen," *Jurisprudence*, Vol. 3, No. 2, 2012, pp. 367-390, DOI: 10.5235/Jurisprudence.3.2.367, https://homepage.univie.ac.at/Herlinde.Pauer-Studer/wp-content/uploads/2016/02/Law-and-Morality-under-Evil-Conditions.pdf, accessed 14 October 2021] states the point, "In difficult cases where legal rules do not clearly settle a criminal case, a judge does best when he tries to come to a verdict in light of principles that provide the best moral interpretation and justification of the precedents, regulations and statutes relevant to the case. Judges have to assess what would be the best moral justification of an existing body of law and then formulate the principles on which the justification rests and apply them in settling a given case." Pauer-Studer cites the relevant passage from Dworkin (*Law's Empire*, Hart Publishing, 1998, p. 243) thus: "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards."

[48] Elsewhere Dworkin explained that legal positivism "holds that whether a law exists is fundamentally a question of historical fact. Law exists only when some person or group has created that law." See here,

reminded in his reputed *Law's Empire*, Dworkin has "argued for many years against the positivist's claim that there cannot be 'right' answers to controversial legal questions, but only 'different' answers; I have insisted that in most hard cases there are right answers to be hunted by reason and imagination."[49]

This would apply to any application of international law, including judgments in the domain of international criminal law. Since all courts (including such as the international military tribunals of Nuremberg and Tokyo) issue legal judgments in view of both the facts and the law (the latter including both positive and natural law and an authoritative tradition of appeal to judicial precedent), it is important to acknowledge that, "legal reasoning is an exercise in *constructive* interpretation…"[50] As such, the fact that both construction and interpretation are conjoined means that one is never engaged merely by the letter of the law and that one must iterate and reiterate the relation of facts and law. What matters (in Dworkin's position, in contrast to that of the positivists) is that the positivist's "skeptical thesis" (i.e., that there are no right answers in law) is to be construed as a controversy "about morality, not metaphysics." And, in that case Dworkin opines, "the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as well as in law."[51]

Since this essay is not the occasion for disputation about legal philosophy *per se*, the point of reference to Dworkin's position is to allow for a warrant from legal theory. This warrant permits a review of the Tokyo trial with the understanding that the majority judgment issued there—along with several dissentient judgments on various elements of fact, law, and procedure—concerns not merely *different* legal opinions, but also a debate about a *right* (i.e., *just*) judgment. This is to be had in view of the requisites of both law *and* morality, even if

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Dworkin's, "A New Philosophy for International Law," *Philosophy & Public Affairs*, Vol. 41, No. 1, 2013, pp. 2-30.

[49] Ibid. pp. viii-ix

[50] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press/Harvard University Press, 1986), p. vii; emphasis added.

[51] Ibid. p. ix. See also Dworkin's "Philosophy, Morality, and Law," *University of Pennsylvania Law Review*, Vol. 113, 1965, pp. 668-690.

one is to speak of "political" morality. And, that means that a merely positivist account of international law is reasonably eschewed thereby.[52] This is all the more important since a positivist account of international law depends on a claim of State consent for any claim to obligation under international law. As Dworkin observed, "we cannot take the self-limiting consent of sovereign nations to be the basic ground of international law. The temptation to do so is understandable. It makes international law compatible […] with the doctrine of state sovereignty. It also resonates with a very popular conception of political legitimacy: that coercive dominion can be justified only by the unanimous consent of those subject to that dominion … [But] consent is neither a necessary nor a sufficient ground of legitimacy."[53]

Hence, Dworkin is clear about what he calls the "doctrinal" concept of law: "Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not happen." And, since "the doctrinal conception of law is interpretive," therefore "a theory of the grounds of law" is to be had "by posing and answering questions of political morality."[54] Dworkin's remarks are thus pertinent to sorting out the issue of law and political morality in the Tokyo trial, specifically as a matter of concern in the entirely dissentient judgment of Justice Pal. For, as Dworkin reminded, "We know that there is a difference, often profound, between what the law is and what it ought to be."[55] That difference is salient because "judicial institutions with compulsory jurisdiction and sanctions at their disposal"—

[52] Dworkin, in his "A New Philosophy for International Law" (p. 5), refers to the position of international lawyers who follow the legal positivist H.L.A. Hart's account of international law, to wit that: "They assume that a sovereign state is subject to international law but, on the standard account, only so far as it has *consented* to be bound by that law, and they take that principle of consent to furnish an international rule of recognition. This is a firmly positivist view of international law because whether a state has consented to a particular rule is just a matter of history." Dworkin notes that on this view Article 38(1) of the Statute of the International Court of Justice is taken to be such a rule of recognition.
[53] Ibid. pp. 10-11
[54] Ibid. p. 11
[55] Ibid.

such as the Tokyo Tribunal was—"are subject to special moral standards of legitimacy and fairness."[56]

Justice Pal's Concern for Justice Due

The standing of Justice Pal in the postwar international legal order is a matter of diverse opinion, given the way in which his dissentient judgment has been evaluated or appropriated. Latha Varadarajan has opined that, "Pal's dissent at the Tokyo tribunal is an episode of great significance that compels us to reconsider not just the meaning of a specific international legal institution, but also the structural logic from which it emerged."[57] Indeed, Varadarajan adds, "The crux of Pal's argument was that, for all the claims of a new and progressive world order, global politics in the mid-20th century was still fundamentally defined by imperialism,"[58] in which case the Tokyo trial represented a "trial of imperialism." The Nuremberg and Tokyo Tribunals were pointedly concerned with securing the postwar peace against aggressive war. But, in his anti-colonial view of South Asian history in particular, Justice Pal insisted that, "Equating 'peace' with the maintenance of the status quo was not an abstract or arbitrary decision. It was essentially a political one that very clearly colluded with the continuation of the imperialist world order. Effectively, what the tribunals and the legal order they expressed insisted on was a continued acceptance of colonial relations until the imperialist powers were willing to accept any change."[59]

The contrast to the foregoing view of Justice Pal's dissentient judgment is the right-wing neo-nationalist appropriation of his judgment in Japan. This is part of an effort to disabuse Japan of the national/collective guilt (perceived to have been rendered in the majority judgment of the Tokyo Tribunal), hence the related opinion of some commentators

[56] Ibid. p. 14
[57] Latha Varadarajan, "The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal," *European Journal of International Relations*, 2014, pp. 1-23, DOI:10.1177/1354066114555775, accessed 19 October 2021.
[58] Ibid. p. 2
[59] Ibid. p. 15.

who consider Pal an "outright apologist for Japanese imperialism."[60] Nariaki Nakazoto, e.g., is concerned that, "In postwar Japanese domestic politics right-wing polemicists have [since the 1990s especially] used Pal's judgment since the end of the Allied occupation in their political propaganda for refuting the Tokyo trial's majority judgment and justifying Japan's aggression," thus what amounts to a Japanese "historical revisionism" about this period in the nation's past.[61] Nakazoto adds, "… most important, the dominant leaders of the ruling Liberal Democratic Party, still hold that the nature of the Asia-Pacific War was not aggressive but defensive, and that Japan fought not for her own sake, but for the liberation of Asia from Euro-American colonialism."[62] This view is contrary to the indictments in the Tokyo trial, the defendants having been charged with crimes against peace (i.e., wars of aggression).

Justice Pal rightly noted at the outset of his dissent that, "The accused at the earliest possible opportunity expressed their apprehension of injustice at the hands of the Tribunal," as it was then constituted.[63] Why so? Pal explained: "The apprehension is that the Members of the Tribunal being representatives of the nations which defeated Japan and which are accusers in this action, the accused cannot expect a fair and impartial trial at their hands and consequently the Tribunal as constituted should not proceed with this trial." Thus, justice, if it were to be obtained in the proceedings, was conceived by the accused to be comprised of (a) *justice as fairness* and (b) *impartiality of judgment*.

Absent these guiding criteria from the outset, the very structure of the Tribunal entailed a lack of both moral or legal warrant, the prior claim of "Anglo-Saxon" justice clearly prejudicial and reasonably to be dismissed as a *bona fide* warrant. This was also

[60] Ibid., p. 7, citing here H.P. Bix, *Hirohito and the Making of Modern Japan* (New York: HarperCollins, 2000), p. 595.
[61] Nariaki Nakazoto, *Neonationalist Mythology in Postwar Japan: Pal's Dissenting Judgment at the Tokyo War Crimes Tribunal* (Lanham MD: Lexington Books, 2016), p. xvi.
[62] Ibid. p. xvii.
[63] International Military Tribunal for the Far East, *Dissentient Judgment of Justice Pal*, (Tokyo: Kokusho-Kankokai, Inc., 1999), p. 9.

perceived as evidence against the presumed assessment that such tribunals "represented a genuine step forward in the development of law and universally accepted norms about criminality and justice."[64] Whether there was a *moral* warrant was in particular centrally at issue; for, as Justice Pal reminded, it was in this court of judgment that "the moral conscience of the world is there reasserting the moral dignity of the human race." To assert the dignity of *humanity* and to speak on behalf of the moral conscience of *the world* is not to do so partially. Yet, the Allied Powers presumably acted partially when they—for all practical purposes—excluded the Japanese nation as rightly among those having the same dignity of "the human race" and legitimately contributing to the moral conscience of the world through their own historical and legal traditions, all of which were manifestly ignored.

The defendants were being tried on charges alleging individual criminal responsibility. Justice Pal, however, wrote: "The acts alleged are, in my opinion, all *acts of state* and whatever these accused are alleged to have done, they did that in working the machinery of the government, the duty and responsibility of working the same having fallen on them in due course of events."[65] On that view, Pal considered it a *material question of law* "whether individuals comprising the government of an alleged aggressor state can be held criminally liable in international law in respect of such acts"—a question of law that, in his view, had to be settled *prior* to engaging the matters of fact. For Pal it was by no means settled at the outset of the trial that (1) "military, naval, political, and economic domination of one nation by another is crime in international life," (2) whether "wars of the alleged character became criminal in international law during the period in question in the indictment," (3) whether "any *ex post facto* law could be and was enacted making such wars criminal so as to affect the legal character of the acts alleged in the indictment," (4) whether "individuals comprising the government of an alleged aggressor state can be held criminally

[64] Varadarajan, op. cit., p. 14.
[65] Pal, Dissentient Judgment, p. 9.

liable in international law in respect of such acts."[66] That said, Pal was clear that, whatever the rationale for resort to war (according to *jus ad bellum* doctrine), "A war, whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare. No pact, no convention has in any way abrogated *jus-in-bello* [i.e., right conduct in war]."[67]

Justice Pal reasonably cited the opinion of the learned professor of law, Hans Kelsen[68] (at the time, from the University of California) that, for "the injured states" to exercise "criminal jurisdiction […] over enemy subjects is considered by the peoples of the delinquents *as vengeance rather than justice*, and is consequently not the best means to guarantee the future peace." Kelsen advised, "The punishment of war criminals should be an act of international justice, not the satisfaction of a thirst for revenge." Accordingly, opining as to juridical procedure, Kelsen added, "It does not comply with the idea of international justice that only the vanquished states are obliged to surrender their own subjects to the jurisdiction of an international tribunal for the punishment of war crimes. *The victorious*

[66] Pal, Dissentient Judgment, p. 9.
[67] Pal, Dissentient Judgment, p.12.
[68] Pal's choice of Kelsen as an authority in international law is perhaps curious inasmuch as "his approach to legal theory never found a following in the United States." See here D.A. Jeremy Telman, "Chapter 1, Introduction: Hans Kelsen for Americans," in D.A. Jeremy Telman, ed. *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence* (Springer, 2016), p. 3. Telman comments later (p. 4), "the American academy (and not just the legal academy) rejected Kelsen's approach as politically anemic. The inability of the Central European legal positivist tradition to stand up to Nazism was cited as evidence that its legal relativism easily elided into moral relativism." Nevertheless, Pal's reference to Kelsen suggests that he appreciated Kelsen's conception of law in the sense that (as Telman summarizes), "The structure of legal systems…is that they consist of certain normative rules that instruct the subjects of law how they *ought* to behave. Law differs from ethics or morality, however, in that it is indifferent to the substance of those rules and in that the consequence of violating a legal norm is legal sanction rather than moral or ethical sanction. (Kelsen 1934: 15-19)." However, there remained for Kelsen after the Nuremberg tribunal's prosecution whether "application of the newly established 'crimes against peace' to acts of aggression that were committed during the 'Third Reich' through the Nuremberg judgment was clearly a form of retroactive legislation and punishment. However, international law did not have a clear rule recognizing the prohibition on retroactive legislation, and in most domestic legal systems the rule was only valid with important exceptions. Because it was not an established rule of international law, the Allies in 1945 did not violate international legal rules by authorising the application of these newly established crimes to acts committed during the war…There were simply no applicable rules that prohibited the new rules established by the London Agreement." In that context, for Kelsen "there were good 'moral' reasons to allow retroactive punishment of those persons 'who are morally responsible for the international crime of the second World War" (citing here Kelsen, 1947, p. 165). Thus "The fact that there was a demand for moral justice to punish the perpetrators led Kelsen to endorse retroactive punishment in Nuremberg." The latter statements are from J. von Bernstorff, "Chapter 5: Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremburg Trials and the International Judicial Function," in Telman op. cit., pp. 93, 94.

states too should be willing to transfer their jurisdiction over their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal."[69]

The Allied Powers, of course, did not see fit to do so, even though the transfer of such jurisdiction in the interest of impartiality of judgment is by no means to surrender to a *tu quoque* defense (about which more below). To the extent the proceedings of the Nuremberg tribunal were taken as precedent for the Tokyo trial, it is salient that Kelsen had argued in disagreement with Justice Jackson's opinion that the Nuremberg tribunal had incorporated rules of law such as to establish a "judicial precedent." Kelsen argued, "A precedent is a judicial decision which serves as a model for subsequent decisions of similar cases. In order to be a precedent, the decision of a tribunal must conform with certain formal and material conditions which the judgment of Nuremberg does not fulfil."[70] Hence, not fulfilling those conditions, the Nuremberg Tribunal's procedural process could not be an authoritative precedent for the Tokyo Tribunal. Justice Pal understood and argued the same.

To the extent the crime against peace was specified at Nuremberg, Kelsen was clear in reference to extant treaties, including the Kellogg-Briand Pact, that "All these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions. *None of these treaties stipulated individual criminal responsibility*."[71] Thus, the *legal* foundation for prosecution of alleged war criminals for individual criminal responsibility, whether at Nuremberg or Tokyo, was reasonably in question as far as Justice Pal was concerned. In the absence of any legitimate claim to indictment for individual criminal responsibility, the Kellogg-Briand Pact allowed the sanction of resort to war against the belligerent State, i.e., for acts of State. Thus, "These sanctions constitute *collective* responsibility, *not criminal* responsibility of definite

[69] Ibid. p. 10, italics added.
[70] Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" *International Law Quarterly*, Vol. 1, No. 2, Summer 1947, pp. 153-171, https://www.jstor.org/stable/762970, accessed 12 October 2021.
[71] Ibid. p. 155; italics added.

individuals performing the acts by which international law is violated" (emphasis added). Kelsen thereby makes an important distinction: "A war waged in violation of treaties prohibiting resort to war, especially in violation of the Briand-Kellogg Pact, is certainly illegal. *It is not necessarily a 'war of aggression',* as the London Agreement assumes. A war of aggression is a war on the part of the State which is the first to enter hostilities against its opponent. Such action may be legal as well as illegal."[72] Accordingly, Kelsen clarified further (citing here his argument at some length):

> It can hardly be denied that *international law prior to the London Agreement, did not provide punishment of those individuals who performed the acts of an illegal war.* It is likewise undeniable that the national laws of the States which waged a war, illegal under international law, but carried out in conformity with the law of the State concerned, do not provide punishment for those who perform the acts of such war. Only under the law of the State against which an internationally illegal war is waged could the individuals, who perform the acts of the illegal war as acts of their State, be treated as criminals, if the law of the State against which the illegal war was waged provided punishment for such acts. Since no criminal law of an existent State expressly refers to killing, assault, deprivation of liberty, destruction of property performed in an illegal war, except as acts of legitimate warfare, the punishment of these acts under national law is possible only in the way of interpretation. It stands to reason that an interpretation is excluded according to which the definitions of these crimes include acts performed in a war, which is internationally illegal but constitutionally waged by the State whose criminal law is in question […] The criminal laws of all States have been established at a time when it was generally taken for granted that no State could violate international law by resorting to war, when no treaty existed outlawing war, and when the doctrine of bellum justum was almost generally rejected, so that the distinction between legal and illegal war did not play any role at all.[73]

Justice Pal could not, of course, have been aware of Kelsen's argument here; but, the fact that he referred to Kelsen's learned opinion is itself informative of *the legal rationality* running through the extended argument of his dissentient judgment. One says here 'legal' rationality precisely because the context of deliberation for Kelsen and Pal is one of *positive* international law, excluding any appeal to a *jus ad bellum* doctrine (just cause for resort to war) while allowing for assessment with reference to the *jus in bello* (right conduct in the

[72] Ibid. pp. 155-156; italics added.
[73] Ibid. pp. 157-158. '*Bellum justum'* means "just war."

perpetration of hostilities). It is relevant to the presumed legality of the Tokyo Tribunal, in its acceptance of the Nuremberg Tribunal as precedent, that, as Kelsen concludes: "Neither by the doctrine of the American prosecutor nor by the doctrine of the tribunal is it possible to prove that existing international law, especially the Briand-Kellogg Pact, has already established individual criminal responsibility for acts by which a State resorts to an internationally illegal war."[74]

If the complaint of individual criminal responsibility were to be found legitimate, then there would remain for both the Nuremberg and Tokyo Tribunals the question of the legal culpability of individuals (military and civilian) of *the Allied Powers* for crimes against peace, crimes against humanity, and crimes against extant international humanitarian law, even as there were questions related to violation of the moral standards of the *jus in bello*. As noted earlier, this raised the question of the so-called *tu quoque* defense on the part of the Japanese being prosecuted by the Tokyo Tribunal.[75] There are those who assert that, if the prosecuting "victor" nations are reasonably to be investigated for similar crimes in one or another setting of armed hostilities, but in fact are not investigated or brought to the bar to face judgment, then they have neither moral nor legal authority to proceed with formal judgment against the militarily vanquished. Doing so would, therefore, display merely a victors' justice, indeed.

But, for some this view is *revisable* to say something different, and thus to remove it from the *tu quoque* objection, viz., that not only are the vanquished reasonably to be held accountable according to the relation of fact and applicable law, but *the victors also* are to be held accountable if justice as fairness and impartiality of judgment are to be secured as a matter of law and morality. This is why Justice Pal, echoing Kelsen, insisted that, as a matter of impartiality, the victorious states *should* be willing to transfer their jurisdiction over their

[74] Ibid. p. 162.
[75] Borrelli, op. cit.

own subjects (who have offended the laws of warfare) to the same independent and impartial international tribunal. The problem, of course, was to establish first that the Tokyo Tribunal, on the basis of its Charter as promulgated by General MacArthur, in fact constituted such an independent and impartial international tribunal. Presumably not, the argument goes, because it included justices only from the variety of countries so represented, even if in their individual capacity and not as representatives of State. Kelsen was clear, as Pal cites him, that "Only a court established by an international treaty, to which not only the victorious but also the vanquished states are contracting parties, will not meet with certain difficulties which a national court is confronted with …" (a "civil" or "military" court being likewise so confronted).[76]

Justice Pal expressed his disagreement with the Tribunal's prosecution holding the Japanese defendants responsible individually for crimes occurring over the period 1928 through the end of the Pacific war in 1945; and he sustained "the substantial objection relating to the jurisdiction of the Tribunal," i.e., that "the CRIMES TRIABLE BY THIS TRIBUNAL MUST BE LIMITED TO THOSE COMMITTED OR IN CONNECTION WITH THE WAR WHICH ENDED IN THE SURRENDER ON 2 September 1945."[77] The main reason for this restriction in scope was, for Pal, that, "There is nothing in the Potsdam Declaration and in the Instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to proceed against the persons who might have committed crimes in or in connection with ANY OTHER WAR."[78]

Allowing for this restriction of scope such as Pal deemed legally controlling in all further discussion of matters of law by the Tribunal, then the prosecution's allegations of crimes beyond the war settled by the Instrument of Surrender had *no legal standing* and afforded the Tribunal *no jurisdiction*. Justice Pal was explicit: "In my view, if there is any

[76] Pal, Dissentient Judgment, p. 10.
[77] Ibid. p. 13.
[78] Ibid., p. 13.

international law which is to be respected by the nations, that law does not confer any right on the conqueror in a war to try and punish any crime committed by the vanquished not in connection with the war lost by him but in any other unconnected war or incident."[79] Further, as to the question of applicable law for adjudication of the counts against the defendants, Pal argued: "…in my opinion, the criminality or otherwise of the acts alleged must be determined *with reference to the rules of international law existing at the date of the commission of the alleged acts*."[80] With this criterion Pal stipulates *applicable extant positive law*, not any "new" law such as might be derived from the Nuremberg Tribunal judgment as precedent, or any rules such as devised by the Tokyo Tribunal itself.

Law, Morality, and the Just Claims of "Humanity"

Justice Pal's dissentient judgment reminds of the fact that, with the creation of the League of Nations and commitment to its covenant, the world had a system of nation-states, each consenting to coordinating its cooperation with other states while insistently retaining its sovereignty and asserting its national interest.[81] WW2 may have elicited a call from some observers of international relations morally to recognize a "widening sense of humanity" pertinent to the development of international law and morality in international affairs. However, Pal reminded of the fact that, at the time of the creation of the League of Nations, Baron Makino of Japan had proposed a resolution that would have recognized "the equality of nations as a basic principle of the League," while Great Britain opposed it in reference to what was nothing less than insistence on recognizing and preserving the colonial interests of the British Empire.[82] Thus, despite the presumptions of the League to constitute representation of an international community, it retained legal recognition of "continued

[79] Pal, Dissentient Judgment, p. 14. Pal rejected the prosecution's argument that there was basis for such expanded scope in the Cairo Declaration, which specified Japan's responsibility to release control of conquered territories to those countries having rightful sovereignty—nowhere in the text referring to individuals being held criminally liable for war crimes of any kind.
[80] Pal, Dissentient Judgment, p. 16.
[81] Pal, Dissentient Judgment, p. 65.
[82] Pal, Dissentient Judgment, p. 66.

domination of one nation by another," thus the "servitude" of some nations to other "master" nations. It remained committed, in other words, as Pal observed, to an "imperial" international order.

This structural arrangement surely could not satisfy the requirements of international justice, i.e., find its justification in a just concept of humanity. This accepted structural feature of the period prior to WW2, as included in the League's constitution, called into question the legitimacy of the position taken by Justice Jackson at the Nuremberg Tribunal (thus prejudicing the legitimacy of the Tokyo Tribunal in adopting it as precedent): "According to him," Justice Pal observed, "a preparation by a nation to dominate another nation is the worst of crimes." The point, of course, refers to the indictment of Japan for precisely that crime. Pal continued, "This may be so now. But, I do not see how it could be said that such an attempt or preparation was a crime before the Second World War when there was hardly a big power which was free from that taint."[83] Hence, it was clearly questionable that the defendants from Japan could be charged in that regard fairly.

But, Pal did not leave the matter there. He proceeded to engage the question of the American use of the atomic bombs on Hiroshima and Nagasaki:

> Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs." Perhaps these explosives have awakened within us the sense of unity of mankind,—the feeling that: "We are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed or color, by bonds which have been fused unbreakably in the diabolical heat of those explosions." All this might have been the result of these blasts. But certainly these feelings were non-existent AT THE TIME when the bombs were dropped. I, for myself, do not perceive any such feeling of broad humanity in the justifying words of those who were responsible for their use.[84]

In short, the fact that the League recognized and sustained the legitimacy of colonial empire rather than an equality of nation-states inclusive of Japan, the fact that the USA was deemed

[83] Pal, Dissentient Judgment, p. 66.
[84] Pal, Dissentient Judgment, pp. 66-67.

justified in the employment of atomic bombs that violated *jus in bello* principles of discrimination and proportionality, both implied lack of a moral and legal vindication of an inclusive concept of humanity. This lack of vindication meant that the Tokyo Tribunal suffered from a manifest deficiency in its own supposed moral and legal ground, as it held the Japanese to account for individual criminal responsibility but did not do so as a matter of equity in the case of the victor nations that had their own culpability. Not doing so meant, for Pal, that the Tokyo Tribunal deferred to the *arbitrary power* of the victor nations, putting in place an entirely questionable precedent for the future of international law, inasmuch as this arbitrary power does not represent the genuine will of humanity at large. Hence, a trial of the Japanese defendants, for Pal, depended not on extant "law" *per se*, but merely "upon the fact of [Japan's] defeat in war."[85]

What, then, of the relevance of the claim of *criminality* in war (including here individual criminal responsibility)? Justice Pal comments, with respect to the regulatory authority of extant treaty:

> In my judgment *no category of war became a crime in international life up to the date of commencement of the world war under our consideration*. Any distinction between just and unjust war remained only in the theory of the international legal philosophers. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life. No war became an illegal thing in the eye of international law as a result of this Pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. *No customary law developed so as to make any war a crime*.[86]

In the absence of any other applicable legal enactment, it is not clear how the defendants in the Tokyo trial could reasonably be held culpable for individual criminal responsibility in international law, despite the supposed precedent of the Nuremberg Tribunal.

[85] Pal, Dissentient Judgment, p. 71.
[86] Pal, Dissentient Judgment, p. 73.

Considering the desire among some for prosecution of those responsible for instigating World War 1, Justice Pal reminded of the reasoning of the Commission of the Peace Conference that ultimately permitted "formal condemnation" but not formal legal/criminal proceedings. Indeed, "The two American members of the Commission […] did not consider that a judicial tribunal was a proper forum for the trial of *offenses of a moral nature*."[87] *Moral* offenses, while subject to the condemnation of *moral conscience* across the geographic scope of extant nation-states, were not *criminal* offenses subject to juridical proceedings that referenced extant positive law. This reasoning was surely pertinent to the deliberations in the aftermath of WW2, inasmuch as extant international law did not criminalize any category of war during the years of that war, notwithstanding the moral authority of the just war tradition to speak to a wholly voluntary consent of State authorities to the *jus ad bellum* and the *jus in bello*.

Justice Pal cites Quincy Wright's remarks from his "Outlawry of War" (1925), to wit that, "The main difficulty found by the commission was that international law did not recognize war-making as positively illegal; but even if it had, there would be doubt whether any particular individual, even a sovereign, could be held liable for the act of the state."[88] Taking these post-WW1 proceedings as pertinent to determining the status of the Japanese defendants brought to account before the Tokyo Tribunal at the close of WW2, it was clear to Pal that, insofar as they conducted themselves according to the dictates of their state and thus engaged in "acts of state," they could not individually be held criminally liable, even though they may be subject to moral censure from whatever source of moral conscience.

In the immediate post-WW1 period, the concept of justice included elements of both positive law and moral philosophy; and, it was essential to justice due to individuals that the distinction between a moral offense and a criminal offense be sustained. In the present case

[87] Pal, Dissentient Judgment, p. 75, italics added.
[88] Pal, Dissentient Judgment, p. 75.

of the Tokyo Tribunal, to proceed otherwise was to assure not justice due but only its semblance in what amounted to a mere victors' justice. Justice Pal's dissentient judgment thus contributed a salient juridical perspective that could not, and should not, be readily dismissed as a deliberative matter of law and morality, despite the Tokyo Tribunal's eventual proceedings against the Japanese defendants. Pal's dissentient opinion was amply informed by the legal literature of his day so as to pronounce on what was to count as international law and what could or could not count as crime with reference to that law. Hence, for the occasion and matter upon which he delivered his dissent to the Tokyo Tribunal, Justice Pal's own words remain salient to the call to justice when war has come to a close and belligerents are expected to pursue a perpetual peace:

> As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance.
>
> It has been said that A VICTOR CAN DISPENSE TO THE VANQUISHED EVERYTHING FROM MERCY TO VINDICTIVENESS; BUT THE ONE THING THE VICTOR CANNOT GIVE TO THE VANQUISHED IS JUSTICE. At least, if a tribunal be rooted in politics as opposed to law, no matter what its form and pretenses, the apprehension thus expressed would be real, unless "JUSTICE IS REALLY NOTHING ELSE THAN THE INTEREST OF THE STRONGER."[89]

That "might makes right" and that justice is really nothing else than "the interest of the stronger" was the view of the interlocutor Thrasymachus presented long ago in Greek antiquity in Plato's *Republic* (338c1-2 ff.). Those learned in moral and political philosophy will recall that Plato presents Socrates to have argued against this sentiment on behalf of "true" justice; and, certainly, Justice Pal rightly did not accede to the argument that "might makes right," even as the might of the victors in the Second World War did not, in and of itself, "make right" and was properly to be held to account for true justice. Justice Pal, to his credit, sought to hold all victors in WW2 to account for true justice, in which case his dissentient judgment at the time of the Tokyo Tribunal proceedings remains a testament to

[89] Pal, Dissentient Judgment, p. 700.

the quest for true justice, despite the vagaries of the imperial order of the day that yielded before the claims of might over right.