THE ILLUSION OF LEGALITY? POST–WWII MILITARY TRIBUNALS IN THE FAR EAST

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ABSTRACT

This paper looks at the question of legality in relation to the post–World War II military tribunals in the Far East with particular focus on the somewhat neglected tribunals of Japanese war criminals. It critically assesses the Manila–based tribunals which involved the trial of General Tomoyuki Yamashita and the Tokyo Trials (more correctly known as the International Military Tribunal for the Far East or IMTFE). The author asks the questions; were these tribunals merely a mask for some type of victor's retribution? Can justice ever be achieved in a post–war environment? This thought– provoking and comprehensive analysis of past efforts to punish war criminals offers some insights into the direction that future efforts should take with particular reference to the current International Criminal Court.

A INTRODUCTION

The structure of international law was dramatically altered in the course of the twentieth century; many of the changes that took place centered on the tragedy and aftermath of World Wars I and II. Some of the major advancements included the concerted efforts to prosecute and punish those guilty of war crimes and the recognition of war crimes and crimes against humanity as international crimes. These advancements arose from the post–war international and domestic military tribunals. This essay will look at the question of legality in relation to those tribunals with particular focus on the somewhat neglected tribunals of Japanese war criminals. It will look at the Manila based tribunals which involved the trial of General Tomoyuki Yamashita and the Tokyo Trials (more correctly known as the International Military Tribunal for the Far East or IMTFE). The purpose here is mainly to look at the criticisms and shortcomings of the trials. How truly legal were they? Was the formal setting of the trials merely a mask for some type of victor's retribution? Can justice ever be achieved in a post–war environment? Hopefully this analysis of past efforts will offer some insights into the direction that future efforts to punish war criminals should take with particular reference to the current International Criminal Court.

B CURRENT CONTROVERSY

An interesting place to start looking at the trials is with some present controversy. The current Japanese Prime Minister Junichiro Koizumi has repeatedly been attacked by international and domestic commentators for his visits to the Yasukuni Shrine, which honours Japanese war dead, including those found guilty of war crimes by the IMTFE. While he diplomatically avoided visiting the shrine in August 2005 for the 60th anniversary of the end

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of WWII, he did visit them again more recently provoking further outcry. In addition to this in May of 2005 a leading minister, Masahiro Morioka, stated that the Tokyo tribunal had "invented crimes against peace and humanity"[1] and that Japanese war criminals should no longer be treated as such.[2] Their actions have been viewed as indicative of a resurgent Japanese nationalism which is arising in response to a perceived threat (be it economic or otherwise) from China[3] and it is clear that some are using the trials to support their opinions. So, while it is not the purpose of this essay to condone such views, it is clear that the results of the Tokyo Trials, and the denunciation of 'war criminals' contained therein, are still a contentious and live political issue over fifty years after judgment was delivered.

C MANILA TRIBUNAL – CASE OF YAMASHITA

First of all it would be mistaken to think that the post–WWII punishment of war criminals was confined to the two major international tribunals at Nuremburg and Tokyo. There were countless other domestically based trials, for example there were extensive British trials of Italian war criminals.[4] However recourse to legal punishment of Japanese war criminals was far greater than that of any other nation. Indeed it is estimated that somewhere in the region of 5000 were tried in the various countries affected by the Japanese war machine and that up to 900 were executed.[5] Of these 'other' tribunals some of the best known took place in Manila; they are well known due to their instigation by the US and also due to the questionable use of the command responsibility doctrine in the Yamashita trial.[6] As a result the trial has earned considerable notoriety over the years. The following is a brief overview of the salient issues that arose in the case.[7]

Yamashita was charged in relation to events that occurred during the US attack on the Philippines at Leyte and Manila. At the time Yamashita was the army commander with official responsibility for all troops (including navy and air force) based in the Philippines. The Japanese Navy troops in Manila during the US attack were known to have committed various atrocities within

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[1] The Asahi Shimbum (2005) Editorial, 28/05/2005 (http://www.asahi.com/english/Herald-asahi/TKY200505300091.html, visited on the 18/06/2005); China Daily (2005), *Tokyo Tribunal's Verdict on War Crimes Undisputable* 08/06/2005, pg 5 (available at http://www.chinadaily.com.cn/english/doc/2005-06/08/content_449597.html).

[2] Indeed several Japanese class A war criminals went on to become leading politicians, including one who became prime minister (Kishi).

[3] See New York Times (2005), Editorial *Pointless Provocation in Tokyo*, Oct. 18th 2005 pg. 26 and The Asahi Shimbum, Wang Ke *Japan Must Break With its Wartime Past*, 23/11/05 (available at http://www.asahi.com/english/Herald-asahi/TKY200511230123.html visited on 11/02/06).

[4] Pritchard, Dunlap and Carey (editors) International Humanitarian law: Origins (Transnational Pub Inc., 2003) at 89. See also A. Cassese, International Criminal Law (Oxford: OUP, 2003) at 296.

[5] See for example http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX101.html.

[6] *In Re Yamashita* 327 US 1 (Rutledge J and Murphy J dissenting).

[7] For an in-depth study of the Yamashita case refer to Prevost, A.M. 'Race and War Crimes: The 1945 War–Crimes Trial of General Tomoyuki Yamashita' 1992, 14 Human Rights Quarterly 303; Frank Reel, *The Case of General Yamashita*, (Chicago: The University of Chicago Press, 1949).

the city, including the killing of nearly 100,000 civilians. Yamashita was charged as being the commanding officer who had failed to prevent the atrocities from occurring.[8]

The charge against Yamashita was based on the command responsibility doctrine in international law. Command responsibility is similar in a sense to vicarious liability in that it makes those in charge of illegal activities directly liable for their commission. Of course command responsibility is considerably different since within a military hierarchy commanders are the ones who issue orders and so, in theory at least, are directly responsible for the actions of those under their command. The doctrine has a rich history in international law which lies beyond the scope of this essay.[9]

Yamashita was, however, charged with a unique version of the doctrine, namely liability through omission. The prosecution counsel's argument was that the atrocities committed were so bad that Yamashita must have known they were occurring and in failing to address the situation he became liable; this unique construction of the doctrine was "without any precedent in international law".[10]

In response to this his defence counsel provided considerable evidence to the effect that Yamashita was completely out of communication with his troops for ten days due to a total blackout and due to the US policy of communication disruption. When he learned of the situation he ordered a full withdrawal of all troops. However no contact could be made with the naval troops and they remained fighting to the bitter end. No evidence was adduced which directly linked Yamashita to the atrocities and all the evidence use to connect him to the events was strictly hearsay.[11] The defence position was that, given the lack of evidence, it was legally impossible to impute knowledge of the atrocities to Yamashita merely due to the fact of his post. Nonetheless the military tribunal found him guilty for 'failing to exercise proper control' and sentenced him to execution.

Yamashita's defence counsel had from an early stage become convinced of his innocence and it was decided to appeal the case to the US Supreme Court[12] on the following grounds:[13]

(a) That the tribunal was illegal ;
(b) No stated violation of laws of war had occurred;
(c) No due process (ie right to a fair trial);
(d) Failure to notify neutral power representing interests of Japan.

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[8] *Ibid* at 314.
[9] For an overview of the topic see A.D. Mitchell, 'Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes' 2000,22 Sydney Law Review 381.
[10] Major General R.J. Marshall quoted in Prevost, *supra* n 7, at 315.
[11] *Ibid* at 317, this was of course in breach of his right to due process but the military tribunal and subsequently the US Supreme Court never felt such rights to be applicable to such a case.
[12] *Ibid* at 305.
[13] *Yamashita* 327 U.S. at 6.

In a majority decision the Supreme Court upheld the decision of the tribunal. There were two notable and strong–worded dissents from Murphy J and Rutledge J. Murphy J issued a most scathing judgment. On the issue of due process he felt the military tribunal could not ignore such procedural rights and he was also of the opinion that Yamashita was convicted for a crime that was, as already mentioned, without precedent in international law and recognized concepts of justice.[14] Finally he was critical of the prospect of so–called 'victor's justice' and condemned the military tribunal for this. The following passages of the judgment are indicative of his views:

> The probability that vengeance will form a major part of the victor's judgment is an unfortunate but inescapable fact.[15]

> The indictment in effect permitted the military commission to make the crime whatever it willed, dependent on its biased view.[16]

As we shall see the criticism of the post–war tribunals as mere instances of victor's justice remains; and indeed it remains the most intractable aspect of this type prosecution under international law.

Of course the powerful dissents could not save Yamashita from the fate ordained for him and he was executed on the 23rd February 1946.

D TRIAL OF TOYODA – A CASE OF *DÉJÀ VU*?

Questions concerning the atrocities committed in Manila did not go away and a few years later Admiral Soemu Toyoda was tried for the exact same offence as Yamashita.[17] Toyoda was the naval commander on the Philippines at the time in question. The trial of Toyoda took place during the Yokohama trials of so–called Class B war criminals, which came after the Tokyo Trials (the Tokyo based trials dealt with the Class A cases). Several interesting points emerged in the case of Toyoda. Firstly there was the production of evidence by the prosecution which seemed to indicate that it was Toyoda and not Yamashita who was exercising actual control over the troops in the Philippines.[18] Secondly Toyoda himself testified to the effect that it was he who had issued the order to the navy that Manila should be defended to the last and which directly contradicted the order of Yamashita who had called for naval forces to evacuate the city.[19] Finally, and indeed most interestingly of all, Toyoda was acquitted.

The defence had been run on two main grounds. It was argued in the first instance that Toyoda had no knowledge of the atrocities (similar to the failed defence arguments in Yamashita) and secondly the defence made use of the result in Yamashita's case to show that it was he and not Toyoda who was

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[14] *Ibid* at 35 (Murphy J dissenting).
[15] *Ibid* at 35-36.
[16] *Ibid*.
[17] Prevost, *supra* n 7 at 330.
[18] Essentially it emerged that the navy, although officially under control of army, had a veto power over any orders by the army. This veto was exercised by Toyoda.
[19] See transcript of Toyoda trial at 4.

responsible.[20] The defence counsel also made reference to the issue of 'victor's justice' and expressly called the trial a trial of vengeance.[21]

All the evidence before the tribunal seemed to indicate that it was indeed Toyoda and not Yamashita who was in command at the time of the atrocities. It would seem logical then, given the fate that befell Yamashita, that Toyoda would be found guilty. However the court, while expressing the view that it could not comment on the precedential value of Yamashita, propounded a revised version of command responsibility. This new doctrine was strangely similar to the one put forward by Yamashita's defence counsel during his case, ie since the evidence adduced could not directly link the defendant to the atrocities, nor claim that he had any knowledge of the atrocities, he must be found not guilty.[22] The outcome can hardly be defended as upholding the sound principles of international law. The judgment may have been fair in Yamashita's case but since the evidence before the court indicated that Toyoda was in fact directly responsible for issuing orders to the navy then he should have been found guilty even under the revised doctrine of command responsibility. It should also be noted that the court made express denials of any charges of being a trial of vengeance, stating that these trials were "patently free of any suggestion of victor's revenge."[23]

It could be argued that they had this issue in mind when passing judgment and thus may have been keen to avoid the possibility of such criticisms being leveled against them. All in all it would appear that, given the irregularities and inconsistencies in the approaches of the respective courts, Yamashita was a victim of some form of victor's vengeance in the aftermath of the conflict. In Yamashita's case the Manila tribunals were not far removed in time from the actual events in question and are thus open to the view that they were caught up in the hysteria of the war. The tribunals were somewhat hastily organized by the supreme commander of the allied forces, General MacArthur, immediately after the end of the war and were enmeshed in the seemingly extreme hatred that existed between the US and Japan at the time,[24] a hatred which had subsided by the time Toyoda was brought to trial. The establishment of cordial post–war relations between the US and Japan by 1949 when the Toyoda case was heard may go some way toward explaining the more lenient application of the doctrine of command responsibility.

E THE TOKYO TRIALS

1 Introduction

[20] *Ibid* at 1120, quoted in Prevost *supra* n 7, at 332.
[21] *Ibid* at 333.
[22] *Ibid* at 334.
[23] *Ibid*.
[24] On this point see Hane, *Modern Japan: A Historical Survey* (Westview Press, 1986) for a detailed look at Japan's international relations. Note other cases with potentially racist undertones at the time in particular the case of *Korematsu v. United States* 323 US 214 (see Murphy J dissenting). This concerned the use of detention camps for Japanese-American citizens during the war. The decision was eventually 'vacated.' See E. Yamamoto, *Korematsu* Revisited–Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review, 1986, 26 Santa Clara Law Review 1, also Prevost *supra* n 7, at 323.

We are now going to move on to look at the official international tribunal that took place in Tokyo after the war (the IMTFE). The IMTFE was essentially the counterpart to the more famous Nuremburg based trials. Although both were the official allied attempts to punish war criminals in an international forum it is generally only the Nuremburg–based trials which are studied in any great depth. This is unusual given the fact that the IMTFE was by far the larger and indeed more international of the two. I will come back to both these points later but first I will give a very brief outline of what happened during the trials. It is not my intention to get into detail on any of the individual cases that came before the tribunal but merely to look at the trials as a whole.[25]

The first point is that the charter for the IMTFE was an executive order with MacArthur acting under mandate from the joint chiefs of staff, unlike the Nuremburg equivalent which was negotiated at a conference in London. It was issued on the 19th of January 1946.[26] A panel of eleven judges was appointed by MacArthur, each judge representing a different country involved in the conflict. The defendants were divided up into Class A criminals accused of 'crimes against peace' (meaning waging and planning an aggressive war), encompassing the top officials who had planned and directed the war, and then Class B and C criminals accused of 'conventional war crimes', this encompassed officials and military commanders or troops at any level.

In total 28 defendants were indicted on 55 counts (as opposed to the four used at Nuremburg) of 'crimes against peace, conventional war crimes, and crimes against humanity'. This was broken down into 36 counts relating to crimes against peace, 16 relating to murder charges (considered to be crimes against peace, war crimes and crimes against humanity) and 3 relating to conventional war crimes and crimes against humanity. The use of 55 counts allowed for the charges to be itemized in much greater detail than was the case at Nuremburg.[27] At Nuremburg the details of the offences charged were set out entirely in the narrative appendix. The trials themselves lasted two and a half years, three times the length of Nuremburg. None of the defendants were cleared of all the charges. Seven were sentenced to death, sixteen to life, two to lesser terms, two had died during the trials and one was found to be insane.

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[25] The information here is amalgamated from several sources including the following, many of the sources overlap hence it is difficult to pinpoint any in particular, although I have done so where possible: B.V.A. Roling, 'Tokyo Trials; in R. Bernhardt (ed.) *Encyclopaedia of Public International Law Vol. IV* (Amsterdam: Elsevier Science B.V., 2000 1st Ed.) at 863; A.S. Comyns Carr 'The Judgement of the IMTFE' (1948) 34 Transactions of the Grotius Society at 141; C. Sheldon, 'Book Review of The Tokyo Judgment by B.V.A. Roling' (1980) 14 Modern Asian Studies 703; , J. Nafziger, 'Book Review and Note: The Tokyo Trial and Beyond by B. V. A. Roling and A. Cassese,' 1996, 90 AJIL 342; Pritchard, 'The IMTFE and its Contemporary Resonance,' paper delivered on 17th of Nov. 1995 at a conference entitled Nuremberg and the Rule of Law: A Fifty-Year Verdict, in Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; http://www.geocities.com/nankingatrocities/Tribunals/imtfe_01.htm (Summary and some pictures from the United States National Archives).

[26] See http://www.yale.edu/lawweb/avalon/imtfem.htm for the charter and rules of procedure.

[27] Many were different charges related to the same facts although some were the same charges in respect to different countries, periods and places. See Comyns *supra* n 25.

The seven sentenced to death included General Tojo himself. They were hung at Sugamo prison on December 23rd 1948.

The judgment of the Tribunal was accepted by Japan at the San Francisco Peace conference in 1951. Also by 1958, with the consent of the majority of countries involved in the trials, all remaining Class A war criminals were released from prison and several went on to become establishment figures in Japanese politics again.

2 Criticisms of the Trial

The Tokyo Trials were from their very beginning subjected to many criticisms of their legitimacy. Although some of these criticisms may be unjustified, it is generally accepted that some were valid and they serve to highlight the problems in attempting to administer this form of international justice.[28]

The first problem with the trials was in the panel of judges itself. The panel was very representative of the countries involved in the conflict and indeed the internationalism of the panel, it could be argued, was something sorely lacking in the Nuremburg trials.[29] On this point it was even argued in the immediate aftermath of the Nuremburg trials by some highly respected international jurists, including Hans Kelsen, that those trials were not international at all but rather domestic. This particular viewpoint rests on the somewhat technical argument that the trial, being the order of the allied powers in legal control of the German state following the war, was in fact administered by the official German government.[30] Despite the international character of the judges at Tokyo many, had the trial been a domestic trial, would have been properly disqualified from such a position. None of the judges, with the exception of the Indian judge Radhabinod Pal who ended up dissenting from the entire decision, had much experience in international law. The Chinese justice, Mei Ju–ao, had no experience as a judge; the USSR representative did not speak either of the official languages of the trial; and the Philippine justice was himself a direct victim of some of the charged offences. Also despite the internationalism of the panel of judges there was only one prosecution team, led by the American Joseph B. Keenan, and this ultimately gave the trials an American bias. This stands in contrast to Nuremburg where each power had a prosecution team.[31]

Other criticisms included the issue of the immunity granted to Emperor Hirohito and his family by the US. The Australian justice, William Webb (who was also president of the tribunal) took up this issue in his judgment by claiming that any argument that the emperor merely acted as he was advised was contrary to evidence.[32] More shocking was the emergence, some years later, of details concerning an immunity from prosecution granted

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[28] See n 25 for the sources used in this section, unless otherwise stated.
[29] On this see Pritchard, *supra* n 25.
[30] F. Neumann, 'The War Crimes Trials,' 1949, 2 World Politics 135 at 137.
[31] Bernhardt *supra* n 25, entry under Nuremburg trials and Nafziger, *supra* n 25 at 343.
[32] It has since been argued that this involved a misunderstanding of the actual role of the Emperor, who did all he could to avoid war behind the scenes; see Sheldon, *supra* n 25 at 704.

by the US to the military scientists of Unit 731 who had experimented with bacteriological weapons on human guinea pigs. The immunity was granted in exchange for the research data.[33]

Individual judges also had their own criticisms of the trials. As previously mentioned Justice Radhabinod Pal of India produced a 1,235–page dissenting judgment in which he dismissed the entire procedure as being mere victor's justice. He felt all the nations involved in the conflict deserved to share in the blame; he was of the opinion that war itself bred criminality and thus justice could only ever be achieved through peace. Justice Henri Bernard of France, while not actually dissenting from the majority opinion, pointed out the insufficient deliberations and the absence of Hirohito. Justice Jaranilla of the Philippines took issue with what he viewed to be the leniency of the verdict and its resultant ineffectiveness in acting as a deterrent to similar future crimes. Justice B.V.A. Roling of the Netherlands criticised the trial in both his dissenting judgment and his subsequent writings.[34] Firstly, he felt that it was impossible to define the concept of initiating or waging a war of aggression both accurately and comprehensively.[35] He, like Justice Bernard of France, was disappointed by the lack of deliberation in preparing the judgment.[36] He was also particularly disturbed by the 6–to–5 vote in favour of a death sentence against the former Japanese Foreign Minister and Prime Minister, Koki Hirota, for his role in failing to prevent the Nanking atrocity. He felt Hirota's foreign policy, although dangerous, fell short of amounting to a genuine plan of aggression.[37] Finally, he sought to distinguish the Japanese defendants from those at Nuremberg. In his opinion the Japanese defendants were most unlike the 'German scoundrels … who killed uselessly'[38] as the atrocities in Japan were not orchestrated by some governmental plan. Consequently he felt the Japanese defendants did not deserve the same treatment as their German counterparts.

F ISSUE OF RETROACTIVE LAW–MAKING

We now come to one of the major criticisms of both the post war international military tribunals; namely that they were guilty of retroactive law–making. The argument is that the crimes charged against the defendants (war crimes, aggressive war and crimes against humanity), were not actually recognized as crimes at the time of their commission. Such retroactive law–making offends the basic principles of justice and the rule of law as held by most legal systems and is summed up in the pithy Latin phrase *nullum crimen nulla pœna sine lege*.[39] One can easily see the potential abuses of power which could take place if this were allowed; no activity would ever be safe from

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[33] P. Williams, and D. Wallace, *Unit 731* (New York: Free Press, 1989). It has been argued that a potential motivation for this was to deprive Stalin of the information, see Nafziger, *supra* n 25 at 343.
[34] In particular see B.V.A. Roling, and A. Cassese, *The Tokyo Trial and Beyond* (Oxford: Blackwell Publishers/Polity Press, 1993).
[35] *Ibid* at 58.
[36] Nafziger *supra* n 25 at 343.
[37] *Ibid*. Nafziger argues that Roling had discounted evidence from Miner Searle Bates which should have lead to a finding of criminality.
[38] B.V.A Roling, and A. Cassese *supra* n 34, at 47.
[39] No punishment without law.

potential conviction and there could be no certainty as to what the law required.

This criticism of the trial has been the source of much academic debate over the years, in particular a debate arose over whether the findings of the respect tribunals rested on positivist or a naturalist conception of the law. It has often been opined that it was a natural law theory which won the day and that, while the offences charged may not have existed in positive law, they clearly formed part of some higher natural law.[40] However it is clear that the judgments in both instances took quite a different view. It was the position of the tribunals (both Tokyo and Nuremburg) was that the respective charters setting up the trials were merely declaratory of the state of international law at the time and were not engaged in creating new offences. In doing so they wished to deflect criticism of the respective charters being legislative (i.e. law–making in character). They based their opinion on three major international treaties: the two Hague conventions (1899 and 1907) and the Kellogg–Briand pact (1927). It was held that aggressive war, war crimes and crimes against humanity were prohibited by these treaties. In this respect the Hague conventions, which contained the so–called laws of war, were deemed to outlaw war crimes and crimes against humanity whereas the Kellogg–Briand pact was deemed to outlaw 'aggressive war'. On this last point it should be noted that the 1927 pact did not create any 'offence' of 'aggressive war' but this was rather inferred from its content.[41]

Thus it is clear that the Tribunals did not consider themselves to be engaged in any form of retroactive law making. However that did not prevent this criticism being thrown at them. There is little doubt that the use of individual responsibility for acts of state and the attachment of criminal liability for acts of war were without precedent in international law but some scholars were of the opinion that even if it were *ex post facto* law it was justified. On this issue Kelsen said that the London Agreement was clearly engaged in *ex post facto* law–making,[42] but only in respect to the creation of individual responsibility for offences previously deemed to be of collective responsibility. He also felt that the rule preventing such law–making had no role in international law and indeed only applied to limited areas of national law. In support of this he maintained that precedent and custom are always retroactive in effect.[43] Justice Roling seems to support this with his assertion that *nulla pœna sine lege* was an expression of political wisdom as opposed to a genuine legal rule.[44] Another view used to support the decision of the tribunals is that the combined treaties and conventions were sufficiently developed international custom, and could thus aid in the conception of aggressive war as an international crime. However others view this as untenable given that the signatories to these treaties clearly refuted them in

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[40] See Hart/Fuller debate Harvard Law Review 1958 Vol. 71 No. 4. Much of this actually concerns crimes committed within Nazi Germany rather than those committed in the international sphere but the argument has been used for both scenarios.
[41] A. S. Comyns Carr, *supra* n 25, at 142.
[42] See Kelsen, 'Will the Judgment in the Nuremburg Trial Constitute a Precedent in International Law?' 1941, 1 International Law Quarterly 153 at 164.
[43] *Ibid.*
[44] Nafziger, *supra* n 25 at 342.

practice[45] and such custom, if it existed, did not set down any clear guidelines as to the requisite punishment for a breach, in particular there was no authorisation of the death penalty[46] or any notion of individual responsibility for such crimes.[47]

A curious fact in the Tokyo trials which did not arise at Nuremburg and which tends to add weight to the above criticisms was the attempt to pursue a charge of murder. This could be viewed as a way of sidestepping the issue of retroactive law making since murder was undeniably a crime under international law at the time. Obviously all wars tend to involve orders to kill but the question arises of justification which may not arise in the case of an aggressive war (as opposed to actions of self–defence) and could hence provide for a charge of murder. However this charge would rest on aggressive war being in breach of international law which is a position that has its own problems, as previously mentioned. Ultimately the judgment did not address this issue.[48]

Finally, in relation to this area, the judgment of Nuremburg was authorized by the UN General Assembly in Resolution 95 (I) 11th December 1946. It is this resolution which has provided the foundation for the more recent efforts at prosecuting crimes against humanity in Rwanda and the Former Yugoslavia (the ICTR and ICTY respectively). In this manner the three treaties referred to at Nuremburg and Tokyo as the legal foundation of those decisions have been mysteriously buried. Also the ICTR and the ICTY do not concern themselves with the concepts of 'aggressive war' or 'conspiracy to wage aggressive war', which were the most contentious and dubious of the 'crimes' charged at the post–WWII tribunals, but rather with questions of international humanitarian law.[49] The disregard for the original sources adds weight to the criticism and it would appear clear, at this stage, that there was some sort of *ex post facto* law–creation present in the post–war tribunals, although it is questionable, as pointed out by Kelsen, as to how serious this was. The more recent discussions of the judgments tend to ignore this issue and prefer to discuss the importance of the decisions as a step forward in international law and in their condemnation of crimes against humanity.[50] Also it could be argued that this criticism has at least gone away in the aftermath of the UN general resolution which appears to have settled the law on this issue.

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[45] On both these points see G. Finch, 'The Nuremberg Trial and International Law,' 947 41 AJIL 20. State practice and *opinio juris* are essential evidence of custom.
[46] See W. Schabas, Conceptualizing Violence: Present and Future Developments in International Law,1997, 60 Alb. L. Rev. 733 at 735-740. The issue is more complex than I have made out. No defendant, at either trial, was sentenced to death solely for crimes against peace. Thus it is debateable whether a death penalty could stand for a conviction of waging an aggressive war on its own. Also some domestic law did provide punishments for war crimes and crimes against humanity while international law did not.
[47] Kelsen (1947) *ibid.*
[48] A.S. Comyns Carr, *supra* n 25, at 142.
[49] Pritchard, *supra* n 25. These tribunals are different in many respects to the post-WWII tribunals. It should be noted that no real issue of an 'aggressive war' arose in relation to the atrocities in these countries.
[50] See Luban, *Legal Modernism* (University of Michigan Press, 1994) at 336.

G VICTOR'S JUSTICE

This is a second serious criticism of the Tokyo trials and is a problem that will be faced by virtually all attempts to mete out justice in a post–war environment. The problem arises out of the essential hypocrisy which surrounds the punishment of war crimes, in particular those in relation to the waging of aggressive war.[51] As has already been pointed out, at least one judge at the Tribunal, Justice Pal, was critical of the trials in this regard. He felt the trials were merely a 'show' and pointed out that the allied powers were themselves guilty of war crimes such as the dropping of the atomic bombs on Hiroshima and Nagasaki and the Russian invasion of Manchuria. It is a position that has been taken up by others, most notably by Minear in his polemical book *Victor's Justice: The Tokyo War Crimes Trial*.[52] In the European context the same could and has been argued of allied bombings of German cities such as Dresden and also the actions of the Russians in Eastern Prussia.[53] In the particular context of Tokyo, Pritchard (who has dedicated much of his life to studying the trials)[54] is of the opinion that those who claim the trials to be guilty of 'victor's justice' have "facts if not merit on their side".[55]

This was particularly so when what tended to be at issue in the trials was not the facts themselves but rather the construction put on those facts. He points to several aspects of the trial which tend to support this criticism, for example the non–admission of evidence favourable to the defence which could have brought the wartime activities of the allies into question and the flexible approach adopted by the court in relation to its own jurisdiction. There was also a general disregard for standard rules of evidence. To this effect there were some 779 unsubstantiated affidavits and depositions given and accepted for whatever probative value their words might have.[56] In response to this it may be argued that rules of evidence are difficult to establish in an international setting when there are competing legal systems and also there were practical restraints on the tribunal with regard to the calling of witnesses.

The problem of victor's justice is also highlighted by Franz Neumann in an article written in the aftermath of the Tokyo decision but which also relates to Nuremburg:

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[51] Although it applies to war crimes and crimes against humanity too.
[52] (Princeton: Princeton University Press, 1971).
[53] M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick NJ, Transaction Press, 1997); also Steiner and Alston, *International Human Rights in Context* (Oxford: OUP, 2000 2nd Ed.) at 125.
[54] See R. John Pritchard, *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes* (R. John Pritchard ed., with the assistance of Sonia Magbanua Zaide, New York & London, 1981) (volumes 1-19, Transcripts of the Proceedings in Open Session; volume 20, Judgment and Annexes; volume 21, Separate Opinions; volume 22, Proceedings in Chambers). See also R. John Pritchard, *The Tokyo War Crimes Trials: Index and Guide* (R. John Pritchard ed., with the assistance of Sonia Magbanua Zaide, New York & London 1981-87) (volumes 1-2, Index to Names and Subjects; volume 3, Narrative Summary of the Proceedings; volumes 4-5, Miscellaneous Finding Aids).
[55] Pritchard, *supra* note 25
[56] *Ibid.*

> They [the trials] were conducted by the victors and are thus exposed to the obvious reproach that they merely clothe naked power with the garb of right … Governments which resort to aggressive war obviously expect to be victorious and thus avoid punishment. If, however, they lose the war and their responsible leaders are punished as a result of trials conducted by the victors, the victors can hardly escape having a charge of hypocrisy leveled against them.[57]

In respect to the crime of 'aggressive war' one can easily see the problem, the crime only exists in the context of defeat and thus it has been opined that the real crime here is that of defeat. After all, the victors in any war, regardless of their actions, are highly unlikely to be punished given their status as victors. As Pritchard puts it, the "Lord Haigs and Air Marshall Harrises of this world escape justice only because their defeats were not acknowledged."[58] In this respect it could be argued that the legal nature of these tribunals was illusory or as another commentator puts it they were 'dressed up in the false *façade* of legality.'[59]

While the problem of retroactive law making may have gone away this is a problem that will remain for all war crimes tribunals. International law is inescapably and often obviously political in its nature.[60] In the absence of a world governing authority it will continue to be directed by international power relations. Of course domestic tribunals of these crimes are open to the same criticisms, as was witnessed in the Yamashita case. The best one can hope for is to minimize the problems associated with the politicization of trials and the potential does exist to mitigate it; as Neumann said: 'In the absence of a permanent international criminal court the sincerity of the victors cannot be tested.'[61]

If war crimes continue to be tried in *ad hoc* tribunals then they are more obviously open to criticisms of victor's justice since they only apply to isolated and selected events. It is thus submitted that the recent establishment of the International Criminal Court is a step forward in this regard. A permanent and independent court is less open to criticisms of hypocrisy and double standards. However this too is being hampered by the vagaries of international relations.[62]

H CONCLUSION

The purpose of this essay has not been to deny the reality or extent of Japanese war crimes, which undeniably took place, nor does it seek to excuse those who celebrate them. The purpose has rather been to highlight the

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[57] F. Neumann, *supra* n 28 at 141.
[58] Pritchard, *supra* n 25.
[59] A.T. Mason, *Harlan Fiske Stone: Pillar of the law* (NY: Viking Press, 1956) at 715, quoted in Steiner and Alston, *supra* n 45, at 124. It should be noted that Stone was Chief Justice of the US Supreme Court at the time of the Yamashita decision.
[60] Of course the same can be argued of domestic law, although perhaps less obviously.
[61] F. Neumann, *supra* n 28 at 141.
[62] Due to its non-acceptance by several states, particularly the US who have generally adopted a hard-line opposition to the court although they did not stand in the way of letting the UN Security Council authorise an investigation, by the ICC, into Darfur; see UN Security Council Resolution No. 1593, March 31st 2005.

problems with their prosecution. The post–war tribunals were major steps forward in the development of international law and in the recognition of war crimes and crimes against humanity. The law at the time was underdeveloped and the position has been greatly clarified by these decisions and by the subsequent efforts of the UN and the international community. However not all the problems associated with the punishment of war crimes have gone away and the recent attempts to prosecute Saddam Hussein in the aftermath of the Iraqi invasion once again highlight the shortcomings that can, and perhaps always will be, features of this type of punishment.