Conclusion

Justice Pal’s most persisting insight involved connecting international criminal law to a project for stabilizing and securing existing power distributions within international society. For Pal, the criminalization of aggression, in particular, was simply a way of freezing the status quo. The criminal repression of territorial change was meant to ensure that the frontiers created by the original sin of colonial maldistribution would remain fixed by the legitimating force of an international rule of law. The deepening juridification of war was intended to remove armed struggle from the repertoire of anti-colonial, anti-Western political movements and states. (Tanaka, McCormack and Simpson, 2011: p354)

The changes in the international system seem to defy the logic of Pal’s analysis. The questions that they give rise to are many and unsettling. Are we members of an ‘international community’ today? Is international law stronger now than it was earlier? Have we found a solution to the problem of ‘victor’s justice’ which had so disturbed Pal? Do international tribunals have a deterrent effect? Does a dissent written in 1948 have any relevance today? An attempt to answer these questions would imply looking at the developments in the international system from within Justice Pal’s theoretical framework.

Is there an ‘international community’? An affirmative answer to this question would probably be the biggest challenge to Pal’s world view. However, before coming to any conclusion, we have to keep in mind Pal’s conception of an international community. Going by Schwarzenberger’s definition, Pal believed that the pre-requistite to the creation of any community was the binding force which makes it cohesive. In the case of the international system, this binding force is common norms and standards. The question about international community would, therefore, translate into a query on whether we have universal norms. The answer to this would be a definite ‘yes’, especially while discussing areas like ‘war crimes’ and ‘crimes against humanity’. (Vardarajan, 1998: p38, IJIL)
There are states which violate these norms time and again; but all these violations are recognized as breaches of international law. At the normative level, the international system can be considered to be a ‘community’ even within Pal’s own definition. The problem, however, arises at the level of implementation. What Pal would probably point out is that a mere recognition of violations does not suffice. Are all the violating states punished by universally applicable rules? To take an oft-quoted example, the USA violated a series of laws, right from the one prohibiting the use of ‘force to almost all the existing humanitarian laws, in Vietnam. However, no charges were brought up against any of the US government agencies involved in the operation, nor were any US citizens tried for violations of international law in any international tribunal or court.

The international tribunals set up to prosecute perpetrators of crimes against humanity in the former Yugoslavia and Rwanda have been cited as illustrations of the existing universal regulatory mechanism. At one level, any comparison between the tribunals in Yugoslavia and Rwanda and that established in Tokyo over fifty years ago would be meaningless: the circumstances are different, the parties involved are different, and the method of enforcing the regulatory mechanism is different. Politics does play a very important role in determining international crimes, but in the case of Yugoslavia and Rwanda, there was a general consensus about the extent of human rights violations and the need to set up tribunals to prosecute the violators. While these were important determinants, what probably swung the balance in favour of setting up the tribunals was that none of the powerful states would be put in the dock as defendants. The concept of ‘victor’s justice’ may no longer exist in the form it was visualized during the Tokyo trials; however, it is still extremely difficult to envisage a situation where tribunals are set up to try a country like the US for violation of humanitarian laws: .(Vardarajan: 1998, p38, IJIL)

The International Criminal Court is being projected as the solution to this problem. Since the court would be permanent and would have a definite jurisdiction, it would probably provide a more equal justice than the concept of ad hoc tribunals. While sound in theory, this would not bear close scrutiny in actual practice. The draft statute proposed by the ILC makes it clear that the court can exercise jurisdiction only after states parties accept
its jurisdiction. The concept of state sovereignty is too deeply rooted in the international system for any state to accept, without any pre-condition, the jurisdiction of a body like the proposed criminal court. The ‘fundamental gap’ in international relations—no state is bound to submit its disputes with other states to a binding judicial decision—seen by Radhabinod Pal during the Tokyo trials exists even today. Even while holding that “nations have not yet considered the condition of international life ripe enough for the transposition of principles of criminality into rules of law in international life”, Pal believed that: if and when international law would be conceived to govern the conduct of individuals it may become less difficult to project an international penal law. (Vardarajan: 1998, p236, IJIL)

Indeed some of Pal’s theoretical views are contestable. An example is his championing of national societies as ‘cohesive’ and the ideal toward which the international society ought to move. Whether nations can be really regarded as ‘communities’ within Pal’s own conception is itself debatable. Moreover, how can the level of integration of values be measured in domestic societies; problems like hegemony and cultural relativism are not unique features of the international system. (Vardarajan: 1998, p239, IJIL) They exist even within national boundaries. Even if the level of integration in national communities is greater than that of the international system, this takes place over a long period of time. Presuming that we want the international legal system to resemble the municipal legal system, what would be required is a longer time frame. While dealing with the issue of ‘social utility of punishment’, Pal conveniently overlooks the deterrent effects of tribunals and the norms they create. We may not be living in a perfect world where all offenders are judged by the same criteria, but the creation and internalisation of norms would contribute immensely to the development, and eventually, the codification of law.

The Tokyo trials concluded at a time when India had just emerged as an independent nation. Radhabinod Pal was an Asian, a citizen of a country that was trying to redefine the international system, a country which had not really borne the brunt of Japanese actions during the war. These factors probably did influence his opinion and verdict. Pal’s reading of the international system, moreover, reflected the dominant theoretical paradigm of the day, namely, Realism. Whether he might have interpreted the system
differently if exposed to other approaches remains a matter of conjecture. (Vardarajan: 1998, p235, IJIL)

Prior to the Second World War, the world as Pal saw it consisted of states, all of which were trying to maximize their gains — economic, political, military and in some cases, ideological — by following certain policies which put them on a collision course. (Vardarajan: 1998, p237, IJIL). The League of Nations had already proved to be a failure as far as international organization was concerned. There were no rules that could-be universally applicable, regardless of the position of the offender. The international system was at best an inchoate society where only the rules agreed to by all parties had come to occupy the position of law. However, Pal felt that nothing can said to be law when its obligation is still for all purposes dependent on the mere will of the party. His conception of law made the existence of an “international community which can be brought under the reign of law” a pre-requisite for any kind of international organization. It is here that one must understand the difference between a ‘community’ and a ‘society’. A ‘society’ lacks the binding force that makes a ‘community’ cohesive (Minear, 1971:p24). Pal believed that the international system did not have standards/norms which transcended all boundaries and which could be applied under all circumstances. The best that could be said of the system was that if states so desired, they could, through agreements, adjust their divergent interests. Human beings had as yet not succeeded in creating an international community where order or security was provided by law. Peace was, therefore, a negative concept — a negation of war, an assurance of status quo.

It was quite naive to expect the smaller, less powerful nations to be satisfied with this state of affairs. Moreover, international law recognized that in the absence of an agreement to the contrary, no state was bound to submit its disputes with other states to a binding judicial settlement or to a method of settlement resulting in a solution binding upon both parties. This created a fundamental gap in the international system; a gap which war alone could fill.

One of the main charges levelled against the defendants at the Tokyo trials was that they had plotted to wage an “aggressive” war. This gives rise to two questions:

(1) Was war a crime in international law?
(ii) What exactly was ‘aggression’?

Attempting to answer the former, Pal held that modern international law was developed as a means of regulating external conduct rather than as an expression of the life of a true society. Moreover, existing international practice (especially that pertaining to the Kellogg-Briand Pact of 1928) proved that while there might have been contractual obligations, there was no law that made war a crime. War has always remained outside the province of international law and only its conduct has been regulated. As Pal put it:

When the conduct of nations is taken into account, the law will perhaps be found to be that only a lost war is a crime.”(Rolling and Reuter, 1977:p630)

As for the issue of defining ‘aggression’, the main problems arose in determining the index: would ‘aggression’ be defined in terms of the interests of the dominated nation as distinct from the dominant or would it be merely a reference to the status quo? Pal dismissed Robert Jackson’s definition of aggression (with its heavy emphasis on first strike) as an ideological cloak intended to disguise vested interests. One of the fundamental principles of law was a “nullum crimen sine lege, nulla poena sine lege”—no punishment of a crime without a pre-existing law. Under such circumstances, the defendant could not be held guilty of waging an aggressive war. (Minear, 1971:p28)

Since the basis for international relations was “... still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision”, war could be regarded as a legitimate instrument of self-help against an international wrong (Pal, 1951:p132). For such a society, the conception of crime was still a bit premature. Pal believed that any conception of crime in international life needed to be looked at from within the framework of the social utility of punishment. Reformatory, deterrent, retributive and preventive theories justify punishment. (Pal, 1951:p132) In international relations, the reformatory and retributive theories probably would not have any relevance. As for the other two theories, in Pal’s words: So long as the international organization continues at the stage where trial and punishment for crime remain available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and preventive effect. Viewed from this angle, the very basis of setting up an international tribunal becomes questionable. Moreover, as long as national sovereignty remained the fundamental basis of international relations, acts
committed while working a national constitution would remain unjusticiable in the international system and individuals functioning in such capacity would remain outside the sphere of international law. This negation of individual responsibility was a logical progression of Pal’s theoretical beliefs.

Firmly committed to some of the tenets of Realism — to the extent that he believed in the existence of a self-help system where states acted to maximize power — Pal was not unaware of the cultural relativist position taken by the Allies. As he looked at it, one could not reconcile something like the ‘Truman Doctrine’ with concepts of self-defence, non-intervention, non-aggression.” (Vardarajan: 1998, p40, IJIL) If some victor states could not live securely in contact with governments having radically different ideas, were not defeated nation entitled to share the same feeling? Keeping in mind the lack of any universal standards, how could some nations sit in judgment over others? Pal strongly believed that: if an individual’s life or liberty is to be taken then it is imperative to measure his conduct by a standard having universal application. (Vardarajan: 1998, p40, IJIL)

Despite having misgivings about the creation of an ‘international community’ Pal believed that, given time and “...the vindication of law through a genuine legal process”, order and decency could be re-established in international relations. Till such time, however, any attempt to regulate international crime in the manner the Allies had done, would only be “formalized vengeance”. (Vardarajan: 1998, p41, IJIL)

Pad did not hold any brief for the Japanese; at no point of time did he condone Japanese actions. In fact, there is an implicit condemnation of the Japanese policy in the Pacific when he states that the belief in one nation having “interests” in the territory of others is indicative of a deluded mind. However, given these theoretical underpinnings. Radhabinod Pal could logically deliver just one verdict — “not guilty on all counts”. (Pal,1951:p136)

Before addressing the issue of Pal’s relevance to the current debate on international criminal jurisdiction, we need to look at the changes that have taken place in the
international system in the past fifty years. These changes have, to a large extent, been influenced by the experiences prior and during the Second World War. Keeping in mind the concerns, one can identify three distinct trends since the time Radhabinod Pal wrote his dissent: a growing concern with issues of human rights as seen in the codification of humanitarian laws; the emergence of the United Nations (UN) as a major step forward in the process of international organization; and the renewed interest in attempts to move from *ad hoc* international tribunals to permanent International Criminal Court.

The Nuremberg and Tokyo trials, all their drawbacks notwithstanding, served an extremely important purpose — that of exposing some striking gaps in the international legal system. These pertained primarily to:

1. the responsibility of individuals under international law, and
2. the state of humanitarian law.

Even before the Second World War, Hans Kelsen had argued that, in the ultimate analysis, individuals were the subjects of international law. However, only after Nuremberg and Tokyo did it become clear that international law could reach over and beyond traditional technicalities and punish guilty individuals. As the Nuremberg Tribunal put it:

> Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

Despite the objections raised by Justice Pal on this point, the trend of international law towards attaching direct responsibility to individuals has been reaffirmed by subsequent treaties.

‘Crimes against humanity’ was a category recognized for the first time in the Charter and judgment of the Nuremberg Tribunal. These refer to acts of a very serious nature, such as wilful killing, torture or rape, and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character. A series of treaties and conventions over the years have contributed to the codification of humanitarian laws. The first act of legitimisation was the United Nations General Assembly (UNGA) resolution of 1946 on the Nuremberg Principles. It was followed by the 1948 Convention
on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{23} Nazi atrocities, especially the holocaust which ‘shocked the conscience of mankind’ brought into sharp focus a problem which had never really been dealt with before — acts committed with the intention of destroying a particular national, ethnic or racial group. The Genocide Convention was the direct result of growing concerns over this issue. Apart from defining genocide, the convention makes it clear that such acts, whether committed in times of peace or in time of war, are crimes under international law for which individuals would be tried and punished.

The Genocide Convention was, in a way, a continuation of the 1907 Hague Laws of War. However, there were still issues regarding the conduct of belligerent states towards various categories of people. These were addressed by the 1949 Geneva Conventions.\textsuperscript{24} These conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons, namely, wounded and sick members of armed force in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians, in time of war. They form the core of customary law in international armed conflicts.

The issue of defining ‘aggression’, raised by Justice Pal in his dissent was tackled by the UNGA soon after the war. The almost insurmountable difficulties in completing this endeavour was illustrated by the failure of the two special committees set up in 1952 and 1954 to deal with the question of defining aggression. It was only at its seventh session (1974) that a special committee was able to adopt, by consensus, a definition of aggression that was latter accepted by the UNGA. As per the existing definition, aggression means, “... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations...”. Though the definition tries to cover as many areas as possible, it definitely falls short of legal perfection.

Radhabinod Pal had claimed that the process of international organization was, at best, in its formative stages and states still belonged to a self-help system. However, it can be argued that the existence of the United Nations fosters the notion of an ‘international community’ even within the framework of Pal’s understanding of the term.
The inability of the League of Nations to prevent the outbreak of the Second World War did not really affect the process of international organization. Even during the course of the war, the Allies were discussing the possibility of setting up an organization which would take over from where the League left off. The result was the United Nations which came into being in October 1945. The membership of this body has gradually increased from a little over 50 to over 180 nations today. The importance of the UN lies in the fact that it has proved to be an extremely effective forum for states to debate and decide upon standardized norms. Most of the conventions and treaties that have been signed and ratified in the past five decades have owed their existence to measures initiated by the UNGA. Issues of international concern ranging from human rights to drug trafficking have been taken up by one or other of the UN bodies. The Charter gives both the General Assembly and the Security Council the right to discuss issues affecting international peace and security. Norms, such as those against the use of force in international relations, have been strengthened by the decisions of the International Court of Justice (ICJ).

One of the main reasons for Justice Pal’s dissent was that he felt any tribunal established by the victor in a war would not be able to provide justice. The UN Charter attempts to resolve this problem by giving the world body the right to take action against states which violate the spirit of the Charter. Such actions could include setting up of an international tribunal to prosecute perpetrators of crimes against humanity. In the normal course of events, state parties would conclude a treaty to establish a tribunal and approve its statute. This treaty would be drawn up as approved by either the UNGA or any specially convened conference. The final step in the procedure would be to open the treaty for signing and ratification. While this approval would ensure that all issues pertaining to the establishment of an international tribunal would be subjected to close scrutiny, it has the disadvantage of being extremely long drawn out. An alternative approach that would expedite the procedure is to establish an international tribunal by means of a Chapter VII decision. This basically implies that the international tribunal would be the result of an enforcement action taken by the Security Council (SC) under the provision of Chapter VII and all states would be under a binding obligation to take whatever action was required to carry out the SC’s decision. An international tribunal
thus established would not actually be creating or ‘legislating’ law; it would merely have the risk of implementing existing humanitarian law.

The UN mechanisms do not guarantee implementation of humanitarian laws. However, by making provisions for dealing with violation and providing a forum for the ongoing process of standardization of norms, this organization has tackled many of the questions posed by Radhabinod Pal.

The draft statute of the ICC presented by the International Law Commission (ILC) in 1994, was the results of a concerted effort which was resumed in 1989 when the UNGA requested the ILC to work on such a draft. Since the end of the First World War, there had been attempts to create a court which would enforce international criminal responsibility. The main objection to such proposals was that there was no International Penal Law recognized by all nations. Over the years, there has been a growing awareness of the fact that it might not be possible to establish a definite international criminal law to which all states adhered, in the near future. Even in national societies, criminal law has taken a long time to develop and had been preceded by civil law. Moreover, there existed rules on subjects ranging from war crimes and genocide to drug-trafficking and terrorism, which were recognized by all states as part of customary international law. An additional problem was posed by the fact that the only other body that could serve the adjudicatory purpose of a criminal court was an international tribunal, *ad hoc* in character and created to deal with specific breaches of international law. All this resulted in greater attention being paid to the proposal for an ICC.

The ILC draft envisages a court which would exercise jurisdiction only over the “…most serious crimes of concern to the international community as a whole”. The categories of crime over which the court could adjudicate include genocide, aggression, war crimes, crimes against humanity, and treaty crimes (Art. 20). The enumeration and categorization of crimes in the draft statute is more comprehensive than that in the statute of the international war crimes tribunal. The draft not only covers areas like the crime of aggression, but also includes the grave breaches of the 1949 Geneva Conventions in the aforementioned ‘treaty crimes’ Apart from detailing the preconditions to the exercise of jurisdiction (Art. 21), acceptance of the jurisdiction of the court by states (Art. 22), and
action by the Security Council (Art. 23), the draft statute also focusses on the procedural aspects of the proposed court. Despite its efforts to cover as many areas as possible, the draft statute leaves a lot to be desired. The problems start from the way the court is envisaged in the Preamble itself, giving rise to several questions over the court’s jurisdiction and its relations with national courts. These are the issues that are most likely to be taken up when the UNGA debates the draft in 1997. The problems with the draft statute notwithstanding, this proposal undermines many of Pal’s beliefs, especially those pertaining to states ever accepting universal norms.

. For waging the war in Iraq in 2003, codenamed ‘Operation Iraqi Freedom’, America was never indicted in any international court or tribunal. Although Iraqi dictator Saddam Hussain was not put up before any international criminal court or tribunal, but tried by a local Iraqi ‘kangaroo’ court, before being hanged by a judicial verdict. Although the effect of victor’s vengeance remained the same, yet the farcical process of setting up ad hoc tribunals seems to have somewhat been deterred.

The international tribunals set up to prosecute perpetrators of crimes against humanity in the former Yugoslavia and Rwanda have been cited as illustrations of the existing universal regulatory mechanism. At one level, any comparison between the tribunals in Yugoslavia and Rwanda and that established in Tokyo over fifty years ago would be meaningless: the circumstances are different, the parties involved are different, and the method of enforcing the regulatory mechanism is different. Politics does play a very important role in determining international crimes, but in the case of Yugoslavia and Rwanda, there was a general consensus about the extent of human rights violations and the need to set up tribunals to prosecute the violators. While these were important determinants, what probably swung the balance in favour of setting up the tribunals was that none of the powerful states would be put in the dock as defendants. The concept of 'victor's justice' may no longer exist in the form it was visualized during the Tokyo trials; however, it is still extremely difficult to envisage a situation where tribunals are set up to try a country like the US for violation of humanitarian laws.

The International Criminal Court is being projected as the solution to this problem. Since the court would be permanent and would have a definite jurisdiction, it would probably
provide a more equal justice than the concept of ad hoc tribunals. While sound in theory, this would not bear close scrutiny in actual practice. The draft statute proposed by the ILC makes it clear that the court can exercise jurisdiction only after states parties accept its jurisdiction. The concept of state sovereignty is too deeply rooted in the international system for any state to accept, without any pre-condition, the jurisdiction of a body like the proposed criminal court. The ‘fundamental gap’ in international relations—no state is bound to submit its disputes with other states to a binding judicial decision—seen by Radhabinod Pal during the Tokyo trials exists even today. Even while holding that “nations have not yet considered the condition of international life ripe enough for the transposition of principles of criminality into rules of law in international life”, Pal believed that: if and when international law would be conceived to govern the conduct of individuals it may become less difficult to project an international penal law.

Though international law does not actually ‘govern the conduct of individuals’, the concept of individual criminal responsibility has become an accepted norm. But has it made the development of an international criminal law any easier? Despite the existence of rules governing the conduct of states and to a certain extent influencing the behaviour of individuals, one still has to deal with the question of what makes any act, a ‘crime’. An answer to this question is provided by Judge Pal in his dissent. While discussing why piracy alone was chosen for international regulation, he makes it clear that it as not because of theoretical considerations regarding the nature of international crime, “but by various political motives, the interest of one country or a group of countries in the combat against a given crime, material facilities for the organization of such combat...” (B.V. A. Rolling & Antonio Cassesse,1993:p 38) Unless and until we reach a point where a crime against one state would be seen as affecting the interest of all the states, it would be extremely difficult to construct an international criminal code.

This is not an attempt to uphold or justify Radhabinod Pal’s theoretical beliefs. Indeed, some of his views are contestable. An example is his championing of national societies as ‘cohesive’ and the ideal toward which the international society ought to move. Whether nations can be really regarded as ‘communities’ within Pal’s own conception is itself debatable. Moreover, how can the level of integration of values be measured in domestic societies; problems like hegemony and cultural relativism are not unique features of the
international system. They exist even within national boundaries. Even if the level of integration in national communities is greater than that of the international system, this takes place over a long period of time. Presuming that we want the international legal system to resemble the municipal legal system, what would be required is a longer time frame. While dealing with the issue of ‘social utility of punishment’, Pal conveniently overlooks the deterrent effects of tribunals and the norms they create. We may not be living in a perfect world where all offenders are judged by the same criteria, but the creation and internalisation of norms would contribute immensely to the development, and eventually, the codification of law.

The Tokyo trials concluded at a time when India had just emerged as an independent nation. Radhabinod Pal was an Asian, a citizen of a country that was trying to redefine the international system, a country which had not really borne the brunt of Japanese actions during the war. These factors probably did influence his opinion and verdict. Pal’s reading of the international system, moreover, reflected the dominant theoretical paradigm of the day, namely, Realism. Whether he might have interpreted the system differently if exposed to other approaches remains a matter of conjecture.

Radhabinod Pal’s dissent is the first main critique of international tribunals by a participant in the process. At a time when the international community is refocussing attention on this particular mechanism to implement humanitarian laws, the significance of Pal’s dissent lies in the nature of the questions it raises; questions regarding the process of norms formation, of individual criminal responsibility, and of the possibility of creating an international criminal law. While the questions remain relevant, Pal’s analysis falls short mainly because of the limitations of its theoretical paradigm. Concepts like anarchy and sovereignty, which Pal regarded as static and given, are now being questioned.

For Pal, sovereignty was an unchanging factor: a factor that needed to be respected in international relations. Hence, his emphasis on individuals not being liable for prosecution for acts committed in their official capacity. There has been a historical tension between state sovereignty (which stresses the link between sovereign authority and a defined territory) and national sovereignty (emphasizes a link between sovereign
authority and defined population). In their opinion, the current period is one where international norms legitimize national rather than state sovereignty; one could, therefore, expect the international system to be more sympathetic to the claims of ethnic groups even within state borders. Placing Pal’s dissent in this framework would give us some interesting answers to the questions he posed.

Pal had held that law would be meaningless if its obligation is dependent on the mere will of states. Given that state borders are no longer regarded as sacrosanct, the fear of international intervention might motivate states to respect human rights more than they did in the past. While the standardization of norms is an ongoing process, one important implication of the ‘nation’ being given priority over the ‘state’ is that the international community may no longer be willing to turn a blind eye to “gross abuses by governments of their population”. In such a context, the creation and implementation of an international criminal law may not be as improbable as it seems. The proposed draft statute has many obvious loopholes, especially pertaining to areas of jurisdiction, law applicable, admissibility and above all the definition of the category of ‘crimes of concern to the international community as a whole’. Despite these drawbacks, the ICC promises the best way to ensure to some extent at least, the implementation of humanitarian laws, although it is not a perfect antidote to the malaise of ‘victor’s justice’. (B.V. A. Rolling & Antonio Cassesse, 1993:p 35)

As Pal pointed out more than fifty years ago, we do not have a perfect international community with a high level of integration of values; what we do have is a system in which despite its flaws, certain laws can and need to be implemented to preserve the dignity of the individual.

An observation or finding comes to the forefront that scholars have previously identified and articulated lessons from Tokyo or that the international community has not already been applying some of the lessons in contemporary war crimes trials. The stain of victor’s justice has persisted since the Tokyo and Nuremberg Trials were conducted precisely because there is substance to the critique. The partisan imposition of justice by the winners upon the losing side in the war can never satisfy demands for impartiality, systematicity and consistency. The international community seems to have accepted that
the Tokyo and Nuremberg model is sub-optimal in the pursuit of justice (Totani, 2008: p218). The International Criminal Court (ICC) represents an important breakthrough in the sense that it is permanent—not ad hoc for specific conflicts—and because it has general jurisdiction—not established by the winners of a conflict to try out the losing side. The existence of the ICC as the world’s first permanent international criminal tribunal is no guarantee against the establishment of new ad hoc criminal tribunals. The establishment of Special Tribunal for Lebanon, by the UN Security Council—the ad hoc tribunal to try those allegedly responsible for the assassination of the former Lebanese Prime Minister Rafiq Hariri-following the entry into force of the Rome Statute is indicative of precisely this sort of mutual coexistence. (Tanaka, McCormack and Simpson, 2011: p354) Even in those unusual circumstances, where the UN Security Council considers an ad hoc tribunal desirable, the Council will not revert to the Tokyo/Nuremberg model bestowing its imprimatur on a tribunal established by the winners against the losers. A non-partisan approach to justice is now viewed as an inextricable element of multilateral involvement in the process. The ICC may not be able to try all deserving cases and the challenge of achieving an impartial, systematic and comprehensive approach to global justice remains the single greatest challenge facing the ICC and all those in the international community committed to the ideal. An important general lesson from Tokyo and Nuremberg, also evident in the contemporary evolution of international criminal justice system, relates to the rules of evidence and procedure and the guarantee of fair trial rights. All recent international and hybrid ad hoc criminal tribunals as well as the ICC itself have invested significant time and energy in the development of defensible rules of evidence and procedure which guarantee fair trial rights to the accused. (Tanaka, McCormack and Simpson, 2011: p354)

The main objective of the thesis had been to look into the process by which the dominant powers in the international system seek to impose what has been described as “Victor’s Justice” over the “vanquished”. Conceptually reference were made to the judgement of Dr. Radhabinod Pal, in the Tokyo Trials and analysis was made in the light of the evolution of the international criminal legal regime and its operation in the international
system. Dr. Pal’s dissentient judgement in the Tokyo Trials represent the voice of the “vanquished in war” and more so of the “third world” countries and constitute some sort of a resistance to breaking away from the “hegemonic” position of the victorious powers. The contemporary world order seems to reflect the hegemonic position of the dominant powers in almost all spheres and the international criminal legal system is no exception. Several instances go to prove the mere perpetuation of the “Victor’s Justice” regime and its virtual institutionalization through the setting up of the I.C.C. which is merely a tool at the hands of the dominant powers to define and establish their own standards of criminal justice, at the total cost of an egalitarian system of justice. The research has strived to point out the significance of Dr. Pal’s dissentient judgement in the light of contemporary developments in criminal justice system and illuminate the relevance which the same has or how it can be a guiding light for the lesser vanquished powers to strive for setting up an egalitarian criminal legal system. The process of evolution of the legal regime of war crimes and international criminal law should in some way reflect the voice of the ‘vanquished’ and not merely institutionalize the hegemonic position of the victorious powers and the concept of “Victor’s Justice”. The challenge is to free international criminal legal regime from the clutches of major power politics—a path shown before the world by Dr Pal in his Tokyo judgement, while showcasing the Japanese case. This may be the guiding light in the sphere of international criminal jurisprudence in the years to come.

Pal’s uncompromising position seems to be an outgrowth of academic pique, as a radical ‘fringe position’, or as a luxury enjoyed by a jurist writing without an emotionally-invested constituency. ”(Kopelman,1991: p439). Pal only emerges as a comprehensible voice when he is held up against the dominant American vision. His work is a very early example of differing Third World perceptions of Western legal concepts(Nandy,1992:p79). Pal agreed that the basis of international relations is still the competitive struggle of states, where there is no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is still no provision anywhere in the system for any peaceful readjustment without struggle. In arguing throughout his Dissent for the evenhanded enforcement of the conventional rules of war,
Pal insisted that until nations came to adopt the same standards of morality, world law cannot regulate their behavior. Nor could international institutions, international military tribunals, “produce by sleight of hand a moral consensus where none exists. World Law must express world community; it cannot create it” (Pal, 1951: p52). Pal seemed to be an ideologue of a different kind, someone offering his assessment of the proceedings in the light of an alternative world vision. Perhaps Pal may best be seen as an early believer in what one may consider as a third world alternative to the prevailing Eurocentric ideology in international relations, also reflecting anti-imperialist and pan-Asian sentiments” (Kopelman, 1991: p425). Jurists have a duty to speak out coolly but firmly when when an innovation seems to be of doubtful value, retrograde or dangerous. Pal attempted to do this and his position throughout was one of *fiat justicia ruat coelum*—do justice though the sky falls. His attempt at objectivity essentially comported with Gandhiji’s plea to “let hundreds like me perish, but let the truth prevail. Let us not reduce the standard of truth by even a hair’s breadth for judging erring mortals like myself” (Kopelman, 1991: p439). As a dissenter among the judges, Pal functioned on the basis of his formal knowledge of international law and, in the established language of legal scholars, as a strict constructionist who went by the letter of the law. As a dissenter among dissenters, Pal functioned on the basis of a cultural concept of justice, camouflaged by his self-taught knowledge of international law. Pal raised his voice against the Western racism in Asia. And it was this exposition of the notion of ‘victor’s Justice’, so succinctly done by Pal, that had opened up new vistas in the realm of modern international criminal law. The spirit of his judgement still smacks off relevance and contemporaneity in the international legal sphere. It may be argued that it continues to have somewhat of a deterring effect in the process of blatant imposition of mere ‘victor’s justice’ in contemporary times. The challenge still remains to free the same from the clutches of major power politics, democratize the system and make it an arena wherein the voice of the Third world countries are also heard and reflected.