Introduction

Criminal law refers to the body of laws, norms and rules governing international crimes and cooperation between national criminal legal systems. International criminal law refers to the crimes committed by national governments or rather by the individuals who control and direct them. The concept of war crimes is at the core of international criminal law. It refers to a range of acts judged to be beyond civilized human behaviour, even in extreme conditions of warfare. Just over sixty years ago, the international community, seeking to heal the wounds of a brutal war, embarked on a bold legal experiment. For the first time in history, legal mechanisms were invoked to bring to justice the perpetrators of war crimes and crimes against humanity in international tribunals specifically formed for the purpose. The trials at Nuremberg and Tokyo were extraordinary and unique in their time. These two trials and their proceedings represented a substantial step forward in the development of the law of war crimes.

The victorious Allied powers, at the close of the Second World War established a tribunal at Nuremberg to judge “the major war criminals of the European Axis powers”. In all, some twenty two leading Nazis were tried by a court composed of eight judges-two each from the U.S.A, U.K., France and the Soviet Union. The Nuremberg Trials (1945-46), prosecuted three category of offenses: crimes against peace, war crimes, crimes against humanity. After Nuremberg, individual criminal responsibility became a recognized tenet of law. The Tokyo Trials represent a major step forward in the process of development of war crimes law. The International Military Tribunal For The Far East was set up by the Allied powers to try alleged Japanese war criminals and it started its proceedings on 3rd May 1946. Eleven prosecuting nations filed charges on fifty-five counts against twenty eight defendants consisting of Japanese Generals, Admirals, Bureaucrats, Diplomats and Politicians. Eleven Justices in the Tribunal came from the countries whose Allied effort during the War had hastened Japan’s defeat. The Trials lasted for two and a half years. Dr. Radhabinod Pal, a renowned Indian jurist, among the panel of judges of the Tokyo Trial gave a dissenting opinion and came up with a verdict of “not guilty” at a time when most of the Allied world were convinced of “Japanese guilt”.

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The world, Justice Pal, saw as consisting of states, all of which were trying to maximize their gains-economic, political, military and in some cases ideological-by following certain policies that put them on collision course. 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 be said to be law when its obligation is still for all purposes dependent on the mere will of the party and there was no international community where order and security could be provided by law. Pal put up two intriguing questions: was war a crime in international law? What exactly was ‘aggression’? There was no law that made war a crime. War has always remained outside the purview of international law and only its conduct has been regulated. Pal sarcastically argued: 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. Hence, the basis of setting up an international tribunal to try war criminals becomes questionable.

Dr. Pal’s judgement was a watershed in the process of development of international criminal law and gave vent to the notion of “Victor’s Justice”, particularly the tribunals constituted by the Victorious powers never considered war crimes committed by their own soldiers and by attempting to try only the ‘vanquished’ had only succeeded in creating an inegalitarian/ unequal/ biased system of justice.

The international criminal legal system has evolved and undergone changes in the past few decades, but the embedded nations of ‘victor’s justice’ as reflected through major power politics seems to continually ‘plague’ it.

Dr. Pal had claimed that the process of international organization, was at best, at its formative phase and states still belonged to a self- help system. Pal felt that any ad hoc tribunal established by the victor in a war would not be able to provide justice.

In 1948, the U.N. General Assembly assigned the task of preparing a statute for an international criminal court to the International Law Commission presented the draft Statute of an International Criminal Court to the General Assembly. The eventual draft of the International Criminal Court (ICC) as modified by subsequent General Assembly Committees, was submitted
to a U.N. Diplomatic Conference in Rome on June-July 1998. The Rome Statute, adopted at the close of the Conference, was signed by nearly one hundred forty countries and came into force on 1st July 2002, after ratification by requisite sixty countries. The ICC, based in Hague, is authorized to prosecute war crimes, crimes against humanity, and acts of genocide. Two ad hoc international criminal tribunals established by the U.N. Security Council for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were given jurisdiction to punish genocide, crimes against humanity and war crimes, but not aggression.

The ICC is being projected as the solution to the problem of setting up ad hoc international criminal tribunals. Since the Court is permanent and has a definite jurisdiction, it should theoretically provide a more equal notion of justice than the ad hoc tribunals. While sound in theory, this bears close scrutiny in actual practice. The Court can exercise jurisdiction only when state parties accept its jurisdiction. The concept of state sovereignty is too deeply rooted in the international system for any state to accept, without any precondition, the jurisdiction of the ICC. The “fundamental gap” in international relations—no state is bound to submit its disputes with other states to a binding judicial decision—-as envisaged by Dr. Pal, exists even today. The concept of ‘Victor’s Justice” may no longer exist in the form as it was visualized during the Tokyo Trials. However, it is still extremely difficult to envisage a situation where U.S.A or other major powers are prosecuted and tried for violation of humanitarian law. The recent execution of Saddam Hussain seems to reinforce the notion of “Victor’s Justice” and the process of evolution of international criminal justice system seems to be merely a process of institutionalization of the “Victor’s Justice” regime by the dominant victorious powers and the establishment of their hegemony over the international criminal legal regime.

Objective Of The Research

The main objective of the dissertation would be 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 shall be made to the judgement of Dr.
Radhabinod Pal, in the Tokyo Trials and analysis would be made in the light of the evolution of the international criminal legal regime and its operation in the international system.

Research Question(s)

1. Does 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?

2. Has the process of evolution of the legal regime of war crimes and international criminal law in any way reflect the voice of the “vanquished” or it has merely institutionalized the hegemonic position of the victorious powers and the concept of “Victor’s Justice”?

Research Methodology

The research will trace the evolution of the legal regime of war crimes till the Nuremberg and Tokyo Trials and in the light of Dr. Pal’s judgement, look into the developments in the international criminal legal regime till the formation of the I.C.C. and beyond and would take up three case studies: The International Criminal Tribunal For Yugoslavia, The International Criminal Tribunal For Rwanda and The Trial Of Saddam Hussain. Primary documents/ source materials like the official judgements at Nuremberg, Tokyo, ICTY, ICTR, etc., would be taken into consideration along with important books, journals and articles, newspaper reports that are relevant in the context. Field investigation and survey will be considered in tune with the need of the research work.

Relevance Of The Research

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 would strive 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.

**Review Of Literature**

The book of Antonio Cassesse entitled *International Criminal Law*, Oxford University Press, 2003, outlines the basic concepts of international criminal legal systems it is operative today since its evolution and deals with the notion of the war crimes law.

Richard Minar’s book: *Victor’s Justice: The Tokyo War Crimes Trial*, Princeton University Press, 1971, criticizes American military policies in the Vietnam War by drawing upon Justice Pal’s criticism of the hypocrisy of the Allied nations, which while punishing Japanese leaders for aggressive wars at the Tokyo Trials, had engaged in expansionist warfare in the past and have continued to do so. The conceptual innovation ‘victor’s justice’ is also outlined by Minar.

B.V.A. Rolling & C.F. Reuters(eds): *The Tokyo Judgement: The International Military Tribunal For The Far East*’ APA University Press, 1977, Amsterdam, considers the majority judgement and all separate opinions of the Tokyo Trials along with the dissentient judgement of Dr. Pal.

B.V.A.Rolling & Antonio Cassesse(eds): *The Tokyo Trial And Beyond*, Polity Opress, U.K., 1993, gives an outstanding account of the Tokyo Trials and also takes the form of an extended interview with Dr. B.V.A. Rolling, one of the eleven judges who took part in the trials, concerning the aims, conduct and consequences of the Tokyo Trial, and concerning the role of aggression and the prospects for peace in the modern world.

Dr. Radhabinod Pal: *International Military Tribunal For The Far East*, Sanyal, Calcutta, 1951, deals with the original judgement of Dr. Radhabinod Pal, in the Tokyo Trials. The dissentient
judgement consists of eleven parts. In parts one, two and three, Dr. Pal discusses some preliminary questions of law, the jurisdiction of the tribunal and rules of evidence and the trial’s procedures. Parts four, five, six examine adduced evidence to assess if charges can be established. In the final part he gives final verdict with a few concluding remarks.

Gray Jonathan Bass: Stay The Hand Of Vengeanc e: The Politics Of War Crimes Tribunals, Oxford University Press, U.K., 2000. This book provides a comprehensive study of the history of war crimes tribunals. The author argues that the vigour with which war criminals are pursued is directly related to the degree to which troops from liberal democracies will be in harms way in apprehending criminals. He refers to the Nuremberg and Tokyo Trials as well as the I.C.T.Y.


George Ginsberg & V.N. Kudriavtsev(eds): The Nuremberg Trial And International Law, M. Nijhoff, Boston, 1990, looks into the details of the proceedings at the Nuremberg Trials.


The article by Theodore Meron, “Reflections On The Prosecution of War Crimes By International Tribunals”, AJIL, VOL-100, NO-1, U.S.A. 2006 January, highlights the similarities and differences of the post-World War II tribunals and the modern tribunals (especially ICTY) to show how humanitarian law has evolved and also analyses its future prospects.
The article by Theodore Meron, “War Crimes In Former Yugoslavia And The Development Of International Law”, AJIL, VOL-88, NO-1, 1994, looks into the legal procedures at the ICTY from the perspective of Meron’s experiences as the President of the ICTY.


Patricia M. Wald’s article, “Dealing With Witnesses Inn War Crimes Trials: Lessons From The Yugoslav Tribunal”, Yale Human Rights And Development Law Journal, Vol-5, 2002, argues that convictions, if they are to be legitimate, must be based on credible evidence presented in public trial. The conflict between the right of an accused to a public trial and the exceptional pressures on victim witnesses of war crimes is omnipresent in ICTY trials.

The above represent some of the core areas which the present research would take into consideration and it would strive to further extend the research and attempt to investigate into the problems and prospects of setting up an egalitarian system of international criminal justice regime by taking Dr. Pal’s judgement as a guiding light.

The Dissertation is divided into the following chapters

Introduction.

Chapter-1: Tracing the Evolution of international criminal law regime

Chapter-2: The Tokyo Trials And The Dissentient Judgement of Dr. Radhabinod Pal Inception Of The Notion Of Victor’s Justice

Chapter:3 From Tokyo To The Hague: The Transedence From The International Criminal Tribunals To The International Criminal Court.
Chapter-4  

Beyond Victor’s Justice: A Reassessment Of Dr Pal’s Judgement In The Light Of Recent Developments

Conclusion.