CHAPTER-II

THE TOKYO TRIALS AND THE DISSENTIENT JUDGEMENT OF DR. RADHABINOD PAL: INCEPTION OF THE NOTION OF ‘VICTORS’ JUSTICE’

In 1994, the International Law Commission presented the draft Statute of an International Criminal Court (ICC) to the General Assembly (Report of The international Law Commission). The backdrop of the same had been the Security Council resolutions establishing International Tribunals for the former Yugoslavia and Rwanda (Security Council Resolution 827). This seemed to be a step forward in the process of creating an institutional mechanism for implementing humanitarian laws. However, the draft refocuses attention on certain fundamental questions. How do we define ‘international crime’? Can concepts like ‘crime’ and ‘punishment’ be separated from their cultural and political contexts? The formation of an international criminal court implies a certain homogenization of norms and a high level of integration of values. Have these ‘universal’ norms been internalized by multicultural societies to the extent that a crime against any constituent group of the system is regarded as a crime against the whole system? How does interpretation of notions like ‘sovereignty’ affect the development of international criminal law?

More than fifty years ago these issues were addressed by an Indian Jurist, Radhabinod Pal, in his landmark dissenting opinion at the Tokyo trials (Pal, 1953: p10). The Tokyo trials took place in the background of dramatic developments in international law. After Nuremberg, individual criminal responsibility became a recognized tenet of the law; Moreover, international tribunals were regarded as a just mechanism to implement international law. At a time when most of the Allied World was convinced of the Japanese guilt, Radhabinod Pal came up with a verdict of ‘not guilty’. Despite suffering from the limitations of the Realist paradigm within which he wrote, Pal’s dissent deserves a closer look because of the timeless questions it addresses.
The second atomic carnage at Nagasaki brought the War in the Pacific to its fiery conclusion. Even before the War had ended, the Allies had publicly announced their intention to prosecute the Japanese War criminals:

We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals….

(Potsdam Declaration, July 26, 1945)

Accordingly, the International Military Tribunal for the Far East set up and it started its proceedings on 3rd May 1946. Eleven prosecuting nations filed charges on 55 counts against twenty-eight defendants. Among the twenty-eight were former generals, admirals, bureaucrats, diplomats and politicians("Rolling & Reuter, 1977:20-21) The most conspicuous were Tojo Hideki (Prime Minister and War Minister during Pearl Harbor and most of the war), Hirota Koki (Foreign Minister, 1933-36, Prime Minister, 1943-44) and Shigemitsu Momaru (Foreign Minister, 1943-44). There was no prosecution of Emperor Hirohito either because the heavenly Chrysanthemum Throne gave him divine immunity or because the Allies ‘pragmatically’ thought that the crime were not attributable to him in terms of the evidence uncovered by them.

The eleven justices who comprised the tribunal came from the countries whose allied effort during the war had hastened Japan’s defeat. The Charter which called for “just and prompt trial and punishment of the major war criminals in the Far East” detailed the offences over which the tribunal would have jurisdiction, the procedural norms to be followed by the parties and the penalties that could be imposed by the tribunal. The Tokyo trials lasted for over two and a half years — it was only on 4 November 1948 that the tribunal reconvened to read out its verdict. The defendants were held guilty of all charges and the sentences were death by hanging for seven including Tojo and Hirota; life imprisonment for sixteen; twenty years’ imprisonment for one; and seven years’ imprisonment for Shigemitsu. Of the remaining three, one had been deemed unfit for trial and the other two had died during the proceedings.(Rolling & Reuter, 1977:443)

As Judge Pal wrote his dissenting opinion, he tackled each of the charges levelled against the Japanese. Before coming to his verdict of ‘not guilty’, he took cognizance of the historical developments that had taken place around the world, with particular reference to the Japanese
policy in East and South-East Asia. His understanding of history made it possible for him to find similarities between the Japanese and the Allied policies prior to and during the conduct of the war. What follows is an attempt to understand Radhabinod Pal’s world view and the theoretical framework within which he placed his dissent.

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. 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.* (Rolling & Reuter, 1977:630).

His conception of law made the existence of an “international community which can be brought under the reign of law” (Rolling & Reuter, 1977:560) 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. 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:

(i) 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. (Rolling & Reuter, 1977:563) 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 & Reuter, 1977:563)

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. (Meron, 2006: p5) One of the fundamental principles of law was a “nullem crimen sine lege, niulla 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. (Meron, 2006: p5)

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. 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. (Rolling & Reuter, 1977:563) 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”. (Rolling & Reuter, 1977:563) 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. 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”, (Rolling & Reuter, 1977:563) 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”. (Rolling & Reuter, 1977:563)

Pal 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”. An attempt is made to look into the details of Justice Radhabinod Pal’s dissentient judgement.

The Dissentient Judgment consists of seven parts. In Parts One, Two and Three, Pal discusses some preliminary questions of law, the jurisdiction of the Tribunal, and rules of evidence and trial’s procedure. The discussion in these parts defines the legal basis for the investigation of the present case. Parts Four, Five and Six examine adduced evidence to assess if charges can be established. Pal spends considerable space in investigating conspiracy charges, making Part Four a very large section. In the final part (Part Seven), he gives the final verdict with a few concluding remarks.

Part I: “Preliminary Question of Law”

This Part begins with outlining the fifty-five charges that fall into three groups. The first group contains charges related to crimes against peace (Count 1 to 36), the second, charges of murder (Count 37 to 52), and the third, those of the conventional war crimes and conspiracy to secure the military, naval, political and economic domination of certain and by the waging of declared or undeclared war or wars of aggression and of war or wars in violation of international law, treaties, agreements and assurances, in East Asia and the Pacific and Indian Oceans, Counts
2-5 contain itemized charges in Court 1, namely, the domination of Manchuria (Count 2); the domination of all China (Count 3); the domination of areas indicated in Count 1 by waging illegal war against sixteen specified countries and peoples (Count 4); and conspiracy with Germany and Italy to secure the domination of the world by waging illegal wars etc. (Count 5). Count 1 is in complementary relationship with Count 2 to 5. These are designed in such a way that when the first count cannot be established, counts 2 – 5 will be under consideration. The remaining counts in this group contain further itemizations of the charge indicated in Count 1. In counts in Group 2, the accused are charged with ordering, causing, and permitting Japanese armed forces to unlawfully kill soldiers and civilians of the United States, the Philippines, British Commonwealth, Netherlands, China, Mongolia and the USSR as in Group one, charges are itemized by regions or by various specifications of terms and conditions of the crimes. The charges in Group 3 center on crimes of authorizing atrocities against prisoners of wars and civilians as government policy.

What connects all the charges is the hypothesis that the accused planned and tried to accomplish the domination of the area known as Greater East Asia, by waging unlawful wars between January 1, 1928 and September 2 1945. Another important hypothesis is that each and every accused was a member of the conspiracy and was criminally liable for the alleged act (Minear,1971:p48). As a way of testing the feasibility of these hypotheses, Pal suggests that the following questions be examined. First, whether “military, naval, political and economic domination of one nation by another is crime in international war, or simply put, whether aggressive war is a crime in international life. Second, he asks if “wars of the alleged character became criminal in international law during the period in question in the indictment (Minear,1971:p48). “If not, one needs to consider if “any ex post facto law could be and was enacted making such wars criminal so as to affect the legal character of the acts alleged in the indictment.” In other words, the question is whether criminality of an aggressive war had been established by law prior to or during the Second World War, and if not, whether there is any international law or convention that allowed the retroactive application of law. Finally, it needs be clarified if “individuals comprising the government of an alleged aggressor state can be held criminally liable in international law in respect of such acts.” (Minear,1971:p48). For the rest of Part One, Pal undertakes to answer these questions.
Before doing so, however, he spends some pages defining the jurisdiction of the Tribunal in view of some defense objections and problems that arise from the interpretation of the Charter. The Charter was published by the Supreme Commander Allied Powers (SCAP) for the purpose of setting up the International Military Tribunal for the Far East. It was meant for implementing the Potsdam Declaration and the Terms of Surrender.

The defense had three major objections. First, the defense argued that the Tribunal had no authority to try crimes against peace and humanity because, being represented by the Allied nations, it could not be an impartial tribunal but a court of vengeance. Pal disallows the objection, arguing that even though the judges may have been appointed from countries Japan had been at war with, it does not make them devoid of authority or ability to judge a case in the international court. The defense also challenged the Tribunal’s power to try individuals who acted as state agents. Pal rejects this objection, too, contending the international court is vested with power to try individuals, especially when the charges are related to conventional war crimes.

In another objection, the defense conducted that the Tribunal’s jurisdiction should be limited to wars that ended by the Instrument of Surrender on September 2, 1948 Pal sustains the objection and argues that the Cairo Declaration and the Potsdam Declaration are mere declarations of the Allied Powers’ intention, and that they are therefore not legally binding(Pal,1953:p13). Moreover, Japan’s “unconditional” surrenders does not give the Supreme Commander any absolute sovereignty in the handling of vanquished in his custody. Japan surrendered to the war that ended by the Instrument, and therefore, wars resolved prior to the surrender fall out of Tribunal’s jurisdiction. The prosecution and the defense had different opinions as to the commencement of the war in question. The prosecution contended that Japan’s war began in 1928 on the basis of the conspiracy hypothesis and the defense contended the war began in December 1941. The scope of Tribunal’s jurisdiction cannot be determined at this point because Pal has not started examining evidence. He will therefore come back to this question in Part Five after examining the charge of over all conspiracy in Part Four.
As for the Charter, the prosecution contended that the Tribunal should try the present case on the basis of what the Charter schedule as war crimes and rights and duties of the Tribunal. Pal disagrees with prosecution and argues that the Charter gives the Tribunal only the right to try the present indictment. The Charter by itself does not have the power to enact law although the authors of the Declaration and the Charter might have intended it. Since the Tribunal is ultimately bounded by international law, it independently determines if crimes itemized in the Charter and the Declarations can indeed be recognized as crimes in international Law. The victors who promulgated the Charter may have rights to reprisal and punish violators of rules and customs of law who fell in their custody. But they are essentially not vested with power to define crimes or give law (Pal, 1953: p23) This must be born in mind particularly when the victor state issues the Charter in order to set up an international court, not a national court. The victor’s power does not go beyond international authority and it has the duty to accede to place prisoners of war under the protection of international law (Pal, 1953: p32)

To summarize the central concern in the above discussion, Pal delineates the scope of the Tribunal’s jurisdiction in order to clarify the Tribunal’s independence irrespective of any victor’s intention, as manifested in the Charter and two Declarations, and to stress its subordination only to supranational law. With this clarification of some basic problems regarding the Tribunal’s constitution, Pal proceeds to discussing questions he raised earlier. They are whether military, naval, political and economic domination of one nation by another is a crime in international life; whether international law made an aggressive war a crime before, during or after the Japan’s wars; and whether individuals who act as state agents are criminally liable to acts of state.

The key to the first two questions lies in the interpretation of the Pact of Paris of 1928. The Pact, also known as the Kellogg-Briand Pact. However, closer examination of the Pact shows that it only created a “contractual obligation” among the contractors rather than creating a new law. Even though the Pact condemned aggressive warfare as a criminal act, it failed to prove an objective condition that could discern war of aggression from that of self-defense. It still depended on the subjective judgment of the individual state what a war it waged was meant for, self-defense or aggression. Pal’s analysis shows that signatory nations agreed to sign the Pact on the ground that nation’s right to self-defense would remain unaffected. Thus the Pact of Paris in
reality had no effect to change legal status of aggressive warfare in international life. The following passage describes the deficiency embedded in the Pact agreement:

“A rule of law, once created, must be binding on the state independently of their will, though the creation of the rules was dependent on its voluntary acceptance by them. The obligation of this Pact, however, always remains dependent on the will of the states, in as much as it is left to these states themselves to determine whether their action was or was not in violation of the obligation undertaken by the Pact.” (Pal, 1953:p45)

If the right to self-defense remains to be the supreme prerogative of individual states in international life, and if outside authority has no power to objectively determine and try war of aggression, the Pact fails to give a new law to defy aggressive warfare a crime. If the Pact did achieve anything at all, what it did was only to provoke the world opinion against an offending party of the treaty obligation, which is, of course, a separate matter from determining criminality of aggressive war.

The failure of the Pact was perhaps inevitable in the present world where national sovereignty persists as the principal norm of international life. Individual nations opt for international cooperation only when doing so is expedient and when it does not affect the principle of national sovereignty. Pal writes:

“…Apart from the domain regulated by expressly accepted international obligations, there is no international community: As these obligations exist only in the limited sphere of the expressly recognized partial community of interests, the individual interest of each state must always remain the guiding consideration. Modern international law was developed as a means for regulating external contracts rather than as an expression of the life of a true society.” (Pal, 1953:p51)

Ideally, the entire international community should be placed under the rule of law, and the source of authority of law should reside outside the will of individual states. But the world as it exists does not make it possible. It is essentially the will and power of states that determines the sphere
of orderliness in international community. Given this condition, Pal considers that it was very difficult to introduce the idea of crimes in international life, and the Pact of Paris exemplified the difficulty.

But were there other factors that may have made aggressive war a crime if not the Pact of Paris? According to the prosecution, "there is a large body of international law known at different times and by different writers as the ‘common law’ or ‘general law’ or national law…….., “ and that”[international law] being the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances……..it is unquestionably within the power, and …..the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case” (Pal,1953:p16) To assess the prosecution contention, Pal discusses if aggressive war became criminal customary law, by the progressive nature of international law, by creative judicial discretion of the Tribunal, and by natural law. The questions of creative judicial discretion of the Tribunal and natural law do not concern him much. The former question is already dealt with in relation to defining the Tribunal’s jurisdiction, and the answer was negative. As for natural law, it only introduces fundamental principles of law and right. It therefore does not offer any rules that affect the legal status of any war.

With regard to customary law, it can create law only when two conditions are satisfied. One condition is that there is a growing popular conviction of their law, and another is that people have come to live according to the law. Prior to and during the previous world war, the renunciation of aggressive wars may have become a popular conviction, but the idea was not “lived” yet. Pal illustrated the point by enumerating a number of events that betray the popular conviction, such as, Russian hostility against China over the Chinese Eastern Railway in 1929, Japan’s occupation of Manchuria in 1931, Peru’s invasion of the Colombian Province in 1932, Italy’s invasion of Abyssinia in 1935, Russian invasion of Finland in 1939, and Japan’s invasion of China in 1937 (Pal,1953:p62). These events are sufficient to prove that customary law had not made aggressive warfare a crime.
As for the prosecution contention of international law as a progressive system, Pal agrees with the view. Yet, he considers that the progress the international community has made up until today has been very limited, and finds it difficult to concur with the prosecution that an aggressive war had virtually became a crime. Besides, there are several events in the recent past that betray the prosecution contention. For example, the League of Nations established in response to the growing sense of the unity of humanity was essentially a “system of international cooperation “where “National sovereignty and national interest continued to play the fundamental part in this organization. (Pal,1953:p65).

Colonialism is another example that militates against the progression of international law. When a country puts other nations into servitude and treats whatever happenings in these regions as domestic issues on the one hand, and when it claims to be part of community of humanity on the other, isn’t there a fundamental contradiction in it ? Justice Jackson, the U.S. Chief of Counsel in prosecuting the principal war criminals of the European Axis in the Nuremberg Trial, has made an interesting comment in this connection. He contended that preparing to dominate another nation is the worst crime that a nation can commit. “This may be so now, “Pal writes, “But I do not see how it could be said that such an attempt or preparation was a crime before the Second World War when there was hardly a big power which was free from that taint. “It seems Justice Jackson was not aware that such accusation could be directed against him and his own country. Pal offers a solution to this perplexing problem and writes: “Instead of saying that all the powerful nations were living a criminal life, I would prefer to hold that international society did not develop before the Second World War so as to make this taint a crime.”(Totani, 2008;p66)

Likewise, the dropping of the atomic bomb raises a similar problem in accepting the assumed progression of international community. There is a prevailing view that the atomic bomb “destroyed selfish nationalism” and “awakened within us the sense of unity of mankind. “But, these feelings were non-existent at the time when the bombs were dropped.” The histories of the League of Nations, colonialism and the atomic bomb together point to the view that the world had not reached a stage of maturity to introduce aggressive war a crime in international life.
One should be reminded here that Pal does not discount the view that international law makes progressive development. Pal himself has faith in the value of growing international organizations and advocates a greater cooperation of nations. For instance, he recognizes the United Nations as “a material step” that marks the progress of international community. He writes:

“I know that (i.e. that the United Nation is a material step) as a judge, it is not for me to preach the need for a wider social consciousness or to propound practical solutions for the problems involved in material independence of the modern world.” (Pal, 1953: p65)

Pal then continues,

“Yet, the international relation has reached a stage where ever a judge cannot remain silent though the task that is given him is only one of formulation, classification and interpretation.” (Pal, 1953: p66)

The United Nations is an important step, but it is still far from enough. National sovereignty persists to be the supreme doctrine in international life. Nations often neglect the objective of enhancing human welfare beyond national boundaries because they are so concerned with safeguarding interests of their own nations. With a hint of frustration, Pal continues:

“I believe…that it is high time that the international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end.”

In this passage, Pal reveals his humanistic understanding of the object of international law. He does not expand on this point, but this brief passage suggests that he tries to resist those doctrines or systems of nations that slight values and wellbeing of individuals lives.

In any case, all that Pal attempts to demonstrate is that all of the factors contended by the prosecution – the Pact of Paris, customary law, the progressive nature of international law, the
creative judicial discretion of the Tribunal, and natural law as failed to make aggressive a crime in international life.

Pal now moves on to the question whether the individuals can be responsible for acts of state. Similar to the discussion of the Pact of Paris, the issue boils down to determining to what extent, if at all, nations have come to renounce their sovereign right so that external authority could interfere with the matter of the working of their own constitution. Can international court now try statesmen who run the government machinery of the nation?" (Pal,1976:p74) The answer is negative. Acts estate remain outside the jurisdiction of international law and so do those of individuals who enact the decisions made in the working of the national constitution. This does not mean that individuals are exempt from any criminal charges in commissioning war just by virtue of being statesmen. There are rules and regulations of war in international law. Those who violate them are “war criminals strict sense” and thus justifiable in the international court. (Pal,1976:p93)

The discussion of Part 1 can be now concluded as follows:

1. That no category of war became criminal or illegal in international life;
2. That the individuals comprising the government and functioning as agents of that government incur no criminal responsibility in international law for the acts alleged;
3. That the international community has not as yet reached stage which would make it expedient to include judicial process condemning and punishing either states or individuals. (Pal,1976:p107)

The main legal matters to be dealt with in Part One are hereby resolved. Before proceeding to the next part, however, I would like to explore another discussion in Part Out that runs parallel to the judicial one as outlined above. While examining legal matters in order to clarify criminality of aggressive war, Pal engages in some lengthy explication of his own philosophical view of international community and law. He focuses on critiquing the nature of
modern nations that comprise international community, and the limitation of international law that emerged from the modern international community.

One may quote a passage that shows Pal’s perception of the origin of the state and international community. The evolution of national and international communities described here may appear peculiar in light of modern political theory. Pal’s worldview is underlined by a eudemonistic assumption of the world order, that is to say, the view that the concern for human welfare is the force and essence of the world order. The quotation below begins with Pal’s critique of modern international life. It is a long passage, but worth quoting. He writes:

“National sovereignty is, even now, the very basis of the so-called international community. States are not only parties but also, judges and executors in their own cases in relation to certain matters. The dangers of a too rigid application of the doctrine of national sovereignty and of the principals or ‘self-determination’ are not even now fully appraised. It is still considered better to run the risk of sacrificing the directing influence of any central authority, than to allow its operations to be extended into the sphere of the international activity of the states.” (Pal,1953:p33)

The division of mankind into national states dates from the time when the idea of the World Empire had disappeared, and all the states confronted one another independently, and without supreme authority.

The division was indispensable: its justification had been that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavors of other who might be dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents and abilities to the utmost. It is the vocation of a national society to thoroughly develop every capability inherent in any people and its justification is its affording an opportunity for the profitable employment of everyone’s activity everywhere. (Pal,1976:p60)
A national society, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity and consequently is bound to regard other national societies not only as entitled to rights equal with its own members upon the universal objects of general humanity and consequently is bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. National states thus cannot seek any absolute seclusion, nor striven after any absolute self-sufficiency; and in this sense the period of national states is also marked by the period of international society. But this international society is anything but a society under the reign of law. (Pal,1976:p68)

No doubt the national state cannot be considered so definite and perfect a policy amongst the societies as to form the utmost boundary their development. Every class of the population has its own one-sidedness; it will remain stationary on a certain plane of education and knowledge unless it receive impulses from without and feels the influenced of foreign images and ideas, so that a constant exchange between its own development and between the assimilation of, and adaptation to, external ideas takes place. In this way nations have developed and are developing in state communities. (Totani,2008: p83)

The federation of mankind, based upon the external balance of national states, may be the ideals of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international community, if it can be called a community at all, is and will continued to be the national sovereignty(Pal,1976:p60)

According to the above passage, something called, “the World Empire,” preceded the emergence of the states and international community, although we do not know what exactly this “Empire” is. No matter what, the reason and the purpose of the emergence of national states and international community can be made explicable and legitimate only by referring to the prior existence of the World Empire under which protection mankind existed. The Empire eventually broke up, not to give room for Hobbesian states but rather, the state that can accomplish what the World Empire sought to accomplish but could not. The new state now took on the duty to provide its members with protection and opportunities to enhance their wellbeing.
within the framework of the nation. The same state also had obligation to the larger world since it was always “aware of the bearing of the interests of its own members upon the universal objects of general humanity.” (Totani, 2008: p69) In this respect welfare of the national that of general humanity are complementary and closely connected. One may argue that the formation of international community in the modern period was a natural consequence when such characteristics of the nations are taken into consideration.

Some pages later, Pal takes a step further and discusses the relationship between law and “community of nations”. Pal starts by pointing out the problem of national sovereignty, and reasserts the view that nations are complementary to each other by virtue of being bound by the universal objective of enhancing greater human welfare. He then writes;

“Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social co-existence with regard to the activity of the community and of the individual. Law stems from a man’s reasonableness and from his innate sense of justice. But what is that law? And is international law of that character? (Pal, 1976: p18)

In this quotation, Pal treats law as a pervasive force in the universe rather than law of a contractual kind of a legal sense. He describes the nature of law as a “dynamic human force” which operates as the “sum of the conditions of social co-existence with regard to the activity of the community and of the individual. “Law here is something ballistic that organizes the order of the human world. (Totani, 2008: p,107) Still, it is not clear what exactly this law is. Pal asks a question himself (“But what is that law?), Pal argues:

“…..In our quest for international law are we dealing with an entity like national societies completely brought under the rule of Law? Or, are we dealing with an inchoate society in a stage of its formation? It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made will not be the law safeguarding the peace-loving law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much covered Society of Nations, will shake the very foundation of any future international society.” (Pal, 1976: p70)
Modern international law, though meant to create world peace and order, essentially serves to safeguard the interests of the individual nations which participate in the law-making. This does not only limit the scope of international law, but also endangers the well being of mankind as a whole since it is sectarian interests that enable the enacting and application of law in international community. The following passage elaborates Pal’s view in this respect: He writes:

“I have elsewhere given my view of the character of the so-called international community as it stood on the eve of the Second World War. It was simply a co-ordinate body of several independent sovereign units and certainly was not a body of which the order or security could be said to have been provided by law. By saying this, I do not mean to suggest any absolute negation of international Law. It is not my suggestion that the observance of the rules of international law, so far as these .........is not a matter of obligation. These rules sought have resulted from the calculation that their observance was not incompatible with the interest of the state. Yet, their observance need be characterized as the result of such calculation. A state before being willing party to a rule, might have willed thus on the basis of some such calculation, but after contribution of its, “will; which essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created: The rule thus deists independently of the will on the parties: It is of no consequence that in coming into existence it had to depend on such will. Yet, simply because the several states are thus subjected to certain obligatory rules. It does not follow that the states have formed a community under a reign of law. Its order or security is not yet provided by law. Peace in such a community is only a negative concept – it is simply allegation of war, or an assurance of the status quo….. Basis of international relations is still the competitive struggle of states, a struggle for solution of which there is still no judge, no executor, no standard of decision (Pal, 1976:pp105-106)

In this way, Pal produces a critique of modern nations and the existing international law. This critiques is not directly relevant to the present Tribunal’s concern of determining criminal responsibility of the accused. In fact, one may see it as sidetracking. It then raises the question why he engages in, though fragmentarily, this critique of the present world order. How is this
kind of a critique important to writing the Dissentient Judgment? For the rest of the Judgment, he mostly restricts himself to the “task that is given him” in the sections to come that is, the “one of formulation, classification and interpretation” of adduced evidence and international laws and regulations in question for the rest of the Dissentient Judgment. But one needs to keep the above question in mind since Pl does have some more to say about the problems of the modern world in pages to come.

PART:II: “What is Aggressive War”.

In this section, Pal asks what is “aggressive war”, and how it can be discerned as such. According to Pal it is generally understood that a war that cannot be justified and act in self-defense or self-protection is an aggressive war. The point at issue then is “whether there need be any objective condition as the basis of self-defense or whether mere subjective end suffice”. (Totani, 2008:p107) In the Pact of Paris, it was individual state’s subjective judgment that determined the scope of self-defense. Pal finds this to be an unsatisfactory criterion, so as other ones offered by the Nuremberg trial or the present Tribunal. In order to make up for the deficiency, Pal suggests that the Tribunal consider the following factors as guiding principles. First, the Tribunal should consider if “according to the information and bona fide belief of the invading state there existing any objective condition as the basis of the justification pleaded,”. Second, the Tribunal should ask if “the alleged objective condition as believed by the invading state was such as would justify a reasonable statesman in acting on it in the manner it was acted upon by the accused.” (Pal, 1953:p 123)

Pal further enumerates specific factors as a guideline for assessing bona fide belief of the accused in the present case. The proposed factors are: (1) the Japanese perception of the development of Communism in China; (2) the legality of Chinese government involvement in popular boycott movements; (3) the extent of rights and duties of nations which declare neutrality particularly those of the United States which came to assist China during Sino Japanese hostilities, (4) international economic sanctions and their implication for the neutrality question; (5) the legality of compulsive measures as a legitimate means to resolve international conflict; (6) the question whether wars in violation of treaties is criminal or mere delinquent in international life; and finally, (7) the question whether the Japanese leaders intended and planned
a treacherous war with the United States. Pal will consider all of these factors when investigating the prosecution case of over all conspiracy in Part Four. One can now proceed to the next part.

Before doing so, however, one may examine some other discussions that take place in this part. Pal in particular gives some space to expressing his views of Communism in China and colonialism, both of which are recurring subjects in the rest of the Dissentient Judgment as well. For instance, late discussion will show that Pal takes into consideration the Communist menace to a great extent, suggesting that he had personal sympathy with anti-communist sentiments. He largely concurs with the defense contention that Japanese leaders sincerely believed Communism to be a great threat to national interests and that they were obliged to take certain aggressive measures in self defense. Likewise, Pal criticizes imperialism at various occasions in the later parts of the Dissentient Judgment, giving an impression that he wrote this judgments to make it a vehicle of anti colonialism. Yet, the discussions in Part Two suggests his more nuanced perceptions of these issues. (Totani, 2008:p107)

For instance, discussing the world terror of Communism, Pal writes as follows:

“It is nor for me to comment on the justification or otherwise of these feelings fear towards the Communist development. Such feelings have not allays been shared by the world’s wisest mind. While frankly condemning the ruthless suppression of all contrary opinion, the wholesale regimentation, and the unnecessary violence in carrying out various policies’ in Sovciet Russia, some with equal frankness point out that ‘there was no black of violence and suppression in the capitalist world’. I realized more and more, says Pandit Jawaharlal Nehru of India how the very basis and foundation of our acquisitive society and property was violence…..A measure of political liberty meant little indeed when the fear of starvation was always compelling the vast majority of people every where to submit to the will of the few….Violence was common in both places, but the violence of the capitalist order seems inherit in it, while the violence of Russia, bad though it was, aimed at a new order based on peace and cooperation and real freedom for the masses”. (Pal,1976:p64)
By drawing upon Nehru’s words, Pal here presents a rather complex view of the development of Communism in the present world. It is true that Communism became a world terror, but there were also sufficient reason why emerged as a powerful political ideology today. It came into being as an antithesis and trenchant critic of the existing capitalist world order that embraced ruthless exploitation of the weak. As Nehru saw it, the violence of communism was not as bad as that of capitalism. The violence of the former is not necessary inherent to communist thought per se, while that of the latter is embedded within the capitalist system itself. (Totani, 2008:p108)

As regards colonialism, Pal has briefly taken up this subject earlier in relation to his criticism of Justice Jackson. Pal offers more severe and comprehensive criticism of Jackson in this part, who has presumably argued during the Nuremberg trial that “our position is that whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions. In this statement, too, Justice Jackson disregards the violence incurred by colonialism in the past and present, and advocates that “status quo” be maintained”. (Totani, 2008:p108) Pal writes in response:

“We need not stop here to consider whether a static conception of peace is at all justifiable in international relations. I am not sure if it is possible to create ‘peace’ once for all, and if there can be status quo which is to be eternal. At any rate in the present stage of international relations such a static idea of peace is absolutely untenable. Certainly dominated nations of the present day status quo cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of self-help by force can be effectively excluded only when his problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful. Before the introduction of criminal responsibility for such efforts the international law must succeed in establishing rules for effecting peaceful changes. Until then there can hardly be any justification for any direct and
indirect attempt at maintaining, in the name of humanity and justice, the very status quo which might have been organized and hitherto maintained only by force by pure opportunist ‘Have and holders’, and which, we know, we cannot undertake to vindicate. The part of humanity which has been lucky enough to enjoy and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only menace of totalitarianism but also the actual plague of imperialism. They have not as yet been in a position to entertain a simple belief in a valiant god struggling to establish a real democratic order in the Universe….”(Pal, 1953:p 110)

In the above passage, the central issue is not only to criticize colonialism, but the “actual plague of imperialism” as he puts it. Imperialism itself is bad enough, but even worse, it has come to be a legitimate mode of behavior in international life. As imperialism became normalized, people like Justice Jackson no longer realize the abnormality of the brutality and injustice incurred by the expansionist doctrine. . (Totani, 2008:p118)

When seen together, there is a common theme that runs through the discussions on criticism of Communism and Colonialism. Pal approaches these two subjects not exactly to demonstrate his anti-or pro-communist position, or merely to declare his “anti-colonialist” sentiments. Rather, his discussion centers on criticizing the fundamental doctrines the modern nations advocate – in the present discussion, capitalism and colonialism. This criticism resonates with the previous critique of modern international community in Part One, suggesting that the theme of the Dissentient Judgment revolves around criticizing the prevalence of systems of domination in the present world order.

Part III : “Rules of Evidence and Procedure”

Central to this part is to assess validity of various rules of evidence applied in the Tribunal. One may only note Pal’s objection to the Tribunal’s decision to disallow evidence related to Communism in China. He considers that the evidence of this category is relevant to the present case because it can be held to determine the bona fide belief by the accused of the need
to act in self-defense, which may consequently “shut out or weaken the inference of over-all conspiracy from such occurrences.” (Totani, 2008:p116) Since the Tribunal largely rejected evidence related to the development and activities of Communists in China, Pal utilizes some authoritative reports and surveys on Japan’s relations with China, such as, the Report produced by the Litton Commission – a fact-finding mission saintly the League of Nations after Manchurian Incident of 1931 – and Surveys published by the Royal Institute of International Affairs in London in the 1930s. These studies help Pal clarify the Japanese diplomatic situations where decisions towards war were taken.

With this in mind, we can now move on to the main part of the Dissentient Judgment.

Part IV: “Over All Conspiracy”

This part examine the alleged crimes against peace, that is, the alleged crime of conspiracy to dominate Greater East Asia by waging unlawful wards, from the time of the murder of Chang Tso-Lin of 1928 to the attack on Pearl Harbor in 1941. This section begins with an introductory part where Pal restates prosecution hypotheses and legal preliminaries discussed in Parts One and Two. He also introduces how the prosecution outlines principal matters and events related to the indictment in Group One, which is:

1. Military aggressions in Manchuria.
2. Military aggression in the rest of China
5. General preparation for war.
7. Collaboration between Japan, Germany and Italy. Aggression against French Indo China and Thailand.
8. Aggression against Soviet Union.
The organization of Part Four largely follows the above outline so that the prosecution case can be tested point by point. There are ten sections in this part including the introduction. They can be grouped under the following four headings; (1) The First Stage – obtaining control of Manchuria; (2) The Second Stage – the expansion of control and domination from Manchuria to all of the rest of China; (3) The Third Stage – preparation of Japan for aggressive war internationally by alliance with the Axis Powers; and (4) The Final Stage or the Fourth Stage—the further expansion of the conspiracy in to the rest of East Asia and the Pacific and Indian Ocean by further aggressive wars. One may strive to summarize the main argument of each section.

1. The First Stage Obtaining Control of Manchuria – Manchurian Incident

This section focuses on two major events in Manchuria, which were allegedly the initial part of the conspiracy plan. The events in question are the murder of Chang Tso-Lin of June 1928, and the Manchurian Incident (also known as the Mukden Incident) of September 1931. Japan had been trying to secure her privileges over commercial, industrial, agricultural, and railway development in Manchuria for a few decades prior to these events. According to the Lytton Report, the source of the Sino-Japanese conflict over the region by in the fact that Manchuria had been in direct negotiation with Japan as an autonomous polity although it was legally part of China. General Chang Tso-lin was one such figure who came to take leadership and determine Manchuria’s diplomatic relation with Japan. He had been entrusted by the Manchurian authorities to protect the region since the time of the Chinese Revolution of 1911, and he eventually declared complete independence of Manchuria in 1922. (Totani, 2008: p129)

When General Chang was killed by a train explosion in 1928, a rumor spread that Japan planned the murder because became to resist Japanese interference in Manchurian affairs. However, the criminal responsibility for the murder was never established and the
truth remained shrouded. The Mukdert Incident of September 1931 refers to a sudden military action taken by the Kwantung Army, a Japanese garrison guarding the Southern Manchurian Railway and the Kwantung Territory whose lease Japan had gained in 1915. (Totani, 2008: p137) The Kwantung army took to a sudden military attack even though there was no actual attack or provocation from the Chinese side. The Kwantung army however claimed that the military attack was an act in self-defense. Investigating the two incidents, the Lytton Commission concluded that the truth of the murder of Marshal Chang Tso-lin remains unknown and Japan could not be held responsible for the murder. As for the Mukden Incident, the Report recognized the possibility that, although it was not a legitimate act, the local Japanese army who decided to carry out the sudden attack had bona fide belief of their act as self-defense. (Totani, 2008: p137)

Pal largely concurs with the Report and argues that there is no evidence to prove the specified accused – the then senior officials of the Kwantung Army and War ministers – as to have had a plan of the alleged conspiracy. Furthermore, the Survey of International Affairs helps in grasping the changing international position of Japan between 1919 and 1926, contributing to the explanation of the two incidents. The Survey points out that Japanese industrial boom began to decline rapidly as the First World War was over, and the economy was further damaged by the Great Earthquake in 1923. (Totani, 2008: p138) Internationally, Japan faced Chinese resistance to her economic expansion on the one hand, and the American restriction of Japanese immigrants in 1924 on the other. The Chinese nationalist party, Kuomintang, began to threaten Japan’s rights and privileges in the northern region as it gained support from Russian communism in 1926. Above all, there was a collective effort to undermine Japan’s prestige in the Washington Conference of 1922 where representatives of the nations aimed at restoring the balance of power in the Pacific and the Far East. By illustration, Japan was asked to compromise the strategic position she had gained in South Manchuria and Eastern Inner Mongolia in the mid-1910s, respect China’s sovereignty and independence, and to agree to imposing restriction on naval armament. (Totani, 2008: p139)
Pal considers that these are sufficient objective circumstances in which Japan may have had bona fide belief that interests of the nation were threatened, and that she may have felt the need to act in self-defense. Thus, Pal does not find that Japan had the alleged conspiracy plan, or that the accused was criminally responsible for the two events since their involvement cannot be established from adduced evidence.

2. The Second stage: The Expansion of Control and Domination from Manchuria to All the Rest of China.

The Manchuria Incident as followed by a series of military conquests in Manchuria as part of Japanese “positive policy” in China affairs, finally concluded by the creation of an independent state of Manchukuo in 1932. The former emperor of the Quin dynasty, Pu Yi, was brought in as the emperor of the new state. The Prosecution regarded it as the completion of the first stage of conspiracy and the beginning of the next plan to dominate other parts of China. (Totani, 2008: p140)

The legal status of Manchukuo was precarious since the world knew too well that it was a puppet state of the Japanese government. Nonetheless, Japan “played out this elaborate political farce, “ because – according to the Survey of International Affairs, wished to restore the status quo ante 1928 where Manchurian maintained its autonomy from the Kuomintang under Japanese protection, Japanese leaders were also reluctant to explicitly annex Manchuria for fear that it would mean an outright violation of her treaty obligation in the Washington Treaty. Furthermore, one may argue that Japan simply followed the method of conquest exemplified by the preceding western nations by adopting the term, “ protectorate,” as a euphemism for “annexation”. (Totani, 2008: p142)

One Japanese statesman of the time explained the series of military actions as measures to bring peace and order to the territory in question. The prosecution did not accept such views and contended the events were no doubt part of the aggressive plan. Commenting on Japanese statesmjan’s, Pal writes:
“It may not be a justifiable policy, justifying one nation’s expansion in another’s territory. But remembering the trend of international behaviour I do not see why we cannot accept this [that the policy was a bring peace and order to the territory] even as an explanation of the expansion without having recourse to a hypothesis of an enormous conspiracy……As a program of aggrandizement of a nation we do not like, we may deny to it the terms like manifest destiny, the protection of vital interests, “national honors” or a term co……on the footing of ‘the white man’s burden, and may give it the name of aggressive aggrandizement’ pure and simple. Even then we do not come to the conspiracy as alleged in the indictment.”38

All Pal needs to do here is to prove that there is no sufficient ground to regard Japanese positive policy as part of the alleged conspiracy, But it seems that Pal cannot help making sarcastic remarks when opportunities arise as in this case. Here, Pal, critizes the western nations which indict Japan for crimes of conspiracy while they themselves had conquered other nations in the name of manifest destiny” or “white man’s burden” Japan perhaps does not have the “privilege” to justify her positive policy by using those terms, but, Pal asks, shouldn’t the world at least allow her an “equal” right to explain her expansionist policy without referring to the conspiracy theory? . (Totani, 2008:p123)

After securing Manchuria, Japan exploited the transportation and communication facilities and developed natural resources and heavy industries in order to consolidate her economic domination in the region. At the same time, the then foreign minister Mirota adopted cooperative policy towards the Nanjing Government so that Japan could gain Chinese government support to repress anti-Japanese movements and to fight with communism. In the respect, there was a degree of improvement in the Sino-Japanese relation since 1923. The Japanese government also aimed at forming the Sino-Japanese economic block to counter block economies in other parts of the world”39

According to prosecution contention, the friendly phase was part of the designed on Japan’s side to expand her control beyond Manchuria. The Amau Statement of April 1934
marked the all edged expansionist plan. The main purport of the Statement was that the Japanese government would not tolerate any interference from Western powers with her plan in china in response to the prosecution, Pal suggests that one locate the statement in its context in order to appreciate its true meaning. For instance, he brings into light the activities of Western Powers in providing economic and military assistance of China at the time. The assistance ranged from proposals of loans to the Chinese government, the advent of financing corporation to check the growth of Japanese commerce and investment, to the provision of various military assistance that included sending military experts and advisors. (Totani,2008;p101) Japanese policy toward China also needs to be understood in relation to certain economic and political circumstances of the Chinese state and society. China was then in the state of anarchy, or, “suspended state,” due to civil war, and two competing governments emerged within the Chinese continent by the 1930s. One of them was the Communist government in Huped and the other, Kuomintang government in Nanjing(Totani,2008;p105). As the societal level, nation wide boycott had come to pose a serious problem for the problem for the Japanese economic activities on the continent. What complicated the boycott movement was that the Kuomintang came to take the initiative in oorganizing and directing the movement by the late 1920s. This implied that the national government became complicit with the boycott despite its international obligation.

Furthermore, Communism developed as more than “a mere agrarian revolt against intolerable mis-government” but “rival of the national government” which “possessed its own law, army, and government, and its own territorial sphere of action,” to use the words of the Survey by the Royal Institute of Internationals Affairs. Commenting on Community menace, Pal writes:

“It might not be necessary for us to examine the correctness or otherwise of such criticism of communism or of Russian theory and practice of the same. At the same time we might have to take into our consideration of these facts, the growth of Communism in China, its connection with the Society Russia and its probable effect on Japanese interest in China. We might have to considers whether the circumstances would indicate the bona
fides of the measures taken by Japan to forestall the danger, if any involved in such development.” (Pal, 1976:p52)

When all of the above economic, political and ideological circumstances are taken into consideration, the Amau Statement can be explained without referring to any conspiracy plan. It was a Japanese version of the Monroe Doctrine for the purpose of protecting interests Japan had in China.

Japan later reverted to aggressive policy, which is marked by the Marco Polo Bridge Incident of July 1937. This can be also explained by considering consequence of Japanese diplomacy with China. As it turned out, Japanese friendship policy was not successful since the Kuomintang’s Nanjing government formed the united front with a Communists in early 1937 in order to resist Japanese dominance.

3. The Third Stage: The Preparation of Japan for Aggressive War Internally and by Alliance with the Axis Power.

The section consists of six subsections. They are 1) psychological preparation of the nation for war-race feeling; (2) psychological preparation of the nation for war – militarization of education; (3) seizure of political power; (4) general preparation for war; (5) the preparation of Japan for aggressive war internationally by alliance with the xis Powers, and (6) aggression against the Soviet Union. (Totani, 2008:p106)

(1) Psychological preparation of the nation for war-race feeling.

The prosecution contended that the Japanese government had implemented a policy of militaristic education, war propaganda, and the mobilization of people for war in order to create a feeling of racial superiority, which was allegedly a scheme for substantiating the conspiracy plan in this section, Pal offers a preliminary discussion on racism in general in order to test the validity of the prosecution charge in the section to follows:

Pal begins by arguing that racial superiority is not unique to Japan but is commonly held as a sort of deception of all nations, and that such delusion is a necessary “defensive weapon”
of the present world in order to protect one’s own nation. Puts supply belief in racial superiority came into being due to the coactive sense of self-defense. In the present world, the collective impulse to protect the nation is so strong that the “ideal of asceticism and self repression has not as yet been adopted by any of the modern civilized nations. It is not clean where the ideal of asceticism and self-repressions comes from – it certainly is not part of the idea of the self in the modern world”. (Totani,2008;p101)

In any case, Pal goes on to discuss the origin of racial superiority that has become pervasive in the present world. He specifically refers to a British Historian of his time, Arnold Toynbee, and his work, A Study of History. The part that concerns Pal is the era after the Seven Years’ War of the mid-eighteenth century, when notorious English-speaking Protestants began to migrate and settle in the non-western world. According to Toynbee, the English speaking Protestants who led the peoples from Europe and had them settled in the new land considered themselves the “chosen people”. (Totani,2008;p102) It was a distinctive sense of mission that they were a vehicle for spreading the virtue of western civilization. This “race-feeling engendered by the English Protestant version,” to use Toynbee’s words, “became the determining factor in the development of race-feeling in our Western Society as a whole”. (Totani,2008;p102) In Pal’s view, the mode of race-thinking that pervades the present world originates in the one held by those western settlers in the new world. Their thought was characterized by the sense of racial superiority and driven by imperialist impulse. (Totani,2008;p102)


The basic presupposition of the above section has been that developing race-feeling has become the norm of the world for collective defensive purposes. In this light, Pal does not see anything abnormal about militaristic training being adopted in the Japanese educational curriculum as national policy. If it does indicate anything, it only shows the “clear-sightedness” of the Japanese leaders who perceived the reality of the
racialized competitions of nations, and who equally decided to respond to the reality with the same weapon. The most importance of all, “the evidence does not necessarily lead to the inference that Japan was preparing for aggressive war or that the heads of the various departments of the Japanese Government were conspiring to wage any aggressive war. (Totani, 2008: p109)

To illustrate Pal’s view, one may look at how he dismisses the testimony that stresses abnormality of Japanese nationalism advocated in a problematic textbook, *Way of the Subject* (Shinmin no michi), published in March 1941. This textbook basically glorifies the imperial household and Japanese racial superiority by mixing leget myth and tacts. Its theme is that the Japanese imperial subjects have been ordained to assist the countries of the greater East Asian Co-Prospierity Sphere, and to help and lead them to be liberated from Westerner’s aggressors. Pal comments on it and says, “However unpleasant its content might appear to us, they were perhaps not devoid of truth. For instance, *Way of a Subject* criticizes European colonization of the American Indians, the African blacks and the people of Asia by way of killing and enslavement of the aborigines and exploitation of national resources. It also points out that the western powers such as Britain, France and America came to make conscious efforts to maintain the “status quo” after the First World War since they began to fear the “possible downfall of western civilization. In this way Pal rejects the charge that racist education and propaganda was part of the conspiracy scheme. (Totani, 2009: p101)

(3) Seizure of political power

The analysis of the alleged psychological preparation for war ends in the abode section, and now Pal examines prosecution’s allegation that the accused planned to take over the government in order to fulfill the alleged conspiracy. According to the prosecution, the gradual ascendency of conspirators began around the year 1928 when Japan abandoned friendly diplomacy with China and adopted positive policy. The accused allegedly completed the takeover of the government in October 1941 when Tojo became the Prime Minister and formed the Cabinet. The prosecution contended that the accused utilized certain army cliques who conducted a number of political assassinations.
and abortive coups, in order to achieve the political ascendancy. It also argued that the covert attempt of the accused was marked by the Imperial Ordinance of 1936, which allegedly gave greater opportunity for the accused to take control of the government. The Ordinance decreed ministers for the Navy and War be brought from high-ranking generals on the active list.

(4) General preparation for war

The subject of this section is Japan’s preparation for total war, that is, the transition to the government-initiated planned economy to prepare for war beginning in 1937. Pal dismisses the prosecution charge that the accused attempted to ensure the perfection of aggressive war by adopting the planned economy. Total war, Pal argues, is the characteristic of modern warfare, and writes:

“While war procurement is ordinarily a military function, the modern concept of war, as primarily a battle between industrial societies, makes adequate procurement a task for the whole nation. Any organization of procurement methods cannot ignore their relation to the problem of efficiently producing materials and transporting products from assembly lines to battle fronts with the least possible dislocation of the nations’ economy.” (Pal, 1976:p57)

The adduced evidence only proves that “Japan shared the same fear and with characteristic clear-sightedness envisaged the character of future warfare and took what steps she could in order to be prepared for it.” (Pal, 1976:p65) Japan’s failure to pursue wealth through peaceful means in international community can be also explained by growing economic pressure from within and out. Therefore, it does not bring Pal to believe that the change in economic policy was an aggressive design. (5) The preparation of Japan for aggressive war internationally by alliance with the Axis Powers.
The allegation in this section refers to the Anti – Cominterm Pact of November 1936 and the Tri-partite Pact of January 1942. After carefully examining the Pacts, (Totani, 2008; p110) Pal concluded that the alliance was essentially of a defensive nature, designed to secure means to protect the signatory nations from worldly feared Communism and the danger of diplomatic isolation. He then reiterates his view on the competitive nature of international relations of the modern world and writes:

“In a society in which the interests of members are primarily conflicting, the main concern of each entity must necessarily be directed towards self-preservation. The Society of States which have developed is composed of nations too strong and too self-conscious to permit any of its members to attempt to solve its problem of self preservation by mean of impartial universality. On the plane of power politics, therefore, the only realistic alternative for those countries, which were neither geographically nor politically in a position of exceptional security, was provided by the principle of the balance of power, the only factor of relative stability in a world divided by alliances and counter-alliances. In the very nature of it, this polity involves continuous efforts of balancing in order to avert the ever-present danger of the preponderance of one or other group. (Pal, 1976:p67)

(6) Aggression against the Soviet Union
Finally, this section deals with conspiracy charges related to the USSR Pal explores the historical background of the Russo-Japanese relations, going far back to the Opening of Japan in the mid-nineteenth century. He demonstrates how Japan’s fear about Russia’s possible advance into Manchuria had built up historically and how Japan’s fear increased as Communism came to dominate Russia after the Revolution. Pal considers the presence of Russian terror sufficiently explains Japan’s constant alertness and preparedness for contingent hostility and her taking confrontational measures against Russia when she saw it necessary. (Totani, 2008; p108)

(4) The Final Stage – The Further expansion of the Conspiracy into the Rest of East Asia and the Pacific and Indian Ocean by Further Aggressive Wars”
This final section focuses on three events concerning Japanese movements in the Asian Pacific region prior to the outbreak of the Pacific War. They are the advance into Indo China and Thailand, the advance into the Netherlands East Indies, and the American Japanese negotiation before the surprise attack on Pearl Harbor. (Totani, 2008, p. 121)

Japanese conflicts with French Indo-China between October 1938 and May 1941 arose in relation to the conflicts over stationing Japanese troops along with China since the Marco Polo Bridge Incident of July 1937. Japan and France reached a resolution by the Protocol of the Guarantee and Political Understanding in May 1941. As for the event concerning the Netherlands East Indies, Japan began a negotiation in September 1940 in order to secure oil, which ended in June 1941. The direct reason for moving to the south was because Japan lost her primary source of oil due to the American oil embargo of 1938. Pal finds in neither case any evidence that proves the allegation that the steps taken by Japan were and design of conspiracy. (Totani, 2008, p. 74)

The American-Japanese negotiation preceding the surprise attack on Pearl Harbor began in January 1941, virtually failing in November of the same year. The negotiation centered on settling matters on the following four subjects. First, whether Japan could give an assurance that she would not go to war to help Germany if the U.S. participated in the European war. The American side did not demand the abandonment of the Tri-Partite Treaty but it was hoped that Japan would interpret her treaty obligation in such a way that she would not go into war against the United State. The evidence shows that Japan made a number of concessions in order to accommodate the American demand. Second, the stationing of Japanese troops in China and their ultimate withdrawal was brought to the negotiation table. (Totani, 2008, p. 75) The Tojo cabinet presented a proposal in early November, which indicated the definite time, areas, and number of Japanese troops to be kept stationed in China. It was a big concession in view of the fact that Japan was at war with China. Third, the two governments attempted to reach a set agreement that the two nations would observe the principle of peaceful, non-discriminatory commercial activities in the south western Pacific region. Fourth, and partly related to the third issue, the United States attempted to check Japan’s southward expansion through Indo-China for
fear that it affected the peaceful settlement of the Pacific problem. Japan’s advancement to the south had been agreed upon under the Protocol signed by Japan and France in May in the same year. Nonetheless, Japan propose to withdraw her troops stationed in French Indo-China to meet the American request although, again the hostility in China had not reached a general settlement. *(Totani, 2008:p75)*

The United States did not fully appreciate these Japanese proposals and largely dismissed them, since it had deep mistrust about sincerity of Japan’s intention. American mistrust of Japan is best reflected in adduced evidence concerning the American interception of telegrams sent from Tokyo to the Japanese ambassador in the United States. The telegrams decoded and translated were factually correct, but the purport of Japan’s intention was distorted to such an extent that in only gave the impression that Japanese leaders were making insincere promises to deceive the American side and to prepare for a treacherous war”. *(Totani, 2008:p85)*

After a series of unsuccessful negotiations, U.S. Secretary Hull presented a proposal in November 26, 1941, commonly known as the Hull note. Some of the major requests in the proposal were that Japan abrogate the Tri partite Pact, unconditionally withdraw all military naval, air and police force from China and Indo-China, and recognize the Chunking Government only (which the United States supported to oppose the Japanese puppet government in Nanjing). There were some other new requests that had not been negotiated before. The American side was prepared to go into war with Japan by then, as evidence shows that the U.S. President Roosevelt and Secretary Hull authorized a warning of the coming war be given to the American outpost commanders the very next day.

In the final analysis, Pal contends that the Japanese leaders’ intention was “absolutely clear at the very outset,” that is, to avoid going into war with the United States. “The proposals might have been selfish, the attitude expressed might have been unyielding,” Pal writes, “…..but there was no hide and seek on the part of Japan in her proposal to the United States.” *(Totani, 2008:p87)*
On the other hand, Pal suspects that it was in fact on the state of the United States which protracted the negotiation purposefully. A series of embargoes since 1938 and the American support to the Chang Kai-shek Government suggests that the United States had already participated in a hostility against Japan from the earlier years, although it did not involve direct armed conflict. The United States may have purposefully postponed oil embargo to mid 1941 lest Japan be compelled to fight prior to the. When the American policy against Japan is seen in this light, it appears that it was the United States rather than Japan that systematically planned a full scale Pacific War. (Totani, 2008:p88)

Pal does not intend, though, to accuse the United States and its allies for instigating, or for that matter, conditioning, the outbreak of the Pacific War. The point is that the analysis of the negotiation process and the facts of economic war started by the United States “sufficiently explain the subsequent development leading to the attack on Pearl Harbor without there being any conspiracy of the kind alleged in the indictment.” Thus Pal concludes that there was neither the alleged treacherous plan on the Japanese side nor the conspiracy to wage war to dominate the region of Greater East Asia. Japan was largely “driven by the circumstances that gradually developed to the fatal steps taken by her.”

6. Conclusion
Pal’s verdict as regards the charges of crimes against peace is concluded as follows:-

“1. That no conspiracy either of a comprehensive character and of a continuing nature; or of any other character and nature was ever formed, listed or operated during the period form January 1, 1929 to September 2, 1945 or during any other period.

2. The neither the object and purpose of any such conspiracy or design for domination of the territories, as described in the indictment, nor any
design to secure such domination by was has been established by evidence in this case.

3. That none of the defendants has been provided to have been members of any such conspiracy at any time”. *(Totani, 2008:p98)*

Part V : Scope of Tribunal’s Jurisdiction.

Now that the charge of over-all conspiracy in Count failed, it becomes necessary to reconsider the scope of the Tribunal’s jurisdiction. In accordance with the defense objection, the war in the present case has to be the one that ended on September 2, 1945. Pal does not take the attack on Pearl Harbor as the commencement of the war in question just because the prosecution case was not established. According to Pal’s view, it is the Marco Polo Bridge Incident of July 7, 1937 that marked the beginning of the war between Japan and the Allied nations. It is known that the United States, China, and Japan, did not recognize the Incident as a war. Or put another way, all of them did not want to be recognized as belligerent nations for fear that it would make them delinquents of various international obligation to which they were committed. But Pal considers that the subsequent Pacific War originated in the event, for the United States and the Allied nations had already participated in hostilities against Japan by way of collectively imposing economic sanction and giving assistance to China. Pal will examine the remaining charges with the above redefinition of war. *(Totani, 2008:p100)*

Part VI : “War Crimes Stricto Sensu”.

1. Charges of Murder and Conspiracy (Count 37 – 53)

   The charges to be examined in this section are related to wars in the period between June 1, 1941, and December 8, 1941. From Count 37 to 43 and 45 to 52, the accused are charged with ordering, causing, and permitting Japanese armed force to unlawfully kill soldiers and civilians of the United States, the Philippines, British Commonwealth, the Netherlands, China, Mongolia and the USSR. The terms and conditions of the charge are specified in each count. In Count 44 and 53, the accused are charged with conspiracy to procure and permit the murder of prisoners of
war, civilians and crews of destroyed ships (Count 44) and conspiring to order, cause, and permit Japanese commanders, War-Ministry officials, police and subordinate to breach laws and customs of war by commending, atrocities and other crimes against prisoners of was and civilians belonging to the United States, the British Commonwealth, France, Netherlands, the Philippines, China, Portugal and the USSR (Count 53). Count 51 and 52 concern incidents in the territories of Mongolia and USSR in 1939, which Pal considers outside the jurisdiction of the Tribunal. (Totani, 2008:p101)

In light of the previous analysis of Japan’s wars, Pal acquits the accused from charges in Count 37 to 43 and 45 to 50. The prosecution contended that the hostilities indicated in these counts were illegal wars, and that Japan did not enjoy the protection of any belligerent right. But Pal has shown in Part Four that the hostilities in question did indeed constitute war “within the meaning of the international law”. (Pal,1953:p125) It follows that killing in these counts cannot be criminal or illegal. As for counts 44 and 53, Pal concludes that there was no common plan or conspiracy on the side of the accused to perform the alleged crimes as indicated in these counts.

2. Counts 54 and 55

After clearing charges of murder and the conspiracy of murder, the only remaining matters under consideration are war crimes stricto sensu. Count 54 refers to offences of mentioned in Count 53, charging specified accused with ordering authorizing and permitting commanders-in-chief to commit atrocities and other crimes against civilians and prisoners of wards, of the U.S. the British Commonwealth, France, the Philippines, China, Portugal and the USSR. Count 55 charges the same specified accused with “having violated the laws of war by deliberately and recklessly disregarding their legal duty to take adequate steps to secure the observance of conventions, assurance and the laws of war for the protection of prisoners war and civilians of the nations and peoples named in Count 53. There was no charge corresponding to the one in Count 55 in the Nuremberg trial and according to Pal, the “act of omission,” if a crime, falls outside the provision of the Charter. The deliberate inaction, when established, can only be taken as “evidentiary conduct whereupon the resulting violation of laws of war should be ascribable to the persons charged.” (Pal,1953:p126)
Before proceeding to examine the charges of atrocities, Pal discusses some matters concerning probative value of evidence on atrocities adduced at the Tribunal, particularly with regard to testimony on atrocities. Evidence of this kind needs to be treated with some suspicion of exaggeration, Pal argues, since witnesses’ observations are often that of “the most fleeting kind” and yet “the positiveness of the witnesses is sometimes in the inverse ratio to the opportunity for knowledge”. (Pal, 1953:127) By saying so, Pal does not mean to dismiss testimony on atrocities all together. As a matter of fact, “keeping in view everything than can be said against the evidence adduced in this case in this respect and making every possible allowance for propaganda and exaggeration, the evidence is still overwhelming that atrocities were perpetrated by the members of the Japanese armed forces against the civilian, population of some of the territories occupied by them as also against the prisoners of war. All he tries to do by giving the cautious remark on the treatment of evidence is to remove the general human tendency to blindly believe in testimony of excitable nature, and to focus on discerning command responsibility of the accused for the atrocities.” (Pal, 1953:p128)

Another issue Pal takes into consideration is the fact that most Japanese civilians, soldiers and their immediate superiors who were responsible for perpetrating atrocities have been tried and punished in other Allied war crimes. 920 Japanese were sentenced to death and around 3,000 were given various prison terms in these trials between 1945 and 1951”. The Prosecution provided the Tribunal with evidence that reported the results of other Eastern war crimes trials. In view of the given information, Pal stresses that the “devilish and fiendish character of the alleged atrocities” (Pal, 1953:p130) have been meted out by equally stern punishment, and;

“I believe no one will be able to accuse any of the victor nations of any mistaken clemency towards any of the alleged perpetrators of all these four acts. These convictions can, I believe, be taken as having sufficiently quenched any resentment”. (Pal, 1953:p130)
With these preliminary discussions, Pal proceeds to investigate the charges indicated in Counts 54 and 55, first with regard to atrocities against civilians and later those against prisoners of wars.

2-1. Counts 54 and 55 in Relation to the Civil Population of the Territories Occupied by Japan.

The events of atrocities against civilians fall largely into three groups; First, atrocities in Chinese cities and villages prior to the Pacific War, which includes atrocities after the fall of Nanjing in December, 1937. The second group includes atrocities in Chinese cities and villages during the Pacific War. In the third group are atrocities that took place in some twenty areas in the Asian-Pacific region. The evidence adduced in support of the occurrence of the alleged atrocities proves the prevalence of “devilish and fiendish character” of atrocities, but it does not convince Pal that there is any ordering, authorizing or permitting of such acts on the side of accused. (Totani, 2008:p111)

Pal then shifts his attention, and argues that if the kind of crime indicated in Count 54 is to be punished, it is the decision to drop the atomic bomb that come closed to the criterion in the count. He discusses how, in the part at the time of the First World War, German Kaiser Wilhelm II advocated ruthless policy of indiscriminate murder for the sake of swift conclusion of war, and writers.

….if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and the Nazi leaders during the second world war.” (Pal,1953:p131)

In this way, Pal dismisses the allegation that the accused adopted policy of commission atrocities against civilian during the war.
As for the charge of deliberate disregard of duty, the command responsibility of senior officers of the army becomes the focus of the discussion. “It is a well–established principle in criminal law, “Pal writes, “that liability may rise from omission as well as commissioner,” and “…..these commanders swore legally bound to maintain discipline in the army and to restrain the soldiers under their command from perpetrating these atrocities.” (Pal, 1953:p131) A commanding officer does not automatically become liable for low-ranking official criminal acts merely by virtue of being their superior. Yet, he still has to be accountable for actions of his subordinates and to take adequate measures when there is any misconduct among his subordinate officials and soldiers. In the present case, there were five specified accused who were charged with crimes of inaction. For all the cases, Pal reaches the conclusion that there is no satisfactory evidence to prove the charge.

One may introduce two cases here in order to illustrate Pal’s argument. One case concerns the “rape of Nanjing” in December 1937. General Matsui, Commander-in-Chief of the Central China Area Army, was accused of deliberately neglecting his duty. General Matsui was appointed Commander-in-Chief of the Japanese Expeditionary Forces to Shanghai four months prior to the event. The expeditionary Forces were eventually combined with the Tenth Army to form a new army force, and Matsui was appointed Commander-in-Chief in November of the combined Army. His inability to control his own troops seemed to be largely due to the fact that he had not been able to co-ordinate the two armies under his leadership To make thing worse, he was ill at the time of the attack on Nanjing, being obliged to give command from his sickbed. On the other hand, the evidence also shows that Matsui gave his subordinate strict orders to observe military, discipline prior to the attack on Nanjing, and further instruction after learning that there were breaches of military discipline and morality in spittle of his orders. None of these turned out to be effective,. And Matsui was eventually replaced by General Hata in February, 12, 1938. (Totani, 2008:p112)

With the understanding of the event outlines as above, Pal does not find that Matsui disregarded his obligation. He also does not consider that Matsini was responsible to personally instruct and punish perpetrators of atrocities, as he writes:
“……a commander-in-chief is entitled to rely on the efficient functioning of the machinery supplied for the purpose of enforcing discipline in the Army. The army certainly was provided with personnel whose function it was to prosecute the offenders. It is evidence that this party of the machinery did function”. (Pal, 1953: p132)

In another case, the command responsibility was tested in relation to the atrocity incident known as the “rape of Manila” in 1944 and 1945. The accused Muto was serving under General Yamashita, the commanding officer of the 14th Area Army in the Philippines. Yamashita’s was arraigned in a separate military tribunal soon after surrendering to the American forces in September 1945, and sentenced to death in December of the same year. (Totani, 2008: p113) Yamashita’s crime was that of deliberate disregard of his duty, but it is known that communication of his troop was disrupted by the American forces to such an extent that there was no way he could control the army discipline. In view of such condition, Pal does not find criminal responsibility of his subordinate Muto for atrocities in the Philippines. (Totani, 2008: p113)

2-1. Counts 54 and 55 in Relation to prisoners of War.

In this section, Pal deals with count 54 and 55 in relation to prisoners of war differently from the case related to civilians, since a few specify questions are involved in determining criminal liability of this case. To begin with, it is necessary to determine whether Japan is bound by the Hague Convention of 1907 and the General Convention of 1929 – the major international conventions in relation to the treatment of prisoners of war. The charges were made primarily on the ground that Japan had international obligation to observe the Conventions by signing both. (Totani, 2008: p114) Yet, according to Pal’s interpretation, Japan was not bound by either convention. The Hague Convention of 1907 which Japan ratified was not made effective because it did not have all the necessary ratification by signatory nations. As for the Geneva Convention, Japan was among the first signatory nations, but she did not ratify it in the end. In January 1942, Japan communicative with the United States, Britain, Australia and New Zealand, and acceded to adopt the provisions of the Convention with necessary modification. The
communication however did not make the Convention legally binding upon Japan. “This, of course, does not mean that the fate of the prisoners of war was absolutely at the mercy of the Japanese,” Pal writes. “All that I find here is that those conventions, as conventions, would not apply to this case”. (Pal, 1953:p142) But it is not clear as to what were then international obligations that Japan might have had in the treatment of prisoners of war, Pal does not discuss this issue. (Totani, 2008:p114)

Another subject Pal introduces concerns a cultural issue, namely, the question of mental make-up of Japanese soldiers. Pal considers it vital to take into account of the Japanese “non-surrender policy,” because it helps explain prevalence of ill-treatment and brutal attitudes toward Allied prisoners of war without necessitating the hypothesis that atrocities were a government policy. Pal refers to some study by Ruth Benedict to explore a deep rooted sense of disgrace and shame in Japanese understanding of surrender. Pal argues that the Japanese idea of valour denied soldiers to seek salvation by way of submitting to the enemy or to show mercy to the damaged no matter whether they were enemies or allies. These ideas of mercy were simply “alien” to the Japanese military ethos. Moreover, the Japanese armies were compelled to fight to the end since they took in for granted the principle of “the expendability” of the fighting forces.” (Pal, 1953:p145)

Japanese soldiers with such mental makeup, the, found themselves having difficulty to accept an overwhelming number of surrendering Allied soldiers. Commenting on the matter, Pal writes that this must have been “almost as unexpected as the atom bomb.” He then continues,

“…….If the atom bomb has come to force a more fundamental searching of the legitimate means for the pursuit of military objectives, these overwhelmingly large numbers of surrenders have equally come to force a more fundamental searching of the extent of the victors’ obligations to give quarters to the surrendering army. An army of 100,000 surrendering to an army of 34,000 creates a very grave problem for the small victory army.” (Pal, 1953:p174)
Here, Pal refers to the atomic bomb obviously for a polemic purpose, that is, for a simple shock effect. In any case, he introduces a cultural analysis as an alternative way and viable means to explain the prevalence of brutality against prisoners of war across the expansive theater of war.

With this in mind, Pal proceeds to examine seven items of crimes against prisoners of war. They are: (1) treating the prisoners of war inhumanly; (2) exposing them to public curiosity; (3) forcing them to make oaths not to escape and punishing severely when the oaths were not kept; (4) transporting them in inhuman ways; (5) employing them for tasks connected with the operations of war; (6) convicting some for false espionage charges; and (7) executing Allied airmen – all either in contravention to the Hague and Geneva Conventions or violation of other laws. (Totani, 2008; p132)

To start from the first item, adduced evidence shows that the high-ranking authorities did make inquiries upon receiving reports on atrocities from various sources, and gave instructions where appropriate. The second item refers to various incidents when prisoners of war were exposed to public gaze, one of such examples being the government decision to intern American and British prisoners of war into Korea. The internment was meant for a propaganda purpose, that is to demonstrate the might of the Japanese Empire to the Korean people and eliminate the myth of white supremacy from their mind. Pal comments on this matter and writes;

“They were taken to those places simply to convince the people there that even white soldiers could be defeated and could be taken prisoners. The faith in white supremacy was considered by the Japanese authorities concerned to be more myth and they simply though that the very fact that white soldiers could be taken prisoners would demolish that myth. I do not see why this should be looked upon as an insult or exposition to public curiosity.” (Pal, 1953: p175)

The third item concerns the allegation that Japanese government violated international law by authorizing the creation and application of illegal non-escape rules to prisoners of war. Pal argues that Japan was not bound by the Conventions in the first place, and that the creation of
new law is merely an act of state. It follows that the accused are not criminally liable to the allegation. In addition, determining criminality of creating the non-escape rules must be considered by taking into account the overwhelming number of surrenders. The fourth item refers to the transportation of the prisoners of war in unhygienic, overcrowded ships where brutal treatment by Japanese soldiers was commonplace. The Bataan Death March of 1942 in the Philippines is also under consideration. With regard to the former incident, Pal recognizes the facts of ill treatment and unhygienic conditions, but does not find any evidence that proves it to be government policy. He also adds that the factor of excessive surrenders must be taken into account. (Totani,2008;p143) As for the Death March Pal concurs with the prosecution that the event was an unjustifiable, criminal conduct. But the Death March remains to be “an isolated instance of cruelty”. Rather than being proved to be a part of government policy. More important, “the man responsible for it has been made to account for the same with his life. The Death March, therefore, does not establish the criminal responsibility of the presence accused. (Totani,2008;p144)

The fifth item concerns the employment of prisoners of war for tasks related to the operations of war, such as, the transportation of combatant materials and the construction of the Burma – Thailand Railway, in contravention to the Conventions. Pal admits that there is evidence of prisoners of war being used for the alleged purposes. Nonetheless, he contends that this does not make the accused criminally responsible since the violation was an act of state, and because the violation itself was a mere “delinquency” on the part of the state. As for the notorious construction work of the Burma-Thailand Railway, it was ordered under the decision of the Imperial General Headquarters. It began in September 1942 and completed in October 1943. Pal agrees that the members of the general headquarters and the War minister were directly responsible for employing prisoners of war for the construction work., But the act “is not mala in se and I would not make any of these persons criminally liable for it. (Totani,2008;p145)

It is not exactly clear on what basis Pal is determining one criminal liability of the state and the accused in these charges of the employment of prisoners of war. All that is said here is that the decision of employing prisoners of war for work related to war only makes the state delinquent but not criminal, and therefore, the accused do not incur criminal liability.
As for brutality of local officials during the construction work, Pal argues that it was not
due to the inaction on the part of any of the accused but overzealousness of the local officers and
engineers. Most of them had already been punished in the war crimes trials held by Australia,
the Netherlands and the United States, so there is no need to go further into considering criminal
liability of the accused. *(Totani, 2008; p148)*

The last item refers to the charge that the Japanese authorities created ex post facto law to
execute Allied airmen on trial, or sometimes executed them even without a trial. One of the cases
at issue concerned Colonel Doolittle’s crews who were captured following the bombing on April
18, 1942. The were tried by court martial under their “regulation for the Punishment of Enemy
Aircrews: Created on August 13, 1942, and sentenced to death under the rule. Pal recognizes the
fact that Japanese authorities created new ex post facto law and applied it to punish the Allied
airmen. *(Totani, 2008; p151)*  This is the first clearest occasions in the Dissentient Judgment when
the possibility arises that some of the accused may actually by criminally responsible for one of
the charges. However, Pal acquitted the accused of the crime indicated in this item as well for
the following reasons. First of all, if the Tribunal recognizes the victor’s right to make law, Pal
considers that Japan should be also entitled to the same right. Pal invites the reader to recall the
earlier discussion on the scope of legislative pier of the victor in Part One, and writes:

“There I have pointed out how the Tribunal at Nurnberg accepted the Charter creating
that Tribunal as defining war crimes and thereby giving it a binding law in that respect. It
seems the victor powers think that international law authorizes them to make law in this
respect. Whatever be my views, if the victor nations, and, for the matter of that, so many
judges of the tribunals set up for the purpose of trying the war criminals could hold that it
was open to the victor nations to create ex post facto law for the trial of prisoners of war,
I would be reluctant to fix any criminal responsibility on the authors of the ex post facto
for the trial of allied airmen.” *(Pal, 1953; p177)*

The arguments here is this the international military tribunal today is adopting ex post facto
law, then shouldn’t Japan doing the same in the earlier period be equally acceptable, just
for the sake of being fair? In this way, Pal applies a theoretical argument in order to dismiss the possible criminal liability arising in this way. Pal applied a theoretical argument in order to dismiss the possible criminal liability arising in this case. It is also instructive to note how Pal defines the scope of the victor’s power over prisoners of war at different military tribunals (Totani, 2008; p160). He seems to tolerate a degree of arbitrariness by the victor state when it tries the vanquished in its custody in a national court. But he defies the victor state doing the same in the international court. It is clear what is the judicial explanation for this distinction: All one needs to know is that Pal acquits the accused from the crime of enacting ex post facto law.

There is another reason for the acquittal. In Pal’s view, the deficiency in international rules and regulations concerning aerial warfare itself may have made the creation of new law necessary on the side of the Japanese authorities. The international community had not been able to determine “what constitutes legitimate object of attack” in earlier days, and therefore, they failed to create rules to prohibit illegitimate bombardment (Totani, 2008; p162). With this perplexing situation in mind, Pal does not see why the Japanese decision to create rules on this matter should be found as a criminal conduct. Above all, he argues that the gravest issue here is not the legal protection of the airmen. He writes:

“We should not fail to remember that the real horror of the air warfare is not the possibility of a few airmen being captured and ruthlessly killed, but the havoc which can be wrought by the indiscriminate launching of bombs and prejudices. The conscience of mankind revolts not so much against the punishments added out to the ruthless bomber as against his ruthless form of bombing”. (Pal, 1953: p178)

In this way, Pal dismisses the crimes related to be execution of Allied airmen. The execution of airmen without trial does not concern him much, because all the cases adduced in the Tribunal are relating to cases at different theatre of war far away from Japan. “Even the ones that took place in Japan proper, occurred in 1945” when everything was in a chaotic condition here. Pal does not find any evidence that makes any of the accused responsible for the crimes. (Totani, 2008; p165)
Part VII: Recommendation.

The final section of the Dissentient Judgment begins with the pronouncement of his verdict that declares that each and every accused is not guilty of any charges in the indictment, and that they shall be acquitted of all charges for that reasons. This is followed by a brief discussion on legality of Japan’s war by comparing it with the Napoleonic War. He then concludes this section with some personal observations of the postwar condition of the world order. (Totani, 2008: p167)

It is worthwhile to examine these observations now in order to consider the following two questions First, what did Justice Pal dissent from, and on what ground did he do so? Second, why did he acquit all the accused from all charges despite the possibility of criminal liability for one or two charges One may analyze two specific passage where Pal comments on the postwar condition in one, and the guilt of the Japanese leaders in the other. (Totani, 2008: p170)

Pal outlines the situation of the world today by drawing upon some authoritative opinions (the sources are not identified), which warn that the world today is facing unprecedented terrors – terror as threatening as the Nazis – even though all the sinister forceps of the previous war are being eliminated. Pal reflects upon this situation, and writes:

“……Sp, it may be that the world’s attention has not yet been directed in the right direction. The depressing aspect of the situation, the world is told, is the duplication of the high-handed, calculated procedure of the Nazi regime. “This may be so; or it may also be that we are only being betrayed by what is false within, - the incipient failure of will and wisdom.” (Pal, 1953: p185)

In this passage, Pal suggests two ways of understanding the persistence of threat in the present world. It is either that the world is still in the progressive stage for the creation of true cooperation of nations. Or, the source of the problem today may be that there was something fundamentally wrong within the existing world itself from the outer. In light of the discussions in the earlier part of the Dissentient Judgment, the latter view appears closer to Pal’s personal understanding. As I have tried to demonstrate earlier, he has criticized the basis of the present
world from various angles. In part One, he produced a critique of the doctrine of national sovereignty that underlines modern international community. In part Two, he criticized the system of violence rooted in capitalism and the pervasion of imperialism and colonialism as a norm of international life. And finally in Part Four, he investigated the origin and spread of racial feeling as a defensive weapon of the modern international relations. In all cases, Pal harshly criticized how the idea of equality of mankind has been constantly endangered and how egocentric principles have come to dominate the world.

Pal suggests that the “false within” the world could have been corrected if there was not the “incipient failure of will and wisdom.” Recalling the event of the drafting of the League Convention, I am inclined to think that this “will and wisdom”, refers to words of Baron Makino. It was a moment when the world for the first time attempted to form an international organization with genuine hope for world peace. But it turned out to be an occasion when powerful nations of the west refused to listen to words of wisdom and relegated the principle of equality. (Totani, 2008; p171)

As for his view on the vice Japan committed in the previous war, Pal comments on the Japanese leader and writes:

“We may not altogether ignore the possibility that perhaps the guilt of the leaders was only their misconception, probably founded on illusions. It may indeed be that such illusions were only egocentric. Yet we cannot overlook the fact that even as such egocentric illusions these are ingrained in human minds every where.” (Pal, 1953; p187)

The “leaders” here apparently refer to Japanese leaders. When seen in retrospect, Pal’s attempt to establish Japan’s bonafide claim of self-defense was really about demonstrating how deeply implicated Japan had become in this illusion of national sovereignty as the supreme doctrine of international life.

Japanese leaders came to share with the world the illusion of the supremacy of national sovereignty, the illusion of expansionist doctrine, and the illusion of racial
It was perhaps right to punish Japan for the sin of being complicit in the creation of such world. But she was only one among many”.....we cannot overlook the fact that even as such egocentric illusions there are ingrained in human minds everywhere.” The violent and egocentric illusions were already deep-rooted in those human beings who have created and sustained the present world. *(Totani,2008;p175)*

In the final analysis, what, Justice Pal has attempted in the Dissentient judgment is more than disagreeing with the prosecution or the majority judgment. He disagreed with, or even refuted, the established egocentric, power-oriented doctrines that were taken for granted in the existing world. When the war was over, Japan and the Allied nations stood on the same footing, both being responsible, not only for the commencement of the war and its disastrous consequences, but also as complicit in sustaining the world of power and inequality. As he came to participate in the Tokyo trial as a judge, Justice Pal perhaps hoped to judge this vice committed by the world to assist the complicity with the atonement for the past sin in the postwar period, and to witness it himself. But the atonement became the task of the vanquished only in the actual trial, while the victor nations still engaged in military, economic, or ideological warts in the name of the doctrine of national sovereignty in other parts of the world.(Picchigalo, 1979;p45)

Here seems to lie the reason why Justice Pal persisted in making each and every accused not guilty in the case. Japan was certainly responsible for the past misdeeds, but she was not the one to take responsibility for what the international community is like today. Besides, it was simply out of the question that Japan alone should atone for the “incipient failure” of the existing world of power and inequality, when other nations that may be more responsible do not show even a morsel of a sense of guilt.(Brackmann, 1987:p178)

For the purpose of rendering the verdict of not guilty, Pal often engaged in rhetorical discussion as the case of the execution of the Allied airmen shows. The dropping of the atomic bomb also serves as a polemic device at various occasions in the Dissentient Judgment. He
certainly had deep humanistic resentments about the Allied decision to use the atom bombs. But apart from that, Pal regarded it as a useful tool to make his criticism powerful. For instance, introducing a brief discussion on the German Kaiser Wilhelm and the dropping of atomic bomb appears more like a digression than being directly connected to the matter of the present Tribunal case. At another occasion, Pal compares the shock of finding a lot of surrendering Allied soldiers with that of the atomic bomb. (Picchigalo, 1979; p45)

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. (Vardarajan: 1998, p36, IJIL). 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. (Vardarajan: 1998, p37, IJIL). 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). (Picchigalo, 1979; p45)

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 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 changes in the international system that have been dealt with 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-requisite to the creation of any community was the binding force which makes it cohesive. (Vardarajan: 1998, p39, IJIL). 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’. 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. (Vardarajan: 1998, p39, IJIL). 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 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, p39, IJIL).

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 criminalization 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. (Kopelman, 1991: p 428)

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...”. (Kopelman, 1991: p 429) 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.

Indeed, some of Radhabinod Pal’s theoretical beliefs 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. (Vardarajan: 1998, p34, IJIL). 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.

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, p34, IJIL).

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. However, Bruce Cronin and Samuel Barkin, for instance, have argued that sovereignty is a variable.

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”. (Kopelman, 1991: p 439) In such a context, the creation and implementation of an international criminal law may not be as improbable as it seems.

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.

Pal’s Dissentient judgement was seen as an example of courage under in extreme circumstances. Although most of it was coldly logical in tone and often formalistic in content, the overall impression was of an impassioned plea to posterity (Kopelman, 1991: p 439) Jurists have a duty to speak out coolly but firmly when an innovation seems to be of doubtful value, retrograde or dangerous (Kopelman, 1991: p 439). Pal attempted to do the same-to do justice though the sky falls (Kopelman, 1991: p 439). Pal insisted that until nations came to adopt the same standards of morality, world law could not regulate their behavior. World law must express world community; it cannot create the same. Pal’s dissent aptly demonstrates that the fundamental problem with the Tokyo trial was America’s attempt to make a moral and legal virtue out of a political necessity (Kopelman, 1991: p 440). If the Trial was itself a crime, as Pal tried to show, then “it doubles the crime to look away, for then we are not able to fix the limits of necessity….or make our own, awkward judgements of the people who kill in our name” (Kopelman, 1991: p 441).

Based on the principle of Non-retoactivity of law, Justice Pal, explicated his criticism of the Tribunal’s ex post facto legislation in his Dissenting Opinion. He affirmed that the alleged’conventional war crimes’ by Japanese defendants came within the jurisdiction of the Tribunal because they were already classified as crimes in pre-existing International Law. However, Justice Pal opposed ‘crimes against peace’ and ‘crimes against humanity’, as defined in the Tribunal’s Charter, because these crimes had no previous grounds in international law. If the defendants were to be found guilty of crimes which did not exist in international law when the alleged acts were actually executed, , Pal said, “then the Tribunal will not be a ‘judicial tribunal’, but a mere tool for manifestation of power”. It would subscribe to an understanding that the victors of war were entitled to judge the defeated while disregarding the rules of international law (Tanaka Maccormack and Simpson, 2011:p128)

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. One may attempt to analyse the relevance of Dr Pal’s Judgement and the embedded concept of Victor’s Justice in the context of future developments in the realm of the international criminal justice system.

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