

ARTICLE

## Locating and Situating Justice Pal: TWAIL, International Criminal Tribunals, and Judicial Powers

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(Received 26 July 2021; revised 13 January 2022; accepted 24 January 2022; first published online 10 May 2022)

### Abstract

This paper brings forward Justice Pal's dissenting opinion at the Tokyo Tribunal to add to Third World Approaches to International Law (TWAIL) literature on international criminal law and the rules of evidence and procedure. It is part of a TWAIL effort to scrutinize the everyday practices of international prosecutions through procedural and evidentiary rules. By locating and situating Justice Pal's reasoning within the broader academic literature on dissents in international criminal law, it is possible to illustrate how and why Justice Pal's views were obscured as a relevant dissent. From this vantage point, this paper pursues Justice Pal's legacy as it relates to the rules of evidence and procedure in the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda. It traces the evolution of the judicial power to draft and amend these rules, and examines the impact of these decisions on the everyday functions of the tribunals and how truth is determined.

**Keywords:** History and Theory of International Law; International Criminal Law; International Organizations

As the Indian judge on the Tokyo Tribunal,<sup>1</sup> Justice Radhabinod Pal was one of the first jurists from the Global South to be appointed to an international criminal tribunal. Justice Pal's dissent is a largely forgotten critique of international criminal law. The importance afforded to the Nuremberg International Military Tribunal (Nuremberg Tribunal) further reinforces the obfuscation of Justice Pal's dissent.<sup>2</sup> Notwithstanding,

<sup>1</sup> Commonly known as the International Military Tribunal for the Far East (IMTFE). I use the Tokyo Tribunal in the remainder of this paper.

<sup>2</sup> Neil BOISTER and Robert CRYER, "Introduction" in Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), xxxiii at xxxiii; for recent attempts to examine the history and implications of Tokyo Tribunal, see generally Yuki TANAKA, Tim MCCORMACK, and Gerry SIMPSON, "Editors Preface" in Yuki TANAKA, Tim MCCORMACK, and Gerry SIMPSON, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden, Boston: Martinus Nijhoff Publishers, 2011), xxvii at xxvii–xxx; Kirsten SELLARS, "Imperfect Justice at Nuremberg and Tokyo" (2010) 21 *European Journal of International Law* 1085; for a Japanese perspective on Justice Pal, see Nakajima TAKESHI, "Justice Pal (India)" in Yuki TANAKA, Tim MCCORMACK, and Gerry SIMPSON, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden, Boston: Martinus Nijhoff Publishers, 2011), 127 at 127; Sumedha CHOUDHURY, "Contextualising Radhabinod Pal's Dissenting Opinion in Contemporary International Criminal Law" (2021) 11 *Asian Journal of International Law* 223.

given that Justice Pal was “an outsider to international criminal law ... his visceral critique of the institutionalization of this system reveals the deep roots of third-world resistance”.<sup>3</sup> Justice Pal’s approximately 1200 page dissent is significant, especially as international criminal law continues to encounter staunch criticisms of its own Eurocentricity<sup>4</sup> and the reproduction of Western legal normativity.<sup>5</sup>

Third World Approaches to International Law (TWAIL) offers a central challenge to international law’s Eurocentricity. Broadly, TWAIL argues that international law is the handmaiden of colonialism and imperialism, which is built on racial hierarchies and double standards.<sup>6</sup> TWAIL scholars maintain that these architectures of exclusion persist in various locations and institutions, including settler colonial milieus.<sup>7</sup> While some TWAIL critiques of international criminal law may only have started in 2003,<sup>8</sup> there is nonetheless a concerted effort to expose this dynamic field’s “idealization of Western liberal criminal law fused with a transcendently utopian ethos”.<sup>9</sup> Asad Kiyani and other scholars have pushed to expose the double standards prevalent in the selection of international criminal cases<sup>10</sup> and various “operational selectivity” mechanisms of the International Criminal Court (ICC).<sup>11</sup> Other TWAIL scholars have challenged the ways in which post-colonial states have deployed the ICC as a means to “redefine” their internal armed conflict.<sup>12</sup> Vasuki Nesiiah astutely argued that local voices are used by international criminal institutions to justify their pursuits of international justice.<sup>13</sup> In this expanding body of scholarly engagement,<sup>14</sup> the focus is on the more recent international criminal

<sup>3</sup> Rohini SEN and Rashmi RAMAN, “Retelling Radha Binod Pal: The Outsider and The Native” in Frédéric MÉGRET and Immi TALLGREN, eds., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge: Cambridge University Press, 2020), 230 at 233.

<sup>4</sup> Asad KIYANI, John REYNOLDS, and Sujith XAVIER, “Foreword” (2016) 14 *Journal of International Criminal Justice* 915, 915–20; John REYNOLDS and Sujith XAVIER, “The Dark Corners of the World: TWAIL and International Criminal Justice” (2016) 14 *Journal of International Criminal Justice* 959; Obiora Chinedu OKAFOR and Uchekukwu NGWABA, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections” (2015) 9 *International Journal of Transitional Justice* 90; Choudhury, *supra* note 2.

<sup>5</sup> See for example, Sujith XAVIER, “Theorising Global Governance Inside Out: A Response to Professor Ladeur” (2012) 3 *Transnational Legal Theory* 268.

<sup>6</sup> Makau MUTUA, “What is TWAIL” (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31.

<sup>7</sup> Antony ANGHIE, “Foreword: Welcoming the TWAIL Review” (2020) 1 *Third World Approaches to International Law Review* 1 at 2; Sujith XAVIER and Jeffery G HEWITT, “Introduction: Decolonizing Law in the Global North and South: Expanding the Circle” in Sujith XAVIER, Beverly JACOBS, Valarie WABOOSE, Jeffery G. HEWITT, and Amar BHATIA, eds., *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (Milton: Taylor & Francis Group, 2021), 1.

<sup>8</sup> Antony ANGHIE and B. S. CHIMNI, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2 *Chinese Journal of International Law* 77.

<sup>9</sup> Asad G. KIYANI, “Third World Approaches to International Criminal Law” (2015) 109 *American Journal of International Law Unbound* 255 at 255.

<sup>10</sup> Asad KIYANI, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity” (2016) 14 *Journal of International Criminal Justice* 939.

<sup>11</sup> Reynolds and Xavier, *supra* note 4.

<sup>12</sup> Parvathi MENON, “Self-Referring to the International Criminal Court: A Continuation of War by Other Means” (2015) 109 *American Journal of International Law Unbound* 260.

<sup>13</sup> Vasuki NESIAH, “Local Ownership of Global Governance” (2016) 14 *Journal of International Criminal Justice* 985.

<sup>14</sup> Victor KATTAN, “Palestinian Scholarship and the International Criminal Court’s Blind Spot” *Third World Approaches to International Law Review* (20 February 2020), online: TWAILR <<https://twailr.com/palestinian-scholarship-and-the-international-criminal-courts-blind-spot/>>; Noura ERAKAT and John REYNOLDS, “We Charge Apartheid? Palestine and the International Criminal Court” *TWAILR* (20 April 2021), online: TWAILR <<https://twailr.com/we-charge-apartheid-palestine-and-the-international-criminal-court/>>.

institutions and on broad conceptual concerns that examine the application of the doctrines of international criminal law,<sup>15</sup> the histories of international criminal law,<sup>16</sup> and institutional practices.<sup>17</sup> Precursors of TWAIL's animating ethos however can be found much earlier in the dissenting views of Justice Pal. To this point, James Gathii characterized Justice Pal's dissent "as building on resistance towards projections of both metropolitan power and authority over third world peoples".<sup>18</sup> TWAIL scholars writing about international criminal law have also taken note of the "TWAIL sensibility" of Justice Pal's dissent.<sup>19</sup>

In this paper, I seek to contribute to this field by bringing forward the continued relevance of Justice Pal's dissenting reasons in the prosecution of Japanese war criminals by the Tokyo Tribunal in 1948.<sup>20</sup> This paper moves beyond the conceptual and institutional TWAIL critiques of international criminal law. In particular, the central purpose is to bring forward Justice Pal's largely ignored views on the Rules of Procedure of the Tokyo Tribunal (Tokyo Tribunal Rules) and the Tokyo Tribunal's evidentiary rules as set out in Article 13 of Tokyo Tribunal Charter.<sup>21</sup> It is part of a TWAIL based effort to scrutinize the everyday practices of international prosecutions through the various rules of evidence and procedure.<sup>22</sup> In this vein, I examine the recently completed work of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and their respective rules of evidence and procedure to illustrate the continued importance of Justice Pal's dissent.

In the first section of this paper, Justice Pal's reasoning is located and situated within the broader academic literature on dissents in international law and, in particular, international criminal law. This discussion will illustrate how and why Justice Pal's reasons have been obscured, both as a useful dissent and as a site of scholarly engagement. I then locate Justice Pal's perspective within the earlier precursors to TWAIL, or what is

<sup>15</sup> Asad G. KIYANI, "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 Chinese Journal of International Law 467; Christopher GEVERS, "Prosecuting the Crime Against Humanity of Apartheid: Never, Again" (2018) African Yearbook of International Humanitarian Law (forthcoming), online: <[https://www.academia.edu/39736593/Prosecuting\\_the\\_Crime\\_Against\\_Humanity\\_of\\_Apartheid\\_Never\\_Again](https://www.academia.edu/39736593/Prosecuting_the_Crime_Against_Humanity_of_Apartheid_Never_Again)>.

<sup>16</sup> Vasuki NESIAH, "The Law of Humanity Has a Canon: Translating Racialized World Order into 'Colorblind' Law" *PoLAR: Political and Legal Anthropology Review* (15 November 2020), online: *PoLAR: Political and Legal Anthropology Review* <<https://polarjournal.org/2020/11/15/the-law-of-humanity-has-a-canon-translating-racialized-world-order-into-colorblind-law/>>.

<sup>17</sup> Nesiiah, "Local Ownership of Global Governance", *supra* note 13.

<sup>18</sup> James T. GATHII, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3 Trade Law and Development 26 at 35; Elizabeth Koppleman recognized Justice Pal as a "[p]recursor to Third World Perspectives on International Law" in 1990, see Elizabeth S KOPELMAN, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial" (1990) 23 New York University Journal of International Law and Politics 373 at 428.

<sup>19</sup> Kiyani, Reynolds, and Xavier, *supra* note 4 at 918.

<sup>20</sup> While there are different available versions of Justice Pal's dissent, for ease of reference, I have relied on Boister and Cryer's compilation of the documents of the Tokyo Tribunal; "Judgment of The Hon'ble Mr. Justice Pal, Member from India" in *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (New York: Oxford University Press, 2008), 809 [Judgment of Justice Pal]; for a recent intervention arguing for the continued relevance of Justice Pal for international criminal law, see Choudhury, *supra* note 2.

<sup>21</sup> "Rules of Procedure of the International Military Tribunal for the Far East (25 April 1946)" in Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 12 [Tokyo Tribunal Rules]; "Charter of the International Military Tribunal for the Far East (as amended 26 April 1946)" in Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 7 [Tokyo Tribunal Charter].

<sup>22</sup> Sujith XAVIER, "Learning from Below: Theorising Global Governance through Ethnographies and Critical Reflections from the Global South" (2017) 33 Windsor Yearbook of Access to Justice 229.

now characterized as TWAIL I scholarship, to contextualize his views. The second section of this paper pursues Justice Pal's legacy as it relates to the rules of evidence and procedure in subsequent international criminal tribunals. This section first traces the evolution of the judicial power to draft and amend the rules of evidence and procedure from the Nuremberg and Tokyo Tribunals, and then examines the impact of this judicial power on the everyday functions of the ICTY and ICTR and how they determined truth. The ICTY and ICTR are two examples of the international community arriving at international "justice" through the United Nations Security Council where the ICC may not have the requisite jurisdiction.<sup>23</sup> More importantly, while some of the challenges raised in this section of the paper about the rules of evidence and procedure may be applicable to the ICC and other international criminal institutions like the Special Court for Sierra Leone, I focus my analysis on the Tokyo Tribunal, ICTY, and ICTR. The final section concludes.

Throughout this project, I have remained uncertain that the victims of mass violence can seek redress through some form of international criminal justice beyond the reach of the ICC in situations like Syria, Myanmar, and Sri Lanka.<sup>24</sup> When and if the international community does create an ad hoc tribunal (or something similar), greater attention must be had to the construction and amendment of the various evidentiary and procedural rules. While I remain hopeful in revisiting the work of Justice Pal, I cannot ignore the recent challenges to Western notions of justice, punishment, and the carceral state, wrought on by social movements like "Movements for Black Lives" and "Idle No More".<sup>25</sup>

## I. Locating Justice Pal's Radical Dissent: Context and Reception

A special proclamation by General Douglas MacArthur created the Tokyo Tribunal based on the Allies' declarations and the instrument of Japanese surrender.<sup>26</sup> The Tokyo Tribunal Charter and the Tokyo Tribunal Rules were "approved and issued" by General MacArthur. These rules were modelled on Nuremberg, and they set out the jurisdiction, the applicable crimes, and other necessary components of Western based adjudicatory processes.<sup>27</sup> General MacArthur more or less "rubber stamped" the appointment of eleven judges from the allied nations, including three judges from "Asiatic" countries in the

<sup>23</sup> See for example Sujith XAVIER, "Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?" in Amarnath AMARASINGAM and Daniel BASS, eds., *Sri Lanka: The Struggle for Peace in the Aftermath of War* (London: Hurst Publication, 2015), 53; Stephanie NEBEHAY, "Step Up Trials of Alleged Syrian War criminals, U.N. Rights Chief Says" *Reuters* (11 March 2021), online: Reuters <<https://www.reuters.com/article/us-syria-security-anniversary-un-idUSKBN2B31D2>>.

<sup>24</sup> For an excellent critique of the hopefulness in TWAIL, see Asad G. KIYANI, "Afghanistan & the Surrender of International Criminal Justice" *TWAILR* (16 September 2019), online: TWAILR <<https://twailr.com/afghanistan-the-surrender-of-international-criminal-justice/>>. See also Karin MICKELSON, "Hope in a TWAIL Register" (2020) 1 *Third World Approaches to International Law Review* 14, online: TWAILR <<https://twailr.com/wp-content/uploads/2020/11/Mickelson-Hope-in-a-TWAIL-Register.pdf>>.

<sup>25</sup> On western notions of justice, see Sylvia McADAM, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Saskatoon: Purich Publishing Limited, 2015); on justice, punishment and carceral state, see Ruth W. GILMORE, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (California: University of California Press, 2007); Rinaldo WALCOTT, *On Property: Policing, Prisons, and the Call for Abolition* (Windsor: Biblioasis, 2021).

<sup>26</sup> For an in-depth discussion of the Allies reasons for prosecution, including the various legal instruments, see Boister and Cryer, "Introduction" *supra* note 2 at xxxv; Johannes FUCHS and Flavia LATTANZI, "International Military Tribunals" in *Max Planck Encyclopedias of International Law* (New York: Oxford University Press, 2007), 27 at para. 13.

<sup>27</sup> See generally Yuma TOTANI, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2008) at 24–32; the Charter was based on a policy document drafted by the State-War-Navy Coordinating Committee and presented to the Allied governments in mid-October 1945; Fuchs and Lattanzi, *supra* note 26 at para. 21.

Global South.<sup>28</sup> The indictment against the twenty-eight accused major war criminals was deposited with the Tribunal on 29 April 1946, and the trial quickly commenced on 3 May 1946.<sup>29</sup> As a condition of surrender, the Japanese Emperor was not prosecuted.<sup>30</sup> The twenty-eight accused persons were indicted on charges related to crimes against peace, war crimes, and crimes against humanity, as set out in the Tokyo Tribunal Charter, comprising of “fifty-five counts grouped into three categories”.<sup>31</sup>

Two and half years later, having heard 419 witness testimonies and reviewed 4335 exhibits and 779 witness affidavits, the Tribunal rendered its majority decision on 4 November 1948.<sup>32</sup> It was not a unanimous decision, as previously hoped. Justice Bernard (from France) and Justice Pal dissented, Justice Röling of Netherlands partially dissented, the President of the Tribunal, Justice Webb of Australia, issued a separate opinion, and Justice Jaranilla of the newly independent Commonwealth of the Philippines issued a concurring opinion.<sup>33</sup> Justice Jaranilla was in a unique position as he was a victim of the Japanese violence and viewed the prosecution and punishment of Japanese from a drastically different perspective than Justice Pal.<sup>34</sup> Justice Cramer of the United States took control of the “seven member majority drafting committee” and Justice Webb’s influence on the majority decision remains uncertain.<sup>35</sup>

There was intrigue and drama in drafting the majority decision, where Justice Webb objected to the role of the military assistants, which Justice Cramer proposed. Justice Webb did not approve of the use of capital punishment either.<sup>36</sup> In the end, General MacArthur confirmed the Tribunal’s decision to sentence seven of the accused to death,<sup>37</sup> and the remaining were given varying prison sentences.<sup>38</sup> The defence counsel nonetheless sought to appeal to the Supreme Court of the United States. The Supreme Court, however, declined to grant leave on the grounds that it lacked jurisdiction.

<sup>28</sup> Nine judges hailed from the signatory states to the Japanese Surrender from Australia, Canada, China, France, New Zealand, the Netherlands, the United Kingdom, the United States, and the Soviet Union and two remaining judges were from former colonies of India and Philippines.

<sup>29</sup> Boister and Cryer, *supra* note 2 at lix.

<sup>30</sup> It was believed that the emperor would ultimately face the will of his people, see: Yoriko OTOMO, “The Decision Not to Prosecute the Emperor” in Yuki TANAKA, Tim McCORMACK, and Gerry SIMPSON, eds., *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Leiden, Boston: Martinus Nijhoff Publishers, 2011), 63. See also Totani, *supra* note 27 at 43–62. Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008) at 21.

<sup>31</sup> Indictments were filed against twenty-eight accused, but two died during the proceedings and Shumei Okawa was discharged for mental health reasons, see: Judgment of Justice Pal, *supra* note 20 at 811 para. 2. Another accused was admitted to a psychiatric facility, see: Robert CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005) at 42.

<sup>32</sup> Boister and Cryer, *supra* note 2 at lix.

<sup>33</sup> *Ibid.* at lxix–lxx.

<sup>34</sup> “Concurring Opinion by the Honourable Mr. Justice Delfin Jaranilla, Member from the Republic of the Philippines” in Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 642. See also Kopelman, *supra* note 18 at 391.

<sup>35</sup> Boister and Cryer, *supra* note 2 at lxxviii.

<sup>36</sup> Justice Webb is noted as remarking “[i]t may prove revolting to hang or shoot such old men”, see: *ibid.* at lxxv; see also the recent dramatization of *The Tokyo Trial*, 2016, Netflix app, (Tokyo: NHK; Amsterdam: FATT Productions; Toronto: Don Cormandy Television, 2016), online (video): <<https://www.netflix.com/title/80091880>>.

<sup>37</sup> Fujita HAISAKAZU, “The Tokyo Trial: Humanity’s Justice v Victors’ Justice” in Yuki TANAKA, Tim McCORMACK, and Gerry SIMPSON, eds., *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Leiden, Boston: Martinus Nijhoff Publishers, 2011), 3 at 8.

<sup>38</sup> Boister and Cryer, *supra* note 2 at lxxxii.

Notably, there was an important dissent by Justice Douglas of the Supreme Court of the United States.<sup>39</sup>

Of the three full and partial dissenting opinions of the Tokyo Tribunal, Justice Pal's reasons outlined the problem with Western universalism embedded within the majority decision.<sup>40</sup> This led Justice Pal to conclude that the "accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges".<sup>41</sup> He viewed the prosecution of the Japanese accused as an act of "vindictive retaliation" and an exercise in victors' justice.<sup>42</sup> For Justice Pal, the American exemption from prosecution for the atomic bombing of Japan, general colonial aggression, and territorial annexation by the Allies rendered any attempts to punish the Japanese as vindictive retaliation. More importantly, he was highly critical of the decision to mandate the Tribunal to prosecute undefined and retroactive crimes.<sup>43</sup> When it was time to render the judgment, Justice Pal's request to read out his dissent was denied.<sup>44</sup> Yet the "US censors[]" [attempts] to suppress the dissenting judgment" were not successful and the "existence of the split was revealed" to the Japanese people.<sup>45</sup> The dissent, however, was still not published along with the judgment,<sup>46</sup> and only resurfaced a few years later.

In this section, I will first contextualize Justice Pal's view within the burgeoning literature on dissents in international law. I offer this discussion to demonstrate how the rediscovery of the Tokyo Tribunal and Justice Pal's dissent is unusual, even within international criminal law. Said another way, even though there is a recognized practice of engaging with dissenting views of international judges, the field of international criminal law has obscured the relevance of Justice Pal's dissent. To reinforce this point, I will explore the curious characterization of Justice Pal's dissent by both academic and non-academic commentary within international criminal law after the rediscovery of the Tokyo Tribunal some forty-five years later. I will then juxtapose how scholars with a Third World sensibility have sought to recover Justice Pal's dissent, notwithstanding its exclusion by mainstream and critical international criminal law scholars. While it is important to recover Justice Pal, it is also worthwhile to point out some of the challenges embedded within his reasons. In this vein, I locate Justice Pal as part of the "first generation of post-colonial international lawyers" and I illustrate the importance of Justice Pal for TWAIL in the context of international criminal law, albeit while taking note of the controversies in his dissent.<sup>47</sup>

### A. Locating Justice Pal's Decision among Dissents in International Law and International Criminal Law

Dissents play a crucial role in charting the future of legal normativity within specific fields of law in national jurisdictions.<sup>48</sup> There is no universal practice of including dissenting

<sup>39</sup> For a discussion on *Hirota*, see: Stephen I VLADECK, "Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III" (2007) 95 *Georgetown Law Journal* 1497; *Hirota v. MacArthur*, 338 U.S. 197 (1948).

<sup>40</sup> Kopelman, *supra* note 18 at 403.

<sup>41</sup> Judgment of Justice Pal, *supra* note 20 at 1422 para. 1226.

<sup>42</sup> *Ibid.* at 829–30, para. 1233.

<sup>43</sup> *Ibid.* at 829, para. 42; Justice Pal states: "To say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at his will, it will [...] find itself back on the same spot whence it started on its apparently onward journey several centuries ago."

<sup>44</sup> Boister and Cryer, *supra* note 2 at lxix.

<sup>45</sup> *Ibid.*

<sup>46</sup> Gerry SIMPSON, "Writing the Tokyo Trial" in Yuki TANAKA, Tim McCORMACK, and Gerry SIMPSON, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden, Boston: Martinus Nijhoff Publishers, 2011), 23 at 27.

<sup>47</sup> Anghie and Chimni, *supra* note 8 at 79.

<sup>48</sup> See, for example, Ruth Bader GINSBURG, "Remarks on Writing Separately" (1990) 65 *Washington Law Review* 133.

views in international courts and tribunals<sup>49</sup> and, subsequently, there is no consensus on their usefulness.<sup>50</sup> Some international and regional courts allow dissents while others do not. For instance, the European Court of Justice does not disclose the judicial voting records, while the International Court of Justice and other courts have a significant history of dissents.<sup>51</sup> There is a fascinating history of the politics of dissents reaching as far back as the debates on creating the Permanent International Court of Justice.<sup>52</sup> This prompted R.P Anand to reflect on the necessity of allowing international judges to dissent, given the complex, “imprecise, fragmentary, uncertain and controversial” nature of international law.<sup>53</sup> Importantly, Anand suggested:<sup>54</sup>

There is no use suppressing these differences. When judges do not agree, it is a sign that they are dealing with subjects on which society itself is divided. It is the democratic way to express dissident views. The right to speak is the ‘fortress of the personality of the free judge’ and that is the reason judges attach greatest importance to this sacred right. Judges should be honoured rather than criticised for following that tradition and proclaiming their differences so that all may read.

Within international criminal law, dissents can be deployed for a variety of purposes. Sometimes described as the “paradox of dissent”, the politics of dissents of international criminal courts and tribunals oscillate between maintaining the legitimacy of an institution to promoting judicial dialogue.<sup>55</sup> Dissents can be straightforward disagreements with the majority’s view on a specific doctrine. In exceptional circumstances, dissents can take on a fundamental character.<sup>56</sup> Building on these typologies, some dissents within the international criminal law jurisprudence are “radical” in nature.<sup>57</sup> A radical dissent<sup>58</sup>

is one that critiques the authorized version of the historical, political and cultural portrait set up by the trial and creates a civic space for counter-narratives to emerge and challenge the idiom in which the majority judgment speaks and which it takes as a given.

Justice Pal’s “radical” dissent is significant because it examined the retroactive application of the prohibition of war crimes, the double standards in prosecuting the Japanese, and the legacies of colonialism and imperialism in the guise of universal prosecution of various crimes by the Japanese.<sup>59</sup> In this manner, the dissent challenged the authorized

<sup>49</sup> Donald R. SONGER, John SZMER, and Susan W. JOHNSON, “Explaining Dissent on the Supreme Court of Canada” (2011) 44 *Canadian Journal of Political Science* 389.

<sup>50</sup> R.P. ANAND, “The Role of Individual and Dissenting Opinions in International Adjudication” (1965) 14 *International and Comparative Law Quarterly* 788; Neha JAIN, “Radical Dissents in International Criminal Trials” (2017) 28 *European Journal of International Law* 1163; Jeffrey L. DUNOFF and Mark A. POLLACK, “International Judicial Practices: Opening the Black Box of International Courts” (2018) 40 *Michigan Journal of International Law* 47.

<sup>51</sup> Dunoff and Pollack, *supra* note 50 at 81–6, 89–101.

<sup>52</sup> Anand, *supra* note 50 at 804–5.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 805.

<sup>55</sup> Hemi MISTRY, “The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice” (2015) 13 *Journal of International Criminal Justice* 449; Dunoff and Pollack, *supra* note 50 at 89–101.

<sup>56</sup> For a greater exposition of the distinction between the different types of dissents, see Jain, *supra* note 50 at 1169–72.

<sup>57</sup> Kopelman, *supra* note 18 at 373; Jain, *supra* note 50.

<sup>58</sup> Jain, *supra* note 50 at 1170.

<sup>59</sup> Kopelman, *supra* note 18 at 376.

version of the “historical, political, and cultural” image that the Americans sought to generate with the prosecution of the Japanese war criminals.<sup>60</sup> More importantly, when placed within the literature, it is not at all surprising that Justice Pal’s dissent (or the Tokyo Tribunal’s decision for that matter) was not studied with the same eagerness as the Nuremberg decisions, especially when the international community was grappling with the genocides in the former Yugoslavia and Rwanda.<sup>61</sup> The dissent’s challenge to Western universalism of international criminal law invites open questions about the field’s very core. This challenge, coupled with Justice Pal’s Global South “otherness”, makes it easy for Western scholars writing about international accountability in the “dark corners” of world to dismiss this dissent and relegate it to annals of history.<sup>62</sup>

### B. Scholarly Reception of Justice Pal’s Dissent

Justice Pal’s critique of international criminal law has only recently been academically scrutinized.<sup>63</sup> There was a return to the Tokyo Tribunal by international criminal law scholars, political scientists, and historians in the 1990s,<sup>64</sup> where some attention focused on the dissenting views of the judges of the Tokyo Tribunal, especially by scholars with close ties to the Global South.<sup>65</sup> While the return to the Tribunal’s judgment can be viewed as an attempt to recover significant insights from the past, there has yet to be a complete reckoning with the arguments set out in Justice Pal’s dissent by international criminal law scholars and practitioners.<sup>66</sup>

Rather, the dissent has sparked varying levels of academic and non-academic dismissal.<sup>67</sup> For example, Justice Pal’s scathing assessment of the Tribunal, in excess of 1200 pages, was characterized as “almost schizophrenic”.<sup>68</sup> Surprisingly, he was described as the “world’s first mystic positivist” by a leading Western international criminal law scholar.<sup>69</sup> It is true that there are problematic moments within Justice Pal’s dissent and, in this vein, some commentary has focused on Justice Pal’s unfortunate use of quotes from “the slaver Jefferson Davis” in his conclusion.<sup>70</sup> Others have rightly picked up Justice

<sup>60</sup> Jain, *supra* note 50 at 1170.

<sup>61</sup> For an exception, see Kopelman, *supra* note 18.

<sup>62</sup> Reynolds and Xavier, *supra* note 4.

<sup>63</sup> Takeshi, *supra* note 2 at 127–44. Simpson, *supra* note 46 at 27–29; for an extensive engagement with Justice Pal’s dissent, see Boister and Cryer, *supra* note 30.

<sup>64</sup> Richard H. MINEAR, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971); Kopelman, *supra* note 18; Guido SAMARANI, Article Review of “Tokyo Judgement and the Rape of Nanking” by Timothy BROOK, (2002) 20 *Revue Bibliographique de Sinologie* 174; Madoka FUTAMURA, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (London: Taylor & Francis Group, 2007); Totani, *supra* note 27 at 224–45; Tanaka, McCormack, and Simpson, *supra* note 2; Boister and Cryer, *supra* note 30.

<sup>65</sup> Ashis NANDY, “The Other Within: The Strange Case of Radhabinod Pal’s Judgment on Culpability” (1992) 23 *New Literary History* 45; Melinda BANERJEE, “Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal’s Tokyo Judgment in Light of his ‘Indian’ Legal Philosophy” in Wui Ling CHEAH, Tianying SONG, and Ping YI, eds., *Historical Origins of International Criminal Law* (Brussels: Torkel Opsahl Academic EPublisher, 2014), 64; Latha VARADARAJAN, “The Trials of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal” (2015) 21 *European Journal of International Relations* 793; Sen and Raman, *supra* note 3.

<sup>66</sup> Boister and Cryer, *supra* note 30 at 176–204.

<sup>67</sup> Totani, *supra* note 27 at 224–39; Mark A. DRUMBL, “Memorializing Dissent: Justice Pal in Tokyo” (2020) 114 *American Journal of International Law Unbound* 111; Mark A. DRUMBL “Judge Pal with Jefferson Davis in Tokyo” *Opinio Juris* (23 March 2019), online: <http://opiniojuris.org/2019/03/23/judge-pal-with-jefferson-davis-in-tokyo/>.

<sup>68</sup> Kopelman, *supra* note 18 at 378.

<sup>69</sup> Simpson, *supra* note 46 at 27.

<sup>70</sup> Drumbl, *supra* note 67.



Pal's "unforgiveable" and "irresponsible" dismissal of the severity of the "reports of the Rape of Nanking (Nanjing)"<sup>71</sup> and the more general dismissal of Japanese violence and its effects on innocent civilians.

The sanist ("almost schizophrenic")<sup>72</sup> and racially charged ("mystic")<sup>73</sup> references are part of the larger trend prevalent within international criminal law and other fields of public law.<sup>74</sup> TWAIL scholars have pointed to this larger trend endemic within the field of international criminal law, especially in the context of race<sup>75</sup> and voice.<sup>76</sup> From a different point of view, Obi Okafor identified similar trends in the construction of knowledge in the context of United Nations human rights commissions, where expertise travels in a single direction from the North to South, causing a "one way traffic paradigm".<sup>77</sup> Okafor's reflection is particularly salient and helps to rationalize why Justice Pal's dissent was not studied, while Justice Röling's was.<sup>78</sup> These features of international law broadly prompted Makau Mutua to reflect on the construction of the "savage" worthy of being saved in 2001.<sup>79</sup> These are not unique features to international law, rather they are part of a larger form of "false western universalism"<sup>80</sup> that perpetuate what Antony Anghie has characterized as the "dynamics of difference".<sup>81</sup>

The construction of Justice Pal as mentally ill or someone of the occult, coupled with his own promotion of prominent white supremacists like Jefferson Davies and the negation of the lived experiences of the victims of the Japanese, then worked to assiduously dispossess his radical claims set out in the dissent.<sup>82</sup> Justice Pal's pro-Japanese sympathies and his overt support of these movements during the post-War period did not help

<sup>71</sup> Banerjee, *supra* note 65 at 37.

<sup>72</sup> Sonia MEERAI, Idil ABDILLAHI, and Jennifer POOLE, "An Introduction to Anti-Black Sanism" (2016) 5 *Intersectionalities: A Global Journal of Social Work Analysis, Research, Polity, and Practice* 18.

<sup>73</sup> Daniel SOLÓRZANO, "Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students" (2000) 69 *Journal of Negro Education* 60.

<sup>74</sup> Richard DELGADO, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want Minority Critiques of the Critical Legal Studies Movement" (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 301.

<sup>75</sup> Souheir EDELBI, "Making Race Speakable in International Criminal Law: Review of Lingaas' *The Concept of Race in International Criminal Law*" *TWAILR* (14 April 2020), online: *TWAILR* <<https://twailr.com/making-race-speakable-in-international-criminal-law-review-of-lingaas-the-concept-of-race-in-international-criminal-law-%e2%80%a8/>>.

<sup>76</sup> Kattan, *supra* note 14.

<sup>77</sup> Obiora OKAFOR, "International Human Rights Fact-Finding Praxis: A TWAIL Perspective" in Philip ALSTON and Sarah KNUCKEY, eds., *The Transformation of Human Rights Fact-Finding* (Oxford: Oxford University Press, 2015), 49 at 54.

<sup>78</sup> Robert CRYER, "Röling in Tokyo: A Dignified Dissenter" (2010) 8 *Journal of International Criminal Justice* 1109. Antonio CASSESE and Bert ROLLING, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (London: Polity, 1994).

<sup>79</sup> Makau MUTUA, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201.

<sup>80</sup> Sujith XAVIER, "False Universalism of Global Governance Theories: Global Constitutionalism, Global Administrative Law, International Criminal Institutions and the Global South", Osgoode Hall Law School, PhD Thesis, 2015 at 353.

<sup>81</sup> Antony ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

<sup>82</sup> I remain ambivalent about Justice Pal and his dissent, particularly because of what seems like a disavowal of the lived experiences of the victims of the Japanese in dissent and the promotion of white supremacists like Jefferson Davies. Even though new understandings of the analogous nature of caste and anti-black racism is available, I am unable to reconcile how Justice Pal could advocate for racial equality all the while electing to conclude his dissent with the words of a known white supremacist. These incongruous positions require further study of the dissent and Justice Pal's perspectives. George Galindo's discussion on anachronism is useful in this instance. See George R.B. GALDINO, "Splitting TWAIL?" (2016) 33 *Windsor Yearbook of Access to Justice* 37 at 44–8.

either.<sup>83</sup> By “disinheriting” Justice Pal, his dissent was not able to gain any traction to become part of the larger critique of the universalism of international criminal law.<sup>84</sup>

A handful of scholars, with a Third World sensibility, view the dissent as a “fly in the ointment of the post-Second World War efforts at institutionalizing international justice”.<sup>85</sup> More recently, some have characterized Justice Pal’s dissent as “deeply suspicious of this utopian state of order ...”.<sup>86</sup> The most interesting examinations of his dissent have focused on his Third World perspective and animosity towards Western universalism. For example, Adil Hasan Khan has characterized Justice Pal as deeply suspicious of universal creeds and truths: “Pal demonstrated a ‘tragic ethos’ in his persistent suspicion of assertions of a ‘universal’ ‘international community’ in whose name a ‘new’ truly ‘universal’ international law was sought to be authorized.”<sup>87</sup> Yet, what is missing from these types of critical engagement is a robust discussion of where to place Justice Pal’s views within TWAIL. To locate his views, it is important to examine the history of TWAIL.

Antony Anghie and Bhupinder Chimni have suggested that TWAIL has transformed over time, and they have chronicled this evolution through two stages.<sup>88</sup> While recognizing the challenges of anachronism and the progress narrative built into this type of periodization,<sup>89</sup> the first generation of international lawyers and scholars grappling with the realities of newly independent former colonies were gathered under the moniker of “TWAIL I”. The second generation of TWAIL scholars have sought to follow in the footsteps of TWAIL I, all the while building new ground. More recently, Karin Mickelson has pointed to the emergence of a third wave of TWAIL scholars and beyond.<sup>90</sup>

International law scholars like Georges Abi-Saab, F. Garcia-Amador, R.P. Anand, Mohammed Bedjaoui, and Taslim O. Elias were important figures in TWAIL I, where the impetus was to deploy international law as an emancipatory tool for the betterment of Third World peoples.<sup>91</sup> Under the rubric of TWAIL I, even though nineteenth century international law was used to exclude non-Europeans, there was a firm belief that international law was part of the fabric of Third World societies. It was believed that international law’s power could be harnessed for good. Importantly, there was an emphasis on the sovereign equality of nations, underscored by the firm belief in international law. TWAIL II scholars, while travelling on the same path, elected to break new ground by developing “powerful critiques of the Third World nation-state, of the processes of its formation and its resort to violence and authoritarianism”.<sup>92</sup> By looking at the theory and doctrines of international law, scholars writing in this vein sought to clearly demarcate the racial hierarchy’s endemic nature within international law, placing an emphasis on the lived experiences of the peoples of the Global South.<sup>93</sup> More importantly, by using history, they sought to connect international law to its civilizing mission and its colonial

<sup>83</sup> Totani, *supra* note 27 at 224–39; see also Takeshi, *supra* note 2.

<sup>84</sup> Prabhakar SINGH, “Reading RP Anand in the Post-Colony: Between Resistance and Appropriation” in Jochen von BERNSTORFF and Philipp DANN, eds., *The Battle for International Law in the Decolonization Era* (Oxford: Oxford University Press, 2019), 297 at 305.

<sup>85</sup> Varadarajan, *supra* note 65 at 794.

<sup>86</sup> Sen and Raman, *supra* note 3 at 232.

<sup>87</sup> Adil Hasan KHAN, “Inheriting a Tragic Ethos: Learning from Radhabinod Pal” (2016) 110 *American Journal of International Law Unbound* 25 at 26.

<sup>88</sup> Anghie and Chimni, *supra* note 8 at 79–80.

<sup>89</sup> Galdino, *supra* note 82.

<sup>90</sup> Mickelson, *supra* note 24; for a similar earlier framing, see Madhav KHOSLA, “The TWAIL Discourse: The Emergence of a New Phase” (2007) 9 *International Community Law Review* 291.

<sup>91</sup> Anghie and Chimni, *supra* note 8 at 79.

<sup>92</sup> *Ibid.* at 83.

<sup>93</sup> Galdino, *supra* note 82 at 42–3.

past.<sup>94</sup> The next generation of TWAIL scholars are pushing further ground and are making “sweeping indictment(s) of international law”,<sup>95</sup> all the while building bridges between marginalized communities through “praxis of place”, for example.<sup>96</sup>

Justice Pal’s dissent then can be situated within the first group of international law jurists. In coming to his conclusion of not guilty, there are two central themes that scaffold Justice Pal’s dissenting view. The first is the double standards of the decision to prosecute, indict, and ultimately find culpable Japanese officials.<sup>97</sup> The second is the pure politics of victors’ justice.<sup>98</sup> The former theme manifests throughout his reasons with repeated references to colonial endeavours of the Allies, and how they, in fact, engaged in aggressive war in various parts of the world, before and during the Second World War. These forms of violence were clearly overlooked, while the Japanese were prosecuted. The second interrelated theme of victors’ justice is littered throughout Justice Pal’s dissent with references to the atrocities arising out of the use of the atomic bombs on Hiroshima and Nagasaki. These themes work to assiduously expose the double standards of the charges laid against the Japanese. They are scaffolded throughout the analysis in setting out the problems with the competency of the established Tribunal and the meaning and scope of the law that the judges sought to apply. In pursuing the legality of Japan’s conduct, Justice Pal deploys various opinions of legal experts ranging from Manley Hudson, Hans Kelsen, Hersch Lauterpacht, Aron Trainin, and others to parse through the veracity of the prosecution’s case against the accused. Throughout his analysis, there are robust discussions on, for instance, individual criminal responsibility<sup>99</sup> and customary international law,<sup>100</sup> all the while gesturing to the possibility of a future in which international law can be emancipatory.

Justice Pal’s dissent is predicated on the sovereign equality of Japan and its conduct within the then existing framework of international law that he sought to apply. The dissent falls squarely within the first generation of TWAIL scholars. By locating the dissent in this context, some of the fault lines within Justice Pal’s thinking become easier to trace, and place as well. More importantly, doing so allows for a fuller nuancing of Justice Pal’s decision where we can identify some of the commonalities, all the while troubling the

<sup>94</sup> *Ibid.*

<sup>95</sup> Mickelson, *supra* note 24.

<sup>96</sup> Sujith XAVIER, Amar BHATIA, Usha NATARAJAN, and John REYNOLDS, “Placing TWAIL Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access to Justice” (2016) 33 Windsor Yearbook of Access to Justice v at vii. See also Xavier, Jacobs, Waboose, Hewitt, and Bhatia, *supra* note 7.

<sup>97</sup> See for example Justice Pal’s discussion of “[w]hether the war of the alleged character became criminal in international law”; Judgment of Justice Pal, *supra* note 20 at 840 para. 69. In this discussion, Justice Pal notes, “[a]s to the ‘Widening sense of humanity’ prevailing in international life, all that I can say is that at least before the Second World War the powerful nations did not show any such sign. I would only refer to what happened at the meeting of the Committee drafting resolutions for the establishment of the League of Nations when Baron Makino of Japan moved a resolution for the declaration of the equality of nations as a basic principle of the League. Lord Robert Cecil of the Great Britain declared this to be a matter of highly controversial character and opposed the resolution on the ground that it “raised extremely serious problems within the British Empire”. The resolution was declared lost: President Wilson ruled that in view of the serious objections on the part of some it was not carried.” Judgment of Justice Pal, *supra* note 20 at 867 para. 137; see also Neil BOISTER and Robert CRYER, “International Military Tribunal for the Far East, (*United States et al. v. Araki Sadao et al.*)-Majority Judgment” in Neil BOISTER and Robert CRYER, eds., *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008) at 71–639 paras. 48414–49858.

<sup>98</sup> Judgment of Justice Pal, *supra* note 20 at 835 para. 57, 838 para. 64, 913 para. 246, and 916 paras. 251a–b.

<sup>99</sup> *Ibid.* at 874–85 paras. 154–79; see also Choudhury, *supra* note 2.

<sup>100</sup> *Ibid.* at 885–904 paras. 179–225.

erasures of, for example, the lived experiences of the victims and the problematic, questionable, and racist citational practices.<sup>101</sup>

In the next section, I take up Justice Pal's unique perspective on institutional powers granted to the judges of the Tokyo Tribunal to amend the rules of evidence and procedure. By focusing on the relevant sections on proceduralism and evidence in his reasons, I will exemplify the dangers of othering his radical dissent, further cementing my argument that Justice Pal remains a relevant figure in international criminal law.

## II. Enduring Legacies of Justice Pal's Conceptual Challenges: Judges' Quasi-Legislative Powers, Procedural Irregularities, and the Truth

Justice Pal's dissent is a complex multifaceted intervention that confronts central fault lines in the creation of the Tokyo Tribunal. Importantly, the dissent challenges the double standards and victors' justice in the reasoning of the majority decision. Similarly, TWAIL scholars have devoted much effort to exposing the embedded racial hierarchies and double standards in international law and international criminal law.<sup>102</sup> Double standards can be broadly characterized as the inconsistent application of international law. The themes of double standards and victors' justice that scaffold Justice Pal's dissent are prominently featured in TWAIL scholarship on international criminal law's theory, doctrine, and institutional design. For example, in 2003, Anghie and Chimni signalled to the double standards and victors' justice evident in how the ICTY and ICTR operate.<sup>103</sup> They first locate these two tribunals within the ongoing relationship between the Global North and the Global South and the civilizing mission that continues to structure this relationship. For them, this of course includes the role of international institutions in either promoting the conditions that led to the violence in the former Yugoslavia and Rwanda or the role of the international community in ignoring these conditions. Anghie and Chimni argue that "there must be a consistent and objective approach to initiatives directed towards establishing individual criminal responsibility".<sup>104</sup> They suggest that the lack of consistency, especially in the selectivity of cases, lead to the systemic reproduction of double standards and the confirmation that international criminal justice is selective justice, premised on North–South power dynamics.<sup>105</sup> More recently, other TWAIL scholars have pursued similar broad critiques of international criminal justice and its respective institutions. Some TWAIL scholars have explored the selectivity of prosecution in international criminal law and the "operational selectivity" in the ICC cases,<sup>106</sup> and are worried about the focus on the African war criminal to the exclusion of the Israeli and Sri Lankan Sinhala war criminals.<sup>107</sup>

<sup>101</sup> I borrow George Galindo's suggestion on how to present TWAIL's history, see Galdino, *supra* note 82 at 56.

<sup>102</sup> Mutua, *supra* note 6; James Thuo GATHII, "The Agenda of Third World Approaches to International Law (TWAIL)" SSRN (2018), online: SSRN <<https://ssrn.com/abstract=3304767>>; Mainstream and critical scholars have also pointed to the double standards in international criminal law, see: Gabriel M. LENTNER, "The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism" (2020) 20 International Criminal Law Review 251, and Wolfgang KALECK, *Double Standards: International Criminal Law and the West*, FICHL Publication Series No. 26 (Brussels: Torkel Opsahl Academic EPublisher, 2015). For an excellent discussion of the Tu Quoque Defence, see Katerina BORRELLI, "Between Show-Trials and Utopia: A Study of the Tu Quoque Defence" (2019) 32 Leiden Journal of International Law 315; Sienho YEE, "The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment" (2004) 3 Chinese Journal of International Law 87.

<sup>103</sup> Anghie and Chimni, *supra* note 8 at 88–91.

<sup>104</sup> *Ibid.* at 91.

<sup>105</sup> *Ibid.* at 89–91.

<sup>106</sup> Kiyani, *supra* note 10; Reynolds and Xavier, *supra* note 4.

<sup>107</sup> Reynolds and Xavier, *supra* note 4.

Both mainstream and critical international criminal law scholars have pointed to the double standards within the international criminal justice system as well.<sup>108</sup> Similar to TWAAIL arguments, the double standards that they worry about oscillate between the cases that are prosecuted, to the accused persons that are selected for prosecution.<sup>109</sup> Selectivity is the biggest weakness of international criminal law where it is “predominantly wielded against weak, fallen and toppled autocrats and military leaders”.<sup>110</sup> Subsequently, the claim of double standards was not only vexing for the Nuremberg Tribunal and the Tokyo Tribunal, it was something that the ICTY and ICTR encountered regularly. The then ICTY prosecutor, Carla del Ponte’s decision not to prosecute NATO leaders in the commission of international crimes was viewed by some as “amateur white-wash”.<sup>111</sup> In a similar vein, the decision to not prosecute the leaders of the Rwandan Patriotic Front was seen as problematic and pointed to the selective nature of international criminal prosecution.<sup>112</sup> Moving beyond the issue of selectivity in international criminal justice, there are other instances within the adjudicatory process that illustrate the double standards endemic within international criminal justice. For example, a review of the trial transcripts prompted Nancy Combs to suggest that the judges of various international criminal tribunals have a pro-conviction bias.<sup>113</sup> These examples then work to demonstrate the role of power and politics that drive the international criminal justice system.

Justice Pal was broadly concerned with the Tribunal’s double standard in prosecuting the Japanese, while it ignored the colonial violence of the Allies. He was particularly vexed by the lack of prosecution of those responsible for the use of the atomic bombs. To Justice Pal, these double standards then worked to fuel a form of victors’ justice (notwithstanding the support of China and other newly independent Global South states of India and the Philippines).<sup>114</sup> A unique aspect of Justice Pal’s dissent is the focus on the everyday practices of the Tribunal and the rules of evidence and procedure. In this vein, Justice Pal took issue with the flexibility of the rules and its impact on the daily operation of the Tribunal. He chronicled the effects of the judges’ powers to draft and amend the rules as means to expedite the daily proceedings, the various procedural irregularities, and the determination of truth via witness testimony. These three conceptual challenges then work to reinforce the broader “Third Worldist” systemic critique central to his dissent: double standards and victors’ justice.

In this section, I examine the double standards arising out of the inconsistent application of the rules of evidence and procedure. Importantly, I trace these inconsistencies from the Tokyo Tribunal to the more recent ICTY and ICTR. The rules of evidence and procedure within a criminal proceeding are of the utmost importance, especially given the impact on the accused. While the evidentiary thresholds are much lower in, for example, non-criminal proceedings,<sup>115</sup> the presumption of innocence is an essential

<sup>108</sup> Kaleck, *supra* note 102; Robert CRYER, Hakan FRIMAN, Darryl ROBINSON, Elizabeth WILMSHURST, *An Introduction to International Criminal Law and Procedure*, 3rd ed. (New York: Cambridge University Press, 2014) at 44–5.

<sup>109</sup> Kaleck, *supra* note 102 at 7–9.

<sup>110</sup> *Ibid.* at 2.

<sup>111</sup> Michael MANDEL, “Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned from it” (2001) 25 *Fordham International Law Journal* 95 at 96. See also, Kaleck, *supra* note 102 at 48–51.

<sup>112</sup> Mahmood MAMDANI, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2002).

<sup>113</sup> Nancy A. COMBS, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) at 224.

<sup>114</sup> Kaleck, *supra* note 102 at 13.

<sup>115</sup> See for example in the administrative law context, Sujith XAVIER, “Biased Impartiality: A Survey of Post-RDS Caselaw on Bias, Race and Indigeneity” *SSRN* (2021), online: [SSRN <https://ssrn.com/abstract=3762594>](https://ssrn.com/abstract=3762594).

part of international criminal prosecution. The Chief Prosecutor of the Nuremberg Tribunal, Robert Jackson, is noted to have said “[t]he ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty”.<sup>116</sup> The ensuing analysis focuses on the specificity of rules and the role of the judges in drafting and amending the rules. In doing so, I will illustrate the larger systemic problems built into the Tokyo Tribunal and the two ad hoc international criminal tribunals rather than exploring the specificities of the rights of the accused.<sup>117</sup>

I explore the enduring legacy of Justice Pal’s dissent with a particular focus on the ICTY Rules of Procedure and Evidence (ICTY Rules) and the ICTR Rules of Procedure and Evidence (ICTR Rules) from a TWAIL perspective. By engaging Justice Pal’s three conceptual problems with the Tokyo Rules, I first trace the evolution of the powers of the judges to draft and amend their respective rules of evidence and procedure and the resulting procedural irregularities and the admission of problematic hearsay evidence. In the first section of my analysis, I locate the origins of these powers to Robert Jackson, the Nuremberg Tribunal, and to a “Nuremberg legal sensibility”.<sup>118</sup> In the following two sections, I expose the effects of these powers and how they generate double standards through the malleability of the rules evidence and procedures. The second section examines the inconsistencies within the everyday judicial decisions, ranging from the type of adduced evidence to the number of judges needed to depose a witness. These inconsistencies within the everyday practices of the tribunals further corroborate the broader selectivity arguments leveled against international criminal prosecutions. In the third and final section, I examine the impact of allowing hearsay evidence. I first chronicle the results of allowing hearsay evidence at the Tokyo Tribunal and then examine the effects of allowing hearsay evidence at the ICTY and ICTR. The central aim of these sections is to pursue the legacy of Justice Pal’s dissent as it relates to the Tokyo Tribunal Rules and the rules of evidence and procedure of international criminal tribunals.

### A. Critique of the Institutional Powers of the Judges of the International and Military Tribunals

Several problems plagued the Tokyo Tribunal, starting with General MacArthur’s heavy-handed role in its creation.<sup>119</sup> The Tokyo Tribunal’s Charter provisions ensured that the Japanese accused were prosecuted quickly and efficiently, with relaxed evidentiary rules.<sup>120</sup> The nine rules of procedure accompanying the Tokyo Tribunal’s Charter were rather superficial as well, especially for an international criminal trial that would eventually convict and then deploy capital punishment on those deemed culpable. Drawn from the Nuremberg blueprint, the powers allocated to the judges to amend the rules of evidence and procedure moreover caused day-to-day operational problems.<sup>121</sup>

<sup>116</sup> Christoph Johannes Maria SAFFERLING, *International Criminal Procedure* (Oxford: Oxford University Press, 2012) at 403.

<sup>117</sup> Yvonne McDERMOTT, *Fairness in International Criminal Trials* (Oxford: Oxford University Press, 2016).

<sup>118</sup> Reynolds and Xavier, *supra* note 4 at 962.

<sup>119</sup> See Hisakazu’s discussion of the treatment of war criminals after the restoration of independence, Haisakazu, *supra* note 37 at 15–6.

<sup>120</sup> See Article 13 of the Tokyo Tribunal Charter, *supra* note 21 at 10; Richard MAY and Marieke WIERDA, “Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha Essays on the Laws of War and War Crimes Tribunals in Honor of Teleford Taylor” (1998) 37 *Columbia Journal of Transnational Law* 725 at 730–1.

<sup>121</sup> There were other controversies. Judicial impartiality to judicial interpretation of retroactive application of law (whether aggression as a concept existed in law at the time the IMTFE Charter was drafted) were problems that the Tribunal could not overcome. On impartiality and on retroactivity, see: Kirsten SELLARS, “*Crimes against*

Approximately forty-five years later, identical problems were evident in the day-to-day operations of the two ad hoc international criminal tribunals created by the United Nations Security Council.

The United Nations Security Council established the ad hoc tribunals on the heels of the findings of the commissions of experts tasked with investigating the violent conflicts in the former Yugoslavia and Rwanda.<sup>122</sup> Similar to the Nuremberg and Tokyo Tribunals, the ICTY and ICTR statutes set out the applicable international crimes,<sup>123</sup> the organizational structure of the respective tribunals, and tribunal composition.<sup>124</sup> Importantly, they follow the Nuremberg Tribunal's approach to the rules of evidence and procedure. The ICTY and ICTR statutes allowed judges to draft the rules of evidence and procedure.<sup>125</sup> The judges then designed the amendment process through their respective rules.<sup>126</sup>

The Rome Statute of the International Criminal Court was drafted differently. Article 51 of the Rome Statute explicitly guarantees that amendments to the rules of evidence and procedure are only possible with a two-thirds majority of the Assembly of States Parties.<sup>127</sup> While this approach to the rules may seem like an anomaly, an in-depth analysis is warranted to examine recent trends in the institutional dynamics of the ICC and the Assembly of States Parties. For example, eight amendments were adopted by the Working Group on Amendments of the Assembly of States Parties, while other proposed amendments by the Court have yet to be considered and or adopted.<sup>128</sup>

I trace the origins of the “quasi-legislative” powers of the judges to draft and amend the rules of evidence and procedure back to Robert Jackson and the Nuremberg Tribunal in this section.<sup>129</sup>

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*Peace” and International Law* (New York, United States: Cambridge University Press, 2013) at 234–6; Boister and Cryer, “Introduction”, *supra* note 2 at ixix.

<sup>122</sup> *UNSC Resolution 780*, 3119th meeting, UN Doc. S/RES/780 (6 October 1992) at 1; adopted unanimously with 0 No/Abstentions, non-permanent members: Austria, Belgium, Cape Verde, Ecuador, Hungary, India, Japan, Morocco, Venezuela and Zimbabwe.

<sup>123</sup> *Statute of the International Tribunal for the Former Yugoslavia*, 25 May 1993, 32 I.L.M. 1192, arts. 2–5 [ICTY Statute]; *Statute of the International Tribunal for Rwanda*, 8 November 1994, 33 I.L.M. 1598, arts. 2–4 [ICTR Statute].

<sup>124</sup> ICTR Statute, *supra* note 123 at art. 11–12; ICTY Statute, *supra* note 124 at art. 10–11.

<sup>125</sup> “The Statute, in turn, empowered the judges of the ICTY to create the Rules of Procedure and Evidence. In doing so, the Security Council also requested the Secretary-General ‘to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal’. The Secretary-General, for his part, agreed that ‘the judges of the International Tribunal as a whole should draft and adopt the rules of procedure and evidence’, and set about gathering suggestions from UN member states”, see: Gideon BOAS, James L. BISCHOFF, Natalie L. REID, and B. Don TAYLOR III, eds., “Creation and Amendment of Rules of International Criminal Procedure” in Gideon BOAS, James L. BISCHOFF, Natalie L. REID, and B. Don Taylor III, eds., *International Criminal Law Practitioner Library: International Criminal Procedure* (Cambridge: Cambridge University Press, 2011), 21 at 23; see also Safferling, *supra* note 116 at 25.

<sup>126</sup> *Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia*, UN Doc. IT/32Rev.50 (10 July 2015) at r. 6 [ICTY Rules]; and *Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda*, UN Doc. ITR/3/Rev.23 (29 June 1995) at r. 6 [ICTR Rules].

<sup>127</sup> For recent issues with ICC judicial interpretation of procedural rules, see Giovanni CHIARINI interview of Cuno Jakob TARFUSSER, “Can We Return to the Law, Please? Rethinking the Judicial Interpretation of Procedural Rules in the ICC – A Conversation with Judge Tarfusser after the Gbagbo-Blé Goudé Appeal Judgment” *Opinio Juris* (13 April 2021), online: <http://opiniojuris.org/2021/04/13/can-we-return-to-the-law-please-rethinking-the-judicial-interpretation-of-procedural-rules-in-the-icc-a-conversation-with-judge-tarfusser-after-the-gbagbo-ble-goude-appeal-judgment/>; Safferling, *supra* note 116 at 51; *Rome Statute of the International Criminal Court*, A/CONF.183/9 of 17 July 1998, art. 119 [Rome Statute].

<sup>128</sup> International Bar Association, “Strengthening the International Criminal Court and the Rome Statute System: A Guide for States Parties” *IBA* (October 2021), online: <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021> at 77–8.

<sup>129</sup> Megan A. FAIRLIE, “Rulemaking from the Bench: A Place for Minimalism at the ICTY” (2004) 39 *Texas International Law Journal* 257 at 263.

By modelling the ICTY Rules and ICTR Rules on the Nuremberg Tribunal and granting quasi-legislative powers to the judges, the double standards and unfairness that Justice Pal was concerned with continued as international criminal prosecutions moved forward. Justice Pal's view that a liberal approach to the rules did not lead to happy results can be more evident by chronicling the origins and effects of these quasi-legislative powers. In fact, these are the same exact concerns that TWAIL scholars set out *vis-à-vis* the double standards in the "selection of cases" and "operational selectivity", albeit in the doctrinal and institutional context.<sup>130</sup>

### *1. Judicial power to draft and amend the rules: Inheriting "utmost liberality"*

Evidentiary and procedural rules are the backbone of an international criminal tribunal. They are essential in setting out how the institution performs its basic function of determining the truth and culpability. To that effect, Article 7 of the Tokyo Tribunal Charter was modelled on its Nuremberg counterpart.<sup>131</sup> Article 7 allowed the judges to draft and amend their rules, provided the amendments were consistent with the Charter. Based on the Nuremberg precedent, the Tokyo Tribunal Charter offered, moreover, further guidance to the judges on how to conduct the trial (Article 12) and receive evidence (Article 13 and Article 15(d)). In dealing with the admissibility of evidence, Article 13(a) enabled the Tribunal to move beyond technical rules of evidence and proclaimed that the Tribunal "shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value".<sup>132</sup> Expeditiousness was thus built into the Charter, as part of the Allies efforts to deliver victors' justice quickly. Judges were granted these "quasi-legislative" powers to ensure that the proceedings were expedited.<sup>133</sup>

Importantly, the desire for expeditious trials can be traced back to the drafting of the Nuremberg Charter. Robert Jackson's meticulous notes on the International Conference on Military Trials (June to August 1945) illustrate the importance of expeditious proceedings. Jackson made the following statement to this effect: "[w]e do not want technical rules of evidence designed for jury trials to be used in this case to cut down what is really and fairly of probative value, and so we propose to lay down as a part of the statute that *utmost liberality* shall be used".<sup>134</sup> Russian General Nikitchenko responded in agreement: "[w]e think it is perhaps very advisable to remind the judges that there may be a possibility of attempts by the Fascists to use the courts as a sounding board for accusing the Allies of imperial designs".<sup>135</sup> This approach to the rules of evidence and procedure at Nuremberg then travelled to the Tokyo Tribunal via General MacArthur and other American officials tasked with steering the prosecution of the Japanese.

The "liberality" approach to the rules caused significant concern for the Tokyo Tribunal defence lawyers. They worried about the judicial determination of probative value afforded to their evidence.<sup>136</sup> Defence lawyers were concerned that their evidence would not have the same weight as that of the prosecutor (as discussed in the next sections). Put differently, given the criminal nature of these proceedings, Tokyo Tribunal judges had a duty to ensure that the most relevant evidence with probative value was

<sup>130</sup> Kiyani, "Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity", *supra* note 10; Reynolds and Xavier, *supra* note 4.

<sup>131</sup> Tokyo Tribunal Charter, *supra* note 21 at 7–11.

<sup>132</sup> *Ibid.* at 10.

<sup>133</sup> Fairlie, *supra* note 129 at 263.

<sup>134</sup> Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*, US Department of State Publication 3080 (Washington: United States Government Printing Office, 1949) at 83 [Report of Robert H. Jackson] (emphasis added).

<sup>135</sup> *Ibid.*

<sup>136</sup> Boister and Cryer, *supra* note 30 at 112.



accepted. In this vein and in referring to the powers granted to the judges, Justice Pal arrived at an important conclusion in his dissent: “though the Charter sought to make us independent of all artificial rules of procedure, we could not disregard these rules altogether. The practical conditions of the trials necessitated certain restrictions.”<sup>137</sup> These problematic results centred on the Tribunal’s understanding and determination of probative value of evidence. In fact, Justice Pal worried about the meaning and scope of probative value of evidence that was used to determine the criminal culpability of the accused. To this effect, Justice Pal powerfully remarked that with “these provisions of the Charter we admitted much material which normally would have been discarded as hearsay evidence”.<sup>138</sup> The ability of the judges to amend the rules, at times mid-way through the process, reinforces the animating themes of Justice Pal’s dissent. On the one hand, the double standards allow the judges to direct the rules to benefit the prosecution, and, on the other, the malleability of the rules reinforce the idea of victors’ justice, where the outcome is certain.

As part of the “inheritance” from the Nuremberg Tribunal, similar problems arising from the malleability of the rules of evidence and procedure can also be found within the ICTY and ICTR.<sup>139</sup> Notwithstanding the need to expedite the proceedings, the real life results were the exact opposite that resulted in the double standards that Justice Pal was worried about.

## 2. *Inheriting legacies of the past: utmost liberality at ICTY and ICTR*

Article 15 of the ICTY Statute enabled the judges to “adopt rules of procedure and evidence for the conduct of the [...] trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters”.<sup>140</sup> The ICTR statute borrowed from the ICTY statute’s language on the rules of evidence and procedure.<sup>141</sup> Drafted by the judges, the ICTY Rules consist of 127 provisions, while the ICTR Rules include 126 provisions. Slight variations aside, the respective rules specify the required pre-trial, trial, and appeal procedures. These rules cover every aspect of the tribunals’ work, from investigations to appeals. ICTY and ICTR Rule 6 allowed judges to amend the provisions<sup>142</sup> and, unlike the rules of the Tokyo Tribunal, it established a clear amendment process.<sup>143</sup> The rules thus form the normative architecture that enables the tribunals to function effectively.

For example, judges of the ICTY would gather to elect the President of the Tribunal, discuss policy and administrative issues, and amend the rules when required through the plenary sessions.<sup>144</sup> These sessions were confidential, and public records of the discussions and decisions are unavailable. As the tribunals started their proceedings, an Intersessional Working Group for the Amendment of the Rules, with a panel of five judges, was established to deal with any issues. This working group later morphed into the Rules Committee that took on the role of “a permanent working group for the plenary of judges in respect of changes to the Rules of Procedure and Evidence”.<sup>145</sup> The Rules Committee

<sup>137</sup> Judgment of Justice Pal, *supra* note 20 at 942 para. 304.

<sup>138</sup> *Ibid.* at 933 para. 282.

<sup>139</sup> I borrow this idea of inheritance from Adil Khan, see Khan, *supra* note 87.

<sup>140</sup> ICTY Statute, *supra* note 123 at art. 15.

<sup>141</sup> ICTR Statute, *supra* note 123 at art. 14.

<sup>142</sup> Boas, Bischoff, Reid, and Taylor III, *supra* note 125 at 26–7; ICTR Rules, *supra* note 127 at r. 6; ICTY Rules, *supra* note 127 at r. 6; it is important to note that the ICTR Rule 6 is slightly different.

<sup>143</sup> Boas, Bischoff, Reid, and Taylor III, *supra* note 125 at 26–7.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

included three judges from the Trial Chambers, the Vice-President, and the President of the ICTY.<sup>146</sup>

Notwithstanding the cosmopolitan nature and history of the rules,<sup>147</sup> several important criticisms emerged as the tribunals carried on the work. Certain criticisms were concerned with the cost of justice,<sup>148</sup> while others focused on length of the proceedings.<sup>149</sup> As a result, in April 1999 the United Nations General Assembly requested the United Nations Secretary General to create an “Expert Group” to evaluate the operation of both tribunals, given the delays in prosecution and the drain on the financial resources needed to continue the international prosecutions.<sup>150</sup> The Expert Group made a number of recommendations to improve the daily operations of the trials.<sup>151</sup> The main crux of the Expert Group’s report was on the role of the judges and the adversarial system, and the recommendations focused on shifting the judicial role within the Tribunals.<sup>152</sup>

In response, the ICTY and ICTR judges sought to tackle delays and other inefficiencies within the adjudicatory process by turning to “managerial” judging.<sup>153</sup> They adopted a managerial role and amended the rules of evidence and procedure in the hopes it would bring about cost cutting and efficient processes. These reforms to the rules were precipitated by the urgency of the United Nations Security Council’s completion strategy that sought to limit the length of trials and reduce the costs of international justice.<sup>154</sup> The desire for expeditious prosecutions is part of the history of international criminal prosecutions and can be traced back to the Nuremberg Tribunal and Robert Jackson’s “utmost liberality” approach to the rules of evidence and procedure.<sup>155</sup> The Expert Group’s report and the United Nations Security Council’s completion strategy then reinforced the application of the “utmost liberality” approach within the ICTY and ICTR.

To prevent delays, judges introduced reforms and amended the rules to allow increased judicial access to case information. Simultaneously, the reforms to the rules provided the judges with new powers to set deadlines and work plans, thereby, for example, limiting

<sup>146</sup> *Ibid.*

<sup>147</sup> Safferling, *supra* note 116 at 14; Gideon BOAS, “Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility” (2001) 12 *Criminal Law Forum* 41 at 50; Richard MAY and Marieke WIERDA, “Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha” (1999) 37 *Columbia Journal of Transnational Law* 725.

<sup>148</sup> While some may perceive ascribing monetary value to international justice as “vulgar”, the reality is that international institutions are governed by how much they spend. By 2011, it was forecasted that the cost of international criminal justice would reach close to \$6.5 billion by 2015, see: Stuart FORD, “How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts” (2011) 55 *Saint Louis University Law Journal* 953 at 956; David WIPPMAN, “The Costs of International Justice Notes and Comments” (2006) 100 *American Journal of International Law* 861 at 862; Mark DRUMBL, “International Criminal Law: Taking Stock of a Busy Decade Feature: Reflections on a Decade of International Law” (2009) 10 *Melbourne Journal of International Law* 38.

<sup>149</sup> See Sarah WILLIAMS, “The Completion Strategy of the ICTY and the ICTR” in Michael BOHLANDER, ed., *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007), 153, cited in Antonio CASSESE, ed., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 362–3; Cryer, Friman, Robinson, Wilmshurst, *supra* note 108 at 133–6, 141–2.

<sup>150</sup> *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN Doc. A/54/634 (1999) at paras. 36–101 [*Report of the Expert Group*].

<sup>151</sup> Maximo LANGER and Joseph W. DOHERTY, “Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms” (2011) 36 *Yale Journal of International Law* 241 at 247.

<sup>152</sup> *Ibid.* Report of the Expert Group, *supra* note 150.

<sup>153</sup> Langer and Doherty, *supra* note 151 at 247.

<sup>154</sup> Cassese, *supra* note 149 at 362–3; Cryer et al, *supra* note 108 at 133–6, 141–2.

<sup>155</sup> Report of Robert H. Jackson, *supra* note 134 at 83.

the number of witnesses. These changes, it was argued, “would reduce the length of both pre[-]trial[s] and trial[s]”.<sup>156</sup> In this context, the ICTY judges, for example, amended their respective rules on forty-eight different occasions.<sup>157</sup> In contrast, the ICTR Rules were amended twenty-three times during the life of the Tribunal.<sup>158</sup>

The move to managerial judging did not, however, lead to more efficient or expeditious trials. On the contrary, the changes, with the added new steps built into the rules and the adjudicatory process, prolonged the duration of trials. The judges lacked specific information about their cases. The prosecution and defence counsel resented and resisted their diminished roles. This led some commentators to conclude that the “managerial judging reforms did not deliver any of their promised outcomes”.<sup>159</sup>

These everyday changes then generate two important issues that strike at the heart of the operationalization of the double standards. First, judges acting on their own volition changed the rules of evidence and procedure at various stages of the prosecution.<sup>160</sup> While it is true that the central goal of these tribunals was to prosecute the perpetrators and render justice in an “ad hoc” manner,<sup>161</sup> the judicial power to amend the rules leave open questions about the scope of the legitimate authority of judges. As I illustrate in the next section, there are inconsistencies throughout the processes of ad hoc tribunals where the accused were subject to varying degrees of procedural standards. Second, even within the most liberal account of the rule of law (whether in the domestic or international context), an accused has the right to evidentiary disclosure and, more importantly, to know the process that will be used to determine individual criminal responsibility.<sup>162</sup> The death sentences meted out by the Tokyo Tribunal illustrate the importance of safeguarding procedural standards.

This drive for expeditious adjudicatory process formed the backdrop to Justice Pal’s dissent. He worried about the flexibility of the rules of evidence, how the procedural rules were used to diminish the protections afforded to the accused, the impact of the Tribunal’s decision on the accused’s life and liberty, and the legitimacy of the Tokyo Tribunal.<sup>163</sup> In a similar manner, the move to managerial judging in the ICTY and ICTR did not yield quick or cheap international justice. Rather, these changes exacerbated the situation within these two tribunals, which adversely affected the rights of the accused, prolonged the proceedings, and challenged the legitimacy of the process. Much more broadly, the ability of judges to change the rules mid-way through the adjudicatory process, or admit hearsay evidence, ultimately undermines the central goals of an international criminal prosecution. In fact, the inconsistent application of the rules of evidence and procedure, especially in the context of the North–South divide reinforces the existing colonial mentality that those from the peripheries do not need robust adjudicatory processes. Rather, the judicial changes to the rules suggest that processes can be developed as the prosecution unfolds, where judges sitting in plenary can decide the fate

<sup>156</sup> Langer and Doherty, *supra* note 151 at 247.

<sup>157</sup> Safferling, *supra* note 116 at 25.

<sup>158</sup> Boas, Bischoff, Reid, And Taylor III, *supra* note 125 at 25; *Ibid.* at 26–9. For a complete list of the dates that the ICTR Rules were amended, see ICTR Rules, *supra* note 126 at 1; the most recent update to the ICTR Rules as of the date of publication is 13 May 2015.

<sup>159</sup> Langer and Doherty, *supra* note 151 at 244.

<sup>160</sup> For other examples of this type of rulemaking, see Boas, Bischoff, Reid, and Taylor III, *supra* note 125 at 35–7.

<sup>161</sup> For an explicit discussion of the goals of international criminal law, see Cryer, Friman, Robinson, Wilmshurst, *supra* note 108 at 28–45.

<sup>162</sup> Safferling, *supra* note 116 at 403.

<sup>163</sup> Judgment of Justice Pal, *supra* note 20 at 936 para. 290.

of an accused. In the following section, I chronicle the daily effects of amending of the rules regularly.

### **B. Procedural Irregularities at the Tokyo Tribunal, ICTY and ICTR: The Everyday Changes to the Rules**

The flexibility of the rules described above precipitated daily procedural irregularities at the Tokyo Tribunal and the two ad hoc tribunals. These procedural irregularities can, moreover, be traced back to the notion of “utmost liberality” formulated by Robert Jackson, outlined in the previous section. This idea of utmost liberality would eventually travel to the ICTY and ICTR. I set out the procedural irregularities within the Tokyo Tribunal and then turn to the two ad hoc tribunals, focusing procedural discrepancies within and during the adjudicatory process. By chronicling the inconsistency in the application of the rules, I reveal the systemic problems within these tribunals and the resulting pro-conviction bias.

#### **I. Procedural irregularities at the Tokyo Tribunal**

Justice Webb commented about the controversial nature of the everyday changes to the rules by the Tokyo Bench. In fact, he was very much alive to the effects of these procedural irregularities, as evidenced by his comments from the bench. His reflection is worth quoting in its entirety as it illustrates the challenges brought on by a flexible approach to the rules of procedure:<sup>164</sup>

I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says *we are not bound by any technical rules of evidence*. [...] All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court. Sometimes we have eleven members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from the seven judges as you would from eleven. I know that you would not... You cannot be sure of what decision the court is going to come to on any particular piece of evidence not absolutely sure—because the constitution of the court would vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. *On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present*. How are we to over-come that. We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement. The Charter does not allow us to adopt them in any event. It is contrary to the spirit of the Charter. The decision of the Court will vary with its constitution from day to day. There is no way of overcoming it.

The inheritance of Robert Jackson’s “utmost liberality” approach to the rules of evidence and procedure from the Nuremberg Tribunal then had a significant impact on the day-to-day operations of the Tokyo Tribunal.<sup>165</sup> Justice Webb’s acknowledgment of the daily realities of the Tribunal compounded an already difficult situation brought on by the flexibility built into the rules, all of which fuelled Justice Pal’s scathing dissent. In his analysis of the Tokyo Tribunals rules, Justice Pal was concerned with the ways in

<sup>164</sup> *Ibid.* at para. 348 (emphasis added).

<sup>165</sup> Report of Robert H. Jackson, *supra* note 134 at 83.

which these procedural irregularities had a significant impact on the accused and the proceedings, depending on which judge was present on the bench on a particular day.

For example, on 26 June 1946, defence counsel sought to cross-examine a prosecution witness on a document that was yet to be introduced into evidence.<sup>166</sup> The judges accepted the prosecution's objection. This decision was in accordance with the Tokyo Tribunal Rules.<sup>167</sup> Three days later, the Tribunal made a similar decision. In this instance, when cross-examining a prosecution witness, defence counsel asked questions based on another yet to be introduced document. The prosecution objected as the document needed to be served twenty-four hours in advance. The judges again accepted this objection. Notwithstanding these rulings, when the prosecution attempted to rely on yet-to-be introduced documents in cross-examination, the Tribunal departed from its two earlier decisions in June. In fact, the Tribunal noted that "the rule as to processing and serving a copy of the document in advance did not apply".<sup>168</sup>

These procedural inconsistencies animated Justice Pal's dissent and his specific focus on the construction of the rules, the application of the procedure, and, ultimately, their negative impact on the proceedings. In fact, these types of irregularities, where the judges of the Tribunal elect to change the rules daily based on what would amount to be an alleged pro-prosecution bias, assiduously reinforces the themes that form the bedrock of his dissent.<sup>169</sup> These double standards remove the due process rights of the accused and ensures that a form of victors' justice is meted out.

## 2. Procedural irregularities at the ICTY and ICTR

Turning to the ICTY, similar examples of these types of everyday procedural irregularities are evident. For example, during the deposition of two witnesses in *Prosecutor v. Zoran Kupreskic* (Kupreskic), the presiding judge informed the Chambers that one of the members of the Bench had fallen ill and was "unlikely to be able to attend the hearings during the remainder of the week".<sup>170</sup> The ICTY Statute requires three judges to serve in a Trial Chamber. Given the circumstances, the presiding judge encouraged the parties to proceed, relying on Rule 71. This Rule allows for the appointment of a "Presiding Officer" to depose a witness "in exceptional circumstances and in the interests of justice".<sup>171</sup> To the objection of the defence counsel, the prosecutor made an application to this effect. Defence counsel objected because the witnesses would testify on specific facts relating to the charges against the accused.<sup>172</sup> The third judge of the Trial Chamber needed to be present to decide if the witnesses' testimonies were credible and to determine probative value, which goes to the heart of the determination of guilt in the commission of an international crime. Based on the prosecutor's application, the two judges of the Trial Chamber decided to receive the witness testimonies without their third colleague.<sup>173</sup>

<sup>166</sup> Judgment of Justice Pal, *supra* note 20 at 962 para. 347.

<sup>167</sup> See Rule 2 of the Tokyo Tribunal Rules: Tokyo Tribunal Rules, *supra* note 21 at 12.

<sup>168</sup> Judgment of Justice Pal, *supra* note 20 at 962 para. 347.

<sup>169</sup> Combs, *supra* note 113 at 224–74.

<sup>170</sup> *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition (15 July 1999) at para. 4 (ICTY, Appeals Chamber).

<sup>171</sup> *Ibid.* at para. 12.

<sup>172</sup> *Ibid.* at para. 5.

<sup>173</sup> "We rule that in spite of the opposition of the Defence counsel and the accused, Rule 71 is fully applicable because according to this Rule the request of one party is sufficient, and we feel that we are confronted with exceptional circumstances and that the interests of justice command that a fair and expeditious trial be held" cited in *ibid.*, at para. 6.

The defence appealed the decision to include the deposed testimony. The ICTY Appeals Chamber agreed with the accused. Relying on the ordinary meaning of the Statute, the Appeals Chamber noted the following:<sup>174</sup>

Rule 71 provides that a Trial Chamber may order that a deposition be taken, whilst Article 12 of the Statute stipulates that a Trial Chamber shall be composed of three Judges. Given the plain and ordinary meaning of the latter provision, a Trial Chamber is only competent to act as a Trial Chamber *per se* if it comprises three Judges. Consequently, the requirement in Rule 71 that an order for depositions to be taken may only be rendered by a Trial Chamber, has not been met. That a written decision confirming the ruling was issued by the Trial Chamber the following day could not *ipso facto* cure this illegality. Where the Statute or the Rules prescribe that a matter is to be decided by a *Trial Chamber*, two sitting Judges may not do so on the part of the Trial Chamber, save in the case where the Trial Chamber has received prior authorisation by the President. Such authorisation may, however, only be given in respect of routine matters pursuant to Sub-rule 15(E). In the present case, no such authorisation had been given by the President, and, in any event, the making of a decision to proceed by way of deposition with regard to the examination of witnesses giving evidence on facts relating to the specific charges made against an accused, thereby having a direct bearing on the determination of the guilt or innocence of the accused, does not, in the view of the Appeals Chamber, constitute “routine matters” within the meaning of Sub-rule 15(E).[...] The Appeals Chamber, therefore, finds that the ruling was null and void since it was rendered without jurisdiction with regard to defence witnesses Pero Papic and Goran Males ...

In November 1999, the judges sitting in plenary amended Rule 15 and added Rule 15bis (Absence of a Judge). This new rule changed the earlier ICTY Appeals Chamber’s five member panel decision in Kupreskic. In fact, Rule 15bis was much more expansive in scope. If one of the judges is ill or unable to attend, the new Rule allowed the remaining two judges of a Trial Chamber to “continue in the absence of that judge” (for no more than five days), if they are satisfied that doing so would be in the “interest of justice”.<sup>175</sup> The decision to amend the rules in this manner then worked to change the Kupreskic Appeals Chamber decision to rely on the ordinary and plain meaning of the Statute.

There are other examples in which the judges have sought to change their previous decisions.<sup>176</sup> Gideon Boas suggests that judges have altered the chambers’ decisions in “core areas of the law, including the procedure for the delivery of discrete sentences for each finding of guilt by a trial chamber; amending the provisions on the right of appeal”.<sup>177</sup> Kupreskic and other similar cases illustrate the broader implications of judicial inconsistency in applying the rules of evidence and procedure in admitting evidence. These inconsistencies adversely affect, for example, tribunal practice, tribunal jurisprudence, and, importantly, the rights of the accused.

Decisions like Kupreskic highlight the problems brought about by allowing the judges to amend the rules of evidence and procedure. Justice Pal first articulated these issues as a result of the changes to the rules midway through the Tokyo proceedings detailed earlier.<sup>178</sup> He was concerned with the way procedural rules were changed to allow for

<sup>174</sup> *Ibid.* at para. 14.

<sup>175</sup> ICTY Rules, *supra* note 126 at r. 15bis.

<sup>176</sup> Boas, Bischoff, Reid, And Taylor III, *supra* note 125 at 35–7.

<sup>177</sup> *Ibid.* at 35.

<sup>178</sup> Judgment of Justice Pal, *supra* note 20 at 932–62 paras. 280–348.

expeditious prosecution. During the Tokyo Trial, the procedural guarantees were not seen as important (as I have illustrated in the earlier section on the critique of the institutional powers of the judges). These examples then enliven Justice Pal's central concerns articulated forty-five years before the judges of the ICTY and ICTR started to draft and amend their respective rules.

Judges were able to change the process that sought to determine the credibility of the witness and the veracity of their testimony midway during the proceedings. Moreover, these changes illustrate the double standards that were built into the international criminal justice system, which Justice Pal and many more recent TWAAIL interventions have sought to illustrate. A criminal justice system must afford the accused with a clear understanding of the process that will be followed to determine culpability. This process was not clear, as the judges made changes to procedures as they sought to determine criminal culpability. In the next section, I take up the probative value assigned to witness testimony that forms the factual basis of the determination of truth by these three tribunals.

### *C. Critique of Truth: Probative Value of Witness Testimony*

Beyond the everyday changes to the rules adopted by the Tribunal, Justice Pal articulated several other important shortcomings with the Tokyo Tribunal's determination of truth in prosecuting Japanese war criminals. In particular, he was deeply critical of how the Tribunal determined the probative value of the 419 witness testimony and 779 witness affidavits.<sup>179</sup> By allowing hearsay evidence, the Tokyo Tribunal may have potentially compromised the importance of truth, especially in the prosecution of war crimes. By adopting the practices of the Nuremberg Tribunal as a model for the ICTY and ICTR, the "utmost liberality" approach detailed earlier is once again visible and also the cause of significant problems in meting out justice for the genocide in Rwanda and the former Yugoslavia. In the following section, I set out Justice Pal's concerns with hearsay evidence and trace the effects of allowing hearsay at the ICTR.

#### *1. Hearsay evidence at the Tokyo Tribunal*

In exposing some of the fundamental flaws of the determination of probative value, Justice Pal focused on the use of the diary of Koichi Kido and the Saionji-Harada memoir by the Tokyo Tribunal's prosecutors. Kido held several important ministerial positions within the government of Japan. He served as the adviser to the Emperor, the Lord Keeper of the Privacy Seal.<sup>180</sup> During the proceedings, Kido's diary, which covered 1930 to 1945, was introduced as evidence. The prosecution relied on the diary because of Kido's role within the government and his dealings with other Japanese officials at that time.<sup>181</sup> The diary was used to substantiate conversations that Kido had with Japanese officials facing similar charges.<sup>182</sup> Justice Pal was, however, worried about the trustworthiness of the diary. He thus noted: "[w]hen, however, the author proceeds the whole course either of a life or any event, there may come an unconscious influence of his creation which may greatly affect the record detracting from its initial trustworthiness".<sup>183</sup>

Similarly, Justice Pal was concerned about the prosecution's use of Saionji-Harada's memoir to construct their respective case against the accused.<sup>184</sup> The memoir was

<sup>179</sup> Boister and Cryer, *supra* note 2 at lix.

<sup>180</sup> Judgment of Justice Pal, *supra* note 20 at 933–5 paras. 283–9.

<sup>181</sup> *Ibid.* at 52.

<sup>182</sup> *Ibid.* at 68.

<sup>183</sup> Judgment of Justice Pal, *supra* note 20 at 934–5, paras. 286–7.

<sup>184</sup> *Ibid.* at 935 para. 288.

introduced into evidence by the prosecution as part of its rebuttal evidence. The memoir reported various conversations with different Japanese officials during the war, as experienced and chronicled by the secretary to Prince Kimmochi Saionji, Baron Harada.<sup>185</sup> These accounts were transcribed by Baron Harada's stenographer. Harada dictated the text from 1930 to 1940, based on his interactions with various government personnel.<sup>186</sup> These notes were then reviewed by Harada and later corrected by Prince Saionji.<sup>187</sup>

For Justice Pal, the hearsay evidence in the memoir had an insidious effect that made the entries completely "worthless".<sup>188</sup> At times, Harada was not present when these statements were made. More importantly, the accounts of the author were edited by Prince Saionji,<sup>189</sup> even though he was not part of these conversations. Subsequently, this portion of the dissent focused on the nature of the evidence, prompting the following crucial reflection by Justice Pal: "I for myself find great difficulty in accepting and acting upon evidence of this character in a trial in which the life and liberty of the individuals are concerned."<sup>190</sup>

## 2. Hearsay evidence at the ICTY and ICTR

Similarly, hearsay evidence was allowed through the ICTY Rules and ICTR Rules. Rule 89 of the ICTY and ICTR sets out the framework to adduce evidence.<sup>191</sup> In particular, this provision adopts a "free proof approach", where the trial chamber admits any evidence with probative value.<sup>192</sup> There is, however, no clear, consistent, and discernible practice on admitting evidence.<sup>193</sup> Both the ICTY and ICTR admitted hearsay evidence since their inception,<sup>194</sup> albeit with some caution.<sup>195</sup> The tribunals' jurisprudence suggests that each chamber had to be satisfied with the reliability of evidence, "given the content and character of the evidence for it to be admitted"<sup>196</sup> – reflecting the tribunals' recognition of the limited probative value of hearsay evidence. For example, in *The Prosecutor v. Thoneste Bagosora*, the ICTR Trial Chamber noted that "there are limited avenues for testing the reliability of this [hearsay] ... evidence".<sup>197</sup>

Various scholars have examined witness testimony before the two ad hoc tribunals.<sup>198</sup> Like Justice Pal, these scholars were particularly worried about false witness accounts and

<sup>185</sup> *Ibid.* at 935–40 paras. 288–99.

<sup>186</sup> *Ibid.* at 936 para. 290.

<sup>187</sup> *Ibid.* Boister and Cryer, *supra* note 30 at 113.

<sup>188</sup> Judgment of Justice Pal, *supra* note 20 at 940 para. 299.

<sup>189</sup> *Ibid.* at 936 para. 290.

<sup>190</sup> *Ibid.*

<sup>191</sup> ICTR Rules, *supra* note 126 at r. 89; ICTY Rules, *supra* note 126 at r. 89.

<sup>192</sup> Yvonne McDERMOTT, "The ICTR's Fact-Finding Legacy: Lessons for the Future of Proof in International Criminal Trials" (2015) 26 Criminal Law Forum 351 at 360.

<sup>193</sup> *Ibid.*, at 359–60, citing Goran SLUITER, Hakan FRIMAN, Suzannah LINTON, Salvatore ZAPPALA, and Sergey VASILIEV, eds., *International Criminal Procedure: Rules and Principles* (Oxford: Oxford University Press, 2013)

<sup>194</sup> See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay (5 August 1996) (ICTY, Trial Chamber); *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (2 September 1998) at para. 136 (ICTR, Chamber I).

<sup>195</sup> McDermott, *supra* note 192 at 362. For an account of a cautious approach, see *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C) (2 August 2002) at paras. 26–71 (ICTY, Appeals Chamber). In this interlocutory appeals decision, the Appeals Chamber had to weigh reliability of statements of deceased witness and whether these statements were admissible as per Rule 92bis.

<sup>196</sup> John F. ARCHBOLD, Karim KHAN, and Rodney DIXON, *Archbold, International Criminal Courts: Practice, Procedure and Evidence*, 4th ed. (London: Sweet & Maxwell, 2014) at 751.

<sup>197</sup> *The Prosecutor v. Thoneste Bagosora*, Case No. ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP (18 November 2003) at para. 8 (ICTR, Trial Chamber I).

<sup>198</sup> Combs, *supra* note 113 at 222; Alexander ZAHAR, "The Problem of False Testimony at the International Criminal Tribunal for Rwanda" in André KLIP and Göran SLUITER, eds., *Annotated Leading Cases Of International*



possibilities of perjury.<sup>199</sup> For example, Alexander Zahar highlighted several instances of perjury by ICTR witnesses.<sup>200</sup> The ICTR may have opted for a relaxed approach to witness testimony, recognizing the context in which the witnesses testified. Further, the passage of time and witness trauma may have contributed to witnesses' fading memories. Due to the horrific nature of the Rwandan genocide, these were practical realities that the Tribunal had to grapple with.

In an analogous manner, Combs pinpointed significant dangers in using hearsay evidence in 2010, by examining the trial transcripts from the ICTR.<sup>201</sup> In this groundbreaking study, Combs points out several problems that the ICTR faced. For example, how to contend with a Rwandan eyewitness with different socio-cultural practices? As a result, "[i]n sum, Trial Chambers often seem content to base convictions on highly problematic witness testimony".<sup>202</sup> This was because the witnesses were unable to provide detailed accounts of the dates, times, and specific locations of the events they were attesting to.<sup>203</sup> More importantly, based on Combs' careful review of trial transcripts, the ICTR witnesses could not place the accused accurately at the scene.<sup>204</sup> This is a necessary and essential requirement for individual criminal responsibility.

Throughout the life of the ICTY and ICTR, hearsay witness testimony was used to indict, prosecute, and then determine the guilt of accused perpetrators of international crimes.<sup>205</sup> Within the ICTR, the judges accepted problematic witness testimonies for a whole host of reasons. Based on the history of the conflict, the Hutu perpetrators were responsible for the Rwandan genocide. Even in instances where there are significant problems with the testimonies, Combs suggests that the "Trial Chambers explain these [inconsistencies] away as products of the passage of time, the frailty of memory and errors introduced by investigators and interpreters."<sup>206</sup>

Spanning half a century, all three tribunals encountered difficulties by admitting hearsay evidence. By exploring parallel examples from Justice Pal's dissent and the practices of the more recent tribunals, I illustrated the continuing legacy of the flexible approach to hearsay evidence. In highlighting the dangers of adduced hearsay evidence, it is prudent then to return to Justice Pal's words referenced earlier: "I for myself find great difficulty in accepting and acting upon an evidence of this character in a trial in which the life and liberty of individuals are concerned."<sup>207</sup>

### III. Conclusion: Pal's Continued Relevance to Twail and Critique Of International Law

Framed as an excavation of a significant intervention in the aftermath of the Second World War, I have argued that Justice Pal's dissent remains relevant, especially for scholars interested in a Third World view of international criminal law. By moving beyond

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*Criminal Tribunals*, 25 International Criminal Tribunal For Rwanda, 2006–2007, (Cambridge: Intersentia, 2010) at 509–12.

<sup>199</sup> Zahar, *ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Combs, *supra* note 113.

<sup>202</sup> *Ibid.* at 224.

<sup>203</sup> *Ibid.* at 277–9; Xavier, *supra* note 23 at 62.

<sup>204</sup> For more detailed discussion see, Xavier, *supra* note 23 at 62; Xavier, *supra* note 5 at 277.

<sup>205</sup> See for example, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgment (20 July 2009) at paras. 21–37 (ICTY, Trial Chamber III); *Prosecutor v. Nyiramasuhuko et al. (Butare)*, Case No. ICTR-98-42-A, Judgment (14 December 2015) at paras. 1610–17 (ICTR, Appeals Chamber).

<sup>206</sup> Combs, *supra* note 113 at 221.

<sup>207</sup> Judgment of Justice Pal, *supra* note 20 at 936 para. 290.

TWAIL's conceptual and institutional challenges of international criminal law, this paper has located and situated Justice Pal's views within the broader literature on dissent in international law and the specific academic engagement by international law and international criminal law scholars. Importantly, while acknowledging some of the problems within Justice Pal's dissent, I sought to locate his views within the TWAIL tradition. I then examined the problematic use of the rules in the everyday practices of the Tokyo Tribunal, and the more recent international criminal tribunals set up to prosecute the most egregious perpetrators of genocide in Rwanda and the former Yugoslavia. Deploying an understudied facet of Justice Pal's dissent on the rules of evidence and procedure, I chronicled how his scathing perspective remains relevant today, especially within the context of the practices of the ICTY and ICTR. I did so by tracing the effects of allowing judges of these tribunals to draft and amend their respective rules, the everyday impacts of these changes and the effects of allowing hearsay evidence.

Broadly, this paper followed in the footsteps of other TWAIL interventions on international criminal law, challenging the various forms of western universalism and double standards. These themes were scaffolded throughout Justice Pal's dissent. As I have illustrated, the same themes were part and parcel of the everyday practices of the ICTY and ICTR through the changes to their respective rules of procedure and evidence. By examining these practices, I have sought to uncover the embedded double standards, which are pervasive within these international criminal institutions. While there is a robust tradition within TWAIL that reconstructs and reimagines the existing structures within international law,<sup>208</sup> for this paper, my concern was focused on uncovering as opposed to reconstructing. Although the importance of creating "new legal edifices" for the betterment of the lives of those affected by international law and international institutions must be acknowledged,<sup>209</sup> one cannot ignore the calls for abolition and its continued relevance, especially in the delivery of international criminal justice.<sup>210</sup>

My intervention is offered as a means to explore how the practices of international criminal institutions remain exclusionary and are unable to move beyond the persistent legacies of colonial double standards. This perspective though should not be mistaken as an insistence on, and continued faith in, international criminal law's ability to deliver justice. It is impossible to displace law's western universalism and its enduring legacies of the past. I would be remiss not to mention that there may be no other alternative but to engage in disavowal,<sup>211</sup> given the very nature of law and international law in particular. The more recent calls for racial justice have precipitated a reckoning with the law's role in the continued subjugation of black people, indigenous peoples, and racialized peoples.<sup>212</sup> In the same way, there is a real and urgent need to rethink international criminal institutions and how to deliver justice to the victims of mass violence.

**Acknowledgements.** The author is indebted to Dr Amar BHATIA, Dr Kate CRONIN-FURMAN, Dr Usha NATARAJAN, Dr John REYNOLDS, and Tyler DUNHAM for their comments. The author is grateful to Masa HAMWI and Leslie SCHUMACHER for editorial and research assistance. The author is also grateful to the University of Windsor Paul Martin Law Librarians and staff, in particular Annette DEMERS, Meris BRAY, and Vicki JAY LEUNG.

<sup>208</sup> Balakrishnan RAJAGOPAL, "Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World strategy" (2006) 27 *Third World Quarterly* 767; James Thuo GATHII, "Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)" (2020) 114 *Proceedings of the ASIL Annual Meeting* 165; see also Mickelson, *supra* note 24.

<sup>209</sup> Mutua, *supra* note 6.

<sup>210</sup> Gilmore, *supra* note 25; Walcott, *supra* note 25.

<sup>211</sup> Ryan Cecil JOBSON, "The Case for Letting Anthropology Burn: Sociocultural Anthropology in 2019" (2020) 122 *American Anthropologist* 259.

<sup>212</sup> Walcott, *supra* note 25.

**Funding statement.** None.

**Competing interests.** None.

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**Cite this article:** XAVIER S (2022). Locating and Situating Justice Pal: TWAIL, International Criminal Tribunals, and Judicial Powers. *Asian Journal of International Law* 12, 292–318. <https://doi.org/10.1017/S2044251322000145>