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Front cover: *The picture shows judges, interpreters and court reporters of the International Military Tribunal for the Far East (IMTFE) in session, 26 November 1946, former War Ministry Building in Tokyo. The picture is used here with the courtesy of the National Archives and Records Administration at College Park, Maryland, USA (NARA, 238-FE-46-66422).*

Substantive Law Issues in the Tokyo Judgment: From Facts to Law?

Marina Aksenova*

11.1. Introduction

Back in 1950, one of the contemporary scholars of the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Tribunal') wrote:

[T]he unwieldy mass of the majority judgment as a whole, to say nothing of the dissenting opinions, is an especial pity under the circumstances, for its sheer bulk precludes reproduction and makes it impossible for the Tribunal's arguments and conclusions of law ever to be textually available to the international legal world [...].¹

It is clear that the problem of accessibility no longer exists as technology has enabled access to the relevant material. The length of the Tokyo judgment was unprecedented only if compared with its Nuremberg counterpart – the Tokyo judgment exceeds 1,000 pages while the Nuremberg one is less than 200 pages. The volume is, however, not unusual for modern international criminal law: one of the last judgments rendered by the International Criminal Tribunal for the former Yugoslavia ('ICTY') before its closure was in the *Mladić* case. It is 2,526 pages long and consists of five volumes.² What makes the Tokyo judgment truly stand out is

* **Marina Aksenova** is a lawyer specializing in international criminal and comparative criminal law. Ms. Aksenova graduated with honours from the International University in Moscow. She holds an LL.M. in Public International Law from the University of Amsterdam and an M.Sc. in Criminal Justice and Criminology from the University of Oxford. Dr. Aksenova defended her Ph.D. entitled "Complicity in International Criminal Law" in 2014 at the European University Institute, in Florence. Prior to joining the IE Law School, she was as a postdoctoral research fellow at the Centre of Excellence for International Courts (iCourts), Faculty of Law, University of Copenhagen.

¹ Gordon Ireland, "Uncommon Law in Martial Tokyo", in *Year Book of World Affairs*, 1950, vol. 4, p. 63.

² International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Mladić*, Trial Judgment, 22 November 2017, IT-09-92-T (<https://www.legal-tools.org/doc/96f3c1/>),

not its length, but its fact-based methodology (also adopted by the International Military Tribunal ('IMT') at Nuremberg), whereby the judges discussed at length the circumstances of Japan's military domination and aggression,³ but devoted remarkably little space to the individual contribution of each of the accused.⁴ The section of the judgment dealing with individual verdicts constitutes less than five per cent of the entire judgment.

What explains such an approach at Tokyo? Admittedly, part of the reason was the desire of the Tokyo judges to collectively attribute guilt to high-ranking defendants.⁵ The other explanation, which is not mutually exclusive with the first one, was the lack of legal vocabulary and pertinent legal structures that could serve as a basis for the factual analysis in the judgment. While modern international criminal law developed a highly technical and often confusing language to describe the modes of liability, defences, substantive crimes, and, to a lesser extent, sentencing considerations, the Nuremberg and Tokyo judges operated in a legal vacuum.⁶ The Nuremberg and Tokyo Charters were the products of a political compromise between the Allied powers. It was not a given that these trials would even occur in the first place.⁷ The judges therefore faced a challenging task of creating new approaches to prosecuting mass atrocities on an unmatched scale. They did not have the option of falling on the formulaic language widely used in modern international criminal law. The question looms as to whether the fact-based approach of Tokyo has any legal precedential value for contemporary jurists.

<https://www.legal-tools.org/doc/f8f51c/>, <https://www.legal-tools.org/doc/e6f43e/>, <https://www.legal-tools.org/doc/e8792f/>.

³ Ireland, 1950, p. 61, see above note 1.

⁴ Kai Ambos noted that "the Nuremberg approach can be called pragmatic rather than dogmatic". See Kai Ambos, "Individual Criminal Responsibility in International Criminal Law: A. Jurisprudential Analysis – From Nuremberg to The Hague", in Gabrielle Kerk McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of National and International Courts, Volume I Commentary*, Kluwer Law International, The Hague, 2000, p. 8.

⁵ Marina Aksenova, *Complicity in International Criminal Law*, Hart Publishing, Poland, 2016, pp. 53 ff.

⁶ Solis Horwitz, "Document 465: The Tokyo Trial", in *International Conciliation*, 1950, vol. 28, pp. 475–540.

⁷ See Richard Overy, "The Nuremberg trials: international law in the making", in Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003.

This chapter answers this question in the positive by looking at the Tokyo judgment through the lens of ‘constructed temporality’, which invites the reader to view international criminal law not as a linear exercise, but rather as a ‘puzzle’ with various points of reference grounded in different interconnected and mutually enriching moments in time.

The traditional understanding of the evolution of international criminal law is that it emerged in Nuremberg,⁸ was subsequently applied in Tokyo, and was then codified to some extent by the International Law Commission, which adopted the Nuremberg Principles in 1950⁹ and then started its work on the draft Code of Crimes against the Peace and Security of Mankind (‘Draft Code’).¹⁰ There was a legal vacuum until the 1980s when the work on the Draft Code was resumed. This was followed by the resurgence of international criminal law in the 1990s with the establishment of the *ad hoc* tribunals. The early 2000s were marked by the first years of the operation of the International Criminal Court (‘ICC’) – the permanent body tasked with prosecuting mass atrocities. By then, international criminal law had reached a stage of certain maturity, accompanied by a number of legitimacy and enforcement challenges, which can be perceived either as ‘growing pains’ of the discipline or as a threat to its survival, depending on the point of view of the observer. Such a linear narrative, dominant in the discussions of international criminal law, dovetails the principle of legality in a sense that it tracks down the development of the body of law and its incorporation in the work of the relevant institutions.

While acknowledging this linear narrative, this contribution suggests that alternative narratives are also possible and desirable in order to achieve a better understanding of the field. One may equally argue that the linear progression of international criminal law is nothing more than an illusion or a constructed idea. This is the reason why temporality is

⁸ Some might argue that the origins of international criminal law go back in time to pre-Nuremberg. See Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law, Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2014 (<https://www.legal-tools.org/doc/6a26c8/>).

⁹ Adopted by the International Law Commission at its second session in 1950, *Yearbook of the International Law Commission*, 1950, vol. II (<https://www.legal-tools.org/doc/brq89g/>, <https://www.legal-tools.org/doc/9c9ro7/>, <https://www.legal-tools.org/doc/kug9u3/>).

¹⁰ Adopted by the Commission at its sixth session, in 1954, *Yearbook of the International Law Commission*, 1954, vol. II (<https://www.legal-tools.org/doc/114616/>).

viewed as a ‘constructed’ concept in this chapter. It is plausible to suggest that the discipline moves in circles – taking a leap forward and then retracting to the state of affairs that existed before.

Now, it is clear that this conceptualization cannot exist in a vacuum and must be measured against particular facts and events. The view adopted in this chapter is that the establishment of the Nuremberg and Tokyo Tribunals, the creation of the *ad hoc* tribunals and the ICC were all points in time when international consensus was reached as to the need to ‘do something about’ mass atrocities. It is equally important to know that political and international considerations halted the development of the discipline at many other points in time. For instance, in the 1950s and 1960s, the climate of accountability for the crimes committed during World War II was overshadowed by the desire, which accumulated at an international level, to forge another consensus on the alignment of States’ positions along the Cold War divide.¹¹ It is also possible to see that presently, international law is in a phase of ‘backtracking’ as it struggles to fend off the mounting criticism of its cost, ineffectiveness and lack of legitimacy.

This chapter therefore argues that one can conceptualize international criminal law as developing in cycles, each adding a layer of complexity and understanding to this constantly evolving discipline. However, the evolution is by no means linear, rather each moment in time when international criminal law takes a leap forward or backwards is defined by the accumulation of political will at the level of States, institutions and individual actors. The lens of ‘constructed temporality’ thus creates a narrative for this contribution. The purpose is not, however, to explore the political dimension of international criminal law, but rather to argue that the factual approach adopted in Tokyo is not prohibitive to it being the source of further development for international criminal law.

If one looks at the Tokyo judgment from a purely legalistic perspective, it is easy to see how the lack of legal definitions as well as the perceptions of the lack of objectivity can be prohibitive to its relevance in modern international criminal law. It appears, however, that the value of the Tokyo judgment extends beyond the provision of legal definitions as such; rather, the judgment marks a point in time when certain consensus

¹¹ Devin O. Pendas, “Seeking Justice, Finding Law: Nazi Trials in Postwar Europe”, in *Journal of Modern History*, 2009, vol. 81, no. 2, pp. 347–68.

was forged as to the prosecutions of the crimes committed in Asia during the Second World War. This position does not mean the judgment was fully accepted by its contemporaries. For instance, Judith Shklar observed that the Tokyo Trial was perceived as a ‘bore’ by the Japanese. Unlike its Nuremberg counterpart, it did not dramatize anything for the local population because the conquerors were behaving as they were expected to behave.¹² This reaction does not mean, however, that the judgment and its findings will not resonate with diverse audiences in the future. If one adopts the lens of ‘constructed temporality’, one allows for the ‘surprise re-emergence’ of the Tokyo ideas and concepts at the moment when the cycle of international criminal law picks up again.

Turning to facts and statistics, it is well established that Article 5 of the Tokyo Charter provided for individual criminal responsibility for the following substantive crimes: crimes against peace, conventional war crimes and crimes against humanity. The same article specified responsibility of leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes. The Tokyo indictment contained 55 counts charging 28 accused with crimes against peace, conventional war crimes, and crimes against humanity during the period from 1 January 1928 till 2 September 1945.¹³ The Tokyo Tribunal dismissed 45 counts of the indictment, leaving valid only 10, which included the grand conspiracy (count 1); waging the war of aggression against China, the United States, the British Commonwealth, the Netherlands, France, the Soviet Union and Mongolia (counts 27, 29, 31, 32, 33, 35 and 36, respectively); ordering, authorizing and permitting violations of the laws of war (count 54); and deliberately and recklessly disregarding the legal duty to secure the observance of the laws of war (count 55).

This chapter does not purport to comprehensively discuss each category of crimes adjudicated by the Tokyo Tribunal as it has been exhaustively done elsewhere.¹⁴ It rather focuses on four specific notions discussed at Tokyo by examining them through the lens of ‘constructed tem-

¹² Judith Nisse Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, 1964, p. 181.

¹³ *The Tokyo War Crimes Trial*, vol. 22, p. 48420 (‘Tokyo Judgment’) (<https://www.legal-tools.org/doc/8bef6f/>).

¹⁴ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, 2008.

porality'. These notions are, firstly, the conspiracy and the tension between individual responsibility and collective offending. Secondly, the chapter dwells on the definition of aggression and the right to self-defence as understood by the Tokyo Tribunal. The third concept is the definition of specific war crimes, in particular torture. Finally, the fourth notion is superior responsibility and what it means to consciously or recklessly disregard information, which indicates that subordinates are committing crimes.¹⁵ Each section of the chapter draws on the rhetoric of the Tokyo judgment as well as current debates on the same issue. The purpose is to demonstrate the cyclical nature of international (criminal) law and to establish precedential value of the Tokyo judgment, which is not cancelled out by its highly factual language.

11.2. Conspiracy

The Tokyo indictment charged all of the accused with conspiracy extending over a period of 18 years with the broadly defined objective of securing “the military, naval, political, and economic domination of East Asia and the Pacific and Indian Oceans, and for all countries and islands therein and bordering thereon”.¹⁶ The charge stemmed from Article 5(a) of the Charter, which called for responsibility of those involved in planning, preparation, initiation, waging aggressive war, and participation in a common plan or conspiracy for the accomplishment of any of the crimes mentioned in the same article. The IMTFE interpreted this provision as covering five different substantive crimes, treating conspiracy and other ways of engagement in criminality as substantive offences. This was a legal solution borrowed from Nuremberg. The Nuremberg indictment charged conspiracy for an even more extended period of time – starting with the formation of the Nazi Party in 1919 till the end of the war in 1945. The difference between Nuremberg and Tokyo was that the Nuremberg judges rejected the grand conspiracy charge, while the Tokyo judges convicted all but one accused – Foreign Minister Mamoru Shigemitsu –

¹⁵ Rome Statute of the International Criminal Court (‘Rome Statute’), 17 July 1998, Article 28 (b)(i) (<https://www.legal-tools.org/doc/7b9af9/>); and count 55 of the Tokyo Indictment (<https://www.legal-tools.org/doc/8bef6f/>).

¹⁶ Tokyo Judgment, p. 48421.

under count one as “leaders, organizers, instigators, or accomplices” in the grand conspiracy.¹⁷

Conspiracy was essentially a tool devised to tackle one of the biggest problems of international criminal law of all times: how does one attach individual responsibility for collective offending? In the absence of developed law on the modes of liability, conspiracy allowed for a fact-based approach to charging and giving space to the dominant narrative of aggression, which overpowered both the Nuremberg and the Tokyo indictments.¹⁸ Furthermore, the Tokyo judges chose to treat conspiracy as a substantive crime, largely following the domestic law approach prominent in the United States and overlooking the lack of distinction between the forms of participation and the substantive crime at issue. This approach resulted from the lack of the established legal framework coupled with the desire to secure convictions even in the absence of a well-defined link between the accused and the specific crimes.

Such liberal deployment of conspiracy attracted contemporary criticism. For instance, Gordon Ireland – a scholar of the IMTFE judgment at that time – claimed that it was unjust that the Tokyo version of conspiracy did not allow for the possibility of withdrawal at a later stage – something that the American version of conspiracy guaranteed, thereby protecting those who changed their minds and decided to renounce criminal participation.¹⁹ Judge Henri Bernard from France criticized the deployment of conspiracy for he considered the classical notion of complicity to be more accurate in describing the responsibility of those accused at Tokyo. The principal perpetrator, according to Judge Bernard, would have been the Emperor – a figure not even charged in the indictment.²⁰ Finally, Judge Pal in his strong dissent emphasized the fact that conspiracy is not a crime under international law.²¹

The dissenting voices were thus strong. They also elucidate how international criminal law has struggled with the problem of attribution of

¹⁷ *Ibid.*, p. 49773. See Ireland, 1950, p. 80, above note 1; Boister and Cryer, 2008, pp. 217-19, see above note 14.

¹⁸ Aksenova, 2016, chap. 1, above note 5.

¹⁹ Ireland, 1950, pp. 81-82, see above note 1.

²⁰ Dissenting Opinion of Judge Bernard, p. 22, reproduced in part in Ireland, 1950, p. 64, fn. 2, see above note 1 (<https://www.legal-tools.org/doc/f4179a/>).

²¹ Dissenting Opinion of Judge Pal, p. 991, reproduced in part in Ireland, 1950, p. 100, see above note 1 (<https://www.legal-tools.org/doc/2a3d21/>).

responsibility from the time of its conception. The 1990s and the work of the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') contributed to the development of a more sophisticated body of law dedicated to the modes of liability.²² Both Tribunals paid sufficient attention to the problem and came up with more legalistic solutions than the Nuremberg and Tokyo Tribunals. The ICTY extensively employed the doctrine of joint criminal enterprise, using it as a form of responsibility through which all of the participants are held accountable as principals provided they shared a common intent and contributed to the common plan. This concept attracted significant criticism from both practitioners and scholars.²³ The ICTR used the doctrine of extended participation to solve the same legal problem – extending principal perpetration to those who may not have been physically involved in the crime but exerted significant influence over its commission.²⁴

The Rome Statute of the ICC contains the most detailed provision on modes of liability to date – Article 25(3). It is designed to cover various forms of complicity and primary perpetration, introducing concepts such as indirect perpetration, co-perpetration and contributing to a group committing crimes. Despite all the details stipulated in the legal text, ICC judges still often find it challenging to link individual contributions to specific crimes.²⁵ Moreover, it appears that the gravitas at the ICC is once again shifting towards appreciating the context of mass offending together with the individual accountability: the current focus on reparations and the appropriate forms of collective and individual reparations can be seen as an attempt to acknowledge and remedy to the extent possible the wide-

²² See, for instance, Aksenova, 2016, pp. 81 ff., see above note 5.

²³ Alison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, pp. 75–169; Gideon Boas, James L. Bischoff and Natalie L. Reid, *International Criminal Law Practitioner Library International Criminal Procedure*, Cambridge University Press, Cambridge, 2007, pp. 17–22; Stephen B. Powles, "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?", in *Journal of International Criminal Justice*, 2004, vol. 2, p. 606.

²⁴ International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Gacumbitsi*, Appeal Judgment, 7 July 2006, ICTR-2001-64-A, para. 60 (<https://www.legal-tools.org/doc/aa51a3/>).

²⁵ For more discussion on the use of various modes of liability at the ICC, see Aksenova, 2016, pp. 133 ff., above note 5.

spread nature of suffering afflicted by mass atrocities.²⁶ Thus, if one looks at the problem of collective wrongdoing versus personal responsibility through the lens of ‘constructed temporality’, it becomes obvious that the dilemma still looms large in the field and the new ways of accounting for the context are being developed. The nuanced forms of participation developed in the 1990s only dealt with the problem in part – namely, the legality problem. The factual challenges of distilling individual guilt from the collective wrongdoing remains one to be examined in more detail by the scholars and practitioners of international criminal law.²⁷

11.3. The Crime of Aggression

The crime of aggression could be named, with some caution, the oldest international crime among the three categories of crimes mentioned at Tokyo. The first attempt to invoke it was made in the aftermath of the First World War. Article 227 of the Versailles Treaty of 1919 called for the creation of a special tribunal to try the German Kaiser for “a supreme offence against international morality and the sanctity of treaties”.²⁸ The former Emperor took refuge in the Netherlands and the trial never took place. The crime of aggression re-emerged in the work of the United Nations War Crimes Commission, which labelled the aggressive war and its preliminary and contemporaneous acts as war crimes “in a wider sense”.²⁹ The idea was to hold individually responsible those who launched and waged the Second World War.

Consequently, Article 6(a) of the Nuremberg Charter and Article 5(a) of the Tokyo Charter defined crimes against peace as

planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,

²⁶ See, for instance, the reparation order in the *Al Mahdi* case engaging closely with the cultural significance of the destroyed buildings. International Criminal Court (‘ICC’), *Prosecutor v. Al Mahdi*, Appeals Chamber, Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, ICC-01/12-01/15 A (<https://www.legal-tools.org/doc/8b92e9/>).

²⁷ This problem is discussed in detail by multiple authors in the forthcoming volume by Marina Aksenova, Elies van Sliedregt and Stephan Parmentier (eds.), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches to International Criminal Law*, Hart, Oxford.

²⁸ The Treaty of Versailles, 28 June 1919 (<https://www.legal-tools.org/doc/a64206/>).

²⁹ Kirsten Sellars, *Crimes against Peace and International Law*, Cambridge University Press, Cambridge, 2013, p. 60.

agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The Charters failed to explain in much detail what “waging the war of aggression” means in practice. Despite the lack of clarity, this class of offences played a central role both in Nuremberg and in Tokyo: count one of each respective indictment referred to the broad conspiracy to commit crimes against peace, whereas count two charged defendants with committing specific offences against peace.³⁰ The IMT judges were not persuaded by the over-expansive conspiracy charge.³¹ Continental lawyers rejected the idea of conviction without proof of the specific crimes perpetrated by the defendant.³²

Despite the failure of the grand conspiracy charge, the IMT called the initiation of a war of aggression not just an international offence, but “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”.³³ The dominant role of this charge in the case in Nuremberg is evident from the judges’ treatment of the *ex post facto* challenge raised by the defence. The Tribunal found that the maxim *nullum crimen sine lege* was observed for two main reasons: firstly, the defendants must have known that they are acting in violation of international law by engaging in the war of aggression, and, secondly, recourse to war was already expressly renounced by the Kellogg-Briand Pact at Paris in 1928.³⁴ However, this reasoning of the IMT is flawed because the 1928 Paris Pact had not intended to give rise to individual criminal responsibility.

Later, in proving the validity of the prohibition of the war of aggression, the prosecution in Tokyo relied most heavily on Article 1 of the Kellogg-Briand Pact of 1928:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to

³⁰ International Military Tribunal (Nuremberg) Judgment and Sentences, reprinted in *American Journal of International Law*, 1947, vol. 41, p. 186 (‘Nuremberg Judgment’); see also Tokyo Judgment, p. 48421.

³¹ Nuremberg Judgment, p. 222.

³² Overy, 2003, p. 19, above note 7.

³³ Nuremberg Judgment, p. 186.

³⁴ *Ibid.*, pp. 217-218. See also the General Treaty for the Renunciation of War of 27 August 1928 (<https://www.legal-tools.org/doc/396040/>).

war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

The prosecution submitted that by 1928, most civilized nations had established the illegality of war as a positive rule of international law.³⁵ The majority declared that it is bound by the law of the Charter and referred to the Nuremberg IMT judgment in addressing the defence's *ex post facto* challenge:

The maxim '*nullum crimen sine lege*' is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.³⁶

As it turned out, defining aggression was not easy. The prosecution in Tokyo, towards the end of the trial, backed away from providing such a definition and, in a typical – for that period of the development of international criminal law – manner, adopted a fact-based approach. The prosecution clarified that what matters was the essence of the crime of aggression, which rested in complete domination of a foreign country.³⁷ The majority followed suit and did not try to come up with a specific definition.³⁸ The IMTFE, for instance, held:

The Tribunal is further of opinion that the attacks which Japan launched on 7th December 1941 against Britain, the United States of America and the Netherlands were wars of aggression. They were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the difficulty of stating a comprehensive definition of "a war of aggression," attacks made with the above motive cannot but be characterised as wars of aggression.³⁹

³⁵ Boister and Cryer, 2008, p. 124, above note 14, citing Elizabeth S. Kopelman (n. 80).

³⁶ Tokyo Judgment, p. 48438.

³⁷ Boister and Cryer, p. 122, see above note 14.

³⁸ *Ibid.*

³⁹ Tokyo Judgment, p. 49584.

It is noteworthy that the defence in Tokyo raised an important self-defence challenge, arguing that Japan had the right to invoke self-defence under the terms of the Kellogg-Briand Pact. The majority disagreed, stating that:

Under the most liberal interpretation of the Kellogg-Briand Pact, the right of self-defense does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action. Any other interpretation would nullify the Pact.⁴⁰

Judge Pal in his dissent argued to the contrary – self-defence, in his view, was inherent in sovereignty and could not be “affected by implication”.⁴¹ The approach of the IMTFE was therefore case-by-case and focused on different theatres of war. Robert Cryer argues that it is possible that the majority did not define aggression to avoid suggestions that their definition covered acts by the prosecuting nations.⁴²

The lack of definition by the IMT and the IMTFE was understandable but left more questions than answers. Gordon Ireland observed at that time that aggressive war had never been acceptably defined internationally, and there were serious doubts as to if it could ever be.⁴³ He argued that “not all war has been or can here be condemned, for even the prosecuting nations are not universal pacifists, and before one form of war can be singled out for punishment, it ought to be made clear what kinds are included”.⁴⁴

State-focused understanding of aggression dominated international law for decades after the conclusion of the Nuremberg and Tokyo Trials. The 1950 Nuremberg Principles,⁴⁵ codifying the IMT law, and the 1954 Draft Code briefly mentioned crimes against peace as offences punishable under international law, but fell short of defining them.⁴⁶ The International

⁴⁰ *Ibid.*, p. 48495.

⁴¹ Dissenting Opinion of Judge Pal, p. 91, see above note 21.

⁴² Boister and Cryer, 2008, p. 121, see above note 14.

⁴³ Ireland, 1950, p. 83, see above note 1.

⁴⁴ *Ibid.*

⁴⁵ Adopted by the International Law Commission at its second session in 1950, *Yearbook of the International Law Commission*, 1950, vol. II (<https://www.legal-tools.org/doc/6465a9/>).

⁴⁶ Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Adopted by the International Law Commission at its second session, in 1950, *Yearbook of the International Law Commission*,

Law Commission, in charge of formulating both the Draft Code and the Nuremberg Principles, deferred in this matter to the Special Committee established by the General Assembly.⁴⁷ Only in 1974 did the General Assembly adopt Resolution 3314 defining aggression.⁴⁸ Article 1 of this resolution states that “aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. It is clear that this provision is consonant with Article 2(4) of the UN Charter prohibiting the use force against territorial integrity or political independence of another State. Article 5(2) of Resolution 3314 mentions that aggression gives rise to international responsibility but fails to specify the type of this responsibility as well as the consequences of establishing it. It appears that the General Assembly aimed at obliging States to refrain from aggression and did not deal with matters of individual criminal responsibility.

The crime of aggression made its way back into international criminal law only in 1998, when the drafters of the Rome Statute of the ICC included the crime of aggression within the jurisdiction of the Court. The definition of this crime, which proved so difficult to furnish in the 1940s, had still been missing in the Rome Statute until 2010, when the Assembly of States Parties finally reached an agreement on this controversial issue.⁴⁹ Article 8*bis* of the Rome Statute relies on Resolution 3314 for the list of acts that qualify as an act of aggression (for example, the invasion or attack by armed forces of a State or the territory of another State). Strong ties between State- and individual criminal responsibility provoked a debate around the political nature of this crime and the feasibility of prosecuting aggression internationally. Indeed, the ICC included a higher threshold for aggression than that contained in Resolution 3314 by requiring that act of aggression, “by its *character, gravity and scale, constitutes a manifest violation* of the Charter of the United Nations”.⁵⁰ On 15 De-

1950, vol. II (see Principle VI, along with commentaries at <https://www.legal-tools.org/doc/038f9a>).

⁴⁷ Boister and Cryer, 2008, p. 264, see above note 14.

⁴⁸ United Nations General Assembly, resolution 3314(XXIX), 14 December 1974 (<https://www.legal-tools.org/doc/752c30/>).

⁴⁹ Resolution RC/Res.6., adopted at the 13th plenary meeting, on 11 June 2010 (<https://www.legal-tools.org/doc/0d027b/>).

⁵⁰ Rome Statute, Article 8*bis*(1) (emphasis added) (<https://www.legal-tools.org/doc/3cf6dd/>).

cember 2017, the Assembly of States Parties activated the jurisdiction of the ICC over the crime of aggression with effect from 17 July 2018.⁵¹ This date was marked by the ICC as a moment of historic significance, despite the ongoing difficulties in defining both the scope of the Court's jurisdiction as well as the exact opt-out procedure available to countries not wishing to be bound by the amendment to the Rome Statute.⁵²

If one looks at the evolution of the crime of aggression, three major trends become obvious. Firstly, there is an ongoing reluctance at defining the offence. Even though the Rome Statute has now been amended to include the elaborate definition of that crime, the road to the adoption of the amendments was thorny and the intricate nature of the legal definition can be explained precisely by States' desire to create a feasible opt-out mechanism that would protect them from the jurisdiction of the Court.

Secondly, the discussion that took place in Tokyo as to whether a State can unilaterally invoke the right to self-defence is still a very timely and relevant one. On 17 May 2018, at the meeting of the UN Security Council dedicated to its role in maintaining international peace, the representatives of Brazil warned against expansive interpretation of the right to self-defence in violation of Article 2(4) of the UN Charter. Brazil's representatives noted that despite the year 2018 marking the ninetieth anniversary of the Kellogg-Briand Pact prohibiting the use of force as national policy, States keep unilaterally invoking it for various purposes, including the protection of human rights, thereby putting in question the stability of an international legal order.⁵³ The restrictive interpretation of the right to self-defence furnished by the majority at the IMTFE is therefore very modern and relevant, as it resonates with the debates currently ongoing in the UN Security Council.

Thirdly, and related to the question of self-defence, is the ongoing contestation of the scope of the prohibition of the use of force. The Tokyo judgment essentially avoided an overall discussion of the issue, but it highlighted the criminality of the motivation to wage an aggressive war

⁵¹ ICC, Press Release, "Assembly activates court's jurisdiction over crime of aggression", 15 December 2017 (<https://www.legal-tools.org/doc/40be95/>).

⁵² Nikolas Stürchler, "The Activation of the Crime of Aggression in Perspective", *EJIL: Talk!*, 26 January 2018 (available on its web site).

⁵³ Security Council 8262nd meeting, "Security Council Must Rectify Failure to Prohibit Use of Force, Maintain International Peace, Speakers Stress in Day-long Debate", SC/13344, 17 May 2018.

with the purpose of dominating another country. As recently noted by Brazil, force still occupies a prominent place in international relations with various justifications underlying its deployment, including humanitarian intervention, or acting to alleviate the extreme humanitarian suffering of the people.⁵⁴ For instance, the UK engaged creatively with the concept of humanitarian intervention to justify the Syria strikes of 13 April 2018.⁵⁵ The action was met by scepticism in some legal circles as this doctrine fell short of being an established principle of customary international law.⁵⁶

11.4. War Crimes

The category of war crimes draws its substantive content from international humanitarian law, which can be roughly presented as a combination of ‘the law of the Hague’ and ‘the law of Geneva’. The former, codified in the 1899 and 1907 Hague Conventions, provides definitions of lawful combatants, regulates means and methods of warfare and the treatment of persons no longer taking part in hostilities (*hors de combat*). The latter comprises four Geneva Conventions of 1949 and two Additional Protocols of 1977 dealing primarily with the treatment of persons who do not, or no longer, take active part in hostilities (civilians, the wounded, the sick and the prisoners of war).⁵⁷

International criminal law and international humanitarian law are closely connected, which explains the relatively solid grounding of war crimes in the sources of law. However, the aims of these two disciplines are different. International criminal law deals with the individual responsibility for violence that erupts in the course of an armed conflict between sovereign States (belligerency) or between armed groups within the State (insurgency).⁵⁸ In contrast, international humanitarian law performs more general regulatory functions and speaks to a wider audience. International

⁵⁴ Syria Action – UK Government Legal Position, 14 April 2018 (available on the web site of the UK Government).

⁵⁵ *Ibid.*

⁵⁶ Opinion of Professor Dapo Akande, The Legality of the UK’s Air Strikes on the Assad Government in Syria, 16 April 2018 (available on the web site of the UK Government).

⁵⁷ Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, third edition, Oxford University Press, 2013.

⁵⁸ ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, IT-94-1, para. 96 (‘Tadic Jurisdictional Decision’) (<https://www.legal-tools.org/doc/01079f/>).

humanitarian law frequently calls on States, as opposed to individuals, to ensure compliance by their military with the rules applicable in armed conflicts.

The absence of any legal precedent regarding the crimes prosecuted internationally, first by the IMT and then by the IMTFE, inspired the work of the United Nations War Crimes Commission, which was set up in 1943 to assist with finding substantive definitions. The primary task of this body was to investigate facts and formulate legal opinions relating to war crimes and penal liability of the perpetrators.⁵⁹ Consequently, war crimes as a category made an early entrance onto the scene of international criminal law and largely dominated it. Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter extended the jurisdiction of these Tribunals over war crimes, together with crimes against peace and crimes against humanity.⁶⁰ War crimes re-emerged in the statutes of the ICTY,⁶¹ ICTR,⁶² and Special Court for Sierra Leone,⁶³ as well as the Law on Establishing the Extraordinary Chambers in the Courts of Cambodia.⁶⁴ Article 8 of the Rome Statute contains the most sophisticated and detailed account of war crimes in modern international criminal law.

The IMTFE in the 1940s did not dwell on the contextual elements of war crimes and legal distinctions between different forms of warfare, but rather focused on specific instances of offending. The judges dismissed most of the charges describing responsibility of the defendants for various acts of mass atrocity on technical grounds, retaining only two counts covering war crimes and crimes against humanity (counts 54 and

⁵⁹ History of the United Nations War Crimes Commission and the Development of the Laws of War compiled by the United Nations Commission, His Majesty's Stationary Office, London, 1948, p. 169 ('UN War Crimes Commission') (<https://www.legal-tools.org/doc/cac045/>).

⁶⁰ Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter.

⁶¹ Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute') (as amended on 17 May 2002), 25 May 1993, Articles 2 and 3 (<https://www.legal-tools.org/doc/b4f63b/>).

⁶² Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute') (as last amended on 13 October 2006), 8 November 1994, Article 4 (<https://www.legal-tools.org/doc/8732d6/>).

⁶³ Statute of the Special Court for Sierra Leone, 16 January 2002, Articles 3 and 4 (<https://www.legal-tools.org/doc/aa0e20/>).

⁶⁴ Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC) Law, Article 6 (<https://www.legal-tools.org/doc/88d544/>).

55).⁶⁵ Count 54 of the indictment charged 19 persons for having ordered, authorized, permitted persons to commit offences violating the laws of war. Count 55 charged some defendants for being, by virtue of their respective offices, responsible for securing observance of the conventions and the laws and customs of war in respect of the armed forces, prisoners of war and civilians of the Allied forces; and for deliberately and recklessly disregarding their duty to take adequate steps to secure the observance and to prevent breaches thereof.⁶⁶ As Yuma Totani noted, the focus of the Tokyo Trial on crimes against peace led to the proposal of the lead American Prosecutor Joseph Keenan to drop the war crimes charges and shorten the trial. The proposition was rejected, and charges were heard.⁶⁷ The majority thus spent over 1,000 pages discussing evidence relating to aggression but very little space tackling war crimes.⁶⁸ The approach of the IMTFE was thus illustrative rather than comprehensive.

As with the rest of the Tokyo judgment, the discussion of war crimes was highly factual. The legal analysis was interwoven into the general narrative of the Japanese aggression. There are, however, some significant discussions in the judgment that can serve as a legal precedent. For instance, the IMTFE encountered the question of whether the norms of the laws of war contained in the Geneva Prisoner of War Convention of 1928 are applicable to individuals in cases when the State is not legally bound by the respective convention. The IMTFE resolved this question by reference to customary international law, arguing that “under the customary rules of war, acknowledged by all civilized nations, all prisoners of war and civilian internees must be given humane treatment”.⁶⁹

In a highly significant part of the judgment, there is a discussion of the rapes and other atrocities which occurred in Nanjing:

the members of the victorious Japanese Army had set upon the prize to commit unlimited violence. Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning. There was no discipline

⁶⁵ See Yuma Totani, “The Case against the Accused”, in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 154.

⁶⁶ Tokyo Judgment, pp. 48423-48424.

⁶⁷ See Totani, 2011, p. 153, above note 65.

⁶⁸ Boister and Cryer, 2008, p. 190, see above note 14.

⁶⁹ Tokyo Judgment, p. 49719-20.

whatever. Many soldiers were drunk. Soldiers went through the streets indiscriminately killing Chinese men, women and children without apparent provocation or excuse until in places the streets and alleys were littered with the bodies of their victims. According to another witness Chinese were hunted like rabbits, everyone seen to move was shot. At least 12,000 non-combatant Chinese men, women and children met their deaths in these indiscriminate killings during the first two or three days of the Japanese occupation of the city.⁷⁰

This is a rather under-acknowledged and early discussion on sexual crimes in international criminal law.⁷¹ It was not until the 1990s that the ICTY and the ICTR picked up this important topic and prioritized the prosecution of sexual violence in times of war. The UN Commission of Experts, set up to analyse information pertaining to the violations of international humanitarian law on the territory of the former Yugoslavia, whose report served as a catalysis for the creation of the ICTY, singled out sexual violence as one of the main avenues for its work.⁷² Annex IX of the Commission's report entitled "Rape and Other Forms of Sexual Assault" was part of the Commission's study pursuing the objective to serve, *inter alia*, as a basis for the eventual prosecution of rape and sexual assault by the ICTY.⁷³ M. Cherif Bassiouni, who headed the Commission at that time, noted that this rape investigation was the first one of its kind conducted in time of war.⁷⁴ The expectation was therefore that the ICTY would give

⁷⁰ *Ibid.*, p. 49605.

⁷¹ See Diane Orentlicher, "The Tokyo Tribunal's Legal Origins and Contributions to International Jurisprudence as Illustrated by its Treatment of Sexual Violence", chap. 5 above.

⁷² United Nations Security Council, Resolution 780, 6 October 1992 (<https://www.legal-tools.org/doc/cdc5ad/>).

⁷³ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) dated 27 May 1994 ('Final Report'), UN Doc. S/1994/674, Annex IX, p. 6 (<https://www.legal-tools.org/doc/361096/>).

⁷⁴ M. Cherif Bassiouni, "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780", in *American Journal of International Law*, 1994, vol. 88, pp. 794-795, 798.

“this particularly heinous crime its utmost attention”,⁷⁵ which the Tribunal did.⁷⁶

Another significant discussion on substantive war crimes pertained to that of torture: its definition and particular conduct that constitutes it. The IMTFE noted that the practice of torture of prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan. The IMTFE further listed the types of torture inflicted: “[a]mong these tortures were the water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging”.⁷⁷

Some of the issues discussed by the IMTFE have clear resonance with current debates. This is where the lens of ‘constructed temporality’ is useful in assessing the developments in international criminal law. For instance, it is interesting to dwell on the IMTFE’s definition of waterboarding as torture:

The Japanese Military Police, the Kempeitai, was most active in inflicting these tortures. [...] The Kempeitai were administered by the War Ministry. A Kempeitai training school was maintained and operated by the War Ministry in Japan. It is a reasonable inference that the conduct of the Kempeitai and the camp guards reflected the policy of the War Ministry. The so-called “water treatment” was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.⁷⁸

In a sad and ironic twist, the use of torture as an ‘enhanced interrogation technique’ designed to fight terrorism, has re-entered public discourse of many States, including the US following the 9/11 attacks. Francesca Laguardia explains how the turn of criminal justice towards preven-

⁷⁵ *Ibid.*, p. 799.

⁷⁶ For a comprehensive overview of the track record of the ICTY, see Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016.

⁷⁷ Tokyo Judgment, p. 49663.

⁷⁸ *Ibid.*, p. 49664.

tion of terror rather than the extraordinary circumstances of the fight against terror in the context of a non-international armed conflict is chiefly to blame for the increasing acceptance of torture by some officials of the Central Intelligence Agency ('CIA').⁷⁹ In her powerful article, she questions both the effectiveness of torture and the principles underlying its use, referring, for instance, to the case of the Guantánamo detainee, Khalid Sheikh Mohammed. In response to being waterboarded, he falsely stated that two individuals, subsequently erroneously detained, were linked to Al-Qaeda.⁸⁰ Notwithstanding the criticism by academics, the fact that the current CIA director, Gina Haspel, oversaw a secret prison where waterboarding was used, attests to the ongoing contestation related to the content and definition of war crimes as well as the implications of engaging in this conduct.⁸¹

It is therefore clear that the IMTFE's discussion of substantive war crimes has strong resonance with today's reality as the work on defining commonly accepted standards of behaviour is still ongoing.

11.5. Superior Responsibility

The last important contribution of the Tokyo judgment that is factual in nature but has strong legal implications is its interpretation of superior responsibility. The Tokyo Charter did not have a separate provision on modes of liability and only mentioned that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy" are to be held responsible for the substantive crimes mentioned in Article 5 of the Charter. This early stage of the development of international criminal law is characterized by the lack of distinction between the forms of participation and the substantive offences.⁸² The IMTFE (and the IMT) judges did not dwell on the way in which individuals became involved in crimes, but rather focused on their actual contribution based on the circumstances of the case. It was only later, that

⁷⁹ Francesca Laguardia, "Imagining the Unimaginable: Torture and the Criminal Law", in *Columbia Human Rights Law Review*, 2015, vol. 46, p. 48.

⁸⁰ *Ibid.*, p. 71, citing Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program Executive Summary, 2014, pp. 83, 108, n. 448.

⁸¹ David Smith, "Torture allegations dog Gina Haspel as she is poised to be first female CIA head", *The Guardian*, 16 March 2018 (available on its web site).

⁸² Aksenova, 2016, p. 79, see above note 5.

modes of liability crystalized into a separate issue and occupied an independent article in the Draft Code.⁸³

Despite the lack of explicit focus on modes of liability, there is a striking similarity between the formulation of charges 54 and 55 in the Tokyo indictment and Articles 25(3)(b) and Article 28 of the Rome Statute of the ICC. As mentioned in the previous section, count 54 charged the defendants with “ordering, authorizing and permitting violations of the laws of war”, while count 55 dealt with recklessly disregarding the legal duty to secure the observance of the laws of war. Article 25(3)(b) of the Rome Statute establishes responsibility for complicity in the form of ordering, soliciting, or inducing the commission of the crime, while Article 28 deals with the responsibility of military commanders and other superiors. Under the latter, military commanders are responsible if they either knew or, owing to the circumstances at the time, should have known – and other superiors are liable if they either knew, or consciously disregarded information which clearly indicated – that the subordinates were committing or about to commit the relevant crimes.

Yuma Totani argues that one of the biggest challenges to the prosecution in Tokyo was securing evidence of criminal orders for count 54 because of the empire-wide document destruction orchestrated by the Japanese Government prior to its surrender.⁸⁴ The prosecution procured witness statements and affidavits from victims, perpetrators and bystanders. This evidence did not implicate specific individuals but helped establish patterns of atrocities perpetrated by the Japanese, which, in turn, allowed the prosecution to argue that the atrocities were not random.⁸⁵ This was an interesting way of handling evidence and linking it to specific individuals. The analysis of the IMTFE with respect to this count was thus largely inferential – suggesting that the omnipresent patterns attest to individual

⁸³ UN Doc. A/RES/177(II) (<https://www.legal-tools.org/doc/57a28a>). Doudou Thiam, who was appointed as the ILC’s Special Rapporteur charged with preparing the document in the 1980s, identified the gap in international criminal law in attributing responsibility for the crimes committed by a plurality of persons. The Commission, from its thirty-fifth session, in 1983, to its forty-second session, in 1990, received eight reports from the Special Rapporteur. See the Report of the International Law Commission on the Work of its Forty-Third Session, 29 April-19 July 1991, UN Doc. A/46/10, p. 80 (<https://www.legal-tools.org/doc/88a770/>). See also Aksenova, 2016, p. 74, above note 5.

⁸⁴ Totani, 2011, see above note 65.

⁸⁵ *Ibid.*

responsibility for ordering and not the other way around. The defence unsuccessfully contested this approach.⁸⁶ The IMTFE concluded.⁸⁷

During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that only one conclusion is possible - the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.

The IMTFE further held that war crimes were a matter of policy:⁸⁸

At the beginning of the Pacific War in December 1941 the Japanese Government did institute a system and an organization for dealing with prisoners of war and civilian internees. Superficially, the system would appear to have been appropriate; however, from beginning to end the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded. Ruthless killing of prisoners by shooting, decapitation, drowning, and other methods; death marches in which prisoners including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayoneted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offences.

Inferential analysis of the mental state of the defendant in the cases of ordering has interesting resonance with modern international criminal law. In the *Šljivančanin* case dealing with the movement of prisoners from the Vukovar hospital to Ovčara by the Yugoslav People's Army during the Balkan war, the ICTY Appeals Chamber viewed the failure of the accused to prevent the implementation of the unlawful order as satisfying all the

⁸⁶ *Ibid.*, p. 158.

⁸⁷ Tokyo Judgment, p. 49592

⁸⁸ *Ibid.*, p. 49593.

requirements for a conviction as an accomplice to murder by omission.⁸⁹ It was held that although Mr. Šljivančanin no longer exercised *de jure* authority over the military police, his duty to protect the prisoners of war required him to order the police not to withdraw from the hospital where the prisoners were kept. The Appeals Chamber employed largely inferential analysis suggesting that “had he ordered the military police not to withdraw, these troops may well have, in effect, obeyed his order to remain there”.⁹⁰

Similarly, the ICC in *Mudacumura* (charged with committing war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus in the Democratic Republic of the Congo) tackled his responsibility for ordering under Article 25(3)(b) by highlighting that Mudacumura was the top military commander for the relevant period and instructed others to conduct a military campaign resulting in the commission of war crimes.⁹¹ His knowledge about the crimes was inferred from the reports he allegedly received by virtue of his position. Thus, it is clear that despite the developed legal framework for different forms of individual criminal responsibility, inferential analysis based on the facts and the position held by the accused is still employed in modern international criminal law.⁹²

With respect to count 55, the first challenge was to prove criminal negligence in cases involving civilians in positions of authority – an untested territory at that time.⁹³ One of the legal tools employed by the IMTFE to activate responsibility of civilians was referencing the Hague Convention IV of 1907, which states that: “Prisoners of War are in the power of hostile Government, but not of the individuals or corps who capture them”.⁹⁴ The idea was therefore that the primary responsibility for the welfare of prisoners rests with the government. To that effect, the judges ruled on the responsibility of the government as a collective entity:

⁸⁹ ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Appeal Judgment, 5 May 2009, T-95-13/1-A, paras. 101-103.

⁹⁰ *Ibid.*, para. 93; Aksenova, 2016, p. 105, see above note 5.

⁹¹ ICC, *Prosecutor v. Mudacumura*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12, paras. 64-65 (<https://www.legal-tools.org/doc/ecfae0/>).

⁹² Aksenova, 2016, p. 258, see above note 5.

⁹³ Totani, 2011, see above note 65.

⁹⁴ Tokyo Judgment, p. 48498; Totani, 2011, p. 158, see above note 65.

The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. That Government also attempted to conceal the ill-treatment and murder of prisoners and internees by prohibiting the representatives of the Protecting Power from visiting camps, by restricting such visits as were allowed, by refusing to forward to the Protecting Power complete lists of prisoners taken and civilians interned, by censoring news relating to prisoners and internees, and ordering the destruction of all incriminating documents at the time of the surrender of Japan.⁹⁵

The second challenge for the IMTFE was to dissect the responsibility of the government as a collective entity and link it to individual accused persons. This involved assessing the *mens rea* standard for this category of crimes. The judges interpreted the standard of ‘reckless disregard’ of a duty in a very broad way: “[i]f such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes”.⁹⁶ Furthermore, the IMTFE judges stressed that merely accepting assurances from those more directly involved in criminality is not enough:

[I]t is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue.⁹⁷

Interestingly, these findings did not translate into many guilty verdicts. Only three former Cabinet members were convicted on the ground of negligence (Hirota, Shigemitsu and Koiso). Seven others were found guilty of war crimes on various legal and factual grounds.⁹⁸

⁹⁵ Tokyo Judgment, p. 49750.

⁹⁶ *Ibid.*, pp. 48445-6.

⁹⁷ *Ibid.*

⁹⁸ Totani, 2011, p. 159, see above note 65.

The recent *Bemba* appeal judgment rendered by the ICC provides for an interesting comparison with the *mens rea* standard in cases of superior responsibility. Bemba, who was President and Commander-in-Chief of the Movement for the Liberation of the Congo, was convicted for war crimes by the Trial Chamber under Article 28(a) of the Rome Statute, which, as mentioned, establishes responsibility of a military commander who either knew or should have known about the crimes committed by the subordinates. The Trial Chamber in this case acknowledged that Bemba undertook some measures to address the criminality. In particular, he sent a letter to the UN Representative in the region and requested the Prime Minister of the Central African Republic to set up an international commission of inquiry. The trial judges nonetheless held that Bemba's motivations in doing so were not "genuine".⁹⁹ On appeal, Bemba argued that, having been told that the investigation would take place, it was reasonable for him to wait for it.¹⁰⁰ The Appeals Chamber agreed with him and overturned his conviction, *inter alia*, for this reason, highlighting the practical and operational difficulties Bemba faced as a remote commander operating in a foreign country.¹⁰¹

The Appeals Chamber therefore adopted a much more conservative view on superior responsibility than that of the IMTFE 70 years earlier. It must be noted that the IMTFE dealt with responsibility of civilians under the 'reckless disregard' standard, while the ICC in the *Bemba* case looked at the responsibility of a military commander pursuant to the 'knew or should have known' test. The latter standard is however even lower than the 'reckless disregard' (or, as Article 28(b) of the Rome Statute calls it, 'conscious disregard') for other superiors. The situation in *Bemba* of a failure of the commander to follow up on his orders for investigation speaks directly to the pronouncement of the Tokyo Tribunal, which ruled that accepting mere assurances from others is *not* sufficient to absolve a superior of responsibility. The ICC Appeals Chamber ruled to the contrary. Moreover, it introduced the idea of a 'remote commander' – someone who cannot fully control the situation on the ground due to operational inabil-

⁹⁹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08 A, para. 131 (<https://www.legal-tools.org/doc/40d35b/>).

¹⁰⁰ *Ibid.*, para. 159.

¹⁰¹ *Ibid.*, para. 189.

ity and thus cannot be held responsible for any actions outside of his or her control. This conception stands in contrast with the sweeping approach of the IMTFE holding the whole government responsible for the system of ill treatment of prisoners. It is therefore interesting to observe continuous contestation as to the scope of the notion of superior responsibility and the exact duties imposed on those in positions of authority.

11.6. Conclusion

This chapter demonstrated that international criminal law is not static. It is developing in a non-linear fashion by adding layers of complexity with every new cycle of its existence by constantly revising the same philosophical and legal problems. The Tokyo judgment is indeed very factual, which is in part due to the lack of the applicable law available at the time of its creation. But its struggles are not too different from those of modern international criminal justice, well equipped with sophisticated legal formulae and case law. There continue to be debates about the best way of attributing individual responsibility for collective offending, assessing the mental state of the accused in the absence of directly implicating evidence, and applying solidified prohibitions of various international crimes, such as torture, consistently across the spectrum of factual scenarios.

The flaws of the Tokyo judgment were arguably outweighed by the fact that the trial took place in a near legal vacuum,¹⁰² having only the Nuremberg process to rely upon for precedent. Judith Shklar grappled with the application of the principle of legality to the Nuremberg trial when no law had existed prior to it.¹⁰³ Her solution was to draw attention away from the legalistic propensity of thinking about law in black and white terms as ‘being there’ or ‘not being there’. It is much more plausible when assessing the legacy of the IMTFE (and the IMT) to focus on the quality of its work and the strength of its intention to achieve the best possible form of justice available at that moment in time.

While there were many deficiencies in the way law was administered in Nuremberg and later in Tokyo, it was an achievement in itself that the debates about the destiny of the defendants took place within the parameters set out by a legal trial. Mass execution or a purely political process could have been other alternatives. The fact that the setting of an in-

¹⁰² Shklar, 1964, p. 153, see above note 12.

¹⁰³ *Ibid.*

ternational criminal trial was chosen to deal with the worst atrocities of the twentieth century had profound impact on how we currently think about individual responsibility of those in positions of power.

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The Tokyo Tribunal: Perspectives on Law, History and Memory

Viviane E. Dittrich, Kerstin von Lingen, Philipp Osten and Jolana Makraiová (editors)

The 'International Military Tribunal for the Far East' (IMTFE), held in Tokyo from May 1946 to November 1948, was a landmark event in the development of modern international criminal law. The trial in Tokyo was a complex undertaking and international effort to hold individuals accountable for core international crimes and delivering justice. The Tribunal consisted of 11 judges and respective national prosecution teams from 11 countries, and a mixed Japanese–American team of defence lawyers. The IMTFE indicted 28 Japanese defendants, amongst them former prime ministers, cabinet ministers, military leaders, and diplomats, based on a 55-count indictment pertaining to crimes against peace, war crimes, and crimes against humanity. The judgment was not unanimous, with one majority judgment, two concurring opinions, and three dissenting opinions. The trial and the outcome were the subject of significant controversy and the Tribunal's files were subsequently shelved in the archives. While its counterpart in Europe, the 'International Military Tribunal' (IMT) at Nuremberg, has been at the centre of public and scholarly interest, the Tokyo Tribunal has more recently gained international scholarly attention.

This volume combines perspectives from law, history, and the social sciences to discuss the legal, historical, political and cultural significance of the Tokyo Tribunal. The collection is based on an international conference marking the 70th anniversary of the judgment of the IMTFE, which was held in Nuremberg in 2018. The volume features reflections by eminent scholars and experts on the establishment and functioning of the Tribunal, procedural and substantive issues as well as receptions and repercussions of the trial.

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