Transitional justice is presented as a project of global redemption. Yet this process may obfuscate realities of the use and abuse of victims, their spoliation in the name of justice, their pain and disappointment, the compelled nature of participation (p. 546), and the hurtfulness of mandated forgiveness as being "coercive reconciliation" (p. 603).

Where to begin the checks and balances on all this? For starters, perhaps, to deflate the messianic virtue-values attributed to transitional justice. To de- or un- enthrall, to revert to Schwöbel-Patel's work. Perhaps transitional justice activists should sit more than they stand. Perhaps not everything needs to be redressed. Transitional justice actors should be aware of their surroundings and the potential of co-optation and abuse. Perhaps greater valence should be given to transitional justice as an organic, messy, and spontaneous process that best emerges bottom-up even if in contestation with state power.

If transitional justice is akin to playing with fire, then perhaps less of it would be better. But I fear that having none of it—to give up entirely—would be far worse.

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Judgement at Tokyo: World War II on Trial and the Making of Modern Asia. By Gary Bass. New York, NY: Alfred A. Knopf, 2024. Pp. 793. Index
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Introduction

> "We all look forward to the day when law rather than force will be the arbiter of international relations" (President Truman, 1945) (p. 114).

I finished writing this review just a few days after Volodymyr Zelensky's chaotic visit to the Oval Office in late February 2025. Of course, for many reasons, this media event exercised a car crash fascination on its audience. But at least one way to read the exchanges between the Ukrainian president and President Trump (and his vice president, JD Vance) was as a clash between two visions of internationalism: one insisting that the original sin of a crime of aggression establishes a moral limit in any negotiated end to a war, the other more concerned with reaching an agreement in which an over-attention to law and the allocation of historical responsibility (e.g., for "the crime of aggression") might hamper the prospects of diplomatic resolution or artful deal.

Multiple questions arise at the intersection of these conceptions of global order: are the leaders of a state guilty of the crime of aggression or are they simply defending the state's traditional sphere of interest from a rival's expansionary tendencies? Is the indictment of political enemies just a way of liquidating them through legal process, in Judith Shklar's famous phrase?[1] Are the responsible heads of state to be tried as war criminals or rehabilitated as diplomatic partners? Is it all victor's justice, or is none of it? Some of it? In the world of war crimes trials these questions persist over time. For Japan's Far East Co-Prosperity Sphere read Vladimir Putin's invasion of Ukraine (though Putin turns out to be a fan of the Tokyo Trial) (pp. 359, 683).[2]

How timely then to be asked to review Gary Bass's *Judgement at Tokyo*, a densely researched and resonant book on the Tokyo war crimes trial, a trial that formed part of an effort to revive international law for the post-war generation by holding commanders responsible for the crimes of their subordinates, making leaders accountable for initiating an aggressive war and criminalizing acts committed against civilians in occupied countries—but a trial that for a long time had

[1] JUDITH N. SHKLAR, LEGALISM: LAWS, MORALS, AND POLITICAL TRIALS (1964). For a still pertinent early essay, see G. Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROB. 163 (1950).

[2] GARY BASS, WORLD WAR II ON TRIAL AND THE MAKING OF MODERN ASIA (2024). In fact, Putin's arguments about NATO expansion bear a close resemblance to those of the Japanese defense lawyers at Tokyo. Kiyose Ichiro, Tojo's defense attorney, for example identified the origins of the war in a series of acts by the United States that threatened to emasculate Japan and forced it into its attack on Pearl Harbor.

fallen out of favor (indeed fell out of favor with most of the judges long before the end of the proceedings) (pp. 8, 379).[3]

At Melbourne University, I used to teach a course called *The Law of War Crimes*. I would usually begin by asking students to identify the origins of this sub-field of international law. Invariably, they would choose "Nuremberg." It seemed surprising to me that even in Australia—a state that had, after all, convened war crimes trials across South-East Asia and supplied a touchy and obstinate presiding judge at the International Military Tribunal for the Far East (IMTFE or Tokyo Tribunal) in Tokyo—the war crimes trials of Japan's A-Class military and political elite barely registered in the political or legal consciousness. But then "Tokyo" was long regarded as a slightly embarrassing cousin or inferior twin to its European avatar in Germany. Arnold Brackman had even written a book about the trial called "The Other Nuremberg."[4] The title said it all. My own interest in the Tokyo Tribunal, meanwhile, began in the 1980s when my college professor recommended to us Richard Minear's Vietnam-inflected *Victor's Justice*, one of the earliest books on the trial (that title, too, tells its own familiar story).[5]

About two decades ago, though, a cottage industry began to develop with conferences, edited volumes, films, collections of documents, articles, and some important monographs.[6]

This is no great surprise. Tokyo has benefited from international law's Southern (or Eastern) gaze with some scholars turning to the famous dissent of Radhabinod Pal as an early anti-colonial jeremiad directed at the European powers.[7] Others have seen the trial as a battle-ground between revived ideas of natural law (represented here by William Webb, the Australian president of the Court and the dissenting judgment of Frenchman, Judge Bernard) and the then-ascendant certainties of positivism (Elizabeth Kopelman places Pal at the heart of this relationship, too)[8] or as a site for the study of dissenting judgments (there were three at Tokyo despite MacArthur's injunction against them) or as an example of the projection of American post-war moral and political power or as an early iteration of an "ad hoc" tribunal (established by presidential decree, presided over by the supreme commander in Tokyo).[9]

Venturing into this scholarship we have Gary Bass's version of the Tokyo story. Bass, a professor in Princeton's Politics Department, has a history of revisiting familiar international legal forms having published previous books on genocide and humanitarian intervention. He has also written before about war crimes trials; *Stay The Hand of Vengeance* told the general history of the field through the lens of a liberal legalism he seems less enamored of this time around.[10]

[3] Some judges even threatened to quit the Trial altogether.

[4] ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987).

[5] RICHARD H. MINEAR, VICTORS' JUSTICE: TOKYO WAR CRIMES TRIAL (1971).

[6] DAVID COHEN & YUMA TOTANI, THE TOKYO WAR CRIMES TRIBUNAL: LAW, HISTORY, AND JURISPRUDENCE (2018); MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY (2007). Defining study into the law of the trial, see NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008); WAR CRIMES TRIALS IN THE WAKE OF DECOLONISATION AND COLD WAR IN ASIA, 1945–1956: JUSTICE IN TIME OF TURMOIL (Kerstin von Lingen ed., 2016); TRIALS FOR INTERNATIONAL CRIMES IN ASIA (Kirsten Sellars ed., 2015); SANDRA WILSON, ROBERT CRIBB, BEATRICE TREFALT & DEAN ASZKIELOWICZ, JAPANESE WAR CRIMINALS: THE POLITICS OF JUSTICE AFTER THE SECOND WORLD WAR (2017); Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085 (2011); DEBATING COLLABORATION AND COMPLICITY IN WAR CRIMES TRIALS IN ASIA, 1945–1956 (Kerstin von Lingen ed., 2017).

[7] Adil Hasan Khan, *Inheriting a Tragic Ethos: Learning from Radhabinod Pal*, 110 AJIL UNBOUND 25 (2016); Ashis Nandy, *The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability*, 23 NEW LITERARY HIST. 45 (1992); Barry Hill, *Reason and Lovelessness: Tagore, War Crimes, and Justice Pal*, 18 POSTCOLONIAL STUD. 145 (2015).

[8] Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 INT'L L. & POL. 373, 418 (1991).

[9] *Id.* at 373.

[10] GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2002).

The book performs a twin service. First, by presenting the trial as a gripping narrative of men and women engaged in a struggle to remake Japan and international law.[11] Second, by thickening (and it is a very thick book) our existing accounts of the trial through an immersion in the primary texts and archives. So, along with some vaguely revisionist material on the familiar lead actors (Webb, Pal, Röling, MacArthur), we are presented with new supporting players (notably the Chinese judge, Judge Mei, and Koichi Kido, Japan's lord keeper of the privy seal) as well as some rather unexpected cameos (Yoko Ono, Archibald McLeish, and George H.W. Bush), all underpinned by detailed archival work and serious scholarly endeavor.[12]

The trial—which only 4 percent of Americans were in favor of—is worth returning to for so many different reasons. Most obviously, as I indicated above, it speaks to our current disorders. The question of Japanese guilt for a crime of aggression (the core of the proceedings) has long been understood (outside the United States, in particular) as more questionable than that of, say, the German leaders tried at the same time. The Nazis have been made to sit outside history—the perpetrators of a supreme, unprecedented evil—while hanging over Tokyo is the thought that perhaps the Japanese were not behaving so differently from any other great power throughout history. The determination to strike first, the mixture of offensive immediate action as part of a long-term defensive strategy, the sense of being forced into aggression—all these will seem familiar to any connoisseur of classical realism not to mention Russian paranoia and/or history. The defense lawyers (even one or two of the judges) at Tokyo were sometimes speaking in the same language as Vladimir Putin.

International Law?

From an international law perspective, there were, of course, a number of doctrinal and jurisdictional debates first ventilated by international tribunals at Nuremberg and Tokyo. That said, many of these same questions had been taken up proleptically at Versailles in 1919 by the Japanese delegation (this time on the winning side and including Mineitciro Adatci (later a judge and president of the Court at the Permanent Court of International Justice) to the Commission on the Responsibility of the Authors of the War who, in alliance with the Americans jurists, dissented from the Commission's majority on a number of salient matters). The Japanese in 1919, for example recognized that in a loose sense, crimes had been committed ("during the course of the present war") but were disinclined to accept the existence of any international law by which such crimes might be tried: "It may further be asked whether international law recognizes a penal law as applicable to those who are guilty."[13] There may be guilt, the Japanese delegation seemed to be arguing, but was there law? This is a motif later to be found in Justice Pal's account at Tokyo.

Finally, the Japanese delegation in 1919 made it clear that it was uncomfortable with the consequences of placing heads of state on trial (the American delegates spelled out more clearly that the doctrine of sovereign immunity was at stake) and that it had "scruples" about putting military commanders on trial "on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws

[11] Diane Marie Amann's essay, "Glimpses of Women at the Tokyo Tribunal," in *The Tokyo Tribunal: Perspectives on Law, History and Memory* 103 (Vivian E. Dittrich, Kerstin von Lingen, Philipp Osten & Jolana Makraiová eds., 2020), offers a portrait of a cohort of eight women: Virginia Bowman, Lucille Brunner, Eleanor Jackson (a federal law clerk who ends up dancing with the disgraced British MP, John Profumo), Helen Grigware Lambert, Grace Kanode Llewellyn, Bettie Renner, Coomee Strooker-Dantra, and Elaine B. Fischel (herself the author of a noteworthy memoir: *Elaine B. Fischel, Defending the Enemy: Justice for the WWII Japanese War Criminals* (2010)).

[12] Gary Jonathan Bass, Judgment at Tokyo: World War II on Trial and the Making of Modern Asia 7, 206 (2023). Bush was shot down over Chichi Jima in 1945 along with eight other U.S. fliers. Those fellow fliers were executed (some of them eaten by their killers). Bush, of course, escaped. Yoko Ono's uncle, meanwhile, agitated on behalf of the emperor.

[13] *The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AJIL 95, 152 (1920).

and customs of war."[14] This was a rejection of a command responsibility doctrine to be fully developed later at Tokyo and applied even more contentiously, at the *Yamashita* trial.[15]

It is fascinating, then, just how many of the later doubts about war crimes trials and, in particular, the Tokyo Trial are found in these two pages written as an addendum to the Versailles meeting. And, as I have indicated elsewhere, what is most striking about these early Japanese reservations is that they "represent the scrupulous legalism of the victors not the special pleading of the vanquished."[16]

Just as the Versailles lawyers worried about the jurisdictional basis of any future trial, so, too, did the judges at Tokyo. Three positions predominated, according to Bass (pp. 345–46). The first, prevailing, view was that the jurisdictional legitimacy of the trial rested more or less entirely on its own Charter. This bootstrapping mirrored a similar maneuver at Nuremberg and did not satisfy all of the judges. A second approach (adopted by the French justice, Judge Bernard) was to find the authority of the court in some form of "universal conscience." The third position—not entirely distinguishable—was found in an early, abandoned draft (a draft described by the then British lord chancellor as "a laughable document") of William Webb's where he elaborated, in a stylistically Grotian manner, a natural law justification for the trial.[17] The judges eventually chose in favor of parsimony with the result that references to natural law and conscience were conspicuously absent from the final judgment.

Bass describes all of this more familiar material in a useful fashion but, as I have said, the more valuable contribution of the book lies in its revisiting those aspects of the trials that have not before been made especially visible, including questions of race and memory (which I will turn to at the end) and in the renewed attention given to the familiar key figures at the trial as well as individuals such as the Chinese judge, Mei Ruo, one of a whole cast of people (others include George Kennan and Koichi Kido) who might previously have been regarded as minor characters.[18]

Asked to nominate the two best-known features of the trial, international legal scholars, would probably refer to the dissenting (and separate) opinions (and especially the monumental dissent of the Indian judge, Justice Pal) and the decision to immunize the emperor.[19] Let me begin with the dissenters.

The Dissenters

In Sloan Wilson's *Man in the Grey Flannel Coat*, a Judge Bernstein receives a message from

[14] *Id.*

[15] *See* In Re Yamashita, 327 U.S. 1 (1946) (diss op., Murphy, J.; diss op., Rutledge, J.). It is still in practice controversial in cases where the commander in question might have difficulty punishing or repressing violations committed by personnel under his command, see The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ICC-01/05-01/08-3636-Red, paras. 170–94 (June 8, 2018).

[16] Gerry Simpson, *Revisiting the Tokyo War Crimes Trial*, 78 PAC. HIST. REV. 608 (2009).

[17] Curiously, a fourth position (the idea that the trial and its laws might be based on an already existing skein of customary law and treaty provision) is not enumerated here and yet seeps into so many of the discussions in the book and at the trial. *See* BASS, *supra* note 12, at 380 (for the UK Lord Chancellor's views).

[18] Mei's biography is in a sense the story of the shifting preferences within Chinese politics itself. Mei comes across as a versatile character, capable of trimming his sails rather effectively (Mei was in the awkward position of having been appointed to the Court by the Government of the Republic of China soon to be comprehensively defeated in the wake of Mao's Long March. He survived that transition as well as an arduous Cultural Revolution and is now a feted as a major figure in the history of Chinese international law). But he also plays a surprisingly influential role in the trial itself. I say "surprising" because in the (Western) literature on the trial he has not featured very much.

[19] There are myriad others who are given their moment in the sun here, e.g., Bruce Blakeney, the fearless young American defense attorney whose references to Hiroshima and Nagasaki inflame the court room or Joseph Keenan, whose florid language and overreach (he makes the wild claim at one point in the trial that the crime of aggression had been around in "the prehistoric and primeval ages") maddened William Webb. *Id.* at 202.

an unhappy client, a Mr. Shultz, and turns to speak to a visitor in his office.

> How violent Schultz had sounded over the phone. "I want justice" he had said. I wonder how many murders have been committed, and how many wars have been fought with that as its slogan . . . . Justice is a thing that is better to give than to receive, but I am sick of giving it . . . .[20]

This is a fair expression of what has become a common experience in international criminal law. Hannah Arendt's report on the Eichmann Trial is an emblematic text in this regard. More broadly, though, it has often been the case throughout history that retributive enthusiasm (in 1917 or 1945) gives way to a kind of sickness or at least a turning away from, or renunciation of, the idea of trial as a cure (or balm) for war and atrocity. So, Nazis are rehabilitated as respectable politicians or businessmen while A-Class criminals (Mamoru, Nobusuke) become cabinet ministers (in one case a prime minister). International law demands punishment but international diplomacy's default position is impunity. We can hear the gears cranking already in relation to President Putin. The International Criminal Court's indictment of the Russian leader—a vain (in both senses of that word) performance of justice—is very likely to be quietly set aside or ignored as some kind of peace deal is struck; international criminal law, always dependent on exigent alignments of force, is in danger of being left high and dry by a re-alignment of these same relations.

It is clear from some of the dissenting judgments at Tokyo that the dissenting judges too were sick of justice or understood that war crimes trials are usually a projection of contingent legal power. This was particularly true of Justice Pal.

In Barry Hill's magisterial, confounding and distinctive study of the intersections between Pal, Gandhi, and Tagore, he describes the image "haunting" Pal's dissent:

> It is of a battlefield. After the battle. There lie the dead and the dying. What is to happen next? . . . What is the quality of mercy? How should a war end? By what species of judgement?[21]

These remain the questions that haunt international war crimes trials today. But how did Pal come to be the person formulating them in 1948? Bass gives us a sense of Pal's life in Indian pre-war politics (anti-colonial, wary of Hindi nationalism, placatory, liberal) and his unusual judicial style (Röling reports that Pal would recite "Bangali love poems" during particularly gruesome testimony (p. 261)) but it would be hard to better Hill's encapsulation of Pal's multiple selves: "the international lawyer with so little trust in sovereignty . . . the post-colonialist who seems not to have belonged to the nationalist movement when it most needed him."[22]

Pal famously acquitted *all* the Japanese defendants on the basis that the trial failed entirely to point to any legal norms that permitted the criminalization of defeated enemies. This was what Elizabeth Kopelman describes as his "positivism," here understood as a noble refusal to countenance the discovery of principles and rules of international law that simply were not there in the first place. Pre-war international law was, for Pal, a wasteland as far as international criminal law was concerned. The category of crimes against humanity barely existed; war crimes law *stricto sensu* did not contemplate the international prosecution of individuals for violations of standards. But Pal, like William Webb the Australian presiding judge, was especially exercised by the criminalization of aggression. This had a retroactive ring to it. There was precious little in pre-war international law to suggest that states had been serious about establishing a crime of aggression (even Myron Cramer, the U.S. judge at the Tokyo Trial and Harvard Law graduate, had argued in 1944 that the idea of a crime of

[20] Gerry Simpson, Law, War and Crime: War Crimes, Trials and the Reinvention of International Law 9 (2007).

[21] Barry Hill, Peacemongers 374 (2014); *see also* Kopelman, *supra* note 8, at 418; Ashis Nandy, The Intimate Enemy: Loss and Recovery of Self Under Colonialism (2009).

[22] Hill, *supra* note 21, at 400.

aggression possessed no standing under international law).[23]

Pal also stated famously—making a larger point—that "the historic causes of the war simply defy legal judgement."[24] Here he was very much reflecting the views of the Commission on the Authorship of the War. In its Majority Report, the Commission, anticipating Pal by twenty-seven years, warned that courts were wholly unsuitable as fora for determining the multiple and complex causes of war. This task, the Commission went on to say, was the business of historians and statespersons.[25] But for Pal, the problem was exacerbated by his belief that "aggression" had been the policy of the colonial powers for nigh on five hundred years. Their criminalization of it now felt too convenient, hypocritical, an exercise in bad faith.[26] In some respects then Pal was an early example of a Third World Approach to International Law and has been remembered as such by scholars from the Global South. He was certainly alone in understanding that the trial was taking place in what Bass calls "a chaotic background of rising anti-colonial nationalism in India, Indonesia, Vietnam and elsewhere" (p. 9).[27] As Bass points out, the key difference between Nuremberg and Tokyo was that the war of aggression in Europe was carried out against sovereign states while the Japanese, for the most part, had invaded European colonial territories while adopting an (obviously self-serving) anti-colonial posture.

Pal, then, is a giant in the history of dissent in international law but Bass makes renewed claims for Justices Röling and Bernard as equally important figures.[28] These dissenting judges took a not dissimilar line. Bernard, a self-styled natural lawyer, was an immunity-skeptic when it came to Hirohito, a due process advocate when it came to the absence of what he thought of as a fair defense and argued against the idea of commander responsibility in the strongest terms. As for Röling, it is now a commonplace of international criminal law scholarship to say that the field is riven with politics, even if it not always entirely apparent what this is supposed to mean. The Dutch dissenting judge—one of these protean, almost novelistic, figures the field throws up every so often—arrived in Tokyo having just completed a book on criminology and *Macbeth*.[29] Mired perhaps in the bloody struggles of eleventh century Scottish history, he concluded that states had a "sovereign right" to begin wars and regarded aggression as a not readily adjudicated political crime for which there should be, at most, some form of political responsibility. The Japanese leaders could be imprisoned at the behest of MacArthur but prosecuting them for non-existent crimes was a category error.

[23] BRADLEY F. SMITH, THE ROAD TO NUREMBERG 103–05 (1981). The status of the crime of aggression in pre-war international law was still being argued over in 2006 in the House of Lords. *See* R v. Jones [2006] UKHL 16 (Mar. 29, 2006). At one point, a headcount of the judges at Tokyo reveals that only six of the eleven thought the Kellogg-Briand Pact had made aggressive war a crime. BASS, *supra* note 12, at 348.

[24] *See* Kopelman, *supra* note 8, at 94. Or to put this differently: "culpability is seldom divisible" as Ashis Nandy argued. *See* Ashis Nandy, *The Other Within: The Strange Case of Radhabinod Pal's Judgement of Culpability*, *in* THE SAVAGE FREUD 80 (1995).

[25] *Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919*, 14 AJIL 118, 118–19 (1920).

[26] The United States, for example and for all its anti-imperial self-credentializing, had done its fair share of torturing, deporting, and killing in its own colonial counterinsurgency in the Philippines at the turn of the century. During World War II itself, the United Kingdom had instituted a blockade on grain imports to India with the resulting deaths from famine somewhere in the region of 3 million. The London Charter, meanwhile, with its new references to "crimes against humanity" had been adopted the day before the bombing of Nagasaki.

[27] BASS, *supra* note 12, at 10. The Trial itself has superior credentials to most international institutions of the time with its judges chosen from all over Asia (Jaranilla (the Philippines), Pal (India), Mei (China)). Bass declared it "a measure of Asian justice after an Asian War" (rather overstating things). *Id.*

[28] *See also* B.V.A RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER (1994).

[29] B.V.A. RÖLING, DE CRIMINOLOGISCHE BETEKENIS VAN SHAKESPEARE'S MACBETH [THE CRIMINOLOGICAL SIGNIFICANCE OF SHAKESPEARE'S MACBETH] 173 (1946).

This is a minority position in international politics these days but it was one shared by the Commission on Authorship in 1919 when it recommended that German aggression should be met with a political declaration rather than trial, and it was the position of George Kennan who arrived in Tokyo to discuss with Macarthur the post-war settlement and who worried not that the trials would be unfair but that they would be *too* fair. Kennan, after observing the trial at close range, saw that it might backfire on the Allies by provoking sympathy for the Japanese defendants. War crimes trials, he averred, ought to be run by "persons deeply versed in the history and practice of international relations" (p. 494).

What does Bass make of all this? On the one hand, he gives the various dissents their due. But on the other hand, he remarks at one point (comparing Tokyo unfavorably to Nuremberg):

> Such judicial independence was a mixed blessing. Taken together, the onslaught of conflicting opinions—the dissents, the squabbling concurrences, the Supreme Court's zigzag decision to hear oral arguments—would badly undermine the legitimacy of the judgment. (P. 27)

This sounds like an argument against judicial independence, against variety, against the idea of a contested history. Would the judgment have been more "legitimate" (a word that gets mobilized when legal institutions slip out the grasp of their architects) with only the four Great Powers represented on the bench? Even Bass does not seem to think so as he bemoans the failure of the trial architects to contemplate the prosecution of Allied leaders or those responsible for the secret biological weapons program in Northern China or the incendiary bombing of Tokyo and other major Japanese cities (not to mention the use of atomic weapons on Hiroshima and Nagasaki).

The Emperor

The other great figure looming over the Trial—there but not there—was the Japanese emperor. Bass places a good deal of emphasis (perhaps over-emphasis) on the issue of how to dispose of the imperial question, or, indeed, the emperor himself.[30] This is presented as a long feud between those thirsty for judicial revenge and a group of more diplomatically minded individuals around Truman who wanted to protect the emperor in order to smooth the transition to indigenous civilian rule in Japan and who were conscious of Lord Hankey's edict that we have to live with our enemies after the battle has ended. The disposition of the emperor replayed an earlier controversy in relation to another emperor, Kaiser Wilhelm of Germany. Unlike Hirohito, Kaiser was indicted (in Article 227 of the Versailles Peace Treaty). But, as with Hirohito, there was no trial. Instead, Kaiser Wilhelm was offered hospitality by the Dutch government and died in the Netherlands in June 1941, the same month that Hitler embarked on his ill-fated war against the Soviet Union.

Pragmatism (or mercy) ruled at Tokyo, too, where there was a preference for bloodless occupation over attritional war and so, on the emperor's directive, seven million soldiers would lay down their arms (pp. 124–25). The emperor's shared culpability for the war is laid out forensically and repeatedly, and, as Bass argues, the decision not to prosecute him not only leaves a shadow over the trial but may have discouraged the Japanese from coming to terms with war guilt more generally. But Bass also describes this decision as "understandable" and spends more time in the book describing the machinations around imperial immunity than adjudicating the decision to grant it (p. 15).

This is familiar territory, of course, and we may find ourselves revisiting it in relation to Vladimir Putin at some point in the intermediate future. I suppose, in the end, I would argue that international criminal law has long been a vulnerable project to prevent impunity while offering up a practice in which impunity is the default position and in which the requirements of diplomatic resolution often prevail.[31] In the particular context of post-war Japan, we can be

[30] Yoriko Otomo, *The Decision Not to Prosecute the Emperor*, *in* BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED (Yuki Tanaka, Tim McCormack & Gerry Simpson eds., 2010).

[31] Tor Krever, *Dispensing Global Justice*, 85 NEW LEFT REV. 67 (2014).

glad that people sick of delivering justice saw the immense advantage in sparing the emperor whatever he may or may not have done (he comes across in the book as a wily, evasive, but one might say, necessary character).

Race

One of the more neglected aspects of the trial is race.[32] The trial, it is now clear, laid bare the racialized inflections of early international criminal law. At one point a Chinese reporter at a White House press conference on the trial is seen with a badge that says, "Chinese Reporter: Not Japanese, Please" (p. 687). Meanwhile, *Life Magazine* described Tojo as "betraying (sic) aboriginal antecedents" (*id.*). But, as Bass shows, racism lay not far beneath the surface of the formal proceedings themselves (even the heroes of the story, like Bert Röling, traded in racial stereotyping of the Japanese). And little wonder, given the anti-Japanese propaganda and stereotypes that were churned out during the war (and in the boyhood comics consumed by British schoolboys well into the 1970s) positioning the "Japs" as a sub-human race of violent lunatics. The Supreme Court, in a politer vein, had done its bit by permitting the internment of Japanese Americans (*Korematsu*, *Hirabayashi*). All of this produced a situation where the Allies felt obliged to restrain popular (and savage) passions. The Tokyo Trial might be understood as an attempt to do this though not everyone thought the Japanese worthy of such a trial. As one British official is quoted as saying "We are judging them by the rules of an adult's party to which they should never have been invited in the first place" (p. 179). And it is clear from Bass's book that to varying degrees a number of the judges regarded the Japanese as an inferior race and indeed continued to project onto the trial a number of barely disguised colonial—or at least heavily paternalistic—assumptions. Pal himself put it diplomatically remarking that his fellow judges might hold a "bias created by racial ... factors" albeit one that "operated ... unconsciously" (p. 21). As the book points out, the trial itself followed the Potsdam Declaration, which included the less than reassuring promise that "[we] do not intend that the Japanese shall be enslaved as a race or destroyed as a nation," a promise prompted by and reversing an earlier view of Truman's that the Japanese ought to be "annihilated" (*id.*). Even the structure of the trial proceedings led to an over-emphasis on crimes against peace (Pearl Harbor, the invasion of Singapore) and an under-emphasis on war crimes (especially many of those committed against subjugated Asian peoples). In the end, though, and in spite of the racialized "optics" of the trial, Bass takes an equivocal line—one that I broadly share—by arguing that it at least (certainly Pal's dissenting judgment and some of the latter-day commentary around the trial) contributed to the opening up of questions around race in international law and relations.

Memory

Hovering over all this is the question of memory itself (a question the book directly intervenes in). The controversy over whether to convene the trial was eventually displaced by a different question about how to, or whether to, remember it. On one side there are the likes of the Hiroshima Foundation, on the other are the "normalizers" like Abe Shinzo, Japanese prime minister and grandson of an A-Class war criminal, who visits the Yasukuni Shrine and calls for a de-emphasis of the trial or like Chairman Mao who exclaims to a Japanese visiting delegation: "you can't apologize every day!"

To a great extent the final parts of Bass's book are dedicated to diagnosing the many important ways in which the trial is remembered, misremembered and unremembered (e.g., by Abe Shinzo at the Yasukuni Shrine, or by Vladimir Putin, or by George H.W. Bush). But how might international lawyers remember the trial? First, and most obviously, the proceedings were very much part of a general mid-century turn toward individualized forms of justice. Second, the Tokyo Trial was symptomatic of later asymmetrical applications of justice: not just the

[32] *See* Ann Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303 (1992).

justice of the victors but also a justice that selected among war's losers by trying a tiny caste of war-time leaders while implicitly exculpating both the industrial elites who kept the war machine ticking over by exploiting enslaved enemy citizens, and the masses who enthusiastically supported it at every turn. Third, this was itself an act of memory in the midst of a struggle over the terms of memorializing. Nuremberg settled an official history of World War II for post-war Germany where remorse was the operative emotional state. Tokyo, on the other hand, was—and remains to an extent—the occasion for contentious debates and national agonizing in Japan. The decision to spare the emperor and the various dissents meant that the Trial left an equivocal or maybe plurivocal legacy and one that was further shaped by a Cold War of which the trial, the nuclear attacks on mainland Japan, and the rehabilitation of the Japanese state (now an ally) were opening gambits.[33] Fourth, Tokyo and Nuremberg introduced a language of criminality into our discourses of war and peace (Edith Togo, the wife of Togo Shigenori, one of the accused, caught this mood when she described the incarceration of her sick husband as a "crime against humanity") (p. 116). Finally, of course, the trial—remembered as an act of memory—was also about everything that was not acknowledged or charged, the forgotten material of the trial from the nuclear attacks and fire-bombing of Japanese cities (the inhabitants "perishing in their own wooden houses") to the sexual violence perpetrated on Korean (and other) women to biological warfare testing (p. 545).

At the time, the U.S. prosecutor, Joseph Keenan, hailed the trial as "another milestone in the quest of mankind for peace" (p. 565). But maybe, given the recent tectonic shifts in global political alignments, we will remember it instead as one of the opening acts in a seventy-five-year experiment now slowly receding.

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[33] BASS, *supra* note 12, at 408. Bass describes a trial in which Soviet judges spoke for the United States while American defense counsel condemned American double standards.

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Introduction

The "Conclusions on Identification of Customary International Law" (Conclusions) were adopted by the United Nations (UN) International Law Commission (ILC) in 2018 and soon thereafter annexed by the UN General Assembly (UNGA) to UNGA Resolution 73/203 (2018) (p. 3; appended at pp. 301–02).[1]

The Conclusions have achieved a status not always accorded to ILC output (p. 46 n. 103) and done so only after "six years," which is, "in terms of ILC work a mere twinkling of an eye" (p. 47) and a testament to the quality and efficiency of the authors' work in support of the ILC's efforts, most notably Sir Michael Wood's rapporteurship. They form the basis for the book under review, which "seeks to complement the ILC's authoritative work by offering more information and analysis for those . . . with the time or need to dig deeper" (p. 3).

The authors' analytical approach and style, like the Conclusions', aim to be pragmatic, written by and (primarily) for practitioners. They provide a commendably comprehensive overview of practice and literature on customary international law (hereinafter CIL), with a focus on CIL "identification," yet without seeking to engage with (vexed and seemingly unsolvable) philosophical, methodological, and theoretical debates surrounding CIL. Their reluctance to engage in such discussions is apparently due not necessarily to the (seemingly presumable) unsuitability of theoretical discourse to provide guidance on CIL identification but to their concern over the (perceived) impact of theorizing about CIL on international law's standing: not only Wood's

[1] The Conclusions' text is also appended to the authors' manuscript, in the form of Annex 1 (pp. 302–05, attaching the Conclusions) and Annex 2 (pp. 307–44, attaching the Conclusions "with commentaries").