

Keynote Address

The Present Day Significance of Nuremberg and Tokyo Trials in Modern International law- Jurisprudence Aspect

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On 12 November, 1948, the Tokyo International Military Tribunal (International Military Tribunal for the Far East, or Tokyo Tribunal, or IMTFE), delivered its final judgement. The Tokyo Tribunal, was established in 1946 under the Special Proclamation of General MacArthur, the Supreme Commander of Allied Powers, to try the crimes committed by Japanese war criminals during the World War II.¹ The Tokyo Trial lasted for 3 years, with 28 defendants indicted and 25 convicted.² The IMTFE tried to keep abreast with the jurisprudence of the Nuremberg Trial, while some aspects of the IMTFE were innovative, for instance, the findings on the concepts of conspiracy, superior responsibility of the civilian leaders, immunity of the Head of States and many procedural issues. The legacy of the Tokyo Trial constitutes a landmark in the development of international criminal law and international humanitarian law after the World War II and sets a brilliant precedent for the ad hoc tribunals, such as International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), established by the United Nations Security Council in early 90s to address the individual criminal responsibilities, as well as International Criminal Court (ICC) established by the adoption of the Rome Statute in 1998.³

I. Common Plan and Conspiracy

According to the Charter of the International Military Tribunal for the Far East, the IMTFE has the jurisdiction over three crimes, crimes against peace, conventional war crimes and crimes against humanity.⁴ The Tokyo Tribunal, made no findings on crimes against humanity, instead it concentrated on the charges of crime against peace and war crimes.

Count 1 of the indictment submitted by the prosecution in Tokyo Trial states that: “leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy .. to wage wars of aggression, and war or wars in violation of

international law.”⁵ It is obvious that conspiracy to ‘wage aggressive war’ was the heart of the prosecution’s case. All 25 defendants except 2 in Tokyo Trial were convicted of this charge relating to the common plan or conspiracy to commit crimes against peace.⁶ Among them, 7 defendants are civilians who were not the physical perpetrators since they were not personally present at the crime scene.⁷ The Tokyo Tribunal finds that Count 1 is the most serious crime by stating that, “no more grave crimes can be conceived of than a conspiracy to wage a war of aggression, for the conspiracy of waging a war of aggression threatens the security of the peoples of the world,”⁸

In Nuremberg judgement, only 8 out of 22 defendants were found guilty of conspiracy to commit crimes against peace, and none were so convicted without also a finding of guilt as to the substantive offense of crimes against peace.⁹ This is also true for the Tokyo Trial. This may lead to the conclusion that conspiracy was a mode of liability rather than an inchoate crime.¹⁰

The concept of conspiracy in the Nuremberg and Tokyo Charters originates from the common law system, in which conspiracy was defined as “an agreement of two or more individuals to commit a criminal or unlawful act or a lawful act by unlawful means.”¹¹

In his opening speech, Mr. Keenan, the Chief Prosecutor of the Tokyo Trial, states by citing the US precedent case of *Marine v. US*: “A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.... it is the partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.”¹² To be convicted as a conspirator, the accused must have participated in a concrete and criminal common plan with a group of persons.¹³

The Tokyo judgement states that successive leaders of the wartime Japanese Government participated in a common plan to wage aggressive war between 1931 to 1945 with the goal to secure

Japanese domination in Asia by using military forces.¹⁴ That means that although a civilian leader did not personally take part in the aggressive war, he still could be convicted as a conspirator by his involvement of the designing the common criminal plan.

The Tokyo Judgment does not discuss the nature of the conspiracy, but just defines conspiracy as arising “when two or more persons enter into an agreement to commit a crime,” and states that “those who participate at (the planning and preparing) stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators. The conspirators were parties to (the conspiracy) at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charges contained in Count I.”¹⁵

Based on the jurisprudence of the Tokyo Trial, the UN ad hoc tribunals developed the theory of the conspiracy into two legal concepts, one is joint criminal enterprise (JCE), a mode of liability. The other is the conspiracy, an inchoate crime. In the practice of the *ad hoc* tribunals, the theory of the conspiracy as an inchoate crime only applies to the most serious crime ---- genocide.¹⁶

The ICTY in *Tadic* case, cites many cases after the WWII following the Nuremberg trial¹⁷ and reaches the conclusion that “for joint criminal enterprise to be constituted, the existence of the following elements need to be proved: a plurality of persons, not necessarily organized; a common plan, design or purpose (involving the commission of a crime proscribed in the Statute); the participation of the accused in the common plan or design to perpetrate a crime under the Statute; a shared intent between all the participants to further the common plan or design involving the commission of a crime; that the accused, even if not personally effecting the crimes, intended the result.”¹⁸ All the participants in the JCE are regarded as principals of the crime, not as aiders or abettors. The ICTY in *Balgojevic and Jokic* case points out “the accused is understood to be a perpetrator (or, more accurately in many cases, a co-perpetrator) rather than an accomplice.”¹⁹ If the accused just participate in certain part of the crime, he must be responsible for the whole crime. Since JCE is a mode of liability, it requires the substantial crime really occurred.

As for conspiracy as an inchoate crime concerning genocide, the judicial practice of the ICTR is more opulent than that of the ICTY. The ICTR in *Nahimana et al* case points out that “conspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated

by the conspiracy.”²⁰ “Conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.”²¹ The ICTR in *Niyitegeka* also states, “the act of conspiracy itself is punishable, even if the substantive offence has not actually been perpetrated.”²² The “requisite intent for the crime of conspiracy to commit genocide is . . . the intent required for the crime of genocide, that is the *dolus specialis* of genocide.”²³

Then, the next question is whether a court may convict a person for both genocide and conspiracy to commit genocide. The Appeals Chamber of the ICTR gives an affirmative answer and finds that the reason for criminalizing conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide... the Appeals Chamber finds... that the inchoate nature of the crime of conspiracy does not obviate the need to enter a conviction for this crime when genocide has also been committed by the accused, since the crime of genocide does not punish the agreement to commit genocide.²⁴

II. Sexual Violence

It is a very strange phenomenon that large scaled sexual violence was not regarded as a *sui generis* crime under war crimes for a long time even after the WWII. Article 27 of Geneva Convention IV and Article 76 (1) of the API state: “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”²⁵ However, this is the prohibition, but not the criminalization. Large scaled sexual violence, including rape is not included in Common Article 3 and the Articles of grave breaches in Geneva Conventions, nor under war crimes in the Statutes of the ICTY, ICTR, where sexual violence is only punishable under the crimes against humanity which requires the background of wide spread and systematic attack against civilian population.

The first international treaty implicitly outlawing sexual violence, the Hague Convention of 1907, did not end impunity for these crimes. At the Tokyo Trial, although the rape of Chinese women during the Nanjing Massacre was prosecuted, it was charged as an criminal act within the war crime, but not as a separate crime. Rape was not even explicitly listed in the Tokyo Charter as a crimes against humanity. Other sexual violence, such as sexual enslavement of the so called ‘comfort women’, enforced prostitution and human body experience were also missing, absent not only from the the Tokyo Charter, but also in the proceedings of the Tokyo Trial.

The legal approach to sexual violence during wartime had not been effectively developed before the creation of the ICTY. The wars in the former Yugoslavia revealed the urgent need to fill in

the vacuum and bring international criminal law out of theory and into the courtroom. Since its inception, the ICTY has carried out extensive investigations and prosecution of wartime sexual violence. Since then, more than 70 individuals have been charged with crimes of sexual violence including sexual assault and rape, of which over 30 have been convicted.²⁶

In a number of landmark judgments, the *ad hoc* tribunals advanced the development of international justice in the realm of gender crimes by enabling the prosecution of sexual violence as a war crime, as a crime against humanity and even as crime of genocide. The first case of the ICTY, *Tadić* case, was also the first international war crimes trial involving charges of sexual violence. The trial proved to the world that the international criminal justice system could end impunity for sexual crimes and that punishing perpetrators was possible.

The sexual victims are no limited to women, but also involving the same gender.

The Trial Chamber found in a horrific incident in the Omarska Camp, one of the detainees was forced by uniformed men, including *Tadić*, to do terrible sexual assault against another male detainee. In May 1997, the Trial Chamber found *Tadić* guilty of cruel treatment (violation of the laws and customs of war) and inhumane acts (crime against humanity) for the part he played in this crime and other incidents.²⁷

Two years later, on appeal, *Tadić* was additionally sentenced for grave breaches of the 1949 Geneva conventions: inhumane treatment and willfully causing great suffering or serious injury to the body or health. In January 2000, *Tadić* was sentenced to 20 years' imprisonment. Incidents of sexual violence against men were also examined in other cases before the Tribunal.²⁸

The first case at the ICTY to concentrate entirely on charges of sexual violence was the *Anto Furundžija* case, which focused on the multiple rapes of a Bosnian Muslim woman. It was not *Furundžija* personally, but his subordinate who raped the woman in front of a laughing audience of other soldiers. Nevertheless, as the unit's commander, *Furundžija* was found guilty as a co-perpetrator and as an aider and abettor.²⁹

Presenting its legal considerations in the judgment, the Trial Chamber made important remarks on the qualification of rape in the context of international crimes. In the ICTY Statute, the only explicit reference to rape is in crimes against humanity. The Trial Chamber widened that scope and stated that rape may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war.

Importantly, the ICTY judges also confirmed that rape may be used as a tool of genocide based on a landmark precedent in 1998 when ICTY's sister tribunal, the ICTR, rendered a judgment in

Akayesu case in which it was concluded that rape constitutes genocide.³⁰

The second ICTY trial to deal entirely with charges of sexual violence is *Kunarac* case which made another significant contribution to international humanitarian law. The judgement broadened the concept of sexual assault to include sexual enslavement as a crime against humanity.

The three accused played a prominent role in organizing and maintaining the system of infamous rape camps in the eastern Bosnian town of Foča. In the spring of 1992, Bosnian Serbs gathered Muslim women in detention centers around the town where they were raped by Serb soldiers. Many women were then taken to apartments and hotels run as brothels for Serb soldiers. The judges heard the testimonies of over 20 women regarding repeated acts of rape, gang rape and other kinds of sexual assault and intimidation.

The women also described the way in which they were obliged to perform household chores. They were forced to comply with all the demands of their captors, were unable to move freely and were bought and sold like commodities. In short, they lived in conditions of enslavement. There was no doubt in the Judges' minds that the enslavement was sexual in nature. This was a significant ruling, because international law had previously associated enslavement with forced labour and servitude. The definition of the crime was therefore widened to include sexual servitude.

The trial of *Mucic* case set a milestone in international justice by recognizing rape as a form of torture, and as such both a grave breach of the Geneva Conventions and a violation of the laws and customs of war.

Three out of the four accused were charged with sexual violence against Bosnian Serb civilians kept in a prison camp in *Čelebići* in central Bosnia and Herzegovina. Significantly, the ICTY also held one of the accused superior responsible for these acts. *Mucić*, the camp commander, was found guilty of sexual violence and other crimes committed by his subordinates— the first such judgement by an international criminal tribunal. The crimes were qualified as grave breaches and violations of the laws and customs of war. The deputy camp commander, *Hazim Delić* was convicted of rape as a form of torture.

Delić raped two women detained in the camp during interrogations. The purpose of the rapes was to obtain information, punish the women for their inability to provide information and to intimidate and coerce them. The Trial Chamber also found that the violence suffered by the two women had a discriminatory purpose - it was inflicted on them because they were women.³¹

When passing this judgement, the Trial Chamber considered “the

rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.”³²

In *Kunarac case*, the Trial Chamber criticizes previous judgments for adopting too narrow a definition of rape. The previous judgments focus on the elements of coercion, force or threat of force. The *Kunarac* Trial Chamber holds that the use or threat of use of force is just one factor – among others – to indicate the absence of consent on the part of the victim.³³

Article 3 on “violations of the laws or customs of war” of the ICTY Statute states that “such violence shall include, but not limited to”, which means this crime is open-ended and all inclusive. According to the principle of *ejusdem generis*, which means that if an act is of comparable seriousness or comparable gravity to the other enumerated acts, it should be punishable under the same rule.³⁴ So large scaled sexual violence or rape could be prosecuted as war crimes since it is as serious as the other crimes, such as inhumane treatment and willfully causing great suffering or serious injury to body or health, even torture. Indeed, the decisions by the *ad hoc* tribunals recognizes violence against women as a means of warfare and brings important advances in the prosecution of sexual violence both in war time and peace time.

In sum, sexual violence could be successfully prosecuted as war crime, crimes against humanity and even genocide before the *ad hoc* tribunals thus making a significant progress in addressing the crime of sexually related violence.

III. Superior Responsibility of Civilian Leaders

Superior responsibility of civilian leaders was an untested doctrine before the Tokyo Trial, which addresses the criminal negligence on the civilians in the position of authority.

Count 55 of the indictment filed by the Prosecution in Tokyo Trial charged the accused as deliberately and recklessly neglect their duty to take adequate steps to prevent atrocities.³⁵

Among the 28 accused, 7 were convicted for Count 55, command responsibility. 3 of the them were civilian leaders, Hirota,³⁶ Koiso³⁷ and Shigemitsu,³⁸ among whom, Hirota Koki was the only civilian leader who was sentenced to death by IMTFA, since he was also convicted with Count 1, waging war of aggression and war or wars against international law; Count 27, waging an unprovoked war against China.

Koki Hirota, who was Japanese Foreign Minister during the Nanjing massacre. He received the report on the atrocities occurred in Nanjing and discussed it with the War Ministry. In turn, he got the assurances to stop the atrocities and he relied on it. The Tokyo judgment finds that “Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken

to put an end to the atrocities, failing any other action open to him to bring about the same result.”³⁹

In Mamoru Shigemitsu’s case, the Tokyo Tribunal seems to realize the elements of effective control. Shigemitsu was Foreign Minister from April 1943 to April 1945. He received protests after protests on mistreatment of prisoners of war and he was aware of the commission of war crimes, but he took no measures to have the matter investigated. The Tribunal was of the opinion that as member of War Cabinet, he was responsible of the welfare of prisoners of war. In sentencing, the Tribunal takes into account that “the military completely controlled Japan while he was Foreign Minister, so that it would have required great resolution for any Japanese to condemn them”, and therefore he was only sentenced for 7 years imprisonment,⁴⁰ which is the lowest sentence among all the convicted.

It seems that the Tokyo Tribunal put more emphasis on the *de jure* position of the accused, rather than their material ability to take effective control over their subordinates and the doctrine of the superior responsibility of civilian leaders was very controversy even among the judges in the Tokyo Tribunal. Justice Rolling states that

“I think, however, this responsibility for ‘omission to act’ can be taken too far, That happened, in my opinion, with respect to Shigemitsu, Togo and Hirota..... What more could they have done than protect? They could not communicate directly with the commanders in the field. Their possibility for action was restricted by the system in which they fulfilled their function. They could do no more.”⁴¹

The Indian Judge Pal held that civilian cabinet members should not be found guilty for their omission. In his dissenting opinion, he argued that:

“As members of the government, it was not their duty to control the troops in the field, nor was it within their power so to control them. The commanding officer was a responsible personage of high rank. The members of the government were certainly entitled to rely on the competency of such high-ranking officers in this respect.”⁴²

Despite the dissenting and separate opinions, the Tokyo judgement nevertheless concludes that “torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy. And that given the scale, the geographical spread, and commonality of patterns of atrocity, only one conclusion is possible- the atrocities were either secretly ordered or willfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.”⁴³

The Tokyo judgment holds that those at the top positions shall

have the duty to ensure proper treatment of prisoners and to prevent ill-treatment, the violation of which would incur individual responsibility based on Count 55. It also points out that “if he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners, he willingly assumes responsibility for any ill treatment in the future.”⁴⁴

In summing up the legal reasoning for the conviction of command responsibility for the civilian leaders, Professor Yuma Totani points out that “in establishing their conviction, the Tribunal made the following common findings: (1) that they received reports on Japanese perpetrated atrocities; (2) that other than passing along information to the military, they did not take other actions to stop the atrocities; (3) that they were aware of the notoriety of the Japanese conduct of war and, therefore, had the reason to doubt the validity of the military’s assurance; and (4) that they remained in Cabinet, thereby supporting, in effect, a government that tolerated the continuation of the commission of atrocities.”⁴⁵

After WWII, there had been little progress on the doctrine of command responsibility until the establishment of the *ad hoc* tribunals. Although Geneva Conventions are silent on the command responsibility, Article 86.2 of Additional Protocol I incorporates the principles that came out of the trials in Nuremberg and Tokyo.⁴⁶ Article 87 of Additional Protocol I spells out the duties and obligations of military commanders with respect to their subordinates. The superiors must prevent and, where necessary, suppress and report to competent authorities grave breaches committed by their subordinates. Only in the event that he failed in these duties does a commander risk being held criminally responsible for taking no action.⁴⁷

Based on the jurisprudence of the Tokyo Trial, the ICTY first pointed out that “the principle that military and other superiors may be held criminal responsible for the acts of their subordinates is well-established in conventional and customary law.”⁴⁸ “It cannot be overemphasized that, where superior responsibility is concerned, as accused is not charged with the crimes of his subordinate but with this failure to carry out this duty as a superior to exercise control.”⁴⁹

The ICTY has refined the modern doctrine of criminal responsibility of superiors – the so-called command responsibility. It has clarified that a *de jure* superior-subordinate relationship, though as an important indication of command, is not necessarily required for criminal responsibility. “The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute of the ICTY is the effective control

over s subordinate in the sense of material ability to prevent or punish criminal conduct.”⁵⁰

The first and most comprehensive judgment on the doctrine of superior responsibility at the ICTY is the *Čelebići* Trial Judgment, which makes an invaluable contribution to the development of the doctrine. The Trial Chamber identifies three elements of superior responsibility pursuant to Article 7(3) of the ICTY Statute:

- i. The existence of a superior-subordinate relationship;
- ii. The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- iii. The superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.⁵¹

The ICTY further points out that in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offenses.⁵²

As for the superior responsibilities of civilian leaders, the jurisprudence of the *ad hoc* tribunals confirms the findings of the Tokyo tribunal by declaring that “a civilian superior may be held criminally responsible for the crimes of this subordinates.”⁵³ In *Akayesu* trial judgement, the ICTR directly refers to the Hirota case as a relevant precedent and states:

“It is, in fact, well-established, at least since the Tokyo Trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking.”⁵⁴

The *ad hoc* tribunals put the emphasis on the effective control over the subordinates by the civilian superior, at the same time, making a differentiation between the effective control possessed by civilian leaders and military commanders. The Trial Chamber of the ICTY in *Brdianin* Case states:

“The concept of effective control for civilian superiors is different in that a civilian superior’s sanctioning power must be interpreted broadly. It can not be expected that civilian superiors will have disciplinary power over their subordinates equivalent to that of military superiors in a analogous command position. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in that hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.”⁵⁵

The nature of command responsibility was not clear during the post-Second World War trials of Nazi and Japanese military and civilian officials. According to the conclusion of the ICTY Trial Chamber in *Halilović*, the doctrine of superior responsibility makes a superior responsible not for his subordinate acts sanctioned but for his failure to act. A superior is held responsible.... if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.⁵⁶ This responsibility is *sui generis*, distinct from other modes of participation of the crimes, namely planning, instigating, ordering, aiding and abetting or commission.⁵⁷ In light of this principle, the accused is individually criminally responsible for his failure to carry out his duty as a superior to exercise control and he is not charged with the crimes of his subordinates.⁵⁸ Therefore, a causal link “has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal responsibility on superiors for their failure to prevent or punish offenses committed by their subordinates”.⁵⁹

IV. Immunity of the Head of the State

Article 6 of the Tokyo Charter provides that “neither the official position, at any time, of the accused, nor the fact that an accused acted pursuant to order of this government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged....”⁶⁰

During the Tokyo Trial, there were widespread demand that Emperor Hirohito of Japan be prosecuted and evidence showed that he was personally involved in the aggression war.⁶¹ However, he was shield from the prosecution and trials by the order of the Supreme Commander General Douglas MacArthur in order to preserve the public order in the occupied Japan in afraid of the disintegration of the nation, thus retaining the Emperor as a symbol of the nation rather than as an official sovereign head of the state.⁶² The immunity granted was not limited to the Emperor himself, but also extended to the members of the Royal family.

A member of the Imperial family, Prince Asaka was commander of Japanese forces in the final attack on Nanjing, then the capital city of Nationalist China in December 1937. One month earlier, Prince Asaka became temporary commander of the Japanese forces outside Nanjing, because General Matsui was ill. During the final assault on Nanjing between 2 and 6 December 1937, he allegedly issued the order to “kill all captives”, thus providing official sanction for what became known as the “Nanking Massacre” or the “Rape of Nanking” (12 December 1937 – 10 February 1938).⁶³ As the principal perpetrator of the Nanjing massacre, his name was on the top of the list of war criminals drawn up in 1946 by the Nationalist Government of China. The

officials of the investigation team of the Allies interrogated Prince Asaka about his involvement in the Nanjing Massacre on 1 May 1946, but did not bring him before the IMTFE for prosecution. For politico-strategic and geopolitical reasons, General Douglas MacArthur decided to support the Imperial family and to grant immunity to all its members. The request for extradition for trial before Nanjing Military Tribunal in China for his leading role in the Nanjing Massacre filed by the General staff of the Chinese Armed Forces and Ministry of Justice was denied.⁶⁴ After war, Prince Asaka spent most of his time playing golf. He died of natural causes in 1981 at his home at age of 93.

The practice of the *ad hoc* tribunals completely changed this situation with an aim to end the impunity. In the case of the ICTY, Milosevic was the President of Serbia (originally the Socialist Republic of Serbia, a constituent republic within the Socialist Federal Republic of Yugoslavia) from 1989 to 1997 and President of the Federal Republic of Yugoslavia from 1997 to 2000. In 1999, Milošević was charged by the ICTY with war crimes in connection to the wars in Bosnia, Croatia, and Kosovo.⁶⁵ He became the first Head of the State prosecuted and tried by an international criminal tribunal in Europe after the WWII.⁶⁶ Radovan Karadžić served as the President of Republika Srpska during the Bosnian War. He was extradited to the ICTY Netherlands, in 2008 and was charged with 11 counts of war crimes. On 24 March 2016, he was found guilty of genocide in Srebrenica, war crimes and crimes against humanity, 10 of the 11 charges in total, and sentenced to 40 years’ imprisonment.⁶⁷

Mrs. Biljana Plavsic was a Serbian Representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina from 11 November 1990 until December 1992. Later, She became a member of the collective and expanded Presidencies of Republika Srpska. Plavšić voluntarily surrendered on 10 January 2001. On 2 October 2002, Plavšić pleaded guilty to the crime against humanity of persecutions and the Trial Chamber found her guilty accordingly. She was sentenced by the ICTY Trial Chamber for a period of 11 years’ imprisonment.⁶⁸

In the case of ICTR, Jean Kambanda, as Prime Minister and Head of Government of Rwanda from 8 April 1994 to around 17 July 1994, was arrested in July 1996 in Nairobi, Kenya. He was charged with six counts of Genocide, Conspiracy to Commit Genocide, Complicity in Genocide, Direct and Public Incitement to Genocide, and Crimes Against Humanity. On 1 May 1998, Kambanda pleaded guilty to genocide and he was sentenced to life imprisonment.⁶⁹ He is the first Prime Minister who confessed for committing the crime of genocide.

On 26 April 2012, The Special Court for Sierra Leone delivered the judgement in the case of Charles Taylor, the former

Liberian President who became the first African Head of State to be convicted for his part in war crimes.⁷⁰

International Criminal Court (ICC) also indicted two sitting Heads of States. Mr. Laurent Gbagbo, President of Côte d'Ivoire from 2000 until his arrest in April 2011 and Mr. al-Bashir, the sitting President of Sudan. The ICC finds that the non-immunity of the Head of the State when indicted by an international criminal tribunal had become a customary international law. The Pre-Trial Chamber of the ICC holds “that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.”⁷¹ The ICC First states that “immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.”⁷² Secondly, “there has been an increase in Head of State prosecutions by international courts in the last decade... [indicating that]...initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.”⁷³ Thirdly, “the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials.”⁷⁴ Fourthly, since 120 states “have ratified this Statute and/or entrusted this Court with exercising its jurisdiction over persons for the most serious crimes of international concern” that it would be “facially inconsistent” for immunity to overrule this purpose.⁷⁵

The analyse of the judicial practice of the international criminal law from the Nuremberg and Tokyo Trials to the *ad hoc* tribunals and the ICC shows that there has been a change and continues to be a change in the theory of immunity of the Head of the States when indicted by an international criminal tribunal for the most heinous crimes. With the increased influence of international human rights law, and the development of international criminal law, non-immunity of the Head of States when indicted for the most grave crimes by an international tribunal is becoming an emerging rule in international law.

V. Procedural development

The Tokyo Trial has been sharply criticized by some international and domestic scholars, especially for the so called “victor’s justice”, for instance, it is alleged that there were no equality of arms between the prosecution and defendants, relative lack of time for proper preparation of the defence case, lack of resource for expeditious translation of documents from English to Japanese, limitation on the ability of the defence to call witnesses and lack of other procedural guarantees which are today considered fundamental to a fair trial.⁷⁶ It is true that the Tokyo

Trial is not a perfect one. However, comparing with Article 16 of the Nuremberg Charter, the Tokyo rules made great improvement, especially on the more detailed provisions of fair trial.

Following the suite of Nuremberg Charter, Tokyo Charter specifically lays down the procedure for the fair trial in Article 9, for conduct of trial in Article 12 and admission of evidence in Article 13.⁷⁷ This set up a very good precedent for the *ad hoc* tribunals and ICC to follow. Article 9 (a) of the Tokyo Charter provides the furnish of the indictment, which means the whole trial will be oriented by the indictment. This is the typical practice of common law legal system. The Trial Chamber and prosecution could not deviate from this sole legal document so as to void the situation that the defence could face a moving target. The *ad hoc* Tribunals also adopted this practice in their Statutes and judicial practice. After certain period of time, especially after the prosecution finishes its case, there should be no way to change the charges in the indictment.⁷⁸

Article 9 (c) of the Tokyo Charter stipulates that an accused shall have the right to be represented by the counsel of his own selection, while Article 16 (d) of the Nuremberg Charter states “a Defendant shall have the right to conduct his own defense before the Tribunal or to the assistance of Counsel.”⁷⁹ It is clear that the Tokyo Charter avoids the very controversial issue of self representation. This issue is finally settled before the *ad hoc* Tribunals. In *Šešelj* case, the Appeals Chamber of the ICTY confirms that self representation or the conduction of defence though lawyers is the right of the accused. Considering the complexity of the case, the legal norms involved and unfamiliar procedures, the *ad hoc* Tribunals may appoint a standing counsel on behalf of the accused in case he chooses to defend himself so as to protect the accused to his best interest.⁸⁰

Article 9 (e) of the Tokyo Charter states that an accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. If the Tribunal grants the application, the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.⁸¹ It seems that the Tokyo Tribunal was trying its best to assist the Defendants to present their cases and provide meaningful defence.

As for the admission of evidence, Article 13 of Tokyo Charter clearly declares that the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. This stipulation corresponds with Article 19 of the Nuremberg Charter and indicates that the trial before international tribunals shall not stick to the rules of any domestic jurisdictions. Taking

the practice of common law legal system as their basis, the rules for the admission of evidence of the Nuremberg and Tokyo Tribunals also took some elements from civil law legal system. This gave great guidance to the improvement of the proceedings before the *ad hoc* tribunals.

The flexible approach the Tokyo Tribunal adopted shows that the admission of evidence does not only rely on the oral testimony, but also in admission of the written materials. All most of all evidence are admissible, for instance, documents, regardless of its security classification and without proof of its issuance or signature; reports which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report; affidavit, deposition or other signed statement, a diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge; copy of a document of other secondary evidence of its contents, if the original is not immediately available, Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.⁸²

The flexibility concerning with the admission of the evidence in the Tokyo Trial also sets up a precedent to the present tribunals to improve their procedural and evidence rules. The *ad hoc* Tribunals have invested significant time and energy in the development of defensible rules of evidence and procedure so as to guarantee fair trial right to the accused.

At the very beginning, the Rules of Procedure and Evidence of the ICTY (“RPE”) adopted more elements of the common-law adversarial legal system than of civil-law inquisitorial practice, especially in procedural aspect. The common law system prefers the oral presentations of evidence with the right of cross examination, which is essential for the party driven process. The criterion for the admission of evidence is very strict, which may be called “opt in” approach. By contrast, in the civil law system, which adopted the principle of free assessment of evidence, trials are conducted by professional judges and evidence rules are relatively more flexible. What is more, the civil law system relies on dossiers of the case prepared by judicial officers before the trial. In the trials, the parties may challenge the admission of evidence and have it taken out of the dossiers, which may be named as “opt out” practice.

The cases before the ICTY are very complex and difficult compared to domestic ones. In only one case, hundreds of witnesses may be called to testify and thousands of documents may be admitted into evidence. As a result, a trial is very time-consuming, may even last for a few years.

In order to reach the aim of fairness and expeditiousness of trials, the ICTY begins to amend its RPE and adds more elements of civil law system, especially in the admission of evidence. The RPE set up three criteria for the admission of evidence, which are relevance, reliability and probative value. If all the three criteria are fulfilled, any materials tendered by the parties during the proceedings will be admitted, even the hearsay evidence. The RPE also divides the evidence into two major categories: essential evidence which goes to the acts and conducts of the accused; contextual evidence which goes to the context where a crime occurred. For the essential evidence, the common law principles of orality and immediacy are applied, while for the contextual evidence, written statements could be admitted in lieu of oral testimony.

In procedural aspect, another great development is the right of the appeal. As a matter of fact, before the WWII, appeal before an international criminal tribunal was not the statutory right for the parties in criminal procedures. The Charters of the Nuremberg and Tokyo Tribunals have no provisions on appeal, though the Charter of Tokyo Tribunal allows the convicted to file a petition to the Supreme Commander of the Allied Powers in the Far East to review his case.⁸³

The *ad hoc* Tribunals also filled in this vacuum in the Nuremberg and Tokyo Charters. At the present, the right of appeal is generally recognized as a fundamental human right in international criminal proceedings, owing to the development of human rights law after WWII.⁸⁴ The UN *ad hoc* tribunals have kept abreast with the trend of international human rights law. The Appeals Chamber in the *Tadić* case calls for the respect of the “‘internationally recognized standards regarding the rights of the accused’ including Article 14 of the International Covenant on Civil and Political Rights”.⁸⁵ The ICTY has also articulated the specific standards for appeal in their judicial practice.⁸⁶ The Appeals Chamber emphasizes that an appeal is not an opportunity for the parties to re-argue their cases – it does not involve a trial *de novo*.⁸⁷ The Appeals Chamber in *Kvočka et al.* states that “on appeal, the Parties must limit their arguments to legal errors, which invalidate the decision of the Trial Chamber and to factual errors, which occasion a miscarriage of justice within the scope of Article 25 of the Statute”.⁸⁸

Although the Statutes of the *ad hoc* tribunals do not mention the right of interlocutory appeal, their Rules of Procedure and

Evidence provides two channels for interlocutory appeal if an immediate resolution by the Appeals Chamber may materially advance the proceeding. One is in the case of motion challenging jurisdiction, where the accused has an automatic right to appeal. The other scenario requires certification granted by the Trial Chamber in order to prevent frivolous motions or an abuse of process.⁸⁹

The *ad hoc* Tribunals also set up a review procedure for any new facts discovered after the delivery of the final judgment. If a new fact is discovered and was not known to the moving party at the time of proceedings and could not have been discovered through the exercise of due diligence, the parties may file a motion for review of the judgment. For the defence, there is no time limit for filing the motion; while for the prosecution, there is a one-year time limit.⁹⁰ The Tribunals' practice can therefore be considered as an edifying example for the future.

Although there are some criticism on the fair trial aspect in Tokyo Trial, the practice of the Tokyo Trial set a very good example for the conduction of international trials for the later international criminal tribunals. Of course, after the WWII, the protection of the human right, especially the right of the accused, have been greatly enhanced. It is submitted that it is not fair to use the the present standard to judge what happened 70 years ago.

VI. Conclusion

Despite of the continued heated debates on the legacy of the Tokyo Trial, the Tokyo Trial sent a very strong and powerful message to the international community, especially to the Asian countries that impunity is no longer allowed and those who alleged to commit the most serious crimes in violation of international humanitarian law and human right will eventually to be brought to justice. This message is the most pertinent to the Asian region, where the most heinous crimes of massacre occurred in Cambodia, where the terrorist activities have been most rampant in the past 20 years and, what is more, where most of the nuclear states in the world are located. Unfortunately, the study and research of the legacies of Tokyo Trial are still in the rudimentary stage. "Japanese societal attitude towards the Tokyo Trial has been a complex mixture of acceptance, disinterest, cynicism and frustration, each of which embraced by the people in a nuanced and varying manner."⁹¹

It is not a strange phenomena that a judgement once delivered will invite the comments, criticisms and even attacks. However, no matter it is liked or disliked, it is already a piece of history. It is submitted that the Tokyo Trial and Tokyo Judgement should not be a "national taboo", but a valuable national heritage. It is time to learn how to come in terms with the legacies of the Tokyo Trial

after 70 years. As the leadership in the development of international law and guardian for the post war international order and regional peace and security requires, it is high time for Japan to claim the ownership to the Tokyo Trial and move forward.

"Once you replace negative thoughts with positive ones, you'll start having positive results."⁹²

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¹ Cenap Çakmak, A Brief History of International Criminal Law and International Criminal Court, Palgrave macmillan, 2017, p. 64

² Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* Oxford University Press, Oxford, 2008. p. 5. The 28 accused are: Four former premiers: Hiranuma, Hirota, Koiso, Tojo; Three former foreign ministers: Matsuoka, Shigemitsu, Togo, Four former war ministers: Araki, Hata, Itagaki, Minami, Two former navy ministers: Nagano, Shimada; Six former generals: Doihara, Kimura, Matsui, Muto, Sato, Umezu; Two former ambassadors: Oshima, Shiratori; Three former economic and financial leaders: Hoshino, Kaya, Suzuki; One imperial adviser: Kido; One radical theorist: Okawa; One admiral: Oka; One colonel: Hashimoto. Two defendants died during the proceedings and one was ruled unfit to stand trial.

³ For the Statute of the ICTY, see the attachment to UNSC/Res. 827 (1993) adopted on 25 May 1993. For the Statute of the ICTR, see the attachment to the UNSC Res. 955 (1994) adopted on 8 November 1994. For the Rome Statute, see U.N. Doc.A/CONF.183/9, International Legal Materials 1998, 999.

⁴ *Supra* Note 2, p 34.

⁵ *Ibid.*

⁶ Shigemitsu Mamoru was a career diplomat. He was appointed as the Minister for Foreign affairs in 1943. He was convicted for war crime and other crimes and sentenced for 7 years imprisonment by the IMTFE. Matsui Iwane was the Commander in Chief of the Japanese Expedition Army in China. He was convicted for war crime for his involvement of the Nanjing Massacres. He was sentenced to death.

⁷ *Supra* note 2, p.98.

⁸ *Ibid.*

⁹ International Military Tribunal, (Nuremberg), "Judgement and Sentence", in American Journal of International Law, 1947, Vol 41, no. 1,p.218.

¹⁰ As a mode of liability, such as ordering, planning, instigation, aiding and abetting, it requires the substantive crimes really occurred, while inchoate crimes do not.

¹¹ Richard G. Singer and John Q. La Fond, *Criminal Law, Sixth Edition*, New York: Wolters Kluwer Law & Business, 2013, p. 342.

¹² United States *et al* v. Araki Sadao *et al* The Tokyo Major War Crimes Trial: the Records of International Military Tribunal for the Far East with an Authoritative Commentary and Comprehensive Guide (2002), Vol 2. Opening speech by Prosecutor Keenan.

¹³ This approach was based on a memorandum prepared by the U.S Department of Justice for the benefit of Allied prosecutors. It is articulated

that “Under the international doctrine of conspiracy, Japanese leaders were guilty of a crime, just as soon as they entered into an understanding either among themselves or with the leaders of Italy and Germany, to commit any act, *malum in se*, which violated an international social interest of personality or substance, prior therefore, to the commission of the act itself. It would have been (an) international crime, although such as agreement or understanding did not culminate in the act intended.”

Ibid. Pre-Trial Brief on the law of Conspiracy. The memorandum was dated 23 May, 1946 and addressed to Prosecutor Joseph Keenan. At Vol 2, A General Preface to the Collection, xxxiii.

¹⁴ The Tokyo Judgement further states that “these far-reaching plans for waging wars of aggression, and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object...The conspiracy existed for and its execution occupied a period of many years. Not all of the conspirators were parties to it at the beginning and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in count one.” See Tokyo Judgment, see *supra* note 2, pp. 1141-1143.

¹⁵ *Ibid.*

¹⁶ Article 4.3, the ICTY Statute. *Supra* note 3.

¹⁷ *Tadic* Appeals Judgement, IT-94-1-A, 15 July 1999. Para 185 --- 237.

¹⁸ *Simic, Tadic and Zaire*, IT-95-9, Trial Chamber judgement, October 17, 2003, para 156.

¹⁹ *Blagojevic and Jokic*, IT-02-60, Trial Chamber judgement, January, 2005, para, 696.

²⁰ *Nahimana et al*, Case No. ICTR-96-11-T, Trial Chamber Judgement, 3 December 2003, para. 1044.

²¹ *Musema*, ICTR-96-13, Trial Chamber Judgement, 27 January, 2000, para. 191.

²² *Niyitegeka*, ICTR-96-14-T, Trial Chamber Judgement, 16 May, 2003, para. 423:

²³ *Ibid.* para. 192

²⁴ *Gatete*, ICTR-00-61-A, Appeals Chamber Judgment, 9 October 2012, para. 261.

²⁵ See Convention relative to the Protection of Civilian persons in Time of War (1949), (GC IV), United Nations Treaty Series, Vol. 75, 287. Also Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (1977) (Protocol I), United Nations, General Assembly, A/32/144, 15 August 1977.

²⁶ Crime of Sexual Violence, ICTY website, <http://www.icty.org/en/features/crimes-sexual-violence>, last visited on 1 November, 2018.

²⁷ *Tadic* case, IT-94-1, Trial Chamber Judgement, para. 438.

²⁸ *Ibid.*, Appeals Sentencing Judgement, IT-94-1-A, January 2000. para. 145.

²⁹ *Furundžija*, IT-95-17/1, Trial Chamber Judgement, 10 December, 1998, para. 346.

³⁰ *Akayesu*, ICTR-96-4, Trial Chamber Judgement, 2 September 1998, para. 850.

³¹ *Delalic, Mucic et al*, (Čelebići case) IT-96-1-T, Trial Chamber Judgement 485.

³² *Ibid.* para. 684.

³³ *Kunarac et al*, “FOČA” IT-96-23 and 23/1, Trial Chamber judgement, 22 February 2001, para 246-367.

³⁴ *Kordic and Cerkez*, IT-95-14/2, Appeals Chamber Judgement, found that “In accordance with the settled jurisprudence, the Appeals Chamber holds that those acts constitutes criminal conduct of a gravity equal to the crimes listed in Article 5 of the Statute.” December 17, 2004, paras 673.

³⁵ Indictment. *Supra* note 2, 1 34.

³⁶ Hirota Koki, foreign minister at the time of the rape of Nanjing (June 1937-May 1938), Prime Minister of Japan from 9 March 1936 to 2 February 1937. Tojo Hideki, Prime Minister of Japan during much of World War II, from October 17, 1941, to July 22, 1944.

³⁷ Koiso Kuniaki, Prime Minister after the fall of Tojo Cabinet (July 1944 -April 1945);

³⁸ Shigemitsu Mamoru, Foreign Minister during the Pacific war (April 1943- April 1945), later as the Deputy Prime Minister of Japan;

³⁹ Tokyo Trial Judgment, 49791, *Supra* note 2. 4 604.

⁴⁰ *Ibid.* *Supra* note 2, judgement, 48 448.

⁴¹ B.V.A Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Polity Press, 1993) p.75.

⁴² United States et al v. Araki Sadao et al in *The Tokyo Major War Crimes Trial: The Record of the International Military Tribunal for the Far East, with an Authoritative Commentary and Comprehensive Guide*, (2002) Vol.108, 1111.

⁴³ *Ibid.*, Judgement, 49 592.

⁴⁴ *Ibid.*, Judgement, 48 446.

⁴⁵ Yuma Totani, *The Case against the Accused, Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, edited by Tanaka, McCormack and Simpson, Martinus Nijhoff Publishers, Leiden Boston, 2011, p.159.

⁴⁶ *Supra* note 25. This article stipulates that “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

⁴⁷ *Ibid.*

⁴⁸ *Delalic et al*, IT-96-1-T. Appeal judgement, February 20, 2001, para 195.

⁴⁹ *Krnjelac*, IT-97-25-A, Appeals Judgement, September 17, 2003, para 171.

⁵⁰ *Blaskic*, IT-95-14, Appeals Judgement, July 29, 2004, para 375.

⁵¹ *Delalić et al*, IT-96-21-T, Trial Judgment (‘Čelebići Trial Judgment’), 16 November 1998, para. 346.

⁵² *Ibid.*, para. 378.

⁵³ *Stakic*, IT-99-34, Trial Chamber, July 31, 2003, para, 462.

⁵⁴ *Akayesu*, Trial Chamber judgement, ICTR-96-4, 2 September 1998), para. 633.

⁵⁵ *Brdanin*, IT-99-36, Trial Chamber, September 1, 2004, para 281.

⁵⁶ *Aleksovski*, IT-95-14/1-T, Trial Chamber Judgment, 25 June 1999, para. 67.

⁵⁷ *Halilovic*, IT-01-48-T, Trial Chamber Judgment, 16 November 2005, para. 42. See also ICTY, *Obrenović*, IT-02-60/2-S, Trial Chamber Judgment, 10 December 2003, para. 100 which states:

[w]hen a commander fails to ensure compliance with the principles of international humanitarian law such that he fails to prevent or punish his subordinates for the commission of crimes that he knew or had reason to know about, he will be held liable pursuant to Article 7(3). When a commander orders his subordinates to commit a crime within the jurisprudence of the Tribunal, he will be held liable pursuant to Article 7(1) of the Statute.

⁵⁸ *Krnojelac*, Case No. IT-97-25-A, Appeals Chamber Judgment, 17 September 2003, para. 171.

⁵⁹ *Čelebići* Trial Judgment, *supra* note , para. 398.

⁶⁰ Tokyo Charter, *Supra* note 2.

⁶¹ Bix, Herbert P. (2001). Hirohito and the making of modern Japan (Book) (1st Perennial ed.). New York: Perennial. pp. 387–391. ISBN 978-0060931308.

⁶² John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, June 17th 2000 by W. W. Norton Company (first published 1999). ISBN13: 9780393320275, pp 524.

⁶³ Chang, Iris (1998). *The Rape of Nanking: The Forgotten Holocaust of World War II*. Penguin. pp. 248. ISBN 0-14-027744-7.

⁶⁴ See Hu Ju-rong, *The Nanjing Trials*” in Zhang Xian-wen (ed), *Collection of Historical Materials on the Nanjing Massacre* (published in Chinese, 2006, Vol 24, 63.

⁶⁵ *Milošević*, IT-01-51-I, Prosecution’s Indictment, 22 November, 2001.

⁶⁶ His trial formally ended on 14 March 2006, following Slobodan Milošević’s death in the Tribunal’s Detention Unit on 11 March 2006, just weeks before the trial’s scheduled conclusion. A thorough inquiry performed by Dutch and Tribunal authorities determined conclusively that Milošević’s death was from natural causes. Release of Internal Report Into Slobodan Milosevic’s Death. ICTY Press Brief, The Hague, 31 May 2006 LM/MOW/1081e. <http://www.icty.org/en/sid/8743>, last visited on 1 November, 2018.

⁶⁷ *Karadžić*, IT-95-5/18-T, Trial Chamber’s judgement. 24 March 2016.

⁶⁸ *Plavšić*, IT-00-39&40/1-S. Trial Chamber’s Sentencing Judgment, 27 February, 2003.

⁶⁹ *Kambanda*, ICTR-97-23, Appeal Judgement, 19 October, 2000.

⁷⁰ *Charles Taylor*, SCSL-03-01-1389, Appeal Judgement, 26 September, 2013.

⁷¹ Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (ICC Pre-Trial Decision) 12 December 2011

⁷² *Ibid*, para 38

⁷³ *Ibid*, para 38

⁷⁴ *Ibid*, para 39

⁷⁵ *Ibid*, para 43.

⁷⁶ Neil Boister, *The Tokyo Military Tribunal: A Show Trial?* Morten Bergsmo, CHEAH Wui Ling and YI Ping edited, *Historical Origins of International Criminal Law: Volume 2*, p 14-18, Torkel Opsahl Academic

EPublisher, 2014.

⁷⁷ Tokyo Charter, *Supra* note 2.

⁷⁸ See Rule 50 of the RPE of the ICTY. IT/32/Rev. 50. 8 July 2015.

⁷⁹ Article 16 (d) of the Nuremberg Charter. United Nations Treaty Series, vol.82, 279.

⁸⁰ *Šešelj*, IT-03-67-AR73.3. Appeal Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel. 20 October, 2006. para. 52.

⁸¹ Tokyo Charter, *Supra* note 2.

⁸² Article 13 (c) (d) (e) of the Tokyo Charter. *Supra* note 2.

⁸³ Article 17 of the Tokyo Charter provides: “A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.” *Supra* note 2. In Tokyo Trial, two defendants, Hirota and General Doihara, petitioned for review of their convictions before the U.S. Supreme Court. On December 20, 1948, the Supreme Court replied that it had no jurisdiction to hear the appeal; the International Military Tribunal was not a court of the United States, and therefore was beyond the Supreme Court’s power to review. Three days later, their death sentences were carried out.

⁸⁴ Article 14(5) of the International Convention on Civil and Political Rights states: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” 999, UNTS 171.

⁸⁵ *Tadić*, IT-94-I-A-AR77, Appeal Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, p. 3.

⁸⁶ *Supra* note 3. Article 25 of the ICTY Statute stipulates that “ 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice,” which means that the appellant could not only appeal on a question of law, but also on an error of fact.

⁸⁷ *Kupreškić et al.* IT-95-16-A, Appeals Chamber Judgment, 23 October 2001, para. 22.

⁸⁸ *Kvočka, et al.* IT-98-30/1, Appeal Judgment, para. 14.

⁸⁹ The Rule of Procedural and Evidence of the ICTY, Rule 72(B). *Supra* note 78.

⁹⁰ *Ibid*. Rule 120.

⁹¹ Madoka Futamura, *Japanese Societal Attitude towards the Tokyo Trial: From a Contemporary Perspective*. P.52. *Supra* note 45.

⁹² Willie Nelson (2006, *The Tao of Willie: A Guide to the Happiness in Your Heart* by Willie Nelson with Turk Pipkin, (Epigraph of book), Quote Page vii, Gotham Books, New York: A Division of Penguin Group. (Verified on paper),