

## STUDENT CONTRIBUTION

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# Substantive or Jurisdictional? The Tokyo Charter and the Legality Challenge at the International Military Tribunal for the Far East\*

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*The legacies of Tokyo Trial have been overlooked and questioned partly because prosecuting aggression was allegedly a violation of the principle of legality. This essay argues that the trial should not be overlooked for this reason because the legality debate at the trial provides insights into the interplay between the principle of legality and sources of international criminal law. Besides the majority judgment, some minority opinions could shed light on the nature of the Tokyo Charter by distinguishing between jurisdiction and applicable law and link the issue to the legality challenge. Although the Tokyo Charter was formally different from the Nuremberg Charter, both of them are substantive in nature so that the tribunals were allowed not to address the legality challenge. In addition, prosecuting aggression was arguably not a violation of the principle of legality because this principle, at that time, did not bind ex post facto legislation against international crimes committed during World War II.*

### Keywords

International Military Tribunal, IMT, IMTFE, Tokyo Charter, ICC.

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## I. Introduction

The Tokyo International Military Tribunal (International Military Tribunal for the Far East: “IMTFE”) was established in 1946 under the Special Proclamation of General MacArthur, the Supreme Commander of Allied Powers, for the purpose of “meting out stern justice” to Japanese war criminals as required by the Potsdam Declaration and consented by Japan via the Japanese Instrument of Surrender.<sup>1</sup> The proceedings lasted for 3 years, tried 28 defendants, and produced valuable records on prosecuting international crimes at an international level.<sup>2</sup> The legacies of the IMTFE, however, have been largely overlooked. This may be because IMTFE came second to the Nuremberg International Military Tribunal (“IMT”), or its judgment was not as publicly available as that of the IMT,<sup>3</sup> or it was considered to be essentially unfair.<sup>4</sup> Some even argued that the post-World War II (“WWII”) cases altogether should be disregarded today as they disrespected some basic principles of criminal law such as the principle of legality.<sup>5</sup>

The first three reasons are easy to rebut, while the last one is worth more attention. For the first reason, indeed, in many parts of the judgment, the IMTFE followed the reasoning of the judgment of IMT in order to avoid conflicting jurisprudence,<sup>6</sup> while some aspects of the IMTFE were innovative (*e.g.*, command responsibility<sup>7</sup> and murder charges<sup>8</sup>) and even had more enduring influence than the IMT (*e.g.*, debates on aggression).<sup>9</sup> Concerning the second reason, the first-hand resources of the IMTFE

<sup>1</sup> N. BOISTER & R. CRYER (EDS.), *DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS* 5 (2008).

<sup>2</sup> For some recent works revisiting legacies of IMTFE, see YUKI TANAKA ET AL. (EDS.), *BEYOND VICTOR’S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED* (2010); N. BOISTER & R. CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* (2008); YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* (2008); TOKYO TRIAL REVISITED 东京审判再讨论 (Research Center for Tokyo Trial Studies ed., 2015).

<sup>3</sup> K. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 139 (2009).

<sup>4</sup> M. Cherif Bassiouni et al., *Nuremberg Forty Years After*, 80 AM. SOC’Y INT’L L. PROC. 64 (1986). See also R. MINEAR, *VICTORS’ JUSTICE: TOKYO WAR CRIMES TRIAL* (1971).

<sup>5</sup> B. Sander, *Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence*, 23 LEIDEN J. INT’L L. 130 (2010).

<sup>6</sup> International Military Tribunal For The Far East Judgment, at 48439 (Nov. 4, 1948), available at <http://werle.rewi-berlin.de/tokio.pdf> (last visited on Oct. 21, 2018).

<sup>7</sup> Xiao Mao, *Omission Liability for War Crime Charges in International Military Tribunal for The Far East*, 4 INT’L. J. L. & LEGAL JURISPRUDENCE STUD. 36 (2017), available at [http://ijlls.in/wp-content/uploads/2017/02/Omission\\_Liability\\_for\\_War\\_Crime\\_Charges\\_in\\_International\\_Military\\_Tribunal\\_for\\_The\\_Far\\_East.pdf](http://ijlls.in/wp-content/uploads/2017/02/Omission_Liability_for_War_Crime_Charges_in_International_Military_Tribunal_for_The_Far_East.pdf) (last visited on Oct. 21, 2018).

<sup>8</sup> N. Boister, *The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?*, 8 J. INT’L. CRIM. JUST. 439-46 (2010).

<sup>9</sup> K. Sellars, *The Legacy of the Tokyo Dissents on “Crimes against Peace” in THE CRIME OF AGGRESSION: A COMMENTARY*

were available thanks to some databases<sup>10</sup> and scholars.<sup>11</sup> Regarding the third reason, although it would be criticised that “Tokyo ... was a precedent that legal history can only consider with a view not to repeat it,”<sup>12</sup> this does not suggest overlooking the IMTFE but learning lessons from it.<sup>13</sup> It is short-sighted to disregard the IMTFE simply on the ground that it was unfair. As a comparison, *Yamashita*,<sup>14</sup> notorious for failure to respect the principle of personal culpability, is still cited frequently as the first case of command responsibility.<sup>15</sup>

As the IMTFE, established on the basis of the proclamation of a joint organ of states, is an international criminal court;<sup>16</sup> its judgment, by definition, represents internationally authoritative, albeit not necessarily conclusive statements as to certain rules of international law. Therefore, it should not be given less attention than decisions of municipal courts, the latter constituting no more than state practice and *opinio juris* on the part of the forum states.<sup>17</sup>

The last reason is worth further analysis. Arguably, the jurisprudence of post-WWII era should be treated with caution today because the principle of legality is applied more strictly than ever before.<sup>18</sup> It is also argued that the culture of international criminal law today largely deviates from what it was in Nuremberg era with the evolution of the principle of legality.<sup>19</sup> In light of this transformation, it seems sound for the legal scholarship today to pay less attention to post-WW II trials when interpreting contemporary rules of international criminal law. This essay, however, will argue that the IMTFE should not be overlooked for this reason because, at least, from a theoretical perspective, the legality debate surrounding aggression at the IMTFE provides insights into the interplay between principle of legality and sources of international criminal law.

113 (C. Kress & S. Barriga eds., 2016).

<sup>10</sup> See, e.g., Tokyo Trial Databases [东京审判资源库], available at <http://tokyotrial.cn>; Tokyo Trial Resource Platform, available at <http://mylib.nlc.cn/web/guest/djsp/index> (all last visited on Oct. 21, 2018).

<sup>11</sup> BOISTER & CRYER, *supra* note 1.

<sup>12</sup> Bassiouni, *supra* note 4.

<sup>13</sup> N. Boister, *Aggression at the Tokyo War Crimes Trial* (2007), available at [https://ir.canterbury.ac.nz/bitstream/handle/10092/737/12607990\\_Boister.pdf?sequence=1](https://ir.canterbury.ac.nz/bitstream/handle/10092/737/12607990_Boister.pdf?sequence=1) (last visited on Oct. 21, 2018).

<sup>14</sup> *US v Yamashita*, 327 U.S. 1, Law Reports of Trials of War Criminals Volume IV, at 1 (1948), available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-4.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf) (last visited on Oct. 21, 2018).

<sup>15</sup> BOISTER & CRYER, *supra* note 2, at 3.

<sup>16</sup> R. O'KEEFE, INTERNATIONAL CRIMINAL LAW 89 (2015).

<sup>17</sup> *Id.* at 110.

<sup>18</sup> A. CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 22-3 (3d ed. 2013).

<sup>19</sup> *Jean d'Aspremont, The Two Cultures of International Law* in OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW (K. Heller et al. eds., 2018) (forthcoming), available at <https://ssrn.com/abstract=2910295> (last visited on Oct. 21, 2018).

The legality debate at the IMTFE could be summarized as whether a challenge based on the principle of legality could be brought at the IMTFE and, if so, assessed against the status of the principle in international law at that time, whether the principle was violated if the accused were found criminally responsible for aggressive war. This essay will examine the approach raised by the prosecution to justify that finding the accused responsible for aggressive war was not a violation of the principle of legality. The prosecution's approach was borrowed from the Nuremberg judgment based on the nature of the principle of legality as "a principle of justice" and the nature of the Tokyo Charter as substantive law binding the Tribunal. This approach aroused heated debate, while the judgment of the IMTFE to this question was too imprecise and sometimes self-contradictory. This essay finds that the debates surrounding this issue can be knitted together through the framework of the interplay between the principle of legality and sources of international criminal law. It shows that in relation to the legality debate, the IMTFE provided some creative arguments, as demonstrated in the submissions of prosecution (especially Mr. Comyns Carr), the defendant counsels (especially Dr. Takayanagi) as well as minority opinions of Judge Webb (Australia), Judge Bernard (France), Judge Röling (the Netherlands), Judge Pal (India), and Judge Jaranilla (the Philippines).

This essay is composed of five parts including Introduction and Conclusion. Part two will generally discuss the interplay between the principle of legality and sources of international criminal law, focusing on how the principle of legality is relevant to the hierarchy of sources of international criminal law and nature of the statutes of international courts. Part three will analyse the legality debate at the IMTFE, focusing on how the Judgment understands the legal nature of the Tokyo Charter. This part criticizes that it is not proper for the IMTFE to borrow the reasoning of the judgment of IMT without considering the differences between the constituting instruments of the two courts, and argues that the nature of the Tokyo Charter should be analysed in its own way. Part four will address the views expressed by the minority opinions on the nature of Tokyo Charter and the legality debate. The minority judges provided a useful approach to address the legality debate by showing that the nature of the Tokyo Charter, whether substantive or purely jurisdictional, has legal consequences on the right of the defendant to resort to the principle of legality to challenge the charges. Although this part praises the minority judges' attempt to distinguish between jurisdictional and substantive rules, it nonetheless concurs with the conclusion of the majority judgment that the Tokyo Charter was substantive in nature and prosecuting aggression at IMTFE did not violate the principle of legality.

## II. The Principle of Legality and Sources of International Criminal Law

As a preliminary point, it is necessary to briefly discuss how the principle of legality interacts with sources of international criminal law. The principle of legality in international law was considered to have emerged in post-WWII trials.<sup>20</sup> Now, it can be also found in treaties as well as customary international law.<sup>21</sup> The principle has several dimensions which are relevant to the discussion here, such as *nullum crimen sine lege scripta* (no crime without written law), *nullum crimen sine lege certa* (no crime without definite law), *nullum crimen sine lege praevia* (no crime without previous law), and *nulla poena sine lege* (no punishment without law).<sup>22</sup> The emphasis on strict legality also entails a different approach to the sources of international criminal law from sources of general international law. To clarify, in relation to hierarchy of sources of international criminal law, adherence to principle of legality leads to more reliance on treaty law for determining individual criminal responsibility than on, or even excludes, customary international law and general principles of law.<sup>23</sup> In relation to interpretation, the principle of legality favours strict interpretation which arguably supersedes Article 32 of the Vienna Convention on the Law of Treaties (“VCLT”).<sup>24</sup> After briefly discussing the hierarchy of the sources of international criminal law, this part will focus on how the principle of legality interacts with the statutes of international criminal tribunals and general principles

### A. The Principle of Legality and Hierarchy of Sources of International Criminal Law

It is generally accepted that different from Article 38(1) of the Statute of International

<sup>20</sup> S. Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (VOL. 1) 735 (A. Cassese et al. eds., 2002). Cf. A. Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 *STAT. L. R.* 51 (2005).

<sup>21</sup> J.-M. HENCKAERTS & L. DOSWALD-BECK (EDS.), *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (VOL. 1: RULES) Rule 101 (2009).

<sup>22</sup> On different dimensions of the principle of legality, see GALLANT, *supra* note 3, at 11; W. Worster, *On the Purpose of Legality and its Applicability to International Law*, 9 *J. INT’L CRIM. JUSTICE* 973 (2011); D. Jacobs, *International Criminal Law*, in *INTERNATIONAL LEGAL POSITIVISM IN A POSTMODERN WORLD* 451-74 (J. Kammerhofer & J. D’Aspremont eds., 2014); V.-D. Degan, *On the Sources of International Criminal Law*, 4 *CHINESE J. INT’L L.* 51 (2005).

<sup>23</sup> Jacobs, *id.* at 458-66. See also N. Jain, *Judicial Lawmaking and General Principles in International Criminal Law*, 57 *HARV. INT’L L. J.* 112 (2016).

<sup>24</sup> Jacobs, *id.* at 466-70.

Court of Justice where there is no firm hierarchy between international convention, custom, and general principles of law, a hierarchy exists and should exist for sources of international criminal law.<sup>25</sup> Cassese, for example, considers that because international criminal courts “are invested by states which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them,” they “must first and foremost apply their Statutes,” with the examples such as London Agreement of 8 August 1945 and 1998 Rome Statute.<sup>26</sup> However, a counter-position argues that human rights norms, like the principle of legality, can override the provisions of statutes in certain scenarios.<sup>27</sup> In order for a tribunal to disregard its statute, it must find some sources of law superior to its statute.<sup>28</sup> However, whether and under what circumstances the principle of legality overrides the statutes is still debated. For the Rome Statute, for example, some have argued that human rights principles cannot supersede the definitions of crimes under the statute, because if the drafters had wished so, they would have had placed the duty to comply with human rights principles at the beginning of Article 21.<sup>29</sup> Conversely, others argue that the ordinary meaning of Article 21(3) is that statutory crimes are inapplicable when conflicting with human rights principles.<sup>30</sup> However, the approach solely based on the wording of a specific article in a particular statute might not be applicable when analysing the statutes of other tribunals. As shown below, a better approach would be to ascertain the nature of the statute, i.e., whether it is substantive or jurisdictional in nature, and the approach has been well demonstrated by the judges at the IMTFE when debating whether the tribunal must formally address the legality challenge.

## B. The Principle of Legality and Nature of Statutes of International Criminal Courts

The nature of the constituent instrument of an international criminal court—substantive

<sup>25</sup> CASSESE, *supra* note 18, at 11-18; Degan, *supra* note 22, at 45. See also D. Akande, *Sources of International Criminal Law*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 47 (A. Cassese et al. eds., 2009).

<sup>26</sup> CASSESE, *supra* note 18, at 11.

<sup>27</sup> Prosecutor v Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (May 31, 2004), available at [http://www.worldcourts.com/scsl/eng/decisions/2004.05.31\\_Prosecutor\\_v\\_Norman.pdf](http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Norman.pdf) (last visited on Oct. 21, 2018). See also Akande, *supra* note 25, at 45.

<sup>28</sup> Akande, *id.*

<sup>29</sup> G. Hafner & C. Binder, *The Interpretation of Article 21(3) ICC Statute: Opinion Reviewed*, 9 AUSTRIAN REV. INT'L & EUR. L. 174 (2004).

<sup>30</sup> A. Pellet, *Applicable Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (VOL. 2) 1080 (A. Cassese et al. eds., 2002).

or jurisdictional in nature-has implications on whether the principle of legality can be invoked by the defendants.<sup>31</sup> Substantive norms of criminal law, including norms of crimes and forms of criminal responsibility, “directly address individuals, dictating them to do or not to do a particular conduct,” and failure of compliance would result in criminal responsibility.<sup>32</sup> Substantive norms in a statute are the chief sources of applicable law. In contrast, purely jurisdictional rules of statutes only limit the scope of the court’s authority in deciding cases. A specific provision defining crimes and modes of responsibility may be both substantive and jurisdictional in nature. It may both address individuals and limit the court’s subject-matter jurisdiction, or it may be purely jurisdictional in nature, only referring to what kind of conducts can be addressed by the tribunal without mentioning the applicable law to decide the case. The Rome Statute can be considered substantive in nature,<sup>33</sup> while the statutes of the ICTY and ICTR are considered purely jurisdictional in nature<sup>34</sup> so that the substantive norms applied by the two *ad hoc* tribunals have to be found elsewhere.<sup>35</sup> Substantive and jurisdictional rules are usually closely related because a substantive statute would necessarily be jurisdictional<sup>36</sup> and a jurisdictional statute limits the scope of applicable substantive rules. Therefore, there is usually no problem even if jurisdictional and substantive rules are intertwined with each other, as long as the crimes defined in the statute are no broader than the substantive rules binding individuals at the time of commission.

However, it is the scenario where the statutory provisions are arguably broader than the customs binding individuals at time of commission that poses a legality challenge, because, in such a case, an individual could be prosecuted for a crime over which the statute gives the court jurisdiction but was not actually criminal at the time of commission.<sup>37</sup> The *Ntaganda* Appeal Judgment shows such a scenario

<sup>31</sup> M. Milanović, *Is the Rome Statute binding on individuals (And Why We Should Care)*, 9 J. INT’L CRIM. JUST. 25 (2011); M. Milanović, *Aggression and Legality: Custom in Kampala*, 10 J. INT’L CRIM. JUST. 165 (2012).

<sup>32</sup> A. Cassese, INTERNATIONAL CRIMINAL LAW 11-3 (2d ed. 2008). See also C. Kreß, *International Criminal Law*, ¶ 10, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?rkey=YgZdwg&result=1&prd=EPIL>. It is, however, disputable whether international criminal law binds individuals directly. See K. Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 HARV. INT’L L. J. 2 (2017), available at <http://www.harvardilj.org/wp-content/uploads/Heller-Reply.pdf> (all last visited on Oct. 20, 2018).

<sup>33</sup> Milanović, *supra* note 31.

<sup>34</sup> Cassese, *supra* note 32, at 5; Kreß, *supra* note 32.

<sup>35</sup> UNSC Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704, May 3, 1993, ¶ 34, available at <http://repository.un.org/handle/11176/51122> (last visited on Oct. 20, 2018).

<sup>36</sup> Milanović, *Aggression and Legality: Custom in Kampala*, *supra* note 31, at 171-2.

<sup>37</sup> Milanović, *Is the Rome Statute binding on individuals (And Why We Should Care)*, *supra* note 31, at 33.



where the crimes defined in the Rome Statute were arguably broader than the scope of war crimes under customary law at the time the accused carried out the conducts charged.<sup>38</sup> The Appeal Judgment adopted a broader interpretation of rape in the Rome Statute, but some scholars considered it contrary to the customary definition of war crimes.<sup>39</sup> Similar scenarios where statutory crimes were claimed to be broader than customary rules binding the accused also exist in previous cases of the International Criminal Court (“ICC”)<sup>40</sup> and *ad hoc* tribunals.<sup>41</sup> In these scenarios, challenges to the courts’ jurisdiction arose based on the principle of legality, and ascertaining the nature of the statute would help them decide whether the legality challenge should be formally addressed. To clarify, a purely jurisdictional statute would make it possible for the accused to object the charges for the reason that the conduct in question was not punished under customary international law at the time of commission, as it happened in the ICTY and the ICTR,<sup>42</sup> while a substantive statute would refuse such a challenge, as shown in the above-mentioned *Ntaganda* and *Lubanga* decisions. The approach to decide whether the legality challenge should be addressed by reference to the nature of the statute was also adopted at the IMTFE.

### III. The Nature of the Nuremberg Charter and the Tokyo Charter and Its Implications on Legality Challenge

#### A. Majority Judgment’s Approach to the Nature of the Nuremberg Charter and the Tokyo Charter

To reject the defendant’s legality challenge, the majority judgment of the IMTFE, like the Nuremberg Judgment, embraced the idea that the Tokyo Charter was “decisive

<sup>38</sup> Prosecutor v Ntaganda, ICC-01/04-02/06-1962, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” (June 15, 2017), available at [https://www.icc-cpi.int/CourtRecords/CR2017\\_03920.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF) (last visited on Oct. 21, 2018).

<sup>39</sup> K. Jon Heller, *ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL*, OPINIO JURIS, June 15, 2017, available at <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl> (last visited on Oct. 21, 2018).

<sup>40</sup> E.g., Prosecutor v Lubanga, ICC-01/04-01/06-803-tEN, Decision on Confirmation of Charges (07 February 2007), available at [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF) (last visited on Oct. 21, 2018).

<sup>41</sup> E.g., Prosecutor v Norman, *supra* note 27; See also Akande, *supra* note 25, at 45; O’KEEFE, *supra* note 16, at 553.

<sup>42</sup> E.g., Prosecutor v Milutinovic et al., Case No. IT-99-37-AR72, Decision on Challenging Jurisdiction-Joint Criminal Enterprise (May 21, 2003), available at <http://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Jdanic%20JCE%20Jxn%20Challenge.pdf> (last visited on Oct. 21, 2018). See also Milanović, *supra* note 37, at 34.



and binding” and that the law of the Charter reflected international law when WWII began,<sup>43</sup> while it added that the tribunal has to “act only within the limits of international law.”<sup>44</sup> In this regard, one controversy raised in all the minority opinions at the IMTFE was whether the Tokyo Charter is binding and consequently whether the Tribunal has power to question the authority of the Charter by examining international law at the time the conducts charged were committed.<sup>45</sup> The IMTFE’s approach following the IMT attracted criticism as being self-conflicting and “revealed its uneasiness about the state of international law.”<sup>46</sup> As analysed below, this criticism is right to the extent that it illustrates the uncertainty of the majority judgment regarding the legal nature of the Tokyo Charter.

As the Tokyo Charter was, to a large extent, a reproduction of the Nuremberg Charter, it would be thus helpful to firstly examine how the nature of the Nuremberg Charter was understood. Some scholars consider the Nuremberg Charter jurisdictional in nature,<sup>47</sup> while others consider its nature uncertain, maybe either “declaratory of pre-existing custom” or “a substantive retroactive imposition of criminal responsibility,” and the position of the IMT itself on this point was ambiguous.<sup>48</sup>

A jurisdictional reading of the Nuremberg Charter could be supported. Article 6 of the Nuremberg Charter stipulates that crimes against peace, war crimes, and crimes against humanity “are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility,”<sup>49</sup> ordinarily meaning that they set the subject-matter jurisdiction of the tribunal. Also, at the Nuremberg proceedings, the British prosecutor Shawcross justified the legality of the charges by reference to the nature of the Charter. He argued that the Charter did not create law but established a jurisdiction based on which the court could convey punishment to a crime that already existed under the law of nations itself.<sup>50</sup> He distinguished between the saying “You will now be punished for what was not a crime at all at the time you committed it” and the saying “You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although,

<sup>43</sup> International Military Tribunal for the Far East Judgment, at 48436 (Nov. 4, 1948), available at <http://werle.rewi.hu-berlin.de/tokio.pdf> (last visited on Oct. 21, 2018).

<sup>44</sup> *Id.* at 48436-7.

<sup>45</sup> Pal’s separate opinion, at 34; Jaranilla’s separate opinion, at 31; Bernard’s separate opinion, at 4; Röling’s separate opinion, at 4; Webb’s separate opinion, at 1, *in* BOISTER & CRYER, *supra* note 1.

<sup>46</sup> MINEAR, *supra* note 4, at 64-5.

<sup>47</sup> Krieb, *supra* note 32, ¶ 30.

<sup>48</sup> Milanović, *supra* note 37, at 28.

<sup>49</sup> Charter of the International Military Tribunal, art 6 (adopted and entered into force 8 August 1945), 82 U.N.T.S. 279.

<sup>50</sup> IMT, vol. 3, 106, *recited from* Sellars, *supra* note 9, at 122-3.

owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgment against you.”<sup>51</sup> The former view treats the Nuremberg Charter as substantive in nature, while the latter treats it as jurisdictional, and it is the latter view that the prosecution adopted.<sup>52</sup> However, the Nuremberg Judgment said that the provisions in the Nuremberg Charter are also “binding upon the Tribunal as the law to be applied to the case.”<sup>53</sup> It considered the Charter as “the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered.”<sup>54</sup> For this reason, the IMT considered the legality challenge unnecessary to consider.<sup>55</sup> Therefore, the Nuremberg judgment seemed to consider the Charter as substantive in nature; the court should thus apply the law of crimes against peace, legislated by the allied powers, regardless of whether they are consistent with pre-Charter customary international law. As mentioned above, the fact that certain provisions in the constitutive instrument of a tribunal are both substantive and jurisdictional in nature is not *per se* problematic as long as the Charter law does not go beyond customary law binding individuals at the time the crimes were committed.<sup>56</sup> However, this arguably was not the case for the Nuremberg Charter since many post-war criticisms of the IMT revealed that the Charter went beyond pre-existing customary law.<sup>57</sup>

Despite the criticism, the understanding of the nature of the Nuremberg Charter by the Nuremberg judgment accorded with the legislative intent of the Charter. During the negotiation at the London Conference, the substantive nature of the Nuremberg Charter was mentioned.<sup>58</sup> For example, Andre Gros, a member of the French delegation, maintained that the crimes defined in the Charter were simply “creation of four people who are just four individuals” because “those acts have been known for years before and have not been declared criminal violations of international law.”<sup>59</sup> David Maxwell Fyfe, the British delegate and subsequently the British prosecutor at the IMT, later responded: “What we want to abolish at the trial

<sup>51</sup> *Id.*

<sup>52</sup> H. Ehard, *The Nuremberg Trial against the Major War Criminals and International Law*, 43 AM. J. INT’L L. 240-1 (1949).

<sup>53</sup> *See Judgment of the Nuremberg International Military Tribunal 1946*, 41 AM. J. INT’L L. 174 (1947).

<sup>54</sup> *Id.* at 218.

<sup>55</sup> *Id.* at 219.

<sup>56</sup> *See* pt. II.B of this paper.

<sup>57</sup> *See, e.g.*, E. Borchard, *The Impracticality of “Enforcing” Peace*, 55 YALE L. J. 966 (1946); L. Gross, *The Criminality of Aggressive War*, 41 AM. POLITICAL SCI. REV. 205 (1947); Sellars, *supra* note 9, at 137.

<sup>58</sup> Sellars, *id.*, at 92; Heller, *supra* note 32, at 22.

<sup>59</sup> M. Lippman, *Nuremberg: Forty-Five Years Later*, in PERSPECTIVES ON THE NUREMBERG TRIAL 510 (G. METTRAUX ED., 2008).

is a discussion as to whether the acts are violations of international law or not. We declare what international law is ... there won't be any discussion of whether it is international law or not."<sup>60</sup> Their arguments are in accordance with the Nuremberg judgment in the following sense: The Tribunal recognised that the victorious states legislated the crimes *ex post facto* and the Nuremberg Charter was substantive in nature, so that the tribunal could not be allowed to formally address the legality issue.

## B. Inapplicability of the Analysis of IMT to IMTFE

Even if the Nuremberg judgment was right in interpreting the nature of the Nuremberg Charter, it is doubtful whether the same conclusion is right for the IMTFE. Although the UNGA recognized the Nuremberg principle as good law,<sup>61</sup> it is disputed whether the so-called international law, as declared by the Nuremberg Charter and judgment, could be applied in the same way to other tribunals like the IMTFE. In his 1949 report on the IMT, the UN Secretary General Trygve Lie, for example, said the Nuremberg principles appeared to be “a *lex in casu* to be applied by an *ad hoc* tribunal to a special case or group of cases.”<sup>62</sup> Scholars at that time also generally took such a position. Kunz, for example, described the Charter as “only a *lex specialis* against a named group of men in the service of a conquered enemy.”<sup>63</sup> In a similar vein, Kelsen wrote: “The source of law is the London Agreement; and it is a source of law only and exclusively for the International Military Tribunal established by this Agreement.”<sup>64</sup> The view that the Nuremberg Charter as well as the UNGA resolution were only applicable to “offences perpetrated on behalf of the Axis European States” and could not be thus applied to atrocities committed elsewhere was also expressed in some domestic cases.<sup>65</sup> Although some cases at the European Court of Human Rights claimed that as the Nuremberg principles had ‘universal validity,’ they were

<sup>60</sup> *Id.*

<sup>61</sup> Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/RES/1/95 (Dec. 11, 1946), available at <http://www.un-documents.net/a1r95.htm> (last visited on Oct. 20, 2018).

<sup>62</sup> The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, Memorandum Submitted by the Secretary-General (1949), U.N. Doc. A/CN.4/5, at 37, available at [https://digitallibrary.un.org/record/160809/files/A\\_CN.4\\_5-EN.pdf](https://digitallibrary.un.org/record/160809/files/A_CN.4_5-EN.pdf) (last visited on Oct. 20, 2018).

<sup>63</sup> J. Kunz, *The United Nations Convention on Genocide*, 43 AM. J. INT'L L. 742 (1949).

<sup>64</sup> H. Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L. Q. 282 (1947).

<sup>65</sup> Judgment of 1 April 1993, in *Bulletin des arrêts de la Cour de Cassation*, Chambre Criminelle (1993) No. 143, at 354-5, recited from A. Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: the Kolk and Kislyiy v Estonia Case before the ECHR*, 4 J. INT'L CRIM. J. 413 (2006).

applicable beyond Nazi war criminals.<sup>66</sup> Opposing arguments also existed in the other side. Three dissenting judges in *Kononov v. Latvia*, for example, questioned:

It is doubtful whether Article 6(b) of the Charter which is clearly retroactive in effect, should be construed as having *erga omnes* effect for the past or whether its scope should, on the contrary, be limited to the Tribunal's general jurisdiction *ratione personae*, or even to its jurisdiction solely in respect of persons tried by it.<sup>67</sup>

Even if it is right for the Nuremberg judgment to consider the Nuremberg Charter substantive in nature, it may not thus necessarily be the law that another international criminal tribunal at the same era must also follow.<sup>68</sup> Eventually, the nature of the Tokyo Charter should be analysed in its own way.

## IV. The Nature of the Tokyo Charter and Minority Opinions at IMTFE

### A. Jurisdictional or Substantive? Minority Opinions on the Nature of the Tokyo Charter

The judges presenting separate and dissenting opinions at the IMTFE challenged the understanding that the Tokyo Charter is substantive in nature. An approach to ascertain the nature of Article 5<sup>69</sup> by distinguishing between applicable law and jurisdiction was adopted by Judge Röling. He pointed out that the Charter only defines “which facts may be subjected to a legal hearing,” while the Tribunal determines “which of those facts are crimes according to international law,”<sup>70</sup> implying that the Charter is only jurisdictional in nature. He considered that it was right for the majority judgment to state that the Charter was binding only in the sense that it could never have power to try the persons and conducts beyond the confines restricted by Article 5 of the Charter rather than in the sense that Article 5 is itself the

<sup>66</sup> *Kolk and Kislyiy v Estonia* App No. 23052/04 (ECtHR 17 January 2006); *Kononov v Latvia* App No. 36376/04, Eur. Ct. H. R. (2008); *Korbely v Hungary* App No. 9174/02, Eur. Ct. H. R. (2008).

<sup>67</sup> *Id.* See also *Kononov v Latvia* (Dissenting Opinion), ¶ 13; M. Milanović, *Was IMT a Violation of Principle of Legality?*, EJIL: Talk! (May 18, 2010), available at <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality> (last visited on Oct. 20, 2018).

<sup>68</sup> Kreß, *supra* note 32, ¶ 23.

<sup>69</sup> Article 5 is a reproduction of Article 6 of Nuremberg Charter with some small changes.

<sup>70</sup> Röling's separate opinion, at 6, in BOISTER & CRYER, *supra* note 1.

applicable law.<sup>71</sup> He also alluded to the danger of the IMTFE applying “rules laid down by the Supreme Commander of the victorious nations, without having either the power or the duty to inquire whether it was applying rules of justice at all.”<sup>72</sup>

Judge Bernard also argued that the majority judgment wrongfully treated Article 5 as a rule of substantive law, which the tribunal could not refuse to apply,<sup>73</sup> and by the word ‘jurisdiction’ in Article 5, it meant “the limits within which a court has authority to hear and determine a cause or causes.”<sup>74</sup> He also argued: “The tribunal would still have the duty to examine *ex-officio* the legality of those substantive provisions, and if it found them to be beyond the competence of the author, to refuse to apply them.”<sup>75</sup>

In his dissenting opinion, however, Judge Pal gave a more compelling argument by distinguishing between the Nuremberg and the Tokyo Charter. He argued:

Both Röling and Bernard’s conclusions are only based on a literal reading of the Tokyo Charter, but such an approach would be inconclusive because they could not explain why the Tokyo Charter, the wording of which is almost the same as that of the Nuremberg Charter, is of a different nature from the latter.<sup>76</sup>

## B. Distinction between the Tokyo Charter and the Nuremberg Charter

The IMTFE is differentiated from the IMT in the sense that the latter was established under a treaty, while the former was established under the Special Proclamation of General MacArthur. It is questionable whether such a difference would result in the different nature of their constituent instruments.

Pal answered this question by referring to the argument of Hans Kelsen, addressing that the legal nature of the Tokyo Charter is not necessarily the same as that of the Nuremberg Charter. Kelsen maintained: “If individuals shall be punished for acts which they have performed as acts of state ... the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished.”<sup>77</sup> Even if a treaty can create *ex post facto* law binding individuals, Pal

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> Bernard, at 9, in BOISTER & CRYER, *supra* note 1.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 10.

<sup>76</sup> Pal’s separate opinion, at 41, in BOISTER & CRYER, *supra* note 1. *Cf.* R. Cryer, *Justice Röling*, in TANAKA, *supra* note 2, at 113.

<sup>77</sup> H. Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 543 (1943).

argued that the case is different here because the IMTFE was established under the authority of the Supreme Commander, and “the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.”<sup>78</sup> It implies that the legal nature of the Tokyo Charter is not necessarily the same as that of the Nuremberg Charter. Pal’s approach to distinguish the ways in which the two tribunals were established might be accepted by those who considered the IMTFE less legitimate than IMT.<sup>79</sup> However, this is a misinterpretation of Kelsen’s point. The treaty mentioned by Kelsen is used to waive the immunity otherwise enjoyed by the accused as organs of a state.<sup>80</sup> This aim was also achieved in the IMTFE with the consent of Japan that waived the immunity by accepting prosecution of ‘war criminals.’<sup>81</sup> Thus, the key issue here is not which instrument, treaty or special proclamation, is more legitimate as a basis to establish international criminal tribunals, but how to interpret the proclamation of General MacArthur as a joint organ of the Allied Powers.

### C. Tokyo Charter and the Power of General MacArthur under International Law

Judge Pal also mentioned that the nature of the Tokyo Charter is particularly relevant to the legality challenge.<sup>82</sup> His approach of interpreting the Tokyo Charter is similar to the method of treaty interpretation under Article 31 of the VCLT—taking into account the text, context, and purpose of the instrument. Like Röling and Bernard, Pal also distinguished the rules limiting jurisdiction from those specifying applicable law.<sup>83</sup> He further argued the ordinary meaning of Article 5 “is not to enact that these acts do constitute crimes but that the crimes, if any, in respect to these acts, would be triable by tribunal.”<sup>84</sup> Pal then made an argument of the purpose of the Tokyo Charter, referring to the statement of Robert Wright, head of the UN War Crimes Commission

<sup>78</sup> Pal’s separate opinion, at 41, in *BOISTER & CRYER*, *supra* note 1.

<sup>79</sup> Minear, *supra* note 4.

<sup>80</sup> Kelsen, *supra* note 77, at 542-3. The Nuremberg Charter was concluded among the four allied powers rather than with “the state whose acts shall be punished” as required by Kelsen. Also, the accused at IMT enjoyed no immunity because the Allied powers were exercising sovereign authority over Germany rather than character of Nuremberg Charter as treaty. See D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 625-34 (2003).

<sup>81</sup> Japanese Instrument of Surrender, *supra* note 1.

<sup>82</sup> Pal’s separate opinion, at 34, in *BOISTER & CRYER*, *supra* note 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

as follows:

[Acts under Article 6 of Nuremberg Charter] are not crimes because of the agreement of the four governments; but the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption, the court would not be a court of law, but a manifestation of power.<sup>85</sup>

Pal argued that the intention mentioned by Robert Wright (to establish a “judicial tribunal” while not “a manifestation of power”) also concurred with Article 1 of the Tokyo Charter<sup>86</sup> and the Potsdam Declaration (“Stern justice shall be meted out to all war criminals”). In light of this intention, even if the Charter declared the conducts as international crimes, the judges still have the authority to decide whether they are crimes under customary international law; otherwise, the tribunal will only be “a manifestation of power.”<sup>87</sup> In contrast, for some people, the aim of international criminal justice is prosecution and punishment of international crimes. This aim, however, should be the normal function of the prosecutor, while the ordinary function of the judicial body is to do justice according to law.<sup>88</sup> In this sense, Pal’s understanding of the purpose of the Tokyo Charter is right. However, as analysed in Section 2.1, the ‘justice’ does not necessarily mean positive international law, so the interpretation here is still inconclusive.

Meanwhile, it is questionable whether the interpretation method in VCLT could be applied here. Some judicial pronouncements in relation to the interpretation of the Security Council resolutions could shed light on the interpretation of the Special Proclamation by General MacArthur, as both are political organs. The ICJ has made it clear in the *Namibia Advisory Opinion* that special considerations should be given to the language used in, the discussions leading to, and the UN Charter provisions invoked in a resolution for its interpretation. All these factors are purported to establish the intent of the UNSC in the Resolutions, as has been affirmed in the *East Timor case (Portugal v. Australia)* by the ICJ.<sup>89</sup> Thus, although the preparatory

<sup>85</sup> *Id.* at 36.

<sup>86</sup> Article 1 specifies the tribunal is established “for the just and prompt trial and punishment of the major war criminals.” Charter of the International Military Tribunal for the Far East, Art. 1 (Jan. 19, 1946), available at [http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf) (last visited on Oct. 21, 2018).

<sup>87</sup> Pal’s separate opinion, at 36, in BOISTER & CRYER, *supra* note 1.

<sup>88</sup> Degan, *supra* note 22, at 48.

<sup>89</sup> Case concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 32 (June 30); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21). See also M. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 78 (1998).



work of the Tokyo Charter would also be useful, unlike the Nuremberg Charter, no discussion took place between nations about the nature of the Tokyo Charter.<sup>90</sup> A committee composed of six American prosecutors was authorised by General MacArthur to draft the Tokyo Charter. The drafted Charter was then discussed article by article by all the prosecutors of International Prosecution Section and authorised by General MacArthur.<sup>91</sup> It can be seen that the prosecutors played an important role in drafting the Tokyo Charter and their understanding of the nature of Tokyo Charter (same as that of the Nuremberg Charter) perhaps reflected the intent of General MacArthur. However, this approach of interpretation could be criticized as problematic in the sense that it places too much emphasis on the preparatory work of the Charter. This approach arguably should be replaced by strict interpretation in favour of the accused since it is an instrument in criminal law context.<sup>92</sup> Today, the issue again goes back to the legal status of the principle of legality which, as discussed in Part II, has implications on the interpretation method to be adopted.

The power of General MacArthur to legislate for Japan could also be addressed by reference to the status of the principle of legality at that time, i.e., whether the principle of legality was bound to legislative power at that time. Since the principle of legality was derived from domestic law, identifying the common denominator of domestic law on this rule would be necessary. Before and during WWII, such states as the Soviet Union and the Nazi Germany even punished any conducts harmful to society, regardless of whether the conduct was already criminalised at the time it was taken.<sup>93</sup> In post-WWII era, in some domestic legal systems such as Latvia, Estonia, Albania, Poland, Hungary, and Slovenia, etc., ‘war crimes,’ “crimes against humanity,” and “crimes against peace” were not subjected to *nullum crimen sine lege*.<sup>94</sup> As for states where the principle of legality existed, generally speaking, this principle “was a limitation on the judiciary of legal systems on the European Continent but not a restriction on the legislature,” while the principle in American law “was an inhibition on the legislature, but not the courts.”<sup>95</sup> Given the above analysis, a common denominator of the principle of legality, drawing from all these domestic

<sup>90</sup> N. EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY* 114 (2007).

<sup>91</sup> Zhenyu Wang, *The International Prosecution Section in Tokyo Trial* 东京审判中的国际检察局, in TOTANI, *supra* note 2, at 501.

<sup>92</sup> Jacobs, *supra* note 22, at 470.

<sup>93</sup> CASSESE, *supra* note 18, at 22-3.

<sup>94</sup> T. Mariniello, *The Nuremberg Clause’ and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence* 82 *NORDIC J. INT’L L.* 221-48 (2013).

<sup>95</sup> J. KEENAN & B. BROWN, *CRIMES AGAINST INTERNATIONAL LAW* 52 (1950).

laws mentioned, would be that this principle did not bind *ex post facto* legislation with respect to international crimes committed during WWII.<sup>96</sup>

## V. Conclusion

The judgment of IMT/FE held that the international crimes as charged under the Tokyo Charter constituted an exception rendering the principle of legality inapplicable. Such an exception was justified by the nature of the Tokyo Charter. This essay has demonstrated that some minority opinions at the IMT/FE could shed light on the nature of the Tokyo Charter by distinguishing between jurisdiction and applicable law and linked the issue to the legality challenge. Although the approach for interpreting the Tokyo Charter was formally different from that for the Nuremberg Charter, in the final analysis, both of them are substantive in nature, so that the tribunals were allowed not to formally address the legality challenge. In addition, the *ex post facto* legislation was arguably not a violation of the principle of legality because this principle, at that time, did not bind *ex post facto* legislation with respect to international crimes committed during WWII. Despite that the status of the principle of legality today is different from what it was in Nuremberg era, such an approach to addressing the legality challenge by ascertaining the legal nature of the constitutive instrument can also be adopted today.<sup>97</sup>

<sup>96</sup> The power of victorious states to legislate for the vanquished was also justified by the unconditional surrender. See Q. Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947). Cf. R. PAL, CRIMES IN INTERNATIONAL RELATIONS 218-29 (1955).

<sup>97</sup> Milanović, *supra* note 31.

