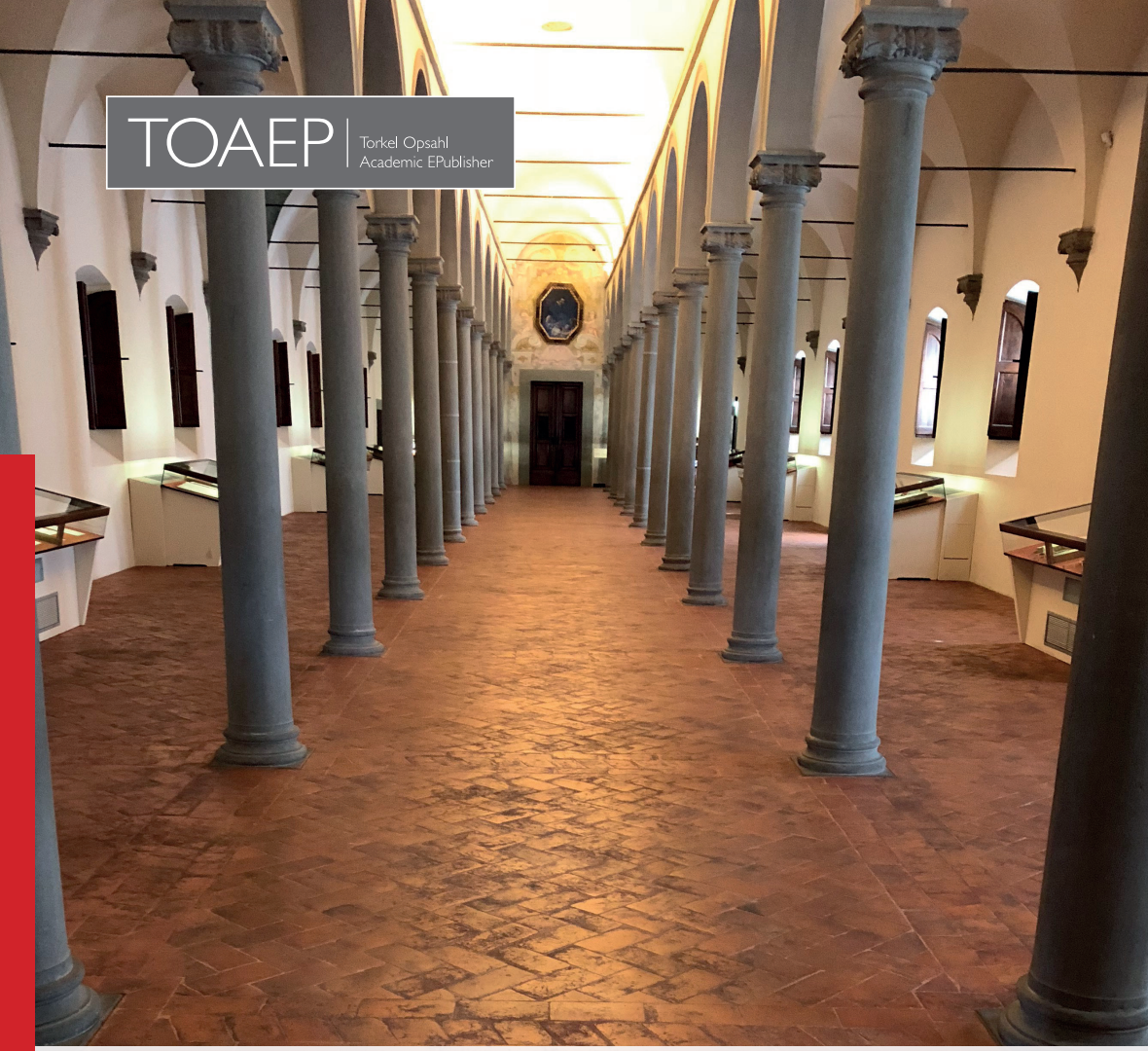
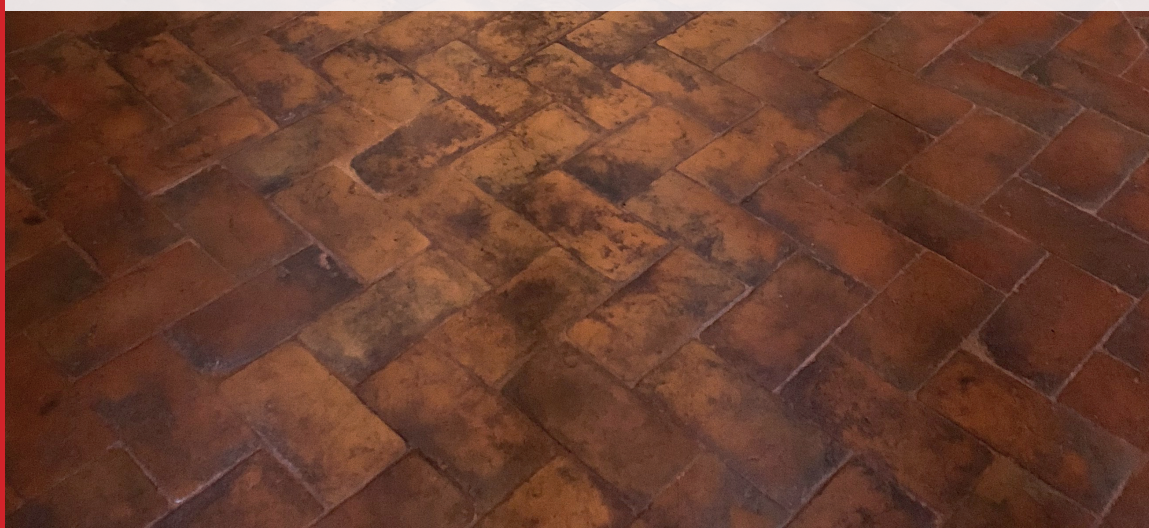


Philosophical Foundations of International Criminal Law: Foundational Concepts

Morten Bergsmo and Emiliano J. Buis (editors)



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Front cover: *The old library in San Marco Convent in Florence which served as an important library for the development of Renaissance thought from the mid-1400s. The city leadership systematically acquired original Greek and Latin texts and made them available in the library, which offered unusually open access for the time. They became part of the foundations of the Renaissance.*

Back cover: *Detail of the floor in the old library of the San Marco Convent in Florence, showing terracotta tiles and a pietra serena column. The clay and stone were taken from just outside the city, faith-ful to the tradition in central Italy that a town should be built in local stone and other materials. The foundational building blocks were known by all in the community, and centuries of use have made the buildings and towns of Tuscany more beautiful than ever. Similarly, it is important to nourish detailed awareness of the foundational building blocks of the discipline of international criminal law.*

3

Towards 'Global' Criminal Justice?

Milinda Banerjee*

3.1. Introduction

In thinking about 'global' criminal justice – the meaning of this phrase will become clearer across this chapter – the Indian jurist Radhabinod Pal (1886–1967) appears at first to offer a singularly unpromising point of departure. Analysing Judge Pal's dissenting Judgment at the International Military Tribunal for the Far East ('Tokyo Trial') (1946–1948), Totani notes that it was hostile to the majority judgment on the very "philosophical foundation" of "modern international law" and "runs counter to the current of international humanitarian law".[1] As I have elsewhere analysed in detail,[2] in existing scholarship, Pal is generally seen as a champion of State sovereignty and positive law against the natural law inflected claims of international criminal justice. Depending on the particular scholar concerned, this stance is related either to his principled anti-colonial opposition to Western legal-political hegemony[3] or seen as a morally problemat-

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1 Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Press, Cambridge, Massachusetts, 2008, pp. 220–21.

2 Milinda Banerjee, "Does International Criminal Justice Require a Sovereign? Historicising Radhabinod Pal's Tokyo Judgment in Light of His 'Indian' Legal Philosophy", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 67–117 (http://www.toaep.org/ps-pdf/21-bergsmo-cheah-yi).

3 See, for example, Judith N. Shklar, *Legalism: An Essay on Law, Morals and Politics*, Harvard University Press, Cambridge, Massachusetts, 1964, pp. 179–90; Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, 1971; Elizabeth S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", in *New York University Journal of International Law and Politics*, 1991, vol. 23, no. 2, pp. 373–444; Latha Varadarajan, "The Trials

ic pan-Asianist defence of Japanese State sovereignty and exculpation of Japanese sovereign violence.[4] Even those who detect elements of natural law argumentation in Pal, see such naturalism as serving the cause of achieving postcolonial statehood through militant decolonisation via 'just war' – Kirsten Sellars offers a sharp articulation[5] – and thus as not antithetical to sovereignty as such. Sovereignty, particularly in its decolonial guise, rather than an ideology of 'global' criminal justice, appears to dominate Pal's legal philosophy.

A careful reading of Pal's Tokyo Judgment, as well as his broader corpus of writings and speeches, however, reveals a more complex project embedded in the notion of what Pal termed as 'the world'. In a key moment in his Tokyo Judgment, which has scarcely been noticed with theoretical rigour in scholarship, Pal observed:

> I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place.[6]

What he refused to accept was not the future possibility of such a ('the') world, but the present existence of 'the world' as created by fiat of the Allied Powers:

> I should only add that the international community has not as yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good".
>
> International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the

of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal", in *European Journal of International Relations*, 2015, vol. 21, no. 4, pp. 1–23.

4 See, for example, Totani, 2008, see *supra* note 1; Nariaki Nakazato, *Neonationalist Mythology in Postwar Japan: Pal's Dissenting Judgment at the Tokyo War Crimes Tribunal*, Lexington Books, London, 2016.

5 Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in *The European Journal of International Law*, 2011, vol. 21, no. 4, pp. 1095–96.

6 International Military Tribunal for the Far East, *United States of America* et al. *v. Araki Sadao* et al., Judgment of The Hon'ble Mr. Justice Pal, Member from India, p. 146 ('Pal Judgment') (http://www.legal-tools.org/doc/712ef9/).

> so-called natural law may be allowed to function in the manner suggested.[7]

I intend to work through this paradox presented by Pal, which, unnoticed by generations of scholars, forms the core irony of his Tokyo Judgment. This is the gap between a denial of 'the world' and an affirmation of 'the world' – denial, in the sense that the present is not characterized by a unified world which is both the space and the moral agent for implementing consensually agreed principles of (criminal) justice; affirmation, in the sense that the hoped-for future would witness such a world, where, among other things, natural law would be able to function through consensus. Equally important is Pal's distinction between the 'international' and the 'world'. The "world community under the reign of law" is not an "international community", rather it is formed through a dialectical negation of the international, given that in the world to come "nationality or race should find no place".[8] For such a world to come about, "political units" would have to "agree to yield their sovereignty and form themselves into a society. As I have shown elsewhere, the post war United Nations Organization is certainly a material step towards the formation of such a society".[9]

3.2. Understanding Pal's 'Global' Criminal Justice

3.2.1. Bengali Intellectual Genealogy

That scholars have not noticed the central importance of this vision of 'the world' in Pal can be attributed in large part to the fact that they have not contextualised the Indian (Bengali) judge within a longer South Asian (and particularly, Bengali) intellectual genealogy. Since at least the 1810s, Bengali actors had been consistently invoking 'the world' as a category of ethical action. An early prominent figure here is the socio-religious reformer Rammohun Roy (1772/4–1833), who repeatedly used 'the world' in his English-language writings, while in his Sanskrit and Bengali works and citations, he used terms like *vishva* (world), *jagat* (world) and *sarva* (all). Rammohun did not produce these categories out of nothing. He drew on centuries-old Sanskritic textual traditions, from the Vedic-Upanishadic

7 *Ibid*., p. 151.

8 *Ibid*., p. 146.

9 *Ibid*., p. 145.

texts (between the second and first millennium BC) to more recent *purana* and *tantra* corpora (between the first and second millennium AD), where such universalistic categories were used to underscore the immanence of the divine/transcendental (*brahman*) in all beings to affirm the ultimate identity, or at least relation, of every being with other beings and the divine. In the context of early colonial India – but drawing on older South Asian debates about social hierarchy, rights, security of life and property from violence (including State violence) and the accessibility of salvation (*moksha*) to lower-castes, women and foreigners – Rammohun asserted the unity of 'the world' to criticise various racial, colonial, religious, caste and gender divisions and hierarchies, and to advocate a European liberalism-inflected vision of cosmopolitanism.[10]

Some decades later, Bankimchandra Chattopadhyay (1838–94), nineteenth-century India's most famous nationalist litterateur, drew on Vedic-Upanishadic as well as epic and *purana* texts to articulate categories like *sarvabhuta* and *sarvaloka* (all beings). He translated Auguste Comte's (1798–1857) notion of 'humanity' into the Bengali neologism *manushyatva*. As with Rammohun, Bankimchandra deployed such vocabularies to contest certain forms of social stratification and articulate ideals of popular welfare (*hita*), even as, again like Rammohun, he legitimated other expressions of social hierarchy and domination – 'the world' was never achieved as a pristinely unified category. Meanwhile, lower-caste peasant activists like Panchanan Barma (1866–1935) related categories like *jagat* – and models, also emphasised by Rammohun and Bankimchandra, about the immanence of the transcendental/divine (*brahman*) in all beings – with British/European-origin concepts of liberal-constitutional self-governance in order to demand political autonomy for subaltern communities.[11] I would argue that Pal's project of creating a just 'world' thus emanated from a decades-long Bengali/Indian grappling with 'the world' as a conceptual category – a category instrumentalised to em-

[10] Milinda Banerjee, '"All This is Indeed Brahman': Rammohun Roy and a 'Global' History of the Rights-Bearing Self", in *The Asian Review of World Histories*, 2015, vol. 3, no. 1, pp. 81–112.

[11] Milinda Banerjee, *The Mortal God: Imagining the Sovereign in Colonial India*, Cambridge University Press, Delhi, 2017; Milinda Banerjee, "Sovereignty as a Motor of Global Conceptual Travel: Sanskritic Equivalents of 'Law' in Bengali Discursive Production", in *Modern Intellectual History*, 2018 (available on Cambridge Core's web site).

phasise the destabilisation, though, never total negation, of racial/ethnic-social distinctions by emphasising the unity of the transcendental.

3.2.2. Pal's Opposition to Victors' Justice

What differentiates Pal, however, from earlier Bengali thinkers is the manner in which he translated this mode of argumentation about the transcendentally-anchored unity of 'the world' into a project of achieving supra-(inter)national criminal justice. For Pal, victors' justice was a clear negation of the possibility of global criminal justice. Pal's animus against international – in the sense of inter-State – criminal justice was that it merely preserved the existing hegemonic order of sovereign States. Far from abolishing sovereignty and sovereign violence, international criminal law – at least when exercised by victor nations to try and punish the vanquished (the Tokyo Trial was exemplary for Pal) – pushed back the mission of achieving global (criminal) justice. In his Tokyo Judgment, Pal cited the jurist Hans Kelsen (1881–1973) to underline the importance of an impartial court to whose judgments actors from both victor and vanquished nations, accused of committing war crimes, would be made subject.[12] Pal was hospitable towards the idea of a court for international criminal justice:

> Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states.[13]

Further, aligning with the jurist Hersch Lauterpacht (1897–1960), Pal commented:

> I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. [...] This certainly is to be done by a method very different

[12] Pal Judgment, pp. 10–15, see *supra* note 6.

[13] *Ibid*., p. 11 (underlining as per the original).

> from that of trial of war criminals from amongst the vanquished nations.[14]

3.2.3. Pal's 'Global' Criminal Justice

In the narrowest terms, Pal's project of achieving 'global' criminal justice would thus amount to the constitution of an impartial court with authority to try and punish actors from anywhere, including from victor and vanquished nations. The judges here would be impartial and not represent the biased interests of State powers. In this sense, the court would not be a platform for bringing together the powers of individual States and sovereignties (least of all, as in the Tokyo Trial, of victor States), rather it would be the first step for going beyond such sovereignties altogether, with the intention of sternly and impartially prosecuting all abuses of sovereign force – the atomic bombing of Hiroshima and Nagasaki constituted such an unpunished crime for Pal.[15] Pal's notion of the 'world' with respect to criminal justice was thus forged through the (graduated) abolition and sublation, rather than simple preservation, of the 'international', the latter understood in the sense of the inter-State order.

But this would still only be a first step. It is obvious that an impartial international criminal court cannot by itself remove the problems of sovereign violence altogether, or perhaps even serve as an adequate deterrent. To the extent that violence by State agents has deeper causes – racial discrimination (the Holocaust remains the paramount exemplar, but instances of colonial massacres, even genocides, are equally instructive),[16] patriarchy (for example, rapes and sexual slavery as ubiquitous war crimes) and structural socio-economic iniquities (which place State power, in the first place, in some dominant classes, rendering others vulnerable) – any project of achieving global (criminal) justice has to address those

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[14] *Ibid*., p. 145 (underlining as per the original).

[15] *Ibid*., pp. 137–38, 1091.

[16] There is a growing corpus of scholarship on colonial State crimes, including genocide. See, for example, A. Dirk Moses and Dan Stone (eds.), *Colonialism and Genocide*, Routledge, Abingdon, 2007; A. Dirk Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn Books, New York, 2008; Alexander Laban Hinton, Andrew Woolford and Jeff Benvenuto (eds.), *Colonial Genocide in Indigenous North America*, Duke University Press, Durham, 2014.

broader issues that sometimes resist easy penalisation. Pal's diagnosis of 'the world' in the 1950s was that of a fragmented stage:

> Indeed till now the story everywhere seems to have been one of ruthless fight for wealth with little regard for the rights or welfare of 'inferior races'. Even to-day two-thirds of the World's population live in a permanent state of hunger. Even now all but a tiny fraction are condemned to live in degrading poverty and primitive backwardness even on a continent rich with land and wealth, with all human and material resources.[17]
>
> Everywhere we witness lust for power to dominate and exploit: we witness contempt and exploitation of coloured minorities living among white majorities, or of coloured majorities governed by minorities of white imperialists. We witness racial hatred; we witness hatred of the poor.[18]

If we are to think about 'global' criminal justice without becoming dependent on the force of sovereign States, especially that of 'great powers' who often commit the greatest, rarely punished, abuses – if we are to avoid relying on the wolf to protect the sheep – it becomes imperative to make a world in which new processes of consensual decision-making can emerge, gathering the support of an adequate plurality of actors and societies, especially those from marginalised positions. Such translocal deliberations alone can remove the broader social disparities mentioned before which constitute some of the root causes of violence perpetrated by State agents or State-supported actors. To think along with Pal, the mechanism of global criminal justice would thus need to be continually reinforced by broad-based deliberations among actors from different societies.

As a member of the International Law Commission (1952-66; twice elected Chairman of the Commission, in 1958 and 1962) as well as a public intellectual, in an age of decolonisation and Cold War, Pal sought to build such a vision of transnational deliberation. Representative is a report he authored on the Fifth Session of the Asian–African Legal Consultative Committee, where he suggested that decolonising States, such as in Asia and Africa, would have to be pioneers in forging such co-operation and

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[17] Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times Down to the Institutes of Manu*, University of Calcutta, Calcutta, 1958, p. 269.

[18] *Ibid.*, p. 274.

consensus, expressing thereby "the popular will of the world", which was instigated by a "sense of injustice […] universally felt being an indissociable blend of reason and empathy", and moved people to "weld their souls and spirits in one flaming effort", forging new "legal provisions" which would be "the instruments of the conscience of the community", indeed for building up "world communal life".[19] Pal expressed his hope before the Committee that "all the Asian-African nations would join the organisation and help building up this new wholeness, always remembering that our environment now is no longer the world about us but rather the world".[20]

3.3. The Role of Sovereignty in 'Global' Criminal Justice

To emphasise global justice through deliberation is also to challenge the model of justice as predominantly implemented through top-down exercises of sovereign force. It is plausible to argue that any project of achieving global criminal justice which is dependent on the authority of sovereign States, however attractive, successful and compelling in the short run, is bound to fail in the long run because abuses (conventional war crimes, crimes against humanity, and so on) are not accidental by-products of sovereignty, of this or that aberrant sovereign rogue State, but rather what structure sovereignty itself. Sovereignty is dependent on force – in Max Weber's famous definition in 'Politics as a Vocation' (1919), "the state is the form of human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory".[21] States thus often consider 'excessive' force (abuse) as 'necessary' to function and survive – this is part of *raison d'état*. Jacques Derrida convincingly argues: "Abuse of power is constitutive of sovereignty itself".[22] For Derrida, when powerful States accuse other States of being rogues in international (criminal) law, that often only serves to mask and legitimate their own violent, potentially roguish, behaviour:

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19 Radhabinod Pal, "Report on the Fifth Session of the Asian–African Legal Consultative Committee (Rangoon, January 1962) by Mr. Radhabinod Pal, Observer for the Commission", pp. 153–4 (www.legal-tools.org/doc/5b8e6e/).

20 *Ibid*., p. 154.

21 Max Weber, *The Vocation Lectures*, Hackett Publishing, Indianapolis, 2004, p. 33.

22 Jacques Derrida, *Rogues: Two Essays on Reason*, Stanford University Press, Stanford, 2005, p. 102.

> It consists in accusing and mounting a campaign against so-called *rogue states*, states that do in fact care little for international law. This rationalization is orchestrated by hegemonic states, beginning with the United States, which has quite rightly been shown for some time now (Chomsky was not the first to do so) to have been itself acting like a rogue state. Every sovereign state is in fact virtually and a priori able, that is, in a state [*en état*], to abuse its power and, like a rogue state, transgress international law. There is something of a rogue state in every state. The use of state power is *originally* excessive and abusive.[23]

It is thus impossible to disentangle the history of sovereignty from the history of sovereign violence, and to think of a world free, in any substantive way, from sovereign crimes, while still being grounded in an international order composed of sovereign regimes. To reduce sovereign violence, a broader structural challenge against sovereignty is fundamentally necessary.

3.3.1. Non-State Entities Possessing State-Like Powers

When I speak of sovereign regimes here, I refer not only to States, but also to, for example, corporations whose field of activity extends across one or more States and which wield State-like powers, or sectarian-religious organisations invested in acquiring military-political domination. There is no reason why the abuses committed by such organisations should not be taken into account as sovereign crimes in relation to global criminal justice.

Philip Stern has shown how our contemporary association of sovereignty with territorially bordered States is a rather recent invention; in the early modern period, sovereignty was a marker of a broad range of corporate organisations, including (Stern's particular focus) companies like the English East India Company.[24] Stern's theorisation about the English East India Company as a company-State, as an example of a broader phenomenon of corporate sovereignty, can bolster recent arguments to try and

[23] *Ibid*., p. 156.

[24] Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, Oxford University Press, New York, 2011.

punish transnational companies via frameworks of international criminal justice.[25]

It could be argued that structures of sovereignty are both conceptually and practically porous and in no way limited to States alone. Acts of sovereign violence are often committed by, or through the complicity of, corporate bodies which are not, in the formal sense, States. Nevertheless, often, especially in Asia, Africa and Latin America today, such acts encompass particularly brutal crimes, committed by companies wielding State-like powers or in collaboration with States, against economically vulnerable individuals and disempowered communities. Sectarian-militant organisations – which may arguably be seen, like companies, as corporate bodies – manifest comparable forms of sovereign violence. Theologically-mediated aspirations for statehood support the commission of egregiously violent crimes which, in my view, can be labelled as classic manifestations of sovereign violence. Global criminal justice can thus be sharpened into a tool against violence committed by capitalism as well as by sectarian-religious militants.

3.3.2. Pal's Views on Sovereignty

In thinking of sovereignty beyond the sovereign State, Pal is again helpful. For Pal, premodern-origin forms of hierarchy and violence – such as the caste order (including brutal practices of untouchability) in India as well as Christian-European forms of monotheism-inspired political authority and imperialism – were classic examples of the nexus between sovereignty and force. For Pal, the domain of religion indeed provided the earliest articulation of this nexus – a nexus later integrated and secularised into modern forms of State sovereignty.[26] As I have elsewhere shown in detail, Pal's hostility to statist deployments of natural law to bolster Western hegemonic authority over the non-West – for him, settler colonial ideas of

[25] See, for example, Joanna Kyriakakis, "Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, New York, 2010, pp. 108–37; Florian Jessberger and Julia Geneuss (eds.), "Special Issue: Transnational Business and International Criminal Law", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 3, pp. 695–977; Michael J. Kelly, *Prosecuting Corporations for Genocide*, Oxford University Press, New York, 2016.

[26] Banerjee, 2014, see *supra* note 2.

terra nullius as well as, in Tokyo, naturalist principles of international criminal justice, were exemplary – stemmed from a broader animus against the legal and (adulterated/secularised) theological nexus between sovereignty, violence and legitimation of domination.[27] To think of the State, the big company and the sectarian-religious militant organisation/community in a triangular field, as comparable articulations of sovereignty and sovereign violence, would not be going against Pal's own vision. As he argued in his 1958 book on Hindu law:

> There is little fundamental difference between the law viewed as the will of the dominant deity and the law viewed as the will of the dominant political or economic class. Both agree in viewing law as a manifestation of applied power.[28]

Given Pal's understanding of the relation between sovereignty and law, and especially his criticism of law viewed in terms of the legitimation of sovereign power, one can transpose Pal's understanding of law as theological, political and economic dominance to an understanding of sovereign power as theological, political and economic dominance.

However, we also need to push Pal's challenge to sovereignty beyond the limits that he himself perhaps set. I have shown in earlier essays that, while Pal was deeply critical, at least since the 1920s, of sovereignty, in Tokyo, he attempted to protect the Japanese political-military leadership out of a concern for protecting Japan's sovereignty from Western/Allied control. Pal saw sovereignty, when wielded by non-Western States, as a necessary evil, a way to protect non-European societies from Western imperial sovereignty; I have theorised about this as a posture of 'subaltern sovereignty'.[29] In the Tokyo Judgment, for example, Pal argued:

> The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international

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27 *Ibid.*

28 Pal, 1958, p. v, see *supra* note 17.

29 Milinda Banerjee, "Decolonization and Subaltern Sovereignty: India and the Tokyo Trial", in Kerstin von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil*, Palgrave, London, 2016, pp. 69–91.

> community, if it can be called a community at all, is and will continue to be the national sovereignty.[30]
>
> I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the post-war organizations after this Second World War national sovereignty still figures very largely.[31]

3.3.3. Consequences of Sovereignty

Writing today, with the benefit of hindsight, such a stance of tacitly accepting sovereignty as the basis of the international order appears problematic. Not only did Pal end up producing almost an apologia for Japanese State violence in Tokyo, exculpating the Japanese leadership of their role in imperial crimes, but also – at a deeper level – we need to be sceptical whether the translation of sovereignty into non-European societies has indeed been an adequate foundation for bettering the 'world'. After all, postcolonial States – South Asian ones offer classic cases – have produced their own histories of sovereign violence, directed against populations within their own borders, as well as through conflicts against the neighbour – in the case of East Bengal/Pakistan, rising arguably to genocidal proportions and involving grave crimes against humanity, directed especially, but not exclusively, against non-Muslim minorities.[32] Scholars have also made nuanced applications of the concept of genocide in conceptualising the violence carried out against *adivasi* populations with the complicity of the Indian and the Bangladeshi States, generally to further the control of majoritarian settler communities and/or private firms over agricultural-land and mining resources. Euro-American companies, with the connivance of Western States, have frequently been complicit in the construction of such sites of exploitation.[33]

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30 Pal Judgment, p. 125, see *supra* note 6.

31 Pal Judgment, p. 125, see *supra* note 6 (underlining as per the original).

32 There is a growing, and often contentious, body of literature here. For example, see the special issue, edited by A. Dirk Moses, in *Journal of Genocide Research*, 2011, vol. 13, no. 4.

33 See, for example, Mark Levene, "The Chittagong Hill Tracts: A Case Study in the Political Economy of 'Creeping' Genocide", in *Third World Quarterly*, 1999, vol. 20, no. 2, pp. 339–69; Bhumitra Chakma, "The Post-Colonial State and Minorities: Ethnocide in the Chittagong Hill Tracts, Bangladesh", in *Commonwealth and Comparative Politics*, 2010, vol. 48, no. 3, pp. 281–300; Felix Padel and Samarendra Das, "Cultural Genocide and the

These cases have been exemplary of the translation of imperial power into the makeup of what are, formally, postcolonial nation-States. I am, therefore, far less optimistic than Pal was about the potential for postcolonial Asian and African States to build a new world society, while still preserving the order of national sovereignty. State crimes have sadly all too often been constitutive of postcolonial sovereignty, especially when the latter has carried over classic colonial frameworks of bordered military power and political economies based on subjugating and dispossessing vulnerable groups. The compelling question is whether global criminal justice can try and punish such crimes committed directly by, or at least with the complicity of, State agents. Powerful States will obviously have little incentive in punishing such crimes. The punishment of a few perpetrators from select States, as done by various international criminal tribunals and by the International Criminal Court, is clearly inadequate in promoting the cause of global criminal justice.

A broader re-organisation of power is necessary in the future if global criminal justice is to emerge with any amount of adequacy. Such a project may seem utopian, but it needs to be remembered that the very formation of a regime of international criminal law, and eventually the birth of an International Criminal Court, would have seemed implausible before the First World War. That a programme seems utopian today, does not make it *a priori* implausible for the future.

3.4. Anarchist Approaches to 'Global' Criminal Justice

Scholars working with anarchist perspectives can perhaps offer helpful hints about the kind of rearrangement of power and erosion of sovereignty we may need to broaden the socio-political bases of global criminal justice. In speaking of this anarchist turn, I do not refer to the historical nineteenth century usage of the term for particular kinds of political action, but to the way in which, for example, the anthropologist David Graeber underlines key "anarchist principles – autonomy, voluntary association, self-organization, mutual aid, direct democracy".[34] Scholars working through the anarchist turn typically look back to past societies as well as

Rhetoric of Sustainable Mining in East India", in *Contemporary South Asia*, 2010, vol. 18, no. 3, pp. 333–41.

[34] David Graeber, *Fragments of an Anarchist Anthropology*, Prickly Paradigm Press, Chicago, 2004, p. 2.

to present politics, from a broad swathe of societies across the world, for shaping future horizons. The anthropologist James Scott thus identifies anarchist principles in various upland Southeast Asian societies, which he distinguishes from State societies of the plains.[35] Graeber draws inspiration from social forms in Madagascar, Central and South America and Africa (across the colonial divide), types of anti-colonial and anti-racial politics in colonial South Africa and India and present-day movements from the Americas and from Spain.[36] Both Scott and Graeber recognise that various forms of hierarchy and violence still exist in the social-political forms and movements they draw inspiration from, but claim that these forms are still often far less hierarchical and violent, and far more open to possibilities of emancipation, than societies and movements (even revolutionary movements) traditionally organised around State sovereignty.

It is fruitful to think of Pal in relation to global criminal justice through anarchist lenses. Hailing from a poor lower-caste-origin (potter) family, Pal was aware not only about the injustices of colonialism but also about forms of social hierarchy practised in premodern (and modern) India, based on caste and gender. I have elsewhere shown how Pal related the mythic Indian lawgiver Manu to Nietzsche, to brilliantly compare racial and caste forms of heredity-based social hierarchy and violence. I have further shown how Pal established homologies between forms of sovereignty and rulership operating in premodern India, via kingship and caste, and premodern and modern Europe, via Christian forms of political organisation, and compared these to modern forms of statehood and State-backed racism and imperialism. To recover a horizon of justice that was not trapped by sovereignty, Pal looked back to an ancient Indian Vedic past, and especially to Rigvedic (second millennium BC) notions of *rita* (cosmic-moral 'law'). He argued that such notions of law and justice, also present in the Upanishads (first millennium BC), were not subordinate to State sovereignty; they had crystallised before caste and kingship became hegemonic (as it did in later centuries in India, and especially from around the mid-late first millennium BC). Pal further argued, critiquing Europe-

35 James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, Yale University Press, New Haven, 2009.

36 Graeber, 2004, see *supra* note 34.

an-colonial scholars, that premodern India, at least some strands of it, needed to be commended, rather than castigated for supposedly lacking in State 'law', because the societies there showed how law could operate independent of State power and could indeed exist without the backing of, or at least above, the sovereign.[37] This forms a leitmotif in Pal's writings from the 1920s until the end of his life. Entirely typical is the following passage from the 1920s:

> We have seen how the Vedic Rishis generally place law even above the divine Sovereign. The law, according to them, exists without the Sovereign, and above the Sovereign; and if an Austin or a Seydel tell them that "there is no law without a sovereign, above the sovereign, or besides the sovereign, law exists only through the sovereign", they would not believe him. Nay, they would assert that there is a rule of law above the individual and the state, above the ruler and the ruled; a rule which is compulsory on one and on the other; and if there is such a thing as sovereignty, divine or otherwise, it is limited by this rule of law.[38]

This was not a facile nativism. Modern historians have argued that British colonial rule indeed introduced new forms of coercive State sovereignty and State-enforced codified law in India since the late eighteenth century, accentuating and universalising hierarchical strands in premodern Indian (especially Brahmanical and elite-Islamic) legal thinking and practice, while also introducing novel forms of colonial-racial domination, economic subjugation and violence. In doing so, the British marginalised social-political forms present among non-Brahmanical peasant, pastoral and other labouring communities who had, in the precolonial period, often resisted and circumscribed (within limits) governmentalities embedded in caste, patriarchy and kingship.[39] Many historians would also agree with Pal in terms of contextualising *rita* as the product of a social order where principles of caste and kingship had not fully crystallised, and the gradual

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37 Banerjee, 2014, see *supra* note 2.

38 Radhabinod Pal, *The Hindu Philosophy of Law in the Vedic and Post-Vedic Times Prior to the Institutes of Manu*, Biswabhandar Press, Calcutta, 1927, pp. 72–73.

39 For a summary bibliography, see Banerjee, 2014, footnote 7, see *supra* note 2. For a fuller discussion, see Banerjee, 2017, especially Chapter 4, see *supra* note 11.

replacement of *rita* by ideals of caste (*varna-jati*) *dharma* as emblematic of the growth of new forms of socio-political hierarchy in ancient India.[40]

3.5. Law and Justice Beyond State Sovereignty

Certainly, scholars today would disagree with many specific details of Pal's historical readings. However, what interests me is the way in which Pal sought to uncouple law and justice from State sovereignty, and further to identify particular textual-historical sites in ancient/premodern India which offered (to him) evidence that such an uncoupling was not impractical – that justice could indeed operate independently of State coercion. In this sense, it is productive to read Pal through an anarchist lens. What Scott does for premodern Southeast Asia, in some senses, Pal tried to do for precolonial India – to show that societies can historically function for many centuries, and adopt principles of law and justice, without always having to rely on State coercion and rigid social hierarchies.

I disagree, however, with scholars who see Pal's vision as based on an unchanging millennia-old 'Indian' ethical-religious worldview which stands in sharp contrast to 'Western' law and ethics.[41] Such a view of civilisational polarity and ahistorical timelessness is entirely alien to the way in which Pal worked, for example, by relating *rita* to principles of divine reason and certain aspects of natural law produced by Greek, Roman and European-Christian traditions, as well as by reading ideological contestations and diachronic changes (rather than homogenous stabilities) within South Asian as well as within European legal-philosophical traditions.[42]

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[40] In his review of Kumkum Roy, *The Emergence of Monarchy in North India: Eighth to Fourth Centuries B.C.: As Reflected in the Brahmanical Tradition*, Oxford University Press, Delhi, 1994 in *Journal of the Economic and Social History of the Orient*, 1998, vol. 41, no. 1, p. 130, Daud Ali succinctly summarises this perspective:

> The social order, envisaged in the early Vedic period as composed of more or less identical groups fused through the inclusive category of *vis* or "people" and sustained by a holistic notion order (*rta*) gave way to a highly stratified system of political privilege, or *varna*, upheld by a differential code of conduct (*dharma*). Monarchy sat at the centre of this new order.

[41] For such views, see Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability", in *New Literary History*, 1992, vol. 23, no. 1, pp. 45–67; Barry Hill, "Reason and Lovelessness: Tagore, War Crimes, and Justice Pal", in *Postcolonial Studies*, 2015, vol. 18, no. 2, pp. 145–160.

[42] Banerjee, 2014, see *supra* note 2.

What is also interesting is the way in which, definitely by the 1950s/60s, Pal was thinking, beyond Indian tradition and history, of a future world community, and especially mechanisms of global justice, which would emerge through the replacement of sovereign violence by transregional democratic deliberation, creating thereby a new 'world'. For example, in a lecture written for a meeting of the United World Federalists of Japan in 1966, Pal affirmed:

> I have a firm faith in the mission of law in the matter of world peace. If we are sincerely cherishing a desire for creating a peaceful world-order, we must look to law. Such a world-order will be possible only if we succeed in bringing the world society under the reign of law, – under the might of that most reasonable force which alone can check the fatal unhinging of our social faculties. Law alone is entitled to claim recognition as the most reasonable of the forces which can help shaping the human society in the right form.[43]

But simultaneously, Pal warned against all "pretension to finality". People had to be aware of "the unavoidably partial character of all human knowledge", an awareness which might encourage "men to invite the supplementation and completion of their incomplete knowledge from other partial perspectives".[44] Rules of international law had to remain continually flexible and dynamic. Law, like everything else in this 'world' community, was to be "exercised with the active concurrence of the governed"; people would create "a democratically controlled planned community life for the world".[45] This was, in effect, an alternate world – a world created not through sovereign fiat, which Pal (as I mentioned above) decried in Tokyo, but through genuine deliberation: "the creation of the world itself is the victory of persuasion over force and the instrument of that victory is justice".[46] For Pal, genuine discussion, even planning, was only possible when people renounced the sovereignty of their certitudes and laws remained flexible. In his writings on Vedic law, Pal sketched this

[43] Radhabinod Pal, *World Peace Through World Law*, United World Federalists of Japan, Tokyo, 1967, p. 1.

[44] *Ibid*., p. 1.

[45] *Ibid*., p. 19.

[46] *Ibid*., p. 20.

through a dialectic between the idea of cosmic law/justice (*rita*) and a corpus of transformable laws (*vrata*).[47]

In his 1958 book on Hindu law, Pal underlined, by working through a famous creation hymn from the *Rigveda* (the Nasadiya Sukta), the importance of not knowing, of the unknowable (*na veda*).[48] Pal drew from the hymn a portrayal of the creation of the world which did not depend on the fiat of a sovereign deity, of "a whimsical wilful being".[49] In this connection, we should remember that in his Tokyo Judgment, Pal had condemned the Western powers for enacting precisely such a sovereign cosmogony, for hypocritically claiming to act like "a valiant god struggling to establish a real democratic order in the Universe" while preserving colonial rule.[50] Pal saw genuine world-creation as a more complex process, where ultimate knowledge was not available. Not knowing was not antithetical, but rather the spur, to world creation. "This principle of the relativity of our knowledge had a limiting effect on action as well as on thought; and we shall see later how it supplied the metaphysical basis of duty and ultimate guarantee of right".[51] For Pal, justice had to flow not from top-down legal certitude backed by sovereign force, but from incertitude and horizontal deliberation, coupled with the belief that the other person was sacred, towards whom one had duties which were as important as one's own rights:

> Justice is indeed a mutual limitation of wills and consciousnesses by a single idea equally limitative of all, by the idea of limitation itself which is inherent in knowledge, which is inherent in our consciousness as limited by other consciousnesses. In spite of ourselves we stop short before our fellow man as before an indefinable something which our science cannot fathom, which our analysis cannot measure, and which by the very fact of its being a consciousness is sacred to our own.[52]

47 Banerjee, 2014, p. 85, see *supra* note 2.

48 Banerjee, 2014, p. 116, see *supra* note 2; Pal, 1958, pp. 119–22, see *supra* note 17.

49 Pal, 1958, p. 121, see *supra* note 17.

50 Pal Judgment, p. 240, see *supra* note 6.

51 Pal, 1958, p. 122, see *supra* note 17.

52 Pal, 1958, p. 172, see *supra* note 17; Banerjee, 2014, pp. 84–85, 116–17, see *supra* note 2.

Recent anarchist thinkers, like Graeber, while advocating the erosion of sovereign power, similarly emphasise renouncing dogmatism and stress "this very unavailability of absolute knowledge" as the basis for creating a new world.[53]

3.6. Conclusion

If we are to think with Pal about global criminal justice and also against him, renouncing his ethically troubling apologia for non-Western sovereignty and sovereign violence, we need to think of action which gradually uncouples global criminal justice from the force of sovereign regimes. Rather than a momentous transformation right now, we need to deliberate with others, and especially with those in subalternised locations who suffer the most from acts of sovereign violence – from brutal behaviour committed by States, big corporations exercising State-like power (and/or in connivance with States) to commit exploitation, and sectarian militants and hierarchical religion-legitimated communities which all too often assert some form of superordinate political and legal authority. We need to establish translocal social solidarities and simultaneously call for deeply individuated ethical transformations, while renouncing any belief in the sovereignty of our interests and dogmas. Such transformations in our individual, as well as social, selves are not only necessary for legal actors, the judges and lawyers who carry out the practical task of criminal justice, but for everyone who wishes to support the end of sovereign atrocities.

Through such changes, perhaps, a future horizon of global criminal justice can take shape, in alliance with a 'world' where sovereign violence becomes a rarity. However utopian this sounds, this is no more an impossibility than any plan for international criminal law itself would have seemed before the twentieth century. Moreover, to examine and transform our own actions, including in relation to the realm of law and justice, is certainly not entirely utopian. Further, as Pal's emphasis on planning reveals, we need not think of the erosion of sovereignty as the erosion of all forms of organisation. The latter is obviously necessary to carry out not only projects of global justice, but also, for example, to ensure campaigns to eradicate diseases, guarantee better distribution of food and other resources, and so on.

[53] Graeber, 2004, p. 10, see *supra* note 34.

Rather, the erosion of sovereignty in its present forms may lead to new, hitherto unimaginable, ways in which people can come together, discuss with each other and create new ways of organising their lives free from domination and exploitation, across multiple local, translocal and even planetary scales. This chapter, however, does not call for an exact manifesto or roadmap of how the future 'world' is to be achieved – to be dogmatic about how future justice would look like, about what is right and just, would be antithetical to the kind of epistemology of doubt and responsibility sketched here. This chapter is more an invitation to further deliberation, argument and solidarity.

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