

*THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* BY KEVIN JON HELLER (OXFORD, UK: OXFORD UNIVERSITY PRESS, 2011) 509 PAGES. PRICE US\$135.00 (HARDBACK) ISBN 9780199554317.

*BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED* EDITED BY YUKI TANAKA, TIM MCCORMACK AND GERRY SIMPSON (LEIDEN, NETHERLANDS: MARTINUS NIJHOFF, 2011) 402 PAGES. PRICE US\$192.00 (HARDBACK) ISBN 9789004203037.

‘We want historians to confirm our belief that the present rests upon profound intentions and immutable necessities. But the true historical sense confirms our existence among countless lost events, without a landmark or a point of reference.’

— Michel Foucault, ‘Nietzsche, Genealogy, History’<sup>1</sup>

At a time when the field of international criminal law is moving beyond its adolescence into a greater sense of existential comfort, focusing on closure mechanisms for the ad hoc tribunals and on the 10 year anniversary of the International Criminal Court, two recent publications revisit what they take to be neglected institutional sites at the origins of the field. Kevin Jon Heller’s *The Nuremberg Military Tribunals and the Origins of International Criminal Law* makes this bold claim within his title: a claim that anchors the text as a kind of origin narrative rather than merely a descriptive history of this corner of what might be called ‘tribunal studies’. Yuki Tanaka, Tim McCormack and Gerry Simpson’s edited volume entitled *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* is more restrained, ‘revisiting’ the International Military Tribunal for the Far East (‘Tokyo Trial’) to consider alternatives to the familiar victor’s justice critique without assigning the tribunal such constitutive power over the field. Taken together, these books attempt to re-inscribe neglected institutional pasts into the present of international criminal law, offering alternate lineages and ways of understanding the field’s development and animating moments.

Before considering the contributions of these two books in more detail, it is worth pausing to note different historiographical approaches in international criminal law scholarship. How is the history of this field written? The more or less standard textbook account tends to offer a progress narrative that began with the post-World War II tribunals at Nuremberg and Tokyo, was interrupted for several decades by the Cold War, resumed during the 1990s with the ad hoc tribunals for Rwanda and the former Yugoslavia, adapted with the rise of ‘hybrid’ and ‘internationalised’ tribunals, and which culminated with the establishment of the permanent International Criminal Court. Social theorist Michel Foucault would have taken issue with such a telling by reminding us of

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<sup>1</sup> Michel Foucault, ‘Nietzsche, Genealogy, History’ in Paul Rabinow (ed), *The Foucault Reader* (Pantheon, 1984) 76, 89.

the nonlinear, non-teleological movement of history, with its dynamic of fits and starts, accidents and contingencies.<sup>2</sup> The tendency to construct the past from the standpoint of the present, reading a kind of inevitability into contingent events and institutions, seems to mark much scholarly writing on the rise of international criminal law in the last two decades.

Within the past 10 years (and guided implicitly or explicitly by Foucault and post-structuralist thinking), international law scholars have begun to call into question the teleological progress narratives that the field tells.<sup>3</sup> This review essay suggests that both of these books harbour a tension: they are somewhere between the progress narrative and its unsettling. On the one hand, these two volumes trouble the monopoly which the Allied International Military Tribunal at Nuremberg ('IMT') has held on origin stories within the field: rather than having one originary moment such as the *Charter of the International Military Tribunal* ('*London Charter*'),<sup>4</sup> the international criminal legal order emerged from a plurality of sites. On the other hand, rather than pushing farther to contest the notions of origin, they both try to bring the tribunals they describe into a more central place within the progress narrative. In Heller's account, the Nuremberg Tribunal was only one of two paths pursued by the United States Government in its post-World War II juridical response, and his research on the trials conducted in the US zone of occupation addresses this gap in the origin story of international criminal law. Tanaka, McCormack and Simpson's edited volume on the post-World War II Tokyo Trial decentres Nuremberg's hold on the field by also assigning an originary role to its counterpart from the Pacific theatre. Taken together, these two texts argue for a more complex reading of the history of post-conflict judicial institutions. Both highlight the institutional politics, personalities and compromises that have accompanied the field of international criminal justice since its inception.

Heller's impressive monograph addresses the 12 post-World War II military trials conducted by the US between 1946 and 1948 under the authority of the Allies' *Control Council Law No 10*.<sup>5</sup> Heller notes the dearth of literature on what he refers to as the Nuremberg Military Tribunals ('NMTs'), picking up on the name used by Chief Prosecutor Telford Taylor to describe the six courts established by the US to try individuals and theme-based groupings of

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<sup>2</sup> See, eg, Michel Foucault, *The Archaeology of Knowledge* (A M Sheridan Smith trans, Routledge, 2008) [trans of: *L'Archéologie du savoir* (first published 1969)].

<sup>3</sup> See, eg, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002); Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T M C Asser Press, 2010).

<sup>4</sup> *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Persecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*') ('*London Charter*').

<sup>5</sup> *Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity* (Germany) 20 December 1945, 3 *Official Gazette Control Council for Germany* 50 (1946).

defendants.<sup>6</sup> Scholarly interest in these tribunals has been relatively limited, and Heller seeks to address this gap by producing the most extensive and authoritative text on the tribunals to date.<sup>7</sup> Heller claims that he intends to offer a ‘comprehensive jurisprudential and historical analysis’<sup>8</sup> of the trials, and the book lives up to — and exceeds — this objective, offering both an extensive and masterful case-by-case account of the jurisprudence of the NMTs in addition to the broader historical context in which these trials took place. Heller’s introduction advances the rather bold claim that ‘[t]he history of the trials, in short, is the (early) history of the Cold War’,<sup>9</sup> and thereby draws the NMTs into the broader geopolitical history of the post-World War II era. The book will thus be of interest to scholars of international criminal law as well as legal historians and historians of post-war Germany, and it couples an attention to detail with a lucid, highly readable style.

The book is organised into five sections of three chapters each, with a lengthy middle section on the NMTs’ law and practice (chs 5–13) sandwiched between chapters which situate the tribunal historically and draw attention to its legacy. The first chapter opens with the 1943 *Moscow Declaration*<sup>10</sup> and its declared intention to combat impunity, presenting the two-track approach of the US government in developing the joint Allied IMT as well as the establishment of tribunals in the US zone of occupation under the authority of *Control Council Law No 10* (NMTs). Heller takes his readers through the political negotiations of the US’ war crimes policy, the relationship between the IMT and the nascent NMTs, the appointment of Telford Taylor as chief prosecutor, and the logistical challenges of determining how to circumscribe the field of potential defendants. Along the way, he addresses the early ambiguities surrounding whether to hold a ‘second IMT’, as permitted by the *London Charter*, or whether to hold ‘zonal

<sup>6</sup> The 12 cases involving a total of 185 defendants (of which 177 stood trial) were: *United States v Brandt* (United States Military Tribunal, Nuremberg, Case No 1, 20 August 1947) (*‘Medical’*); *United States v Milch* (United States Military Tribunal, Nuremberg, Case No 2, 17 April 1947) (*‘Milch’*); *United States v Altstoetter* (United States Military Tribunal, Nuremberg, Case No 3, 4 December 1947) (*‘Justice’*); *United States v Pohl* (United States Military Tribunal, Nuremberg, Case No 4, 11 August 1948) (*‘Pohl’*); *United States v Flick* (United States Military Tribunal, Nuremberg, Case No 5, 22 December 1947) (*‘Flick’*); *United States v Krauch* (United States Military Tribunal, Nuremberg, Case No 6, 30 July 1948) (*‘Farben’*); *United States v List* (United States Military Tribunal, Nuremberg, Case No 7, 19 February 1948) (*‘Hostage’*); *United States v Greifelt* (United States Military Tribunal, Nuremberg, Case No 8, 10 March 1948) (*‘RuSHA’*); *United States v Ohlendorf* (United States Military Tribunal, Nuremberg, Case No 9, 10 April 1948) (*‘Einsatzgruppen’*); *United States v Krupp von Bohlen und Halbach* (United States Military Tribunal, Nuremberg, Case No 10, 31 July 1948) (*‘Krupp’*); *United States v Weizsaecker* (United States Military Tribunal, Nuremberg, Case No 11, 14 April 1949) (*‘Ministries’*); *United States v von Leeb* (United States Military Tribunal, Nuremberg, Case No 12, 28 October 1948) (*‘High Command’*). Heller provides a helpful ‘Table of Defendants’ as an appendix that includes a list of the cases, defendants, charges, verdicts, sentences, and release dates: Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) app A, 403–64.

<sup>7</sup> The first edited volume on the NMT is due out later this year: Kim Priemel and Alexa Stiller (eds), *Unearthing the Subsequent Nuremberg Trials: Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books, forthcoming).

<sup>8</sup> Heller, above n 6, 4.

<sup>9</sup> *Ibid* 5.

<sup>10</sup> *Declaration of the Four Nations on General Securities, Moscow Conference of Foreign Secretaries 1943*, signed 30 October 1943, 3 *Treaties and Other International Agreements of the United States of America 1776–1949* 821 (*‘Moscow Declaration’*).

trials' under *Control Council Law No 10*. Heller's analysis reveals a set of political stakes, personal concerns, and misunderstandings among key personnel which makes the outcome — an ordinance establishing zonal trials — seem remarkably contingent.

Heller's second chapter moves to the organisation of the NMTs, including staffing, budgetary concerns, their structure, and the composition of the judiciary. He follows this with a chapter on the evolution of the trial program, which addresses the selection criteria used for defendants, their 'occupation-centred' groupings into specific cases, the decision to begin with the so-called 'Medical case', and short descriptions of each of the 12 cases eventually brought to trial (as well as those that were not). Finally, although Heller's introduction argues that the NMTs 'foregrounded the Holocaust in a way that the IMT did not',<sup>11</sup> this chapter shows the limits of the NMTs in this regard, with Heller noting that 'Taylor's response [determining that a Holocaust-centred trial would be too difficult to coordinate] trivialized the crimes committed against the Jews — implying that the "many other crimes" were just as important, if not more so'.<sup>12</sup> Heller's approach tacks between admiring the massive logistical undertaking of establishing the NMTs and pointing out their limits.

Chapter four, on the trials themselves, moves case by case, employing a structure of at least three sections — 'the indictment', 'the tribunal', 'outcome', and sometimes 'noteworthy aspects' — that offers a quick, useful reference to the NMTs at the risk of appearing overly schematic. This reference chapter is followed by the core legal sections of the book, with chapters on jurisdiction, evidence, procedure, three chapters on core crimes (crimes against peace, war crimes and crimes against humanity), modes of participation and liability, defences and sentencing. Here, Heller attempts to illustrate how the NMTs, under the authority of *Control Council Law No 10*, were positioned to develop the field of international criminal law further than the IMT established under the *London Charter*. For example, at the NMTs the charge of conspiracy was not limited to crimes against peace; modes of participation were expressly listed (as opposed to the silence of the *London Charter*); and the nexus to a wartime situation for crimes against humanity was removed by some of the tribunals.<sup>13</sup>

These central substantive chapters also seek to resolve the identity of these Tribunals: after considering various readings of the nature of the NMTs, Heller concludes that they were 'inter-allied special tribunals created by the Control Council in its capacity as the de facto government of Germany', applying international law despite not being international in character.<sup>14</sup> Chapter ten closely examines the NMTs' uneven jurisprudence on the possibility of crimes against humanity occurring in peacetime — a determination that would go against the IMT decision, which precluded the possibility that acts against

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<sup>11</sup> Heller, above n 6, 4.

<sup>12</sup> Ibid 81.

<sup>13</sup> Ibid 236–42.

<sup>14</sup> Ibid 137.

German Jews before the 1939 invasion of Poland could qualify as crimes against humanity.<sup>15</sup>

Perhaps anticipating his concluding chapter on the legacy of the NMTs, the chapters on modes of participation and liability conclude with comments regarding the progressive nature of the tribunals' work. Heller notes these were 'the first tribunals to systematically identify the essential elements of ordering and command responsibility, two modes of participation that are at the heart of international criminal law', adding that their definition of command responsibility 'has had a profound effect on modern tribunals'.<sup>16</sup> Furthermore, he argues that liability at the NMTs 'not only anticipated the modern concept of joint criminal enterprise, it is in at least one important respect — its fine-grained approach to culpability — superior to the modern concept'.<sup>17</sup>

Transitional justice scholars will likely take the most interest in Heller's final chapter on legacy, which considers the 'successes' and 'failures' of the NMTs as well as their uptake at other international criminal tribunals. Here the record appears to be somewhat spotty, though Heller ends on an optimistic note, arguing that the NMTs 'took the raw materials provided to them — the *London Charter*, the IMT judgment, [*Control Council*] *Law No 10* — and honed them into a coherent system of criminal law'.<sup>18</sup>

Just as Heller's book attempts to claim a place for the NMTs at the originary space usually reserved for the IMT, Tanaka, McCormack and Simpson's *Beyond Victor's Justice?* challenges the dominant position of the IMT in the international criminal justice imagination. Drawing largely upon papers presented at a 2008 conference commemorating the 60<sup>th</sup> anniversary of the delivery of the Tokyo judgment,<sup>19</sup> the volume attempts to rethink the ways in which the Tokyo Trial has figured in legal, scholarly and popular representations. This book will also be of interest to historians for its inclusion of original research into perceptions of the Tokyo Trial and for the biographies of its judges, while scholars of international law will benefit from the legal analyses set out in several chapters. A great strength of the volume is its inclusion of work by Japanese scholars, who survey the body of Japanese literature on the Tokyo Trial and provide insights into the national popular context in which it occurred. As with many edited volumes organised around conference proceedings, however, the book struggles to cohere, although the editors attempt to provide a clear organisational structure

The volume is divided into eight parts; beginning with framing chapters that situate the Tokyo Trial in context, the volume then moves on to considering the

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<sup>15</sup> Ibid 236:

Although pre-war crimes against humanity were charged only in *Flick* and *Ministries*, five tribunals addressed the nexus requirement. The *Justice* and *Einsatzgruppen* tribunals rejected the requirement, albeit in dicta, while the *Pohl*, *Flick*, and *Ministries* tribunals accepted it.

Heller later argues that '[t]he modern conception of crimes against humanity' is 'deeply indebted to the judgments in the *Justice* and *Einsatzgruppen* trials': at 375.

<sup>16</sup> Ibid 272.

<sup>17</sup> Ibid 294.

<sup>18</sup> Ibid 400–1.

<sup>19</sup> 'Tokyo War Crimes Trial Conference' (Melbourne Law School, University of Melbourne, 10–12 November 2008).

accused, the judges, the trial proceedings, three sections on ‘forgotten’ crimes, and a final part entitled ‘Tokyo Today’. The volume’s brief introduction by the editors does not provide much detail on the Tokyo Trial, perhaps leaving this work to be performed by Fujita Hisakazu’s first chapter. This chapter helpfully fills in the book’s English language audience on Japanese scholarship that has been written on the tribunal to date, claiming that ‘notions of victors’ justice have shaped Japanese debates’.<sup>20</sup> By contrast, this chapter argues that the Tokyo Trial is somewhere between ‘victors’ justice’ and what Hisakazu refers to as ‘humanity’s justice’: ‘the principle of not permitting impunity in light of (implementation of) humanitarian law or international criminal law and human rights’.<sup>21</sup> This conception of what the tribunal signified is not far off Ruti Teitel’s description of what she terms a nascent ‘humanity’s law’,<sup>22</sup> though one wonders if Hisakazu would try to argue for an earlier emergence of these overlaps between legal fields (and, relatedly, whether this may be a wishful anachronism). Hisakazu leaves the reader with the prescriptive claim that victim compensation must be resolved, though this too raises questions of time and agency: who should assume responsibility for reparations claims, and how might this happen before it is too late for those who have suffered? Issues of compensation and reparations are raised elsewhere in the volume, including in the Chinese and Korean context with respect to Japanese wartime atrocities,<sup>23</sup> and concerning reparations for the atomic bombing of Japanese cities,<sup>24</sup> though the subject is not treated as a general theme of the book.

Although the volume is uneven in the length, approach and focus of its contributions, several pieces stand out for being particularly rich and relevant for the overall subject, whether as reference pieces or by offering original arguments. Gerry Simpson’s chapter attempts to historicise the development of the Tokyo Trial, beginning from the Japanese reservations made at Versailles concerning war crimes trials:

Japanese positivism was uncomfortable with the rush to retribution prefigured at Versailles ... what is most powerful about this dissent is that it represents the scrupulous legalism of the victors, not the special pleading of the vanquished.<sup>25</sup>

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<sup>20</sup> Fujita Hisakazu, ‘The Tokyo Trial: Humanity’s Justice v Victors’ Justice’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 3, 17.

<sup>21</sup> *Ibid.* 20.

<sup>22</sup> Teitel argues that ‘the law of humanity — a framework that spans the law of war, international human rights law, and international criminal justice — reshapes the discourse of international relations’: Ruti Teitel, *Humanity’s Law* (Oxford University Press, 2011) 4.

<sup>23</sup> See Bing Bing Jia, ‘The Legacy of the Tokyo Trial in China’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 207; O-Gon Kwon, ‘Forgotten Victims, Forgotten Defendants’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 227.

<sup>24</sup> See Yuki Tanaka, ‘The Atomic Bombing, the Tokyo Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 293.

<sup>25</sup> Gerry Simpson, ‘Writing the Tokyo Trial’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 23, 26.

He also takes up the dissent by Justice Pal at the trial, which is considered in greater detail in Nakajima Takeshi's subsequent chapter in the section of the volume which addresses the individual judges. Yuma Totani's contribution entitled 'The Case against the Accused' provides a thorough account of the institutional background of the tribunal, the criteria it employed for selecting defendants, and the challenges of the trials in practice. Totani's well-supported findings take a balanced position: on the one hand, 'the Tokyo Trial served as little more than a "follow-on" from the Nuremberg Trial', yet it 'arguably was among the first historical cases that began to address complex issues of individual responsibility of state leaders' and was thus 'an important precedent-setter'.<sup>26</sup> Gideon Boas's chapter on command responsibility is also a solid contribution, illustrating how the modern doctrine is rooted in jurisprudence from the Tokyo Trial as well as the *Yamashita* case before a US military commission<sup>27</sup> and then the US Supreme Court.<sup>28</sup>

The sections of the volume which deal with the Tokyo Trial's exclusions also provide a number of important contributions to the literature in their efforts to draw attention to crimes that have largely been forgotten. The chapter by Bing Bing Jia addresses the Tokyo Trial's perception in China, arguing that it has been largely positive, though the failure to prosecute the Japanese emperor and the impunity for crimes committed in China are significant exceptions. In an effort to remedy the Tokyo Trial's shortcomings, China took matters into its own hands in bringing domestic proceedings against the Japanese state and some Japanese corporations, including four officers extradited from Japan and prosecuted for crimes associated with the Rape of Nanjing.<sup>29</sup> Judge O-Gon Kwon takes up the neglected case of Korea, which had been annexed to Japan as a colony. Kwon writes, 'Korea was not properly recognised or treated as a victim in the course of various dealings which took place after the war. On the contrary, Koreans were regarded in some cases as if they were Japanese'.<sup>30</sup> This led to a case of 'forgotten victimhood', where war crimes committed in Korea were viewed with less interest by the Allied Powers. Nicola Henry's chapter on sexual violence prosecutions shows how the challenges of prosecuting such crimes at Tokyo are carried through into the present, venturing into broader theoretical points about silence, memory and absence.

Continuing with the theme of neglected crimes, several other chapters address gaps in the Tokyo Trials that require turning to other venues or under-represented areas of investigation and prosecution. Yuki Tanaka addresses the US' nuclear bombing of Hiroshima by focusing on the efforts of a survivor to obtain redress in the District Court of Tokyo. Tanaka argues that the resulting judgment — a 'partial victory' for survivors — highlights ongoing ambiguities regarding the relationship between individual and state responsibility for

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<sup>26</sup> Yuma Totani, 'The Case against the Accused' in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 147, 161.

<sup>27</sup> *Trial of General Tomoyuki Yamashita* (United States Military Commission, Manila, Case No 21, 7 December 1945) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1948) vol 4, 1.

<sup>28</sup> *In re Yamashita*, 327 US 1 (1946).

<sup>29</sup> Jia, above n 23, 215.

<sup>30</sup> Kwon, above n 23, 229.

international crimes. Neil Boister addresses the ‘neglected legacy’ of Japan’s drug policy in China, which appeared in the Tokyo indictment as contributing to the waging of aggressive war. Tsuneishi Kei-ichi’s chapter describes the role of medical experimentation in a specialised unit of the Japanese Imperial Army that was never brought to account.

Several of the chapters strain to fall under the overarching theme or approach of the volume. For example, Ustinia Dolgopol’s chapter on the lack of attention to the crimes against ‘comfort women’ at Tokyo focuses mainly on cases before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, dedicating only a section of the chapter to a topic which merits a fuller treatment. Helen Durham and Narrelle Morris’s chapter on rape and sexual assault crimes concentrates primarily on Australian prosecutions. Ian Henderson’s chapter focuses on the firebombing of Tokyo and other Japanese cities from a military and legal perspective, but his approach seems out of place in this volume. More editorial encouragement to round out some of these chapters may have helped, perhaps supplemented by a more robust introduction from the editors explaining each contribution to the volume.

Although the most theoretically sophisticated piece, the clear outlier in this volume is Yoriko Otomo’s chapter entitled ‘The Decision Not to Prosecute the Emperor’, which offers an inventive, post-structuralist account drawing upon psychoanalytic and feminist theory. Through a complex reading of the figure of the Japanese emperor and his synecdochic relationship to the Japanese state, Otomo shows how Emperor Hirota’s disavowal or sacrifice of his divinity simultaneously marked the transformation of Japan into a ‘modern’ secular state. Of particular note is her ‘haiku collage’ constructed out of the *Potsdam Declaration*<sup>31</sup> (the terms of Japanese surrender) and Hirota’s speech to the Japanese nation that places victor and vanquished into what Otomo calls a ‘lovers’ discourse’, which reads as a hauntingly beautiful testament to the ‘secularisation of the sovereign’s body and democratisation of the State’.<sup>32</sup> Otomo’s chapter is textually intricate and powerful, yet it is difficult to read this piece together with some of the more descriptive chapters of the volume, and particularly with the chapters on the judges that follow. It will likely be a divisive chapter for the volume’s readers, who may either welcome its theoretical approach as a refreshing antidote to the overwhelmingly descriptive tone of the volume or who may regard it as obscure and displaced among discussions of legal doctrine and judges’ biographies. Yet of all of the work considered here, Otomo’s piece does the most to push international criminal law scholarship in novel directions.

The final chapter of this volume attempts to take up the problem of representing the Tokyo Trial more explicitly, noting that ‘[a]ny attempt to draw contemporary relevance from the establishment and operation of the Tokyo Trial

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<sup>31</sup> *Proclamation Defining Terms for Japanese Surrender*, US–China–UK, signed 26 July 1945, 3 *Treaties and Other International Agreements of the United States of America 1776–1949* 1204 (‘*Potsdam Declaration*’).

<sup>32</sup> Yoriko Otomo, ‘The Decision Not to Prosecute the Emperor’ in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 63, 71.

will be inherently selective and inevitably inexhaustive'.<sup>33</sup> Yet after acknowledging these limits, Sarah Finnin and Tim McCormack's closing chapter returns to some of the issues taken up in previous sections of the book — for example, the role of the conspiracy counts as well as judicial appointments — rather than offering a broader reflection on how the Tokyo Trial has been 'written', to borrow from Simpson.<sup>34</sup> Given that 9 out of the 22 chapters in the volume are organised under the 'forgotten crimes' theme, it would have been worth returning to this theme to consider how these moments of institutional neglect or failure might bear upon the legacy of the Tokyo Trial. Here Simpson's approach in the second chapter offers some guidance for reflecting on broader paradigmatic issues, including a meta-perspective on the 2008 Conference out of which this volume emerged.

In the final chapter of *Beyond Victor's Justice?*, Finnin and McCormack observe that the rise of international criminal tribunals at the end of the 20<sup>th</sup> century spawned 'a quest for a more comprehensive understanding of the historical development of international criminal law — of where we have come from as an international community and of how we arrived at the place we now find ourselves'.<sup>35</sup> Both this edited volume and Heller's monograph offer new histories of the present, reading largely neglected criminal tribunals through the lens of the contemporary field of international criminal law. Heller notes that '[t]he NMTs might not have given birth to international criminal law, but they clearly nurtured it into adolescence'.<sup>36</sup> One wonders whether this generous reading says more about what kinds of narratives carry purchase within the field now than it does about its institutional subject: as Simpson observes, 'writers and publishers are drawn to anniversaries' because they 'provoke interest in a broader readership, they allow authors to make comparative generalisations, they lend a certain historical weight to the work and they call for some sort of closure'.<sup>37</sup> During a period in international criminal law that lends itself to self-congratulatory sentiment, it would seem that the more open, critical moments in these two texts — moments that counter the field's progress narrative and seek instead 'the dissension of other things'<sup>38</sup> — provide the most interesting and valuable contributions.

SARA KENDALL\*

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<sup>33</sup> Sarah Finnin and Tim McCormack, 'Tokyo's Continuing Relevance' in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011) 353, 353.

<sup>34</sup> Simpson, above n 25, 23.

<sup>35</sup> *Ibid* 380.

<sup>36</sup> Heller, above n 6, 401.

<sup>37</sup> Simpson, above n 25, 30.

<sup>38</sup> Foucault, above n 1, 79.

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