

STUDENT CONTRIBUTION

Dissenting Opinion of Justice Radhabinod Pal on the Notion of Aggressive War: A Critical Evaluation

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Tokyo trial experienced a judgment circumscribed for a long period for publication during allied occupation years. This is Justice Pal's dissenting judgment at the Tokyo trial; endeavored to seek Justice in a different way, justified 'aggression' not only considering subjective ends, rather extends beyond that. The present paper does not intend to justify the judgment which exceeds author's competence, but also tries to extract the notion of aggression where Justice Radhabinod Pal is experimental. Where all acts are not act of aggression, the main concern is to segregate the concept of act of war and the act of aggression. Assertion becomes crucial when certain use of force can be legitimized under sovereign right of self-defense. This paper tends to clarify these ambiguities concerning the notion of aggression relying on Justice Pal's opinion. Firstly, a progressive attempt has been made to identify the extent of use of force under sovereign right of self-defense, overriding that extent may tantamount to aggression. Then possible means have been drawn to limit the concept of aggression. Finally, the paper would shed brief light on the comparison of Justice Pal's dissenting opinion with contemporaneous legal framework predominantly concerning the notion of aggression.

Keywords

Tokyo Trial, Dissenting Opinion, Act of Aggression, Act of War, Self-defense, Use of Force, Objective Test, Customary Norm.

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*For the peace of those departed souls who took upon themselves the solemn vow
the salvation ceremony of oppressed Asia,
Oh, Lord, Thou being in my heart, I do as appointed by you*
Nov. 11, 1952
Radhabinod Pal**

I. Introduction

Justice Radhabinod Pal was appointed as a member to the International Military Tribunal for the Far East (hereinafter Tokyo Tribunal), established for the trials of Japanese war crimes committed during World War II. In April 1946, the trial convicted twenty-eight former national leaders of Japan, political or military, and more than two and a half years later, in November 1948, sentenced seven to death, sixteen to life imprisonment, and two to shorter prison terms.¹ The biggest difference between the two international tribunals, Nuremberg and Tokyo, perhaps was the fact that unlike in Germany, no fewer than five separate opinions were submitted at Tokyo.² Among them, dissenting opinion of Justice Radhabinod Pal at the Tokyo Tribunal is of unique importance in the history of international law as a new interpretation of contemporary (i.e. history of the pre-second World War era) history of international events.³ Despite all criticism, his dissenting opinion has been maintaining substantial significance in public international law, so that publication of which was prohibited during the occupation years. His suspicion concerning subjectivity was linked to his doubts about the motives of the prosecuting powers, yet his attempt to posit an alternative worldview led him back towards a naturalist

** These remarks have been inscribed on a stone monument in the precincts of the Honsho-ji Temple in the city of Hiroshima, Japan.

¹ Ushimura Kei, *Pal's "Dissentient Judgment" Reconsidered: Some Notes on Postwar Japan's Responses to the Opinion*, 19 JAPAN REV. 215 (2007).

² *Id.* at 217. It reads: "The Australian judge, president of the tribunal, contended that in sentencing the defendants, the tribunal should have considered the fact that the Emperor had not been indicted. The French judge complained of procedural shortcomings. The judge of the Netherlands argued that no conspiracy existed and that five of the defendants were innocent. The judge representing the Philippines argued that several of the sentences were too lenient, not exemplary and deterrent."

³ Garima Tiwari, *India's Hostility to Internationalize Criminal Justice – Calculative Strategy or Prejudiced Reluctance?* 2 EUROPEAN SCIENTIFIC J. 190 (2014), available at <http://eujournal.org/index.php/esj/article/view/3708> (last visited on Apr. 21, 2015).