STUDENT CONTRIBUTION

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

Shuvra Dey*

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.

* LL.M. candidate at South Asian University, New Delhi, India. B.A. (Stamford Univ., Bangladesh), ELL.M.(Rajshahi Univ., Bangladesh). ORCID: http://orcid.org/0000-0001-6100-8362. Much gratitude is extended to Professor Srinivas Burra (South Asian University) for his valuable suggestion. Views and errors, if any, are solely the author's responsibility. The author may be contacted at: dshuvro15@yahoo.com / Address: Akbar Bhawan, Chanakyapuri, New Delhi 110 021 India.

DOI: http://dx.doi.org/10.14330/jeail.2015.8.1.10

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).

position.[4]

Earlier the judgment was a type written copy of over 1,200 pages, with the signature of Richard Harris, one of the thirty-odd American lawyers who had come to Tokyo in defense of the accused Japanese.[5] Later, Pal's judgment was exposed to whole world through compilation of the opinion in a book.[6] As for the Manchurian incident, result of long years Sino-Japanese conflicts as the Tokyo tribunal finds it, of Japan's aggression against China, Justice Pal was different in his opinion in identifying aggression, considered objective grounds with humanitarian concerns. One thing that Justice Pal was especially concerned about the war was the atomic bombing of Hiroshima and Nagasaki.[7] He was shocked by monumental inscription dedicated to the A-bomb victims: "Sleep peacefully, for we shall never repeat the mistake." In his view "why should Japanese apologize to the Japanese? "It is not the Japanese who dropped the atomic bombs."[8]

According to estimates made at the Tokyo Tribunal, it is alleged that about 42,000 civilians, mostly women and children, were killed in Nanking, and over 100,000 civilians and prisoners of war in the vicinity of the city….[9] Standing on the crucial ground this research will raise few fundamental questions. When does an "act of war" tantamount to "act of aggression" or when the right of use of force under the right of self-defense tantamount to "act of aggression" or how far the right under sovereign right of self-defense can be exercised requires justification to identify the notion of war of aggression. Justice Pal's dissenting opinion is pragmatic in this concern where this paper attempts to clarify particularly the notion of aggression.

This paper is composed of six parts including Introduction and Conclusion. Part two will discuss the background of Justice Pal's dissenting opinion. Part three will examine the sovereign right of self-defense with regard to the notion of 'aggression.' Part four will investigate the means of limiting war of aggression. Part five will

4 K. Sellars, *Imperfect Justice at Nuremberg and Tokyo,* 21 European J. Int'l L. 1096 (2011), *available at* http://ejil.oxfordjournals.org/content/21/4/1085.abstract (last visited on Apr. 21, 2015).

5 *See generally* Akira Nakamura, International Military Tribunal For The Far East: Dissentient Judgment of Justice Pal III (1999).

6 First book was published in Calcutta titled, "International Military Tribunal for The Far East: Dissentient Judgment of Justice R.B. Pal," in 1953. In 1976, a general textbook concerning the judgment was published by the Kenkyusha Publishing Co., Tokyo, under the title, "In Defense of Japan's Case"; in 1999 Justice Pal's dissenting opinion was published precisely by Kokusho-Kankokai, Inc., Tokyo under the title, "International Military Tribunal for The Far East: Dissentient Judgment of Justice Pal."

7 *Supra* note 5, ch. V.

8 *Id. See also* Yamauchi Tomosaburo, *Some Aspects of Humanism that Combines East and West: MacArthur, Showa Tenno, and Justice Pal*85 (2013), *available at* https://ir.lib.osaka-kyoiku.ac.jp/dspace/bitstream/123456789/27414/1/KJ1_6102_075.pdf (last visited on Apr. 22, 2015).

9 *Supra* note 8, at 84.

analyze Justice Pal's views in contemporaneous legal framework.

II. Background of Justice Pal's Opinion: A Quest for Overcoming Aggression

A. Prosecution

On April 29, 1946 the eleven prosecuting nations filed their indictment against twenty-eight persons before the Tokyo Tribunal.[10] Charges against these accused persons were in three categories:

1. Crimes against Peace (Count 1 to Count 36)
2. Murder (Count 37 to Count 52)
3. Conventional War Crimes and Crimes against Humanity (Count 53 to Count 55)[11]

Justice Radhabinod Pal dissented: "I sincerely regret my inability to concur in the judgment and decision of my learned brothers."[12] His dissenting opinion is empirical in contemplating a strong notion against the concept of aggressive war. There were two main questions in Justice Pal's consideration against the prosecution case:

1. Whether a war of the alleged character is a crime in international law?
2. Whether individual members of a state commit a crime in international law by preparing, etc. for such war?[13]

In finding the answer Justice Pal segregated the whole concept in distinct temporal period.[14] In primary consideration of first two mentioned period he held that "no war

[10] Dissentient Judgment of Justice R. B. Pal, The United States of America v. Araki, Sadao, I.M.T.F.E. at 1, *available at* http://www.legal-tools.org/uploads/tx_ltpdb/JU01-13-a-min_02.pdf (last visited on Apr.4, 2015). Justice Pal's Dissenting Opinion at the Tribunal was prohibited for publication during occupation years. Later the Judgment was exposed through the compilation of book only. Here, a rare original copy of the Judgment has been referred which is available in the abovementioned address.

[11] *Supra* note 10, at 2; *supra* note 5, at 5. *See also supra* note 8, at 81.

[12] *Supra* note 10, at 1; *supra* note 5, at 5.

[13] *Supra* note 10, at 21; *supra* note 5, at 14.

[14] For convenience the question may be considered with reference to four distinct periods, namely:
1. That up to the First World War of 1914;
2. That between the first World War and the date of Pact of Paris (Aug. 27, 1928);
3. That from the date of the Pact of Paris to the commencement of the World War under consideration; and

became crime in international life."[15] In later part of his opinion he followed almost identical stand with greater evaluation for the rest of the two mentioned period.

B. War of Aggression

A considerable focus was on 'war of aggression'; is this crime under international law?[16] He noted, *e.g.*, Robert Jackson's statement at Nuremberg that "whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions."[17] Pal was skeptical about aggressive war. But he was concerned that all "act of war" may not tantamount to "act of aggression." *E.g.*, he considered several scholastic opinions where Quincy Wright maintained, "under present international law "acts of war" are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a "state of war" is neither legal nor illegal."[18] "Act of war" may not be "act of aggression" if it is held in time of war. Senator Borah's[19] view will substantiate the stand which Justice Pal strongly appreciated. Borah expressed: "War between nations has always been and still is a lawful institution and "any nation may, *with or without* cause, declare war against other nation and be strictly within its legal rights…"[20] One should be cautious about the background of those view delivered in 1925 and 1927 by Wright and Borah, respectively. Untill then, Pact of Paris had not been adopted. In a minimal substance of laws of war there stand were substantial in limiting excessive right of war. So the right of war was there but in a limited manner, crossing of which may amount to aggression. One should carefully draw the line between "act of war" and the "act of aggression."

Moving to the next part, the right of war as a prerogative of national sovereignty requires justification. In the Sixth edition (1944) of "Oppenheim's International Law," H. Lauterpacht stated:

4. That since the Second World War.

15 *Supra* note 10, at 75; *supra* note 5, at 38. It reads: "So far as the position unaffected by such covenants and pact is concerned, it seems amply clear that no war became crime during the First two of the above four periods."

16 *Supra* note 10, at 24; *supra* note 5, at 15.

17 International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal 149 (Vol. 2: 1947-1949). *See also supra* note 4, at 1096.

18 Q. Wright, *The Outlawry of War*, 19 Am. J. Int'l L. 76 (1925).

19 W.Borah (June 29, 1865 – Jan.19, 1940) was a prominent Republican United States Senator from Idaho, noted for his oratorical skills and isolationist views. For details, *see William Borah*, Britannica Encyclopedia, *available at*http://global.britannica.com/EBchecked/topic/73799/William-E-Borah (last visited on Apr. 20, 2015).

20 *Supra* note 10, at 72; *supra* note 5, at 37. [Emphasis added]

> So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the *justice or otherwise* of the cause of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived every war was just.[21]

Every act under right of war may not be justified. When an act under that right of war will constitute, "act of aggression" or the parameter of act under the right of war, exceeding of which constitute "act of aggression" need to be identified. Justice Pal was not antagonistic of the notion that aggressive acts or illegal use of force under right of self-defense may constitute war of aggression. Thus, use of force under the right of self-defense and the act of aggression are interrelated, where a proper parameter needs to be drawn to justify the notion of aggression.

III. Justification of Sovereign Right of Self-Defense with respect to the Notion of 'Aggression'

Under the concept of sovereignty, right of self-defense of sovereign State comes into focus when certain amount of aggression can be legitimized under right of self-defense.[22] This sovereignty, however, does not confer unlimited right of self-defense. Historically, public international law has shaped unlimited sovereign rights.[23] Justice Pal in his opinion strongly restricted the unlimited sovereign rights of self-defense. Concerning self-defense, he asserted that:

> It is the right inherent in every sovereign state and implied by the sovereignty of the state. It is not the right which comes into existence by some act of violence of the opponent. It is the very essence of sovereignty and so long as sovereignty remains the

21 N. Boister & R. Cryer, Documents on the Tokyo International Military Tribunal Charter, Indictment, and Judgments 1326 (2008).

22 C. De Bock, *The Crime of Aggression: Prospects and Perils for the Third World,* 13 Chinese J. Int'l L. 97 (2014) He argues that aggression is linked with the only two exceptions to the prohibition on the use of force: Security Council authorization and self-defense.

23 *See* Trail Smelter Arbitration (U.S. v. Can.), 3 UN Rep. Intl. Arb. Awards 1905 (1941), *available at* http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (It holds that no State has the right to use or permit the use of its territory in such a manner as to cause injury (...) in or to the territory of another (...) when the case is of serious consequence and the injury is established by clear and convincing evidence). *See also* Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J 22 (Apr. 9), *available at* http://www.iilj.org/courses/documents/corfuchannel.unitedkingdomv.albania.pdf (It holds that every state has the obligation to ensure that its territory was not to be used for acts which would infringe the rights of other states). (all last visited on Apr. 21, 2015).

> fundamental basis of international life, it cannot be affected by mere implication.[24]

Justice Pal very consciously segregated the right of invoking self-defense from mere violence; threshold for exercising sovereign right is thus high. He maintained:

> The right of self-defense referred to by the various states in relation to the Pact of Paris is certainly not the same as the right of private defense given by a national system against criminal acts as is contended by the Prosecution in the present case…. It is not the right which comes into existence by some act of violence of an opponent.[25]

Under public international law, until an armed attack occurs, States are expected to renounce forcible self-defense.[26] The ICJ has built on this aspect of the UN Charter in finding that not even every armed attack but only serious or significant ones trigger Article 51.[27] In 1986, *Nicaragua* case, the ICJ held that: "The prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[28] The Court also refers to acts that involve 'grave' or 'less grave' use of force.[29] 'Scale' and 'effect' of armed attack need to be 'grave' which empower right of self-defense where certain amount of force can be legitimized.[30] If an armed attack is too insignificant to trigger the right of self-defense, it is unlikely to constitute 'aggression.'[31]

Scope of right of self-defense got momentum through the Briand-Kellogg Pact in 1928. The general prohibition of war laid down in Article I of the Pact was subject only to the reservation of right of self-defense.[32] For the first time a substantial

24 *Supra* note 10, at 111; *supra* note 5, at 54.

25 *Supra* note 10, at 111.

26 A. Randelzhofer, *Article 51*, The Charter Of The United Nations: A Commentary 790 (B. Simma ed., 2002) ("Only if and when the prohibited use of force rises to an armed attack can the State concerned resort to forcible measures for its defence. But even this authority is limited in two ways: first, the State acting in self-defense must observe the principle of 'proportionality'; secondly, it has to report immediately to the SC the measures taken, and it has to discontinue them as soon as the latter itself has taken the measures necessary for the maintenance of international peace.")

27 M. O'Connell & M. Niyazmatov, *What is Aggression?: Comparing the Jus ad Bellum and the ICC Statute,* 10J. Int'l Crim. Jus. 193 (2012).

28 *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 103, ¶4 (June 27).

29 *Id.* at 103. *See also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 187 (Nov. 6). *See also supra* note 27.

30 *Id*.

31 *Id*.

32 A. Randelzhofer, *Article 2(4)*, *in* The Charter of the United Nations: A Commentary 206, ¶ 10 (B. Simma et al.

prohibition of war was formulated through the Pact. Although of outstanding importance, the Briand-Kellogg Pact had its shortcomings.[33] Justice Pal was skeptical about unrestrained view of Kellogg on the scope of self-defense.[34] Kellog declared: "The right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned, and under the treaty, each state would have the prerogative of judging for itself, what action the right of self-defense covered and when it come into play…"[35] Justice pal held: "In my opinion sufficient to take the pact outside of the category of law."[36] So the third period identified in footnote 14 does not favor the prosecution under Pal's finding. Reason behind Justice Pal's consideration may be an unlimited approach of the Pact for self-defense; overall, limited approaches for sovereign right of self-defense are evident.

Justice Pal endeavors to prevent unlimited exercise of the right of self-defense. In his dissenting opinion, Pal has made an attempt to frame his rational approach by evaluating different scholastic view where right of self-preservation of State has been reiterated.[37] Such self -preservation may confer right of self-defense. Justice Pal held: "The conception of aggression being only the complement of that of self-defense, so long as the question whether a particular war is or is not in self-defense remain unjustifiable…"[38] Self-defense and the notion of aggression are thus interrelated.

eds., 2012). *See also* Addendum - Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility, [1980] II (1)Y.B. Int'l L. Comm'n 52 (1980). *See also* U.N. Doc. A/CN.4/318/Add.5-7, *available at* http://legal.un.org/ilc/documentation/english/a_cn4_318_add5-7.pdf (last visited on Apr. 21, 2015).

33 *Supra* note 26, at 116. *See also* H. WEHBERG, KRIEG UND EROBERUNG IM WANDEL DES VOLKERRECHTS 48-50 (1953). ("Its preamble simply declared that a State violating the Pact "should be denied the benefits furnished by Treaty." An even more serious deficiency proved to be the fact that the prohibition, at least according to its wording, merely referred to war, and not to the use of force in general.")

34 *Supra* note 10, at 92; *supra* note 5, at 46. It reads: "The reservation of the right of self-defense and self-preservation in the form and to the extent explained by Mr. Kellog would take the pact out of the category of a rule of law."

35 *Supra* note 10, at 90; *supra* note 5, at 45.

36 *Supra* note 10, at 91; *supra* note 5, at 45.

37 *Supra* note 10, at 92-4; *supra* note 5, at 47. Hall says: "Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary, and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. River says: "A conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. It is never permitted to a government to sacrifice the state which the destinies are confided to it. The government is then authorized and even in certain circumstances bound, to violate the right of another country for the safety of its own. That is the excuse off necessity, an application of the reason of state. It is legitimate excuse." According to Hegel, "Nothing done in the interest of the preservation of the state is illegal." Westlake is more restrictive under Pal's view as follows: "What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defense. In so doing, it will be acting in a manner intrinsically defensive, even though externally aggressive."

38 *Supra* note 10, at 96; Nakamura, *supra* note 5, at 48.

Aggression may complement self-defense, but extreme exercise may be antithesis of international norm.

IV. Means of Limiting War of Aggression under Justice Pal's Observation

Justice Pal considered Wright's view as follows: "… a war by its very nature involving criminal acts. A war can be justified only if it is necessitated by self-defense. Hence an aggressive war being a war which is not in self-defense, is unjustifiable and consequently a crime."[39] General concern is whether war under legitimate self-defense may be justifiable as has been discussed above. Wright maintained:

> The covenant with hesitation, and the Pact of Paris with more firmness, proceed upon a different hypothesis-that war is not a suitable instrument for anything except defense against war itself, actual or immediately threatened. Thus, under these instruments, the tests of "just war have changed from a consideration of the *subjective ends* at which it is aimed, to a consideration of the *objective conditions* under which it is begun and is continued."[40]

Consideration of *objective conditions* was not ignored in Pal's opinion. [Emphasis added] The proper administration of justice is objectively at stake, since the ICJ can act on the merit only if certain objective and peremptory conditions are met.[41] Thus, the Court must objectively satisfy itself that there is a dispute which is not moot, legal in nature.[42]

Justice Pal asserted a reasonable scope to limit the excessive sovereign right of self-defense. He said: "In present case the alleged customary law, if established, would destroy a well-established fundamental law, namely, the sovereign right of each national state."[43] Sovereign right is not unlimited, so that customary norm may impede excessive sovereign right of self-defense leading to war of aggression.

39 *Supra* note 10, at 109; *supra* note 5, at 53.

40 *Supra* note 10, at 110; *supra* note 5, at 54. [Emphasis added]

41 T. Zimmermann et al., The Statute of The International Court of Justice: A Commentary 897 (2d ed. 2012).

42 *Id. See also* The Legality of The Use of Force Case (Serb. & Montenegro v. Belg.), Judgment, 2004 I.C.J. 294, ¶33 (Dec. 15).

43 *Supra* note 10, at 121; *supra* note 5, at 59.

Glueck says that customary international law made an aggressive war a crime in the international community. He expressed: "The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime."[44]

Justice Pal is, however, pragmatic in identifying the notion. He maintained: "In my opinion, no category of war became illegal and criminal either by the Pact of Paris or as result of the same. Nor did any customary law develop making any war criminal."[45] In Justice Pal's view no war is crime; no customary law is developed to make war criminal. It does not, however, mean that he is letting an ultimate freedom to war. Pal did not criminalize war itself. Rather, he is in favor to criminalize the conduct of war. He held:

> In my judgment no category of war became a crime in international life up to the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory of the international legal philosophers. The pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life. No war became an illegal thing in the eye of international law as a result of this pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war crime.[46]

The "conduct of war" is a substantial criterion to determine if a war is aggressive or not. Judge Pal reiterated the objective consideration of conduct to identify act of aggression. He opined: "My own view is that war in international life remained, as before, outside the province of law, its conduct alone having been brought within the domain of law."[47] General principle of international law where Justice Pal is limited in invoking customary norm, may be a substantive means to corroborate objective consideration and the assimilation of both may be a proper means to limit the act of aggression.

44 *Supra* note 10, at 116; *supra* note 5, at 57.

45 *Supra* note 10, at 129; *supra* note 5, at 62.

46 *Supra* note 10, at 152; *supra* note 5, at 73.

47 *Supra* note 10, at 116.

V. Justice Pal's Views in Contemporaneous Legal Framework

Concept of private self-defense is certainly different from the self-defense referred to by a State under existing framework of international law. Example of self-defense include the killing by a prison guard of an enemy prisoner of war who was about to murder the guard, or the wounding of an enemy serviceman by a civilian woman in the hands of the enemy occupant, for the purpose of preventing or halting torture or rape.[48] Generally, this defense must not be confused with self-defense under public international law.[49] Justice Pal is also in identical view where he asseverated: "The right of self–defense referred to by the various states in relation to the Pact of Paris is certainly not the same as the right of private defense given by national system against criminal acts, as is contended by the Prosecution in the present case."[50] He consciously attempted to segregate the two possible wings of aggression, i.e., act of 'State' and 'individual.' These actors of aggression entail their responsibility in different manner. More crucial aspect is to attribute responsibility to individuals. Justice Pal, in favor of putting individual in international legal framework, expressed:

> I believe with Professor Lauterpacht that it is high time to that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end, 'The individual human being-his welfare and freedom of his personality in its manifold manifestations- is the ultimate subject of all law.'[51]

In contemporaneous framework, the resurrection of the crime of aggression in the Rome Statute of the International Criminal Court (hereinafter Rome Statute) would afford an opportunity to solidify the definition of aggression - at the level of both

48 In *Kordic and Cerkez* an ICTY TC held that self-defense as a ground for excluding criminal responsibility is one of the defenses that 'form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it. *See* Prosecutor v. Dario Kordi & Mario Erkez, Judgment (Feb. 26, 2001) Case No. IT-95-14/2-T at 133.

49 A. Cassese, International Criminal Law 259 (2008). *See also* W. Schabas, The International Criminal Court: A Commentary on The Rome Statute 489 (2010). ("It should be obvious enough that article 31(1)(C) contemplates the application of self-defense in an individual context, and not 'the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations' ensured by article 51 of the Charter of the United Nations.")

50 *Supra* note 10, at 111; *supra* note 5, at 54.

51 *Supra* note 10, at 145; *supra* note 5, at 70.

State acts and the individual - in a legally binding and prominent treaty.[52] In 2010, at Kampala, a compromise on the definition of crime of aggression under Article 8*bis* of Rome Statute was contemplated which would be in pipeline to enter into force.[53] Individual has been subjected to international criminal law for the crime of aggression in which Justice Pal was also optimistic once.

As a result, dissenting opinion of Justice Pal is not in favor to criminalize war itself, but to criminalize the conduct of war.[54] As Article 8*bis* (2) mentioned "any of the following act, regardless of the declaration of war…," this may imply Justice Pal's view where conduct is the ultimate and not the war. Reflection of long years back opinion in recent framework signifies the importance of Justice Pal opinion.

The UN International Law Commission ("ILC") pointed out that the UN Charter concerning the prohibition of the use of force in itself constitutes a conspicuous

[52] Amendments to the Rome Statute of International Criminal Court, art. 8*bis* (1) & (2), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (last visited on Apr. 21, 2015). *See also supra* note 22, at 106.

[53] Amendments to the Rome Statute of International Criminal Court, art. 8*bis*, Nov. 29, 2010. It provides: "Crime of Aggression: (1) For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations; and (2) For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
c. The blockade of the ports or coasts of a State by the armed forces of another State;
d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; [and]
g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

[54] *Supra* note 10, at 152; *supra* note 5, at 73. It provides: "War itself, as before remained outside the province of law, its conduct only having been brought under legal regulation."

example of a rule in international law having the character of *jus cogens*.[55] Thus, *jus cogens* principle bars the illegal the use of force. *Jus cogens* was not applied to international law in the classical period. Actually, the ILC did not pay attention to *jus cogens* in its list of agenda at the time when Justice Pal considered use of force under sovereign right of self-defense.[56] When Justice Pal maintained: "In present case the alleged customary law, if established, would destroy a well-established fundamental law, namely, the sovereign right of each national state,"[57] he was invoking the horizon of established general principles of international law to limit the illegal use of force under sovereign right of self-defense; adhering the means of universal principle of *jus cogens*.

VI. Conclusion

The term 'aggression' is not unjustified *per se*. The terms 'aggression' and 'self-defense' are interrelated.[58] It may complement the sovereign right of self-defense when it is limited to legitimate use of force. But extreme act of aggression may dilute the right under self-defense. In other sense, illegal use of right under self-defense may lead to war of aggression. Cardinal point is to identify the extent of use of force under the right of self-defense in order to clarify the notion of aggression. Justice Pal's view is pragmatic in a sense he was not confined in static concept of *subjective ends*, but preferred to consider *objective conditions* for the fragmentation of "act of war" from the "act of aggression."[59] He reiterated the ultimate need of general

55 Draft Articles on the Law of Treaties with Commentaries art. 50(1), [1966] II, Y.B. Int'l L. Comm'n 247-9 (1967).

56 *Jus cogens* was first included in the work of the Commission in the Third Report by G. Fitzmaurice, Special Rapporteur on the Law of Treaties (A/CN. 4/115), under the title "legality of the object." *See* Documents of the Tenth Session including the Report of the Commission to the General Assembly, [1958] II,Y.B. Int'l L. Comm'n 26–7 (1958). Then, in Draft Articles on the Law of Treaties 1966, the Commission included three draft articles on *jus cogens*, namely Draft Articles 50, 61 and 67. These provisions were retained, albeit with some amendments, in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. *See also* Annex of the Report of the International Law Commission, 66th Sess., U.N. Doc. A/69/10, *available at* http://legal.un.org/ilc/reports/2013/All_languages/A_68_10_E.pdf (last visited on Apr. 21, 2015).

57 *Supra* note 10, at 121; *supra* note 5, at 59.

58 *Supra* note 4, at 1096. It reads: "This was a substantial concession to the idea embedded within crimes against peace that wars could be categorized as either illegitimate (aggression) or legitimate (self-defence or sanction)."

59 Strong inclination towards objective consideration can be identified in Pal's view when he implied: "It is the elimination of any objective legal authority endowed with the competence to ascertain whether the duty of good faith has been complied with, which would largely be destructive of the legal objective of the Treaty so interpreted." *See supra* note 10, at 99. [Emphasis added]

principle of international law to limit illegal act of aggression under the right of self-defense. The author is to conclude the paper by quoting Justice Pal's opinion: "The conception of aggression being only the complement of that of self-defense, so long as the question whether a particular war is or is not in self-defense remains unjustifiable…"[60]

[60] *Supra* note 10, at 96; *supra* note 5, at 48.