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Nuremberg Trial to Third World Approaches to International Law

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ABSTRACT

The Second World War marked a pivotal moment in the evolution of international law, particularly through the establishment of war tribunals. This paper examines the Tokyo Trials through the lens of Justice Radha Binod Pal's dissenting opinion, which critiqued the tribunal's foundation and highlighted the inherent biases of victor's justice, colonialism, and Western hegemony. Pal's dissent majorly challenged the retroactive application of laws and the tribunal's jurisdiction as well as also criticised the exclusion of colonial violence from legal scrutiny. His arguments laid the groundwork for Third World Approaches to International Law (TWAIL), which critically analyses how international legal systems perpetuate power imbalances rooted in Western hegemony.

The paper traces the historical development of victor's justice, from ancient practices to modern tribunals of Tokyo and Nuremberg. It highlights how victors have historically imposed unilateral justice on the vanquished, a trend evident in the Treaty of Versailles and the post-war tribunals. Justice Pal's dissent questioned the legitimacy of these tribunals, arguing that they lacked jurisdiction over pre-war actions and violated principles of legal certainty by applying ex post facto laws. His critique resonates in modern contexts, such as the challenges faced by the International Criminal Tribunal for the former Yugoslavia, and for Rwanda where similar issues arose.

Pal's dissent also addressed the ambiguous definition of aggression in international law, arguing that aiding nations with arms could constitute aggression. This perspective has influenced TWAIL, which critiques Western states for their involvement in conflicts for economic gain. The paper further explores the selective application of law, particularly in cases like the Iraq War and the trial of Saddam Hussein. Illegitimacy of colonial aggression and the need for equality among nations remains relevant, as seen in disputes over Western Sahara and Kosovo.

I. INTRODUCTION

Corporate Second World War was an instrumental event in the history of international law which shaped many modern thoughts. One of the most important and widely discussed events

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from the perspective of International Law has been establishment of war tribunals to punish the war criminals after World War II ended. In this paper, author is going to discuss the establishment of these tribunals from the perspective of Justice Radha Binod Pal's dissent and the establishment of Third World approaches to International Law (TWAIL). The dissenting opinion of Justice Radha Binod Pal during the Tokyo Trials remains one of the most significant critiques in the history of international law. Pal's dissent did not merely challenge the legal basis of the post-war tribunal. It also questioned the underlying structure of power, colonialism, western hegemony, and Victor Justice that shaped international law. His dissenting opinion set a powerful precedent for later critiques of international legal system. Being one of the first members from Global South, his dissent highlighted the unequal application of the law on the vanquished while giving a clean chit to the victors. His dissent mentions a detailed discussion on the exclusion of colonial violence from legal review. This discussion paved the way for the development of Third World Approaches to International Law.

TWAIL does not present a single, unified narrative on any issue. It offers a diverse and critical lens through which the evolution of international legal systems is analysed. Focus is given on how these systems perpetuate modern forms of domination rooted in colonialism and imperialism. Justice Pal's dissent laid the foundation for many of the themes central to TWAIL. It addresses the illegality of retroactive application of law to punish the vanquished. The sovereignty of States in the Global South being determined by the western world. Selective application of international law, which continues to shape modern legal discourses.

This paper further examines the long-term impact of these tribunals on the development of international law, particularly through the lens of TWAIL. It explores how criticism of post-war tribunals has led to an expansive definition of aggression, war, and jurisdiction of different tribunals. This paper will follow the structure of Justice Pal's dissent, using his arguments to explore their wider significance and development. This paper further aims to highlight how his dissent challenged the established norms of international law. Furthermore, how TWAIL paved the way for future challenges to the international legal system.

II. HISTORICAL DEVELOPMENTS LEADING TO TOKYO TRIBUNAL

The concept of Victor Justice has roots in history and existed for almost all times of human history of wars. Victorious powers often set the terms of justice unilaterally and impose harsh penalties on the defeated. In ancient times, victors would frequently exact vengeance on the vanquished through forced reparations, land seizures, or subjugation, following this cycle of punitive justice as a norm. In the modern era, this approach has evolved but continues to persist.

A notable example could be aftermath of Napoleonic Wars. The Congress of Vienna in 1815,[3] reshaped European borders and governance in ways that favoured victors like Britain and Austria. This notion of Victor Justice of wielding power to enforce punitive measures and reshape political landscapes sets the tone for the punitive approach. It is this approach that would later be formalized in international tribunals following both World Wars.

In the Indian Context, Balban also followed this principle to reaffirm his authority. In the 13th century, Sultan Ghiyasuddin Balban, one of the most powerful rulers of the Delhi Sultanate, got to know that there is a call to rise against the empire. In Bengal, the local rulers defied his authority. In response to this defiance, Balban launched a ruthless military campaign against Bengal. He was determined to bring it under his control. When Balban's forces defeated the Bengal's leaders, he ordered the king's execution. Thereafter, he went on to impose harsh punishments to the nobility, commanders, and soldiers who had dared to resist him.

As a stark warning to everyone, Balban instructed that the heads of the rebels be displayed on poles, lining the roads and city entrances. This horrific spectacle was intended to break the spirit of the people. To make it absolutely clear that defiance against the Sultan would lead to brutal consequences. Balban's campaign in Bengal became an infamous story. Ever since, it has become a powerful example of Victor Justice. Wherein the victor unilaterally defined justice, using punishment to enforce submission. It left the population under the shadow of constant fear and control.[4]

This approach of Victor Justice was evident after World War I (WWI), when Germany was compelled to sign the Treaty of Versailles.[5] This treaty had a great impact on shaping the political and economic instability in Germany.[6] It was largely due to this treaty that a Fascist government was established, leading to the subsequent onset of World War II (WWII). After WWII, Nuremberg trials and Tokyo trials took place to fix individual responsibility for the war. These tribunals were established to punish individuals for war crimes, crimes against humanity, and crime against peace. The Tokyo tribunal prosecuted the Japanese war criminals.

III. VICTOR JUSTICE AND THE PROBLEM OF JURISDICTION

The first criteria for a court's authority to conduct a trial is establishing jurisdiction. Justice Pal noted that this tribunal will not have jurisdiction primarily for three grounds. First, the crimes

[3] Ozan Ozavci, A Priceless Grace? The Congress of Vienna of 1815, the Ottoman Empire and Historicising the Eastern Question, 136 The English Historical Review 1450 (2021).
[4] SIR HENRY MIERS ELLIOT & JOHN DOWSON, THE HISTORY OF INDIA AS TOLD BY ITS OWN HISTORIANS: THE MUHAMMADAN PERIOD, (London, Trübner & Co. 1869).
[5] CARL T. SCHMIDT, GERMAN BUSINESS CYCLES, 1924-1933 4, (NBER 1934).
[6] JAMES W. ANGELL, THE RECOVERY OF GERMANY 1-16, (Yale University Press, 1929).

to be tried by the tribunal must be limited to WWII. Justice Pal noted that certain incidents fell outside the court's jurisdiction, including the Manchurian Incident of 1931. Furthermore, he excluded all the activities which happened before the WWII. Second, tribunal does not have jurisdiction for conspiracy for acts done before WWII. Third, tribunal cannot accept law made by the victors. That means that the victors can make a tribunal but they cannot make international law.

Jurisdictional questions similar to those raised by Justice Pal have also been raised in later cases involving other tribunals. It has been raised in tribunals established by the UNSC. In ICTY and ITCR, jurisdiction was challenged on similar grounds. These challenges are typically established on three main contentions. First, the establishment of these tribunals exceeded the UNSC's authority. Second, the primacy given to these tribunals over national courts undermines national sovereignty. Third, the jurisdiction of an international tribunal should not extend to internal conflicts such as civil wars. Jurisdiction issues have remained a contentious issue in international law.[7]

Justice Pal's dissent not only addressed the tribunal's jurisdiction but also highlighted broader legal principles, such as the invalidity of ex post facto laws. He argued that creating ex post facto laws to prosecute individuals undermines the legitimacy of judicial processes. He noted that when the constitution of USA does not allow promulgation of the ex post facto laws,[8] it cannot be done by the tribunal as well. Prohibition of creation of ex post facto laws does not violate the sovereignty of a nation. Restriction on ex post facto laws is because of principles of fair trial. This is a universal principle recognised in all major international conventions and covenants now.[9] United Kingdom made a legislation to punish war crimes of WWII by giving power to make ex post facto laws.[10] This example is not a derogation of international law,[11] because the offences existed in law at the time when they were committed.[12]

In reality, the major issue is whether this criticism should be sustained. It is an undeniable truth that various war crimes were committed by the Axis Powers.[13] There were two options before any post war tribunal judge. First, accused cannot be prosecuted because of invalidity of ex post

[7] Colin Warbrick & Peter Rowe, The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case, 45(3) ICLQ 691 (1996).
[8] U.S. CONST. art. I § 9 and 10.
[9] International Covenant of Civil and Political Rights art. 15, Dec. 16, 1966, 999 U.N.T.S. 171.
[10] War Crimes Act, [1991] c.13 (U.K.).
[11] V. Spiga, Non-retroactivity of criminal law: a new chapter in the Hissene Habré Saga, 9(1) J. Int. Crim. Justice 5, 11–12 (2011).
[12] Kryvoi, Y. and Matos, S., Non-Retroactivity as a General Principle of Law, 17(1) Utrecht L Rev 46, 51.
[13] Den Plesch, Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes, Georgetown University Press, 2017.

facto laws or second, by application of retrospective law the accused can be punished. Following the first path leads to undeniable violation of the principle of justice and following the second principle violates the legal certainty aspect. This could have been solved by the Radbruch Doctrine.[14] It stated that any law which is inhumane and there is no attempt to do justice then that law cannot be considered as law. It negates the nature of the law itself which declares an executioner to kill thousands of people or which may allow any war crime. This solution offers two advantages. First, any person who under an arbitrary regime is faced with this dilemma will have greater moral responsibility to not acknowledge that law thereby saving the innocents as well as executioners. Second, it does not require a regime to be ousted for someone to reject the authority of unjust laws. The criticism is when any individual will know that moral obligation should prevail over legal obligation. This has been answered by Radbruch as well that not all laws are to be disobeyed 'unjust laws' can be obeyed and it is only utterly unjust laws which strikes at your conscience that has to be rejected. Although this did not came into practice.

In modern context, ex post facto laws have been continued to be used by the Western States. Bush Administration created a third category in IHL of "Unlawful Enemy Combatant" for Al-Qaeda militants.[15] They could have been categorized as civilians who had taken direct part into the hostilities and punished in accordance with law. Though Al-Qaeda's acts would have drawn criticism but USA cannot make a third category to punish militants. USA can influence or interpret international law; it cannot create international law. There are just two categories in IHL i.e., of Combatants and Civilans.[16] For punishing members of Al-Qaeda only existing laws could have been applied.

Justice Pal noted that these tribunals have jurisdiction to try matters on the basis of international law. They cannot decide matters on the basis of law decided by the victors, which will take retroactive application. The tribunals should have the authority to judge the validity of provisions of the declaration enacting it. As the argument of the majority that challenging the declaration will render whole tribunal invalid is not correct. This analysis of Justice Pal found resonance in a later case of ICTY. ICTY in Tadic case, noted that it had the authority of determining it could assess the lawfulness of the actions which established it.[17]

[14] Radbruch, Gustav, Statutory Lawlessness and Supra-Statutory Law, 26(1) OJLS, 1-11 (1946).
[15] Finkelstein, Claire, 'Fighting State Actors with the Tools of Hybridized Warfare: Can the Law of Armed Conflict be Saved?', in Jens David Ohlin, and others (eds), Between Crime and War: Hybrid Legal Frameworks for Asymmetric Conflict (New York, 2023; online ed., Oxford Academic, Dec. 15 2022),
[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3.
[17] Prosecutor v. Dusko Tadic, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995.

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Jurisdiction issues complicate legal proceedings regarding historical actions and offenses. To conduct a fair trial before a fair and impartial tribunal, it is imperative that both the victors and vanquished should be tried. In Tokyo and Nuremberg trial, only the axis powers were punished. This approach of unfair mechanism in international law can be observed in later cases of ICTY and ICTR. In Tadic case,[18] court observed that the conflict was of international nature. The tribunal criticised the ICJ Judgement in Nicaragua v US,[19] wherein liability was affixed on US based on effective control test.[20] It is a usual practice that judgement of a tribunal is not criticised but differentiated on the facts. The outcome of these two cases were contrasting in nature. US did not pay the compensation in Nicaragua case and did not participate in the trial itself; but ICTY punished the individuals for conflict which was not international in nature based on effective control test. To punish them, the tribunal decided to apply overall control test. The stark difference between these cases shows the unfair application of international law.

IV. SCOPE OF LIABILITY AND AUTHORITY OF THE TRIBUNAL

It is important to note that United Nations Security Council was formulated when Potsdam Declaration took place.[21] It was possible to conduct the prosecution through a UNSC Resolution.[22] This approach would have allowed a fairer dispensation of justice, along with diverse perspective being offered. Although this point has not been raised by Justice Pal in his dissent. The position is clear that the Victor's had the authority to give a declaration and constitute a tribunal. The whole question of Victor Justice would not have arisen if the allied forces had taken the route of UNSC.

Victor Justice leads to questions on fairness in wartime trials and accountability. Justice Pal noted that holding Japan accountable for actions prior to 1931 would violate international law. He explained that the invasion of Manchuria marked the point after which Japan could be held liable for its actions. He further noted that the tribunal cannot prosecute individuals for all their life's doing. The jurisdiction of the tribunal must be limited to offences committed during the period for which it has been established. Phosphates in Morrocco case in PCIJ noted that retroactive application of treaties would be questionable for two grounds.[23] First, it will give rise to revival of old disputes. Second, it will make the States liable for acts for which they could

[18] Tadic case, *supra* note 13, at 33.
[19] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.
[20] Karin Ollers-Frahm, Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions, 5 MAX PLANK UNYB 69, 79-80 (2001).
[21] Potsdam Declaration, NATIONAL DIET LIBRARY, https://www.ndl.go.jp/constitution/e/etc/c06.html.
[22] U.N. Security Council, https://main.un.org/securitycouncil/en (Oct. 23, 2024).
[23] Phosphates in Morocco (It. v. Fr.), Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74 (June 14).

not foresee the legal implications. Although Justice Pal did not mention this judgement. It could have further strengthened the argument for non-application of retroactive laws.

Non-retroactive application of treaties has been accepted subsequently in various courts. ICJ in the matter of Ambatielos case noted that retroactive application of a treaty is invalid in law.[24] Subsequently, this principle was codified in Article 28 of VCLT.[25] In current BIT disputes, it is this retroactive application of laws that is at question but it is decided in favour of non-application of the retroactive laws.[26]

V. LEGALITY OF WAR AND WESTERN HEGEMONY: GLOBAL SOUTH STRUGGLE FOR INDEPENDENCE

To determine the legality of the war, four periods were identified by Justice Pal. First, before WWI. Second, after WWI but before Paris Pact. Third, after Paris Pact but before WWII. Fourth, post WWII. War was a legitimate recourse during both the first and second period. The real dilemma began with the Paris Pact. It declared war to be invalid except for self-defence. The major issue was that it left States to be the sole judge of their actions. Thereby, granting States the right to resort to war when they feel threatened.

To consider the argument that war has become illegal, custom as a source of law was pleaded. Custom emerges only when two requirements has been fulfilled opinion juris and State practice.[27] It was noted that neither of these criteria were fulfilled. States continue to rely on war and requirement of *opinio juris sive necessitates* is not fulfilled. This analysis is valid, even in modern context. States continue to resort to war and it has been accepted internationally to be valid.[28]

It was pleaded by the prosecution that similar to common law, international law must develop to give effect to social changes. Justice Pal did not agree with this point, he claimed that there has not been any societal change to claim that war has become a crime. Criminalisation of war has not emerged from the Paris Pact. Thereby, only because victor wants to punish the individuals of vanquished State, they cannot do so by enacting law which is not in force. Two American members post WWI noted that heads of State cannot be tried before the court of

[24] *Ambatielos* Case (Preliminary Objections), ICJ Rep. (1952) 28 at 40.
[25] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS p. 331, art. 28.
[26] Suranjali Tandon, Issues and Challenges with Applying Investment Agreements to Tax Matters in the Context of India's Experience, 31 (1) Asia Pacific L.R. 235.
[27] Roozbeh (Rudy) B. Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, 21 Eur. J. Int. Law 173, (Feb. 2010).
[28] Shelly Aviv Yeini, War, 44 U. Pa. J. Int'l L. 701, 710 (2023).

justice for ordering a war.[29] This particular analysis was submitted to the President of USA. Justice Pal thus noted that heads of State immunity must prevail as similar stand was taken post WWI by US scholars.

This debate has again arisen post Rome Statute. The question as to which will take primacy, heads of State immunity or jurisdiction of international courts has been debated by various scholars.[30] Western States continue to argue that the jurisdiction should be wide enough to cover the heads of State. Many States would disagree from this, it essentially subjugates the authority of the heads of their State. Thereby, undermining the sovereignty of that State.

There have arisen two approaches for this debate. First, an approach by customary international law which allows the State parties to refuse arrest of head of States of a non-party of Rome Statute. Second, Security Council approach which by virtue of Security Council Resolution 1593,[31] has effectively placed non-State parties as that of a State party.[32] Although this debate is yet to be settled, but it raises the question of primacy of Western States in deciding international law at their behest.

VI. INDIVIDUAL OR STATE RESPONSIBILITY

Justice Pal observed that various laws including Hague Regulations of 1899, 1907 mentions about the State responsibility and not Individual Responsibility. When international community has agreed to make war unlawful, it does not mean that they meant to make it a crime. No distinction is drawn by Paris Pact between aggressive war or war for self-defence. Justice Pal noted that to make crime against peace, a crime. It would not be in consonance with the Paris Pact. It is under the head of 'crime against peace' that 23 out of 25 people were punished in the Tokyo trial.

Individual criminal responsibility was not sought through this pact. It can be observed that Justice Pal did agree with the fact that individuals can be punished for war crimes but they cannot be punished for taking direct part into the hostility. The war in breach of certain treaties, pact, agreement would not amount to any crime but the violation of that particular treaty. These pacts or agreements would allow the other party to even resort to war but does not bring in an element of individual criminal responsibility. Thereby, he drew a distinction between individual

[29] Garner, J.W., Punishment of Offenders Against the Laws and Customs of War, 14 AJIL 70, 70–94 (1920).
[30] Max Du Plessis & Dire Tladi, The ICC's immunity debate – the need for finality, Blog of the European Journal of International Law, (Aug. 11, 2017), https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/.
[31] S.C. Res. 1593, ¶ 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005).
[32] Erik TarBush, Immunity and Impunity: Personal Immunities and the International Criminal Court, 4 PKI Global Justice Journal 24, (2020).

and State responsibility.

It is only for offences which does not follow the universal principles of IHL such as principle of proportionality, distinction and reducing unnecessary suffering that combatants are held responsible. Rome statute's Article 6, 7 & 8 defines and enlist crime against peace, crime against humanity and war crimes, with essential elements to punish individuals.[33] Despite these principles being codified now, their selective application highlights the disparity in the enforcement of international law. This selective enforcement becomes particularly evident when examining how modern Western States have conducted trials.

In modern context, Western States have continued to violate international law. Some notable instances could be Iraq war and the trial of Saddam Hussain. Saddam Hussain was hanged after an unfair trial, wherein US led forces were never able to prove that Saddam Hussain's government had weapons of mass destruction and links with Al-Qaeda.[34] It has been mentioned that the sole purpose of the trial was to give effect to moral justification for the war.

Even in case of Kosovo liberation, NATO led forces were used to form the interim government and Serbia's territorial integrity was violated. It was noted in the dissenting opinion of Justice Bennouna that this would, in fact, leave the parties to a dispute to face off against each other. It was mentioned by Justice Bennouna that due to the deadlock in the UNSC, Serbia had the authority to claim territorial integrity. It would lead to each State having unilateral position to impose its position.[35] What essentially followed from Kosovo liberation was NATO led forces deciding the international order, when Chapter VII of the UN Charter grants this power to UNSC.[36]

VII. DEFINING AGGRESSION: A CHALLENGE TO INTERNATIONAL LAW

It is difficult to define the term "aggressive war" and furthermore difficult to assign each war post 1937 such status of aggressive nature. One of the foremost arguments of America was Pearl Harbour attack which led the prosecution to claim that Japan was the aggressor. This argument lacked conviction as America became an aggressor when it helped China with arms and ammunition. Although Justice pal has been criticised for this argument that supply of arms and ammunition does not make a party aggressor or a part of the armed conflict. This particular approach has become a part of TWAIL that a party by supply of weapons or ammunition can

[33] Rome Statute of the International Criminal Court art. 7 & 8, July 17, 1998, 2187 U.N.T.S. 90.
[34] Christian Eckart, Saddam Hussein's Trial in Iraq: Fairness, Legitimacy & Alternatives, a Legal Analysis, Cornell Law School Graduate Student Papers, Paper 13 (2006).
[35] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (DISS. OP. BENNOUNA), Advisory Opinion, I.C.J. Reports 2010, p. 403.
[36] U.N. Charter ch. VII.

become an aggressor.[37] Having a contrary approach will allow perpetuating war and allowing funding of armed conflicts. A contrary approach will be solely for the profits of the nation supplying arms and ammunition.

Justice Pal noted that the fundamental difficulty of this tribunal. These trials (Nuremberg and Tokyo) have been made on the dictates of humanity. This goes contrary to the practical difficulty that States continue to dominate other States. Elaborating upon aggression, USSR and Netherlands when they waged war against Germany were not considered to be aggressors. The issue with this approach was that even when Axis Powers were losing, they were attacked. The only justification of waging war is that the very life and vital interests of the State will be endangered. This was not fulfilled when a losing side was attacked by the Allied Powers.

Justice Pal while quoting Lord Wright makes an argument that the only justification of war is self-defence or self-protection.[38] A State which is not following this principle can be called an aggressor. In the context of aggression, domination of one State by another State is not justifiable. A nation helping another nation to free it from aggression has been accepted as a valid justification. In this sense, Justice Pal mentions that a nation helping another nation to free itself will also amount to a valid justification.

Justice Pal noted that the western world has continued to benefit from the eastern hemisphere. It is difficult for them to profit from it and repent it at the same time. The impact of colonialism is visible even today. There are various implications of this, but even if we restrict it to economic outcome. The benefits that the colonisers got through colonialism is immense and its effect is plainly visible even today.[39]

Western States have continued to engage in acts of aggression. A prominent example would be of Western Sahara, wherein Spain divided the territory of Western Sahara between Morocco and Mauritania.[40] This approach will be considered as aggression because the lawful course of action would have been to recognise Western Sahara. Scholars have stressed on this part that aggression would not only be restricted to armed attacks. This approach by Western world will also be considered as "Aggression".[41]

The concept of colonialism as aggression has not been accepted. It has been argued that because

[37] Stefan Talmon, The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine, Bonn Research Papers on Public International Law, Paper No 20/2022, Apr. 2022.
[38] Quincy Wright, Changes in the Conception of War, 18(4) AJIL 755, (1924).
[39] James Feyrer & Bruce Sacerdote, Colonialism and Modern Income – Islands as Natural Experiments, NBER Working Paper No. 12546 (2006).
[40] United Nations, Treaty Series, vol. 988, at 257 (1975).
[41] Yahia H. Zoubir, Stalemate in Western Sahara: Ending International Legality, 14:4 MID. E. POL. 158, 158 (2007).

these colonies were established because of a contract, they are valid in law. They conveniently do not mention a basic principle of contract i.e., contracts formed under coercion or fraud are void ab initio.[42] This particular aspect has been argued by India before the UNSC to claim that Invasion of Goa although done by contract, was in fact void. Even when Portugal's right over Goa had arisen due to application of force, this argument of India was rejected.[43] India also mentioned that when the territory itself was captured by force and was invalid even then, how it can be valid now. Theory of "continued aggression" has been rejected by Western States.[44] UNSC observed that only those forces which are valid as per Article 51 of UN Charter are valid in law. This convenience of deciding international law by theses States was at the heart of Justice Pal's dissent.

VIII. CONCLUSION

Dissenting opinion of Justice Radha Binod Pal in the Tokyo Trials serves as a foundational critique of international law's structure. It particularly focuses on the biases rooted in colonialism and Western hegemony. Pal's dissent challenges the authority of post-war tribunals. He questions the selective jurisdiction of these tribunals and retroactive application of laws made by the victors. Even today, there has been blatant violation of these principles. It is visible from trials such as that of Tadic case in ICTY.

He noted that these tribunals and law decided by the victors, disproportionately impacted vanquished while drawing exception for the victors. His dissent focused on how colonial and imperial violence was excluded from legal analysis, a question that is central to TWAIL. TWAIL scholars advocate for a critical examination of international law's role in perpetuating power imbalances. Many scholars echo Pal's observations about Victor Justice, where international legal norms serve Western interests over global equity and Justice.

Pal argued against the tribunal's jurisdiction on several grounds. He criticized the retroactive criminalization of acts and the tribunal's authority. International law must adhere to universally recognized principles of law, thereby prohibiting ex post facto laws.

Further, Pal analysed the ambiguous definition of aggression in international law. He argued that aiding nations with arms constitutes aggression. Even without direct involvement and mere supply of arms would be violative of international law. This viewpoint has influenced TWAIL,

[42] Robert J. Miller & Harry Hobbs, Unravelling the International Law of Colonialism: Lessons from Australia and the United States, 28 MICH. J. RACE & L. 271 (2023).
[43] Robert E. Gorelick, Wars of National Liberation: Jus Ad Bellum, 11 Case W. Res. J. Int'l L. 71 (1979).
[44] PAGE LOUISE WILSON, THE INTERNATIONAL POLITICS OF AGGRESSION: AN HISTORICAL ANALYSIS, 141 (ProQuest LLC 2007).

particularly Western States are addressed for involvement in armed conflicts for economic gain. Pal noted that treaties like the Paris Pact had insufficient consensus to universally criminalize war. It gave the power to the States to be the sole judge for their action. Thus, questioning the tribunal's legitimacy in prosecuting war crimes without established international law.

Various current international practices can be challenged based on the Pal's critique. Such as the "Unlawful Enemy Combatant" classification used by the U.S. It can be asserted that this classification lacks any basis in IHL. The unfair trial of Saddam Hussain, Kosovo's Liberation violating Siberia's territorial integrity and even without UNSC's authorisation. Western Sahara's unfair division between Morocco and Mauritania. UNSC resolution circumventing law on heads to State immunity to grant jurisdiction to the international courts. These examples show that the international law by the Western States have been a threat to the other States.

Justice Pal emphasized the West's historical aggression through colonialism and how such actions went unpunished under international law. His critique highlighted the Western bias in upholding sovereignty for some while denying it to others. It sets a precedent for TWAIL's ongoing critique of international law as a tool for modern domination. Pal's arguments continue to inspire every individual or nation challenging west centric frameworks in international law, asserting the importance of equal treatment for all nations. His concluding quote of Jefferson Davis, set the tone for the international law which existed at that time and continues to exist even today:

"When time shall have softened passion and prejudice, when Reason shall have stripped the mask from misrepresentation, then justice, holding evenly her scales, will require much of past censure and praise to change places."

- *Jefferson Davis,*

First President of Confederate States of America

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