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A CRITICAL STUDY ON INDIVIDUAL CRIMINAL RESPONSIBILITY AND THE CRIME OF AGGRESSION: FROM THE NUREMBERG TRIALS TO THE KAMPALA AMENDMENTS

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ABSTRACT

The article is concerned with the question of whether the revolutionary legal concept of individual criminal responsibility for the crime of aggression, developed at Nuremberg and Tokyo in 1945-1946, has been an effective universal norm or a device for upholding the status quo, and protecting the powerful against the prosecution of the powerless. The article builds on the pre-1945 legal framework, the Nuremberg and Tokyo tribunals, the post-war legal jurisprudence (Nicaragua, Iraq, Ukraine, Gaza), and the Kampala Amendments to the Rome Statute from 2010, and concludes that the enforcement of the prohibition on aggression has always been based on geopolitical power and not legal principle. The national exemption of Article 15bis(5) and the veto of the P5 on Security Council referrals are structurally similar to what Justice Radhabinod Pal had observed in his dissent in Tokyo in 1948. No prosecution has started in the seven years since the Kampala Amendments have come into force. The article ends with a plea for "structural candor," that is, recognition that international criminal law is a law that can be imposed on the weak but not much on the middle powers, and applied selectively to great powers, without losing its moral imperative and without being complete in a political sense.

Keywords: Crime of Aggression, Nuremberg, Kampala Amendments, Pacta Sunt Servanda, ICC Article 8bis, P5 Veto, Justice Pal, Selective Justice, Nullem Crimen Sine Lege.

Section I

Pre-1945 Legal Black Hole and the Nuremberg Revolution

Prior to the Second World War, a pre-war international legal system was essentially state based, with sovereignty as its operating principle and there was very little that was called individual criminal responsibility for aggression. In the context of the mandate the use of force became even more than merely tolerable, in some respects it became an accepted national policy instrument that was justifiable in order to gain territory and resources and to demonstrate one's power status. Only states were legal subjects of international law and their disputes were settled by diplomacy, arbitration or force. The most important pre-war effort to ban aggressive war was the Kellogg-Briand Pact of 1928 (formally, the General Treaty for the Renunciation of War). It was ratified by 63 states and its Articles I and II proclaimed that the contracting parties have abandoned the use of war as an instrument of national policy. However, the Pact never held any real legal force since it had no enforcement mechanism, tribunal or individual criminal liability. The international community responded diplomatically with dismay and with nothing but ineffective League of Nations resolutions to Manchuria in 1931, Ethiopia in 1935, Germany remilitarising in the Rhineland in 1936. There had never been a

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sharper divergence between expectations and enforcement.

The London Charter of 1945 for the establishment of the International Military Tribunal at Nuremberg was an exception to this rule, and at the same time a true legal revolution and a legally dangerous power play. Under Article 6(a), which was a novelty in positive international law, "crimes against peace" were defined as crimes of planning, preparation, initiation, or waging wars of aggression. Under this provision 12 leading Nazi personalities, including Hermann Göring and Joachim von Ribbentrop, were sentenced on 30 September, 1 October 1946.

From the beginning there was disagreement over the doctrinal underpinnings. The Tribunal referred to the Kellogg-Briand Pact, the Treaty of Versailles, and what it described as 'crystallised customary international norms' to support its claim that there was no use of the word 'aggressive' in the definition of war, and that therefore, aggression was not considered to be prohibited before 1939. It compared its uses with those of domestic law — which held accessories to crimes liable, even if the actual crime itself had not been codified — to provide a foundation for individual responsibility in pre-existing legal principle.

However, the argument on closer examination is not convincing. The language of the Pact referred to states; it envisioned diplomacy and collective action. It did not include the element of criminal responsibility for any one. But most importantly, there were no objective criteria to differentiate between legitimate uses of force (such as self-defence, pre-emptive action, protection of nationals) and aggressive wars the Tribunal condemned. The Tribunal did not accept semantic arguments but was only prepared to provide minimal guidance in terms of moral intuition as a test for the law.

The Dissent of Tokyo Parallel and Justice Pal Under an international charter that parallels the Nuremberg Article 6(a), the International Military Tribunal for the Far East in 1946 expanded the scope of guilt to cover Japanese actions since the Mukden Incident of 1931.The International Military Tribunal for the Far East (IMTFE), convened in 1946 under a charter patterned after Nuremberg's Article 6(a), extended the reach of guilt to Japanese actions since the Mukden Incident of 1931. Twenty-five of the 28 Japanese leaders were convicted with the Prime Minister Hideki Tojo among the executed. Most of the judgment referred to "the gathering momentum" toward individual criminal responsibility for aggression, and to Nuremberg as precedent.

After that Justice Radhabinod Pal (whose dissent was 1,235 pages long) showed, in a clinical way, the flaws of the structure. Pal said that peace was not a crime at the time, the trials were acts of victor's justice, and that Allied aggressions, such as the Soviet invasion of Poland, and the drop of atomic bombs on Hiroshima and Nagasaki were systematically exempted from the trials' scrutiny. French Justice Henri Bernard and Dutch Justice Bert Röling cast additional doubts on retroactivity. The Tokyo tribunal was both a synthesis of precedents and a declaration of its nature – a revolution in law, an authority that was not based on the existing tradition but on the control of the occupation troops, and that of the victorious coalition.

Section II

The three principles of legality, retroactivity and nullum crimen sine lege.

The jurisprudential point of critique on the Nuremberg and Tokyo trials is the same: nullum crimen sine lege, no crime without law. This principle of criminal law, stemming from Roman law and brought to the fore by Enlightenment-era thinkers such as Cesare Beccaria, is that crimes and their punishments must be set forth in law ahead of the offense committed. It has been universally codified in the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). It was abused at Nuremberg and Tokyo.

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US Supreme Court Justice William O. Douglas described the trials to be "substituting power for principle. Hermann Jahrreiss, defence counsel, correctly pointed out, and as a matter of strict positivism, that the Kellogg-Briand Pact was without any individual responsibility, and that convictions that fell under Article 6(a) were therefore ex post facto. The Tribunal's answer, based on natural law and universal moral truths, was more morally appealing than it was legally sound.

That Nuremberg verdict, it seemed, was a restriction for judges and not for legislators; no one should be protected from prosecution for actions that flew in the face of basic human dignity, no matter how long it took for a positive law to take hold.

Hans Kelsen's positivism results in a more subtle position. Kelsen felt that aggressive war was not only already forbidden at the state level, but that individual criminal responsibility was what was needed, not something that could be imposed. It was not so much the crime of aggression as the conspiracy charge and the common plan doctrine that concerned him.

In the face of the Nazi catastrophe, the German legal philosopher Gustav Radbruch developed what is known as the Radbruch formula: when a law is in conflict with justice to an intolerable extent (to "statutory lawlessness") the law, or the failure to pass one, can be set aside. The most prominent use of this logic in the history of international law was in Nuremberg and Tokyo.

The Nuremberg innovation was subsequently normatively developed, but with the original retroactivity issue not being addressed. The UN Genocide Convention (1948), the Geneva Conventions (1949), General Assembly Resolution 3314 (1974) as an Agreement on the Definition of Aggression and finally the Rome Statute and Kampala Amendments all confirm the innovation survived. However, confirmation is not resolution: that the violation of nullum crimen sine lege has been a fact of history is not debatable; it is indeed necessary from a just point of view.

Section III

In the Age of American Hegemony Pacta Sunt Servanda

The post-Nuremberg legal order established a norm system based on the principle of universal application of international legal obligations, the principle of good faith (pacta sunt servanda). The lessons of the past 70 years after the London Charter have been learned, and learned with increasing force, that this is an axiom which is only applicable with the help of power.

The United States of America is the state which has done more to sabotage the system it has designed. Rhetoric is not the American kind of exceptionalism, it's the legislative kind. The American Servicemembers Protection Act of 2002 (also known as the "Hague Invasion Act") gives the President of the United States the authority to free any American citizen seized by the International Criminal Court. The fact that the most powerful democracy in the world passed laws authorizing it to go to war against the Netherlands and not have to subject its people to legal proceedings is a telling example of how little faith they have in the criminal accountability of the world's populace. The United States put pressure on more than 100 countries to sign Bilateral Immunity Agreements between 2002 and 2005 that bound them to withhold the transfer of American nationals to the Court if they did not agree to the agreements. In May of 2002, President George W. Bush also "unsigned" the Rome Statute, which is a practice not seen in treaty history; reportedly, he was extremely pleased about that by National Security Advisor, John Bolton.

The case of Nicaragua v. United States (1986). The Case Concerning Military and Paramilitary Activities in and Against Nicaragua is the most important twentieth century post war test of the legal order. By a vote of 12 to 3, the ICJ determined that the United States had breached its customary international law duties through the training, arming, equipping and financing of the Contra rebels and its mining of Nicaraguan harbours. It also discovered violations of the 1956

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Treaty of Friendship, Commerce and Navigation. Washington's response was textbook hegemonic lawfare, with them losing the preliminary objection, refusing to engage in the merits phase, withdrawing their acceptance of the Court's compulsory jurisdiction, and vetoing a Security Council resolution to force them to comply with the Court's judgement. The judgment of the ICJ in Nicaragua has not been enforced so far. The story of the case makes this structural fault at the heart of the post-war system plain. Under UN Charter Article 94(2) the Security Council has the power to implement ICJ rulings but not against a permanent member. It is not an anomaly, nor a regrettable 'concession' to the principle that the architects of the post-war order protected themselves with the veto as a legal shield.

This lack of accountability continues, and the principles of pacta sunt servanda are still far from being enforced: 1986: Nicaragua vs. United States (ICJ) ICJ declared the U.S. as breaching the customary law by arming the Contras and by mining harbours. Security Council enforcement was vetoed by the U.S. Outcome: Judgment unenforced. 2003: Iraq Invasion UN Secretary-General Annan deemed it illegal. The Chilcot Inquiry (2016) identified alternatives that were 'unexhausted'. Outcome: No aggression prosecutions. 2022: Ukraine v. Russia (ICJ) ICJ condemned Russia's actions and called for its termination of operations (13–2). Russia refused to pay attention to it; ICC warrant for Putin on deportation of children only. Outcome: Partial accountability. 2023 – on-going: South Africa v. Israel (ICJ) Interim measures to be taken for the prevention of genocide. U.S. vetoed ceasefires, ICC warrants Netanyahu/Gallant (Nov. 2024). Outcome: Orders unimplemented.

Reviewing Iraq 2003 and the Downing Street Memo. The U.S. and U.K.-led invasion of Iraq in 2003, which never received authorization from the Security Council, is one of the most important acts of state aggression in recent times since the Second World War. Secretary-General Kofi Annan told a BBC reporter in September, 2004, that the invasion was illegal under the UN Charter: "From our point of view, from the UN point of view, it was illegal. It was not an academic view, it was the considered opinion of the head of the organisation whose fundamental law was being broken. After two and a half million words the Chilcot Inquiry has determined in 2016 that the invasion was instigated before peaceful options were exhausted. The Downing Street Memo of July 2002, a classified document of a meeting between British intelligence chief Sir Richard Dearlove and his American counterparts, noted that in Washington military action was seen as "inevitable" and that intelligence was being "fixed around the policy. The Attorney General's thirteen-page legal opinion of January 2003, which determined that the revival argument was a non-starter for legal justification of the invasion, was condensed into one page in a dispatch to the invasion within ten days of that attack, as Chilcot Inquiry found was due to "pressure from the political side and lack of information". If this is applied to this conduct, the Nuremberg definition of "crimes against peace," which describe "the planning, preparation, initiation or waging of a war of aggression or war in violation of international treaties" is hard to differentiate from what actually occurred. Planning was documented to have started at least a year prior. The military deployment was the biggest in the Middle East since the Gulf War. There was no Security Council authorization. The use of manipulation of intelligence to lead to a predetermined conclusion. The architects of the Iraq invasion would be liable to a serious charge under the very definition that led to the execution of Hermann Göring at Nuremberg. That no such accountability followed is not a legal judgement. It is a political one, and it's been the political decision that has been critical since 1945.

Section IV

The Kampala Promise: A Study of Its Structural Dissatisfaction

The same reasoning as Justice Pal's in his analysis of retroactivity can not be applied to the future prosecution of acts under the aggression

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regime of the International Criminal Court as it was given at the Tokyo War Crimes Tribunal. The Kampala Amendments negotiated, codified, and accepted in advance by states, unlike the post-1945 tribunals, allow for in advance the negotiation of the content of article 8bis. But in this regard, the modern concept of aggression is real normative progress – it's not being prosecuted by the imagination of the judge, but by a law enacted by the legislature. However, it comes with a framework of jurisdiction which significantly restricts the effective scope of the crime.

The Kampala system has several safeguards, which are in effect, an architecture of impunity for powerful states. Article 15bis(5) is a categorical exception to the Court's aggression jurisdiction in favor of the nationals of non-party states, except in cases referred by the United Nations Security Council. This exclusion also permanently protects the citizens of the world's most important military powers — such as the United States, Russia, China and India — who are not parties to the Rome Statute. This is supplemented by the fact that the referrals of aggression by non-party nationals are only possible under the Security Council, which has permanent members with veto powers where major powers or their allies are involved politically, in accordance with Article 15ter. Even the substantive definition of aggression, in Article 8bis, restricts responsibility because it requires a manifestation of aggression. The Court has jurisdiction only over acts of force which, by their nature, force, and gravity, are a "manifest violation" of the United Nations Charter. In particular, this does not apply to many interventions that are legally questionable or have political nuances, such as the NATO bombing of Yugoslavia under the guise of "humanitarian intervention," the justification of "revivals' over the war in Chechnya, or the Iraq War under the banner of 'self-defence'. The crime of aggression is now codified and the Court has been given operational powers to prosecute it since 2018, but because of the arrangement of the jurisdiction, no prosecution has taken place yet. The outcome is a system which formally condemns aggression, and which allows the nationals of the most powerful states to remain unexposed to liability.

The Non-Party National Exemption The main structural defect is Article 15bis(5). It shall provide that the Court shall not exercise jurisdiction over the offence of aggression, committed by a national of a State not a party to the Rome Statute. By 2025, the US, Russia, China, India, Pakistan, Turkey, and Israel, seven of the world's most militarily active states, will be completely immune to prosecution under ICC aggression offenses. It's not a drafting blunder. It was the price for American acquiescence to the Kampala Amendments, imposed by a state that also negotiated but didn't sign the Statute — and it deserves close scrutiny. The United States had a court in which it played a role in its design and it gave itself permanent protection without taking on any of the responsibilities that the court has. Under Article 15ter, there remains a gatekeeping role in the Security Council which, in theory, can extend to non-party nationals and achieve this through referral to the Security Council for the purposes of aggression. However, when the aggressor state is a permanent member, or its ally, this mechanism cannot be used with the P5 veto. The two Security Council referrals to the ICC have been to non-P5 states – Sudan (Darfur) in 2005 and Libya in 2011. Structural pattern is consistent, not incidental.

The problem of ad hoc justice in Ukraine. The invasion of Ukraine by Russia on 24 February 2022 is a massive Russian state attack on Europe – the largest since the end of World War II – and is an aggression under any possible definition of the terms of Article 8bis and the UN Charter. The Rome Statute is not applicable to Russia. Article 15bis(5) then removes Russian nationals from the scope of this article. A Security Council referral is vetoed by Russia. The most outrageous act of aggression in eight decades in Europe, therefore, is structurally unsound by the Court which is the most particular of which is its formal jurisdiction to prosecute that crime. This is the system working as intended at Kampala, it's not

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a systems failure. The international community has come up with a proposal to establish a Special Tribunal for the Crime of Aggression against Ukraine, which is similar to the ICTY and ICTR, but limited to aggression, not war crimes or genocide. The proposal has been accepted by over 40 states, the European Union and the Council of Europe by 2025. The immunity problem is tough, though: customary international law provides immunity to the sitting head of state from the exercise of foreign criminal jurisdiction (as established by ICJ in Arrest Warrant case (DRC v. Belgium, 2002)). As a sitting president, Vladimir Putin would have protection on any court that was not authorized by the Security Council — and he has a veto on Security Council authorization. The Ukraine Special Tribunal project is the most open admission since the post-war tribunals that a system of institutions is not able to hold powerful states to account for aggression. The business of "victor tribunals", created ad hoc, is back with us in the twenty first century.

Section V

The Principal must have a full understanding of the regulations and guidelines for effective enforcement when the System Works: Conditions for Effective Enforcement.

In all honesty, the argument of the following pages does not encompass the entire history of international criminal responsibility. The system that saved Bush, Blair and Putin from aggression prosecution has yielded tangible results. The ICTY issued indictments for 161 people and have concluded cases against 90, finding Radovan Karadžić guilty of genocide and war crimes for the Srebrenica massacre. Former President of Liberia Charles Taylor was the first sitting head of state convicted since Nuremberg when he was found guilty in 2012 and sentenced to fifty years' imprisonment by the Special Court for Sierra Leone. In South Africa v. Israel, the ICJ's Bosnia judgment (2007) set the ground rules for state responsibility for failure to prevent genocide. These are concrete successes and not just mere phrases.

However, the circumstances which gave rise to these successes are instructive. The ICTY was able to operate because of a change in the balance of power on the ground, in response to NATO military action in Bosnia and Kosovo, which made it possible to arrest indicted persons. The economic threat issued under the conditionality of entering the EU was in itself the only kind of enforcement, absent in the legal arena, that was applied to Slobodan Milošević and his cohort. The reason the prosecution against Taylor was successful is that he was no longer in power, that no P5 state had a vital interest in protecting him from prosecution and that under American and European diplomatic pressure Nigeria finally handed him over. "Geopolitical alignment, economic leverage and political transition in the target state" have always been necessary for effective enforcement. It's never been done just by the legal process alone with a state protected by a P5 member.

The argument to the contrary, therefore, is not idealist but real. The issue is not what to do to make international law universally self-enforcing — there is always been a distance between what one wants to be, and what one is — but how to broaden the alliance of states willing to use the same enforcement tools and how to separate enforcement mechanisms from the veto power that since 1945 has made hegemonies structurally permanent.

Section VI

Toward a Jurisprudence of Truth

It is not the intention of this article to say that international law is irrelevant or that the enterprise of individual criminal accountability be disavowed. The language of international criminal law, crimes against peace, crimes against humanity, genocide, war crimes, has had a real impact on the imagination of international society that does limit, if not prevent, the worst aspects of state violence. It's better to have some enforcement than no enforcement. The ICC trials of the warlords and the ICTY's verdict in Srebrenica has helped to safeguard real victims and to set real norms. The

meager intellectual dishonesty of intellectuals, however, is to admit that international law is a norm oriented system, and that it is actually of significant force for middle powers, but only selectively for great powers if they choose to abide by the rules. It is a normative order based on an underlying inequality of power, an inequality that is not just inscribed in, but also explicitly established as part of the rules governing the veto power of the UN Security Council. It is not a political mistake that must be regretted or that has been made for political reasons, it is the legal expression of the principle that the winners of WW2 would dominate the post-war legal system forever.

It is important to understand that Justice Pal's dissent in Tokyo was a natural law argument and not a positivist one – that selective law is not law in any meaningful sense, for the conditions of legitimacy require equal application. The Kampala Amendments do not address this argument. Article 8bis offers a positive definition of the crime of aggression which is valid and to a large extent meets the challenge of the retroactivity argument. Does not ensure universal enforcement. This non-party national exemption, the requirement for a manifest violation and the control mechanism role of the Security Council collectively provide the selectivity that has characterized international criminal law since 1945. In 2025, as argued most forcefully by Pal in the case of selectively-held individuals, selective accountability is not outdated, but the present accusation.

Instead of glossing over it with the rhetoric of universal application, a jurisprudence of honesty would start with this asymmetry. Its measure of integrity would be how rigorously its commands were enforced-from the powerful down to the least of these. It would acknowledge that selectivity of international criminal law is not an implementation issue that can be solved through a simple amendment, but a structural issue that must be addressed by political — not just legal means. And it would say without naïveté but not without nihilism that the normative project of universal accountability is moral in a moral sense and institutional in an incomplete sense: still waiting, after eight decades, for its institutional form, the unfinished work of Nuremberg.

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