

A Proposed
DEFINITION OF AGGRESSION
by
COMPROMISE AND CONSENSUS

by
Benjamin B. Ferencz

International Commission of Jurists
Geneva, Switzerland

The International Commission of Jurists is a non-governmental organisation enjoying consultative status with the United Nations Economic and Social Council, with UNESCO and with the Council of Europe. The Commission seeks to foster understanding of and respect for the Rule of Law. The Members of the Commission are:

T. S. FERNANDO (President)	President of the Court of Appeal of Sri Lanka; former Attorney-General and former Solicitor-General of Sri Lanka
PER T. FEDERSPIEL (Vice-President)	Attorney-at-law; Copenhagen; Member of the Danish Parliament
FERNANDO FOURNIER (Vice-President)	Attorney-at-law; Costa Rica; former President of the Inter-American Bar Association; Professor of law
MASATOSHI YOKOTA (Vice-President)	Former Chief Justice of the Supreme Court of Japan
SIR ADETOKUNBO A. ADEMOLA	Former Chief Justice of Nigeria
ARTURO A. ALAFRIZ	Former Solicitor-General of the Philippines
GIUSEPPE BETTIOL	Member of the Italian Parliament; former Minister
GODFREY L. BINAISA	Former Attorney-General of Uganda
DUDLEY B. BONSAI	U.S. District Judge of the Southern District of New York
ALLAH-BAKSH K. BROHI	Former Pakistan Law Minister and High Commissioner
JOEL CARLSON	Former representative of the ICJ in South Africa; U.S.A.
U CHAN HTOON	Former judge of the Supreme Court of Burma
HAIM H. COHN	Supreme Court Judge; former Minister of Justice, Israel
A. J. M. VAN DAL	Attorney-at-law of the Supreme Court of the Netherlands
CHANDRA KISAN DAPHTARY	Senior advocate; former Attorney-General of India
ELI WHITNEY DEBEVOISE	Attorney-at-law; New York
MANUEL G. ESCOBEDO	Professor of law, University of Mexico; Attorney-at-law
EDGAR FAURE	Ministre d'État; former Prime Minister of France
ENRIQUE GARCIA SAYAN	Former Minister of Foreign Affairs, Peru
LORD GARDINER	Former Lord Chancellor of England
BAHRI GUIGA	Counsellor, Court of Appeal of Tunisia
JOHN P. HUMPHREY	Professor of Law, Canada; former Director, U.N. Human Rights Division
OSVALDO ILLANES BENITEZ	Former Chief Justice of the Supreme Court of Chile
HANS-HEINRICH JESCHECK	Professor of law, University of Freiburg, Germany
SEAN MACBRIDE	Former Minister of External Affairs of Ireland
KÉBA M'BAYE	President of the Supreme Court of Senegal
SIR LESLIE MUNRO	M. P. New Zealand; former Ambassador to U.N.
JOSÉ T. NABUCO	Member of the Bar of Rio de Janeiro, Brazil
LUIS NEGRON FERNANDEZ	Chief Justice of the Supreme Court of Puerto Rico
BARON PAUL-MAURICE ORBAN	Professor of law, Belgium; former Minister
GUSTAF B. E. PETREN	Judge and Deputy Ombudsman of Sweden
SHRIDATH S. RAMPHAL	Attorney-General and Minister of State, Guyana
MOHAMED A. ABU RANNAT	Former Chief Justice of the Sudan
EDWARD ST. JOHN	Q.C.; Barrister-at-law, Australia
MICHAEL A. TRIANTAFYLIDIS	President of the Supreme Court of Cyprus
J. THIAM-HIEN YAP	Attorney-at-law; Indonesia

Secretary-General: NIALI MACDERMOT

A Proposed
DEFINITION OF AGGRESSION
by
COMPROMISE AND CONSENSUS

by
Benjamin B. Ferencz

International Commission of Jurists
Geneva, Switzerland

Mr. Benjamin B. Ferencz is a member of the New York Bar, practicing law in New York City. He has been significantly engaged in obtaining compensation for victims of persecution. He has a Doctor Juris degree from Harvard University, and was a Prosecutor at the Nürnberg trials.

This essay by Mr. Ferencz is due to appear as an article in the International and Comparative Law Quarterly, July 1973. With the agreement of the editor of the Quarterly it is now published in advance by the International Commission of Jurists as a special pamphlet in order that it may be available for the work of the U.N. Special Committee on the Question of Defining Aggression at its meeting in Geneva in April/May, 1973.

March, 1973

CONTENTS

Preface, by Professor Erik Suy	5
I. Introduction	7
II. The proposed compromise definition of aggression	11
III. Analysis of the compromise definition	13
A. The preamble	13
B. The substantive definition	17
(1) The general formulation	17
(2) An enumeration of illustrative acts of aggression	18
(3) Reaffirms the open-ended discretion of the Council	23
(4) Preserves the inviolability of the Charter the lawful use of force	26
C. Points not specifically included in the definition	29
(1) Illustrations of aggressive acts	29
(2) The use of force in the exercise of the right of determination	32
(3) Legal consequences of aggression	33
IV. Conclusion	34
FOOTNOTES	37

P R E F A C E

Defining aggression is a task to which the nations of the world have now devoted exactly half a century. It was in 1923, in connection with the draft Treaty of Mutual Assistance, that the question of the definition of aggression first acquired a particular international significance. Since then this question has never been absent from the preoccupations of jurists.

Many have questioned the possibility of securing a definition of aggression. At the present time, most of these critical voices are silent, although certain jurists, weary of the delays and evasions, have adopted a very sceptical attitude. Nevertheless, ever since the nations, in creating their world organisation, set themselves as a principal objective the outlawing of war and aggression and instituting a system of collective security, the definition of aggression has become indispensable, and the resolutions by which the General Assembly in its last sessions has exhorted the Special Committee to continue and accomplish its missions, indicate this favourable trend towards achieving a definition.

Some have said that a definition is impossible, and the efforts of half a century seem to confirm this point of view. But even though any precise definition has its difficulties and dangers, the conclusion must not be drawn that it is impossible. Much would clearly depend upon the goodwill of those called upon to draw up the definition. The climate of international relations is reflected in the progress realised in the field which concerns us. Finally, the possibility of a definition will depend to a very great extent upon the type of definition that is wanted, that is to say the concept one has of a definition.

At present we find ourselves at the beginning of a period of détente in international relations. There no longer exists—except in the Middle East—an armed conflict, and all the indications suggest that this period of peace could be fairly prolonged. What an ideal opportunity to seize for drawing up a definition of aggression! The work of the Special Committee in recent years clearly shows that its members, in spite of differing proposals, are ani-

mated by a firm intention to reach an early conclusion. Whoever has read B. Ferencz's study: "Defining Aggression: Where It Stands and Where It's Going", in 66 A.J.I.L. (1972), will certainly have been struck by its optimistic tone; the first for a long time. The discussion—even though very brief—of the Report of the Special Committee at the time of the Twenty-Seventh General Assembly leaves no room for doubt about this optimism. We firmly believe that, with the help of the political climate, a definition of aggression in the form envisaged by the Committee is imminent.

In the following study, B. Ferencz points out the possibility of a consensus based on the results obtained up to now. His proposal for a compromise definition could have been the conclusion drawn by a computer from all the work of the Special Committee. We join with the author in expressing the hope "that the essence of the compromise suggested herein will prove acceptable by consensus at this time of relative détente, and will thereby mark at least some progress in the requisite clarification of the law of nations". This constructive effort could be of great help to those who will have to bring the final touches and precision to the existing drafts.

Erik Suy

*Professor of International Law, Leuven
Chairman of the Sixth Committee
(Twenty-Seventh General Assembly of the United Nations)*

I. INTRODUCTION

There are times in the affairs of nations when preference for the stability of the traditional must yield to the imperatives of the present. The existing anarchy whereby states decide solely for themselves when resort to force is permissible has become much too hazardous to remain tolerable. In its quest "to maintain international peace and security" the United Nations has proclaimed as one of its primary purposes "the suppression of acts of aggression." ¹ The General Assembly has unanimously condemned aggression as "the gravest of all crimes against peace and security throughout the world." ² Yet, despite half-a-century of effort by legal scholars,³ and the recent urging of 95 nations,⁴ statesmen are still unable to agree on what aggression really means. A compromise definition of aggression will be suggested here which seeks, within the limits of what now seems possible, to bridge the gap between the practices of the past and the requirements of the future.

The most intensive effort to particularize the lawful limits of the use of violence in international affairs has been made by the latest United Nations Special Committee on the Question of Defining Aggression.⁵ The 35 states on the Committee have, after years of effort, divided themselves into three fairly distinct groups. The Soviet Union, as the sponsor of the latest attempt to reach a definition, has submitted its own draft, based in large part upon a definition adopted in 1933 when it signed non-aggression treaties with a dozen of its neighbouring states.⁶ A rather similar definition has been proposed by thirteen Powers (Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia), and a third draft was belatedly submitted by six Powers (The U.S., the U.K., Australia, Canada, Italy and Japan) ⁷ which, until 1969 had been inclined, to use Lord Caradon of Britain's phrase, to consider a definition of aggression as "undesirable, unacceptable and unnecessary." By the eve of its hundredth meeting in March 1972 considerable progress toward reaching a consensus definition had been made. Nevertheless, substantial points of disagreement still remained and progress had slowed to a snail's pace. ⁸

It was generally accepted that aggression should be defined and there was no conflict regarding the format. All concurred that the definition should consist of a preamble, reasserting certain generally accepted principles, a brief formulation in general terms of what is meant by aggression, an enumeration of specific acts which are clearly aggressive, a reaffirmation of the authority of the Security Council to determine that other acts may also be aggressive, and an explanation of when the use of force would be lawful.

Although there were minor variations in proffered wording, the preamble presented no insurmountable obstacles. The Delegates seemed willing to have the preamble reaffirm principles of the Charter and rules of international law while recalling the exclusive authority of the Security Council and proclaiming the utility of the new exposition. A generic formulation of what was meant by the word "aggression" was also relatively uncomplicated, although the members quibbled over emphasis and application as they tried to capture the essence of the term in one compact declaratory sentence.

A declaration of war was no longer considered significant because it has almost become outmoded. Invasion, attack, bombardment, and blockade were recognized to be classical acts of aggression. More subtle breaches of the peace, such as supporting subversion, terrorism or fomenting civil strife, although a common source of international controversy, could not easily be pressed into the aggression mold.

There were those, particularly in the thirteen-Power group, who argued that nothing short of an armed attack could lawfully evoke a legitimate response of self-defense. The six Powers maintained that aggression in more subtle guise would still give rise to the inherent right of states, or similar political entities, to use armed force to defend themselves. Whereas the Soviets clung to their 1933 notion that the first state to use force against another was thereby the offender, the six Powers insisted that the purposes for which the action was taken would have to be weighed, and only if the deed was done in order to achieve an objective which was prohibited could it be considered an unlawful transgression. The Arab states were particularly eager to catalogue any military occupation or annexation by force as an act of continuing aggression, and the six Powers argued that extended military occupation in contravention of an authorization should also be among the proscribed acts. Agreement on these points in either principle or formulation, did not prove possible.

The impasse was no less difficult when it came to considering the lawful use of force. Some felt that the right of self-determination was so crucial and compelling that every means to achieve it, including the use of violence, was legally justifiable. Others argued that only the Security Council could authorize force. There were those who maintained that the consequences of aggression must also be proclaimed in the definition so all would know that ill-gotten territorial gains would never be recognized, and those responsible for aggression would be held to account.

The best that the Special Committee could offer after 99 meetings was to list a number of alternatives dealing with several, although not all, of the points still in dispute. Through the five-year long maze of circumlocution, disputation, and caveats, one could discern the major points of difference, and detect areas in which compromise might be possible. With a reasonable amount of optimism, determination and good will the differences did not appear to be irreconcilable.

Certain techniques have been generally employed in putting forth the present compromise proposal. Whatever had been unanimously accepted by the Special Committee has been included as agreed. Whatever was still being disputed, in either form or substance, but which is already contained in international Declarations approved by the General Assembly has been omitted from the substantive text of the definition. It was felt that there was little purpose in trying to add another layer of identical resolutions where the effort would cause undue delay or disruption. By way of accommodation the Declarations are reaffirmed in the preamble and their contents are thereby incorporated by reference. Wherever there were differences only of wording, but not of principle, an effort has been made to adopt neutral terminology. The precise wording of the Charter or other accepted international instruments has been favored. The few points which still remained in dispute have been dealt with in such manner as to try to give effect to the most important considerations of the parties on all sides. In each case the reason for any modifications of the texts considered by the Special Committee is given together with an explanation of the alternate drafts.

No pretense is made that the proposed definition is either mechanically precise, free from ambiguity and uncertainty, or that it is anything resembling a final word on the subject.⁹ The General Assembly must soon choose among alternative lines of action. Either the Special Committee, or a successor, will be authorized

to continue to argue or bicker indefinitely until all parties are of one mind—an event which is not likely to occur,—or the search for a definition will be abandoned, or a vote will be taken showing that aggression will continue to mean one thing to some states and something else to others, depending upon their values or social systems. Faced with these sorry choices and recognizing that international agreement has been possible on many subjects of at least equal perplexity, it is hoped that the essence of the compromise suggested herein will prove acceptable by consensus at this time of relative détente, and will thereby mark at least some progress in the requisite clarification of the law of nations. If it serves merely to hasten the end of the present debate, or to focus attention on the various and variable factors which must be considered in reaching any conclusion regarding aggression, or to increase awareness that every definition is only a guide and must contain reference to general principles and concepts, then the effort may not have been completely futile.

II. THE PROPOSED COMPROMISE DEFINITION OF AGGRESSION

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security, and, to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Reaffirming the principles set forth in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, and the Declaration on the Strengthening of International Security,

Recalling that Article 39 of the Charter states that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Convinced that the adoption of a definition of aggression would have a restraining influence on a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to stop them, and would also facilitate the rendering of assistance to the victim of aggression and the protection of his lawful rights and interests,

Declares that:

1. Aggression is the use of armed force by a state against the territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.
2. Any of the following acts, regardless of a declaration of war, shall constitute an act of aggression:
 - (a) The invasion or attack by the armed forces of a state of the territory of another state.

- (b) An attack by the armed forces of a state on the land, sea or air forces of another state.
 - (c) 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.
 - (d) The blockade of the ports or coasts of a state by the armed forces of another state.
 - (e) The sending by a state of armed bands, irregulars, or mercenaries which invade the territory of another state in such force and circumstances as to amount to an armed attack as envisaged in Article 51 of the Charter.
3. The Security Council, acting pursuant to Chapter VII of the Charter, may determine that any of the foregoing, or any other breach of the peace, is an act of aggression. In determining the existence of an act of aggression the Security Council may take into account:
- (a) Breaches of the peace committed by or against a state or a group of states or a political entity whose statehood has not been recognized by the United Nations.
 - (b) All of the circumstances of each particular case, giving due regard to which party was the first to commit an unlawful act and whether it was committed for a purpose which violates a declared principle of international law.
4. Nothing in this definition shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.
- (a) No consideration of whatever nature, whether political, economic, military or otherwise, relating to the internal or foreign policy of a state may serve as a justification for aggression as herein defined.
 - (b) The temporary use of force, in the exercise of individual or collective self-defense, until the Security Council can act to restore peace and security, shall not constitute aggression, if such force is reasonable, proportionate to the wrong and necessary to repel an aggressive act.

III. ANALYSIS OF THE COMPROMISE DEFINITION

The proposed definition is composed of a Preamble of four paragraphs plus four substantive provisions. The Preamble refers to the Charter purposes on which it relies, to relevant Declarations of international law, to the authority of the Security Council, and to the usefulness of a definition. The four substantive provisions consist of a formulation in general terms of the meaning of aggression, an enumeration of some specific acts which are to be considered as aggressive, a reaffirmation of the Security Council's opened authority, and an indication of when the use of force is lawful. Let us analyse each of these provisions to see how the technique of compromise was applied.

A. *The Preamble*

In 1969 the Special Committee established a Working Group of the Whole. It succeeded in reaching general agreement on a preamble,¹⁰ subject to drafting changes, and subject to the usual precautionary understanding that nothing was finally accepted until agreement was reached on everything. The text which is adopted here is based on the provisions which seemed to be generally acceptable and only such modifications have been made as seemed to be required in order to encourage complete concurrence.

First Paragraph — Upholds the Fundamental Purposes of the Charter

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security, and, to that end, to take effective, collective measures for the prevention and the removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

The text suggested here is identical with both the U.S.S.R. and the thirteen-Power proposal,¹¹ with the sole exception that neither of those drafts had included the phrase "to that end." The six-Power draft contained the introductory clause "*Conscious* that a primary purpose of the United Nations"... but was in all other respects identical with the compromise text. The purposes to which

reference is made are described in Chapter 1, Article 1, first clause of Sec. 1 of the Charter, and are therefore correctly characterized as "primary," but the distinction between that term "primary" suggested by the six Powers, and the term "fundamental" is so slight that they are generally regarded as synonymous. The Soviet and thirteen-Power introductory clause has therefore been accepted, bearing in mind that the clause "to that end" which they omitted and which appeared only in the six-Power draft, has been inserted. The inclusion of the clause "to that end" also makes the first preambular paragraph follow the precise wording of the Charter.

Second Paragraph — Reaffirms the Principles of International law

Reaffirming the principles set forth in the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, and the Declaration on the Strengthening of International Security.

This is a new proposal not considered by the Special Committee and inserted here by way of compromise. It should be recalled that the "Friendly Relations" Declaration was adopted unanimously by the General Assembly on 24 Oct. 1970, and represented the fruits of eight years of labor by a Special Committee on Principles of International Law.¹² The Declaration on the Strengthening of International Security was adopted on 16 Dec. 1970.¹³ By that time the Special Committee on Aggression had completed its 1970 deliberations dealing with the three alternative drafts submitted in 1969. The Committee could hardly relate its deliberations to Declarations on international law which had not yet been accepted. As a result, the Working Group continued to dispute many points which their colleagues on the other Committee had already resolved by consensus.

The Declarations referred to in the compromise preambular provision encompassed at least five points which were a source of controversy and on which no complete agreement could be reached by the Aggression Committee.

1. *Military Occupation and Annexation.* Both Declarations stated:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.

2. *Subversion.* Both Declarations stated:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to "involve a threat or use of force."

3. *The Right of Self-Determination.* The Declaration on International Security referred to self-determination as an "inalienable right," and the "Friendly Relations" Declaration was even more specific:

Every State has the duty to refrain from any forcible action which deprives peoples... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples...

4. *Non-Recognition of Territorial Gains.* Both Declarations stated:

No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

5. *Responsibility.* The "Friendly Relations" Declaration explicitly declared:

A war of aggression constitutes a crime against the peace for which there is responsibility under international law.

In the light of the agreements already reached by the General Assembly on all of the points enumerated above, the continued debate and disagreement on the same subject by the Special Committee did not seem to be useful or necessary. The heart of the compromise is the suggestion that all such items be omitted from the substantive portion of the definition of aggression but be reaffirmed by reference to the Declarations in the preamble. Since the Declarations are universally accepted the inclusion in the preamble here should not give rise to serious objection.¹⁴

Third Paragraph — Recalls the Security Council's Responsibility

Recalling that Article 39 of the Charter states that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The thirteen-Power draft had an introductory clause reading: "Bearing in mind," but both the Soviets and the six Powers had used the word "recalling," and that is therefore the term inserted here.

The U.S.S.R. and thirteen-Power drafts had omitted the words "make recommendations, or." This omission would seem to be logical since the power to decide includes the power to make recommendations, nevertheless, the text as contained in the six-Power draft has been adopted here because it is identical with the terms of the Charter.

Fourth Paragraph — Outlines the Usefulness of a Definition

Convinced that the adoption of a definition of aggression would have a restraining influence on a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to stop them, and would also facilitate the rendering of assistance to the victim of aggression and the protection of his lawful rights and interests.

The text, accepted in principle by the Working Group of the Whole, is taken from the Soviet draft which had used the introduction "*Considering also.*" The thirteen Powers had omitted the reference to assistance to the victim and the six Powers had simply stated their view that the definition might facilitate the processes of the U. N. and encourage states to fulfil their obligations under the Charter. The differences do not appear to be significant and therefore the Working Group text has been adopted here.

Two clauses which were considered by the Special Committee have not been specifically included in the proposed consensus preamble. One is redundant and the other superseded. The six-Power draft contained a paragraph:

Reaffirming that all states shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The thirteen Powers had a similar phrase referring to "pacific methods" rather than "peaceful means" and the Soviet draft was silent on this point.

The omitted paragraph is contained verbatim in the Charter, the "Friendly Relations" Declaration, and the Declaration on International Security. It is included in the preamble by reference to the other Declarations. To spell it out again would add little since the point is already obvious.

There is also omitted from the preamble a provision, which had been suggested in 1969 by the Soviet Union and the thirteen Powers, to the effect that armed aggression, being the most serious, should be defined first. This seemed to have been prompted by the concern that various indirect forms of aggression could not be easily defined, and by the desire to see at least some progress in time for the 25th anniversary of the United Nations in 1970. The idea seems to have been dropped and such a provision in the proposed consensus definition is superfluous.

B. The Substantive Definition

*1. The General Formulation — Declares that:*¹⁵

Aggression is the use of armed force by a state against the territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.

An Informal Negotiating Group, established during the 1972 sessions, agreed upon the above text with only two relatively minor additions subject to dispute.

The six Powers wanted the phrase "however exerted" inserted after the reference to armed force.¹⁶ The Soviets found this unacceptable since it would require that mere breaches of the peace would have to be treated as acts of aggression, and this went beyond what the Charter required.¹⁷ The thirteen Powers, supported by Romania,¹⁸ wanted the word "sovereignty" to appear after "territorial integrity" but the Soviet delegation argued against including wording which did not appear in the Charter, particularly since, in its view, "sovereignty" was adequately covered by the phrase "political independence." Both additions have been omitted in the compromise text since the arguments against inclusion seemed persuasive²⁰ and what remained was generally acceptable to all.

In several respects the terminology agreed upon by the Informal Negotiating Group varied from the text of the Charter and other international instruments. Despite Soviet arguments for strict adherence to the text of the Charter,²¹ the Group referred to the political independence of "another" state, rather than "any" state.²² No explanation for the change is reported. The Group favored a reference to the "Charter" rather than the "purposes" of the U. N. which was the term used in the Charter itself. Reference to the Charter generally is much broader since it encompasses not merely the purposes but also the procedures.²³

In view of what appeared to be near agreement by the Informal Group the use of the broader term seems justified in the compromise definition as an additional restraint against the unauthorized use of armed force, and as a further support for the United Nations.

Another request of the thirteen Powers has been omitted. They also wanted it to be made clear somehow that "territorial integrity" included "territorial waters and air space." No objection was raised to the request and it was suggested that the explanation be tacked on at the end. It has not been added here since, in case of doubt, the *travaux préparatoires* will confirm that the Special Committee was prepared to follow the common understanding that "territory" includes land, water and air space. There is an ample body of international law dealing with territorial sea, subsoil and airspace problems and there can be little doubt that the term "territorial integrity" is not restricted to a surface land mass only.²⁴

2. *An Enumeration of Illustrative Acts of Aggression*

Any of the following acts, regardless of a declaration of war, shall constitute an act of aggression:

At least since the time of the Kellogg-Briand Pact, making resort to force illegal, a declaration of war was regarded as a prime example of an aggressive act. This was reflected in the initial Soviet and thirteen-Power drafts. The six Powers, however, had recognized that in modern time wars are frequently, if not usually, commenced and conducted without any formal proclamation, and their draft was silent on this point. The form of its inclusion as shown by the above wording, accepted by the Negotiating Group, treats a declaration of war as irrelevant. Only the acts, and not the words, can constitute aggression.

The illustrations which follow are only examples of some of the more obvious or flagrant forms of aggression. There was general agreement that they were not exclusive.

Territorial Invasion or Attack

- (a) The invasion or attack by the armed forces of a state of the territory of another state.

All of the Members agreed in principle that an act of invasion constituted aggression and the wording adopted is that proposed by the Negotiating Group.²⁵ The idea was contained in each of the three drafts with only slight modifications in wording.²⁶ The 1933 Soviet definition declared the aggressor to be the state which *first* committed "invasion by its armed forces with or without a declaration of war, of the territory of another state,"²⁷ and this thought was carried over to 1969. The thirteen Powers preferred a reference to the "territories" of another state, from which the implication might be drawn that a plurality of attacks against more than one territory would be required. The six-Power draft referred to territory *under the jurisdiction* of another state, which would encompass an even broader area, and was perhaps intended to include political entities other than states. Since the latter point will be dealt with by way of compromise in paragraph 3(a), it was felt that there was no need here to go beyond the text which seemed acceptable to the last Negotiating Group, particularly since the same point seemed to have been withdrawn when referring to bombardment.

Attack on the Armed Forces of Another State

- (b) An attack by the armed forces of a state on the land, sea or air forces of another state.

This, like paragraph 2(a) above, is the classical illustration of an act of aggression and the text was generally acceptable to the Negotiating Group.²⁸ It appeared, in slightly modified wording, in the 1933 Soviet treaties dealing with aggression. The thirteen Powers had made no reference to an attack on land, sea or air forces, in contrast with an attack against the territory of another state. The six Powers, in an apparent effort to rule out the possibility that an inadvertent or accidental incident might be viewed as aggression, referred to "carrying out *deliberate* attacks on the

armed forces, ships or aircraft of another state." In the course of the debate it was recognized that the Security Council would not be likely to conclude that an isolated and unintended mishap was an act of aggression and that the precaution evidenced by the six-Power draft was excessive. When the formulation adopted above was unanimously approved by the 1972 Informal Negotiating Group it was on the understanding that there should be a clause excluding its applicability to minor incidents. No such clause has been added here since the underlying purpose of avoiding a major response to an inconsequential incursion is adequately met by the requirement of proportionality which shall be further expounded in the compromise proposal set forth in paragraph 4(b).

Bombardment

- (c) 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.

This text was generally accepted by the Negotiating Group,²⁹ but some members proposed that after the word "weapons" there be added: "including weapons of mass destruction."

An earlier U.S.S.R. proposal had referred to "bombardment of or firing at the territory and population of another state," while the six Powers had suggested "bombardment by its armed forces of territory under the jurisdiction of another state," and the thirteen Powers had relied on the simple "bombardment by the armed forces of a state against the territory of another state," as stated above.³⁰

The reference to the "use of weapons" is a compromise worked out during the negotiations. The U.S.S.R. had originally proposed that "the use of nuclear, bacteriological or chemical weapons or any other weapons of mass destruction" be listed as an aggressive act.³¹ The thirteen Powers had a paragraph listing "the use of any weapons, particularly weapons of mass destruction."³² The six Powers made no specific reference to any type of weapons, and they argued that it is not the nature of the weapon but the legality of its use which determines whether an act is aggressive. The reference to "weapons of mass destruction" has not been inserted in the proposed consensus definition since it is felt that the inclusion of "any weapons" encompasses "nuclear, bacteriological and chemical weapons," as well as "weapons of mass destruction," so that any further elaboration would be redundant.

Blockade

- (d) The blockade of the ports or coast of a state by the armed forces of another state.

The formulation accepted here is the one proposed by the thirteen Powers. The Soviet draft had referred to the "blockade of coasts or ports" whereas the six Powers had made no mention of blockade for inclusion among aggressive acts. Nevertheless, as a gesture of compromise, the U. S. indicated its willingness to have it included and there was apparently no disagreement about the wording.³³

Indirect Aggression

- (e) The sending by a state of armed bands, irregulars, or mercenaries which invade the territory of another state in such force and circumstances as to amount to an armed attack as envisaged in Article 51 of the Charter.

There was no general agreement regarding how the indirect use of force might best be incorporated into a definition of aggression.

This paragraph seeks to deal, at least in part, with the problem which, for years, was a principal source of disagreement among members of the Special Committee.

The idea that there could be indirect forms of aggression had been recognized by the U.S.S.R. in 1933. Their aggression treaties recognized that aggression could be committed by:

Provision of support for armed bands formed in the territory of another State, or refusal notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance and protection.³⁴

In its more recent proposal the Soviets described as an act of indirect aggression:

The use by a State of armed force by sending bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force *with the aim* of promoting an internal upheaval in another State or a reversal of policy in favor of the aggressor... (Italics added.)³⁵

The six Powers had listed as aggressive acts:

Organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate to another State,... violent civil strife or acts of terrorism in another State... or subversive activities aimed at the violent overthrow of the Government of another State.³⁶

The thirteen Powers were prepared to recognize that a state could take reasonable steps to safeguard its existence against such unlawful acts but they did not feel that it would justify unrestricted recourse to individual or collective self-defense under Article 51 of the Charter which, by its terms, referred only to a provisional reaction to an armed attack.

During the last session of the Special Committee a compromise was being considered and two alternative proposals were on the table.³⁷ The first alternative, taking account of the thirteen-Power apprehensions, consisted of two parts. The first part was the proposed consensus definition set forth in paragraph 2(e) above. It recognized that indirect aggression could be of such magnitude and intensity as to be the equivalent of a full-scale military assault and that it should therefore give rise to exactly the same defensive possibilities as were provided by Article 51 in response to an armed attack. The second part would allow a state to take all "reasonable and adequate" steps to defend its institutions without resorting to unlimited self-defense.

It provided:

When a State is victim in its own territory of subversive and/or terrorist acts by armed bands, irregulars or mercenaries organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defense against the other State.

The second alternative proposal was put forth by the six Powers. It was a compromise gesture and indicated a willingness to settle for a repetition in the definition of two paragraphs, taken verbatim from the "Friendly Relations" Declaration, referring to the duty of states to refrain from such acts of subversion as organizing bands for incursion into another state and participating in civil strife in another state through the use or threat of force.

The Soviets objected to the six-Power proposal, once again on the grounds that by including those paragraphs in an enumeration of aggressive acts it might compel the Security Council to declare as aggressive something which might merely be a breach of the peace. The Negotiating Group sought to meet this point by suggesting a clause specifically authorizing the Security Council to refrain from characterizing an act as aggressive if it was, "in intent or extent," too minimal to justify such action.³⁹

What has been proposed in the consensus definition in paragraph 2(e) above is simply to accept the principle, on which everyone agrees, that indirect aggression can amount to an armed attack under certain circumstances, and to include the other ideas in different ways. Subsequent paragraph 3(a) reaffirms the general authority of the Security Council to determine other acts to be aggressive, including less violent breaches of the peace or aggression in any form. Subsequent paragraph 4(b) gives expression to the thirteen Power idea that "reasonable and adequate" steps may legally be taken by a state to safeguard its existence.

The restatement of the principles set forth in the "Friendly Relations" Declaration, as proposed by the six Powers, has been rendered unnecessary by the general reaffirmation in the preamble of the Declarations which spell out those principles.

The attempt to exclude minor incidents as formulated by the Negotiating Group has not been adopted since its reference to "intent and extent" would again invite objections previously and validly made to the use of such subjective terminology.

3. Reaffirms the Open-Ended Discretion of the Security Council

The Security Council, acting pursuant to Chapter VII of the Charter, may determine that any of the foregoing, or any other breach of the peace, is an act of aggression.

This is a reaffirmation of the open-ended authority of the Security Council, — one of the few points on which everyone seemed to agree. The Soviet draft stated specifically that the definition was "without prejudice to the functions and powers of the Security Council," and that other acts might also be determined by the Council to be aggressive. The thirteen Powers reaffirmed that their enumeration of aggressive acts was "Without prejudice to the powers and duties of the Security Council." The six-Power proposal said the term aggression could be applied by the Security

Council "when appropriate" and that aggression was "not necessarily limited to" the acts specified.⁴⁰

The inclusion in the consensus definition of a reference to breaches of the peace was not considered by the Special Committee. It is a compromise clause based on the wording of the Charter. Chapter I, Article I refers to "the suppression of acts of aggression or other breaches of the peace," and Article 39 refers to "any threat to the peace, breach of the peace, or act of aggression," indicating that these are different violations. An act of aggression would surely be a breach of the peace but not every breach must be an act of aggression, a point repeatedly made by the Soviet representatives. The proposed compromise wording seeks to satisfy the common demand that the Security Council be given a free hand to make such distinctions as seem to it to be appropriate.

Applicability to Political Entities Other Than States

- (a) In determining the existence of an act of aggression the Security Council may take into account:

Breaches of the peace committed by or against a state or a group of states or a political entity whose statehood has not been recognized by the United Nations.

This is a compromise proposal. The reference to "political entities whose statehood has not been recognized" is an accommodation to the six Powers. Their draft had proposed that the perpetrators or victims of aggression could include political entities delimited by international boundaries or internationally agreed lines of demarcation. The others insisted, at first, that only "States" could commit aggression or exercise self-defense against it. In the course of the debate it appeared that the six-Power draft was intended to encompass such divided former states as Germany, Korea, Vietnam and others, which had not been recognized as states by the United Nations. After much discussion there seemed to be a general readiness to accept the idea that such political entities should be covered by the definition.

The Informal Negotiating Group proposed the inclusion of an explanation in the definition that the term "state" is used without prejudice to questions of recognition or to whether a state is a member of the United Nations, and includes the concept of a "group of states."⁴¹ The compromise text above by referring to both "political entities" and to "a group of states" seeks to

accommodate the six Powers in a way which was beginning to appear increasingly acceptable to the others.

Relevance of Priority and Intent

[In determining the existence of an act of aggression the Security Council may take into account:]

- (b) All of the circumstances of each particular case, giving due regard to which party was the first to commit an unlawful act and whether it was committed for a purpose which violates a declared principle of international law.

This too is a compromise formulation seeking to reconcile conflicting proposals put forth by the Soviet Union on the one side and the six Powers on the other.

The most striking characteristic of the Soviet definition of aggression, going back as far as their 1933 treaties, was that the state which was the *first* to commit the unlawful international act would thereby automatically be identified as the aggressor. The thirteen-Power draft did not contain such a decisive formulation and the six Powers rejected the idea completely. In their initial view it was necessary to ascertain whether prohibited means had been employed "in order to" achieve certain unlawful *purposes*. The incriminating objectives listed were, to:

- "(1) Diminish the territory or alter the boundaries of another State,
- (2) alter internationally agreed lines of demarcation,
- (3) disrupt or interfere with the conduct of the affairs of another State,
- (4) secure changes in the government of another State, or
- (5) inflict harm or obtain concessions of any sort." ⁴²

After a debate which covered the span of about four years, some softening in the lines began to appear. The six Powers moved from a position which seemed to the others to be saying that the victim had the burden of proving the aggressive intent of the transgressor, to an acknowledgement that the burden would be on the Security Council to ascertain the aggressive intent, and finally to a concession that only "due regard" had to be given to both the question of which state had been the first to commit the aggressive act and the question whether it was committed for one of the five enumerated unlawful purposes. ⁴³ The Soviets in turn indicated some recognition that in the atomic age the mechanical application

of the principle of priority would make their position untenable, for it would seem to be calling upon states to wait to be destroyed before they could legally respond to an attack. They objected however that the recital of the prohibited purposes would accord greater emphasis to motives than to the objective criteria of who had acted first. ⁴⁴ The U.S.S.R. was, however, prepared to consider a proposal by Czechoslovakia which would create a presumption that the one who had acted first was the aggressor, and then due regard could be given to the purposes, on condition, however, that the Security Council still retained discretion to decide on the basis of all the circumstances. ⁴⁵

The heart of these ideas has been incorporated into the proposed consensus definition. The authority of the Security Council to take all the circumstances into account has been reiterated. "Due regard" is to be given to (a) which side had acted first, and (b) the purposes of the action, while both remain on an equal footing. In order to satisfy the Soviet objection that undue emphasis should not be placed on the five prohibited purposes they are not specifically listed. On the other hand, the reference to declared principles of international law in effect incorporates the same prohibited purposes without specifically cataloging them. Each of the purposes listed in the six-Power draft is declared to be a violation of international law by the "Friendly Relations" Declaration. ⁴⁶

Something has also been taken away from the Soviet proposal. In place of a rebuttable presumption that the state which offends first is the aggressor only "due regard" to that fact is required by the proposed consensus definition. The distinction should not prove fatal to acceptance, particularly in view of the reconfirmed absolute discretion of the Security Council, a point repeatedly stressed by the Soviet representatives, and which serves as a form of "insurance" to all those with the power of veto on the Council.

4. Preserves the Inviolability of the Charter Regarding the Lawful Use of Force

Nothing in this definition shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

This sentence was offered as a compromise suggestion on the part of the six Powers, and the text was taken verbatim from the "Friendly Relations" Declaration. ⁴⁷ The Soviet draft had con-

tained a similar provision stating that " Nothing in the foregoing shall prevent the use of armed force in accordance with the Charter . . . "

At the close of the 1972 sessions three alternatives were being considered. The first, which has been adopted here, contained the sentence in paragraph 4 above, together with the sentence in paragraph 4(a) hereafter. The others are considered only for comparison and explanation.

Alternative 2 was a hodge-podge of elements taken from the original six-Power and thirteen-Power drafts.⁴⁸

Not to be outdone, the U.S.S.R. put forward a third variant by reintroducing the provisions of its 1971 proposals, reaffirming that " acts undertaken in accordance with the Charter to maintain or restore peace, or in the exercise of the inherent right of individual or collective self-defense do not constitute aggression," and they linked this with a reaffirmation that " only the Security Council has the right to use force " and another sentence allowing " enforcement actions under regional arrangements consistent with the purposes and principles of the Charter in accordance with Article 53."⁴⁹

The language adopted in the proposed consensus definition has been favoured for several reasons. The identical text has been universally accepted in the " Friendly Relations " Declaration. It has been proposed by the six Powers, and accepted as a basis of agreement by the U.S.S.R. subject to adding a clause that only the Security Council has the right to use force on behalf of the U.N., a point which the Soviets argued was implicit in the Charter anyway. It does not spell out points on which there is still disagreement but it does create the framework for the further elaboration which follows in the next two paragraphs.

Considerations Not Justifying Aggression

- (a) No consideration of whatever nature, whether political, economic, military or otherwise, relating to the internal or foreign policy of a state may serve as a justification for aggression as here defined.

This provision did not appear in any of the original three drafts. It emerged as a compromise. Its origins go back to the 1933 Soviet Treaty definition which provided that " No political, military, economic or other consideration may serve as an excuse or justifi-

cation for . . . (Aggression)." When the Nürnberg trials were being prepared and the Charter of the International Military Tribunal was being drafted in 1945 it was the American delegation which in fact put forth the identical proposal as part of its suggested definition of aggression.⁵⁰ In 1951 the International Law Commission had considered including in a definition of aggression the statement "No political, economic, military, or other consideration may serve as an excuse or justification for an act of aggression."⁵¹ In 1972 the Romanian government joined in submitting practically the same wording to the Informal Negotiating Group.⁵² It is consistent with the principles of international law codified in the "Friendly Relations" Declaration. Since there seems to be broad agreement about the content as well as the wording of this provision and as it serves a useful purpose in clarifying and restricting the lawful use of force it has been adopted for the consensus definition.

Permissible Self-Defense and Proportionality

- (b) The temporary use of force in the exercise of individual or collective self-defense, until the Security Council can act to restore peace and security, shall not constitute aggression, if such force is reasonable, proportionate to the wrong and necessary to repel an aggressive act.

This is a compromise proposal which was not considered by the Special Committee although it contains several points which were the subject of considerable controversy. No one challenged the right of a state to defend itself against an armed attack. The major dispute revolved around the question of whether the self-help remedy of self-defense could be employed if the aggressive act defended against was of lesser magnitude or intensity than that which might legitimately be considered an armed attack. The six Powers were concerned about the more common contemporary forms of indirect aggression, such as infiltration, terrorism and subversion, which might be just as damaging to the institutions of a government as a direct armed assault. They did not feel that it would be reasonable for them to have their hands tied while they waited for United Nations action which might be very slow in coming or might not come at all.

The smaller nations were concerned that a relatively insignificant act of indirect aggression might be used as the excuse for a major counter-assault and then justified on the grounds of legiti-

mate national or collective self-defense. In an attempt to reconcile these two conflicting points of view several restraints have been written into the proposed consensus definition. Self-defense must be temporary, reasonable, proportionate and necessary.

Even the defense against an armed attack as provided in Article 51 would allow a state to defend itself only *until such time* as the Security Council has taken the measures *necessary* to maintain international peace and security. The requirement that the force be "reasonably proportionate to the wrong and necessary to repel the aggressive act," provides the assurance sought by the smaller states that no nation could use every breach of the peace, even if less than an armed attack, as a pretext to use excessive force in retaliation. At the same time, no state would be required to be paralysed in the face of various forms of subversion and indirect aggression prohibited by international law. The requirements of reasonableness and proportionality are consistent with established concepts of law as well as with humanitarian aspirations. Since the Security Council is required to take all the circumstances into account it is unavoidable that the reasonableness of the action will have to be considered in the light of the entire picture.

Soviet representatives have objected to the concept of proportionality as placing an unreasonable burden on the victim for the benefit of the aggressor.⁵³ They have failed to grasp that no mechanical application of the principle is intended and that such force may be applied as is reasonably required to repel the aggressive act. If excessive force is used the offending state may itself be determined to be the aggressor.

The thirteen-Power draft made specific reference to the requirement that self-defense measures be reasonably proportionate. Twenty of the thirty-five members and the Special Committee agreed to stand by this principle.⁵⁴ Many of the other states have also indicated a willingness to accept the idea of proportionality in the definition.⁵⁵ It should prove to be acceptable by consensus.

C. Points Not Specifically Included in the Definition

1. Illustrations of Aggressive Acts

The Special Committee considered a number of illustrations of aggressive acts which do not appear in the suggested consensus definition.

(a) Military Occupation or Annexation

The Soviet draft listed "military occupation or annexation of the territory of another state or part thereof" as an aggressive act. These illustrations did not appear in the 1933 Soviet treaty definition. They may have been adopted from some of the thirteen Powers, whose proposal listed as aggressive "any military occupation, however temporary," . . . or "any forcible annexation of the territory of another state or part thereof."⁵⁶ The 1972 Informal Negotiating Group had refined this to "military occupation, however temporary, resulting from such invasion or attack," or "any annexation by the use of force."⁵⁷ The six-Power draft made no reference to annexation or military occupation.

The reference to "military occupation, however temporary," has been omitted from the proposed consensus definition because it is difficult to envision an invasion by armed forces without at least some temporary military occupation. The term "invasion" connotes a hostile entrance or trespass and since the invasion itself is already listed as an aggressive act the addition of "temporary military occupation," which is in effect the invasion complained about, seems to add nothing but a redundant "overkill" to the definition.

"Annexation" has not been specified as an aggressive act for similar and additional reasons. "Annexation by the use of force" cannot take place without invasion or attack by a state against the territory of another state. Since the antecedent act of invasion is already condemned in paragraph 2(a) as the most serious crime of aggression the inclusion of the concomitant act of occupation, or the subsequent act of annexation, as separate and distinct additional offenses does not seem to be essential. The "Friendly Relations" Declaration, which has been reaffirmed in the Preamble, provides specifically that "the territory of a State shall not be the object of military occupation resulting from the use of force," and "shall not be the object of acquisition resulting from the threat or use of force." These acts are declared to be unlawful violations of recognized principles of international law, and the Security Council has discretion under paragraph 3(b) to determine that it is aggression if all the circumstances of the case so warrant.

(b) *Extended Military Occupation*

Another proposed enumeration of an aggressive act which relates to occupation and which has not been included in this compromise definition is one put forward by the six Powers. They would have listed as aggressive the use of armed forces in another state "in violation of the fundamental conditions of permission for their presence, or maintaining them there beyond the termination of permission," providing it was done in order to achieve a prohibited purpose.⁵⁸ The Soviets and others seemed inclined to go along with this six-Power proposal once it was explained, but there was bickering about the language.⁵⁹

The concept of extended military occupation as a form of aggression is novel and excessive. There are many agreements dealing with the stationing and the status of the forces of one country on the territory of another. It frequently happens that some of the terms of such agreements are breached, and it also happens that such agreements are cancelled or expire. Extended occupation of a military base pending further negotiations or pending removal elsewhere should not *per se* constitute an act of aggression. It need not be accomplished by the loss of a single life, or even any damage to property, and therefore it does not belong among a listing of acts which constitute the most serious of all crimes. Once the listing of prohibited purposes is removed from the definition the support for this six-Power proposal is left without its principle justification and therefore it is no longer significant.

(c) *Subversion*

Acts of subversion can, under certain circumstances, constitute aggression. The proposed definition provides in paragraph 2 (e) that if armed bands invade another state in such force as to constitute an armed attack it is aggression. The preamble reaffirms the principles of international law which prohibit the threat or use of force to assist civil strife or terrorist acts in any other state. The six Powers, which were the ones most concerned about the inclusion of acts of subversion in the definition, were finally prepared to settle for repetition of the two relevant provisions from the "Friendly Relations" Declaration.⁶⁰ That has, in effect, been accomplished by the preambular reaffirmation. In addition, para-

graph 4(b) of the proposed consensus definition provides ample authority for reasonable defensive measures to be employed against any form of aggressive act.

2. The Use of Force in the Exercise of the Right of Self-Determination

There has been omitted from the definition any reference to the right of self-determination as a permissible use of force. Self-determination was the subject of intensive debate by the Special Committee with various proposals considered. The thirteen Powers had proposed a paragraph stating:

None of the preceding paragraphs may be interpreted as limiting the scope of the Charter's provisions concerning the right of peoples to self-determination, sovereignty and territorial integrity.⁶¹

The Syrian representative had proposed that there be added:

or as preventing the use of armed force by dependent peoples in order to exercise their inherent right of self-determination.⁶²

Another alternative would simply have added a reference to the binding effect of the Charter and the elaboration contained in the "Friendly Relations" Declaration.⁶³ The Romanian delegate proposed a wording even more detailed.⁶⁴ The Soviet Union indicated unhappiness with the proposed text for failing to emphasize that it applied to dependent and colonial peoples, nevertheless they indicated a willingness to go along if everything else was settled.⁶⁵

Specific reference to self-determination has been omitted from the proposed consensus definition because there is no consensus agreement on the wording, or on whether or not it should be included. In fact, the point is already covered elsewhere. Paragraph 4, by reaffirming the Charter provisions concerning the lawful use of force, also includes the provisions dealing with the right of self-determination.⁶⁶ The reaffirmation in the Preamble of the "Friendly Relations" Declaration and the Declaration on Strengthening International Security again incorporates by reference all of the agreements which the United Nations have been able to reach thus far in elaboration of the right to self-determination. It is not necessary to go beyond that, nor does it seem possible to do so at this time.

3. *Legal Consequences of Aggression*

Another subject which was debated by the Special Committee but which has not been specifically included in this proposed consensus definition relates to some of the legal consequences of aggression.

(a) *Non-recognition of Territorial Gains*

The U.S.S.R. draft had proposed that:

No territorial gains or special advantages resulting from aggression shall be recognized.

The thirteen Powers had coupled this with a sentence prohibiting any military occupation. Other minor wording changes were also being considered but the six Powers felt that the subject of territorial gains did not belong in a definition of aggression. Since there was no agreement in either principle or wording and since the point is already specifically and clearly contained in the Declarations of International Law approvingly referred to in the Preamble, it was not deemed essential that it be reiterated in the body of the definition.

(b) *Responsibility of Individuals and States*

The final legal consequence of aggression which was the subject of some deliberation by the Special Committee but which was omitted from the proposed consensus definition relates to the question of responsibility for aggression. At its last session three alternatives were being considered.

One said that:

Aggression as defined herein, constitutes a crime against international peace, giving rise to responsibility under international law.

Another proposal was that:

A war of aggression constitutes a crime against the peace for which there is responsibility under international law.

The third suggestion was simply that:

In the general formulation of aggression a phrase be inserted after the word aggression describing it as "a crime against peace." ⁶⁷

The six-Power draft was silent on the subject.

The inclusion of a reference to the criminal nature of aggression does not appear to be indispensable. The planning, preparing, initiating or waging of a war of aggression is a crime against peace, as first articulated and codified in the Charter of the International Military Tribunal, and subsequently universally recognized. The principles of the Nürnberg Charter were formulated by the International Law Commission and unanimously approved by the General Assembly. ⁶⁸ The absence of any reference to it in a definition of aggression does not detract from the definition and the alternative texts considered by the Special Committee do not add anything to what is already part of accepted international law. In the absence of any agreement in the Special Committee, the omission of what is not requisite would seem to be the most constructive solution to the problem.

IV. CONCLUSION

The most fateful challenge to lawyers and scholars in our time, according to Professors McDougal and Feliciano, embraces the dual tasks of inventing the structures of authority to move the people of the world from the balance of terror toward a more complete world order of human dignity, and to have such structures accepted and put into practice. ⁷⁰ Despite the paralysis caused by the fear of change or adhesion to power the evolutionary thrust toward a more rational social order is irresistible. The dispersion among a growing number of nations of the modalities of mutual annihilation has already compelled collaboration in areas beyond the dreams of yesterday. The sea, the skies, and the air we breathe are only a few of the arenas in which the need for collective co-operation is being increasingly recognized and implemented.

It is a dangerous anachronism that states, restricted only by the limits of their power, still exercise unbridled discretion to determine for themselves when they may take up arms against their neighbors. What is advocated here is that the law try to take one small step forward toward restraining the perpetuation of this international anarchy.

No one pretends that by defining aggression a peaceful world will thereby be assured. Belligerency is not a virus which can be eradicated by a verbal formula. Many competent scholars have, over the past 50 years, defined aggression in terms quite different from those proposed here. No formulation, no matter how detailed or precise, can hope to eliminate disagreements about interpretation or application. It can only serve as a guide in helping to indicate some of the relevant factors which must be taken into account in determining the circumstances under which the application of violence is tolerable in international society.

The text suggested here is a compromise in many ways. It is a mixture of legal positivism, natural law and sociological jurisprudence. It recognizes the need for some identifiable standards and yet acknowledges by its terms that law must be interpreted to meet the needs and expectations of the society in which it is to be applied. Most important of all, it is a definition which seems, to the author, to come closest to including what might now be acceptable to a committee which has already debated the subject much too long. The test is not whether the proposed definition is perfect, but whether it is useful in setting forth a compromise which may prove acceptable today.

Partisan self-interest often binds or blinds those charged with speaking for a particular government.

The peoples of the world, who are the victims of aggression, must have at least some objective criteria by which to begin to measure the validity of actions which may affect the destiny of us all.

The movement toward a rational world order will be a long and tedious journey. A few of the other steps along the way will include a Code of Offenses against The Peace and Security of Mankind, and an International Criminal Court to deal with such major international crimes as aggression, genocide, apartheid and other crimes against humanity. We are told, alas, that the United Nations will take no further step in that direction until aggression is defined. The absence of the definition is now a bar to further progress in related areas.⁷¹

There are those who will ask what is the use of a code which is unenforceable and why should time and effort and money be wasted in pursuit of a utopian dream which has eluded man since Cain slew his brother Abel. In a world filled with fear man must choose to live with either despair or hope. Those who seek a definition of aggression are among the latter, believing that:

On one sure certain day, the torch bearers
Will... see a light moving upon the chaos.
Though our eyes be shut forever in an iron sleep,
Their eyes will see the Kingdom of the law. 72

FOOTNOTES

¹ U.N. Charter, Ch. I, Art. 1, Sec. 1.

² General Assembly Res. 380 (V), Nov. 17, 1950.

³ See Stone, J., *Aggression and World Order* (1958); McDougal and Feliciano, *Law and Minimum World Public Order*, 121-260 (1961). Those very scholarly texts, leading to different conclusions, should be consulted for reference to all of the principle writings on the subject to 1961.

⁴ General Assembly Res. 2880 (XXVI), Dec. 21, 1971. The Resolution on Implementation of the Declaration on the Strengthening of International Security called, *inter alia*, for an early agreement on a definition of aggression. Only South Africa voted against the resolution while 16 abstained, including all of the six Powers which joined in a draft definition.

⁵ The reports of the Special Committee are contained in GAOR, 23rd Sess., Agenda Item 86, A/7185/Rev. 1; GAOR, 24th Sess., Supp. No. 20 (A/7620), Feb. 24-Apr. 3, 1969; GAOR, 25th Sess., Supp. No. 19 (A/8019), July 13-Aug. 14, 1970; GAOR, 26th Sess., Supp. No. 19 (A/8419), Feb. 1-Mar. 5, 1971; GAOR, 27th Sess., Supp. No. 19 (A/8719), Jan. 31-Mar. 3, 1972.

⁶ See A.J.I.L. Supp. (1933) for the texts of the Conventions Defining Aggression as signed on July 3, 4 and 5, 1933. This definition was also accepted by Associate Justice Robert H. Jackson, Chief Prosecutor for the United States before the International Military Tribunal at Nürnberg. Jackson, *The Case Against the Nazi War Criminals*, at 79 (1946).

⁷ The texts of the drafts are contained in the reports of the Special Committee referred to in note 5 above.

⁸ See Ferencz, "Defining Aggression: Where It Stands and Where It's Going," 66 A.J.I.L. 491 (1972).

⁹ Stone, *op. cit. above*, at Appendix, lists 45 different definitions of aggression derived from the League of Nations, various treaties and proposals by legal scholars. Some of the definitions would include economic or ideological aggression as well as the failure to accept decisions of international tribunals. Some, such as the Harvard Research of 1939, define aggression "as a resort to armed force by a state when such resort has been only determined by a means which that state is bound to accept, to constitute a violation of an obligation," at p. 216. The shortest and simplest definition was that advanced by George Scelle: "... *tout recours à la violence = guerre; toute guerre = aggression.*"

¹⁰ The text is contained in GAOR, 26th Sess., Supp. No. 19 (A/8419), at 39.

¹¹ The texts of the three draft proposals before the Special Committee are reproduced in GAOR, 27th Sess., Supp. No. 19 (A/8719), Annex I.

¹² G. A. Res. 2625 (XXV), U. N. General Assembly, 25th Sess., Supp. No. 28 (A/8028).

¹³ G. A. Res. 2734 (XXV), U. N. General Assembly, 25th Sess., Supp. No. 28 (A/8028).

¹⁴ See Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey," 65 A.J.I.L. 713 (1971) for an analysis of how the consensus agreement was reached.

¹⁵ The six Powers had used the introductory phrase "Adopts the following definition," and had described aggression as "a term to be applied by the

Security Council." Objection was raised that it sounded like an exercise in grammar. U. N. Doc. A/AC. 134/SR. 57 at 2, and SR. 60 at 7. The form suggested here is more consistent with general U. N. practice.

¹⁶ Note 5 above, A/8719, at 14.

¹⁷ *Ibid.*, at 19.

¹⁸ *Ibid.*, at 22.

¹⁹ *Ibid.*, at 19.

²⁰ Article 2, Sec. 4 of the Charter as well as the "Friendly Relations" Declaration and the Declaration on Strengthening of International Security require that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

No reference is made to "sovereignty."

²¹ Note 5 above, A/8719, at 19. The Soviet insistence that the terms of the Charter be strictly followed was not consistent with its offer to accept a reference to the "Principles" of the Charter, or the "purposes and principles" of the Charter, or its own draft which referred to the "provisions" of the Charter.

²² See text in note 20 above.

²³ The Purposes as set forth in Chap. I, Article 1, are "to maintain international peace and security, develop friendly relations and achieve cooperation among nations." Other provisions of the Charter defining the procedures to be followed for the pacific settlement of disputes are set forth in Chap. VI. Under the broader view the use of armed force without compliance with the procedures might also amount to aggression.

²⁴ See Hyde, International Law, Sec. 134, on the Extent of the National Domain.

²⁵ Note 5 above, A/8719, at 14.

²⁶ Note 5 above, A/8419, at 42.

²⁷ See note 6 above.

²⁸ Note 25 above.

²⁹ *Ibid.*

³⁰ *Ibid.*, at 43.

³¹ Note 5 above, A/7620, at 5.

³² *Ibid.*, at 7.

³³ Note 25 above.

³⁴ Note 6 above.

³⁵ Note 5 above, A/8419, at 43. It is interesting to note the Soviet proposal referred to certain "aims" but they objected very vociferously to the six-Power reference to certain prohibited *purposes*. This Soviet proposal was later suspended. A/8019 at 19.

³⁶ *Ibid.*

³⁷ Note 5 above, A/8719, at 15.

³⁸ The texts of both paragraphs are reproduced in connection with the discussion of subversion in relation to the second preambular paragraph above.

posal

³⁹ Note 37 above.

⁴⁰ Note 5 above, A/8419, at 42.

⁴¹ Note 37 above.

⁴² Note 11 above.

⁴³ U. N. Doc. A/AC. 134/SR. 96, p. 16; note 5 above, A/8719, at 18. In 1970 Ambassador Chaumont of France had suggested that the Security Council, in dealing with the question of priority consider "the circumstances of each particular case" and in dealing with intent consider "the declared intentions and aims pursued." U. N. Doc. A/AC. 134/SR. 57, at p. 7.

⁴⁴ Note 5 above, A/8719, at 21.

⁴⁵ *Ibid.*, at 16, 21, 22.

⁴⁶ Included among the stated principles of international law are the duty to refrain from the use of force to violate existing international boundaries or international lines of demarcation, or to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other state, or to interfere with the political system of any other state or to coerce another state to secure from it advantages of any kind. Note 12 above. This would seem to cover all of the five unlawful purposes listed in the six-Power draft.

⁴⁷ Note 5 above, A/8719, at 19.

⁴⁸ Alternative 2 provided:

1. According to the Charter, only the United Nations [through the Security Council exercising its primary responsibility for the maintenance of international peace and security] has the authority [competence] to use force in the performance of its functions to maintain international peace and security. However under the Charter, the use of force is also legitimate in the case referred to in Paragraph 2 hereof, or when it is undertaken subject to the provisions of Article 53 of the Charter.

2. The inherent right of individual or collective self-defense of a state can be exercised only in case of the occurrence of armed attack [armed aggression] in accordance with Article 51 of the Charter. *Ibid.*, at 16. The second paragraph is taken verbatim from the initial thirteen-Power draft, whereas the first seems to be derived from the six-Power proposal: "The use of force in the exercise of the inherent right of individual or collective self-defense, or pursuant to decisions of or authorization by competent United Nations organs or regional organizations consistent with the Charter of the United Nations, does not constitute aggression." Paragraph III.

⁴⁹ Note 5 above, A/8719 at 20-21.

⁵⁰ Int. Conf. on Military Trials, London, at 374, 375 (Dept. of State Pub. 3080).

⁵¹ Cited in Stone, note 3 above, at 207.

⁵² Note 5 above, A/8719, at 22.

⁵³ U. N. Doc. A/AC. 134/SR. 97, p. 4.

⁵⁴ Note 5 above, A/8719, at 23.

⁵⁵ Mr. Vincent Mutuale of the Congo, U. N. Doc. A/AC. 134/SR. 72 at 7; Mr. Stephen M. Schwebel of the U. S., U. N. Doc. A/AC. 134/SR. 63 at 5; Mr. H. Steel of the U. K., U. N. Doc. A/AC. 134/SR. 74 at 8; M. Philippe Petit of France and Mr. E. F. Ofstad of Norway, U. N. Doc. A/AC. 134/Sr. 74 at 4. See Bowett, Self-Defense in International Law (1958) at 269.

⁵⁶ Note 5 above, A/8719, at 8, 10.

⁵⁷ *Ibid.*, at 14.

⁵⁸ *Ibid.*, at 12.

⁵⁹ *Ibid.*, at 15.

⁶⁰ *Ibid.*, at 18.

⁶¹ *Ibid.*, at 10.

⁶² *Ibid.*, at 17.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at 22.

⁶⁵ *Ibid.*, at 21.

⁶⁶ Article 1 and 55. See Nanda, *Self-Determination in International Law*, 66 A.J.I.L. 321 (1972).

⁶⁷ Note 5 above, A/8719, at 17.

⁶⁸ General Assembly Res. 95 (I), Dec. 11, 1946; General Assembly Res. 177 (II), Nov. 21, 1947; See Woetzel, *The Nürnberg Trials in International Law* (1962).

⁶⁹ Note 3 above, at 260.

⁷⁰ Note 3 above, at 260.

⁷¹ See General Assembly Res. 898 (IX), Dec. 14, 1954; Res. 1187 (XI) Dec. 11, 1957.

⁷² From a poem by: Alfred Noyes, in *Watchers of the Sky* (1922), cited in M. E. Hall, *Selected Writings of Benjamin N. Cardozo*, (1947), at 3.

RECENT PUBLICATIONS
OF THE INTERNATIONAL COMMISSION OF JURISTS

Review of the International Commission of Jurists

Issue No. 9 (December, 1972)

Human Rights in the World: U.N. Sub-Commission; Bangladesh; Northern Ireland; Portuguese Africa; Switzerland; Turkey; Uganda.

Articles on Expulsion of Aliens; Conscientious Objection; Preventive Detention in Nigeria.

Notes on cases; Contempt of Court in South Africa; Extradition in Costa Rica.

ICJ News; Books of Interest.

Price: Swiss Francs 7.50

The Events in East Pakistan, 1971

A Legal study by the ICJ Secretariat

Introduction; Outline of Events, March-December, 1971; Legal Position under Pakistan Law; Legal Position under International Penal Law; Right of Self-Determination in International Law; The Role of the United Nations; The Role of India.

Price: Swiss Francs 12.00 or Swiss.Fr. 8.00 each for bulk orders of 10 or more; postage free.

The Protection of Privacy

A Comparative Study by the ICJ Secretariat

Introduction: What is Privacy? The Impact of Technological Developments on the Right of Privacy. The General Law Relating to Privacy in Ten Countries. Intrusions into Privacy. Public Disclosure of Private Information. Conclusions.

Price: Swiss Francs 8.00

Published by UNESCO, International Social Science Journal, Vol. XXIV, No. 3, 1972, in English and French.

The above publications are available from:

International Commission of Jurists
109, route de Chêne; 1224 Chêne-Bougeries,
Geneva, Switzerland

Published and distributed by
INTERNATIONAL COMMISSION OF JURISTS,
109, ROUTE DE CHÊNE, 1224 CHÊNE-BOUGERIES
GENEVA SWITZERLAND

HENRI STUDER S.A., PRINTERS, GENEVA, SWITZERLAND