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I
THE GENERAL PROBLEM OF DEFINING AGGRESSION

THE LEGAL CONTROL OF THE USE OF FORCE AND THE DEFINITION OF AGGRESSION

*Donald C. Piper**

It is both logical and inevitable in a discussion of the legal control of the use of force by the members of the international community that the absence of and need for a legal definition of aggression is mentioned. Over the past five decades, intermittent attempts have been made in both the League of Nations and the United Nations to formulate such a legal definition.[1] We are all aware that during this same time acts of aggression have occurred and in some instances have been appropriately condemned and punished by members of the international community. To speculate whether the existence of a specific legal definition of aggression would have deterred the decision-makers from committing these acts is provocative, but not conclusive. Nevertheless, that the existence of such a definition might have deterred certain aggressive acts is sufficient reason for some scholars and state authorities to continue

*Chairman, Department of Government and Politics, University of Maryland.

[1]The following sources are useful in examining the historical development of attempts to define aggression. Report of the 1956 Special Committee on the Question of Defining Aggression, 12 U.N. GAOR Supp. 16, U.N. Doc. A/3574 (1957); Report of the Secretary-General, Oct. 3, 1952, on the Question of Defining Aggression, 7 U.N. GAOR, Annexes, Agenda Item No. 54, at 17, U.N. Doc. A/2211 (1952); 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 719-874 (1965).

to advocate the need for a concerted effort to formulate a legal definition of aggression. Accordingly, notwithstanding the repeated failures in the efforts to define aggression, the matter remains on the international agenda and periodic attempts within the United Nations are made to formulate an acceptable definition.

The attempts at definition, while a legal exercise requiring the precision and skill of the international lawyer, are fundamentally a political exercise that exposes basic philosophical differences between states regarding the desirability of the task and the utility of the possible product. My purpose here is to examine briefly the attempts that have been made to formulate a legal definition of aggression and to consider the types of definition that have been proposed and the difficulties inherent in each.

Although we must acknowledge that the members of the international community have not been able to agree upon a legal definition of aggression, we must recognize that the concept of aggression is fundamental to contemporary international law and international relations. The judgment of the Nuremberg Tribunal makes it clear that acts of aggression are illegal under international law.

States utilize the concept without definition in a wide range of both bilateral and multilateral nonaggression or mutual-defense treaties. In the former they pledge not to commit aggression against the other treaty parties. In the latter they pledge to come to the assistance of other treaty parties who are the victims of an armed attack or acts of aggression.

Moreover, the lack of a specific legal definition of aggression has not impaired the ability of either the League of Nations or the United Nations to find that certain states were guilty of acts of aggression. The League Assembly made such a finding with regard to the Soviet Union's invasion of Finland in 1939,[2] and in 1951 the General Assembly found that both North Korea and Communist China had committed aggression against South Korea.[3]

We should also acknowledge that some scholars and state authorities assert that decision-makers should and can employ the concept without specific legal definition. They assert that there is a conventional or natural definition of the term that provides decision-makers with a standard that can be utilized to examine acts involving the use of force.

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[2]Report of the Secretary-General, Oct. 3, 1952, on the Question of Defining Aggression, *Criteria Applied When a Conflict Has Been Accompanied by the Use of Force* § VIII, para. 96, 7 U.N. GAOR, Annexes, Agenda Item No. 54, at 17, 36-38, U.N. Doc. A/2211 (1952), *reprinted in* 5 M. WHITEMAN, *supra* note 1, at 729.

[3]G.A. Res. 498, 5 U.N. GAOR Supp. 20A, at 1, U.N. Doc. A/1775/Add.1 (1951).

Their point is analogous to the view that while one cannot define love or hate in all of its meanings, one can experience it or observe it.

Before we begin to discuss the types of definitions that have been proposed and the efforts that have been made, it is instructive to mention briefly the pros and cons regarding the desirability and feasibility of a legal definition of aggression. The debates within the United Nations on the subject and the reports of the special committees contain a full spectrum of viewpoints by state authorities.[4] The writings of legal scholars such as Quincy Wright,[5] Julius Stone,[6] D.W. Bowett,[7] and Ian Brownlie[8] are well known.

In support of the benefits of a legal definition to the members of the international community, it is asserted that a legal definition will enable the United Nations to be more effective in the maintenance of international peace and order. A legal definition will enable the members of the Security Council or General Assembly to determine which state violated the international order. Article 39 of the Charter provides that the Security Council may make a determination of an "act of aggression" and decide what measures should be taken to restore international peace and security. Under the Uniting for Peace Resolution,[9] the General Assembly may make a finding of an "act of aggression" and make recommendations to the members for collective measures to maintain or restore international peace. Once the delinquent state is identified, the community is able to impose appropriate sanctions against the lawbreaker.

It is also asserted that a legal definition will have a deterrent effect upon national decision-makers. If certain behavior is clearly and specifically prohibited and national decision-makers know that violations will be punished, they may be deterred from the contemplated act. (We must comment here that the certainty that lawbreakers will be appropriately punished by the international community does not automatically or necessarily follow from the existence of a legal definition of aggression.) A clear definition will eliminate the possibility that national decision-makers might commit aggression through ignorance or inadvertence.

It is furthermore asserted that a legal definition will assist the community in making decisions regarding self-defense. If a state has com-

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[4]For a collection of sources that record some of these views, see note 1 *supra*.

[5]*E.g.*, Q. WRIGHT, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR (1961).

[6]*E.g.*, J. STONE, AGGRESSION AND WORLD ORDER (1958); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1954).

[7]*E.g.*, D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958).

[8]*E.g.*, I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).

[9]5 U.N. GAOR Supp. 20, at 10, U.N. Doc A/1775 (1950).

mitted an act that is defined as aggressive, it cannot assert a claim of self-defense to cover its illegal activities.

Finally, it is asserted that a definition of aggression would have an automatic quality; that is, it would provide no opportunity for the national decision-makers to raise political considerations. In other words, the legal definition would prevent nonlegal considerations, contribute to uniform perceptions of events, and facilitate difficult judgments of cause and effect. The following quotation from Quincy Wright is appropriate:

> Definitions of aggression and self-defense, resting as far as possible on easily observable facts rather than on motives or attitudes, are, therefore, of major importance, especially in view of the difficulty of decision in the Security Council and the General Assembly. Discretion on these matters should be reduced to the minimum.
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> It is true that the Charter intended to give a considerable discretion to the Security Council to decide such issues on the basis of the facts of a situation; and on some questions, such as what constitutes a threat to use armed force or a threat to the peace, discretion is necessary. Experience, however, underlines the need for definitions as precise as possible of what constitutes, for example, aggression, so that states will not commit it through inadvertence or through ignorance. . . . United Nations organs should not be able to evade their responsibility if a transgression occurs . . . . Those who have sought to make the term aggression identical with injustice have misconceived the function of the term in the Charter and in international law. It is a rule of order, not of justice.[10]

The contrary arguments center on both the undesirability of a specific legal definition and the unlikelihood of any agreeable formulation. It is asserted that the legal aspects of the use of force represent only a part of the problem. The use of force is more than a legal problem; rather it has political, economic and ideological characteristics that must be taken into account by the decision-makers in making any determination of the existence of acts of aggression. It is also asserted that the application of a specific legal definition (especially an enumerative definition) will require the decision-makers to exercise a very narrow focus on the alleged acts. While this narrow focus may assist the community in maintaining international order, it may do so at the expense of justice for a particular state whose acts may be justified in a larger context. A specific definition is dangerous, since it would be incomplete and thus invite evasive action by states to avoid the application of sanctions. Perfidious decision-makers would seek loopholes in the definition to

[10]Q. WRIGHT, *supra* note 5, at 14.

frustrate the will of the international community or to blame an innocent party. The failure thus far to formulate a definition illustrates the complexities of the problem and the specific difficulties of each of the proposed definitions. Because of the deficiencies that can be cited for each type of definition, it is concluded that no definition will really be useful to the members of the international community.

Although the view does not appear to have been set forth in public by state authorities, it must be pointed out that a specific definition of aggression would give to international law a degree of specificity regarding the use of force that has not existed to date. Decision-makers appear to prefer a degree of ambiguity and uncertainty with respect to the international legal rules regarding the right to resort to the use of force. The specificity that might be set forth in a legal definition could circumscribe the ability of decision-makers to resort unilaterally to the use of force for the protection of national security.

The scholars and state authorities who argue against the utility of a specific definition of aggression prefer to let the appropriate international organ evaluate each alleged incident and make a decision within the general framework of a "natural" definition of aggression. Whether it is because of the persuasiveness of their arguments or the recalcitrance of state authorities, one must acknowledge that the opponents to a legal definition have to date prevailed.

John Hazard points out that the differences among state authorities concerning the desirability and feasibility of a legal definition of aggression may be attributable in part to their differing legal traditions. Those who favor a legal definition are to a large extent participants in a Roman-law tradition with emphasis on a detailed code of law; those who prefer the "natural" approach are to a large part participants in a common-law tradition with emphasis on the exercise of judicial wisdom in particular cases.[11]

As one reviews the history of the efforts over the past five decades to formulate a legal definition of aggression, several specific developments stand out. The first to note is the Politis definition of aggression prepared for the Committee on Security Questions at the Conference for the Reduction and Limitation of Armaments held at Geneva, 1932-1933, under the auspices of the League of Nations. Although this definition was not adopted by the Conference it has had substantial impact on subsequent discussions. The Politis definition provides that the aggressor in an international conflict is that state which first commits one

[11]Hazard, *Why Try Again to Define Aggression?*, 62 A.J.I.L. 701, 703-06 (1968).

of five specific acts listed therein. These acts include a declaration of war, invasion of armed forces into the territory of another state, attack by military forces on the territory, vessels, or aircraft of another state, naval blockade of the coasts or ports of another state, and the provision of support to armed bands formed within a state's territory which have invaded the territory of another state.[12] (We shall discuss later the difficulties inherent in the application of the enumerative definition.)

The consistent interest of the Soviet Union in the formulation of an enumerative definition of aggression is also evident over the past decades. Soviet representatives submitted an extended, enumerative definition to the Committee on Security Questions mentioned above. In fact, the Politis definition is substantially based upon a definition submitted to the Committee by the Soviet delegation. In 1933 the Soviet Union also signed three conventions with its neighbors that contained the Politis definition of aggression. Although there have been some modifications in its proposals, with recent proposals containing references to indirect aggression, economic aggression, and ideological aggression, the Soviet Union has pressed within the United Nations for the adoption of an enumerative definition similar to the one it proposed in 1933.

While the Soviet Union has consistently pressed for the adoption of an enumerative definition of aggression, the United States, in contrast, has followed an uneven policy. In the formulation of the London Charter for the Nuremberg Tribunal, the United States sought the adoption of a modified Politis definition as a part of the Charter.[13] In this instance it was opposed by the Soviet Union which argued that such a definition was unnecessary as a part of the Charter. Within the debates in the United Nations, the United States has manifested a policy of general opposition to the formulation of a specific definition, preferring to allow the Security Council or the General Assembly to exercise judgment with the benefit of a "natural" definition of aggression. In a different approach, the reasons for which I can only speculate, the United States in 1969 joined with several other states in proposing a mixed definition of aggression for consideration by the General Assembly's Special Committee on the Question of Defining Aggression.[14]

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[12]For the text of the Politis definition and additional commentary, see 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 734-36 (1965).

[13]*See Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945*, at 294 (Dep't of State Pub. No. 3080, 1949), *reprinted in* 5 M. WHITEMAN, *supra* note 12, at 853-54.

[14]24 U.N. GAOR Supp. 20, at 8, U.N. Doc. A/7620 (1969).

Within the context of the United Nations several attempts have been made to formulate a definition of aggression that would enable the Organization to have a specific and agreed-upon standard to apply in instances involving the use of force. In 1950 the General Assembly asked the International Law Commission to consider the question of defining aggression. The Commission considered several alternative definitions, but the members were unable to reach agreement, and no recommendation was forwarded to the General Assembly.

In addition to the activity of the International Law Commission, the General Assembly has established special committees for the purpose of defining aggression and reporting to the Assembly. The activities of these special committees have been intermittent and have sharply exposed the basic differences among the members regarding the type of definition to be sought and the language to be employed. As in many United Nations activities, basic differences among states which are anticipated on this issue are complicated and exacerbated because of "cold war" differences. One must conclude that the United Nations activities in this area have neither strengthened the international organization nor clarified the rules of international law.

It should be noted that although the United Nations has been unable to formulate a definition of aggression, the Act of Chapultepec[15] and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty, 1947)[16] contain mixed definitions of aggression. (We shall discuss the Rio Treaty definition below.) In noting this, we must acknowledge that the problems that confronted the Inter-American states on this matter were less intensive than those confronting states in the United Nations.

It is now appropriate to examine the definitions of aggression that have been proposed and to consider the difficulties that would confront national decision-makers in the foreign offices and in the United Nations in the application of the definitions. I shall accomplish the latter analysis by applying the proposed definitions of aggression to the Arab-Israeli conflict of 1967.[17]

First, let us consider the types of proposed definitions. They fall into three broad categories: the enumerative definitions, the general-principles definitions, and the mixed definitions. The enumerative defi-

[15]Agreement on Reciprocal Assistance and Solidarity, Mar. 8, 1945, in INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE, MEXICO CITY, FEBRUARY 21-MARCH 8, 1945, at 30-33 (Pan American Union, Congress and Conference Series No. 47, 1945), 60 Stat. 1831, T.I.A.S. No. 1543.

[16]Sept. 2, 1947, 62 Stat. 1699, T.I.A.S. No. 1838, 21 U.N.T.S. 93.

[17]I have previously utilized this analysis in an unpublished paper presented at the Southern Regional Meeting of the American Society of International Law held at Tulane University in 1968.

nitions provide a specific listing of acts that constitute aggression with the provision that the state that first commits one of the acts is guilty of aggression. The listing of prohibited acts is usually exhaustive, although this may not always be the case, so that only those acts specified in the definition constitute aggression. This type definition also lists acts that may not be used as justification for the prohibited acts. The general-principles definitions provide a comprehensive formula for determining aggression under particular circumstances. The interpretation of the formula and its application to a particular conflict are left to the discretion and judgment of the members of the appropriate international organ. The mixed definitions contain a general statement prohibiting the use of force in international relations and an open list of acts that constitute aggression. The list illustrates the aggressive act, but does not specifically define it. The appropriate international organ has the authority to specify any other act as aggression according to the particular situation.

In dealing specifically with an enumerative-type definition of aggression, a useful reference may be made to the draft definition submitted to the United Nations by the Soviet Union in 1956.[18] The text of the definition follows:

> 1. In an international conflict that State shall be declared the attacker which first commits one of the following acts:
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> (a) Declaration of war against another State;
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> (b) Invasion by its armed forces, even without a declaration of war, of the territory of another State;
>
> (c) Bombardment by its land, sea or air forces of the territory of another State or the carrying out of a deliberate attack on the ships or aircraft of the latter;
>
> (d) The landing or leading of its land, sea or air forces inside the boundaries of another State without the permission of the government of the latter, or the violation of the conditions of such permission, particularly as regards the length of their stay or the extent of the area in which they may stay;
>
> (e) Naval blockade of the coasts or ports of another State;
>
> (f) Support of armed bands organized in its own territory which invade the territory of another State, or refusal, on being requested by the invaded State, to take in its own territory any action within its power to deny such bands any aid or protection.

[18]Report of the 1956 Special Committee on the Question of Defining Aggression, 12 U.N. GAOR Supp. 16, at 30-31, U.N. Doc. A/3574 (1957).

2. That State shall be declared to have committed an act of indirect aggression which:

(a) Encourages subversive activity against another State (acts of terrorism, diversion, etc.);

(b) Promotes the fomenting of civil war within another State;

(c) Promotes an internal upheaval in another State or a change of policy in favour of the aggressor.

3. That State shall be declared to have committed an act of economic aggression which first commits one of the following acts:

(a) Takes against another State measures of economic pressure violating its sovereignty and economic independence and threatening the bases of its economic life;

(b) Takes against another State measures preventing it from exploiting or nationalizing its own natural riches;

(c) Subjects another State to an economic blockade.

4. That State shall be declared to have committed an act of ideological aggression which:

(a) Encourages war propaganda;

(b) Encourages propaganda in favour of using atomic, bacterial, chemical and other weapons of mass destruction;

(c) Promotes the propagation of fascist-nazi views, of racial and national exclusiveness, and of hatred and contempt for other peoples.

5. Acts committed by a State other than those listed in the preceding paragraphs may be deemed to constitute aggression if declared by decision of the Security Council in a particular case to be an attack or an act of economic, ideological or indirect aggression.

6. The attacks referred to in paragraph 1 and the acts of economic, ideological and indirect aggression referred to in paragraphs 2, 3 and 4 may not be justified by any considerations of a political, strategic or economic nature, or by the desire to exploit natural riches in the territory of the State attacked or to derive any other kind of advantages or privileges, or by reference to the amount of capital invested in that territory, or by the refusal to recognize that it possesses the distinguishing marks of statehood.

In particular, the following may not be used as justifications:

A. The internal position of any State, as for example:

(a) The backwardness of any people politically, economically, or culturally;

(b) Alleged shortcomings of its administration;

(c) Any danger which may threaten the life or property of aliens;

(d) Any revolutionary or counter-revolutionary movement, civil war, disorders or strikes;
(e) The establishment or maintenance in any State of any political, economic or social system.

B. Any acts, legislation or orders of any State, as for example:
(a) Violation of international treaties;
(b) Violation of rights and interests in the sphere of trade, concessions or any other kind of economic activity acquired by another State or its citizens;
(c) Rupture of diplomatic or economic relations;
(d) Measures constituting an economic or financial boycott;
(e) Repudiation of debts;
(f) Prohibition or restriction of immigration or modification of the status of foreigners;
(g) Violation of privileges recognized to the official representatives of another State;
(h) Refusal to allow the passage of armed forces proceeding to the territory of a third State;
(i) Measures of a religious or anti-religious nature;
(j) Frontier incidents.

7. In any event of the mobilization or concentration by another State of considerable armed forces near its frontier, the State which is threatened by such action shall have the right of recourse to diplomatic or other means of securing a peaceful settlement of international disputes. It may also in the meantime take counter-measures of a military nature similar to those described above, without, however, crossing the frontier.

For the general principles definition, I shall use the definition favored, but not adopted by the International Law Commission in 1950.[19] The definition is as follows:

> Aggression is the threat or use of force by a State or Government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations.

For the mixed definition, I shall use the definition included in the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Pact).[20] Of the three definitions, this is the only one that has been

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[19] *Id.* at 28.
[20] *Id.* at 27.

formally adopted by any group of states in a binding instrument. The definition is as follows:

> *Article 1.* The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations.
>
> . . . .
>
> *Article 9.* In addition to other acts which the Organ of Consultation may characterize as aggression, the following shall be considered as such:
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> (a) Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State;
> (b) Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State.

Since the legal definition of aggression is, *inter alia*, to assist national decision-makers operating in the United Nations, it is useful to employ the decision-maker level of analysis to examine the definitions. An analysis from this level of the 1967 Arab-Israeli conflict will enable us to examine the type and complexity of problems attendant to the application of each definition to a particular international conflict. In doing so we must also keep in mind that the benefits of hindsight that we may now employ in examining the 1967 conflict were not available to the decision-makers in the United Nations at the time of the conflict.

For the purpose of our analysis, let us assume that the national decision-makers in the international community are wholly objective in their perception and evaluation of the Arab-Israeli conflict. Thus we assume that the events of the past decades have not conditioned the national decision-makers to any preconceived notions about the merits of the respective sides. Further we assume that the belligerents are not members of any alliance system that will provide political support. Such assumptions, while they do not comport with the real world as we know it, enable us to assess with optimum clarity the problem attendant to the application of each definition to the particular conflict. If we conclude that there are difficulties of application under ideal analytical conditions, we shall be forced to the conclusion that the difficulties encountered in the real world will be more acute.

Let us first look at the enumerative definition.[21] This definition has the advantage of listing particular acts that constitute aggression that a decision-maker may observe in the conflict. In connection with the 1967 conflict, there was an invasion by armed forces; there was a blockade; there was the bombardment of the territory of another state; and there was the support of armed bands that invaded the territory of another state. The encouragement by Syria of subversive activities and acts of terrorism against Israel could certainly constitute "indirect aggression." Moreover, the statements attributed to both sides could be considered "ideological aggression" since they appear to encourage war propaganda: Israel by its statements in mid-May and the Arab states by their continued insistence that they would crush and eliminate the state of Israel.

It is apparent, however, that this definition, because it concentrates on the "first" act in a sequence of events, poses difficult questions for the national decision-makers. A decision-maker concentrating on the question of who initiated the military hostilities on June 5, 1967, will discover that the facts are not firmly established. The United Arab Republic's claim that a captured Israeli pilot confessed to Israel's having taken the first action does not provide sufficient evidence upon which a national decision-maker may rely confidently. The United Nations observers in the area could not determine which side initiated the military hostilities. The confusing data do not enable the decision-maker to come to an unequivocal decision regarding responsibility for initiating the action.

Even if the data enabled the decision-maker to conclude with confidence which state initiated the hostile action on June 5th, his conclusion regarding the existence of aggression would be limited and incomplete. The decision-maker would have to decide whether to concentrate his entire attention on that date or to consider the preliminary events as well. If he shifted his attention to the preliminary events, he would face the task of identifying the cause and effect in a never-ending sequence of past events.[22] Can a judgment regarding aggression on June 5, 1967, have any meaning without considering whether or not the blockade of the Straits of Tiran was a previous act of aggression? A determination

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[21] Pp. 8-10 *supra*.

[22] For a summary of the events leading to the initiation of the June 5, 1967, conflict, see STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 90TH CONG., 1ST SESS., A SELECT CHRONOLOGY AND BACKGROUND DOCUMENTS RELATING TO THE MIDDLE EAST (Comm. Print 1967); O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, 9 ORBIS: A QUARTERLY J. OF WORLD AFFAIRS 692 (1967-1968); Yost, *The Arab Israeli War: How It Began*, 46 FOREIGN AFFAIRS 304 (1968).

of the legality of the blockade in turn requires a decision regarding the validity of the Arab view that the Gulf of Aqaba is historically a national body of water for the Arab states and that the status of belligerency remains in effect. Furthermore, in making a determination of aggression, can the decision-maker ignore the Israeli attack on Es Samu? Is it possible to ignore the El Fatah raids? A decision-maker seeking to ascertain the initial act of causation is constantly pushed in the fashion of a pendulum from one event to another in a sequence that totals over 100,000 incidents.[23] He cannot be sure which event is the cause and which is the effect.

It is clear that a national decision-maker could not apply the enumerative definition of aggression to the Arab-Israeli conflict in any automatic fashion. The definition forces the decision-maker to identify the one side that committed the wrong, and the implication follows that the other side was wholly without blame. To make such an identification and accept its implication would certainly represent a simplistic view of the Arab-Israeli situation. In addition, the application of the enumerative definition would require drawing conclusions based on uncertain data and making difficult judgments regarding cause-and-effect relationships. These are matters over which honest men may differ. We cannot expect that the decision-makers for the international community will draw the same conclusions and make the same judgments.

From this examination, it would appear that the enumerative definition is not useful for a major conflict that has a long series of antecedent stimuli and responses. Such a definition would appear to be useful primarily in a surprise-attack situation similar to Pearl Harbor or the German invasion of Poland.

We must now consider the general-principles definition,[24] as favored by the members of the International Law Commission. The inclusiveness of the formula incorporated in the definition also poses problems of application to the Arab-Israeli conflict. The events of the conflict would give a decision-maker the clear picture that there was the use of force and the threat of the use of force by both sides. Moreover, the recent picture is reinforced by a look at the past two decades. The difficult question that the formula poses for the decision-maker, however, is ascertaining the purpose or reason for the use of force.

According to the general-principles definition, the use of force is justified only if it is for self-defense or the implementation of a decision

[23] STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 90TH CONG., 1ST SESS., A SELECT CHRONOLOGY AND BACKGROUND DOCUMENTS RELATING TO THE MIDDLE EAST 19 (Comm. Print 1967).

[24] P. 10 *supra*.

or recommendation of a competent organ of the United Nations. It is immediately apparent that the use of force by both sides on June 5th and in the previous period was not to implement a decision or recommendation of a competent organ of the United Nations.

To ascertain what incidents involving the use of force were for legitimate purposes of self-defense will not be an easy task for a decision-maker, since matters of intent and motivation must be resolved. To determine whether the exercise of a right of self-defense is justified in a particular situation, the decision-maker will need to consider, *inter alia*, the priority of actions, the existence and nature of any provocation, the credibility of the threat of the use of force, the necessity for immediate action, the proportionality of the response, and the right of preemptive self-defense. These are difficult questions of fact and of law. The definition is silent on how they are to be considered.

Using the general-principles definition, the decision-maker would be able to shift his attention from the "first" acts and the particular events of June 5th to the overall pattern of hostile events. Thus, the question of which side actually initiated the military action of any particular day would become a secondary consideration in assessing the evidence of aggression. In the Arab-Israeli conflict, the decision-maker could conclude without too much difficulty that both sides have committed acts of aggression, or more specifically, acts that were not committed for the purpose of self-defense. For example, the El Fatah raids against Israel involving terrorism, harrassment and sabotage were not for the purpose of self-defense. Nor could the Israeli raid on Es Samu be classified as self-defense in view of the disproportionate nature of the response and the resolution of censure passed by the Security Council.[25]

Finally, we must consider the mixed definition,[26] as incorporated in the Inter-American Treaty of Reciprocal Assistance. According to this definition, one question that must be resolved is whether or not the threat or use of force has been inconsistent with the provisions of the United Nations Charter. In making such a determination, the decision-maker must consider the meaning and interpretation of articles 1, 2 (especially paragraph 4), and 51. These articles, however, set forth broad principles and will not provide operational guidance to the decision-maker. As suggested earlier, it is possible that some national decision-makers may conclude that since 1948 both sides have used force contrary to the provisions of the Charter. Accordingly, both sides are guilty of committing acts of aggression.

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[25]S.C. Res. 228, 21 U.N. SCOR, 1328th meeting 7 (1966).

[26]P. 11 *supra*.

The decision-maker will also observe incidents of armed attack in the pattern of events relating to the Arab-Israeli conflict. Since unprovoked armed attacks constitute aggression, the decision-maker must ascertain which attacks were provoked and which were not. Making such a judgment requires, *inter alia*, a conclusion regarding the priority of acts, which is difficult in the case of the Arab-Israeli conflict, and the nature and credibility of the provocation. For example, the decision-maker will need to conclude whether the Israeli raid on Es Samu was provoked by the El Fatah raids or whether the raid was itself an unprovoked, armed attack. If the El Fatah raids were a provocation, was the disproportionate Israeli response a counter provocation?

The mixed definition also cites the invasion of the territory of another state as an illustration of aggression. The Israeli control of Sinai and parts of Syria and Jordan leaves no doubt that an invasion occurred. To some decision-makers this clear fact may be sufficient to label Israel an aggressor. Other decision-makers may be concerned with whether the invasion was the result of a proper and legitimate response in self-defense. While the definition does not specifically mention self-defense, it does not preclude such a consideration.

We must now take our analysis one more step. We have assumed that the national decision-makers will be wholly objective as they apply the legal definitions to the Arab-Israeli conflict. But this assumption is not compatible with the real world. Students of social psychology and decision making tell us that decision-makers act not on the basis of objective reality, but on the basis of their perceptions of reality. Two recent articles, *Hypotheses on Misperceptions*,[27] by Robert Jervis, and *Misperception of Aggression in Vietnam*,[28] by Ralph K. White, provide useful points regarding the perceptual process that occurs within the minds of national decision-makers. Jervis points out that national actors tend to perceive what they expect to happen. They do not make unbiased interpretations of data, but are influenced by the theories they expect to be verified.[29] He also points out that there is an overall tendency for decision-makers to see other states as more hostile than they are.[30]

Thus, a decision-maker will apply the legal definitions not to the objective reality of the Arab-Israeli conflict, but to his perception of the conflict. His perception in turn will be influenced by what he expects the parties to the conflict will do. In the twenty years of the Arab-Israeli

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[27]Jervis, *Hypotheses on Misperceptions*, 20 WORLD POLITICS 454 (1968).

[28]White, *Misperception of Aggression in Vietnam*, 21 J. INT'L AFFAIRS 123 (1967).

[29]*See* Jervis, *supra* note 27, at 455.

[30]*Id.* at 475.

conflict, the national decision-makers appear to have formulated definite expectations about the acts of the participants. Some decision-makers, the Soviet Union for example, appear to expect that Israel will undertake aggressive military action against the Arab states with the encouragement of the United States and other Western powers. Other decision-makers, the United States for example, appear to expect that the Arab states will undertake aggressive military action against Israel with the encouragement of the Soviet Union. The United States perceives that Israel is an ally and must be supported. The Soviet Union perceives that the Arab states are allies and must be supported. With the different expectations of the parties, the national decision-makers will have different perceptions of the conflict. The application of any legal definition of aggression to the Arab-Israeli conflict will be complicated immeasurably by these differences in expectations and perceptions.

In view of our analysis we are able to draw together several concluding points. The first point is clear: The legal definitions of aggression that have been suggested are not operational. They do not enable a decision-maker to avoid difficult interpretations of fact and of law. Their application under ideal analytical conditions to a particular international event requires difficult judgments. Even under ideal conditions, the use of a legal definition of aggression does not assure that the national decision-makers, and thus the international community, will arrive at the same conclusion regarding acts of aggression and the delinquent party.

Under real-world conditions, there is even less assurance that the use of a legal definition of aggression will result in similar or consistent judgments and conclusions by the members of the international community. In the process of decision-making at the national and international levels, the legal definition of aggression will be applied to a conflict after the expectations and perceptions of the conflict are well established in the minds of the decision-makers.

The analysis also shows that the definitions permit differing emphases. If the concern of the international community is in determining the delinquence of a state for a specific act, the enumerative definition would appear to facilitate this type of decision. If, however, the desire is to review a pattern of events to determine if one or both sides committed acts of aggression, the general-principles or the mixed definition would appear to facilitate the determination.

Since the proposed definitions are not operational and would present difficult problems in application and since the efforts at definition to

date have not been successful, some may come to the conclusion that the time and effort have been wasted. I think this is a reasonable and logical conclusion. However, I would like to hope that the final chapter has not been written and that a continuing effort may yet bring dividends.