

DISCUSSION ON THE PROBLEM OF DEFINING AGGRESSION

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REMARKS OF PROFESSOR ENGEL

Mr. Piper has given an excellent presentation of the pros and cons of defining aggression; the difficulty of arriving at a satisfactory definition as well as the disparate results to which different definitions might lead was illustrated well by the Arab-Israeli case. In many cases it is difficult to determine a cause-and-effect relationship; that is, to identify the aggressor and victim; the party that acted and the one that reacted. One must sometimes refer back over a very long time to make these determinations. In the Arab-Israeli case one might look back to the time of Abraham, the patriarch of the Jews, and of Ishmael, considered to be the ancestor of the Arabs. Abraham could be said to have committed a bloody act of aggression against Ishmael when he circumcised him at the age of thirteen. Although Abraham could have pleaded "superior orders," having acted upon the commandment of the Lord, history demonstrates that there has been hardly a case when the aggressor did not invoke the help of the Lord or claim the Lord to be on his side. Under these circumstances I wonder if there is much point in attempting to define aggression, when the complexity of the series of events in many situations effectively precludes a meaningful determination of who started the action.

In connection with Mr. Rusk's paper, the title of the General Assembly Resolution reminds me of the famous, or infamous, resolution adopted by the League of Nations in 1936 concerning the "Application of the Principles of the Covenant," which really meant the nonapplication of those principles. I hope the similarity in title is no omen.

Whereas Mr. Rusk has referred to the legal status of the General Assembly resolution, I wish to consider the resolution in a more general framework, namely, in the context of modification and interpretation of the Charter through the subsequent practice of United Nations organs. A convention on the law of treaties¹ was recently adopted in

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¹Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 A.J.I.L. 875 (1969).

Vienna at a conference convened under the auspices of the United Nations. That convention includes in article 31 a provision concerning the interpretation of the treaty through the subsequent practice of the parties to the convention. Article 31, however, does not consider the subsequent practice of the organs of an international organization as an interpretation of the instrument under which they operate. In the *Expenses* case² Sir Percy Spender argued against treating the practice of international organs as similar to the practice of the parties to a treaty, and I believe there are sound reasons why article 31 of the Vienna Convention should not be applied by analogy to international organs. Even a unanimous General Assembly resolution creates no new law but is at best a factor in the creation of customary law by the United Nations members who voted in support of the resolution. Contrary to what Mr. Rusk seems to suggest, I doubt that the General Assembly has the power to give the Charter an authentic interpretation, even by unanimous resolution. Interpreting a legal text authoritatively is commensurate with creating or amending it, and would therefore necessitate compliance with requirements of the Charter for its creation or formal amendment: *ejus est interpretari cujus est condere* (it is his to interpret whose it is to enact). The absence of an organ with the power of authentic interpretation contributes to the possibility of conflicting interpretations by different organs. And since there is no organ to decide which interpretation is "right" and which is not, all interpretations perforce must be "right." This dilemma reminds me of the story of a rabbi who was one time approached by a young couple to hear their separate complaints. Upon hearing the husband's account of the problem, he said, "You are right, my son." And after the wife had finished her story, he responded, "You are right, my daughter." When his wife questioned how both could be right, the wise rabbi answered, "You are right, too, my dear wife."

REMARKS OF PROFESSOR TAULBEE

In the 18th and 19th century aggression meant a military attack by the forces of one state against the territory or vessels of another, and often the terms "unjust" or "unprovoked" aggression were neutral terms relating to military activities. Aggression acquired a pejorative meaning after World War I when in discussions among the Allies it came to mean an *unlawful* resort to force. Aggression and self-defense thus became complements. As Brownlie has noted, however, the com-

²Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151.

plementary relationship was a basic assumption, not a definition of either term. The term "aggression" has now passed into common use, and frequent attempts at its definition have been made: for example, (1) the Pacts of 1933 between the U.S.S.R. and its neighbors,³ (2) the provisions of the Nuremberg Charter which involve moral, not legal strictures, (3) the International Law Commission reports, and (4) the work of the Special Committees of the United Nations General Assembly in 1953, 1956, and 1959.

Despite the several attempts at defining aggression, there have been few satisfactory results. Some of the unresolved questions that obstruct progress towards a good definition are whether the word "aggression" denotes a fact or a legal judgment; is it the consequence of behavior, or is it perhaps inclusive of intentions underlying behavior? There have been discussions of military, diplomatic, ideological, economic, and propagandistic aggression, and among these there is a dichotomy between those acts of aggression that should be dealt with under article 51 of the United Nations Charter and other acts that should only be condemned. The scope of the definitional problem might perhaps be contained within the single question: What are the legally permissible forms of a state's involvement in the internal or external affairs of another state? Nations have approached the question in different ways. The smaller nations in the Sixth Committee debates, for example, advocated that a state be prohibited from any form of pressure or threat of intervention in the affairs of other states. By contrast, United States statesmen during the last twenty years have consistently interpreted the legal prohibitions against force to reinforce political requirements of the containment policies of the United States. In this endeavor, the ambiguity of the concepts of "aggression" and "armed attack" have been invaluable. Four successive administrations have asserted that at least certain forms of "indirect" aggression might be assimilated into the concept of "armed attack" in order to justify the use of force as a measure of unilateral or collective self-defense. Not unexpectedly, the nature of the circumstances in which indirect aggression may justify a state in resorting to the use of force in self-defense has remained largely undefined.

Should there be any attempt at all to define aggression? In debate of this question there are on the one side Julius Stone and G.G. Fitzmaurice who argue that a definition would be "a trap for the innocent and a signpost for the guilty"; on the other side are John Hazard and Ian

³Convention Defining Aggression, July 3, 1933, 147 L.N.T.S. 67; Convention Defining Aggression, July 4, 1933, 148 L.N.T.S. 211.

Brownlie who argue that the failure to reach a precise definition merely indicates that the problem is difficult, not that the concept cannot be defined.

I am inclined to reject both positions as extreme and to note further that the possible solution is not a compromise between them. Several objections might be raised against both views. For example, the Stone-Fitzmaurice argument against "aggression" as a norm can be made against most legal rules since, at least to the extent they are known and well defined, they are subject to manipulation by interested and unscrupulous individuals. The potential for manipulation is present particularly in legal orders where authoritative third-party review is nonexistent. The thrust of the Stone argument, then, is to deny that law has any value *qua* law as normally understood. This fallacy of the argument may result largely from Stone's tendency to view the international legal order in both unimodal and unifunctional terms. Stone is thus hoisted by his own bootstrap when he suggests that rather than try to define aggression, which is a pejorative, politically charged, and ambiguous term, we should look for some more neutral term like "breach of the peace." Given the nature of the contemporary international system, any term which purports to serve as a surrogate for "aggression" will surely suffer the same fate of ambiguity and political controversy. To argue otherwise would ignore historical experience.

The arguments of Brownlie and Hazard are no more cogent than those of Stone and Fitzmaurice. It is as true as it is irrelevant to the problem that there is logically no real difficulty in defining "aggression." I could easily draft a definition on request. Would you choose a stipulative-enumerative or open-ended mode, or perhaps a mixture of the two? Although a broad, inclusive definition might be desirable in many ways, it likely would not satisfy the practitioner's preference for a concise text. On the other hand, the usefulness of a narrower definition is questionable in the absence of authoritative third-party interpretation and review. And the terms of a concise statement of law inevitably require further definition. It is at this point that Stone's critique becomes instructive. Definition is clearly more than a purely technical question.

The political obstacles to definition are obvious, but perhaps we should note the success of the Special Committee considering the Principles of International Law Concerning Friendly Relations and Cooperation among States. A most important development was the rejection of the common law perspective by more than ninety United Nations member states. A substantial number of United Nations members viewed the Special Declaration as more than a restatement and reaffirmation of

Charter norms and more than a reassessment of fundamental assumptions of international law. They considered the Declaration an attempt to specify new relationships between old assumptions. The work of the Special Committee was in this respect an exercise in codification.

The real question, however, is the impact that such exercises have upon the behavior of states. Quite apart from the technical question of the legislative competence of the General Assembly is the paradoxical behavior demonstrated by some states with respect to the Special Declaration. In the period since the Declaration's germination in 1954, several of the states that pushed hardest for a statement of principle have engaged in actions clearly violative of both the letter and spirit of the Declaration. The United Arab Republic is an example. From the traditional perspective of law and the functions of law, state support for a statement of general principles appears blatantly hypocritical.

A more fruitful interpretation of exercises like the Special Declaration might be that general statements of principle are insufficient to provide normative guidance to states in concrete situations. Guidance, in this sense of the word, is actually a function of the consensual rules that arise out of the everyday interaction of states. General principles, or as Richard Lillich calls them, "black-letter law," are, to use Nicholas Onuf's terminology, normative-symbolic rather than normative-coercive.

Two separate concepts are involved in this observation: the multifunctional nature of law and the multilevel nature of the international legal order. Both concepts, if not totally ignored, are at least widely disputed by those who see law from a more traditional viewpoint. It is my belief that traditional unifocal assumptions have had a detrimental effect on research and consequently on the development of knowledge concerning the nature of the international legal order and its relationship to the contemporary international system.

A recognition of diversity, however, is merely a recognition of the complexity of the international legal order. Distinctions are suggested by geographical and ideological differences, various processes of rule formation and application, heterogeneity of situations to be regulated, and the rapid change in recent years to which law must adapt. As Michael Barkun has pointed out, however, not every legal order performs every function of law.

In terms of the concepts to which I have alluded, the Special Declaration, the United Nations Charter, and a definition of aggression would be considered principles of the first order, but would be relegated to serving symbolic or communicative functions. Policy-makers might cite those principles as "black-letter law" in order to justify state actions,

but second-order considerations derived from state practice and specific context will have the greater effect on final decisions. In this respect we might consider a third order of legality as suggested by Karl Deutsch's formulation: If in some contexts there is no law *for* behavior, then there should be recognized a law *of* behavior.

The foregoing considerations taken together suggest that it really makes no difference, in a formal sense, whether or not "aggression" is defined. A definition would serve only as an additional rhetorical weapon in the armory of national self-justification. But the real value of attempting to define aggression may not lie in a final product. The subtler value for long-term consideration may be, as John Hazard has noted, in the interaction among those of different ideological and legal backgrounds who work to formulate a definition. Thus, the payoff might not come from a successful definition, but from the definitional process itself. And small steps *are* better than none.

At this point it should be considered that however persuasive my argument might be in analytic terms, it nevertheless raises problems in a practical sense. Its unconventionality probably means that it is either unknown or irrelevant to policy-makers. And even assuming that my arguments are good ones, their credibility among practitioners necessarily will be limited. The confusion alluded to earlier will as a consequence be perpetuated.

My comments have emphasized the functions of the law and their relationships with various orders of legality. But beyond this remains a fundamental problem with respect to the content of the law. The difficulty is that the content of international law might be so trivial that even though the function is adequately performed, no significant progress will be made. The hope is that, by a redefinition and expansion of legal functions, the content of international law will be made more meaningful. Whether or not this hope will be realized is not at all obvious. But the consideration now raised and the work of the scholars mentioned in this presentation are at least the starting points and signposts. The question of whether the road is worth taking remains to be answered.

DISCUSSION FROM THE FLOOR

LT. NEWTON:

Paragraph six of the Declaration on Friendly Relations indicates that a nation may not use force in retaliation to an initial act which threatens neither the territorial nor the political integrity of the injured nation. I would like Professor Rusk to comment on whether this paragraph or international law in general prohibits the use of force in retaliation by

a nation against another which sinks a vessel of the former nation, but which obviously does not have the capability to threaten either the territorial or the political integrity of the injured nation?

MR. RUSK:

First, let me narrow my response by excluding a discussion of the problem of enforcing a general right to use certain areas of the ocean. In response to the situation that Lt. Newton poses, it would be most beneficial as a matter of policy for the world community to refrain from using force; the solution sought by violence might be reached by use of other nonviolent channels. This restraint militates against the growth of the scale of violence. The obvious example of the use of restraint occurred in the Pueblo incident where two decisions were made: first, that the matter of highest priority was to obtain the captives' release, which would be possible only by use of the diplomatic instrument; and second, that it was desirable to avoid increasing the possibility of a major military conflict in the area of Korea. Thus it was determined that military action would not be taken until other channels had been explored to the fullest extent.

This position of full exploration of non-military recourses is not an unusual approach in a post-war period when attempts are made to minimize the level of violence used in response to a situation. When guerrillas entered Greece from Albania, Yugoslavia, and Bulgaria, the West did not open up hostilities against the three countries although, as a matter of collective self-defense, force might have been a justifiable alternative. And, when Mr. Stalin blockaded West Berlin the United States did not use force to reopen the city, but resorted instead to an air lift in order to gain time to reason with the opposition. Moreover, President Truman did not open a general war with China when the Chinese entered Korea; the United States attempted to prevent the situation in Southeast Asia from reaching the point of hostilities. Even though traditional international law might extend the right to use considerably more force than is actually employed, diplomatic channels are coming to be used in many situations to reduce the scale of violence.