UNITED NATIONS

GENERAL ASSEMBLY

GENERAL
A/2211
3 October 1952
ENGLISH
ORIGINAL: FRENCH

Seventh session

Question of defining aggression

REPORT BY THE SECRETARY-GENERAL

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I. Terms of reference of the Secretary-General

1. On 31 January 1952, at the conclusion of the discussion of the question of defining aggression at its sixth session, the General Assembly of the United Nations adopted resolution 599 (VI), whereby it

> "*Instructs* the Secretary-General to submit to the General Assembly at its seventh session a report in which the question of defining aggression shall be thoroughly discussed in the light of the views expressed in the Sixth Committee at the sixth session of the General Assembly and which shall duly take into account the draft resolutions and amendments submitted concerning this question."[1]

2. The Secretary-General considered that, as the General Assembly had instructed him to submit "a report in which the question of defining aggression shall be thoroughly discussed", it was his duty to study all aspects of the question and that accordingly the study should not be confined to examination of the views expressed in the Sixth Committee at the sixth session of the General Assembly. Since the General Assembly instructs the Secretary-General to discuss the question "in the light of" those views, it follows that while their examination must constitute an important element in the study, none of the other elements must be neglected.

II. Divisions of the study

3. The first part will be historical and documentary and will examine how the question of defining aggression was treated by the League of Nations and how it is being dealt with by the United Nations. The second part of the study will discuss the general question of defining aggression and describe the opposing schools of thought and the arguments used. It will be found that despite the changes in the international situation and the replacement of the League of Nations by the United Nations, the problem of defining aggression has remained fundamentally unchanged, at least in its theoretical aspect. The terms of the definitions of aggression now proposed are largely the same as those proposed in the past and there has been relatively little change in the arguments advanced in support of one or other school of thought. It would, however, be wrong to believe that one need do no more than repeat what has already been said. International developments since the establishment of the United Nations have given new importance to and increased the complexity of the problem of aggression.

[1] The complete text of the resolution is as follows:

"*The General Assembly,*

"*Considering* that, under resolution 378 B (V) of 17 November 1950, it referred the question of defining aggression, raised in the draft resolution of the Union of Soviet Socialist Republics to the International Law Commission for examination in conjunction with matters which were under consideration by that Commission,

"*Considering* that the International Law Commission did not in its report furnish an express definition of aggression but merely included aggression among the offences defined in its draft Code of Offences against the Peace and Security of Mankind,

"*Considering* that the General Assembly, on 13 November 1951, decided not to examine the draft Code at its sixth session but to include it in the provisional agenda of its seventh session,

"*Considering* that, although the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it,

"*Considering further* that it would be of definite advantage if directives were formulated for the future guidance of such international bodies as may be called upon to determine the aggressor,

"1. *Decides* to include in the agenda of its seventh session the question of defining aggression;

"2. *Instructs* the Secretary-General to submit to the General Assembly at its seventh session a report in which the question of defining aggression shall be thoroughly discussed in the light of the views expressed in the Sixth Committee at the sixth session of the General Assembly and which shall duly take into account the draft resolutions and amendments submitted concerning this question;

"3. *Requests* States Members, when transmitting their observations on the draft Code to the Secretary-General, to give in particular their views on the problem of defining aggression."

Official Records of the General Assembly, Sixth Session, Supplement No. 20, Resolutions, A/2119, pages 84-85.

PART I

HISTORICAL AND DOCUMENTARY

Title I

The period of the League of Nations

4. The concept of aggression, which is closely bound up with the system of collective security, was introduced into positive law by the League of Nations. In the period between the two wars, the concept of aggressive war was a constant subject of discussion both in the League of Nations and elsewhere.

5. Attempts were made on the one hand to facilitate the application of the Covenant of the League of Nations by defining the conditions governing its application, and on the other to develop the system of the Covenant which was considered by certain Powers to be incomplete and inadequate.

Chapter I

THE COVENANT OF THE LEAGUE OF NATIONS, SUPPLEMENTARY TREATIES, STUDIES, DRAFTS

SECTION I. THE COVENANT OF THE LEAGUE OF NATIONS

6. A system of collective security comprising limited guarantees and obligations was established under the Covenant of the League of Nations. The system was designed to avoid war or to bring hostilities to an end by means of concerted action by the Members of the League.

1. THE ARTICLES OF THE COVENANT RELATING TO COLLECTIVE SECURITY

7. The system of collective security was based principally on Articles 10, 11, 12 and 16 of the Covenant.[1] Articles 10 and 12 indicated what States were prohibited from doing. Articles 11 and 16 established procedures designed either to prevent or to ensure the cessation of violations of the provisions of Articles 10 and 12 of the Covenant.

(a) *Articles concerning limitations of the right to resort to war*

8. *Article 10* provided:

"The Members of the League undertake to respect and preserve as against *external aggression* the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

9. *Article 12* provided:

"1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.

"2. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

10. It will be noted that Article 10 formally embodies the concept of aggression without defining the acts constituting aggression. The concept of aggression is given the value of a juridical concept. It will also be noted that Article 12, which deals with resort to war (without using the term "aggression"), does not prohibit resort to war absolutely. Its effect is to establish two types of war: unlawful wars, namely wars begun less than three months "after the award by the arbitrators or the judicial decision or the report by the Council", and lawful wars, namely wars which may occur in certain conditions after recourse has been had to the procedures laid down in the Covenant and after the expiry of the prescribed time-limit.[2]

(b) *Articles organizing procedures for the maintenance of collective security*

11. These articles are Articles 11 and 16.[3] *Article 11* provided:

"1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. . ."

12. Article 11 was regarded as being designed essentially to avoid armed conflicts or to bring them to an end by means of negotiations and political and moral pressure exerted by the Council of the League, without any need to determine that a State was guilty of a breach of the Covenant. Great use was made of this article and it was the one first invoked whenever a State began hostilities on any considerable scale.

13. *Article 16* dealt with the sanctions of various kinds to be taken against a State which resorted to war in violation of the Covenant. Article 16, paragraph 1, made it the duty of the Members of the League themselves, i.e., of each individual Member, to apply sanctions. In principle, therefore, their decision was not conditional upon any prior decision of the Council of the League. Article 16, paragraph 2, provided, however, that it was the duty of the Council to "recommend to the several Governments concerned what effective military, naval or air force" should be used against Covenant-breaking States.

2. DEVELOPMENT OF THE COLLECTIVE SECURITY SYSTEM AND THE CONCEPT OF AGGRESSION

(a) *Diversity of policies*

14. Collective security inspired many proposals and was a constant subject of discussion. There were two opposing schools of thought on the question. One school, originally represented by France and a number of continental European States, wished to develop the system of collective security by ensuring strict application of the relevant Articles of the Covenant and by supplementing the latter by means of new international instruments. The second school, originally represented by the United Kingdom and the members of the British Commonwealth, was more reserved in its attitude. It considered that owing to the absence of the United

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[1]Article 15 provided that international disputes were to be submitted to the Council or the Assembly of the League of Nations, and did not directly relate to collective security. In practice, however, it was invoked on several occasions in cases of armed conflict. (See below, paragraphs 89 *et seq.*)

[2]The attempt to reconcile the provisions of Article 10 and Article 12, paragraph 1, of the Covenant gave rise to a difficult problem of interpretation.

It was pointed out that while under Article 12 States were entitled in certain conditions to resort to war, resort to war that was lawful under Article 12 could not be deemed to constitute the aggression referred to in and prohibited by Article 10.

Despite differences of opinion and changing views on the question, the tendency was to interpret Articles 10 and 12 as meaning that while Article 12 permitted resort to war in certain cases, it was necessary, if such resort to war was not to constitute an act of aggression within the meaning of Article 10, that the purpose of the State resorting to war should not be to violate the territorial integrity and political independence of the State against which it was opening hostilities.

[3]This is not a hard-and-fast classification. Article 10 could be regarded as introducing a procedure as well as establishing a principle, since it provided that: "In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled". In practice, however, Article 10 was invoked chiefly as an article which established a principle.

States—one of the chief reasons for which was in fact Article 10 under which the Members of the League undertook "to preserve as against external aggression the territorial integrity and existing political independence of all Members of the League"—the obligations of the Covenant with respect to collective security represented too heavy a burden which exceeded what could reasonably be expected when the Covenant of the League was adopted.

15. The positions taken by States with regard to the question of collective security varied. Some States modified their attitude as the international situation changed. From 1931 on, a trend in favour of collective security became apparent, while an opposite trend developed after the failure of sanctions against Italy in 1936. In practice, the followers of the opposing schools of thought compromised on a number of points. The organs of the League of Nations drafted new international instruments to supplement the Covenant and submitted them for accession by States wishing to become parties thereto. They prepared model treaties concerning non-aggression and the settlement of international disputes. It is to be noted that the positions taken by Powers in the general discussions on collective security and their attitudes in specific cases, when they were called upon to determine an aggressor or to take collective action to put an end to an act of aggression which had been committed, were not always identical.

(b) *Influence of the work of the League of Nations on the concept of aggression*

16. As already stated, the Covenant of the League did not absolutely prohibit resort to war. In some quarters it was thought necessary to fill the gaps in the Covenant which made it possible for a State to resort to war without committing a violation of international law. For this purpose, a draft treaty of mutual assistance was drawn up (1923), followed by the Geneva Protocol (1924). After the conclusion of the Paris Pact in 1928, it was proposed to amend the Covenant of the League of Nations to bring it into harmony with the Paris Pact, which contained a general prohibition of recourse to war.

17. Article 10 of the Covenant of the League, which imposed the obligation to "preserve as against external aggression the territorial integrity and political independence" of the Members of the League, was the subject of study and discussion in the early days of the League of Nations, but the discussions and studies showed that many States were strongly opposed to or had serious reservations with regard to this Article and that in consequence the policy of the League could not be based on it. In these circumstances, attention was turned to Article 11 which, without imposing obligations on anyone, would enable the Council to intervene in the event of a threat of war, using a flexible procedure combining persuasion with political and moral pressure, to induce the parties to the dispute to agree to the action the Council deemed necessary to remove the threat of war or ensure the cessation of hostilities which had already begun. In these circumstances, it was considered that, even if the Council's action to safeguard peace failed, it might have the effect of making it easier to determine the aggressor: the aggressor would be the State which had rejected the Council's proposals for the prevention or cessation of hostilities, had violated the decisions taken or had refused to accept the control measures which the Council deemed necessary to supervise compliance with those decisions.

18. Finally, in the course of the Disarmament Conference held under the auspices of the League of Nations, definitions were drafted enumerating the various acts to be regarded as constituting aggression. It will be noted that originally the question of defining aggression was in most cases touched upon indirectly or incidentally.

19. It may be said that until 1933 there was general acceptance of the concept of flexible criteria of aggression to be evaluated by the body qualified to determine the aggressor; it was in 1933, at the Disarmament Conference, that the concept of a precise definition of aggression excluding the use of force and rejecting the idea of provocation took shape and was put forward. Then, and in subsequent years, it was seen that there was a sharp division of opinion with regard to the two opposing concepts.

Section II. Report of the International Blockade Committee (28 August 1921)[4]

20. This report concerning the application of Article 16 of the Covenant of the League of Nations does not deal with the question of criteria of aggression. However, the first part of the report, entitled "Under what conditions should sanctions be applied?", contains the following passage:

> "By the terms of the Covenant, a State which resorts to war against a State Member of the League, in violation of the provisions of Articles 12, 13 and 15—i.e., *which undertakes armed action* against that State—is regarded as having committed an act of war against all the Members of the League."

Thus, the use by a State of its armed forces against another State constitutes aggression.

Section III. The Draft Treaty of Mutual Assistance (1923)

21. A Draft Treaty of Mutual Assistance was adopted in 1923 by the Third Committee[5] of the Assembly of the League of Nations. It was communicated to Governments for their opinions under an Assembly resolution dated 29 September 1923. A number of governments submitted observations. The draft was abandoned in 1924.

1. Preparation of the Draft Treaty of Mutual Assistance

22. The question of the criteria of aggression was discussed on several occasions during the preparation of the Draft Treaty. Arguments on the subject of "defining aggression" are to be found in an opinion submitted jointly by the Belgian, Brazilian, French and Swedish delegations in the Permanent Advisory Commission. The opinion states that:

> "Hitherto, aggression could be defined as mobilization or the violation of a frontier. This double test has lost its value."

[4] League of Nations, *Reports and resolutions on the subject of Article 16 of the Covenant* (League of Nations document A.14.1927.V, pages 15 *et seq*).

[5] League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee* (*Official Journal*, Special Supplement No. 16), page 203.

The authors of the opinion doubt "the possibility of accurately defining *a priori* in a treaty" the expression "cases of aggression". Nevertheless, they enumerate the following list of "signs which betoken an impending aggression":

"1. Organization on paper of industrial mobilization.

"2. Actual organization of industrial mobilization.

"3. Collection of stocks of raw materials.

"4. Setting-on-foot of war industries.

"5. Preparation for military mobilization.

"6. Actual military mobilization.

"7. Hostilities."[6]

23. A Special Committee of the Temporary Mixed Commission drew up a "Commentary on the definition of a case of aggression". Reproducing the words of the Permanent Advisory Commission, the Special Committee said that ". . . under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression." The commentary states that "the test of the violation of a frontier has also lost its value".[7]

24. The Committee accordingly rejected the idea of any definition of aggression and said:

"In the absence of any indisputable test, Governments can only judge by an *impression* based upon the most various factors, such as:

"The political attitude of the possible aggressor;

"His propaganda;

"The attitude of his press and population;

"His policy on the international market, etc."[8]

The factors mentioned by the Committee are given merely for purposes of illustration. It will also be noted that the general concept of aggression adopted by the Committee is very wide, including many other things besides armed action.

2. PROVISIONS OF THE DRAFT TREATY OF MUTUAL ASSISTANCE

25. Article 1 of the Draft Treaty provides as follows:

"The High Contracting Parties solemnly declare that *aggressive war is an international crime* and severally undertake that no one of them will be guilty of its commission.

"A war shall not be considered as an act of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice, or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party."[9]

It can be seen that "war of aggression" is not defined, but that it is indicated that certain wars are not wars of aggression, namely wars begun by a State which has obtained a decision in its favour from an international organ against another State which does not comply with that decision.

3. OBSERVATIONS OF GOVERNMENTS ON THE DRAFT TREATY OF MUTUAL ASSISTANCE

26. Twenty-eight governments submitted observations[10] and several governments made more or less brief statements of their views on the concept of aggression. The *German Government* stated:

"The question who is the aggressor in a war—just like the question who is responsible for a war—cannot, as a rule, be answered according to the immediate and superficial features of the case; it is a problem which can be solved only after careful recognition and appreciation of all the many intrinsic and extrinsic factors which have contributed to originate it. Its solution involves a task of historic research and the application of international law, and this, in its turn, implies the reference to all sources, the disclosure of all records, the examination of witnesses and experts, as well as the taking of all sorts of other evidence".[11]

The *Spanish Government* stated:

"The Spanish Government...quickly realized that it was difficult, if not impossible, to define an 'act of aggression', although it is upon this definition that all subsequent action depends".[12]

The *French Government* stated:

"Though it is difficult to define specifically all cases of aggression, it is undoubtedly possible to specify the most flagrant cases, which would in themselves furnish a solid foundation for the provisions of the draft Treaty".[13]

The *Italian Government* stated:

"...in most cases it will be extremely difficult, if not impossible, for the Council to decide, within the brief period allowed, which party is the aggressor and which the victim; for it is not easy to define what either in law or in fact constitutes aggression".[14]

The *Polish Government* stated:

"The work of the Temporary Mixed Commission and the Commentary drawn up by the Special Committee in co-operation with certain members of the Permanent Advisory Commission show that, failing an exact definition of the word 'aggression', the chief difficulty which the Council would encounter in the matter would be the impossibility of establishing the fact that an act of aggression had really been committed, of deciding which was the aggressor State and, consequently, of putting the different clauses of the Treaty into effect".[15]

The *Romanian Government* stated:

"Unfortunately, the draft does not seem to us to provide the requisite guarantees even from this point of view.

"1. It does not define the facts which constitute aggression. It leaves the decision of this vital point to the Council".[16]

[6] *Ibid.*, pages 116-117.
[7] *Ibid.*, page 183.
[8] *Ibid.*, page 184.
[9] *Ibid.*, page 203.
[10] League of Nations, *Records of the Fifth Assembly, Minutes of the Third Committee* (*Official Journal*, Special Supplement No. 26), pages 129-168.

[11] *Ibid.*, page 147.
[12] *Ibid.*, page 151.
[13] *Ibid.*, page 160.
[14] *Ibid.*, page 162.
[15] *Ibid.*, page 153.
[16] *Ibid.*, page 163.

The *United Kingdom Government* stated:

"...the 'commentary on the definition of a case of aggression', drawn up by a Special Committee of the Temporary Mixed Commission, in collaboration with certain technical members of the Permanent Advisory Commission, is of great interest...It is stated therein more than once that no satisfactory definition of what constitutes an 'act of aggression' could be drawn up. Consequently, the report does not provide that element of certainty and reliability which is essential if the League of Nations is to recommend the adoption of the treaty by its Members as a basis for reduction in armaments".[17]

The *USSR Government* stated:

"The Soviet Government denies the possibility of determining in the case of every international conflict which State is the aggressor and which is the victim. There are, of course, cases in which a State attacks another without provocation, and the Soviet Government is prepared, in its conventions with other Governments, to undertake, in particular cases, to oppose attacks of this kind undertaken without due cause. But in the present international situation, it is impossible in most cases to say which party is the aggressor. Neither the entry into foreign territory nor the scale of war preparations can be regarded as satisfactory criteria. Hostilities generally break out after a series of mutual aggressive acts of the most varied character. For example, when the Japanese torpedo-boats attacked the Russian Fleet at Port Arthur in 1904, it was clearly an act of aggression from a technical point of view, but, politically speaking, it was an act caused by the aggressive policy of the Czarist Government towards Japan, who, in order to forestall the danger, struck the first blow at her adversary. Nevertheless, Japan cannot be regarded as the victim, as the collision between the two States was not merely the result of the aggressive acts of the Czarist Government but also of the imperialist policy of the Japanese Government towards the peoples of China and Korea".[18]

SECTION IV. REPLIES OF THE COMMITTEE OF JURISTS TO THE QUESTIONS SUBMITTED BY THE COUNCIL OF THE LEAGUE OF NATIONS PURSUANT TO THE CORFU INCIDENT (24 JANUARY 1924)[19]

1. THE QUESTION AND THE REPLY

27. After the Corfu incident, which was an armed action of limited scope undertaken by Italy against Greece and which was not meant to create a state of war, the Council of the League of Nations submitted a series of questions to a Committee of Jurists.[20] The fourth of these questions was as follows:

"Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those Articles?"

The Committee gave the following reply:

"Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures."

2. OBSERVATIONS OF GOVERNMENTS ON THE REPLY OF THE COMMITTEE OF JURISTS

28. On 21 September 1925, the Assembly of the League of Nations adopted a resolution requesting the Council of the League to invite States Members of the League "which find, in the report of the Special Committee of Jurists, doubtful points which require elucidation, or which may have other comments to make on this report" to forward their observations to the Secretariat.

29. Eight Governments indicated that they had no observations to present or that they approved the replies of the Committee of Jurists.[21] Eleven Governments formulated criticisms of or reservations to the reply of the Committee of Jurists to the fourth question.

The *Danish Government* indicated that it

"wishes to reserve its opinion regarding Point IV..."

The *Finnish Government* stated that

"...one of the first missions of the League is to safeguard a Member against acts of violence on the part of a non-member, not only in the case of violence in the form of war properly so called, but also in the case of any measure of coercion covered by the term 'external aggression' in the sense of Article 10 of the Covenant".

The *Greek Government* stated that

"the absence of a definite criterion for distinguishing between measures of coercion which are justifiable as being compatible with the Covenant and measures which are inadmissible is liable to give rise to misunderstandings which it is important to avoid".

The *Hungarian Government* said that

"As regards No. 4, the reply is open to very serious question...Measures of coercion and acts of war are closely related, since they have the same purpose —to enable a State to impose its will upon another State by force".

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[17] *Ibid.*, pages 143-144.

[18] *Ibid.*, page 138.

[19] See League of Nations document C.212.M.72.1926.V. This document contains the report to the Council of Viscount Ishii of 17 March 1926, the reply of the Special Committee of Jurists of 24 January 1924 and the observations of Governments.

[20] The Committee of Jurists consisted of Mr. Adatci (Japanese), Chairman, Lord Buckmaster (British), Mr. E. Buero (Uruguayan), Mr. de Castello-Branco Clark (Brazilian), Mr. Fromageot (French), Mr. van Hamel (Dutch), Mr. Rolando Ricci (Italian), Mr. Undén (Swedish), the Marquis of Villa Urrutia (Spanish) and Mr. de Visscher (Belgian).

[21] These eight States were: Australia, Brazil, the British Empire, Estonia, France, Italy, Japan and South Africa.

The Polish Government submitted a report by the Polish Section of the International Law Society on the replies of the Special Committee of Jurists on the interpretation of Article 15 of the Covenant (League of Nations, *Official Journal*, April 1926, page 604), which contains arguments in support of the opinion formulated by the Committee of Jurists.

The *Netherlands Government* said that

"This provides no criterion by which to judge. How are permissible measures of coercion to be distinguished from those which are not permissible?"

The *Norwegian Government* said that

"in its view, the Covenant absolutely prohibits the use of armed force as a measure of coercion before a dispute has been submitted to the procedure laid down in Articles 12 to 15 of the Covenant".

The *Government of El Salvador* considered that

"acts of violence undertaken with a view to coercion for any purpose clearly contain an element of aggression".

The *Siamese Government* felt that

"a clearer answer to the fourth question is essential. Any attack, however violent, however destructive and however unjustified, may be claimed by the nation making it to be merely 'a measure of coercion not intended to constitute an act of war'... Certain so-called 'coercive measures' can be, and clearly ought to be, branded in advance as inconsistent with the terms of the Covenant".

The *Swedish Government* said that

"the use of armed forces must be considered incompatible with the provisions of the Covenant in the circumstances indicated in the fourth question".

The *Swiss Government* said that

"It must be considered incompatible with Articles 12 to 15 of the Covenant for a State to violate the territory of another State during the course of peaceful proceedings and before the expiry of the time-limit laid down in Article 12".

The *Government of Uruguay* considered that

"no measures of coercion can be consistent with the letter and the spirit of the Covenant, since the adoption of the Covenant marks the advent of an international order which precludes the employment of violence until all appropriate measures to dispense States from the necessity of taking the law into their own hands have been exhausted".

Section V. The Geneva Protocol (2 October 1924)

30. The Geneva Protocol[22] is a draft treaty which was adopted by the Assembly of the League of Nations on 2 October 1924 and was abandoned the following year. It contained a general prohibition against recourse to war. The relevant provisions are worded as follows:

"Article 2. The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol."

31. The Geneva Protocol introduces an original method for defining aggression and determining the aggressor.

(a) *Definition of Aggression*

32. The first paragraph of Article 10 reads as follows:

"Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor."

(b) *Determination of the Aggressor*

33. In his report analysing the Protocol, Mr. Politis said:

"The definition of aggression is a relatively easy matter, for it is sufficient to say that any State is the aggressor *which resorts in any shape or form to force* in violation of the engagements contracted by it..."

However, he added:

"On the contrary, to ascertain the existence of aggression is a very difficult matter, for although the first of the two elements which together constitute aggression, namely, the violation of an engagement, is easy to verify, the second, namely, resort to force, is not an easy matter to ascertain. When one country attacks another, the latter necessarily defends itself, and when hostilities are in progress on both sides, the question arises which party began them.

"This is a question of fact concerning which opinions may differ."[23]

34. The Rapporteur states that to escape from the dilemma it was decided to adopt an "automatic procedure". Article 10 establishes a series of presumptions to determine the aggressor "in the event of hostilities having broken out".[24] A unanimous decision of the

[22]League of Nations, *Records of the Fifth Assembly, Minutes of the First Committee* (*Official Journal*, Special Supplement No. 24), pages 136-140.

[23]*Ibid.*, page 127.

[24]Article 10 is worded as follows:

"Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarised zone shall be held equivalent to resort to war.

"In the event of hostilities having broken out, any State shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare:

"1. If it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council, or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognising that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly, in accordance with Article 11 of the Covenant.

"2. If it has violated provisional measures enjoined by the Council for the period while the proceedings are in progress as contemplated by Article 7 of the present Protocol.

"Apart from the cases dealt with in paragraphs 1 and 2 of the present Article, if the Council does not at once succeed in determining the aggressor, it shall be bound to enjoin upon the belligerents an armistice, and shall fix the terms, acting, if need be, by a two-thirds majority and shall supervise its execution.

"Any belligerent which has refused to accept the armistice or has violated its terms shall be deemed an aggressor.

"The Council shall call upon the signatory States to apply forthwith against the aggressor the sanctions provided by Article 11 of the present Protocol and any signatory State thus called upon shall thereupon be entitled to exercise the rights of a belligerent."

Council is needed to reject these presumptions. Where there is no presumption, the Council has to determine, as quickly as possible, who is the aggressor. If it fails to do so, the Council must enjoin an armistice, the terms of which it will fix by a two-thirds majority. The belligerent which rejects the armistice or violates it is held to be an aggressor.

35. On close examination, the system of determining the aggressor in some respects gives the same results as a system of defining aggression. In the event of hostilities having broken out, any State is deemed to be the aggressor, unless a decision of the Council, taken unanimously, otherwise declares, if it has refused to submit the dispute to the procedure of pacific settlement or if it has violated provisional measures enjoined by the Council or does not comply with the armistice terms fixed by the Council.

36. It will be seen that this is a most unusual system. On the one hand, it is connected with the system for the peaceful settlement of disputes (first hypothesis). On the other hand, by placing the parties under the obligation to comply either with the provisional preventive measures enjoined by the Council or with the armistice terms fixed by the Council (second and third hypotheses) it is based on a practical political concept.

Section VI. The Locarno Treaty of Mutual Guarantee (16 October 1925)[25]

37. The Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, dated 16 October 1925, is of special interest from the point of view of the concept of aggression. Concluded under the auspices of the League of Nations, the Treaty placed special responsibilities on the Council of the League. Article 2 of the Treaty provides as follows:

"Germany and Belgium, and also Germany and France, mutually undertake *that they will in no case attack or invade each other or resort to war against each other.*

"This stipulation shall not, however, apply in the case of:

"(1) *The exercise of the right of legitimate defence,* that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone, immediate action is necessary;

"(2) Action in pursuance of Article 16 of the Covenant of the League of Nations;

"(3) Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a State which was the first to attack."

38. The first paragraph states in general terms what is prohibited—*attack* or *invasion,* on the one hand, and *resort to war,* on the other. The second paragraph specifies the cases in which the prohibition contained in the first paragraph does not apply. The first case is that of legitimate defence, which is defined.[26] The second case is that of collective sanctions taken by the League of Nations in pursuance of Article 16. The third case is similar to the second and is that of action as the result of a decision taken by the Assembly or by the Council of the League of Nations.

39. In a resolution of 25 September 1926, the Assembly of the League of Nations approved the treaties concluded at Locarno[27] and declared that "agreements of this kind need not necessarily be restricted to a limited area but may be applied to different parts of the world".[28] The Locarno Treaties were destined to inspire a movement to strengthen security by means of non-aggression treaties.

Section VII. Report by Mr. de Brouckère (1 December 1926)[29]

40. This report was made at the request of the Committee of the Council of the League of Nations. Although it was not adopted by the Committee after consideration, it has nevertheless enjoyed great authority and has often been cited. It raises the question of "the conditions which must be fulfilled before a country can be regarded as having resorted to war". The general idea expressed in the report is that every act of violence does not constitute resort to war and does not justify its victim in resorting to war.

41. The report states the following in this connexion:

"There is no need to dwell upon the case in which the aggressor State formally declares war. Apart from this eventuality, two conditions are necessary, as we said:

"(1) One country must have committed an act of war against another;

"(2) The latter country must have admitted the existence of a state of war.

"Further, the second country must have justification for taking up this attitude.

"*Every act of violence does not necessarily justify its victim in resorting to war.* If a detachment of soldiers goes a few yards over the frontier in a colony remote from any vital centre; if the circumstances show quite clearly that the aggression was due to an error on the part of some subaltern officer; if the central authorities of the 'aggressor State' reprimand the subordinate concerned as soon as they are apprised of the facts; if they cause the invasion to cease, offer apologies and compensation and take steps to prevent any recurrence of such incidents—then it cannot be maintained that there has been an act of war and that the invaded country has reasonable

[25] See League of Nations, *Treaty Series,* Vol. LIV, page 289.

[26] Legitimate defence is strictly defined. It is resistance to attack or invasion or to hostilities.

Reference is also made to certain special obligations imposed on Germany under articles 42 and 43 of the Treaty of Versailles (demilitarization of the left bank of the Rhine) a flagrant breach of which, under the terms of the Treaty, confers the right of legitimate defence.

[27] A number of other agreements, besides the Treaty of Mutual Guarantee, were concluded at Locarno. Some laid down procedures for the peaceful settlement of disputes, while others provided for mutual assistance between France and Poland, and France and Czechoslovakia.

[28] League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Seventh Ordinary Session* (*Official Journal,* Special Supplement No. 43) page 16.

[29] See League of Nations document A.14.1927.V, page 60.

grounds for mobilizing its army and marching upon the enemy capital. The accident which has occurred has in no way released that country from the specific obligations laid down in Articles 12 and following. It could not be so released unless it were the victim of a flagrant aggression of such a serious character that it would obviously be dangerous not to retaliate at once. In short, to borrow the felicitous phrase used in the Treaty of Locarno, 'the country in question must be exercising the right of legitimate defence'.

"Legitimate defence implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger. If a country flagrantly exceeded these limits, even if it were affronted by some incident of little intrinsic importance, it would become in actual fact the real aggressor and it would be only fair that that country should be made the object of the sanctions provided for in Article 16.

"Accordingly, it is not so easy as it may seem at first sight to determine when a country 'resorts to war', and a decision may be a very difficult matter."[80]

Section VIII. Prohibition of Wars of Aggression by the Assembly of the League of Nations under the resolution dated 24 September 1927

42. On 24 September 1927, the Assembly of the League of Nations, in pursuance of a Polish proposal, adopted a declaration condemning wars of aggression. The text of this declaration is as follows:

"The Assembly,

"Recognizing the solidarity which unites the community of nations;

"Being inspired by a firm desire for the maintenance of general peace;

"Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;

"Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament;

"Declares:

"(1) That all wars of aggression are, and shall always be, prohibited;

"(2) That every pacific means must be employed to settle disputes, of every description, which may arise between States.

"The Assembly declares that the States Members of the League are under an obligation to conform to these principles."[81]

Section IX. Prohibition of wars of aggression by the Pan-American Conference (1928)

43. The Sixth Pan-American Conference which met at Havana in 1928 adopted the following resolution:

"*Considering:*

"That the American nations should always be inspired in solid co-operation for justice and the general good;

"That nothing is so opposed to this co-operation as the use of violence;

"That there is no international controversy, however serious it may be, which can not be peacefully arranged if the parties desire in reality to arrive at a pacific settlement;

"That war of aggression constitutes an international crime against the human species;

"*Resolves:*

"(1) All aggression is considered illicit and as such is declared prohibited;

"(2) The American States will employ all pacific means to settle conflicts which may arise between them."[82]

Section X. The Committee on Arbitration and Security (1928)

44. A Committee on Arbitration and Security was established on 30 November 1927 by the Preparatory Commission for the Disarmament Conference, with a view to increasing the guarantees of security and, thereby, facilitating disarmament. The work accomplished by the Committee was two-fold. In the first place, the Committee carried out studies of Articles 10, 11 and 16 of the Covenant of the League of Nations, of which the Assembly of the League expressed its appreciation in its resolution of 26 September 1928. Secondly, the Assembly prepared a number of model treaties concerning mutual assistance and non-aggression.

1. Studies relating to security

(a) *Report by Mr. Rutgers*

45. The studies relating to security centred on the report by Mr. Rutgers (Netherlands).[83] Mr. Rutgers deals with the question of criteria for determining aggression in connexion with Articles 10 and 16, and opposes a rigid definition of aggression. His conclusions contain the following paragraph on this question:

"211. A hard-and-fast definition of the expressions 'aggression' (Article 10) and 'resort to war' (Article 16) would not be free from danger, since it might oblige the Council and the Members of the League to pronounce on a breach of the Covenant and apply sanctions at a time when it would still be preferable to refrain for the moment from measures of coercion. There would also be the risk that criteria might be taken which, in unforeseen circumstances, might lead to a State which was not in reality responsible for hostilities being described as an aggressor."

46. He does not, however, confine himself to rejecting the principle of defining aggression. He considers that "it would be...practical to enumerate some of the facts which, according to circumstances, may serve as evidence that aggression has taken place". Adopting the argument advanced by the Temporary Mixed Commission when drawing up the Draft Treaty of Mutual

[80] *Ibid.*, page 69.

[81] See League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Eighth Ordinary Session* (*Official Journal*, Special Supplement No. 53), page 22.

[82] See *Proceedings of the American Society of International Law at its Twenty-Second Annual Meeting*, 1928, pages 14-15.

[83] See League of Nations, *Minutes of the Second Session of the Committee on Arbitration and Security* (League of Nations document C.165.M.50.1928.IX), pages 142 *et seq.*

Assistance, he enumerates a series of acts, some of which constitute acts of force, and others acts preparatory to the use of force.[34]

47. He also introduces another concept: "the list of factors furnished by the Special Committee of the Temporary Mixed Commission might be supplemented by including the violation of certain undertakings; for instance, refusal to submit a dispute for pacific settlement by the methods agreed upon..."[35]

48. Lastly, he points out that the question of the measures to be taken against an aggressor (Article 16) will not arise without the Council having first to deal with the conflict to prevent its aggravation (Article 11). That being so, "the application of the procedure of Article 11 will be for the Council the best preparation for the performance of its duties under Article 16. This procedure will enlighten it as to the attitude of the two parties, and supply it with valuable information..."[36]

49. A number of critical observations were made on Mr. Rutgers' report. The French delegation in the Preparatory Commission, for example, regretted the complete abandonment of the criterion of aggression adopted in the Geneva Protocol, which, as indicated earlier in this text, established a series of presumptions for the determination of the aggressor.[37]

(b) *Resolution of the Assembly of 20 September 1928 and the report by Mr. Politis*

50. The Assembly did not come to a decision on the question of defining aggression. The resolution of 20 September 1928 merely states the following:

"The Assembly,

".......

"Considers that the *information concerning the question of the criteria of aggression contained in the Committee's documents usefully summarizes the studies made by the Assembly and the Council* and the provisions of certain treaties......."[38]

51. In his report, Mr. Politis has the following to say in this connexion:

"Mr. Rutgers and certain members of the Committee on Arbitration and Security were of the opinion that a hard-and-fast definition of these terms would be very difficult and, even if possible, would be very dangerous, for the very rigidity of such a definition *might conceivably lead the Council into a premature application of the sanctions prescribed by Article 16.*

"This opinion, however, was not general. The Committee on Arbitration and Security, in the resolution which has been adopted by the Third Committee and is now submitted for your approval, merely noted the difficulties......."[39]

(c) *Recommendation of the Assembly of 20 September 1928*

52. The Assembly also adopted the following recommendation:

"The Assembly,

".......

"Considers that the study of Article 11 of the Covenant, which stipulates that the League 'shall take any action that may be deemed wise and effectual to safeguard the peace of nations', forms the natural counterpart of the study undertaken by the Committee of the Council and approved by the Council on December 6th, 1927, on the Assembly's recommendation, and, without detracting from the value of the other articles of the Covenant, brings into prominence the fact that the League's first task is to forestall war, and that in all cases of armed conflict or of threats of armed conflict, of whatever nature, it must take action to prevent hostilities or to stop hostilities which have already begun;"[40]

53. This recommendation is based on the principle that prevention is better than punishment and that the first duty of an international body is to take the most effective action to prevent the outbreak of hostilities or to bring about the cessation of hostilities which have already begun.[41]

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[34]Mr. Rutgers states in this connexion:

"117. First among these sources of information are the results of the investigation carried out by the Permanent Advisory Commission and the Special Committee of the Temporary Mixed Commission when drawing up the Treaty of Mutual Assistance. The reports of these bodies show that *certain acts would in many cases constitute acts of aggression;* for instance:

"(1) The invasion of the territory of one State by the troops of another State;

"(2) An attack on a considerable scale launched by one State on the frontiers of another State;

"(3) A surprise attack by aircraft carried out by one State over the territory of another State, with the aid of poisonous gases. The reports in question add that other cases may arise in which the problem would be simplified owing to some act committed by one of the parties to the dispute affording unmistakable proof that the party in question was the real aggressor.

"There are also certain factors which may serve as a basis for determining the aggressor:

"(*a*) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory.

"(*b*) Secret military mobilization by the formation and employment of irregular troops or by a declaration of a state of danger of war which would serve as a pretext for commencing hostilities.

"(*c*) Air, chemical or naval attack carried out by one party against another.

"(*d*) The presence of the armed forces of one party in the territory of another.

"(*e*) Refusal of either of the parties to withdraw its armed forces behind a line or lines indicated by the Council.

"(*f*) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal of that party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given." (*Ibid.*, pages 143-144).

[35]*Ibid*, page 144.

[36]*Ibid*, page 152.

[37]*Ibid*, page 184 *bis*.

[38]See League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Ninth Ordinary Session* (*Official Journal*, Special Supplement No. 63), page 16.

[39]League of Nations, *Records of the Ninth Ordinary Session of the Assembly, Plenary Meetings, Text of the Debates* (*Official Journal*, Special Supplement No. 64), page 114.

[40]League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Ninth Ordinary Session*, (*Official Journal*, Special Supplement No. 63), page 16.

[41]Mr. Barandon indicates the support enjoyed by this idea. (Barandon, *Le système juridique pour la prévention de la guerre*, 1933, pages 8, *et seq.*, 305 *et seq.*)

2. THE MODEL TREATIES RECOMMENDED BY THE ASSEMBLY

54. Model treaties of non-aggression and mutual assistance had been prepared by the Committee on Arbitration and Security and amended as a result of the work of the First and Third Committees. Under its resolution of 26 September 1928, the Assembly recommended the treaties "for consideration by States", expressing the hope that "they may serve as a basis for States desiring to conclude treaties of this sort".[42]

55. The formula concerning non-aggression contained in the various model treaties reproduces that contained in the Locarno Treaty of Mutual Guarantee of 16 October 1925.[43] The introductory note to the model collective treaties of mutual assistance and the model collective and bilateral treaties of non-aggression contains the following comment on article 1:

"The formula by which 'each of the high contracting parties undertakes not to...resort to war against another contracting party' must, in the opinion of the Committee, be understood to mean that the parties, which undertake by the treaty of mutual assistance to settle all their disputes by forms of pacific procedure, *in every case exclude recourse to force in any form whatever, apart from the exceptions formally reserved in the text*."[44]

SECTION XI. THE PACT OF PARIS (BRIAND-KELLOGG PACT) (27 AUGUST 1928)

56. The Pact of Paris is of special interest from the point of view of the definition of aggression, even though it does not contain the term "aggression". In the diplomatic correspondence exchanged on its conclusion and in the debates in national parliaments held at the time of its ratification, the Pact gave rise to discussions concerning the concepts of legitimate defence and aggression which are, of course, closely interconnected.

57. At the time of its conclusion, the Pact of Paris had a two-fold purpose, to lay down a general prohibition against recourse to war, which was not contained in the Covenant of the League of Nations, and to establish a rule of law which would be binding not only on the Members of the League of Nations but on all States throughout the world, in particular the United States of America and the Union of Soviet Socialist Republics which were not Members of the League.[45]

58. The following is the text of the Pact of Paris:[46]

(List of signatories)

".....

"Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty.

".......

"Article I

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

"Article II

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

"Article III

"......."

59. Article I contains a prohibition of recourse to war to which no reservation or limitation is attached. Article II, which states that the settlement "of all disputes or conflicts of whatever nature or of whatever origin they may be...shall never be sought except by pacific means", confirms Article I.

1. EXCHANGE OF DIPLOMATIC CORRESPONDENCE ON THE CONCLUSION OF THE PACT OF PARIS

60. The conclusion of the Pact of Paris gave rise to lengthy negotiations in the course of which the scope of the prohibition established by the Pact was defined. The signatories of the Pact were generally agreed that, on the one hand, the Pact did not preclude the exercise of the right of legitimate defence and that, on the other hand, a State which violated the treaty would be denied its benefits.

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[42]League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Ninth Ordinary Session*, (*Official Journal*, Special Supplement No. 63), page 18.

There are three model treaties concerning security (*ibid*, pages 40-57):

(i) Collective Treaty of Mutual Assistance (Treaty D).

(ii) Collective Treaty of Non-Aggression (Treaty E).

(iii) Bilateral Treaty of Non-Aggression (Treaty F).

[43]Article 1 of the Collective Treaty of Mutual Assistance reads as follows:

"Each of the high contracting parties undertakes, in regard to each of the other parties, not to attack or invade the territory of another contracting party, and in no case to resort to war against another contracting party.

"This stipulation shall not, however, apply in the case of:

"(1) The exercise of the right of legitimate defence—that is to say, resistance to a violation of the undertaking contained in the first paragraph;

"(2) Action in pursuance of Article 16 of the Covenant of the League of Nations;

"(3) Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a State which was the first to attack."

[44]See League of Nations, *Minutes of the Second Session of the Committee on Arbitration and Security* (League of Nations document C.165.M.50.1928.IX), page 207.

[45]Moreover, when the Pact was concluded, it was hoped that it might serve as a bridge between the League of Nations and the States which had not become Members of the League, and that in the event of an international crisis it would facilitate co-operation between Members of the League of Nations and non-member States with a view to the maintenance or restoration of peace.

[46]See League of Nations, *Treaty Series*, Vol. XCIV, page 57.

61. At the outset of the negotiations, the French Government proposed a formula providing for the prohibition of *wars of aggression* and expressly reserving the right of legitimate self-defence.[47]

62. In reply to this proposal, the United States Government said that the wording of the Pact must be simple if it was to have the desired effect.[48]

63. The wording proposed by the French Government was not adopted. On 23 June 1928, however, the Government of the United States communicated to each of the Governments invited to sign the Pact an identical note clarifying the scope of the Pact. The note dealt, *inter alia,* with the questions of self-defence and of relations with a treaty-breaking State.

64. With regard to *self-defence,* the note states the following:

"There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence since it is far too easy for the unscrupulous to mould events to accord with an agreed definition."[49]

65. In regard to *relations with a treaty-breaking State,* the note states that:

"...there can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking State. Any express recognition of this principle of law is wholly unnecessary."[50]

66. The Governments of the States to which this note was addressed confirmed their agreement,[51] so that the note may be regarded as an authorized interpretation of the Pact.

67. On 27 August 1928, an invitation to accede to the Pact of Paris was addressed to forty-nine States, the majority of which notified their accession. Some of the accessions were accompanied by declarations, a number of which expressly noted the interpretation contained in the United States note of 23 June 1928. Other declarations specified that only the text of the Pact was acceded to or rejected some principle established in the exchange of correspondence.

68. In a note communicated on 31 August 1928, the Government of the Union of Soviet Socialist Republics stated that it could not accept the limitations on the Pact referred to in the diplomatic correspondence of the original signatories. The Soviet Government also made the following critical observations on the actual text of the Pact:

"6. With regard to the text of the pact, the Soviet Government deems it necessary to point out that there is a lack of precision and clarity in Article 1 dealing with the formula prohibiting war; this formula allows various and arbitrary interpretations. For its part, the Soviet Government believes that every international war must be prohibited whether as an instrument of what is called 'national policy', or as a method serving other purposes (for instance the suppression of national movements of liberation, etc.). In the opinion of the Soviet Government, there must be a ban on war, not only in the strict juridical meaning of the word (that is, presupposing a declaration of war, etc.), but also on such military actions as, for example, intervention, blockade, military occupation of foreign territories, of foreign ports, etc.

"The history of recent years has provided instances of military activities which have inflicted terrible hardships on the peoples. The Soviet Republics were themselves the object of such attacks, and at the

[47]The United States Department of State, the *General Pact for the Renunciation of War,* 1928. See page 14, the letter from Mr. Paul Claudel to Mr. Frank B. Kellogg dated 5 January 1928.

The French Government subsequently proposed, on 20 April 1928, a preliminary draft treaty reserving the right of legitimate defence and clarifying the nature of prohibited acts. This draft contained the following provisions:

"Article I

"The high contracting parties without any intention to infringe upon the exercise of their rights of legitimate self-defence within the framework of existing treaties, particularly when the violation of certain of the provisions of such treaties constitutes a hostile act, solemnly declare that they condemn recourse to war and renounce it as an instrument of national policy; that is to say, as an instrument of individual, spontaneous and independent political action taken on their own initiative and not action in respect of which they might become involved through the obligation of a treaty such as the Covenant of the League of Nations or any other treaty registered with the League of Nations. They undertake on these conditions not to attack or invade one another.

". . . . . .

"Article III

"In case one of the high contracting parties should contravene this treaty, the other contracting Powers would *ipso facto* be released with respect to that party from their obligations under this treaty".

See, *ibid.,* page 22.

[48]In a letter to Mr. Paul Claudel of 27 February 1928, Mr. Frank P. Kellogg stated the following:

"If, however, such a declaration were accompanied by definitions of the word 'aggressor' and by exceptions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed. The ideal which inspires the effort so sincerely and so hopefully put forward by your Government and mine is arresting and appealing just because of its purity and simplicity; and I cannot avoid the feeling that if governments should publicly acknowledge that they can only deal with this ideal in a technical spirit and must insist upon the adoption of reservations impairing, if not utterly destroying the true significance of their common endeavours, they would be in effect only recording their impotence, to the keen disappointment of mankind in general."

See, *ibid,* page 14.

[49]*Ibid.,* pages 36-37.

[50]*Ibid.,* page 37.

[51]See, *ibid.:* Germany (page 43), France (pages 43-45), Italy (page 46), Belgium (pages 46-47), Poland (pages 42-43), United Kingdom (pages 47-48), Czechoslovakia (pages 51-53), Japan (pages 53-54).

See Myers, *Origin and Conclusion of the Paris Pact,* World Peace Foundation Pamphlets, Vol. XII, No. 2, 1929.

Union of South Africa (page 150), Australia (page 149), Canada (page 145), Irish Free State (page 144), India (page 149), New Zealand (page 150).

present time the great Chinese people are the victims of similar aggressions. Further, such military actions often develop into big wars which it is then completely impossible to stop, and yet the pact does not say a word about these questions, which are most important from the point of view of peace. Again, the same first article of the pact mentions the necessity of settling all disputes and all international conflicts exclusively by peaceful means. In this connexion, the Soviet Government considers that in the number of non-pacific means forbidden by the pact should also be included such means as the refusal to re-establish normal pacific relations between nations or the rupture of these relations, for such acts, by eliminating the pacific means which might settle differences, embitter relations and contribute to the creation of an atmosphere favourable to the outbreak of war."[52]

2. PARLIAMENTARY DEBATES ON THE PACT OF PARIS

69. Debates on the Pact of Paris were held in various parliaments (Australia, Belgium, Canada, Czechoslovakia, France, Germany, Ireland, Italy, Japan, Poland, Union of South Africa, United Kingdom and United States of America). Generally speaking, these debates confirmed the interpretations of the Pact given in the diplomatic notes exchanged prior to its conclusion.[53] The concept of self-defence figures prominently in the discussions. In some cases it was widely interpreted, while in others it was asserted that it was dangerous to have too broad a definition of self-defence which, interpreted individually by each State, would enable it to use force to protect, for example, the life and property of its nations abroad. In France, it was argued that a war waged against a State refusing to have recourse to peaceful procedures would be a defensive war.

SECTION XII. AMENDMENT OF THE COVENANT OF THE LEAGUE OF NATIONS TO BRING IT INTO HARMONY WITH THE PACT OF PARIS (1929 - 1931)

70. After the entry into force of the Pact of Paris, it was proposed that the Covenant of the League of Nations should be amended to include a general prohibition of recourse to war.[54] The Governments concerned were consulted and a committee of jurists made a study of the question.[55] A number of Governments and certain members of the Committee of Jurists argued that the balance of the system of the Covenant would be destroyed if the principle of the general prohibition of recourse to war were established without drawing the necessary conclusions from that principle, namely, the obligation of States to submit all international disputes to an international body for settlement by a binding decision and the obligation to comply with that decision. A State which resorted to war to enforce a decision in its favour would not commit an act of aggression. As an extension of this argument, a State which refuses to submit a dispute to a procedure of arbitration or judicial settlement is an aggressor.[56]

71. In the report submitted in 1931 on behalf of the First Committee,[57] Mr. Henri Rolin (Belgium) made the following statement concerning self-defence and aggression:

"5. One point appears beyond dispute—namely, that neither...in the Pact of Paris nor in the Covenant of the League in its present form does the prohibition of recourse to war exclude the right of legitimate self-defence...

"6. On the other hand, in the present state of the law, the satisfactory enumeration of the distinctive characteristics either of aggression or of legitimate self-defence appears difficult and even impossible."

SECTION XIII. THE GENERAL CONVENTION OF 26 SEPTEMBER 1931 TO IMPROVE THE MEANS OF PREVENTING WAR

72. This convention, prepared by the Committee on Arbitration and Security, was approved by the Assembly of the League of Nations on 26 September 1931 and opened for signature by States.[58] The Convention, to the underlying conception of which a number of States were opposed, did not come into force as it failed to receive the required number of ratifications and accessions. It envisages the case of armed forces entering the territory of another State and seeks to provide a settlement without determining the aggressor and applying sanctions.[59] According to this conception, the main object is to secure the cessation of hostilities and to safeguard the peace. Only when this has been found to be impossible will an attempt be made to assign responsibility by determining the aggressor.

SECTION XIV. THE DISARMAMENT CONFERENCE (1932 - 1933)

73. The question of defining aggression was discussed at length at the Disarmament Conference. Three proposals were submitted, based on the principle that resort to force should be prohibited and that the aggressor is the State violating that prohibition.

1. DECLARATION OF NON-RESORT TO FORCE IN EUROPE

74. On 15 February 1933, Mr. Eden (United Kingdom) submitted to the Political Commission of the Disarmament Conference a draft declaration prohibiting resort to force which concerned only European states in their mutual relations.[60] The meetings held

[52]See Myers, *Origin and Conclusion of the Paris Pact*, World Peace Foundation Pamphlets, Vol. XII, No. 2, 1929, pages 170-171.

[53]See André Mandelstam, *L'interprétation du Pacte Briand-Kellogg par les gouvernements et les parlements des Etats signataires*, Paris, 1938.

[54]See League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Tenth Ordinary Session* (*Official Journal*, Special Supplement No. 74), page 18: resolution adopted on 24 September 1929.

[55]See the report of the Committee of Jurists, followed by the observations of Governments, League of Nations document A.8.1930.V. The question came before the Assembly again in 1930 (resolution of 4 October 1930) and in 1931 (resolution of 25 September 1931); see League of Nations, Official Journal, Special Supplement No. 83, page 16, and Special Supplement No. 92, page 9.

[56]See below, paragraphs 449-453.

[57]League of Nations, *Records of the Twelfth Ordinary Session of the Assembly, Minutes of the First Committee* (*Official Journal*, Special Supplement No. 94), page 146.

[58]See League of Nations, *Resolutions and Recommendations adopted by the Assembly during its Twelfth Ordinary Session* (*Official Journal*, Special Supplement No. 92), page 24.

[59]Article 2 of this Convention reads as follows:

"If, in circumstances which, in the Council's opinion, do not create a state of war between the Powers at issue which are parties to the present Convention, the forces of one of those Powers enter the territory or territorial waters of the other or a zone demilitarized in virtue of international agreements, or fly over them, the Council may prescribe measures to ensure their evacuation by those forces."

on 15 February and 2 March were devoted to the discussion of this proposal. On 2 March, the Commission adopted the following text by 27 votes:

"The Governments of...

"Anxious to further the cause of disarmament by increasing the spirit of mutual confidence between the nations of Europe by means of a declaration expressly forbidding resort to force in the circumstances in which the Pact of Paris forbids resort to war:

"Hereby solemnly reaffirm that they will not in any event resort, as between themselves, to force as an instrument of national policy."[61]

2. PROPOSAL BY PRESIDENT ROOSEVELT

75. On 30 May 1933, Mr. Norman Davies (United States of America) submitted to the General Commission of the Conference the following proposal contained in a message from President Roosevelt:

"That all the nations of the world should enter into a solemn and definite pact of non-aggression;...and ...individually agree that they will send no armed force of whatsoever nature across their frontiers."[62]

3. THE DEFINITION OF AGGRESSION DRAFTED BY THE COMMITTEE ON SECURITY QUESTIONS[63]

76. On 6 February 1933, the USSR delegation submitted to the General Commission a proposal for the definition of aggression.[64] The text of the proposal was as follows:

"The General Commission,

"Considering that, in the interests of general security and in order to facilitate the attainment of an agreement for the maximum reduction of armaments, it is necessary, with the utmost precision, to define aggression, in order to remove any possibility of its justification;

"Recognizing the principle of equal right of all States to independence, security and self-defence;

"Animated by the desire of ensuring to each nation, in the interests of general peace, the right of free development according to its own choice and at the rate that suits it best, and of safeguarding the security, independence and complete territorial inviolability of each State and its right to self-defence against attack or invasion from outside, but only within its own frontiers; and

"Anxious to provide the necessary guidance to the international organs which may be called upon to define the aggressor:

"Declares:

"1. The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:

"(*a*) Declaration of war against another State;

"(*b*) The invasion by its armed forces of the territory of another State without declaration of war;

"(*c*) Bombarding the territory of another State by its land, naval or air forces or knowingly attacking the naval or air forces of another State;

"(*d*) The landing in, or introduction within the frontiers of, another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area;

"(*e*) The establishment of a naval blockade of the coast or ports of another State.

"2. No considerations whatsoever of a political, strategical, or economic nature, including the desire to exploit natural riches or to obtain any sort of advantages or privileges on the territory of another State, no references to considerable capital investments or other special interests in a given State, or to the alleged absence of certain attributes of State organization in the case of a given country, shall be accepted as justification of aggression as defined in Clause 1.

"In particular, justification for attack cannot be based upon:

"A. *The internal situation in a given State,* as, for instance:

"(*a*) Political, economic or cultural backwardness of a given country;

"(*b*) Alleged mal-administration;

"(*c*) Possible danger to life or property of foreign residents;

"(*d*) Revolutionary or counter-revolutionary movements, civil war, disorders or strikes;

"(*e*) The establishment or maintenance in any State of any political, economic or social order.

"B. *Any acts, laws or regulations of a given State,* as, for instance:

"(*a*) The infringement of international agreements;

"(*b*) The infringement of the commercial, concessional or other economic rights or interests of a given State or its citizens;

"(*c*) The rupture of diplomatic or economic relations;

"(*d*) Economic or financial boycott;

"(*e*) Repudiation of debts;

"(*f*) Non-admission or limitation of immigration, or restriction of rights or privileges of foreign residents;

[60]This proposal was worded as follows:

"The Governments ...

"Acting respectively through their undersigned representatives, duly authorized to that effect;

"Anxious to further the cause of disarmament by increasing the spirit of mutual confidence between the nations of Europe;

"Determined to fulfil, not only in the letter but also in the spirit, the obligations which they have accepted under the Pact of Paris, signed on August 27th, 1928:

"Hereby solemnly undertake that they will not in any circumstances resort to force for the purpose of resolving any present or future differences between them".

See League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments,* Series D, Vol. 5 (minutes of the Political Commission), page 11.

[61]*Ibid.*, pages 23 and 30.

[62]*Ibid.*, Series B (Minutes of the General Commission), Vol. 2, page 565.

[63]The proposal actually speaks of a "definition of 'aggressor'" and not of a "definition of aggression", but this difference of terminology is unimportant.

[64]*Ibid.*, page 237.

"(*g*) The infringement of the privileges of official representatives of other States;

"(*h*) The refusal to allow armed forces transit to the territory of a third State;

"(*i*) Religious or anti-religious measures;

"(*j*) Frontier incidents.

"3. In the case of the mobilization or concentration of armed forces to a considerable extent in the vicinity of its frontiers, the State which such activities threaten may have recourse to diplomatic or other means for the peaceful solution of international controversies. It may at the same time take steps of a military nature, analogous to those described above, without, however, crossing the frontier."

77. The USSR proposal was the subject of a general discussion in the Political Commission on 10 March 1933.[65] Following the discussion, the Commission instructed a Committee on Security Questions, under the chairmanship of Mr. Nicolas Politis,[66] to consider the question. The Committee drew up an Act relating to the Definition of the Aggressor, which provides five criteria of aggression. The report submitted by Mr. Politis on behalf of the Committee is of great interest.[67] The general idea of the Act relating to the Definition of the Aggressor is that the aggressor is the State which first employs force outside its territory.

78. The text of the Act relating to the Definition of the Aggressor is as follows:

"...

"*Article 1*

"The aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be that State which is the first to commit any of the following actions:

"(1) Declaration of war upon another State;

"(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

"(3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;

"(4) Naval blockade of the coasts or ports of another State;

"(5) Provision of support to armed bands formed in its territory which have invaded 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 or protection.

"*Article 2*

"No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 1.

"*Article 3*

"The present Act shall form an integral part of the General Convention for the Reduction and Limitation of Armaments.

".......

"*Protocol annexed to Article 22 of the Act relating to the Definition of the Aggressor*

"The High Contracting Parties signatories of the Act relating to the Definition of the Aggressor,

"Desiring, subject to the express reservation that the absolute validity of the rule laid down in Article 2 of that Act shall be in no way restricted, to furnish certain indications for the guidance of the international bodies that may be called upon to determine the aggressor:

"Declare that no act of aggression within the meaning of Article 1 of that Act can be justified on either of the following grounds, among others:

"A. The Internal Condition of a State:

"E.g., its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions or civil war.

"B. The International Conduct of a State:

"E.g., the violation or threatened violation of the material or moral rights or interests of a foreign State or its nationals; the rupture of diplomatic or economic relations; economic or financial boycotts; disputes relating to economic, financial or other obligations towards foreign States; frontier incidents not forming any of the cases of aggression specified in Article 1.

"The High Contracting Parties further agree to recognize that the present Protocol can never legitimate any violations of international law that may be implied in the circumstances comprised in the above list."[68]

79. It will be seen that, in general, the Act relating to the Definition of the Aggressor reproduces the substance of the USSR proposal, but in somewhat different form. The Act, however, refers to the provision of support to armed bands (5), which is not mentioned in the USSR proposal of 6 February 1933.

80. The Act was considered by the General Commission on 25 and 29 May 1933.[69] There were differences of opinion and the Commission reserved its decision. The definition of the aggressor drafted by the Committee on Security Questions of the Disarmament Conference was adopted in a number of treaties.[70]

SECTION XV. CONSULTATION WITH GOVERNMENTS CONCERNING THE APPLICATION OF THE PRINCIPLES OF THE COVENANT (1936)

81. After the failure of sanctions against Italy, the Assembly of the League of Nations adopted a recom-

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[65] *Ibid.*, Series D, Vol. 5 (Minutes of the Political Commission), page 47.

[66] The Committee consisted of the representatives of the following countries: Belgium, Cuba, Denmark, Esthonia, Finland, France, Germany, Hungary, Italy, Poland, Spain, Switzerland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America and Yugoslavia.

[67] See League of Nations, Conference for the Reduction and Limitation of Armaments, Conference Documents, Vol. II, page 679 (document Conf.D/C.G.108).

[68] *Ibid.*, pages 683-684.

[69] See League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. 2, pages 510-517, 547-559.

[70] See below, paragraphs 205-208.

mendation on 4 July 1936, to the effect that the Council should invite governments to formulate proposals "in order to improve the application of the principles of the Covenant".[71] In this connexion, the Governments of China, Esthonia, Iraq, Latvia, Panama and the Union of Soviet Socialist Republics expressed their support for a definition of aggression.[72] The Argentine Government expressed what would appear to be a different point of view.[73]

Chapter II

CRITERIA APPLIED WHEN A CONFLICT HAS BEEN ACCOMPANIED BY THE USE OF FORCE

82. Article 16 of the Covenant of the League of Nations, concerning the application of sanctions against a State resorting to war in violation of the Covenant, is known to have been applied twice only: in the Italo-Ethiopian dispute (1935) and the Soviet-Finnish dispute (1939). Apart from these cases, however, the organs of the League of Nations, founding themselves on Article 11 or Article 15 of the Covenant, gave more or less explicit rulings on responsibility for armed conflicts. Of course, where a conflict was accompanied by hostilities, the organs of the League sought primarily to put an end to it by persuading the parties to cease the use of force and to accept the measures proposed to prevent a resumption of hostilities. To this end the organs of the League appealed to the good-will of the parties, refrained from condemnatory judgments which might have caused offence, and generally exercised great restraint in pronouncing on the misdeeds of parties, using great tact so that the violators of the Covenant could give way without losing face.

SECTION I. DISPUTE BETWEEN PERSIA AND THE UNION OF SOVIET SOCIALIST REPUBLICS (ENZELI INCIDENT) (1920)

83. In May 1920, USSR vessels shelled the port of Enzeli and disembarked troops to take possession of the fleet of Admiral Denikin, who had taken refuge in the port. The Persian Government appealed to the Council of the League of Nations, invoking Article 11[74] and subsequently Article 10 of the Covenant.[75]

84. On 16 June 1920 the Council of the League of Nations adopted the following resolution:

"The Council considers that the Persian Government has acted in the best interests of peace, and that it has rightly appealed to the fundamental principle of co-operation laid down in the Covenant, in asking the League of Nations to declare its willingness to maintain the territorial integrity of Persia in accordance with Article X of the Covenant.

"The Council decides that before advising upon the means by which the obligations prescribed by the Covenant shall be fulfilled, it is desirable, in order to give every opportunity for the success of the conversations now in progress, to await the result of the promises made by the Soviet authorities. In the meantime the Council requests the Persian representative to keep it informed of the march of events through the Secretary-General of the League of Nations."[76]

SECTION II. INCURSIONS OF ARMED BANDS INTO THE STATES BORDERING ON BULGARIA (INVOLVING BULGARIA, ROMANIA, YUGOSLAVIA AND GREECE) (1922)

85. As a result of a collective note addressed to it on 14 June 1922 by the Governments of Greece, Romania and Yugoslavia, the Bulgarian Government submitted the matter to the Council of the League of Nations on 17 June 1922[77] under Article 11 of the Covenant. The Bulgarian Government was accused of encouraging the formation in its territory of armed bands and their incursions over the frontiers of the neighbouring States.

86. In a resolution of 19 July 1922 the Council:

"Expresses its hope for a satisfactory conclusion to the efforts made by the interested Governments to put an end, by a direct agreement, to a situation which may become dangerous to peace;

"And requests the Governments to inform the Council at its next session of the result of the negotiations in progress, and places itself at their disposal should its intervention be again required to avoid all possibility of a conflict."[78]

SECTION III. GRECO-BULGARIAN DISPUTE (DEMIR KAPOU) (1925)

87. The report of the Commission of Enquiry into the incidents on the frontier between Bulgaria and Greece, the conclusions of which were adopted by the Council on 14 December 1925, stated the following:

"...the Commission must nevertheless record that, by occupying a part of Bulgarian territory with its military forces, Greece violated the Covenant of the League of Nations."[79]

SECTION IV. SINO-JAPANESE DISPUTE (MANCHURIA) (1931)

88. The report adopted by the Assembly on 24 February 1933 in virtue of Article 15, paragraph 4, states:

[71] See League of Nations, *Records of the Sixteenth Ordinary Session of the Assembly, Plenary Meetings, Text of the Debates, Part 2* (*Official Journal*, Special Supplement No. 151), pages 65, 66 and 68.

[72] See League of Nations, *Documents relating to the Question of the Application of the Principles of the Covenant*, (*Official Journal*, Special Supplement No. 154), pages 87 and 88.

[73] *Ibid*, page 13. The Argentine Government asked that "the previous determination of the aggressor in each case and according to circumstances should be laid down as a condition of all sanctions".

[74] Letter dated 19 May 1920 from the Ministry of Foreign Affairs of Persia to the Secretary-General of the League of Nations. See League of Nations, *Procès-Verbal of the Sixth Session of the Council*, page 25. See also the letter of 29 May 1920, *ibid*, page 27.

[75] Memorandum of the Persian Government, dated 14 June 1920, *ibid*, page 31.

[76] *Ibid*, page 41.

[77] See League of Nations, *Official Journal*, 3rd Year, No. 8, Part II: *Nineteenth Session of the Council*, page 795.

[78] *Ibid*, page 804.

[79] See League of Nations document C.727.M.270.1925.VII, page 8. The Commission, however, recognizes various extenuating circumstances of great importance, such as the absence of premeditation. For the Council's decision of 14 December 1925 see League of Nations, *Official Journal*, 7th Year, No. 2: *Thirty-Seventh Session of the Council*, pages 172-177.

"Without excluding the possibility that, on the night of 18-19 September 1931, the Japanese officers on the spot may have believed that they were acting in self-defence, the Assembly cannot regard as measures of self-defence the military operations carried out on that night by the Japanese troops at Mukden and other places in Manchuria. *Nor can the military measures of Japan as a whole,* developed in the course of the dispute, *be regarded as measures of self-defence*".[80]

SECTION V. DISPUTE BETWEEN COLOMBIA AND PERU (LETICIA) (1933)

89. The report adopted by the Council on 18 March 1933[81] under Article 15, paragraph 4, contains the following passage:

"The Council reaches the following conclusions:

"1. That both parties agree:

"(*a*) That the Treaty of March 24th, 1922, between Colombia and Peru is in force;

"(*b*) That, in virtue of that Treaty, the territory known as the 'Leticia Trapezium' forms part of the territory of the Republic of Colombia;

"2. That that territory has been invaded by Peruvians, who ejected the Colombian authorities from their posts;

"3. That those Peruvians have been supported by the military authorities of the Department of Loreto (Peru);

"4. That a Peruvian post had been established at Tarapaca on Colombian territory; that this post was later captured by Colombian forces."[82]

90. Later in the report the Council recommends "the complete evacuation by the Peruvian forces of the territory contained in the *Leticia Trapezium,* and the withdrawal of all support from the Peruvians who have occupied that area".[83]

SECTION VI. DISPUTE BETWEEN BOLIVIA AND PARAGUAY (1934-1935)

91. The report of the Chaco Commission of 9 May 1934 states:

"In this dispute each party claims ownership of the Chaco, and therefore maintains that it is waging defensive war in its own territory. *How is the aggressor to be determined in such a conflict? No international frontier has been crossed by foreign troops,* since the Chaco question will only be settled by a delimitation of this disputed frontier."[84]

92. The report adopted by the Assembly on 24 November 1934, in virtue of Article 15, paragraph 4, contains the following passage:

"2. The dispute which has arisen between the two countries is the consequence of the fact that their common frontier has never been fixed by any final treaty and that hostilities were brought about by the inevitable impact of the two movements of occupation of which the Chaco has been the scene: that of Paraguay to the north and west and that of Bolivia to the south and east.

"3. For several months hostilities continued without either of the Parties appealing to the League of Nations either under Article 11 or under Article 15. The Assembly is therefore bound to record that neither of the Parties has fulfilled its undertakings under Article 12 of the Covenant."[85]

SECTION VII. ITALO-ETHIOPIAN DISPUTE (1935)

93. At its meeting on 5 October 1935, the Council appointed a committee of six members[86] to study the situation in the light of its latest developments. The Committee's report, which was submitted to the Council on 7 October 1935, noted certain events and found that "these events occurred before the draft report in pursuance of Article 15, paragraph 4 of the Covenant had been submitted to the Council".[87] After referring to Articles 12, 13 and 15 of the Covenant, the report came to the conclusion that "the Italian Government *has resorted to war in disregard of its covenants under Article 12 of the Covenant* of the League of Nations".[88] At the meeting on 7 October 1936 the Members of the Council declared themselves in agreement with the conclusions of the report.

SECTION VIII. SOVIET-FINNISH DISPUTE (1939)

94. In its report[89] adopted on 14 December 1939 in pursuance of Article 15, paragraphs 4 and 10, of the Covenant of the League of Nations, the Assembly stated, first, that "in the course of the various stages of the dispute the Finnish Government has not rejected any peaceful procedure",[90] and, secondly, that "the attitude and acts of the Government of the Union of Soviet Socialist Republics, on the other hand, have been incompatible with the commitments entered into

[80] The statement of the recommendations contained in the report includes the following passage:

"1. Whereas the sovereignty over Manchuria belongs to China, A. Considering that the presence of Japanese troops outside the zone of the South Manchuria Railway and their operations outside this zone are incompatible with the legal principles which should govern the settlement of the dispute, and that it is necessary to establish as soon as possible a situation consistent with these principles,

"The Assembly recommends the evacuation of these troops . . ." League of Nations, *Records of the Special Session of the Assembly,* Vol. IV (*Official Journal,* Special Supplement No. 112) pages 22, 72, 75.

[81] League of Nations, *Official Journal,* 14th Year, No. 4: *Seventy-First Session of the Council,* pages 516-523.

[82] *Ibid,* page 608.

[83] *Ibid,* page 609.

[84] League of Nations document C.154.M.64.1934.VII, page 52.

[85] *Dispute between Bolivia and Paraguay, Records of the Special Session of the Assembly* (League of Nations, *Official Journal,* Special Supplement No. 132), page 48.

[86] Chile, Denmark, France, Portugal, Romania, United Kingdom. See League of Nations, *Official Journal,* 16th Year, No. 11: *Eighty-eighth Session of the Council,* page 1213.

[87] *Ibid.,* page 1224.

[88] *Ibid.,* page 1225.

[89] League of Nations, *Official Journal,* 20th Year, No. 11-12 (Part II); *One Hundred and Seventh Session of the Council,* pages 531-540 (document A.46.1939.VII).

[90] *Ibid.,* page 538.

by that country".[91] The report concludes that "the Soviet Government has violated, not only its special political agreements with Finland, but also Article 12 of the Covenant of the League of Nations and the Pact of Paris".[92]

95. The following resolution was adopted by the Assembly on 14 December 1949:

"The Assembly:

"Whereas, by the aggression which it has committed against Finland, the Union of Soviet Socialist Republics has failed to observe not only its special political agreements with Finland but also Article 12 of the Covenant of the League of Nations and the Pact of Paris;

". . . . .

"Solemnly condemns the action taken by the Union of Soviet Socialist Republics against the State of Finland;

". . . . ."[93]

96. The following resolution was adopted by the Council of the League of Nations on 14 December 1939:

"The Council,

"Having taken cognizance of the resolution adopted by the Assembly on 14 December 1939, regarding the appeal of the Finnish Government;

"1. Associates itself with the condemnation by the Assembly of the action of the Union of Soviet Socialist Republics against the Finnish State; and

"2. For the reasons set forth in the resolution of the Assembly,

"In virtue of Article 16, paragraph 4, of the Covenant;

"Finds that, by its act, the Union of Soviet Socialist Republics has placed itself outside the League of Nations. It follows that the Union of Soviet Socialist Republics is no longer a Member of the League."[94]

[91] *Ibid.*, page 539. The Assembly refers in this connexion to Article III of the Convention for the Definition of Aggression signed in London on 3 July 1933. The report states that:

"The order to enter Finland was given to the Soviet troops on the ground of 'further armed provocation'. The reference was to frontier incidents or alleged frontier incidents. In the Annex, however, to Article III of the Convention it is declared that no act of aggression within the meaning of Article II of the Convention can be justified by frontier incidents not forming any of the cases of aggression specified in Article II".

The report (*ibid.*, page 540) also notes a violation of Article III of the Convention by the refusal of the Soviet Government to treat with the present Government of Finland, which it called the "former Finnish Government". The report states:

"The Annex to Article III specifies that aggression cannot be justified either by the international conduct of a State, for example: the violation or threatened violation of the material or moral rights or interests of a foreign State; or by the internal condition of a State, for example; its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions or civil war".

[92] *Ibid.*, page 540.

[93] *Ibid.*, pages 506 and 508.

[94] *Ibid.*, pages 506 and 508.

Title II

The era of the United Nations

97. Attention will be directed first to the Charter of the United Nations and the expressions it uses in connexion with the prohibition of war and the use of force, and then to the question of aggression. It will, however, be noted that the latter question was approached from two different points of view.

98. In the first place, there was a discussion to determine which acts the organs and Members of the United Nations should regard as constituting aggression for the purpose of applying the collective security system.

99. Secondly, a study was made of the question of offences against peace, chief of which is the crime of aggression.

100. Though closely related, these two questions are distinct and were considered separately by the General Assembly and the International Law Commission.

101. The question of defining aggression concerns the political organs of the United Nations, since it is their duty to organize collective action to check aggression, and to do so they might have to determine the aggressor.

102. The question of the crime of aggression also concerns international penal law, since persons who commit acts deemed to constitute the crime of aggression must be punished. In normal circumstances, the crime of aggression will be tried some time after its commission. According to some authorities, it can in practice be tried only when its authors have been apprehended after the aggressor country has been defeated.

103. At its third session, the International Law Commission considered aggression from these two different points of view, dealing separately with the "question of defining aggression" and the question of the "draft code of offences against the peace and security of mankind".[1]

104. It is to be observed that in its draft code the International Law Commission defines the crime of aggression in general terms[2] and treats as separate

[1] See the report of the Commission, A/1858, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, chapter III: Question of defining aggression, and chapter IV: Draft code of offences against the peace and security of mankind.

[2] "Article 2. The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations".

offences, that is to say, as offences other than the crime of aggression, certain acts covered by the definition of aggression prepared in 1933 by the Committee on Security Questions of the Disarmament Conference and by the definition adopted in the treaties concluded in London at that time.[3]

Chapter I

THE CHARTER OF THE UNITED NATIONS

SECTION I. THE RULES ESTABLISHED BY THE CHARTER

105. The Charter of the United Nations introduced important innovations. It limits much more strictly than did the Covenant of the League of Nations the right of States to resort to war and to use force in international relations.

106. The system of the Charter is based on the following principles: (1) resort to war, or to the threat or use of force, is generally prohibited; (2) the cases in which the use of force is permitted are specified by the Charter.

1. RESORT TO WAR OR TO THE THREAT OR USE OF FORCE IS GENERALLY PROHIBITED

107. Two provisions of the Charter, paragraphs 3 and 4 of Article 2, are pertinent in this connexion. Article 2, paragraph 3, provides as follows:

> "All Members shall settle their international disputes *by peaceful means* in such a manner that international peace and security, and justice, are not endangered."

Once it is postulated that States must settle their disputes "by peaceful means", war is unconditionally prohibited as a means of exercising a right, opposing violation of a right or redressing a wrong of which a State may have been the victim.

108. Article 2, paragraph 4, provides as follows:

> "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."

This paragraph confirms and supplements the preceding paragraph. It prohibits recourse to "the threat or use of force". It is not only war properly so-called which is prohibited, but also the use of force, though it might be claimed that a limited use of force does not constitute resort to war and is not intended to do so.[4] It is not only the use of force which is prohibited, but also the threat of its use.

2. THE USE OF FORCE IS LAWFUL ONLY WHEN PRESCRIBED BY THE ORGANS OF THE UNITED NATIONS OR IN APPLICATION OF THE RIGHT OF SELF-DEFENCE

109. In neither of these cases does the State resorting to the use of force take the initiative in doing so. In the first case, the State participates in collective action directed by the United Nations. In the second case, it exercises the right of self-defence against a State which was the first to resort to the use of force.

(a) *Action with respect to threats to the peace, breaches of the peace, and acts of aggression*

110. Such action is provided for under Chapter VII of the Charter, which determines the powers of the Security Council and the obligations of the members of the United Nations. General Assembly Resolution 377(V), entitled "Uniting for Peace", provides that if the Security Council fails to act the General Assembly may intervene.

(b) *Self-defence*

111. The right of self-defence exercised individually or collectively is explicitly recognized by Article 51 of the Charter in cases where an "armed attack" has taken place. In this connexion, Article 51 provides as follows:

> "Nothing in the present Charter shall impair *the inherent right of individual or collective self-defence* if *an armed attack* occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

SECTION II. THE CHARTER OF THE UNITED NATIONS AND THE DEFINITION OF AGGRESSION (*preparatory work*)

1. PROPOSALS FOR THE DEFINITION OF AGGRESSION

112. Proposals were submitted by Bolivia and the Philippines to Committee 3 of the Third Commission of the San Francisco Conference.

113. The Bolivian proposal was worded as follows:

> "A State shall be designated an aggressor if it has committed any of the following acts to the detriment of another State.
>
> "(*a*) Invasion of another State's territory by armed forces.

[3] Thus, in the above-mentioned draft code, "The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose" constitutes an offence distinct from aggression and is included as No. (4) in the list of offences against the peace and security of mankind.

[4] In view of the wording of the Article, a restrictive interpretation might suggest itself.

It is stated 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* . . ." On the basis of the words italicized, could it not be said *a contrario* that the threat or use of force is permitted if it is not intended to infringe the territorial integrity or political independence of a State? Reference to the preparatory work shows that such an interpretation would not accord with the intention of the authors of the Charter. The words "territorial integrity or political independence of any State" did not appear in the Dumbarton Oaks draft. When they were introduced pursuant to an amendment proposed by the Australian Government and to other draft amendments submitted by various Governments, it was done with the strongly expressed desire to ensure respect for the territorial integrity and political independence of States and not with a view to permitting resort to the threat or use of force in certain cases. The text of the Australian amendment was adopted unchanged (see discussion in Committee I/1 of the Conference of San Francisco, 7th meeting, 16 May 1945; 11th meeting, 4 June 1945. *United Nations Conference on International Organization, Documents*, Vol. 6, pages 304 and 334-335).

"(*b*) Declaration of war.

"(*c*) Attack by land, sea, or air forces with or without declaration of war, on another State's territory, shipping, or aircraft.

"(*d*) Support given to armed bands for the purpose of invasion.

"(*e*) Intervention in another State's internal or foreign affairs.

"(*f*) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.

"(*g*) Refusal to comply with a judicial decision lawfully pronounced by an International Court."[5]

114. This proposal was accompanied by the following observation:

"In general the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and should make recommendations or decide on the measures to be taken to maintain or restore peace and security. If the nature of the acts investigated entails designating a State as an aggressor as indicated in the following paragraph, these measures should be applied immediately by collective action."[6]

115. The Philippine proposal was worded as follows:

"Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts:

"(1) To declare war against another nation;

"(2) To invade or attack, with or without declaration of war, the territory, public vessel, or public aircraft of another nation;

"(3) To subject another nation to a naval, land or air blockade;

"(4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation."[7]

2. REPORT BY MR. PAUL-BONCOUR

116. In his report on Chapter VIII, Section B, presented on behalf of the above-mentioned Committee 3, Mr. Paul-Boncour stated the following:

"A more protracted discussion developed in the Committee on the possible insertion in paragraph 2, Section B, Chapter VIII, of the determination of acts of aggression.

"Various amendments proposed on this subject recalled the definitions written into a number of treaties concluded before this war but did not claim to specify all cases of aggression. They proposed a list of eventualities in which intervention by the Council would be automatic. At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene.

"Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of this Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in the other cases listed, automatic action by the Council might bring about a premature application of enforcement measures.

"The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression."[8]

Chapter II

ATTEMPTS TO DEFINE AGGRESSION

SECTION I. GENERAL ASSEMBLY RESOLUTIONS 378 B (V) AND 380 (V) OF 17 NOVEMBER 1950

117. These two resolutions deal with the question of defining aggression, but the former, whereby the General Assembly decided to refer the matter to the International Law Commission, deals with procedure, while the latter is concerned with the substance of the question.

1. GENERAL ASSEMBLY RESOLUTION 378 B (V) OF 17 NOVEMBER 1950

118. At the 385th meeting of the First Committee of the General Assembly, held on 6 November 1950 and devoted to consideration of the question "Duties of States in the event of the outbreak of hostilities", which had been placed on the agenda at the request of the Yugoslav delegation (A/1399), the representative of the Union of Soviet Socialist Republics submitted a draft resolution (A/C.1/608/Rev.1) containing an enumerative definition of acts of aggression.[9]

119. At the 387th meeting of the First Committee, held on 7 November 1950, the Syrian representative submitted a draft resolution (A/C.1/610) suggesting that the USSR proposal should be referred for study to the competent subsidiary organ of the General Assembly, that is to say, to the International Law Commission.[10] The Commission was to include the definition of aggression in its studies when preparing a criminal code for the international crimes, and submit a report to the General Assembly.

120. The Syrian proposal was subsequently replaced by a draft resolution submitted jointly by the delegations of Bolivia and Syria (A/C.1/615).[11] This draft was adopted by the First Committee at its 390th meeting held on 9 November 1950.[12]

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[5] *Ibid.*, Vol. 3, page 585.

[6] *Ibid.*, page 584.

[7] *Ibid.*, page 538.

[8] *Ibid.*, Vol. 12, page 505.

[9] See *Official Records of the General Assembly, Fifth Session, First Committee*, 385th meeting, paragraphs 18-35, and *Annexes*, item 72.

[10] See *Official Records of the General Assembly, Fifth Session, First Committee*, 387th meeting, paragraph 42.

[11] *Ibid.*, 390th meeting, paragraph 11.

[12] *Ibid.*, 390th meeting, paragraph 41.

121. The General Assembly adopted the draft resolution submitted by the First Committee at its 308th plenary meeting held on 17 November 1950.[13] Under resolution 378 B (V):

"*The General Assembly*

"*Considering* that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations,

"*Decides* to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."[14]

2. GENERAL ASSEMBLY RESOLUTION 380 (V) OF 17 NOVEMBER 1950

122. The delegation of the Union of Soviet Socialist Republics requested the President of the General Assembly in a letter addressed to him on 20 September 1950 (A/1376) to include in the agenda for the fifth session of the General Assembly the item entitled: "Declaration on the removal of the threat of a new war and the strengthening of peace and security among the nations."

123. At its 285th meeting, held on 26 September 1950, the General Assembly decided, on the recommendation of the General Committee, to place this item on its agenda and to refer it to the First Committee for consideration and report.[15]

124. The First Committee considered the item at its 372nd to 383rd meetings held from 23 October to 5 November 1950. Several draft resolutions and amendments were submitted to it.[16]

125. At its 383rd meeting held on 3 November 1950,[17] it adopted a draft resolution which was approved without discussion by the General Assembly at its 308th plenary meeting on 17 November 1950.[18]

126. Resolution 380 (V) is worded as follow:

"*The General Assembly,*

"......

"*Condemning* the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force,

"1. *Solemnly* reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world;

"......."[19]

127. It will be noted that, in this resolution, aggression is interpreted broadly by the General Assembly, since it may take the form of "fomenting civil strife in the interest of a foreign Power", and may also be committed "otherwise".

SECTION II. THE INTERNATIONAL LAW COMMISSION (THIRD SESSION: 16 MAY TO 27 JULY 1951)

128. Pursuant to resolution 378 B (V) adopted by the General Assembly on 17 November 1950, the International Law Commission devoted eleven meetings[20] to a study of the proposal (A/C.1/608/Rev.1) submitted by the Union of Soviet Socialist Republics to the First Committee of the General Assembly and of the other First Committee documents dealing with the question. The results of its work are described in its report.[21]

129. The Commission had before it a report by Mr. Spiropoulos entitled "The possibility and desirability of a definition of aggression". This report was unfavourable to the idea of such a definition.[22]

130. Definitions of a general nature were proposed by the following members of the Commission:[23] Mr. Amado, Mr. Alfaro, Mr. Yepes,[24] Mr. Hsu, Mr. Córdova and Mr. Scelle.

131. The Commission was of the opinion that it should adopt a general definition of aggression and took as the basis for discussion the text submitted by Mr. Alfaro.

132. Various modifications were introduced into Mr. Alfaro's draft definition, which was thus amended to read:

"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-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."[25]

133. Nevertheless, a final roll-call vote was taken, the definition was rejected by 7 votes to 3.[26] The majority voted in favour of rejecting the text for various reasons. Some members were opposed to the very principle of defining aggression, while others considered that the definition lacked elements which they thought essential.

134. Mr. Alfaro then proposed that the Commission should not give up its attempt to define aggression, but should continue its efforts, taking as the basis for its

[13] See *Official Records of the General Assembly, Fifth Session, Plenary Meetings*, 308th meeting, paragraph 24.

[14] *Ibid., Supplement No. 20*, A/1775, page 13.

[15] *Ibid., Plenary Meetings*, 285th meeting, paragraph 67.

[16] *Ibid., First Committee*, 372nd to 383rd meetings, and *Annexes*, item 69.

[17] *Ibid., First Committee*, 383rd meeting, paragraph 94.

[18] *Ibid., Plenary Meetings*, 308th meeting, paragraph 57.

[19] *Ibid., Supplement No. 20*, A/1775, page 13.

[20] I.e., its 92nd, 93rd, 94th, 95th, 96th, 108th, 109th, 127th, 128th, 129th, and 133rd meetings.

[21] A/1858, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, Chapter III.

[22] See document A/CN.4/44, Chapter II.

[23] See A/1858, Chapter III, and paragraphs 470-472, 475 and 476 below.

[24] Mr. Yepes presented two definitions, one enumerative (A/CN.4/L.7), the other a slightly developed definition (A/CN.4/L.12).

[25] A/1858, paragraph 49.

[26] *For:* Mr. Alfaro, Mr. Córdova and Mr. François
Against: Mr. Amado, Mr. Brierly, Mr. Hsu, Mr. El-Khouri, Mr. Sandström, Mr. Spiropoulos and Mr. Yepes.
Abstaining: Mr. Hudson.
Absent: Mr. Scelle.

work the several texts presented by others of its members. This proposal was rejected by 6 votes to 4.[27]

SECTION III. GENERAL ASSSEMBLY RESOLUTION 599 (VI) ON THE QUESTION OF DEFINING AGGRESSION (31 JANUARY 1952)

135. At its 341st plenary meeting[28] on 13 November 1951, the General Assembly decided to place on its agenda the report of the International Law Commission covering the work of its third session[29], and, at its 342nd plenary meeting held the same day, decided to refer the question of defining aggression to the Sixth Committee for consideration and report.[30]

136. The question of defining aggression was the subject of prolonged discussion in the Sixth Committee at eighteen meetings, held from 5 January to 22 January 1952.[31] During these discussions, arguments for and against a definition of aggression were advanced.

137. As the basis for its work, the Sixth Committee had the report of the International Law Commission, a draft resolution submitted by Greece (A/C.6/L.206), a draft resolution submitted by the Union of Soviet Socialist Republics (A/C.6/L.208), a draft resolution submitted jointly by France, Iran and Venezuela (A/C.6/L.209) and a Bolivian draft resolution (A/C.6/L.211).

138. Amendments to these draft resolutions were submitted by Colombia (A/C.6/L.210) and Egypt (A/C.6/L.213) (to the draft resolution submitted by the USSR), and by Colombia (A/C.6/L.214/Rev.1), India (A/C.6/L.212) and Syria (A/C.6/L.215) (to the joint draft resolution submitted by France, Iran and Venezuela). Lastly, Mexico submitted an amendment (A/C.6/L.216) to the Syrian amendment.

139. At its 294th meeting on 21 January 1952, the Sixth Committee adopted paragraph 1 of the Colombian amendment and, after modification, paragraphs 1, 3 and 4 of the Syrian amendment. The joint draft resolution thus amended was adopted by 28 votes to 12 with 7 abstentions.[32]

140. On 31 January 1952, the General Assembly adopted[33] by 30 votes to 12 with 8 abstentions the draft resolution[34] submitted by the Sixth Committee.

Chapter III

AGGRESSION CONSIDERED AS AN INTERNATIONAL CRIME

SECTION I. THE LONDON AGREEMENT OF 8 AUGUST 1945, THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL AND THE JUDGMENT OF THE TRIBUNAL

1. THE LONDON AGREEMENT AND THE CHARTER OF THE TRIBUNAL

141. On 8 August 1945 the Governments of France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America signed in London an Agreement[35] providing that an International Military Tribunal should be established for the trial of war criminals whose offences had no particular geographical location (article 1).

142. To this Agreement is annexed the Charter of the International Military Tribunal. Article 6 of the Charter submits to the jurisdiction of the Tribunal three categories of crimes, the first of which, crimes against the peace, is defined as follows:

"(*a*) Crimes against peace: namely, *planning, preparation, initiation or waging of a war of aggression,* or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;"[36]

143. It is to be observed that at the Conference which drafted the Charter of the Tribunal the delegation of the United States of America proposed the inclusion in the Charter of the following definition of the crime of aggression:

"An aggressor, for the purposes of this Article, is that state which is the first to commit any of the following actions:

"(1) Declaration of war upon another state;

"(2) Invasion by its own forces, with or without a declaration of war, of the territory of another state;

"(3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another state;

"(4) Naval blockade of the coasts or ports of another state;

"(5) Provision of support to armed bands formed in its territory which have invaded 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 or protection.

"No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been sub-

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[27]*For:* Mr. Alfaro, Mr. Córdova, Mr. Hsu and Mr. Yepes
Against: Mr. Amado, Mr. Brierly, Mr. François, Mr. Hudson, Mr. El-Khouri and Mr. Sandström.
Abstaining: Mr. Spiropoulos.
Absent: Mr. Scelle.
The Commission did, however, include aggression among the offences covered by its draft code of offences against the peace and security of mankind. See below, paragraph 160.

[28]See *Official Records of the General Assembly, Sixth Session, Plenary Meetings,* 341st meeting, paragraph 42.

[29]See A/1853, *Official Records of the General Assembly, Sixth Session, Supplement No. 9.*

[30]See A/2119, *Resolutions adopted by the General Assembly at its Sixth Session, Official Records of the General Assembly, Sixth Session, Supplement No. 20,* page xvii.

[31]See *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 278th-295th meetings, and *Annexes,* item 49.

[32]*Ibid., Sixth Committee,* 294th meeting, paragraphs 70-73.

[33]The text of resolution 599(VI) is reproduced above, in the footnote to paragraph 1.

[34]*Ibid., Annexes,* item 49, document A/2087, Report of the Sixth Committee, paragraph 37.

[35]See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 -1 October 1946,* Vol. 1, page 8.
Article 5 provided that *any Government of the United Nations* might *adhere to* the Agreement.
Nineteen States have adhered to the Agreement under that provision. They are as follows, in chronological order of adherence: Greece, Denmark, Yugoslavia, Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

[36]*Ibid.,* page 11.

jected to aggression, shall not constitute a war of aggression."[37]

144. The five criteria of aggression described in this proposal are taken from the definition of aggression prepared in 1933 by the Committee on Security Questions of the Disarmament Conference.[38] The United States delegation subsequently amended its proposal by deleting items 4 and 5 from the list.

145. The French delegation in turn proposed a draft definition of the crimes which the Tribunal should punish.[39] The United States proposal gave rise to a discussion,[40] in which it was opposed by General Nikitchenko, the USSR representative, who said that in the circumstances such a definition was unnecessary and that the Conference was not the body competent to prepare it.[41] The proposal was finally rejected.

2. THE UNITED NATIONS INDICTMENT AGAINST THE GERMAN LEADERS

146. This indictment was presented to the International Military Tribunal by François de Menthon, R. A. Rudenko, Sir Hartley Shawcross, and Robert H. Jackson.[42] The crimes against peace referred to in the indictment are conspiracy to commit aggression and the commission of aggression. The indictment includes the following headings:

"3. Aggressive action against Austria and Czechoslovakia.[43]

"4. Formulation of the plan to attack Poland: preparation and initiation of aggressive war: March 1939 to September 1939.[44]

"5. Expansion of the war into a general war of aggression: planning and execution of attacks on Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, and Greece: 1939 to April 1941.[45]

"6. German invasion on 22 June 1941, of the USSR territory in violation of the Non-Aggression Pact of 23 August 1939.[46]

"7. Collaboration with Italy and Japan and aggressive war against the United States: November 1936 to December 1941."[47]

3. THE JUDGMENT OF THE TRIBUNAL OF 1 OCTOBER 1946

147. The Tribunal distinguishes two counts of the indictment relating to crimes against peace. The first is that of "conspiring or having a common plan to commit crimes against peace". The second refers to the commission of "crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States". Immediately afterwards, however, the Tribunal combines these two points by stating: "It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together..."[48]

148. The Tribunal then distinguishes between "acts of aggression" and a "war of aggression" and declares: "The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on 1 September 1939".[49]

149. A chronological list follows:

"Preparation for Aggression".[50] The Tribunal opens its case by quoting *Mein Kampf*.

"The Planning of Aggression."[51] The Tribunal gives an account of the secret meetings held by Hitler on 5 November 1937 and 23 November 1939.

"The Seizure of Austria".[52] The Tribunal describes this as "a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries." It concludes by stating "that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered".[53]

"The Seizure of Czechoslovakia."[54]

"The Aggression against Poland."[55] On this subject the Tribunal says that it is "fully satisfied by the evidence that the war initiated by Germany against Poland on 1 September 1939 was most plainly an aggressive war".[56]

"The Invasion of Denmark and Norway".[57] The Tribunal states that these invasions "were acts of aggressive war".[58]

"The Invasion of Belgium, the Netherlands, and Luxembourg".[59] The Tribunal states that this invasion was "plainly an act of aggressive war".[60]

"The Aggression against Yugoslavia and Greece".[61]

"The Aggressive War against the Union of Soviet Socialist Republics".[62] The Tribunal stated that "the

[37]See *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials. London 1945, Department of State Publication 3080* (1949), page 294.

[38]See above, paragraph 78.

[39]This proposal was worded as follows: "The Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, directed the preparation and conduct of: (1) the policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law . . . ". *Report of Robert H. Jackson*, page 293.

[40]See meeting of 19 July 1945; *ibid.*, pages 295-309.

[41]At the 293rd meeting of the Sixth Committee of the General Assembly (21 January 1952), Mr. Morozov (USSR) stated "that General Nikitchenko had not been representing the USSR on the specific question of defining aggression, but had only been considering the question whether or not such a definition should be included in the Charter of the Nürnberg Tribunal". *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 293rd meeting, paragraph 3.

[42]See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 December 1945–1 October 1946*, Vol. 1, page 27.

[43]*Ibid.*, page 36.

[44]*Ibid.*, page 38.

[45]*Ibid.*, page 39.

[46]By this invasion, the Germans began "a war of aggression against the USSR". *Ibid.*, page 40.

[47]*Ibid.*, page 40.

[48]*Ibid.*, page 186.

[49]*Ibid.*, page 186.

[50]*Ibid.*, page 187.

[51]*Ibid.*, page 188.

[52]*Ibid.*, page 192.

[53]*Ibid.*, page 194.

[54]*Ibid.*, page 194.

[55]*Ibid.*, page 198.

[56]*Ibid.*, page 204.

[57]*Ibid.*, page 204.

[58]*Ibid.*, page 209

[59]*Ibid.*, page 209.

[60]*Ibid.*, page 210.

[61]*Ibid.*, page 210.

[62]*Ibid.*, page 213.

carefully prepared scheme launched on 22 June... was plain aggression".[63]

"War against the United States".[64] The Tribunal observes that the attack by Japan on the American fleet in Pearl Harbor was an "aggressive war" which Germany encouraged and approved by immediately declaring war on the United States.[65]

150. With regard to the judgment, two observations may be made:

(*a*) The Tribunal did not define either acts of aggression or wars of aggression. It merely recognized their existence in a number of specific cases.

(*b*) The Tribunal was careful to establish the fact that in several of the cases mentioned—the invasion of Norway,[66] the invasion of Belgium, the Netherlands and Luxembourg,[67] and the aggression against the USSR[68]—the right of self-defence could not be invoked. The Tribunal declared that Germany could not claim that it was taking the initiative either to prevent an invasion by the Allies or to prevent an attack by the countries which it was invading. Attention may be drawn to the following observation on the subject of Norway:

"...But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[69]

SECTION II. GENERAL ASSEMBLY RESOLUTIONS 95(I) OF 11 DECEMBER 1946 AND 177(II) OF 21 NOVEMBER 1947

151. On 11 December 1946, the General Assembly adopted resolution 95(I) whereby, after affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal", it directed the Committee on the Progressive Development of International Law and its Codification (the so-called "Committee on Methods" established under another resolution adopted on the same day)

"to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."[70]

152. At its single session (1947), the Committee on the Progressive Development of International Law and its Codification prepared a report[71] containing a number of recommendations as to the methods by which the future International Law Commission should take action under resolution 95(I).

153. The General Assembly, to which the above-mentioned report was submitted, adopted on 21 November 1947 resolution 177(II) directing the International Law Commission which it had resolved to establish to:

"(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

"(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above."[72]

SECTION III. ACTION UNDER GENERAL ASSEMBLY RESOLUTION 177 (II)

1. THE FIRST SESSION OF THE INTERNATIONAL LAW COMMISSION (1949)

154. The International Law Commission was of the opinion that its task "was not to express any appreciation of these principles [the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal] as principles of international law but merely to formulate them".[73]

155. The Commission instructed a Sub-Committee to prepare a working paper containing a formulation of the Nürnberg principles.[74] When this document was submitted to it, the Commission expressed the view that the task of formulating the Nürnberg principles appeared "to be so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature for the Commission to give a final formulation to these principles before the work of preparing the draft code was further advanced".[75] It therefore referred the text prepared by the Sub-Committee to a rapporteur, Mr. J. Spiropoulos, requesting him to report to the Commission at its second session.

2. THE SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION (5 JUNE—29 JULY 1950)

156. Mr. Spiropoulos submitted a report[76] on the basis of which the Commission adopted a formulation[77] of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. Among the seven principles formulated by the Commission, one, Principle VI, relates to crimes against peace, war crimes and crimes against humanity.

157. Principle VI refers to crimes against peace in the following terms:

"(*a*) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i)."

[63] *Ibid.*, page 215.
[64] *Ibid.*, page 215.
[65] *Ibid.*, page 216.
[66] *Ibid.*, pages 207 and 209.
[67] *Ibid.*, page 210.
[68] *Ibid.*, page 215.
[69] *Ibid.*, page 208.
[70] See *Resolutions adopted by the General Assembly during the Second Part of its First Session from 23 October to 15 December 1946*, page 188.
[71] A/332, *Official Records of the General Assembly, Second Session, Sixth Committee*, page 211.

[72] See *Official Records of the Second Session of the General Assembly, Resolutions, 16 September–29 November 1947*, page 112.
[73] See the report of the International Law Commission covering its first session, A/925, *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, paragraph 26.
[74] Document A/CN.4/W.12.
[75] A/925, paragraph 29.
[76] A/CN.4/22.
[77] See the report of the International Law Commission covering its second session, 5 June–29 July 1950, A/1316, *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, Part. III.

The International Law Commission makes the following observation:

"The Charter of the Nürnberg Tribunal did not contain any definition of 'war of aggression', nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes."[78]

3. GENERAL ASSEMBLY RESOLUTION 488 (V) OF 12 DECEMBER 1950

158. By its resolution 488 (V) of 12 December 1950[79], the General Assembly invited the governments of Member States to furnish their observations on the principles as formulated by the International Law Commission. By the same resolution, the Assembly requested the International Law Commission, in preparing the draft code of offences against the peace and security of mankind to take account of those observations, and also of the observations made by delegations during the fifth session of the General Assembly.

4. THE THIRD SESSION OF THE INTERNATIONAL LAW COMMISSION (1951)

159. Mr. Spiropoulos submitted a report[80] which included a draft code of offences against the peace and security of mankind and a summary of the observations made by delegations at the fifth session of the General Assembly on the subject of the formulation of the Nürnberg principles as established by the Commission. The Commission also had before it the observations of a number of Governments on that formulation.[81]

160. The Commission adopted a draft code of offences against the peace and security of mankind.[82] The list of offences against the peace and security of mankind includes twelve items.[83] No. (1) is worded as follows:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

161. It is to be observed that while paragraph (1) refers to aggression ("Any act of aggression"), certain acts falling within the same category as those characterized by the Committee on Security Questions of the Disarmament Conference in 1933 as constituting aggression are treated as separate offences in the draft code. This applies to No. (4), which is worded as follows:

"(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose."

162. Nevertheless, the commentary on offence No. (1) (aggression) contains the following statement:

"While every act of aggression constitutes a crime under paragraph (1), no attempt is made to enumerate such acts exhaustively. It is expressly provided that the employment of armed force in the circumstances specified in the paragraph is an act of aggression. It is, however, possible that aggression can be committed also by other acts, including some of those referred to in other paragraphs of article 2."

Hence it appears that paragraph (1), dealing with aggression, does not exhaust the possibilities of aggression, since the acts referred to in other paragraphs may also constitute the crime of aggression.

Chapter IV

THE CRITERIA APPLIED IN THE CASE OF CONFLICTS ACCOMPANIED BY THE USE OF FORCE. THE CASE OF KOREA

163. Several armed conflicts have occurred since the United Nations was established including that involving the new State of Israel and the neighbouring Arab States. Only once, however—in the case of the Korean war—has the Security Council pronounced on the question of aggression.

164. At its 473rd meeting on 25 June 1950, the Security Council, to which the question of the outbreak of war in Korea had been referred, adopted after amendment a draft resolution submitted by the representative of the United States of America. The following is the text of the resolution as adopted:[84]

"*The Security Council.*

". . . . . . .

"*Noting* with grave concern the armed attack on the Republic of Korea by forces from North Korea,

"*Determines* that this action constitutes a breach of the peace,

"*Calls for* the immediate cessation of hostilities; and

"*Calls upon* the authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel;

". . . . . . ."

165. On 27 June 1950, at the 474th meeting of the Security Council, the representative of the United States of America submitted another draft resolution worded as follows:

"*The Security Council,*

"*Having determined* that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace;

"*Having called* for an immediate cessation of hostilities; and

[78] *Ibid.*, paragraph 113.

[79] See A/1775, *Official Records of the General Assembly, Fifth Session, Supplement No. 20, Resolutions*, page 77.

[80] Document A/CN.4/44.

[81] See documents A/CN.4/45 and A/CN.4/45/Corr.1, A/CN.4/45/Add.1 and A/CN.4/45/Add.1/Corr.1 and A/CN.4/45/Add.2

[82] The Commission devoted twelve meetings to the question, the 89th to 92nd, the 106th to 111th, and the 129th and 133rd meetings. See the report of the Commission, A/1858, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, chapter IV.

[83] For the complete list of offences against the peace and security of mankind as formulated by the Commission, see document A/1858, paragraph 59.

[84] See S/1497 and *Official Records of the Security Council, Fifth Year, No. 15*. The voting was as follows:
For: China, Cuba, Ecuador, Egypt, France, India, Norway, United Kingdom and United States of America;
Abstained: Yugoslavia;
Absent: Union of Soviet Socialist Republics.

"*Having called* upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel; and

"*Having noted* from the report of the United Nations Commission for Korea that the authorities in North Korea have neither ceased hostilities nor withdrawn their armed forces to the 38th parallel, and that urgent military measures are required to restore international peace and security; and

"...

"*Recommends* that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."

This resolution was adopted without change at the same meeting.[85]

166. On 1 February 1951, at its fifth session, the General Assembly adopted resolution 498 (V), which reads as follows:

"*The General Assembly,*

"...

"*Noting* that the Central People's Government of the People's Republic of China has not accepted United Nations proposals to bring about a cessation of hostilities in Korea with a view to peaceful settlement, anu that its armed forces continue their invasion of Korea and their large-scale attacks upon United Nations forces there,

"1. *Finds* that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea;

"..."[86]

[85] See S/1508/Rev.1, and *Official Records of the Security Council, Fifth Year, No. 16.* The voting was as follows:
For: China, Cuba, Ecuador, France, Norway, United Kingdom, United States of America;
Against: Yugoslavia;
Abstained: Egypt, India;
Absent: Union of Soviet Socialist Republics.

[86] A/1175/Add.1, *Official Records of the General Assembly, Fifth Session, Supplement No. 20A,* page 1.

Title III

THE TERMINOLOGY USED IN REGIONAL OR INDIVIDUAL SECURITY TREATIES

Chapter I

THE HISTORICAL DEVELOPMENT

167. Regional and individual security treaties have been concluded in the course of three periods: the period prior to the First World War, the period of the League of Nations, and the United Nations period.

SECTION I. TREATIES CONCLUDED IN THE PERIOD PRIOR TO THE FIRST WORLD WAR

168. Treaties of alliance were concluded in this period. These bilateral (Franco-Russian Alliance) or multilateral (Austria-Hungary, Germany, Italy) treaties take the form of treaties of defensive alliance. The allies are therefore under obligation to render assistance to each other only if one of them is attacked. While the term "aggression" is not (generally) employed, the idea of aggression is implicit in reference to attack or invasion. There is no international organization responsible for ensuring the maintenance of peace; the parties adopt such forms of words as they find suitable, which have not been drafted or recommended by any international authority. The parties themselves are the sole judges of whether the *casus foederis* has occurred or not.

SECTION II. TREATIES CONCLUDED IN THE PERIOD OF THE LEAGUE OF NATIONS

1. REASON FOR THE SECURITY TREATIES

169. During the League of Nations period, the Covenant of the League of Nations was supposed to ensure the security of States, and, according to an opinion expressed on several occasions by a number of governments, individual treaties providing for the assistance of one State by another did not meet a need and presented dangers.

170. This opinion, however, did not gain acceptance. Some governments thought that the general engagements under the Covenant of the League of Nations were insufficient and, to be fully effective, had to be supplemented by individual engagements concluded between States which considered themselves exposed to a common danger. Furthermore, the members of the international community which did not belong to the League of Nations sought to obtain the guarantees of security they thought they needed by means of individual engagements.

2. CHARACTERISTICS OF THE SECURITY TREATIES

(a) *Purpose of the treaties*

171. Two types of treaties are to be found. There are treaties of mutual assistance, which provide that a State will be assisted by one or more others should it be the victim of aggression. These treaties have the same purpose as the treaties of alliance of the period prior to the League of Nations. There are also treaties of neutrality or non-aggression, which merely contain an undertaking by the contracting States not to commit aggression against each other and do not provide for any undertaking to render assistance should one of the contracting States become the victim of aggression.

(b) *Most of these treaties are conceived within the framework of the Covenant of the League of Nations*

172. It follows that the terminology used in these treaties is based in varying degree on that recommended or prepared by the organs of the League of

Nations. Moreover, these treaties often stipulate that their effects will not be contrary to the application of the Covenant of the League of Nations or that they will be applied with the assistance of the organs of the League.

(c) *States parties to the treaties*

173. Generally speaking, the treaties are bilateral, although they include a number of regional treaties which are in some cases open to accession by States which did not take part in their conclusion. These treaties are much more numerous than the treaties of alliance in force during the period prior to the League of Nations.

SECTION III. TREATIES CONCLUDED IN THE PERIOD OF THE UNITED NATIONS

174. The treaties concluded during this period do not differ materially from those concluded during the preceding period. It may be noted, incidentally, that a number of the latter are still in force.

1. STATES PARTIES TO THE TREATIES

175. A larger proportion of regional and multilateral treaties is to be observed.

2. THE TREATIES ARE CONCEIVED WITHIN THE FRAMEWORK OF THE CHARTER OF THE UNITED NATIONS

176. The terms used in the Charter of the United Nations with regard to security differ from those used in the Covenant of the League of Nations. Many of the new treaties, therefore, take into account Article 2, paragraph 4 of the Charter, which prohibits resort to "the threat or use of force".

Chapter II

THE TERMINOLOGY USED IN THE TREATIES

177. The regional or individual security treaties—non-aggression treaties, neutrality treaties, treaties of alliance, treaties of guarantee, treaties of mutual assistance, and the like—all revolve around the idea of aggression but vary in the terminology they employ. Some make use of very precise terms, such as "war", "attack", "invasion", "aggression", or "resort to arms", while others use more complex expressions and include definitions or lists. It is to be observed that some of the expressions employed are qualified by a reference to non-provocation.

178. The treaties have been classified into the following six categories according to the form of words used:

1. Attack or invasion;
2. Aggression;
3. Use of force;
4. Enumeration of prohibited actions;
5. General definitions of aggression;
6. Enumerative definitions of aggression.

179. Treaties which merely use the word "war" without further qualification have been omitted because this word does nothing to clarify the idea of aggression. In a final category, category 7, are mentioned the treaties which incorporate the idea of provocation.

SECTION I. ATTACK OR INVASION

180. The following treaties use the terms "attack" or "attacked" exclusively:

Franco-Russian Treaty of Alliance, 15-27 December 1893.

Triple Alliance between Austria-Hungary, Germany and Italy, 22 May 1882 (article 2).

Treaty of Alliance between Austria-Hungary and Romania, 20 October 1883 (article 2).

Treaty of Alliance between Great Britain and Japan, 12 August 1905 (article II).

Convention of Alliance, Kingdom of the Serbs, Croats and Slovenes and the Czechoslovak Republic, 14 August 1920 (article 1). Registered with the League of Nations under No. 154.

Political Agreement, France and Poland, 19 February 1921 (article 3). Registered with the League of Nations under No. 449.

Convention of Alliance, Romania and Czechoslovakia, 23 April 1921 (article I). Registered with the League of Nations under No. 155.

Political Agreement, Finland, Romania and Esthonia, 17 March 1922 (article 7). Registered with the League of Nations under No. 296.

Treaty of Defensive Alliance, Esthonia and Lithuania, 1 November 1923 (article 3). Registered with the League of Nations under No. 578.

Treaty of Guarantee, Poland and Romania, 26 March 1926 (article 2). Registered with the League of Nations under No. 1411.

Treaty of Friendship, France and Romania, 10 June 1926 (article 4). Registered with the League of Nations under No. 1373.

Treaty of Non-Aggression, Lithuania and Union of Soviet Socialist Republics, 28 September 1926 (article 3). Registered with the League of Nations under No. 1410.

Treaty of Friendly Understanding, Kingdom of the Serbs, Croats and Slovenes and France, 11 November 1927 (article 4). Registered with the League of Nations under No. 1592.

Treaty of Neutrality and Conciliation, Bulgaria and Turkey, 6 March 1929 (article 2). Registered with the League of Nations under No. 2668.

Treaty of Guarantee, Poland and Romania, 15 January 1931 (article 2). Registered with the League of Nations under No. 2685.

Treaty of Friendship and Alliance, Union of Soviet Socialist Republics and China, 14 August 1945 (article 3). Filed and recorded by the United Nations under No. 68.

North Atlantic Treaty, Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, United States of America (since 18 February 1952, Greece and Turkey), 4 April 1949 (article 5). Registered with the United Nations under No. 541.

181. The following treaties use the word "attack" in conjunction with a qualifying word or phrase:

(i) "military attack".

Treaty of Friendship and Mutual Assistance, Union of Soviet Socialist Republics and Mongolia, 27 February 1946 (article 2). Registered with the United Nations under No. 744.

(ii) "attacked . . . with a view to threatening its independence, subjugating it or seizing certain parts of its territory":

Treaty of Friendship and Mutual Assistance, Yugoslavia and Albania, 9 July 1946 (article III). Registered with the United Nations under No. 15.

182. The following treaties use both "attack" and "invade":

Locarno Treaty of Mutual Guarantee, Germany, Belgium, France, Great Britain, Italy, 16 October 1925 (article 2). Registered with the League of Nations under No. 1292.

Treaty of Friendship, France and Romania, 10 June 1926. Registered with the League of Nations under No. 1373.

Treaty of Non-Aggression and Arbitration, Greece and Romania, 21 March 1928 (article 1). Registered with the League of Nations under No. 2508.

SECTION II. AGGRESSION

183. Numerous treaties use the word "aggression" to state that the parties will abstain from committing an aggression or that they will assist the party which becomes the victim of an aggression.

184. The following treaties use the expressions "aggression", "acts of aggression", "aggressive acts", "offensive action", "war of aggression":

Treaty of Friendship and Neutrality, Turkey, Union of Soviet Socialist Republics, 17 December 1925 (article 2). Registered with the League of Nations under No. 3610.

Treaty of Non-Aggression, Lithuania and the Union of Soviet Socialist Republics, 28 September 1926 (article 3). Registered with the League of Nations under No. 1410.

Treaty of Guarantee and Neutrality, Persia and the Union of Soviet Socialist Republics, 1 October 1927 (article 2). Registered with the League of Nations under No. 2620.

Treaty of Conciliation, Judicial Settlement and Arbitration, Spain and Turkey, 28 April 1930 (article 1).

Treaty of Non-Aggression, Afghanistan and the Union of Soviet Socialist Republics, 24 June 1931 (article 2). Registered with the League of Nations under No. 3611.

Treaty of Non-Aggression and Conciliation, known as the Saavedra Lamas Pact, Rio de Janeiro, 10 October 1933 (article 1). Registered with the League of Nations under No. 3781.

Treaty of Non-Aggression, Turkey and Yugoslavia, 27 November 1933 (article 1). Registered with the League of Nations under No. 3715.

Non-Aggression Pact, China and the Union of Soviet Socialist Republics, 21 August 1937 (article 1). Registered with the League of Nations under No. 4180.

Treaty for the Peaceful Settlement of Disputes, Brazil and Venezuela, 30 March 1940 (article 1).

Treaty of Friendship and Mutual Assistance, Poland and Yugoslavia, 18 March 1946 (article 3). Registered with the United Nations under No. 13.

Charter of the Organization of American States, Bogotá, 30 April 1948 (article 5). Registered with the United Nations under No. 1609.

Treaty of Friendship, Co-operation and Mutual Assistance, Poland and Bulgaria, 28 May 1948 (article 2). Registered with the United Nations under No. 389.

General Armistice Agreement between Egypt and Israel, 24 February 1949 (article 1, paragraph 2). Registered with the United Nations under No. 654.

General Armistice Agreement between Lebanon and Israel, 23 March 1949 (article 1, paragraph 2). Registered with the United Nations under No. 655.

General Armistice Agreement between the Hashemite Kingdom of Jordan and Israel, 3 April 1949 (article 1). Registered with the United Nations under No. 656.

General Armistice Agreement between Syria and Israel, 20 July 1949 (article 1, paragraph 2). Registered with the United Nations under No. 657.

185. The following treaties use the word "aggression" or "attack" in conjunction with a qualifying word or phrase:

(i) "aggression by land, sea or air":

Pact of Non-aggression, France and the Union of Soviet Socialist Republics, 29 November 1932 (article 1). Registered with the League of Nations under No. 3615.

Pact of Friendship, Non-aggression and Neutrality, Italy and the Union of Soviet Socialist Republics (article 1). Registered with the League of Nations under No. 3418.

(ii) "armed attack":

Treaty of Alliance and Mutual Assistance, United Kingdom and France, 4 March 1947 (article 2). Registered with the United Nations under No. 132.

Brussels Treaty, Belgium, France, Luxembourg, the Netherlands and the United Kingdom, 17 March 1948 (article IV). Registered with the United Nations under No. 304.

(iii) "external aggression":

Treaty of Guarantee, Poland and Romania, 15 January 1931 (article 1). Registered with the League of Nations under No. 2685.

Treaty of Alliance, United Kingdom and Trans-Jordan, 22 March 1946 (article 3). Registered with the United Nations under No. 74.

186. One treaty uses the expression "aggressive action."

Treaty between the United States of America, the British Empire, France and Japan, 13 December 1921 (article II). Registered with the League of Nations under No. 607.

187. Several treaties use the expression "policy of aggression".

(i) Two treaties, when referring to Germany, say merely: "which had resumed her policy of aggression".

Treaty of Friendship, Mutual Aid and Peaceful Co-operation, Czechoslovakia and Yugoslavia, 9 May 1946 (article 3). Registered with the United Nations under No. 14.

Treaty of Friendship and Mutual Aid, Poland and Czechoslovakia, 10 March 1947 (article 3). Registered with the United Nations under No. 365.

(ii) Four treaties, referring to Germany, use some such phrase as the following: "which might seek to renew its policy of aggression".

Treaty of Friendship, Co-operation and Mutual Assistance, Union of Soviet Socialist Republics and Romania, 4 February 1948 (article 2). Registered with the United Nations under No. 745.

Treaty of Friendship, Co-operation and Mutual Assistance, Union of Soviet Socialist Republics and Hungary, 18 February 1948 (article 1). Registered with the United Nations under No. 743.

Treaty of Friendship, Co-operation and Mutual Assistance, Union of Soviet Socialist Republics and Bulgaria, 18 March 1948 (article 2). Registered with the United Nations under No. 741.

Treaty of Friendship, Co-operation and Mutual Aid, Poland and Hungary, 18 June 1948 (article 2). Registered with the United Nations under No. 370.

188. One treaty uses the terms "attack" and "aggression":

Treaty of Friendship and Security, Afghanistan and Persia, 27 November 1927 (article 2). Registered with the League of Nations under No. 2500.

Section III. The use of force

189. The following treaties contain an undertaking not to resort to the use of force. This undertaking is accompanied by certain particular conditions which vary from one treaty to another:

Protocol of Friendship and Co-operation, Colombia and Peru, 24 May 1934 (article 7). Registered with the League of Nations under No. 3786.

Protocol of Friendship, Rio de Janeiro, 24 May 1936 (article 5).

Germano-Soviet Treaty, 23 August 1939 (article 1).

Pact of the League of Arab States, Saudi Arabia, Egypt, Iraq, Transjordan, Lebanon, Syria, Yemen, 22 March 1945 (article 5). Filed and recorded by the United Nations under No. 241.

Charter of the Organization of American States, Bogotá, 30 April 1948 (article 18). Registered with the United Nations under No. 1609.

North Atlantic Treaty, Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, United States of America (since 18 February 1952, Greece and Turkey); 4 April 1949 (article 1). Registered with the United Nations under No. 541.

Section IV. Enumeration of prohibited acts

190. Article I of the so-called "Gondra" Treaty between the American States, concluded on 3 May 1923, provides for an undertaking by the parties "in case of disputes, not to begin mobilization or concentration of troops on the frontier of the other Party, nor to engage in any hostile acts or preparations for hostilities".[1]

Section V. General definitions of aggression

191. Four treaties of non-aggression, concluded by the Union of Soviet Socialist Republics before 1933, give a general definition of aggression.

192. Article 1 of the treaty between Finland and the Union of Soviet Socialist Republics of 21 January 1932 provides as follows:

> "Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations".[2]

193. A similar wording is to be found in the treaties of non-aggression concluded between the Union of Soviet Socialist Republics and Lithuania on 5 February 1932,[3] the Union of Soviet Socialist Republics and Esthonia on 4 May 1932[4] and the Union of Soviet Socialist Republics and Poland on 25 July 1932.[5]

Section VI. Enumerative definitions of aggression

194. The instruments concerned are firstly, the treaties which follow the model definition of the aggressor prepared by the Committee on Security Questions of the Disarmament Conference,[6] and secondly, two treaties which are shorter but which nevertheless approximate more closely to the enumerative, than to the general type of definition, without falling within any clearly defined category.

1. Treaties based on the model prepared by the Committee on Security Questions of the Disarmament Conference

195. The following four treaties reproduce almost word for word the definition of aggression prepared by

[1]See League of Nations, *Treaty series*, Vol. 33, treaty registered under No. 831.

[2]See League of Nations, *Treaty series*, Vol. 157, treaty registered under No. 3613.

[3]See League of Nations, *Treaty series*, Vol. 148, treaty registered under No. 3408. Article 1 of this treaty provides as follows:

> "Each of the High Contracting Parties undertakes to refrain from any act of aggression directed against the other, and also from any acts of violence directed against the territorial integrity and inviolability or the political independence of the other Contracting Party, regardless of whether such aggression or such acts are committed separately or together with other Powers, with or without a declaration of war".

[4]See League of Nations, *Treaty series*, Vol. 131, treaty registered under No. 3020. Article 1 of this treaty provides as follows:

> "Each of the High Contracting Parties guarantees to the other Party the inviolability of the existing frontiers between them, as defined by the Peace Treaty signed on February 2, 1920, and undertakes to refrain from any act of aggression or any violent measures directed against the integrity and inviolability of the territory or against the political independence of the other Contracting Party, whether such acts of aggression or such violent measures are undertaken separately or in conjunction with other Powers, with or without a declaration of war".

[5]See League of Nations, *Treaty series*, Vol. 136, treaty registered under No. 3124. Article 1 of this treaty provides as follows:

> "Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other Contracting Party shall be regarded as contrary to the undertakings contained in the present Article, even if such acts are committed without declaration of war and avoid all warlike manifestations as far as possible".

[6]See above, paragraph 78.

the Security Committee of the Disarmament Conference:[7]

(1) Convention for the Definition of Aggression, with Annex and Protocol—open to all States bordering on the Union of Soviet Socialist Republics—London, 3 July 1933.[8] (Registered with the League of Nations under No. 3391).

(2) Convention for the Definition of Aggression, with Annexes—London, 4 July 1933.[9]

(3) Convention for the Definition of Aggression; Lithuania and the Union of Soviet Socialist Republics—London, 5 July 1933. Registered with the League of Nations under No. 3405.

(4) Pact of Balkan Entente, Greece, Romania, Turkey and Yugoslavia—Athens, 9 February 1934. Registered with the League of Nations under No. 3514.

196. One treaty which generally follows the same model enumerates four acts of aggression:

Treaty of Brotherhood and Alliance, Iraq and Transjordan, 14 April 1947 (article 5). Registered with the United Nations under No. 345.

197. One treaty is drawn up on the general lines of the definition prepared by the Committee on Security Questions of the Disarmament Conference, without, however, following it in all respects:

Treaty of Non-Aggression, Iran, Afghanistan, Iraq and Turkey, 8 July 1937.[10]

198. On signing the Buenos Aires Convention of 23 December 1936 for the co-ordination and extension of the treaties between the American States, Colombia submitted in the form of a reservation a definition of aggression which to some extent is based on the formula prepared by the Committee on Security Questions of the Disarmament Conference but which adds elements not included therein.[11]

2. Other treaties

199. Two other treaties contain definitions of aggression less detailed than those prepared by the Committee on Security Questions of the Disarmament Conference.

200. The Act of Chapultepec signed by all the American Republics[12] on 8 March 1945 provides as follows:

"Whereas...

"(*j*)...any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against all the American States.

"...

"Part I

"Declare:

"...

"3. That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or the political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case, invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression."[13]

201. The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947[14] provides as follows:

"Article 1. The High Contracting Parties formally condemn war and undertake in their international

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[7]The text prepared by the Committee reads in part as follows:

"Desiring, subject to the express reservation that the absolute validity of the rule laid down in Article 2 of that Act shall be in no way restricted, to furnish certain indications *for the guidance of the international bodies that may be called upon to determine the aggressor*";

While the London treaties contain the following paragraph:

"Desiring, subject to the express reservation that the absolute validity of the rule laid down in Article III of that Convention shall in no way be restricted, to furnish certain indications for *determining the aggressor*".

[8]The following States ratified or acceded to the convention: Afghanistan, Esthonia, Finland, Iran, Latvia, Poland, Romania, Turkey, Union of Soviet Socialist Republics.

[9]The following States ratified the convention: Czechoslovakia, Romania, Turkey, Union of Soviet Socialist Republics, Yugoslavia.

[10]The provisions relating to the definition of aggression are as follows:

"The following shall be deemed acts of aggression:

"1. Declaration of war;

"2. Invasion by the armed forces of one State, with or without a declaration of war, of the territory of another State;

"3. An attack by land, naval or air forces of one State, with or without a declaration of war, on the territory, vessels or aircraft of another State;

"4. Directly or indirectly aiding or assisting an aggressor.

"The following shall not constitute acts of aggression:

"1. The exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression as defined above;

"2. Action under Article 16 of the Covenant of the League of Nations;

"3. Action in pursuance of a decision of the Assembly or Council of the League of Nations, or under Article 15, paragraph 7, of the Covenant of the League of Nations, provided always that in the latter case such action is directed against the State which was the first to attack;

"4. Action to assist a State subjected to attack, invasion or recourse to war by another of the High Contracting Parties, in violation of the Treaty for Renunciation of War signed in Paris on August 27th, 1928". League of Nations, *Treaty series*, volume 190, treaty registered under number 4402, article 4.

[11]This definition reads as follows:

"That State shall be considered as an aggressor which becomes responsible for one or several of the following acts:

"(*a*) That its armed forces, to whatever branch they may belong, illegally cross the land, sea or air frontiers of other States. When the violation of the territory of a State has been effected by irresponsible bands organized within or outside of its territory and which have received direct or indirect help from another State, such violation shall be considered equivalent, for the purposes of the present Article, to that effected by the regular forces of the State responsible for the aggression;

"(*b*) That it has intervened in a unilateral or illegal way in the internal or external affairs of another State;

"(*c*) That it has refused to fulfil a legally given arbitral decision or sentence of international justice.

"No consideration of any kind, whether political, military, economic or of any other kind, may serve as an excuse or justification for the aggression here anticipated." *United States Treaty Series, No. 926,* pages 7 and 8.

[12]The Act is not subject to ratification.

[13]See Hudson, *International Legislation*, Vol. IX, pages 286, 287, 288.

[14]United Nations, *Treaty Series*, Vol. 21, Treaty No. 324. Signatories: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela.

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 3. The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 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:

(*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.

"..."

SECTION VII. THE IDEA OF PROVOCATION

202. Numerous treaties contain a form of words which, explicitly or implicitly, embodies the idea of provocation, though its exact scope is not indicated.[15]

203. Some such expression as "attacked without giving provocation" is found in the following treaties:

Political Agreement, France and Poland, 19 February 1921 (article 3). Registered with the League of Nations under No. 449.

Convention for a Defensive Alliance, Poland and Romania, 3 March 1921 (article 1). Registered with the League of Nations under No. 175.

Political Agreement, Esthonia, Finland, Lithuania and Poland, 17 March 1922 (article 7). Registered with the League of Nations under No. 296.

Treaty of Defensive Alliance, Esthonia and Lithuania, 1 November 1923 (article 3). Registered with the League of Nations under No. 578.

Treaty of Guarantee, Poland and Romania, 26 March 1926 (article 2). Registered with the League of Nations under No. 1411.

Treaty of Friendship, France and Romania, 10 June 1926 (article 4). Registered with the League of Nations under No. 1373.

Treaty of Friendship, France and Kingdom of the Serbs, Croats and Slovenes, 11 November 1927 (article 4). Registered with the League of Nations under No. 1592.

204. The expressions "in case of an unprovoked attack", "in case of an unprovoked war", or "in case of an unprovoked aggression" are to be found in the following treaties:

Treaty between Great Britain and Japan, 2 August 1905 (article II).

Convention of Defensive Alliance, Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia, 14 August 1920 (article 1). Registered with the League of Nations under No. 154.

Convention of Defensive Alliance, Romania and Kingdom of the Serbs, Croats and Slovenes, 7 June 1921 (article 1). Registered with the League of Nations under No. 1289.

Convention of Defensive Alliance, Romania and Czechoslovakia, 23 August 1921 (article 1). Registered with the League of Nations under No. 155.

Agreement between Italy and the Kingdom of the Serbs, Croats and Slovenes, 27 January 1924 (article 2). Registered with the League of Nations under No. 596.

Locarno Treaty of Mutual Guarantee, France and Poland, 16 October 1925 (article 1). Registered with the League of Nations under No. 1297.

Locarno Treaty of Mutual Guarantee, France and Czechoslovakia, 16 October 1925 (article 1). Registered with the League of Nations under No. 1298.

Treaty of Defensive Alliance, Albania and Italy, 22 November 1927 (article 3). Registered with the League of Nations under No. 1616.

Treaty of Friendship, Greece and Italy, 23 September 1930 (article 2). Registered with the League of Nations under No. 2510.

Treaty of Guarantee, Poland and Romania, 15 January 1931 (article 2). Registered with the League of Nations under No. 2685.

Treaty of Mutual Assistance, France and the Union of Soviet Socialist Republics, 2 May 1935 (article 2). Registered with the League of Nations under No. 3881.

Treaty of Mutual Assistance, Czechoslovakia and the Union of Soviet Socialist Republics, 16 May 1935 (article 2). Registered with the League of Nations under No. 3677.

205. The expression "attacked without direct provocation on its part" is employed in the Triple Alliance between Austria-Hungary, Germany and Italy, 22 May 1882 (article 2).

206. The phrase "despite its peaceful attitude . . . attacked", is found in the following treaties:

Treaty between Germany and the Union of Soviet Socialist Republics, 24 April 1926 (article 2). Registered with the League of Nations under No. 1268.

Treaty of Non-Aggression, Lithuania and the Union of Soviet Socialist Republics, 28 September 1926 (article 3). Registered with the League of Nations under No. 1410.

Treaty of Neutrality and Conciliation, Bulgaria and Turkey, 6 March 1929 (article 2). Registered with the League of Nations under No. 2668.

Treaty of Neutrality, Greece and Turkey, 30 October 1930 (article 2). Registered with the League of Nations under No. 2841.

[15]The idea of provocation will be dealt with in the second part of this study. See paragraphs 336 *et seq.*

PART II

GENERAL

SHOULD AGGRESSION BE DEFINED?

PROPOSED DEFINITIONS

207. The discussion on whether aggression should or should not be defined has been going on for many years. The two conflicting points of view advanced in the League of Nations still exist today, and a systematic survey of the arguments for and against definition will be given in title I of this part.

208. Various formulae have been proposed by those in favour of defining aggression: enumerative definitions, general definitions and combined definitions. They will be considered in title II of this part.

209. The effects of the adoption of a definition of aggression, i.e., the extent to which such a definition will be binding on the bodies responsible for determining the aggressor or punishing persons guilty of aggression, will be examined in title III of this part.

Title I

THE TWO POINTS OF VIEW

210. Both those in favour of and those opposed to defining aggression have advanced general arguments in support of their points of view. This title will be entirely devoted to a brief summary of these general arguments. A practical study of the problem of aggression in its many aspects has been carried out in connexion with the various proposed types of definition. All the arguments invoked will therefore be found in title II of this part.

Chapter I

IN FAVOUR OF DEFINING AGGRESSION

211. Those in favour of defining aggression point out that such a definition is not only possible but desirable.

SECTION I. POSSIBILITY OF DEFINING AGGRESSION

212. It is legally and technically possible to define aggression.

(a) THE LEGAL POSSIBILITY OF DEFINING AGGRESSION

213. Provided that the definition is not contrary to the provisions of the Charter and falls within the scope of those provisions, there are no legal, that is to say constitutional, objections to defining aggression. On the many occasions on which the question has been discussed, no one has denied that it is constitutionally possible to define aggression. The contested issue is whether, once a definition had been adopted, it would be binding on the organs of the United Nations called upon to consider cases of aggression. This question will be considered in title III of this part.

(b) THE TECHNICAL POSSIBILITY OF DEFINING AGGRESSION

214. That it is technically possible to define aggression is proved by the fact that numerous definitions have been proposed, that the Committee on Security Questions of the Disarmament Conference drew up a definition, and that a certain number of treaties containing a definition of aggression have been concluded. Those opposed to defining aggression do not deny that it is possible, from a purely technical point of view, to define aggression, but they maintain that such a definition would be useless or dangerous.[1]

SECTION II. THE NEED FOR DEFINING AGGRESSION

215. Aggression is the greatest crime against peace. It paves the way for war and is thus the worst threat to international public order that can arise. It sanctions recourse to legitimate individual and collective self-defence under Article 51 of the Charter and obliges the Security Council to adopt the measures of collective security for which provision is made in Chapter VII of the Charter. It also justifies the trial and punishment of those presumed responsible for the aggression.

216. That being so, the partisans of defining aggression argue, it is essential to know in advance what constitutes aggression, particularly since aggression is a legal concept, whether considered from the point of view of general international law or from the point of view of international penal law, and every legal concept must be more or less precisely defined.

(a) UNCERTAINTIES REGARDING THE CONCEPT OF AGGRESSION

217. There is no single, universally recognized concept of aggression, but, rather, several concepts which, according to their advocates, can either be combined or are mutually exclusive. Those in favour of a general definition hope thereby to determine which concept shall be applied to the exclusion of all others. Those in favour of an enumerative definition do not consider a general definition sufficient; once the principle has been adopted, rules for its application should be laid down by enumerating the cases in which it will apply.

218. In any event, those in favour of defining aggression hope to eliminate or reduce the area of uncertainty and the ambiguities and controversies concerning aggression which they regard as serious drawbacks.

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[1]Mr. Fitzmaurice (United Kingdom) stated:

"No one had claimed that it was impossible to define aggression; what could be said was that it was impossible to reach a *satisfactory* definition which would not give rise to unforeseen results or place difficulties in the way of the defence of the victims of the aggression." *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 292nd meeting, paragraph 49.

(b) DESIRABILITY OF A DEFINITION

219. Those in favour of a definition contend that it would have many advantages. Politis, introducing the Act relating to the definition of the aggressor stated:

"Its effect and its practical advantage would be that it warned States of the acts they must not commit if they did not wish to run the risk of being declared aggressors. Thanks to it, public opinion would be able, when a grave incident occurred in international relations, to form a judgment as to which State was responsible. Lastly, and above all, it would facilitate the work of the international organ called upon to determine the aggressor. Furthermore, when that organ had before it sufficiently definite proof to facilitate its task, it would be less tempted to incur the danger of excusing, on political grounds, the act of aggression which it was called upon to judge."[2]

220. A definition of aggression would be useful, first, to governments which must know what constitutes aggression if they are not to run the risk, as a result of the uncertainty surrounding the concept of aggression, of being named the aggressors without knowing that they have committed an act of aggression. Secondly it would be helpful to the organs of the international body responsible, in cases of aggression, for determining the aggressor.

221. Thirdly, it would guide the Governments of States Members of the United Nations which were called upon to decide whether they were justified, pending a decision by the Security Council, in exercising their right of individual or collective self-defence under Article 51 of the Charter, or which wished to know what attitude to adopt, should the organs of the United Nations be unable to reach a decision and leave them the responsibility of deciding. Fourthly, it would guide public opinion which must serve as a controlling factor and would find it difficult to do so in an atmosphere of doubt and confusion.[3] Lastly, the definition would help the Courts which might have to judge the alleged aggressors.

222. The definition would make it much easier to reach a decision in each individual case. There would no longer be any need to be guided by impressions or to decide a complex question on the basis of an individual appraisal of all the factors involved. After verifying whether certain acts had occurred the Court would merely have to ascertain whether they fell within the scope of the definition. Little or no room would remain for a subjective decision which might not be impartial or equitable.[4]

In submitting the report of the Committee on Security Questions of the Conference for the Reduction and Limitation of Armaments, Politis said:

"... there would be less risk of an attempt to shield or excuse the aggressor for various political reasons without appearing to break the rule to be applied".[5]

223. The governments which had to pass judgment either within the organs of the International Organization or on their individual responsibility, would to some extent be protected against their own prejudices and likes and dislikes, on the one hand, and against their timidity and fear of assuming responsibility, on the other. In that connexion, Mr. Salvador de Madariaga (Spain) stated:

"The automatic method had the very considerable advantage of eliminating the individual responsibility of States in naming the aggressor. Everyone knew from experience how difficult it was for one State to judge the conduct of another. Consequently, it was in every way desirable that the decisions to be taken in the matter should be based on facts and not taken by persons who, as far as they could, would always avoid the necessity of giving a decision in this matter."[6]

224. Finally, the difference between various legal systems might lead governments to interpret the concept of aggression in different ways. A definition of aggression would eliminate such differences. Mr. Röling (Netherlands) stated in that connexion in the Sixth Committee of the General Assembly:

"... a definition of aggression would give countries with different legal systems and general backgrounds a clearer understanding of the prevailing policies of States which concluded treaties excluding aggression or adopted resolutions condemning it, and of what they meant by the term".[7]

225. Those in favour of defining aggression argue that it would exclude arbitrary action. The application of a rule which was not sufficiently flexible to cover every possible contingency might undoubtedly result in injustice in certain cases. On the other hand, the absence of any rule whatever also made it possible for injustices to occur and generally speaking opened the door to arbitrary action.[8]

[2]League of Nations, *Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission). Vol. II, page 500.

[3]In this connexion, the representative of the French Government stated:

"... a definition formulated in advance and having the advantage therefore, of being considered impartial and objective would enable public opinion at the same time to understand and appreciate more clearly the action of organs of the United Nations or of States exercising their right of self-defence". (Letter from the representative of the French Government to the Secretary-General of the United Nations, dated 25 June 1952; see document A/2162).

[4]Mr. Dovgalevsky (USSR representative) stated in this connexion:

"The definition and establishment of an act of aggression must leave as little opening as possible for subjective feelings and judgments. Still more, the complete definition must, as far as possible, exclude any possibility of subjective interpretation, and the more automatic the establishment of the aggressor, the better for the work of peace". (League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series D, Vol. V (Minutes of the Political Commission)), page 49.

[5]League of Nations, Conference for the Reduction and Limitation of Armaments, *Documents of the Conference*, Vol. II, page 679.

[6]League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 547.

[7]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 289th meeting, paragraph 33.

[8]This point was stressed by Mr. Castañeda (Mexico) in the Sixth Committee:

"The contention that an enumerative definition would tie the hands of the United Nations and make cases not covered by it punishable was tantamount to saying that injustices could occur by virtue of such a definition. But the same criticism could be made of the description of any offence. Every rule of law involved restrictions and made it possible for injustices to occur in isolated cases. The purpose of law was not to achieve justice directly in each individual case but to create a general security. The object of rules of law was to enable every person to foresee the consequences of his acts. The opposite notion to the legal was not invariably the unjust; it was arbitrary action." *Ibid.*, 285th meeting, paragraph 13.

226. In answer to the argument that aggression will be prevented and suppressed not by the existence of a definition but rather by the courage and determination shown by the United Nations and its Members in defending peace and international order, those who advocate a definition agree that it is not a universal remedy but they maintain that it will nevertheless serve a useful purpose by making aggression harder to commit and easier to punish.[9]

Chapter II

AGAINST DEFINING AGGRESSION

227. Those opposed to defining aggression maintain that aggression, by its very nature, is incapable of definition. They also invoke practical considerations. Not only would defining aggression serve no useful purpose, but it would above all be dangerous. In addition, certain delegations maintain that in view of the current world situation it would not now be advisable to define aggression.

SECTION I. AGGRESSION IS A CONCEPT WHICH IS INCAPABLE OF DEFINITION

1. AGGRESSION IS NOT ESSENTIALLY A LEGAL CONCEPT

228. Even if aggression is to some extent a legal concept, it also has other characteristics, political and military,[10] and, some people add, economic and social.[11] Whereas a legal concept can generally be more or less precisely defined the same is not true of a political or military concept. It should be possible to take into consideration the special circumstances in each case and to determine the importance and significance of each.

229. Mr. Van Glabbeke (Belgium) stated in the Sixth Committee of the General Assembly:

> ". . . the problem was predominantly political and, as such, was totally unsuited to rigid definition. To seek to circumscribe within a rigid formula the innumerable political situations to which such a definition should be applicable would be to sacrifice truth and originality to a purely artificial simplicity. It would be preferable in so complex and delicate a field to have a formula allowing all the relevant facts to be taken into consideration at their true value, if it was desired to obtain a correct view of reality which might bring about a just determination of responsibilities in case of conflict between States."[12]

230. Mr. Fitzmaurice (United Kingdom) said:

> "Real safety for the potential victim lay in the fact that the existence of aggression is not referable to or to be determined by rigid rules or definitions, but was a matter for the judgment of the whole world on the basis of facts."[13]

231. Mr. Scialoza (Italy) had previously expressed the same opinion in his own vivid and emphatic manner:

> ". . . when we speak of aggression, we are perfectly aware of what it means. We know that it means nothing at all. We realize the difficulty of formulating a definition of aggression . . . a State which is resolved to coerce its neighbours by armed force will never be the apparent aggressor, for, however unskilled its diplomacy, it will always manage to make its neighbour begin the attack. Therefore, in our attempt to fix the responsibility for the aggression we must not dwell too much on appearances. We must subject to a close scrutiny all those relations between the states concerned which have in the past given rise to differences. That is far from easy."[14]

232. Mr. Unden (Sweden) proved that the concept of aggression did not have the rigidity of a legal concept when he said:

> "It has been contended that the relationship between the attacking country and the defending country is similar to the relationship between a murderer or bandit on the one hand and his victim on the other. Such a concept, however, has nothing in common with the type of situation that most frequently arises. In reality there are numerous degrees of responsibility in the case of aggression."[15]

233. A single concept can have political and legal characteristics at the same time. The more pronounced the legal characteristics, the more rigid and precise is the concept. That is why Mr. Maktos (United States of America) considers it preferable

> "not to define aggression but to leave the organs of the United Nations to pass on the aggressive nature of each case submitted to them. Aggression was a legal problem still at a stage at which it should not be crystallized".[16]

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[9]Mr. Casteneda (Mexico) said in this connexion:

"A definition might not deter an aggressor nor would it have any magical, automatic effect; nevertheless, it would serve a useful purpose. As lawyers, members of the Committee must have faith in the law as the most effective instrument for guiding the conscience of the peoples along the paths of peace and international understanding." *Ibid.*, 285th meeting, paragraph 21.

Speaking along the same lines, the Yugoslav representative said:

"While the existence of a definition of aggression cannot, of course, in itself prevent acts of aggression, it would, none the less, in addition to its considerable moral and political effect, make it more difficult for an aggressor to seek to justify his aggressive intentions, both in the eyes of his own people and of those of other peoples and of the world community at large, by means of a hypocritical propaganda." (Letter from the representative of Yugoslavia to the Secretary-General dated 18 June 1952, document A/2162).

[10]The Belgian, Brazilian, French and Swedish delegations submitted a joint opinion to the Permanent Advisory Commission of the League of Nations in which they doubted "the possibility of accurately defining this expression (cases of aggression) *a priori* in a treaty, *from the military point of view*, especially as the question is often invested with a political character". League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee* (*Official Journal*, Special Supplement No. 16), page 117.

[11]Mr. Maktos (United States of America):

". . . juridical considerations could not be divorced from political, economic and social factors". *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 280th meeting, paragraph 17.

[12]*Ibid.*, 287th meeting, paragraph 8.

[13]*Ibid.*, 281st meeting, paragraph 20.

[14]League of Nations, *Records of the Eighth Ordinary Session of the Assembly, Plenary Meetings, Text of the Debates* (*Official Journal*, Special Supplement No. 54), page 85.

[15]Unden, *"La guerre d'agression comme problème de droit international", Publications de la conciliation internationale*, 1930, page 25.

[16]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 10.

2. THE "NATURAL" CONCEPT OF AGGRESSION

234. Mr. Spiropoulos (Greece), the exponent of this theory, says:

"If we study the international practice . . ., we are led to the conclusion that whenever governments are called upon to decide on the existence or non-existence of 'aggression under international law' they base their judgment on criteria derived from the 'natural', so to speak, notion of aggression. . ."[17]

He adds:

"The (natural) notion of aggression, as applied by governments in international practice, is composed of *objective* and *subjective* criteria."[18]

235. Mr. Spiropoulos considers that there are two "objective criteria": first, "aggression presupposes some kind of violence—even if this violence be an 'indirect' act".[19] The second objective criterion is the time element: "the State to be considered as responsible must be the first to act".[20]

236. The subjective criterion is "aggressive intention".[21] "The mere fact that a State acted as first does not, *per se*, constitute 'aggression' as long as its behaviour was not due to: *aggressive intention* . . . That the *animus aggressionis* is a constitutive element of the concept of aggression needs no demonstration. It follows from the very essence of the notion of aggression as such."[22]

237. Mr. Spiropoulos adds:

"The (natural) notion of aggression is a concept *per se*, which is inherent to any human mind and which, as a *primary notion*, is *not susceptible of definition*. Consequently, whether the behaviour of a State is to be considered as an 'aggression under international law' has to be decided not on the basis of specific criteria adopted *a priori* but on the basis of the above notion which, to sum it up, is rooted in the 'feeling' of the Governments concerned.

"It may be added that, since this general feeling of what constitutes aggression is not invariable, the 'natural' notion of aggression is not invariable either. Not all the periods of the international relations must necessarily have the same notion of aggression.

"Finally, it is to be said that the (natural) notion of aggression, as a concept having its roots in the 'feeling' of governments, will not always be interpreted by these latter in the same way, which amounts to saying that the *objective* criterion of the 'notion of aggression' will, in the last analysis, depend on the *individual* opinion of each Government concerned."[23]

238. In support of his thesis, Mr. Spiropoulos could have cited the opinion of the Special Committee of the Temporary Mixed Commission of the League of Nations, which stated in a "Commentary on the definition of a case of aggression" (1923):

"In the absence of any indisputable test, Governments can only judge by an *impression* based upon the most various factors. . ."[24]

239. Mr. Spiropoulos's theory has, however, been criticized.[25] Doubts have been cast on the value of the "natural" notion of aggression on the grounds that no such notion is universally recognized. In that connexion Mr. Castaneda (Mexico) stated:

". . . it had been said that actually they were not setting out from a preconceived rational notion but from a 'natural' notion, the vague notion of aggression that was in everybody's mind. If unfortunately not everybody had the same intuitive idea of what constituted aggression, the resulting anarchy would hardly offer a guide in international relations".[26]

240. It has also been said that it is not necessary "for Governments or for organs of the United Nations to take into consideration any element of 'feeling' or 'impression' ",[27] from which biased or ill-founded conclusions may be drawn.

SECTION II. DEFINING AGGRESSION WOULD SERVE NO USEFUL PURPOSE

241. Those opposed to defining aggression claim that neither a general definition nor an enumerative definition would serve any really useful purpose.

1. CONCERNING GENERAL DEFINITIONS

242. A general definition states briefly those concepts which are more or less unchallenged. The opponents of defining aggression maintain that such a statement would do little to advance matters. According to Mr. Spiropoulos (Greece), a general definition would add nothing to the existing texts. In that connexion, he said:

"The idea underlying the drafts most discussed by the International Law Commission had been that aggression consisted of any use of armed force by one State against another for purposes other than self defence or the execution of a decision by a competent organ of the United Nations—an idea that occurred in Article 16 of the much earlier League of Nations Covenant and was also fully covered by the United Nations Charter. Consequently, it added nothing to the existing provisions. . ."[28]

243. Mr. Fitzmaurice (United Kingdom) made the same point in speaking of the method "of defining aggression by a general formula covering all cases". He said:

". . . the difficulty was that such formulae necessarily employed terms which themselves required definition. Mr. Amado's definition in the report of the International Law Commission (A/1858), for instance, spoke of 'any war not waged in exercise of the right of self defence'. The question was, however,

[17] A/CN.4/44, page 63.
[18] *Ibid.*, page 64.
[19] *Ibid.*, page 64.
[20] *Ibid.*, page 65.
[21] *Ibid.*, page 64.
[22] *Ibid.*, page 65.
[23] *Ibid.*, pages 65 and 66.
[24] League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee* (*Official Journal*, Special Supplement No. 16), page 184.
[25] The objective criteria mentioned by Mr. Spiropoulos (use of violence by a State and the fact that the State acted first) are not peculiar to his concept. This will be discussed in title II below, paragraphs 279 and following. The subjective criterion of aggressive intention will also be dealt with in title II, paragraphs 355 and following.
[26] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 285th meeting, paragraph 9.
[27] Mr. Alfaro, in a memorandum submitted to the International Law Commission at its third session in 1951; see document A/CN.4/L.8, page 19.
[28] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 279th meeting, paragraph 12.

when a war was being waged in self defence and when as a matter of aggression. . .

". . . such general definitions could not achieve the main object of indicating precisely in what cases aggression could be said to have occurred, and it would be impossible to say in advance whether a given act was an aggressive act or not. Although they looked well on paper, such general definitions did little to advance matters".[29]

244. Mr. Chaudhuri (India) said:

"It appeared, in fact, futile to define one concept by the use of other equally vague concepts."[30]

2. CONCERNING ENUMERATIVE DEFINITIONS

245. Enumerative definitions begin by indicating the most flagrant forms of aggression such as the declaration of war or the invasion of the territory of another State. In that connexion, Mr. Anthony Eden (United Kingdom) said at the Disarmament Conference:

". . . the actions in question were, generally speaking matters which any international body or any individual State, called upon to form an opinion as to which party to a dispute was to be considered the aggressor in any particular case, would certainly take into account. No formal instrument signed by the nations of the world was necessary to ensure that result. They were the ordinary criteria which everyone would adopt".[31]

246. He was, in fact, referring to what Mr. Fitzmaurice (United Kingdom) calls the "major aggressors", of whom he says:

"Major aggressors acted from military and political motives and would not be discouraged by a definition of aggression. The Egyptian representative thought that such a definition would make them reflect by showing them the consequences of their acts. Mr. Fitzmaurice did not think that a possible aggressor would have scruples of that kind; his main concern would be to know whether he had any chance of succeeding, for in case of victory, he would have nothing to fear from the consequences of his acts. The most a definition could do would be to induce him to modify the technique of his aggression so as to appear in the right in public opinion in his country."[32]

247. The other types of aggression involving the accidental or restricted use of force, which would necessarily be considered aggression and treated as such if aggression was defined, were minor aggressions. Mr. Fitzmaurice said of them:

"With regard to minor aggressions, which were illegalities rather than aggressions properly speaking, it did not seem desirable to run the risk of the dangers involved in the definition in order to prevent them. Even if a definition was drawn up with the greatest care, it could not provide that a specific act was always an act of aggression, because that in fact depended on the circumstances in which the act had been committed."[33]

248. Has the lack of a definition of aggression ever been felt, in practice, when the League of Nations Covenant, the United Nations Charter or other international instruments had to be applied? Mr. Spiropoulos replies to this question by stating that "lack of a definition of aggression has never been felt in the history of either the League of Nations or the United Nations".[34]

249. It has been claimed that the lack of a definition of aggression proved no deterrent to the Military Tribunal at Nürnberg which had to judge the German leaders guilty of acts of aggression.[35] The acts of aggression in question were flagrant aggressions which the German Government did not seek to conceal or justify by legal arguments.

250. With regard to the practice followed by the League of Nations, the lack of a definition did not prevent the Assembly from condemning unlawful recourse to war in violation of Article 12 of the Covenant in two cases where it felt it was its duty to do so (the Italo-Ethiopian war and the Soviet-Finnish war).

251. In a certain number of cases of the use of force, when the Council or the Assembly of the League of Nations did not wish explicitly or implictly to determine the aggressor because they felt that by refraining from so doing they would more easily achieve the desired result, namely the cessation of hostilities, the existence of a definition of aggression might have complicated what they understood to be their task. It is worth considering what the outcome would have been, particularly in the case of the Sino-Japanese conflict, had there been a rigid definition of aggression and had they taken a more severe and energetic stand.

SECTION III. DEFINING AGGRESSION IS DANGEROUS

252. Those opposed to the enumerative or analytical method of defining aggression contend that it would have three dangers: The enumeration would necessarily be incomplete; it might encourage a government to commit aggression by evading the definition; lastly, it would render the decisions of international organs more or less automatic and thus make it harder to re-establish peace.

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[29] *Ibid.*, 281st meeting, paragraphs 16 and 17.

[30] *Ibid.*, 282nd meeting, paragraph 47.

[31] League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 513.

[32] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 292nd meeting, paragraph 45.

[33] *Ibid.*, 292nd meeting, paragraph 46.

[34] *Ibid.*, 292nd meeting, paragraph 13.

[35] Neverthless Judge Jackson's comment should be noted:

"It is perhaps a weakness in this Charter that it failed itself to define a war of aggression . . . One of the most authoritative sources of international law on this subject is the Convention for the Definition of Aggression signed at London on July 3, 1933 by Romania, Estonia, Latvia, Poland, Turkey, the Soviet Union, Persia and Afghanistan . . . In the light of these materials of international law, and so far as relevant to the evidence in this case, I suggest that 'aggressor' is generally held to be that state which is the first to commit any of the following actions: . . . (Nos. 1 to 4 of the Litvinov-Politis definition follow)."

International Military Tribunal, Trial of the Major War Criminals, Nürnberg, 14 November 1945 to 1 October 1946, page 148.

Mr. Chaumont (France) made the following comment on the Nürnberg Judgment:

"If there were no description of aggression, the legislative power would necessarily have to be vested in the judge or the executive authority. The same difficulties would then be encountered as had arisen at the time of the Judgment of Nürnberg, when improvization had been rendered necessary by the inadequacy of international penal law." *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 280th meeting, paragraph 5.

1. It is not possible to draw up a complete list of the cases of aggression

253. The draft resolution submitted by Greece on 4 January 1952[36] refers to "the apparent impossibility of defining aggression in a formula covering all possible cases of aggression". Mr. Spiropoulos (Greece) adds: "It is impossible to forecast what further classes of acts will be recognized in the future by the international community as constituting aggression."[37] According to the same speaker such a definition "could not but be artificial!"[38]

254. According to Mr. Fitzmaurice (United Kingdom):

> ". . . an incomplete list would be extremely dangerous because it would almost inevitably imply that other acts not listed did not constitute aggression. States would thus be encouraged to commit the acts not listed, because, *prima facie* at any rate, they would not be regarded as acts of aggression. In addition, the existence of an incomplete list would show potential aggressors how to accomplish their aims without actually being branded as aggressors, for they would keep their acts within the precise letter of the definition and then claim that they were technically justified".[39]

255. Those who favoured an enumerative definition had invited their opponents to complete the proposed definition. Mr. Kustov (Byelorussian Soviet Socialist Republic) said in that connexion:

> "If they thought a particular definition was incomplete they had merely to complete it by adding further cases."[40]

256. The opponents of the enumerative definition, however, consider that it would be incomplete not because of certain gaps that should be filled, but because it would be practically impossible to cover all possible contingencies.

257. In answer to this objection, some of those who favour an enumerative definition have proposed that the enumeration should be merely an indication, and should not be an exhaustive list.[41] The idea of a non-exhaustive list, however, did not meet with the approval of certain representatives. Mr. Robinson (Israel) stated in that connexion:

> "The fourth and last method was that of exemplification. That method was dangerous, both psychologically and logically, since it directed attention to certain acts which influenced man's thinking, and divided acts of aggression into two categories, those which were explicitly listed and those which were not, thus creating a certain hierarchy of acts of aggression. . ."[42]

2. The risk that a State might commit aggression by evading the definition

258. Sir Austen Chamberlain stated on 24 November 1927 in the House of Commons:

> ". . . I therefore remain opposed to this attempt to define the aggressor, because I believe that it will be a trap for the innocent and a sign-post for the guilty."[43]

259. The draft resolution submitted to the Sixth Committee of the General Assembly by Greece on 4 January 1952 considers:

> "that the formulation of a definition of aggression . . . might encourage a possible aggressor to evade such a definition".[44]

3. The danger of automatism in the decisions of international bodies

260. The existence of a definition of aggression binding on international bodies would obviously oblige such bodies to apply it and declare any State which had committed an act falling within the scope of the definition to be the aggressor.

261. Those opposed to defining aggression have two comments in this connexion. First, they state that it is wrong to consider a minor act as an act of aggression because it merely falls within the scope of the Politis definition. Secondly, they contend that the obligation to name as the aggressor any State which had committed an act falling within the scope of the definition might, in certain cases, worsen an already critical international situation and prove an obstacle to the re-establishment of peace.

(a) *Secondary acts which might fall within the scope of the definition*

262. Various cases have been cited in which acts necessarily characterized as aggression under the definition were not really of very great importance and were much less serious than other acts not covered by the definition. Mr. Di Soragna (Italy) said of the Politis definition:

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[36] See document A/C.6.L.206.

[37] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 279th meeting, paragraph 9.

[38] *Ibid.*, 292nd meeting, paragraph 2.

[39] *Ibid.*, 281st meeting, paragraph 8.

[40] *Ibid.*, 281st meeting, paragraph 39.

[41] Mr. Bernstein (Chile):

"He preferred an enumerative definition listing certain acts of aggression, but without prejudice to other acts which the General Assembly or the Security Council might subsequently characterize as aggression." *Ibid.*, 281st meeting, paragraph 32.

Mr. Urtutia Holguin (Colombia). *Ibid.*, 281st meeting, paragraph 51 U Zaw Win (Burma) proposed that the following clause should be added to the text submitted by the delegation of the Union of Soviet Socialist Republics:

"Any other act declared by the competent organ of the United Nations to be aggression." *Ibid.*, 284th meeting, paragraph 37. In his letter to the Secretary-General, dated 18 June 1952, the Representative of Yugoslavia says:

"Such a definition should be flexible and provide explicitly for the possibility that the competent United Nations body, i.e., the Security Council as a rule and the General Assembly exceptionally, may define as aggression other forms of use of force or pressure, which may appear in the future." See document A/2162.

[42] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 33.

Mr. Ammoun (Lebanon) expressed a similar opinion:

". . . if the list of cases of aggression was merely enumerative and not exhaustive, there would be as it were a presumption of innocence in the cases not enumerated; it was possible that new, subtle and unforeseeable forms of aggression would make their appearance, in the face of which the organ responsible for defining the aggressor, would be hesitant or powerless if an analytic definition was adopted". *Ibid.*, 286th meeting, paragraph 23.

[43] Observations of His Majesty's Government in Great Britain on the programme of work of the Committee on Arbitration and Security, *Minutes of the Second Session of the Committee on Arbitration and Security*, League of Nations document C.165.M.50.1928.IX, page 176.

[44] See document A/C.6/L.206.

"The judges were bound hand and foot. On the one hand, five quite specific cases were laid down. If any one of them occurred, even on a very small scale, full international action would immediately come into operation. On the other hand, no provision was made for a large number of other cases. They might be extremely serious cases. The injured party would be powerless and would have to rely on pacific procedure, which was not always very speedy. There was no need to quote examples. On the one hand, international action might be taken because a cottage had been burnt down; on the other hand, one State might massacre the nationals of another for several days without the latter being able to do anything other than to resort to pacific procedure."[45]

(b) *The compulsion of designating as the aggressor any State which committed any act falling within the scope of the definition*

263. In the opinion of those opposed to defining aggression this compulsion might have unfortunate consequences in some cases and be contrary to the interests of peace.[46] In this connexion, Mr. Fitzmaurice (United Kingdom) says:

". . . in cases where it was perfectly clear that aggression had occurred, it might be politic to refrain from actually naming the State concerned an aggressor if there seems to be any prospect of a settlement and the aggressor State seemed willing to desist from its action. That, however, would be very difficult if certain acts were listed in advance as definitely constituting aggression".[47]

264. The idea that the organs of the international organization should sometimes relegate the question of responsibility to the background and attempt to maintain and re-establish peace by inducing the States concerned to adopt measures of conservation always had a certain following in the League of Nations[48] and still has in the United Nations.[49]

265. There are, in fact, two ways of mitigating the severity of automatic action. First, the determination of the aggressor may, if it is deemed advisable, be postponed while the parties involved in the conflict are enjoined to cease hostilities and to conform to certain measures of conservation (withdrawal of troops beyond a certain line, acceptance of an investigation on the spot by United Nations officials, etc.).

266. Secondly, the link between the determination of the aggressor and the application of sanctions may be relaxed. In this connexion, Mr. Politis stated in his report to the General Commission of the Disarmament Conference on behalf of the Committee on Security Questions:

"6. It should . . . be noted that the question of the definition of the aggressor and that of the sanctions to be taken against the aggressor while, of course, closely connected, are nevertheless separate questions. The strictness of the definition of the aggressor does not necessarily lead to the automatic application of sanctions."[50]

267. Some of those in favour of defining aggression, however, have contended that whenever a case of aggression occurs the aggressor must be named as such and sanctions applied. In that connexion, Mr. Moussa (Egypt) says:

". . . in the current debate it had been suggested that it might sometimes not be expedient to declare that an aggressor was an aggressor. Whatever the circumstances or the political situation, an aggressor ought to be condemned. The automatic application of collective sanctions in cases of aggression was essential for determining a potential aggressor".[51]

268. Mr. Abdoh (Iran) concurs:

"No less fraught with significance was the statement that in cases where it was perfectly clear that aggression had occurred, it might be politic to refrain from actually naming the State concerned an aggressor. When it was remembered that the United Nations had the task of maintaining peace in keeping with justice and not in defiance of it, such an attitude was clearly indefensible."[52]

269. In reply to these criticisms, Mr. Fitzmaurice (United Kingdom) also explained the reasons for his point of view:

"He had been criticized for saying that too rigid a definition would have the disadvantage of compelling the competent organs openly to declare a State an aggressor, whereas in some cases it might be possible, by exercising greater diplomacy, to get the guilty State to mend its ways and renounce its aggressive designs. . . What he had meant to say—and he still though it would be advisable to ponder that aspect of the problem—was that resistance to aggression implied not merely a denunciation and written decisions, but also military action imperilling human lives. The General Assembly could not therefore reasonably bring about such a catastrophe unless it was absolutely essential: in other words, unless there was a case of flagrant aggression."[53]

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[45] League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 550.

[46] At the Disarmament Conference, Mr. Nadolny (Germany) said:

"Moreover, if no strict or rigid criteria were set up, the Council, or the international organ dealing with the question, would not be under the necessity of proceeding to establish the facts of an aggression, even in cases where it might be preferable to apply means of conciliation, which might prove ineffective from the moment when one of the parties to the conflict had been stigmatized as the aggressor." *Ibid.*, page 549.

At the San Francisco Conference when a Bolivian proposal to define aggression was discussed, one argument advanced against that proposal was that it would lead to automatic sanctions and might force premature application of such sanctions. *Documents of the United Nations Conference on International Organizations, San Francisco, 1945.* Vol. 12, page 342.

[47] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 281st meeting, paragraph 12.

[48] See the recommendation of the Assembly of the League of Nations, 20 September 1928 (paragraph 52 above) and the Convention of 26 September 1931 on the means of preventing war (paragraph 72 above).

[49] See the resolution 378 A (V) of the General Assembly of the United Nations of 17 November 1950 on the "duties of States in the event of the outbreak of hostilities". A/1775, *Official Records of the General Assembly, Fifth Session, Supplement No. 20*, page 14.

[50] League of Nations, *Conference for the Reduction and Limitation of Armaments, Documents of the Conference*, Vol. II, page 679.

[51] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 291st meeting, paragraph 6.

[52] *Ibid.*, 290th meeting, paragraph 39.

[53] *Ibid.*, 292nd meeting, paragraph 28.

Section IV. Argument that in existing circumstances a definition of aggression would be untimely

270. Some delegations, while not opposed to defining aggression on grounds of principle, have stated that, given the present political situation, such a definition would be untimely.

271. Mr. Amado (Brazil) referring to the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947[54] said:

"He thought it would not be impossible to adapt the provisions of the Treaty of Rio de Janeiro to the international community, but he continued to believe that any effort to do so would be vain until the prevailing atmosphere of mistrust in the international community was replaced by harmony which existed between the American States. When the Great Powers—and, to be quite frank, the USSR and United States—had knocked down the walls which separated them, confidence would return and the aggression that was no longer feared could be defined."[55]

272. The same idea was expressed by Mr. Maktos (United States of America).

In explaining his country's past and present position with regard to the question of defining aggression, he says:

"A number of delegations had said the United States had in 1945 argued the view which was now that of the Soviet Union. That was quite true, and the United States did not in any way pretend that it was not. In 1945, the United States had been in favour of a definition of aggression because at that time there had been every reason to believe that the term 'international co-operation' would have a real connotation. Unfortunately, the state of international relations had become such as to convince the United States that a definition of aggression had become not only undesirable but even dangerous. The United States delegation had not obeyed a whim; it had adopted a position which was diametrically opposed to the stand it had taken in 1945 and had done so in view of international developments."[56]

[54]See paragraph 201 above.

[55]*Official Records of the General Assembly, Sixth Session, Sixth Committee,* 284th meeting, paragraph 26.

[56]*Ibid.*, 286th meeting, paragraph 36.

Title II

Study of the Definitions of Aggression

273. From the point of view of form, three categories of definitions may be distinguished: enumerative, general and combined.

274. The *enumerative definitions* give a list of the acts regarded as acts of aggression. In most cases, the authors of these definitions have regarded it as essential that the enumeration should be exhaustive, which means that only the acts enumerated constitute acts of aggression. Some authors, however, have proposed that the international organs should be empowered to treat as acts of aggression acts other than those enumerated in the definition.

275. The *general definitions,* instead of listing the acts of aggression, are couched in general terms which cover the entire class of cases to be included. It is left to the international organs to determine the scope of the terms when specific cases are brought before them.

276. The *combined definitions* are a combination of the two preceding types. They contain, first, general terms and, second, a list, but a list which is not exhaustive. Their object is merely to describe the principal forms of aggression.

Chapter I

THE ENUMERATIVE DEFINITIONS

Section I. The problems stated

1. The de facto position of the Politis definition

277. One single enumerative definition has held the constant attention of the organs of the League of Nations and the United Nations during discussions of the question of aggression. This is the Politis definition prepared in 1933 by the Committee on Security Questions of the Disarmament Conference.[1] The other—and, incidentally, not numerous—enumerative definitions are based on the Politis definition.

278. Some authorities regard the Politis definition as typical of the enumerative kind and, after comment-

[1](*a*) The origin of this definition was a Soviet proposal to the Disarmament Conference dated 6 February 1933. The Committee on Security Questions prepared an Act relating to the Definition of the Aggressor which follows the general lines of the Soviet proposal and which was considered by the General Commission on 25 and 29 May 1933. See above, paragraphs 76-80.

A number of individual treaties modelled on this Act were concluded in 1933, 1934 and 1935 and after the Second World War. See above, paragraphs 194-201.

In 1945, at the London Conference on the establishment of an international military tribunal, the United States of America submitted a proposal which reproduced this Act. See above, paragraphs 143 and 144.

In 1945, at the San Francisco Conference, Bolivia and the Philippines proposed definitions of aggression which reproduced the Act, with some additions. See above, paragraphs 113-115.

In the First Committee of the General Assembly of the United Nations, the Union of Soviet Socialist Republics submitted, on 6 November 1950, draft definitions similar to the terms of its 1933 proposal to the Disarmament Conference. See above, paragraph 118. On 5 January 1952, the Union of Soviet Socialist Republics submitted a draft definition which reproduced the earlier proposal, with some amendments. See above, paragraph 137.

(*b*) The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947 reproduces in article 9 certain elements of the Politis definition. See above, paragraph 201.

(*c*) The definitions presented by Mr. Yepes and Mr. Hsu at the third session of the International Law Commission in 1951 reproduced some of the elements of the Politis definition. See documents A/CN.4/L.7, A/CN.4/L.11 and A/CN.4L.11/Corr. 1.

(*d*) On 11 January 1952, Bolivia submitted a draft definition of aggression which reproduces the terms of the Politis definition with some fresh elements. See above, paragraph 137.

ing on it critically, conclude that all enumerative definitions must be rejected. Others, while accepting the principles and forms of this definition, propose that, though its general scheme should be left intact, a number of corrections or additions should be made. Yet others, while taking the Politis definition as a basis, propose the addition of new elements (certain cases of indirect aggression, economic aggression) which correspond to principles different from those underlying the Politis definition.

2. THE PRINCIPLES OF THE POLITIS DEFINITION

279. The Politis definition is based on the following principles strictly applied.

280. *Only acts involving the use of force constitute aggression.* This is the fundamental principle of the definition.

281. *The definition enumerates the acts involving the use of force which constitute aggression.* This enumeration is exhaustive. Any act not covered by the definition cannot be regarded as an act of aggression.

282. *The State which is the first to resort to the use of force is regarded as the aggressor.* The chronological factor is decisive. In this connexion, Politis said in his report:

> "It is clearly specified that the State which will be recognized as the aggressor is the first State which commits one of the acts of aggression. Thus, if the armed forces of one State invade the territory of another State, the latter State may declare war on the invading State or invade its territory in turn, without itself being regarded as an aggressor. The chronological order of the facts is decisive here."[2]

The use of force in reply to the use of force constitutes, not aggression, but the exercise of the right of self-defence.

283. *It is specified that resort to force cannot be justified by any violation of international law which does not constitute an act of aggression under the terms of the definition.*[3] Hence, if a State regards itself as the victim of a serious violation of international law which does injury to what it considers to be its vital interests but which does not fall within the definition of aggression, it may not, of its own accord, resort to the use of force to redress the wrong of which it complains; if it does so it will itself be committing an act of aggression.

3. COMMENTS ON AND CRITICISM OF THE POLITIS DEFINITION

284. The elements of the Politis definition have been the object of much comment and criticism. Some comments relate to the forms of the definition, the principles of which are not contested. For example it has been proposed that the definition should include other acts which might be regarded as direct or indirect participation in acts of force.

285. Other comments and criticisms concern the actual principles of the definition, although in some cases the authors wish to create the impression that they are not taking issue with these principles. Thus, for example, one of the fundamental principles of the definition is repudiated when it is proposed that acts which do not constitute acts of force, such as acts of economic aggression, should be added to the enumeration.

286. Eight questions will be considered:

1. The enumeration of acts of force;
2. Provocation;
3. The aggressive intention;
4. The threat of the use of force;
5. Action to prevent aggression;
6. The inclusion in the definition of acts not involving the use of force;
7. Individual or collective self-defence;
8. The collective action of the United Nations.

SECTION II. THE ENUMERATION OF THE ACTS OF FORCE COVERED BY THE POLITIS DEFINITION

287. Some authorities have criticized the five tests applied by the definition, and have occasionally proposed changes in them. Others have proposed the addition of new tests.

A. THE FIVE ACTS ENUMERATED IN THE DEFINITION

288. The five criteria applied by the Act relating to the Definition of the Aggressor prepared by the Committee on Security Questions of the Disarmament Conference are:

> "(1) Declaration of war upon another State;
>
> "(2) Invasion by its [the aggressor State's] armed forces, with or without a declaration of war, of the territory of another State;
>
> "(3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
>
> "(4) Naval blockade of the coasts or ports of another State;
>
> "(5) Provision of support to armed bands formed in its territory which have invaded 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 or protection."[4]

(a) *Declaration of war upon another State*

289. The USSR proposal submitted to the Sixth Committee of the General Assembly on 5 January 1952 uses the same formula: "Declaration of war against another State."[5]

290. This criterion did not give rise to discussion. A declaration of war is a legal step. It can happen that a State which declares war on another State actually has no intention of starting hostilities against the State on which it declared war. Still, the declaration of war produces a breach of the peace and creates a state of

[2] League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents,* Vol. II, page 680.

[3] This is the purpose of the protocol annexed to article 2 of the Act relating to the Definition of the Aggressor. See above, paragraph 78.

[4] See above, paragraph 78.

[5] A/C.6/L.208.

war. Accordingly the declaration authorizes the State to which it is addressed to resort to force.[6]

(b) *Invasion by its armed forces, with or without a declaration of war, of the territory of another State*

291. The USSR proposal submitted to the Sixth Session of the General Assembly on 5 January 1952 used the following wording:

"Invasion by its armed forces, even without a declaration of war, of the territory of another State."[7]

292. There is no difference of substance between the two versions. Invasion of a territory constitutes the most obvious act of aggression.[8] Hence it was invasion that President F. D. Roosevelt was speaking of in the proposal which he transmitted on 30 May 1933 to the General Commission of the Disarmament Conference.

"That all the nations of the world should enter into a solemn and definite pact of non-aggression; that they should . . . individually agree that they will send no armed force of whatsoever nature across their frontiers."[9]

293. It is immaterial what form the invasion takes whether it involves crossing the land frontier, disembarking on a coast or landing troops by parachute from aircraft. In connexion with invasion, two questions have arisen: the question of territories of uncertain or contested status, and the question of frontier incidents.

(1) *Territories of uncertain or contested status*

294. It can happen that territories are in dispute and that several States claim sovereignty over them.

295. In his report, Politis stated:

"By territory is here meant territory over which a State actually exercises authority."[10]

When Mr. Salvador de Madariaga (Spain) stated that he entertained "serious doubts as regards that last sentence, which, according to the interpretation given to it, might be harmless but might also be extremely dangerous",[11] Politis replied that

"The idea of that sentence was not to justify unlawful occupation, but solely to protect peaceful possession against any act of force, even when the legal titles on which possession was founded might accidentally be open to dispute."[12]

296. The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947 adopted this idea of the *de facto* exercise of authority,[13] as did also the draft resolution submitted to the Sixth Committee by Bolivia on 11 January 1952.[14]

297. It may, however, be doubtful which State in fact exercises sovereignty over a territory. Referring to the course of lectures given by Mr. W. Komarnicki at the *Académie de droit international* at The Hague on the subject of the definition of the aggressor in modern international law,[15] Mr. Amado says that

"the territorial criterion may give rise to serious difficulties in the case of a dispute concerning a territory over which the States parties to the dispute all claim to have *de facto* power, as in the Chaco, Leticia and Vilna affairs".[16]

298. A somewhat analogous case is that in which foreign troops are authorized under an international agreement to be stationed in a certain area which has not been precisely delimited, as was the case with Japanese troops in Manchuria.[17]

(2) *Frontier incidents*

299. Invasion does not necessarily presuppose a crossing of the frontier by large armies. The size of the forces involved in an invasion is not in itself decisive.

300. Nevertheless, the definition of aggression prepared by the Committee on Security Questions of the Disarmament Conference specifies that "frontier incidents" do not constitute aggression.[18] It will be observed that such frontier incidents may take the form of an irregular crossing of the frontier in a manner resembling that of invasion (second criterion) or of a shot fired at targets beyond the frontier in a manner similar to attack (third criterion). The frontier incident was not defined either in the report by Politis or in his

[6]In the report of the Committee on Security Questions, Politis stated:

"The Committee considered the question whether it was advisable to take the declaration of war as a criterion of aggression, or whether the acts of aggression enumerated below would not be sufficient to define it.

"It appeared to it that the declaration of war should not be eliminated from the list of criteria of aggression. On the one hand, it is true, a declaration of war can occur before any act of hostility, and in this case it is the prelude to the hostilities which the declaring State will initiate or which the State on whom war is declared will be authorized to initiate. On the other hand, the Pact of Paris condemns resorts to war, and, as has been said, the Act defining the aggressor is regarded as an extension of the Pact of Paris." League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents,* Vol. II, pages 680 and 681.

[7]A/C.6/L.208.

[8]Invasion is mentioned in treaties other than those concluded on the model of the Politis definition. See above, paragraphs 180 and 182. It is also mentioned in the proposed definitions submitted by Bolivia and the Philippines to the San Francisco Conference. See above, paragraphs 113-115.

[9]League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments,* Series B (Minutes of the General Commission), Vol. II, page 565.

[10]League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents,* Vol. II, page 681.

[11]League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments,* Series B (Minutes of the General Commission), Vol. II, page 548.

[12]*Ibid.*, page 554.

[13]See article 9 of the Treaty, paragraph 201 above. It will be observed that the Act of Chapultepec of 8 March 1945 contains a different formula. It recognizes only legal sovereignty. See article 3 of the Act, paragraph 200 above.

[14]A/C.6/L.211. The draft provides:

"1. . . . an act of aggression shall in all cases be considered to have been committed when any State invades the territory of another State, crossing the frontiers established by treaty or by judicial or arbitral decisions and demarcated in accordance therewith, or when, in the absence of frontiers thus demarcated, the invasion affects the territories under the effective jurisdiction of a State."

[15]*Académie de droit international, Recueil des Cours,* 1949, Vol. II, page 59.

[16]Memorandum submitted by Mr. Amado to the International Law Commission, A/CN.4/L.6, page 4. See also *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 284th meeting, paragraph 13.

[17]Case quoted by Mr. Amado in the above-mentioned memorandum with reference to the course of lectures given by Mr. Komarnicki (Mr. Amado, *loc. cit.*; course of lectures by Mr. Komarnicki, page 60).

[18]See the Protocol annexed to article 2 of the Act relating to the Definition of the Aggressor, paragraph 78 above.

comments to the General Commission of the Disarmament Conference.

301. The de Brouckère report to the Preparatory Commission for the Disarmament Conference dated 1 December 1926 contains a description of the frontier incident:

"Every act of violence does not necessarily justify its victim in resorting to war. If a detachment of soldiers goes a few yards over the frontier in a colony remote from any vital centre; if the circumstances show quite clearly that the aggression was due to an error on the part of some subaltern officer; if the central authorities of the 'aggressor State' reprimand the subordinate concerned as soon as they are apprised of the facts; if they cause the invasion to cease, offer apologies and compensation and take steps to prevent any recurrence of such incidents — then it cannot be maintained that there has been an act of war and that the invaded country has reasonable grounds for mobilizing its army and marching upon the enemy capital. The incident which has occurred has in no way released that country from the specific obligations laid down in Article 12 and following."[19]

302. For the purpose of a description of what constitutes a frontier incident, the first salient feature to note is that it is on a small physical scale, the forces involved being too slight to enable an invasion or attack to be carried out. This criterion, however, would not be a very strict one: What amount of force would have to be used to constitute something which was no longer an incident but an aggression?

303. The second distinctive feature of frontier incidents is that they do not result from an aggressive intention on the part of the State responsible for them. They might be caused in certain cases by errors (involuntary crossing of the frontier) in other cases by action taken by subordinate chiefs acting without orders or misinterpreting the orders they have received.[20]

304. Mr. Spiropoulos (Greece), speaking on the subject of what acts should be held to be frontier incidents as distinct from acts of aggression, said:

"It depended on the circumstances of each act whether or not it really constituted aggression. For example, no one would ever dream of denying that the incident at Pearl Harbor had constituted aggression, but, on the other hand, if a small group of soldiers fired across a frontier and wounded some soldiers on the other side, that could hardly be termed aggression even if the soldiers had been acting on the instructions of their Government. Both cases, would, however, be regarded as aggression under sub-paragraph 1(b) of the USSR draft resolution (A/C.6/L.208)."[21]

305. Mr. Fitzmaurice (United Kingdom) criticized the inclusion of frontier incidents among the acts which could not serve as a justification of resort to force of arms by another State. He said:

"Besides encouraging States to provoke frontier incidents and to violate their treaties, the inclusion of those two items would place the innocent States in a very difficult position. In the first place, a potential aggressor would be able to provoke even the most serious frontier incidents with impunity, because any military reaction on the part of the other State would automatically constitute aggression."[22]

306. Mr. Ogrodzinski (Poland) replied to the United Kingdom representative as follows:

"As to the question of frontier incidents, the United Kingdom representative had pushed his argument *ad absurdum*. The expression 'frontier incident' could mean nothing more than frontier incident, and any situation that went beyond mere incident would fall within a different category: for example, military invasion. The dividing line between certain situations and possible acts of aggression must be established in accordance with certain notions and those notions had to be defined in words."[23]

(c) *Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State*

307. The USSR proposal submitted to the Sixth Committee of the General Assembly referred to:

"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."[24]

308. The word "bombardment" is employed instead of "attack" to emphasize that in such a case there would be no penetration into the territory of the foreign State. Furthermore, the use of the word "deliberate" as applied to attacks on ships or aircraft makes it clear that in such cases there must be aggressive intention.

309. Politis states in his report:

"This hypothesis is distinct from the previous one. The territory of the State attacked is not entered by armed forces but is subject to artillery or rifle fire, air bombardment, etc."[25]

310. A large number of individual treaties, treaties of alliance or mutual assistance, refer to attack as the element which constitutes aggression.[26] This criterion of the Politis definition recurs in a number of proposals[27] and in the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947 (article 9a).[28]

311. Does this criterion refer only to attack directed against the vessels or aircraft forming part of the armed forces of the State, or does it also refer to attack directed against merchant vessels or civilian aircraft? Mr. Alfaro was inclined to adopt the former interpretation.[29]

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[19]See League of Nations, document A.14.1927.V, page 69.

[20]See below, paragraphs 355 and following: the aggressive intention.

[21]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 279th meeting, paragraph 13.

[22]*Ibid.*, 281st meeting, paragraph 10.

[23]*Ibid.*, 283rd meeting, paragraph 9.

[24]A/C.6/L.208.

[25]League of Nations, *Conference on the Reduction and Limitation of Armaments, Conference Documents*, Vol. II, page 681.

[26]See above, paragraphs 180-182.

[27]See the proposals presented by Bolivia and the Philippines at the San Francisco Conference in 1945. See above, paragraphs 113-115. See also the proposal presented by Bolivia to the Sixth Committee of the General Assembly on 11 January 1952 (A/C.6/L.211).

[28]See above, paragraph 201.

[29]In his memorandum to the International Law Commission, Mr. Alfaro made the following observation:

"...attack on the sea and air forces of a State is specifically mentioned as aggression, wherefore attack on merchant vessels and civil aircraft would seem to be permissible". A/CN.4/L.8, page 11.

Politis, however, interpreted it otherwise in his report:

"As regards the vessels or aircraft of another State, no distinction has been made according to whether these vessels or aircraft belong to the armed forces of the State or are of a non-military character belonging either to the State or its nationals."[80]

(d) *Naval blockade of the coast or ports of another State*

312. The USSR proposal submitted to the Sixth Committee of the General Assembly employs an equivalent formula.[81] The blockade in question is the so-called "pacific blockade" as opposed to the blockade ordered in the course of a war. The "pacific" blockade was used on several occasions in the 19th century.[82]

313. Politis says in his report:

"In spite of the objections raised by certain members at the mention of this case, the Committee considered that, while a naval blockade did not necessarily lead to war, it was nevertheless an act applying material force in a limited but real manner against another State. Only the weakness of the State against which a naval blockade is established can deter it from retaliating by acts of war. In certain cases, this weakness might also induce it to submit to a military invasion (see previous heading), which undoubtedly constitutes the most definite act of aggression."[83]

314. It has been proposed to extend the formula. In the definition offered by the Philippines at the San Francisco Conference, the formula was:

"To subject another nation to a naval, land or air blockade."[84]

315. In the International Law Commission Mr. Alfaro commented:

"Naval blockade is branded as aggression, but nothing is said about a land blockade, which produces equal effects."[85]

316. With regard to "land" blockade, the following observation might be made: A land blockade presupposes a decision on the part of a contiguous State to close the frontier separating it from the State to be blockaded. Such a step would be taken by the contiguous State on its own territory, in the exercise of its sovereignty and without resort to force. That being so, a "land" blockade would be fundamentally different from a naval blockade. It would not come within the meaning of "use of force," though possibly within that of "economic aggression," which will be spoken of below.

(e) *Provision of support to armed bands formed in its territory which have invaded 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 or protection*

317. The USSR proposal presented to the Sixth Committee of the General Assembly employs an equivalent formula.[86] The Bolivian proposal submitted to the San Francisco Conference in 1945 included among the acts of aggression "support given to armed bands for the purpose of invasion."[87]

318. It will be observed that article 2(4) of the draft code of offences against peace prepared by the International Law Commission at its third session speaks of an offence described as follows:

"The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose."[88]

319. However, the commentary on this clause reads:

"The offence defined in this paragraph can be committed only by the members of the armed bands, and they are individually responsible. A criminal responsibility of the authorities of a State under international law may, however, arise under the provisions of paragraph (12) of the present article."[89]

320. On the subject of armed bands, the Politis report makes the following observation:

"The Committee, of course, did not wish to regard as an act of aggression any incursion into the territory of a State by armed bands setting out from the territory of another country. In such a case, aggression could only be the outcome of complicity by the State in furnishing its support to the armed bands or in failing to take the measures in its power to deprive them of help and protection. In certain cases (character of frontier districts, scarcity of population, etc.) the State may not be in a position to prevent or put a stop to the activities of these bands. In such a case, it would not be regarded as responsible, provided it had taken the measures which were in its power to put down the activities of the armed bands. In each particular case, it will be necessary to determine in practice what these measures are."[40]

321. In the International Law Commission Mr. Alfaro commented:

"The clause relative to irregular bands fails to foresee the possibility that they be not only assisted but actually organized by the aggressor State."[41]

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[80]League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents*, Vol. II, page 681.

[81]A/C.6/L.208.

[82]See *Memorandum on Pacific Blockade up to the time of the founding of the League of Nations*, League of Nations document A.14.1927.V, page 89.

[83]League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents*, Vol. II, page 681.

[84]See above, paragraph 115.

[85]A/CN.4/L.8, page 10.

[86]A/C.6/L.208.

[87]See above, paragraph 113. The same formula will be found in the Bolivian proposal submitted to the Sixth Committee on 11 January 1952 (A/C.6/L.211).

[88]See the report of the International Law Commission covering the work of its third session, 16 May - 27 July 1951, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, (A/1858), paragraph 59.

[89]Paragraph (12) provides:

"(The following acts are against the peace and security of mankind)"

"Acts which constitute . . .

". . .

"(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article."

[40]League of Nations, *Conference for the Reduction and Limitation of Armaments, Conference Documents*, Vol. II, page 681.

[41]A/CN.4/L.8, page 10.

322. It would appear that if assistance to armed bands constitutes an act of aggression, then, *a fortiori*, the direct organization of such bands would also constitute such an act. Mr. Spiropoulos (Greece) said that in the case of the disturbances which had recently occurred in Greece, the General Assembly, although it had admitted that the Greek partisans were assisted by the neighbouring countries, had not expressly stated that Greece was the victim of an aggression.[42]

323. The situation may occur where a State maintains armed bands in a foreign country but these bands were not formed in the territory of the State which maintains them. Mr. Spiropoulos (Greece) said:

> "The definition proposed by the USSR (A/C.6/L.208) covered only the classic cases of aggression, that is, those which were indisputable. One case of aggression, however, was the complicity of a State which maintained armed bands on the territory of another State."[43]

324. Mr. Hsu (China) included in his proposed definition of aggression:

> "Arming of organized bands or of third States for offence against a State marked out as victim."[44]

B. ANOTHER ACT INCLUDED IN THE DEFINITION PROPOSED BY THE UNION OF SOVIET SOCIALIST REPUBLICS

325. In addition to the acts enumerated in the Politis definition, the USSR, in the proposal which it submitted to the Sixth Committee of the General Assembly on 5 January 1952, added another act of aggression, defined as follows (paragraph *b*):

> "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;"[45]

326. The first hypothesis visualized in this definition would seem to be close akin to invasion (second act referred to in the Politis formula and in the USSR formula). The second, that of violation of the conditions under which the presence of armed forces has been authorized (case of Japanese troops in Manchuria) is admittedly not covered by the earlier definitions.

327. In the International Law Commission, Mr. François criticized the definition in these terms:

> "It must...be realized that such definitions would enable the aggressors to evade responsibility for their acts by taking refuge behind legal texts. Such texts provided no real safeguard. For example, in the case referred to in paragraph 1(*b*), of the Soviet Union draft resolution..., where one State landed or led its land, naval or air forces inside the boundaries of another State without the prior permission of the latter, it would be perfectly easy to disguise the aggression either on the grounds that permission had been given by a government that had seized power in the invaded country at the eleventh hour and was in sympathy with the invader, or by denouncing the government of the country invaded as a "Puppet Government" and refusing to recognize it as the legitimate representative of the people."[46]

C. OMISSIONS IN THE USSR DEFINITION IN THE OPINION OF CERTAIN REPRESENTATIVES

328. The representatives to the General Assembly have criticized the USSR definition and quoted cases which they claimed it did not cover in drawing attention to such gaps; some representatives did not suggest that they should be filled in, but merely cited them as examples to prove that a comprehensive definition was impossible.

(a) *Destruction of the population of another State by technical methods*

329. The acts envisaged are bacterial warfare, the poisoning of streams, and death rays. Mr. Ammoun (Lebanon) states:

> "Nor did the draft mention such concrete cases as bacteriological warfare, or the possibility that a State might poison a stream rising in its territory and flowing through a neighbouring country or might alter its course so that the neighbouring country suffered thirst."[47]

Mr. Spiropoulos (Greece) says:

> "If however, rays capable of destroying a whole population were invented and a State constructed installations for the purpose of using such rays against the people of a neighbouring country, that case would not be covered by the USSR definition."[48]

Would these measures be covered by the criterion of attack stated in the definition?

(b) *Participation in a war of nationals of a neutral country*

330. Mr. van Glabbeke (Belgium) says:

> "...tens or hundreds of thousands of 'volunteers,' armed and equipped, had moved into Korea from China. Would the USSR representative regard communist China as an aggressor under sub-paragraph (*b*)?"[49]

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[42] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 279th meeting, paragraphs 16 and 17:

"He cited various passages from the reports of the United Nations Special Committee on the Balkans and from General Assembly resolutions where it was fully recognized that the Governments of Albania and Bulgaria were giving aid to the Greek guerrillas, that the guerrillas depended largely on the food and supplies they received from abroad and that they often returned into Albania and Bulgaria where they could rest, reform their units and obtain new supplies in safety.

"The General Assembly had recognized that such a situation constituted a threat to the political independence and territorial integrity of Greece. In its most recent report (A/1857) the Special Committee described a change in tactics on the part of the Greek guerrillas but emphasized that their dominant aim was still to overthrow the Greek Government by force. In General Assembly resolution 380 (V), fomenting civil strife in the interests of a foreign Power was recognized as an act of aggression, but in spite of that and in spite of article 1, paragraph (5) of the Politis definition, the General Assembly had never stated in express terms that the activities of Albania and Bulgaria constituted aggression against Greece."

[43] *Ibid.*, 292nd meeting, paragraph 5.

[44] *Ibid.*, 278th meeting, paragraph 50.

[45] A/C.6/L.208.

[46] A/CN.4/SR.93, paragraph 19. Mr. François was referring to the USSR proposal submitted on 6 November 1950 to the First Committee of the General Assembly (A/C.1/608/Rev.1). The USSR proposal submitted to the Sixth Committee of the General Assembly on 5 January 1952 merely reproduced the earlier proposal.

[47] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 286th meeting, paragraph 27.

[48] *Ibid.*, 292nd meeting, paragraph 3.

[49] *Ibid.*, 287th meeting, paragraph 38.

331. Mr. Spiropoulos (Greece) states:

"Similarly, if 'volunteers' left their country of origin to go to a foreign country in order to enroll in the armed forces without any attempt on the part of their country of origin to prevent their doing so, that country would become guilty of aggression even though it had not committed any positive act."[50]

332. In accordance with traditional international law, the fact that aliens enrol in time of war in the armed forces of a belligerent Power does not, in principle, render responsible the State of which they are nationals. This is not so, however, if the recruiting of such "volunteers" is encouraged or decreed by the authorities of a neutral State. Furthermore, if the volunteers who have enrolled without any encouragement from their government are so numerous as to change the nature of the army involved, would that not give rise to a new situation?

(c) *Terrorist activities*

333. In the draft code of offences against the peace and security of mankind, the International Law Commission included the following offence as number 6 on the list:

"The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."[51]

334. One purpose of terrorism is to kill politicians or persons holding high office (e.g., the assassination of King Alexander of Yugoslavia and of Louis Barthou, Minister of Foreign Affairs of the French Republic) whose death would seriously injure their country. Should terrorism organized or encouraged by a foreign State be considered as one form of aggression?

(d) *Refusal to put an end to hostilities which have broken out*

335. Mr. Amado (Brazil) states:

"The USSR draft resolution showed an important omission. In view of paragraph 1(*b*) of General Assembly resolution 378 A (V), which was a decision of that Assembly, the USSR draft resolution ought to contain a provision that any State should be declared an aggressor which, having become engaged in armed conflict with another State or States, did not immediately, and in any case not later than twenty-four hours after the outbreak of hostilities, make a public statement wherein it would proclaim its readiness, provided that the State with which it was in conflict would do the same, to discontinue military operations."[52]

SECTION III. DO PROVOCATION AND VIOLATIONS OF INTERNATIONAL LAW JUSTIFY THE USE OF FORCE?

1. STATUS OF THE QUESTION

336. A certain number of treaties of alliance and security contain a formula explicitly or implicitly covering the notion of provocation[53] but the term itself has not been defined in any international instrument.[54] An analysis of the notion of provocation shows that it can cover a number of very different acts.

337. In this connexion, Politis said:

" 'Provocation' is either one of the acts of aggression defined in Article 1—in such case the State which has been the victim of such an act can obviously retaliate by acts of a similar nature and no difficulty arises—or 'provocation' consists in a breach of international law or in the unfriendly attitude of Governments or public opinion without the commission of an act of aggression."[55]

338. The acts which might constitute provocation can be divided into four categories:

(*a*) Acts constituting aggression. In this case the State which meets force with force is obviously not, in view of the right of legitimate self-defence, an aggressor.

(*b*) Provocation may consist in preparations for aggression at some time in the near or distant future. This extremely important contingency has been the subject of controversy. It will be discussed further on.[56]

(*c*) Provocation may take the form of some breach of international law, involving another State or its nationals.

(*d*) Provocation may, as Politis said consist of "the unfriendly attitude of Governments or public opinion" without being a breach of international law, e.g., the Press in a certain country may criticize the policy of a foreign government or a certain member of that government, or crowds may demonstrate against a foreign government; in neither need there be any excesses or violence which would render the government of the country where such events occurred internationally responsible. It may be said that in this case there is no problem.

339. The case to be considered therefore is that of a breach of international law by one country in respect of another.

2. ARGUMENT THAT THOSE WHO RESORT TO FORCE TO ASSERT A RIGHT ARE COMMITTING AGGRESSION

340. The authors of the enumerative definition adopted a very adamant stand. They not only listed

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[50] *Ibid.*, 292nd meeting, paragraph 5.

[51] A/1858, paragraph 59.

[52] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 284th meeting, paragraph 21.

[53] See paragraphs 202-206 above.

[54] Mr. Robinson (Israel) states:

"There was a tendency to get rid of the epithet 'unprovoked' and with that object, it was claimed that provocation could always be 'fixed'. A definition of aggression, however, could not ignore the question of provocation, which would thus also need defining." *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 30. Mr. Alfaro stated in the International Law Commission:

"The Inter-American Treaty of Mutual Assistance, in classifying as aggression an 'unprovoked attack', seems to justify attack when it has been 'provoked'. Introducing the vague, imprecise and uncertain element of 'provocation' in the determination of the aggressor, may lead to most disturbing and dangerous consequences." A/CN.4/L.8, pages 10 to 11.

[55] League of Nations, *Conference for the Reduction and Limitation of Armaments, Documents of the Conference*, Vol. II, page 682.

[56] See paragraphs 380 and following below.

the acts involving the use of force which constitute aggression but took care to add that no other act may serve to justify the aggressor.

341. Article 2 of the definition prepared by the Committee on Questions of Security states:

"No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 1."[57]

342. A protocol expanding the principle laid down in Article 2 is annexed to that article and reads:

"The High Contracting Parties signatories of the Act relating to the Definition of the Aggressor . . . declare that no act of aggression in the meaning of Article 1 of that Act can be justified on either of the following grounds, among others:

"A. The Internal Condition of a State:

"E.g., its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions or civil war.

"B. The International Conduct of a State:

"E.g., the violation or threatened violation of the material or moral rights or interests of a foreign State or its nationals; the rupture of diplomatic or economic relations; economic or financial boycotts; disputes relating to economic, financial or other obligations towards foreign States; frontier incidents not forming any of the cases of aggression specified in Article 1."[58]

343. It will be noted that the definition of aggression submitted to the General Commission of the Disarmaments Conference by the USSR delegation on 6 February 1933 contained a still more detailed list of the circumstances which could not be accepted as justification of aggression.[59] In this connexion, Politis stated in the General Commission:

"The Committee had felt that to insert so long a list in the body of the clause itself would make the text too heavy. In a spirit of conciliation, however, it had agreed that there should be a special Protocol annexed to Article 2 giving a certain number of illustrations."[60]

344. The proposal which the Union of Soviet Socialist Republics submitted first on 6 November 1950 to the First Committee of the General Assembly (A/C.1/608/Rev.1) and later to the Sixth Committee on 5 January 1952 (A/C.6/L.208) reproduces the list contained in the USSR proposal of 6 February 1933.

345. Replying to a comment by Mr. di Soragna (Italy), who mentioned the possibility that a State might have to witness the massacre of its nationals abroad without being entitled to assist them,[61] Mr. Politis made this statement:

"In this case, it was no longer a question of different conceptions of the nature of law, but of a sharp, a radical disagreement as to the conception of the organisation of international relations, and more especially the organisation of peace. . .

". . . provocation constituted an act which placed the victim in a position of legitimate defence, in which case the act with which the victim was charged was condoned, by reason, however, not of the act of provocation itself, but of the situation which it had brought about—that was to say, the special situation known as legitimate defence . . . or else provocation was not one of the prohibited acts, in which case aggression could not take place on any ground whatsoever and, against such an act of provocation there remained no other remedy than the application of a pacific procedure to secure the vindication of the right infringed. . .

"What was the meaning of the expressions 'prohibit recourse to force' and 'prohibit recourse to war'? They meant, as Article II of the Pact of Paris indicated, that the States undertook that in no circumstance would they employ other means than pacific forms of procedure for settling their disputes, so that, if provocation were to play any part, it could only be the part which it played in private law. If, however, it was desired to extend this idea of provocation in order to justify the use of force in international relations, that meant a very profound difference of opinion as regards the manner in which international relations were conceived. The arguments just put forward belonged, in Mr. Politis' opinion, to the past. He claimed that the conception which he was maintaining existed already in the texts adopted, and was in harmony with the object at which the civilized world was aiming in organising peace."[62]

346. Mr. Litvinov (USSR) made a statement to the same effect. After recalling the various reasons adduced to justify the use of force (defence of nationals, violations of treaties, maintenance of order and peace) he stated:

"If such theories are widely spread and are taken into account . . . it may confidently be prophesied that an aggressor will never be found in any armed conflict, and that only mutually aggressive defensive parties will be established, or, worse still, the defensive party will be considered the aggressor, and *vice versa*."[63]

347. It will be recalled that in the Corfu Incident a committee of jurists considering the case expressed the opinion that "coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant.[64] Eleven Governments formulated criticisms or reservations in this connexion in their observations."[65]

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[57]See paragraph 78 above.

[58]See paragraph 78 above.

[59]See paragraph 76 above.

[60]League of Nations, *Records for the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 501.

[61]Mr. di Soragna stated:

"On the other hand, one State might massacre the nationals of another for several days without the latter being able to do anything other than to resort to pacific procedure. Those were, doubtless, exceptional cases, but the Commission would agree that a State might well ask with some anxiety whether it should subscribe to such onerous and rigorous undertakings, whether it could take the risk, by simply appending its signature to a document, of compromising so gravely what might be the primary interests of its nationals." *Ibid.*, page 550.

[62]*Ibid.*, pages 555–556.

[63]*Ibid.*, page 237.

[64]See paragraph 27 above.

[65]See paragraphs 28 and 29 above.

348. Several members of the International Law Commission expanded this idea that war was no longer legitimate even as a means of righting an injustice or introducing justifiable changes in the *status quo.*

349. Mr. Alfaro says:

"...war, i.e., the use of force in interstate relations, is illegal. It has been renounced too, pronounced an international crime, and is expressly prohibited. There is no distinction between *just* and *unjust* wars. Save two exceptions, all war is aggression, even if started on account of a wrong suffered by a State. Violations of rights under international law give rise to controversies which can only be decided by pacific methods and not by States taking the law into their own hands, assuming the role of party, accuser and judge, and deciding the issue by force of arms."[66]

350. Mr. Scelle says:

". . . aggression [consists] of 'any resort to force contrary to the provisions of the Charter of the United Nations, the purpose or effect of which is to modify the state of positive international law in force and to disturb public peace..."

"He wondered how a meeting of jurists could overlook the opportunity to emphasize the enormous progress represented by the absolute prohibition of resort to force in order to change a legal situation, even if the change were legitimate."[67]

351. Referring to genocide, the most serious possible violation of law, Mr. Spiropoulos (Greece) made a statement to the same effect in the Sixth Committee:

"If a State committed the crime of genocide against a large minority resident on its territory and belonging to a neighbouring State, could that be called aggression? Certainly not under Article 51 of the Charter."[68]

3. CRITICISM OF THIS OPINION

352. At the time of the Corfu Incident (1923) the Italian Government maintained that its armed intervention had been justified. Mr. Salandra (Italy) stated:

". . . It (Italy's action) was merely designed to assure obligations arising out of responsibility for a terrible crime . . . The creation of the League of Nations does not constitute a renunciation by States of all right to act for the defence and safety of their rights and of their dignity. If this were so, no State would desire to belong to the League."[69]

353. Mr. Fitzmaurice (United Kingdom) stated in the Sixth Committee of the General Assembly:

"Another characteristic of the USSR definition was that it listed a number of cases which would not constitute justification for armed action by other States. There were great objections of principle to the establishment of such a list, for its existence would almost amount to an invitation to countries to embark on certain types of illegal action in the knowledge that any armed retaliation would at once be stigmatized as aggression. The list proposed in the USSR draft included 'frontier incidents' and 'the violation of international treaties. (The inclusion of those two items would encourage) . . . States to provoke frontier incidents and to violate their treaties...'."[70]

354. In 1929-1931 when an unsuccessful attempt was made to bring the Covenant of the League of Nations into line with the Pact of Paris, that is to say to revise the Covenant to include a general prohibition of recourse to war, certain governments insisted on the need for giving States some assurance that their rights would be recognized and protected by means of pacific procedures culminating in mandatory decisions the execution of which could be enforced under the control of the League of Nations.[71]

SECTION IV. AGGRESSIVE INTENTION

355. Frequent reference was made in the International Law Commission and in the Sixth Committee of the General Assembly to the subjective factor as it applies to the State committing aggression. This subjective factor is called "aggressive intention" (*animus aggressionis*).

356. Mr. Morosov (USSR) regarded the idea of aggressive intention with some suspicion. This formulation, he said,

". . . would give a State which had committed one of the acts enumerated in the USSR proposal the opportunity of escaping the legal consequences of its action by claiming the absence of *animus aggressionis*."[72]

357. The meaning of "aggressive intention", a concept which has sometimes given rise to confusion, requires clarification.

1. THE CLAIM BY A STATE THAT IT WAS UNAWARE THAT ITS ACTION CONSTITUTED AGGRESSION CANNOT RELIEVE IT OF RESPONSIBILITY

358. Mr. Alfaro, after stating that there can be no aggression unless there was intent to commit aggression, added:

"But the point is that the act of using force reveals the intention by itself. If a town is unexpectedly bombarded or a port is blockaded, there can be no doubt as to the intention accompanying the bombardment or blockade, because force has been used in a manner and for purposes contrary to the present international order."[73]

359. In municipal law there is a maxim that ignorance of the law is no excuse. A person who has committed murder or fraud cannot relieve himself of responsibility by claiming that he did not know that murder was a crime, or that the act he committed

[66] A/CN.4/L.8, page 13.

[67] A/CN.4/SR.109, paragraphs 22 and 30.

[68] *Official Records of the General Assembly, Sixth Session, Sixth Committee* 292nd meeting, paragraph 7.

[69] See League of Nations, *Twenty-Sixth Session of the Council, Official Journal,* November 1923, page 1288.

It will be noted that the Polish delegate accredited to the League of Nations transmitted the observations of the Polish Branch of the International Law Association in regard to the report of the Special Committee of Jurists. (See League of Nations, *Thirty-Ninth Session of the Council (Official Journal,* April 1926, page 604)). These observations contain arguments in favour of the Italian delegate's contention.

[70] *Official Records of the General Assembly, Sixth Session, Sixth Committee* 281st meeting, paragraph 10.

[71] See League of Nations document A.8.1930 V, Annex IV.

[72] *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 278th meeting, paragraph 40.

[73] A/CN.4/L.8, page 20.

constituted fraud. *A fortiori*, States cannot plead ignorance of international law, which they are required to know. As Mr. François said:

"Even where an aggressor was personally convinced that he had acted within his rights, he might be guilty of aggression."[74]

360. There remain cases where doubt may exist concerning the exact requirements of international law. In such a case, if the doubt was justified, a State whose interpretation of international law had been rejected would not be relieved of responsibility; but its good faith might be taken into consideration. International organs, instead of pressing for the determination of responsibility and issuing a condemnation, might request the State which had been in error to put itself right and so end the hostilities.

2. THE EXISTENCE OR NON-EXISTENCE OF AGGRESSIVE INTENTION

361. As Mr. Spiropoulos (Greece) said: "Intention must not be confused with motive."[75] Motive is essentially different from intention; it is the reason for which an act of aggression is committed. The motives for aggression are very varied: e.g., the destruction of a State, the annexation of a territory, the establishment of a protectorate, the securing of economic advantages, the protection of the persons and property of nationals abroad, the changing of a political and social system, redress for an insult, etc.

362. Intention exists only when the State committing the act has acted deliberately. There is no aggressive intention in the two following cases (*a*) when the State committing the act has acted in genuine error; (*b*) when hostilities have broken out by accident.

First case: genuine error

363. Mr. Ammoun (Lebanon) referred to the possibility that "during a war, an air squadron might by mistake bomb a frontier town."[76] Thus, during the Second World War, Allied squadrons dropped on Swiss towns bombs meant for French or Italian towns.

364. One well-known example of error is the Dogger Bank incident. On 9 October 1904, the Russian Fleet under Admiral Rozhdestvensky opened fire in the North Sea on a fleet of British trawlers, mistaking them for Japanese torpedo boats.

Second case: accidental outbreak of hostilities

365. An outbreak of hostilities may be in the nature of a spontaneous and unpremeditated accident. On 25 May 1933, Mr. Eden said in the General Commission of the Disarmament Conference:

"It was surely the fact, for instance, in a time of tension, when troops were facing each other across a frontier and incidents were possible at any moment, the question of which force had been the first to cross the frontier might well have a comparatively slight bearing, in the light of previous history, on the question of which State was in fact the aggressor."[77]

366. In such a case the government may not have actually wished to enter into hostilities. The hostilities may have been initiated by subordinate officers who have misunderstood their orders; or the government's orders may have been given in a state of confusion and haste on the basis of incorrect or incomplete information.

SECTION V. THREAT OF THE USE OF FORCE

1. WHAT CONSTITUTES A THREAT TO USE FORCE?

367. This occurs where a State, in order to force its will on another State, threatens to use force against it. The most typical form of this threat is the ultimatum in which the State to which it is addressed is given a time-limit in which to accept the demands made upon it, and told that if it rejects these demands war will be declared on it or certain coercive measures such as a naval blockade, bombardment, or occupation of a given territory, will be taken. However, the threat to use force is not always made in so crude and open a form. There are sometimes veiled threats which may be very effective, but are difficult to detect.

368. Again, the threat of force differs from the employment of force in the same way as the threat to kill differs from murder. The person who utters the threat may not intend to carry it out, and the threat is then only a form of intimidation and "blackmail". He may also change his mind and not resort to action.

369. De Brouckère, in his report of 1 December 1926 to the Committee of the Council of the League of Nations, stated:

"We find in history many instances of violence and aggression which have not led to war, either because the victim was too weak or too faint-hearted to offer any resistance, or because the matter was settled, by negotiation or through the mediation of a third party, before the state of war was established. The fact is that a state of war does not really exist until the country attacked takes up the challenge and thus admits the existence of a state of war."[78]

370. Similarly, a country's weakness may lead it to yield to a threat of aggression before the potential aggressor needs to take action to achieve the desired result.

2. THE INTERNATIONAL LAW COMMISSION CONSIDERS THE QUESTION FROM THE PENAL STANDPOINT

371. At its third session (1951), the International Law Commission, in preparing a draft Code of Offences against the Peace and Security of Mankind, considered the question whether the threat to resort to an act of aggression ought to be considered as actual aggression.

372. After deciding, by ten votes to one, that the threat of employment of force was an offence, it decided, by six votes to four, that such a threat did not constitute aggression.[79]

373. In the list of offences against peace drawn up by the International Law Commission, the threat to resort to an act of aggression occupies the second place,[80] the first in the list being aggression itself. In

[74] A/CN.4/SR.93, paragraph 18.

[75] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 292nd meeting, paragraph 9.

[76] *Ibid.* 286th meeting, paragraph 27.

[77] League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 514.

[78] See League of Nations document A.14.1927.V, p.68.

[79] A/CN.4/SR.109, paragraph 106.

[80] This offence is defined thus:

"(2) Any threat by the authorities of a State to resort to an act of aggression against another State." A/1858, paragraph 59.

the comments accompanying the text of the draft code, the Commission points out that Article 2, paragraph 4, of the United Nations Charter prescribes that all Members shall "refrain in their international relations from the threat or use of force".

374. It must be borne in mind that in drafting its draft Code of Offences against the Peace and Security of Mankind, the International Law Commission was thinking in terms of the punishment of individuals called to personal account for their crimes. The problem confronting organs of an international institution and governments at the moment when the act is committed is somewhat different, namely, what action to take in respect of a State which resorts to aggression or the threat of aggression.

3. DISCUSSIONS ON THE THREAT OF THE EMPLOYMENT OF FORCE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

375. Mr. Robinson (Israel) said:

"...an aggressor need not use force but merely threats, explicit or implicit. The element of threat... was, moreover, contained, without being defined, in the draft Code of Offences against the Peace and Security of Mankind and in the Charter. Any definition of aggression must therefore take it into account."[81]

376. It will be noted that both the Politis definition and that proposed in the Sixth Committee on 5 January 1952 by the Union of Soviet Socialist Republics do not mention the threat of employment of force.

377. There was some discussion in the Sixth Committee on the subject of the annexation of Austria in March 1938, the annexation of the Sudetenland pursuant to the Munich agreements of September 1938 and the placing of Bohemia-Moravia under German protectorate in March 1939.

378. According to Mr. Morozov (USSR), the occupation of Czechoslovakia and Austria following a threat to employ force constituted aggression within the meaning of sub-paragraph (6) of the definition proposed by the USSR Government.[82]

379. Mr. Fitzmaurice (United Kingdom), citing the cases of Austria and Czechoslovakia, said that the aggressor might achieve his purpose just as certainly by subverting from within the will to resist of the country attacked as by the use of physical force outside. In some cases subversion was the most effective weapon. That had been clearly demonstrated by Hitler in his conquest of Austria and Czechoslovakia.[83]

SECTION VI. ACTION TO PREVENT AGGRESSION

380. The question whether a State may anticipate events and resort to force in order to prevent an expected aggression has been the subject of extensive discussion since the establishment of the League of Nations.

1. OPINION THAT A STATE WHICH, BY ATTACKING, FORESTALLS AN ACT OF AGGRESSION WHICH IS BEING PREPARED AGAINST IT DOES NOT ITSELF COMMIT AN ACT OF AGGRESSION

381. It has been asserted that the most effective way for a State—particularly a small Power—to prevent conquest by an aggressor might be to forestall the attack by itself attacking.

(a) *League of Nations period*

382. The Permanent Advisory Committee on armament questions formulated a theory that, in certain cases, a State which began hostilities against another State should not necessarily be considered as the aggressor.

383. The Permanent Advisory Committee stated:

"...the passage of the frontier by the troops of another country does not always mean that the latter country is the aggressor. Particularly in the case of small States, the object of such action may be to establish an initial position which shall be as advantageous as possible for the defending country, and to do so before the adversary has had time to mass his superior forces. A military offensive of as rapid a character as possible may therefore be a means, and perhaps the only means, whereby the weaker party can defend himself against the stronger. It is also conceivable that a small nation might be compelled to make use of its air forces in order to forestall the superior forces of the enemy and take what advantage was possible from such action."[84]

384. The same Committee listed the "signs which betoken an impending aggression".[85] Again, it expressed this important opinion:

"It will be seen, in short, that the first act of war will precede the outbreak of military hostilities by several months or even more..."[86]

385. In its observations on the draft Treaty of Mutual Assistance (1923), the Government of the Union of Soviet Socialist Republics stated:

"Neither the entry into foreign territory nor the scale of war preparations can be regarded as satisfactory criteria. Hostilities generally break out after a series of mutual aggressive acts of the most varied character. For example, when the Japanese torpedo-boats attacked the Russian fleet at Port Arthur in 1904, it was clearly an act of aggression from a technical point of view, but, politically speaking, it was an act caused by the aggressive policy of the Czarist Government towards Japan, who, in order to forestall the danger, struck the first blow at her adversary. Nevertheless, Japan cannot be regarded as the victim, as the collision between the two States was not merely the result of the aggressive policy of the Czarist Government but also of the imperialist policy of the Japanese Government towards the peoples of China and Korea."[87]

[81] *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 282nd meeting, paragraph 31.
[82] *Ibid.,* 288th meeting, paragraph 19.
[83] *Ibid.,* 281st meeting, paragraph 9.
[84] League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee* (*Official Journal,* Special Supplement No. 16) p.117.
[85] *Ibid.,* p.117. See paragraph 22 above.
[86] *Ibid.,* p.117.
[87] League of Nations, *Records of the Fifth Assembly, Minutes of the Third Committee* (*Official Journal,* Special Supplement No. 26), p.138.

(b) *The International Law Commission*

386. Several members of the Commission expressed the opinion that preventive action against aggression might, in certain cases, be justified.

387. Mr. François stated:

"The acts listed, for example, in the Soviet Union draft resolution, acts which it was proposed to prohibit altogether, might in certain circumstances be justified under international law as a defence against a premeditated and disguised act."[88]

388. Mr. Hsu stated:

"...if Panama for example were threatened with aggression, was she to wait for the armed attack to take place? If she forestalled it, no one would denounce her as an aggressor."[89]

389. Mr. Córdova stated:

"One further instance should be added, one which as a matter of fact could be brought under the heading of self-defence...where a State did not wait until the first shot had been fired before defending itself."[90]

(c) *Sixth Committee of the General Assembly*

390. Mr. Spiropoulos (Greece) stated:

"There must also be aggressive intention....The right to shoot first in self-defence was recognized in all criminal codes. When there was impending aggression a State had the right to attack first in self-defence, although no actual act of aggression had taken place, to counter the aggressive intention of the other State. The League of Nations Permanent Advisory Commission (opinion of the Belgian, Brazilian, French and Swedish delegations) had expressed a similar idea."[91]

391. Mr. Fitzmaurice (United Kingdom) stated:

"From the military point of view, there were few definitions of the enumerative type which might not have a most serious effect on the defensive prospects of a victim of aggression. On the basis of such a list of facts as was contained in the USSR draft resolution, an intending aggressor could easily make it impossible for the intended victim to protect itself adequately without committing or appearing to commit one of such acts, or could seriously prejudice its means of defence."[92]

392. Mr. Maktos (United States of America) stated:

"The USSR draft resolution (A/C.6/L.208) provided that 'that State shall be declared the attacker which first commits' certain acts, one of which was 'the carrying out of a deliberate attack on the ships or aircraft' of another State. He wondered whether under that wording the United States of America would have been considered an aggressor if it had received prior notice of the attack on Pearl Harbour and had destroyed the enemy forces entrusted with that operation. Such a definition might require a State to let itself be attacked before it could defend itself.

"The USSR draft resolution (A/C.6/L.208) defined the aggressor as the one who was the 'first' to commit such actions. In his view that definition was illusory, for the word 'first' was not defined, nor were the expressions which followed it. To ask a State to wait so as not to be the 'first' to attack might give the enemy a great tactical advantage."[93]

393. Mr. van Glabbeke (Belgium) said:

"...the United States would have been regarded as an aggressor if it had attacked the Japanese, even on the high seas, to prevent the bombing of Pearl Harbor; and Argentina or Brazil would be an aggressor if it destroyed aircraft-carriers, close to those States' territorial waters, which were about to bomb them with atom bombs."[94]

394. Mr. van Glabbeke (Belgium) further stated:

"The Polish representative had taken the Belgian delegation to task for having defended an argument which might permit a 'preventive' war. But the representative of Poland had actually contended that, when his country was invaded from the east and the west in 1939, it had been the victim of aggression only on the part of Germany; the entry of the Russian armies into Poland had been a 'preventive' measure which had saved Poland from being completely occupied by the Nazi troops. There was an obvious contradiction in that argument."[95]

2. OPINION THAT A STATE WHICH ATTACKS IN ORDER TO FORESTALL AGGRESSION IS AN AGGRESSOR

(a) *To attack the aggressor before he commits his act of aggression is to launch a preventive war.*

395. It was replied that, in the past, States that have started a war have usually claimed that that war was in fact a defensive one, having been intended to forestall an attack which was being prepared against them.

396. Mr. Morozov (USSR) said:

"The United States representative's claim that the country which attacked first was not necessarily the aggressor proved that the only argument brought against the USSR's constructive proposal was a theory justifying preventive war."[96]

397. It was pointed out that the fact that a country increases its armaments so as to achieve military superiority over another does not necessarily imply that it intends to commit an act of aggression.

398. Mr. Alfaro said in the International Law Commission:

"...industrial mobilization, stocking of strategic materials, full-fledged functioning of war industries, scientific research in connexion with warfare, propaganda, an attitude of ill will in the press and the population of a State towards another State, espionage on the armaments and activities of other countries, even military mobilization, do not by themselves alone constitute aggression. They are preparatory acts which may lead to aggression as well as to self-defence."[97]

399. Similarly, Mr. Robinson (Israel) said:

"...certain acts regarded by the League of Nations as constituting signs of an intention of aggression

[88] A/CN.4/SR.93, paragraph 19.
[89] *Ibid.*, paragraph 30.
[90] *Ibid.*, paragraph 40.
[91] *Official records of the General Assembly, Sixth Session, Sixth Committee*, 279th meeting, paragraph 10.
[92] *Ibid.*, 281st meeting, paragraph 13.
[93] *Ibid.*, 282nd meeting, paragraphs 6 and 20.
[94] *Ibid.*, 287th meeting, paragraph 39.
[95] *Ibid.*, 292nd meeting, paragraph 56.
[96] *Ibid.*, 288th meeting, paragraph 34.
[97] A/CN.4/L.8, pages 19–20.

—for example the theoretical or actual preparation of industrial mobilization or the establishment of war industries—were now no longer regarded as such."[98]

400. As was pointed out, for example, at the Disarmament Conference, it is not so much the volume of a country's armaments which creates the danger of war as the mentality of the rulers who have possession of those armaments. Hence, the Permanent Advisory Committee of the League of Nations stated that governments can only judge

"...by an *impression* based upon the most various factors, such as:

The political attitude of the possible aggressor;

His propaganda;

The attitude of his Press and population;

His policy on the international market, etc."[99]

(b) *The responsibility for taking the necessary action to prevent aggression rests with international organs, not with States acting on their sole initiative.*

401. Mr. Ogrodzinski (Poland) expressed regret, in the Sixth Committee,

"that some representatives had advocated preventive war, despite the existence of an international organization, of a system of collective security and of a body such as the Security Council whose task it was to safeguard international peace and security."[100]

402. In his report, Mr. de Brouckère stressed the importance of the role of the Council of the League of Nations in the prevention of aggression.[101]

403. It will be noted that, during its third session, the International Law Commission, in its draft Code of Offences Against the Peace and Security of Mankind, listed as two separate offences (offences 3 and 7) certain acts consisting in the preparation of aggression.[102]

404. The first of these offences is the following:

"(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

405. The second offence is the following:

"(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or on other restrictions of the same character."

406. But these provisions relate to penal measures applied after the event against persons responsible for acts of aggression already committed. What mainly concerns States is the prevention of aggression, an obligation which falls not on a criminal court but on the political organs of the international institution.

Section VII. Acts not involving the actual use of force which should be considered as acts of aggression

407. Reference has been made to indirect aggression, economic aggression and to the refusal to accept procedure for the peaceful settlement of disputes.

1. Indirect aggression

408. The concept of indirect aggression is comparatively recent, having been discussed and introduced into international law during the life of the United Nations.

(i) *Texts*

(a) *The Charter*

409. The Charter does not speak of indirect aggression. Mr. Spiropoulos (Greece) said in this connexion:

"The difficulty of defining aggression was apparent from a consideration of the case of indirect aggression. Article 51 of the Charter covered only armed attack. It was obvious, however, that a definition of aggression must fall within the framework of the Charter. Could the right of self-defence be exercised only in application of Article 51? He put the question without any attempt to answer it..."[103]

410. Mr. Röling (Netherlands) said:

"Article 51 of the charter referred only to the inherent right of self-defence in the event of 'armed attack'. But if the right of self-defence was based on the right of self-preservation, a State must surely have the right to defend itself against both types of aggression."[104]

(b) *General Assembly resolution 380 (V)*

411. In its resolution 380 (V) of 17 November 1950, the General Assembly, although it does not use the expression 'indirect aggression', seems, by the terms which it uses, to endorse the concept.[105]

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[98] *Official records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 32.

[99] League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee* (*Official Journal*, special supplement number 16, page 117.)

[100] *Official records of the General Assembly, Sixth Session, Sixth Committee* 292nd meeting, paragraph 24.

[101] Mr. de Brouckère stated:

"It cannot be repeated too often that it is not to place on record a breach of the Covenant that the Council should be convened in the ordinary course of things but to prevent it. It was in Article 11 that, with great wisdom, the authors of the Covenant prescribed the convening of the Council and not in Article 16. The declaration that Article 16 take effect may, in the worst case, be the final act of the Council, but it is unthinkable, unless the League has failed in its task, that this should be its first act and that the purpose for which it is convened should be merely to accept the irremediable.

"Between the first hostile act and a definite resort to war, a certain period of time, of varying length, will always intervene. Cases can be imagined in which that period would extend over several months, others are conceivable in which it would last but a few hours. The constant purpose of the League's endeavour should be to organize in such a way that, however short a time available, it may always be in time to make a final attempt at maintaining peace.

"If the Council only met after war has been declared, if it thus neglected or lost the opportunity of doing anything more than intervening in war instead of preserving peace, its wartime task would thereby become much more difficult, for it would lack the most valuable information necessary to decide, with a full knowledge of the facts, which State had really broken Article 16 and against which State the coalition of all peaceful nations should direct its action." See League of Nations document A.14.1927.V, page 70.

[102] A/1858, paragraph 59.

[103] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 292nd meeting, paragraph 6.

[104] *Ibid.*, 289th meeting, paragraph 38.

[105] See above, paragraph 126.

(c) *Report of the International Law Commission*

412. The International Law Commission declared itself in favour of including indirect aggression in the definition of aggression. In this connexion, the report of the Commission on its third session states:

"The Commission gave consideration to the question whether indirect aggression should be comprehended in the definition. It was felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organized bands for offensive purposes directed against another State, and the sending of 'volunteers' to engage in hostilities against another State. In this connexion account was taken of resolution 380 (V), adopted by the General Assembly on 17 November 1950..."[106]

It will be noticed that the examples quoted refer to cases involving the complicity of a State in violent activities directed against another State.

(d) *The Charter of the Organization of American States—Bogotá, 30 April 1948*

413. Article 15 of this Charter includes the following provision:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."[107]

(ii) *What constitutes indirect aggression?*

414. The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative. Representatives who have referred to indirect aggression have sometimes mentioned it in general terms, and at other times have pointed to certain facts which, in their view, constitute indirect aggression.

415. Indirect aggression is a general expression of recent use (although the practice itself is ancient), and has not been defined. The concept of indirect aggression has been construed to include certain hostile acts or certain forms of complicity in hostilities in progress. This form of indirect aggression was mentioned above[108] with reference to the discussion of possible omissions in the list of acts constituting aggression contained in the enumerative definition.

416. What will be considered here are cases of indirect aggression which do not constitute acts of participation in hostilities in progress, but which are designed to prepare such acts, to undermine a country's power of resistance, or to bring about a change in its political or social system.

(a) *Intervention in another State's internal or foreign affairs*

417. The definition of aggression submitted by Bolivia at the San Francisco Conference (1945) included among acts of aggression:

"(*e*) Intervention in another State's internal or foreign affairs."[109]

418. Article 15 of the Charter of the Organization of American States signed at Bogotá on 30 April 1948 provides that:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. . ."[110]

419. Article 3 of the draft declaration of the Rights and Duties of States prepared by the International Law Commission in 1949 states:

"Every State has the duty to refrain from intervention in the internal or external affairs of any other State."[111]

(b) *Intervention or interference in the affairs of another State*

420. This may assume the most varied forms: e.g., encouraging a party, paying it funds, sending weapons etc.

421. The definition of aggression submitted by the Philippines at the San Francisco Conference in 1945 contained this clause:

"(4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation."[112]

(c) *Violation of the political integrity of a country by subversive action*

422. Mr. Fitzmaurice (United Kingdom) said, with regard to the USSR draft resolution:

". . . it was completely silent about what had come to be generally recognized as one of the major causes of aggression, namely, the indirect aggression involved in an attempt to attack the political integrity of a country by subversive action against its government."[113]

423. Mr. Fitzmaurice referred, on another occasion, to the dispatch of nationals to a foreign country for subversive purposes:

"If a State were to send several million unarmed men into a small neighbouring State, it would give the small State a reason for exercising its right of self-defence, for several millions of even unarmed men were capable of taking over the nerve centres of a State and thus weakening it. It could be seen once more that the concepts of aggression and of self-defence were complementary and that it was impossible to define one without the other."[114]

[106] A/1858, paragraph 47.

[107] See Pan American Union, *Law and Treaty Series No. 23,* (Washington 1948), page 26.

[108] See above, paragraphs 328 *et. seq.*

[109] See paragraph 113 above.

[110] See Pan American Union, *Law and Treaties Series No. 23* (Washington 1948), page 26.

[111] See the report of the Commission on its first session, A/925, *Official Records of the General Assembly, Fourth Session, Supplement No. 10,* page 8.

[112] See paragraph 115 above.

[113] *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 281st meeting, paragraph 9.

[114] *Ibid.,* 292nd meeting, paragraph 40.

424. Mr. van Glabbeke (Belgium) quoted a similar case:

"The second act, given in sub-paragraph (*b*), was invasion by armed forces even without a declaration of war. But that failed to cover new refined forms of aggression, such as that employed by Hitler in sending technicians from the German army into Austria disguised as "tourists" to capture the country's means of communication and support a political party bent on seizing power with German assistance."[115]

(d) *Incitement to civil war*

425. As indicated above, General Assembly resolution 380(V) of 17 November 1950 states that:

"...any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power . . . is the gravest of all crimes against peace and security throughout the world. . ."[116]

426. On the basis of this General Assembly resolution, the International Law Commission included the following offences (No. 5) in the draft Code of Offences against the Peace and Security of Mankind:

"The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State."[117]

427. Mr. Crépault (Canada) said that it was "more important still" that the USSR proposal:

"...did not mention indirect aggression consisting of an attempt to attack the political integrity of a country . . . by fomenting civil strife."[118]

428. On 11 January 1952 Bolivia submitted a draft resolution to the Sixth Committee to the effect that:

"... action taken by a State, overtly or covertly, to incite the people of another State to rebellion with the object of changing the political structure for the benefit of a foreign Power"[119]

should be considered as an act of aggression.

(e) *Maintenance of a fifth column*

429. Mr. Hsu (China) included in his definition of aggression:

"Planting of fifth columnists in a victim State..."[120]

(f) *"Ideological" aggression and propaganda*

430. Mr. Röling (Netherlands) stated:

"... nations were prepared to fight to protect their own way of life. Their way of life could be destroyed by other means than war, namely by indirect aggression, economic and ideological, which had now come to be feared even more than war itself . . ."[121]

431. Mr. Sastroamidjojo (Indonesia), similiarly said:

". . . a country could conquer another by a 'military' aggression, 'economic' aggression or 'ideological' aggression. History was full of instances of economic and ideological aggression, which were just as dangerous as military aggression."[122]

432. Ideological aggression is characterized by the dissemination of political ideas. Propaganda addressed by a country to its own nationals does not enter into consideration here; what is referred to is appeals directed at the inhabitants of other countries.

433. Mr. Chaudhuri (India) said:

"Everybody was aware that aggression did not necessarily imply resort to armed force; for propaganda and aid to rebel organizations . . . were means of undermining the government of the victim State, and hence of achieving the purposes of aggression."[123]

434. Mr. Ammoun (Lebanon) said, with reference to the USSR draft resolution:

". . . it did not mention, among what might be described as intellectual and moral cases, propaganda intended to overthrow economic, social or political systems. . ."[124]

435. Ideological aggression might consist of propaganda in various forms directed at foreigners; e.g., radio broadcasts, dispatch of pamphlets, proclamations, etc. The object of such propaganda may simply be to disseminate a doctrine, or to discredit a government or a régime. But it may go further and constitute incitement to civil strife. The distinction between the first and second types of propaganda is sometimes difficult to make.

436. Mr. Spiropoulos (Greece) expressed concern in this connexion:

"Resolution 380(V) of the General Assembly spoke of fomenting civil strife in the interest of a foreign Power. He was afraid that that expression could not be applied, for example, to speeches made or articles published in another State."[125]

437. Article 19 of the Universal Declaration of Human Rights of 10 December 1948 provides that:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[126]

(iii) *Position taken by States of indirect aggression*

438. A fairly large number of representatives supported the concept of indirect aggression; i.e., the representatives of Canada, China, Colombia, Dominican

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[115] *Ibid.*, 287th meeting, paragraph 38.

[116] See paragraph 126 above.

[117] A/1858, paragraph 59.

[118] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 42.

[119] A/C.6/L.211.

[120] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 278th meeting, paragraph 50.

[121] *Ibid.*, 289th meeting, paragraph 37.

[122] *Ibid.*, 290th meeting, paragraph 49.

[123] *Ibid.*, 282nd meeting, paragraph 46.

[124] *Ibid.*, 286th meeting, paragraph 27.

[125] *Ibid.*, 292nd meeting, paragraph 7.

[126] *Official Records of the Third Session of the General Assembly, Part I, Resolutions*, page 74.

Republic, India, Indonesia, Iran, Lebanon, United Kingdom, Uruguay.[127]

439. Mr. Morozov (USSR) said that indirect aggression was covered by the USSR draft.

> "Paragraph 1 (f) of the USSR draft resolution amply showed that the draft resolution did cover indirect aggression."[128]

440. Mr. Moussa (Egypt) expressed certain objections to the proposal to include the concept of indirect aggression. He said in that connexion:

> "The problem of indirect aggression had not been considered at the San Francisco Conference. For the Charter, aggression consisted solely in armed attack. As any attempt to expand the concept of aggression beyond armed attack would be a departure from the Charter, the Committee should confine itself to that one aspect."[129]

2. ECONOMIC AGGRESSION

(a) *Emergence of the concept of economic aggression*

441. The concept of economic aggression is new. Economic aggression was covered in the draft definition submitted to the Sixth Committee by Bolivia on 11 January 1952,[130] which states:

> "Also to be considered as an act of aggression shall be . . . unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, thus jeopardizing the security of that State or rendering it incapable of acting in its own defence and co-operating in the collective defence of peace."

442. Mr. Iturralde (Bolivia) said in support of the Bolivian proposal:

> "In that connexion, however, it would be noted that, although there was legal equality as between States, there was no economic equality, and the economically powerful were in a position to exercise pressure on economically weaker States, with the result that such treaties might not always be fair to all parties. When because of such pressure, a treaty was not just, it constituted aggression."[131]

443. Mr. Röling (Netherlands) spoke of

> ". . . indirect aggression, economic and ideological, which had now come to be feared even more than war itself."[132]

444. Mr. Sastroamidjojo (Indonesia) said with reference to Mr. Röling's statement:

> "History was full of instances of economic and ideological aggression, which were just as dangerous as military aggression."[133]

445. It will be noted that article 16 of the Charter of the Organization of American States signed at Bogotá on 30 April 1948 states that:

> "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."[134]

(b) *Criticism of the concept of economic aggression*

446. The concept of economic aggression appears particularly liable to extend the concept of aggression almost indefinitely. The acts in question not only do not involve the use of force,[135] but are usually carried out by a State by virtue of its sovereignty or discretionary power. Where there are no commitments a State is free to fix its customs tariffs and to limit or prohibit exports and imports. If it concludes a commercial treaty with another State, superior political, economic and financial strength may of course give it an advantage over the weaker party; but that applies to every treaty, and it is difficult to see how such inequalities, which arise from differences in situation, can be evened out short of changing the entire structure of international society and transferring powers inherent in States to international organs.

447. Mr. Fitzmaurice (United Kingdom) said in this connexion:

> "...if all aggression was in fact illegal, every illegality was not aggression. It was not desirable to brand certain minor illegalities as acts of aggression. Such definitions might even mention as "aggression" some acts which were not illegal. There was a danger of that kind in the Bolivian draft resolution (A/C.6/L.211), which dealt with economic aggression in vague terms. He fully understood the concern of those who put forward such a theory; the fact nevertheless remained that no country could be compelled to sell its products to another country if it was not so bound by an agreement. Under too broad a definition, such an attitude, which was perfectly legal, as well as certain measures relating to customs tariffs or trade quotas, might be considered as constituting aggression...
>
> "By extending the notion of aggression, the Security Council's field of action would be extended. Without supporting or opposing such a possibility, Mr. Fitzmaurice considered it an important point. Under Article 39 of the Charter, the inclusion of the idea of economic or ideological aggression would give the Security Council power to take action in cases of that nature. Yet, as the Egyptian representative had pointed out, aggression had been understood solely as armed aggression when the Charter was drafted."[136]

448. Mr. Moussa (Egypt) said:

> "...any attempt to expand the concept of aggression beyond armed attack would be a departure from the Charter...It was true that the Charter demanded co-operation among Member States in solving economic problems, but a breach of that pro-

[127] *Ibid.*, Canada, 282nd meeting, paragraph 42; China, 278th meeting, paragraph 50; Colombia, 281st meeting, paragraph 53; Dominican Republic, 283rd meeting, paragraph 38; India, 282nd meeting, paragraph 46; Indonesia, 290th meeting, paragraph 49; Iran, 290th meeting, paragraph 40; Lebanon, 286th meeting, paragraph 27; United Kingdom, 281st meeting, paragraph 9; Uruguay, 288th meeting, paragraph 9; Bolivia, proposal made at the San Francisco Conference (paragraph 113 above); Philippines, *idem* (paragraph 115 above).

[128] *Ibid.*, 288th meeting, paragraph 18.

[129] *Ibid.*, 291st meeting, paragraph 9.

[130] A/C.6/L.211.

[131] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 293rd meeting, paragraph 30.

[132] *Ibid.*, 289th meeting, paragraph 37.

[133] *Ibid.*, 290th meeting, paragraph 49.

[134] See Pan American Union, *Law and Treaty Series, No. 23* (Washington 1948), page 27.

[135] The naval blockade, which has far-reaching economic effects, is a military measure and must be considered as such.

[136] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 292nd meeting, paragraphs 47 and 48.

vision would not automatically lead to the application of collective security measures. If the breach became very serious and developed into a threat to the peace, any State could always complain to the Security Council."[137]

3. Rejection of peaceful procedures

449. The idea of considering as an aggressor a State which refuses to submit an international dispute to procedure for peaceful settlement or to abide by the decision resulting from that procedure is an old one which has always been favoured in certain circles.[138]

450. It may be noted that whenever the attempt has been made to enact a general prohibition of war or the use of force through a new international instrument, the proposal has been to make peaceful settlement procedure obligatory and implementation of the decision resulting from that procedure binding. The reason given has been that if States are no longer free to take the law into their own hands by resorting to force, they must be assured of obtaining recognition and respect of their rights by some other means.

451. This idea found practical expression in the Draft Treaty of Mutual Assistance of 1933 (article 1)[139] and also in the Geneva Protocol of 1924 (article 10).[140]

452. When in 1931 it was attempted *to amend the Covenant of the League of Nations in order to bring it into harmony with the Pact of Paris*, it was very emphatically maintained by some delegates that if the "gaps" in the Covenant which allowed for the possibility of war were closed, States would in every case have to be given some means other than war to secure recognition and respect of their rights.[141]

453. At San Francisco, Bolivia submitted a draft definition of aggression under which the following were to be considered as acts of aggression:

"....

"(f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement;

"(g) Refusal to comply with a judicial decision lawfully pronounced by an International Court."[142]

Section VIII. Self-defence

1. The enumerative definition does not mention self-defence

454. The definition was criticized on that ground.[143] U Zaw Win (Burma) therefore proposed the addition of an appropriate provision to cover cases in which States acted

"in virtue of the right of self-defence, individual or collective, in the circumstances laid down in Article 51 of the Charter."[144]

455. It may be noted that the definition contained in the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947,[145] the definitions proposed in the International Law Commission and the first offence against the peace and security of mankind defined by the Commission[146] mention the right of self-defence.

456. It appears certain that in the minds of its sponsors the enumerative definition in no way omits or limits the right of self-defence, although the definition itself does not mention that right. Mr. Politis, in submitting to the General Commission of the Conference for the Reduction and Limitation of Armaments the definition formulated by the Committee on Security Questions, said:

". . . in the enumeration of the acts of aggression which M. Politis would describe later, the State which first committed one of the acts mentioned was declared the aggressor. Emphasis should be laid on the word 'first'. It might very well be that, in the complicated circumstances of an international dispute, there might at one time or another have been committed by either party certain acts coming within the scope of the definition in the Act. The only way of having a clear view in so complicated a situation and so being able to apportion the responsibilities and finally to determine the aggressor was to observe the chronological order of events—namely, to ascertain who had been the first to begin to commit one of the forbidden acts—since, once it was proved that one of the parties had been the first to commit one of those acts, the attitude of the other party would immediately be seen to be that of legitimate defence and, by that fact alone, should be excluded from the conception of aggression."[147]

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[137] *Ibid.*, 291st meeting, paragraph 9.

[138] In May 1910, Mr. G. Moch stated at the XVIIIth Universal Peace Congress:

"As a general principle, there exists self-defence either against a State which unexpectedly attacks another State, or against a State which was offered a fair means of having a given dispute settled juridically and which declines this offer or which in practice nullifies its effect." (*XVIIIth Universal Peace Congress, Stockholm*, 1910-1911), page 219.

More recently, the group set up by the Royal Institute of International Affairs (Chatham House) to study the problem of sanctions stated:

"One definition of aggression by a state might run something on these lines: 'Aggression is the act of a state which after refusing to submit a dispute to a process of peaceful settlement, or to abide by the result of such a submission, resorts to the use of armed force against the other state or states concerned." (*International Sanctions* (1938), page 185).

[139] See paragraph 25 above.

[140] See paragraphs 34 - 36 above.

[141] See, e.g., League of Nations document C.160.M.69.1930.V, pages 44 and 45.

Mr. Cassin said in the First Committee of the Assembly:

". . . it was plain that if the total prohibition of war were incorporated in the Covenant, and if the countries were deprived of their traditional right to exercise their own discretion in carrying out an award, that would be conferring a very grave responsibility and a particularly heavy duty on the Council, since any failure on the part of the League in this matter would have incalculable consequences and might even cause a reaction."

See League of Nations, *Records of the Twelfth Ordinary Session of the Assembly, Minutes of the First Committee* (*Official Journal*, Special Supplement No. 94, page 36).

[142] See paragraph 113 above.

[143] See, e.g., Mr. Herrera Baez (Dominican Republic), *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 283rd meeting, paragraph 39.

[144] *Ibid.*, 284th Meeting, paragraph 38.

[145] See paragraph 201 above.

[146] See A/1858, chapters III and IV.

[147] League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B (Minutes of the General Commission), Vol. II, page 500.

457. Neither the Covenant of the League of Nations nor the Pact of Paris, of that period, mentioned self-defence, whereas the United Nations Charter refers to it explicitly in Article 51.

2. SELF-DEFENCE AND THE CHRONOLOGICAL ORDER OF EVENTS

458. Self-defence is a response to an act of aggression. This is true both in municipal criminal law and in international law. In the passage just quoted, Mr. Politis said:

> ". . . the State which first committed one of the acts mentioned was declared the aggressor. Emphasis should be laid on the word 'first'."

459. In the same connexion Mr. Spiropoulos said:

> ". . . the State to be considered as responsible must be *the first* to act. This element, which one encounters in all the definitions of aggression, is logically inherent in any notion of aggression. Aggression is presumably: *acting as first*."[148]

460. In the International Law Commission, Mr. Alfaro quoted the case of the United States declaration of war against Japan after the attack on Pearl Harbor.[149] Similarly, Mr. Fitzmaurice (United Kingdom) said:

> "On the international plane, it was clear that an invasion, for instance, did not constitute an aggression in a case where the invader sought to gain control of bases from which aeroplanes were bombing his own territory."[150]

461. In the two cases quoted, there seems to be no possible doubt. States which react to an attack against them by declaring war, or which attempt to gain control of bases from which aeroplanes have been bombing their territory, are not committing an act of aggression because they are merely taking action against aggression directed against them.

462. In reality, the opponents of an enumerative definition do not object to the principle of the chronological sequence of events. They advance two arguments of a different kind. The first is that the acts which the definition makes it obligatory to consider as acts of aggression may not be of decisive effect. The second is that in certain cases when hostilities have broken out, the chronological order of events cannot be established.[151]

3. INDIVIDUAL AND COLLECTIVE SELF-DEFENCE

463. If the definition of aggression is to be interpreted as allowing the right of self-defence, this covers both collective and individual self-defence. Article 51 of the Charter is quite explicit on this point. Thus, if State A commits aggression against State B, the latter, exercising its right of individual self-defence, is authorized to employ force against State A. But State C, which is a third party, is also authorized to employ force against State A by coming to the assistance of State B. It then exercises the right of collective self-defence.

464. Thus, in 1914, the United Kingdom, when it declared war on Germany, which had previously violated the neutrality of Belgium, did not commit aggression within the meaning of the definition. Nor did it commit aggression in 1939 in declaring war on Germany, which had previously attacked Poland.[152]

SECTION IX. COLLECTIVE ACTION BY THE UNITED NATIONS

465. The enumerative definition of aggression proposed by the Soviet Union was criticized for not providing for collective action by the United Nations.[153] Such collective action may be undertaken in a number of cases. The first and most important case is the restoration of peace when it has been broken as a result of aggression. Individual or collective self-defence in accordance with Article 51 of the Charter is then followed by organized action by the Security Council or, failing that, by the Assembly under resolution 377 (V) of 3 November 1950.

466. Secondly, there are the cases in which force may be used in the absence of an act of aggression or breach of the peace, pursuant to a resolution by a United Nations organ. Thus, under Article 39, the Security Council may act in cases where it merely determines "the existence of any threat to the peace" and where, under Article 96, paragraph 2, it "may . . . make recommendations or decide upon measures to be taken to give effect" to a judgment of the International Court of Justice.

467. Of course, general definitions of aggression mention collective action by the United Nations as well as individual or collective self-defence. But it can apparently be said that any definition of aggression conceived within the framework of the Charter, even if it does not mention collective action, must be interpreted as in no way cancelling or limiting the powers vested in United Nations organs by the United Nations Charter.

Chapter II

GENERAL DEFINITIONS

468. As indicated above, general definitions of aggression, instead of enumerating the forms of aggression, offer a formula expressing a concept of aggression, that formula being required to cover every possible case.[154] Some treaties contain general definitions.

[148] A/CN.4/44, page 65.

[149] A/CN.4/L.8, page 10.

[150] *Official Records of the General Assembly, Sixth Session, Sixth Committee,* 292nd meeting, paragraph 37.

[151] See the observations on these arguments by Mr. Eden (United Kingdom) in the General Commission of the Disarmament Conference on 25 May 1933, League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments,* Series B (Minutes of the General Commission), Vol. II, pages 513-514, and the reply of Mr. Politis (*Ibid.,* page 515).

[152] These cases were quoted by Mr. Alfaro (A/CN.4/L.8, page 10), by Mr. Fitzmaurice (United Kingdom) (*Official Records of the General Assembly, Sixth Session, Sixth Committee,* 281st meeting, paragraph 11), and by Mr. van Glabbeke (Belgium) (*Ibid.,* 287th meeting, paragraph 37).

[153] Mr. Maktos (United States of America) said in this connexion:

> "The USSR draft resolution did not take account of the legality of the use of armed force at the request of the United Nations. Resort to force was one of the international community's means of re-establishing peace and security." (*Ibid.,* 282nd meeting, paragraph 13).

Mr. Bernstein (Chile), also, said:

> "The USSR draft resolution . . . omitted to state that the acts enumerated would not be regarded as acts of aggression if they were committed in consequence of a decision or recommendation of the United Nations." (*Ibid.,* 281st meeting, paragraph 29).

[154] To quote the words of Mr. Scelle, the definition must be "essential, general and abstract" (E/CN.4/SR.93, paragraph 92.)

469. When at its third session the International Law Commission took up the question of defining aggression, it set aside the method of enumerative definition and studied various drafts of a general definition, without finally adopting any.[155]

SECTION I. THE SUBSTANCE OF THE GENERAL DEFINITIONS

1. DEFINITIONS EMBODYING THE PRINCIPLE OF PROHIBITION OF THE USE OF FORCE, SUBJECT TO TWO STATED EXCEPTIONS

470. In the International Law Commission, Mr. Córdova submitted the following definition:

"Aggression is the direct or indirect employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations."[156]

471. Mr. Alfaro proposed the following definition:

"Aggression is the use of force by one State or group of States, or by any government or group of governments, against the territory and people of other States or governments, in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations."[157]

472. The definition proposed by Mr. Amado is on the same lines as the two previous ones:

"Any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations (is) an aggressive war."[158]

473. The definition drafted by the Commission, which was rejected in the final vote, is of the same type, reading 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-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."[159]

2. DEFINITIONS SPECIFYING THE AGGRESSOR'S OBJECTIVE

474. The treaty of 21 January 1939 between Finland and the Union of Soviet Socialist Republics provides that:

"Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations."[160]

475. Mr. Scelle proposed the following definition:

"Aggression is an offence against the peace and security of mankind. This offence consists in any resort to force contrary to the provisions of the Charter of the United Nations, for the purpose of modifying the state of positive international law in force or resulting in the disturbance of public order."[161]

476. Mr. Yepes submitted the following definition:

"For the purposes of Article 39 of the United Nations Charter an act of aggression shall be understood to mean any direct or indirect use of violence (force) by a State or group of States..."[162]

477. The Act of Chapultepec of 8 March 1945 provides that:

"(*j*)...any attempt on the part of a non-American state against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered an act of aggression against all the American States."[163]

SECTION II. CRITICISM OF THE GENERAL APPROACH

478. As already stated,[164] general definitions have been criticized as useless because they would add nothing to the legal provisions—in this instance, of the United Nations Charter—already in force, and because the difficulty is to determine the scope of the general terms used in the definition.[165]

Chapter III

COMBINED DEFINITIONS

479. Supporters of the combined definition assert that it unites the advantages and avoids the disadvantages of the general definition and the enumerative definition.

480. Such a definition begins with a general statement of principles. This is followed by a list of a number of cases in which the general principles are applied. But this list is not restrictive, and the competent international organs may, in pursuance of the general principles, designate as the aggressor a State which has committed an act other than those contained in the list.

481. Mr. Bartos (Yugoslavia) said in this connexion:

"He fully recognized the defects of both the general and the enumerative methods and did not believe that either method on its own would be satisfactory. That, however, did not mean that it was impossible to define aggression. In his opinion, the two methods should be combined, with the enumeration serving as a set of examples but not as an exhaustive list. At the same time, the competent organs of the United Nations would use their own discretion in the case of acts of aggression which were not

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[155] See paragraphs 128–134 above.

[156] A/1858, paragraph 44. The proposal includes this additional provision:

"The threat of aggression should also be deemed to be a crime under this article."

[157] *Ibid.*, paragraph 46.

[158] *Ibid.*, paragraph 40.

[159] *Ibid.*, paragraph 49.

[160] See League of Nations, *Treaty Series*, Vol. 157, page 397.

[161] A/1858, paragraph 53.

[162] *Ibid.*, paragraph 42.

[163] See paragraph 200 above.

[164] See paragraphs 242–244 above.

[165] Mr. el Khoury said in the International Law Commission:

". . . the Commission must either draw up a concrete definition or no definition at all. In any case, if an abstract definition were adopted, it must be accompanied by concrete examples . . ." (A/CN.4/SR.109, paragraph 56).

covered by the list. That method had already been used before, for example in the definition of the crime of genocide."[166]

482. In the Sixth Committee, the representatives of France,[167] Cuba,[168] Lebanon[169] and Ecuador[170] expressed some support for the idea of a combined definition.

483. On 17 January 1952 the Egyptian delegation submitted an amendment to the USSR proposal, requiring the insertion of a general formula at the beginning of the definition, and the elimination of the list's restrictive character.[171]

484. The Inter-American Treaty of Reciprocal Assistance adopted at Rio de Janeiro on 2 September 1947 was quoted[172] as a practical example of the combined definition. Article 1 of the Treaty lays down a general principle, and article 9 gives a number of practical applications.[173]

485. Some representatives questioned the advantages of the combined definition. Mr. van Glabbeke (Belgium) said in this connexion:

"The third method, combining the other two, had the disadvantages of both."[174]

486. The objections, having particular reference to the idea of a non-restrictive list, which is one of the elements of a combined definition, have been dealt with above.[175]

[166]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 289th meeting, paragraph 55.

[167]Mr. Chaumont said: "The analytic and synthetic methods could, perhaps, be combined . . ." (*Ibid.*, 280th meeting, paragraph 9).

[168]Mr. Cortina said: "There would then be a list of the main acts which might constitute aggression and, in addition, a general formula to cover any other acts which were not listed. That was no new idea. Such a solution was often used in penal codes to cover offences which would otherwise be very difficult to define." (*Ibid.*, 285th meeting, paragraph 27).

[169]Mr. Ammoun said: "... it would be possible to combine the advantages of the analytical and synthetic systems." (*Ibid.*, 286th meeting, paragraph 28).

[170]See Mr. Bustamante, *Ibid.*, 290th meeting, paragraph 28.

[171]A/C.6/L.213. The formula is worded thus: "That any act whereby a State infringes the territorial integrity or political independence of another State constitutes aggression."

[172]Mr. Cortina (Cuba) said: ". . . that particular method had in fact been used to define aggression in article 9 of the Inter-American Treaty of Reciprocal Assistance adopted at Rio de Janeiro in 1947, which, being not a mere declaration but a legally binding treaty, was an important precedent to which the Committee had not yet paid sufficient attention." (*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 285th meeting, paragraph 27).

In the International Law Commission, Mr. Alfaro said: "Should it be found desirable to enumerate acts of aggression, it would be necessary to use a language similar to that of the Rio de Janeiro Treaty of 1947, and adopt a clause drafted more or less as follows: *In addition to other acts which the competent organs of the United Nations may characterize as aggression* by application of the rule contained in the preceding definition, the following shall be considered as such . . ." (A/CN. 4/L.8, pages 20-21).

[173]See paragraph 201 above.

[174]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 287th meeting, paragraph 34.

[175]See paragraphs 253 *et seq.* above.

Title III

EXTENT TO WHICH A DEFINITION OF AGGRESSION WOULD BE BINDING ON THE ORGANS RESPONSIBLE FOR DETERMINING OR PUNISHING AN AGGRESSOR

487. The definition of aggression might be applied either by a United Nations organ charged with determining the aggressor, or by an international criminal tribunal responsible for sentencing persons accused of having committed aggression.[1] In order to decide whether and to what extent the definition of aggression would be binding on United Nations organs and individual States, it must be ascertained in what form and by whom the definition would be adopted.

Chapter I

VARIOUS FORMS IN WHICH A DEFINITION OF AGGRESSION MIGHT BE ADOPTED

(a) *The amendment of the Charter*

488. This procedure was mentioned by Mr. Robinson (Israel).[2] In practice the amendment of the Charter is a difficult matter. It would be particularly difficult if the point at issue was to introduce a definition of aggression into the Charter.

(b) *A convention*

489. This might be a universal convention[3] designed to regulate the operation of the international political organs (Security Council, General Assembly). Such a convention would be adopted by the General Assembly and opened for signature or accession by States.

490. It might be a regional or multilateral or bilateral convention to define the conduct and opinion of the States parties with respect to aggression.[4]

491. It might be a convention relating to international criminal law. The definition might, for example, be included in a code of offences against the

[1]A person accused of having committed a crime of aggression might conceivably be judged by a national tribunal; but this study is not concerned with that possibility.

[2]*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 282nd meeting, paragraph 35.

[3]Mr. Robinson (Israel) suggested a universal convention as one possible method (*Ibid.*, 282nd meeting, paragraph 35).

Mr. Majid Abbas (Iraq) voiced the idea of a code of the rights and duties of States (*Ibid.*, 289th meeting, paragraph 7).

Such a code could very likely be adopted in the form of a convention. In 1933, when a definition of the aggressor was drafted by the Committee on Security Questions of the Disarmament Conference, it was contemplated that the definition might be embodied either in the convention for the regulation of armaments or in a separate declaration.

[4]The Yugoslav representative stated, in his letter of 18 June 1952 to the Secretary-General: "It may well be that such a definition would provide the basis for either a general treaty on the definition of aggression, or for regional or bilateral treaties among both Member States of the United Nations and non-member States." See document A/2162.

peace and security of mankind[5] or in a separate convention (such as the Convention on Genocide of 9 December 1948).

(c) *Adoption of a resolution by the competent organs of the United Nations*

492. The proposal to define aggression was brought before the General Assembly, which discussed the matter. The General Assembly might adopt a definition by adopting a resolution. Mr. Robertson (Israel) also mentioned the possibility of the Security Council adopting a definition. He said:

"Another possible solution might be a resolution of the General Assembly and a parallel resolution of the Security Council; there was, however, no guarantee that those two organs would adopt identical texts . . ."[6]

Chapter II

LEGAL VALUE AND AUTHORITY OF THE DEFINITION, ONCE ADOPTED

SECTION I. THE DEFINITION IS ADOPTED BY RESOLUTION OF THE GENERAL ASSEMBLY OR THE SECURITY COUNCIL

1. A RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

493. What would be the legal value and authority of such a resolution with respect to the General Assembly, the Security Council or an international criminal tribunal?

(a) *Legal value and authority of the definition with respect to the General Assembly*

494. The General Assembly might itself have occasion to apply the definition it had adopted, in the circumstances provided for in General Assembly resolution 377 (V) of 3 November 1950. The General Assembly would take action if:

"the Security Council, because of the lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security."[7]

495. It is a general principle of law that an organ is bound by statutory provisions which it has itself adopted, provided that it has not rescinded them.

(b) *Legal value and authority of the definition with respect to the Security Council*

496. It was said in the Sixth Committee that a definition adopted by the General Assembly would not be binding on the Security Council. However, a definition which expressed the opinion of the majority of the General Assembly would have undoubted moral authority. When the Council had occasion to make a ruling it would bear the definition in mind, and would conform to it to the extent which it deemed expedient.

497. Mr. Chaumont (France) said:

"Now, should a definition of aggression be adopted by a General Assembly resolution, it will be useful as a guide to the Security Council, but would not be binding on the Council."[8]

498. Mr. Lerena Acevedo (Uruguay) said:

"Such a definition would not . . . be binding on the Security Council, since Articles 24 and 39 of the Charter conferred broad powers on the Security Council to determine the existence of threats to the peace and the spirit in which the decision had been taken showed clearly that it had not been intended to limit the powers of the Security Council in the matter."[9]

499. It is true that the Security Council bears sole responsibility for exercising the powers vested in it under Chapter VII, and cannot be bound by the Assembly to exercise them. But under Article 11, paragraph 2, the General Assembly may make "recommendations" to the Security Council with regard to "any questions relating to the maintenance of international peace and security."

500. Mr. Casteñeda (Mexico) expressed a somewhat different view. He felt that:

"Its (*sc.* the Security Council's) task was to verify the existence of a fact, and it could only describe that fact as aggression if a pre-determined criterion so allowed. The criterion was to be found in international law, which was binding on the Security Council..."[10]

501. In the opinion of some representatives, the resolutions of the General Assembly, particularly those of a statutory nature, might be part of international customary law.

502. Mr. Casteñeda (Mexico) said:

"A definition adopted by the General Assembly would constitute a useful guide to the Security Council, and if it became a part of international law by a convention or by any of the other means by which international law was made, the Security Council would be bound by it without any violation of Article 39 of the Charter . . ."[11]

(c) *Legal value and authority of the definition with respect to an international tribunal*

503. In the Sixth Committee the international court visualized as the organ responsible for applying the definition was a criminal court; but it is conceivable that the International Court of Justice or an *ad hoc* tribunal might have occasion to deal with a matter relating to a case of aggression.

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[5] Mr. Chaumont (France) said: "The problem was that of the definition of an international crime for inclusion in the draft Code of Offences Against the Peace and Security of Mankind." (*Official Records of the General Assembly, Sixth Session, Sixth Committee*, 280th Meeting, paragraph 5.)

[6] *Ibid.*, 282nd meeting, paragraph 35.

[7] A/1775, *Official Records of the General Assembly, Fifth Session, Supplement No. 20, Resolutions*, page 10.

Mr. Lerena Acevedo (Uruguay) said:

"A definition of aggression might, however, be of some value in regard to the powers of the General Assembly in the cases covered by General Assembly resolution 377 (V)." *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 288th meeting, paragraph 6.

[8] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 283rd meeting, paragraph 33.

Mr. Chaumont said at a later meeting: ". . . the Security Council would not be bound by a definition, but might use it as it thought fit, whereas an international judicial body would be bound." *Ibid.*, 293rd meeting, paragraph 41.

[9] *Ibid.*, 288th meeting, paragraph 5.

[10] *Ibid.*, 285th meeting, paragraph 19.

[11] *Ibid.*, 285th meeting, paragraph 20.

504. Mr. Abdoh (Iran) said:

". . . that definition could serve as a guide to United Nations bodies and at the same time have mandatory force for a judicial body to be established in the future."[12]

2. A RESOLUTION ADOPTED BY THE SECURITY COUNCIL

505. If the Security Council adopted a definition of aggression, it may be assumed that what had been said above regarding the resolutions of the General Assembly would apply in principle. A definition adopted by the Security Council would not be binding on the General Assembly, just as a definition adopted by the General Assembly would not be binding on the Security Council.

506. Another possibility which has been considered is the adoption of the same definition by the General Assembly and the Security Council in concordant resolutions.

SECTION II. THE DEFINITION IS ADOPTED IN A CONVENTION

507. In this case the convention might expressly specify that it related only to the criminal liability of States committing aggression. Failing such a clause the convention would be considered as being of general application.

508. In the case of a convention the effects of the instrument with respect to individual States and international organs must be considered.

1. EFFECTS OF THE CONVENTION WITH RESPECT TO INDIVIDUAL STATES

509. So far as the States Parties to the convention were concerned, the definition of aggression would be binding in every respect. These States would have recognized in advance that they would be guilty of aggression if they committed any of the acts covered by the definition.

510. So far as States not parties to the convention were concerned, it would be a case of *res inter alios acta*. They could legitimately consider that an act did not constitute aggression even if it came within the scope of the definition adopted in the convention.

2. THE EFFECTS OF THE CONVENTION WITH RESPECT TO INTERNATIONAL ORGANS

511. This problem was the subject of a discussion of principle in the Disarmament Conference, in connexion with one of the possibilities contemplated, namely, that the definition of aggression should be embodied in a separate international instrument.

512. Mr. Politis, speaking of the Act relating to the definition of the aggressor drafted by the Conference's Committee on Security Questions, said:

". . . the Act was conceived as of universal application. It was designed to become a general law for all States. Nevertheless, it went without saying that, should it fail to command the acceptance of all States, it would only be compulsory and its rules would only apply in relations between the States which had accepted it."[13]

513. Mr. Eden (United Kingdom) voiced the following objections:

"But even on the assumption that the States represented at the Conference were free to adopt the definition or not as they might see fit, the matter still had a bearing on the position of all countries, for the object of the draft Act, according to its preamble, was to establish the rules to be followed by the international bodies responsible for determining the aggressor, and it followed therefore that either the States which had not accepted the definition would, when acting as members of any such body which was dealing with a dispute, be compelled to apply it, or the international body concerned would find itself in the very difficult position where some of its members were bound to apply the definition while others were not."[14]

514. Mr. di Soragna (Italy) similarly said:

"Nor did he see how it could be said that this Act would not bind States which did not sign it. They would even be bound to a very large extent. That was, in fact, the difficulty.

"Of course, it might be said that States which did not sign bore no responsibility, either for the verdict or for the action to be taken. But that was absolutely impossible, since there would be an advisory body consisting of two kinds of members—those who proposed to apply the principle of the free hand, who would consider things as they were, take all details and circumstances into account in determining the consequences of the acts committed, and those who, on the contrary, had in their pockets the definition of the aggressor and had a ready-made decision in their minds. How could two such opposing conceptions be reconciled?"[15]

515. Of course organs of an international institution frequently have occasion to apply a treaty to which sometimes only a small number of the members of the institution are parties. Mr. Politis drew attention to this point and quoted the example of the Pact of Locarno.[16]

516. However Mr. di Soragna remarked in this connexion:

"...but the case before the Commission was quite a different one. The Act submitted to it contained no rules on special questions affecting only certain specific States. It contained rules relating to a problem of quite general character: the determination of the aggressor. A State could hardly risk having to accept a system under which it might, as a member of an international organization, have to help in determining the party responsible for a dispute and to determine that responsibility, not on the basis of special rules, but on the basis of a general rule which it had not accepted."[17]

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[12] *Ibid.*, 290th meeting, paragraph 41.
Mr. Abdoh did not say whether he contemplated the adoption of the definition by an ordinary resolution of the General Assembly or by a convention. As, however, the definition of aggression has been presented in the form of a proposal to be voted on by the General Assembly, speakers are assumed to be referring to this procedure unless they state otherwise.

[13] League of Nations, *Records of the Conference for the Reduction and Limitation of Armaments*, Series B, (Minutes of the General Commission), Vol. II, page 500.

[14] *Ibid.*, page 513.

[15] *Ibid.*, page 551.

[16] *Ibid.*, page 516.

[17] *Ibid.*, page 551.

517. Mr. Politis replied:

"He now received the answer: 'Yes, but the Pact of Locarno[18] lays down special rules, whereas the rules under discussion are of a general character . . .'

". . . In what sense? In character they were general rules, but they remained special rules in so far as they were only accepted by certain parties . . .

"If, therefore, two countries had concluded, within the limits authorized by general law, special Conventions which, though binding upon themselves, did not bind third parties, and if the application of the rules thus established gave rise to a discussion before the international organ, it appeared to Mr. Politis an anachronism to say: 'How do you expect the members of the international organism, who are not contracting parties, to be able to apply these rules?' . . the international organ and the members of which consisted . . . had to apply rules accepted by certain parties and to apply them solely in the relations between those parties."[19]

518. A definition of aggression enacted in a convention would be binding on international organs only in cases where States Parties to the convention were involved; but even then there is some doubt whether States not parties to the Convention would have to apply the definition to States Parties to the Convention.

519. Mr. Chaumont (France) said in this connexion:

". . . the Security Council would only be bound by the definition in so far as its members were bound by the convention."[20]

520. However, the situation would be different, Mr. Chaumont (France) believed, in the case of an international criminal tribunal. He stated:

"But if an international criminal code, defining aggression among other crimes, were to form part of an international convention laying legal obligations upon individual States or upon some special organ . . . the organ appointed to apply the definition under the convention would be bound absolutely to apply it."[21]

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[18] It will be recalled that the Pact of Locarno, to which a number of Powers were parties, invested certain powers in the Council of the League of Nations.

[19] Ibid., page 556.

[20] *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 283rd meeting, paragraph 33.

[21] *Ibid.*, 283rd meeting, paragraph 33.

Printed in U.S.A. 72848–October 1952–2,250