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Meaning of “Aggression” in the United Nations Charter

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NOTES

MEANING OF "AGGRESSION" IN THE UNITED NATIONS CHARTER

(Results of a Short Seminar in International Law, Spring 1954, College of Law, University of Nebraska, under the supervision of Professor Willard B. Cowles.)¹

At its Seventh Session (1952) the General Assembly of the United Nations adopted a resolution establishing a fifteen member Special Committee on the Question of Defining Aggression.² The resolution assumed that a definition of the term "aggression" would be adopted by the General Assembly at its Ninth Session (Autumn, 1954). During the 1953 Summer Sessions of this Committee, twelve of the fifteen States favored the adoption of a definition. The United States was one of three States which opposed formulating any definition.³ There is much to be said against the adoption of any definition of the term "aggression" at this time.⁴ It is the view of the seminar that the best approach to the matter would be to prick out the meaning of "aggression" from case to case. The proposed definition which follows is set forth, not because this group believes the time is ripe for a definition, but for what it may be worth in case some definition of the term is in fact to be adopted shortly by the General Assembly.

The seminar makes no attempt here to define "aggression" generally, but only "aggression" within our understanding of the meaning of that term as used in the United Nations Charter.⁵

¹ The regular members of this seminar were: John Hopewell Faltys; Ronald W. Hunter; John D. Knapp; Norman G. Oliver, Jr.; David D. Tews; Howard E. Tracy; and Gladwyn A. Youngs. Harry F. Cunningham participated in the seminar as an auditor.

The seminar wishes to recognize expressly the valuable assistance of Henry M. Gallagher, Jr.

² Resolution 688 (VII) of 20 December 1952; also U.N. Doc. A/AC.66/L.11, pp. 4-5.

³ The other two States which opposed formulating any definition were China and the United Kingdom of Great Britain and Northern Ireland. Report of the Special Committee on the Question of Defining Aggression. U.N. Doc. A/AC.66/L.11, p. 8 (14 October 1953).

⁴ It is well known that the difficulty involved in any effort to define aggression is as great, or greater, than that involved in defining the basis of tort liability or of the phrase "due process of law" in American constitutional law. Although it has been found in tort law that by virtue of many decided cases, sound narrow generalizations can be established (such as the last clear chance rule), the idea of the "reasonably prudent man" has not given needed precision.

⁵ The terms "aggression," "act (or acts) of aggression," and "aggressive policy" appear as follows in the Charter: Article 1: "The Purposes of the United Nations are: (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of *acts of aggression* or other breaches of the peace * * *" Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression* * * *." Article 53(1): "* * * no enforcement action shall be taken

Basic Considerations

The Charter's two main purposes are stated to be to maintain international peace and security.⁶ Implicit in this provision is a basic international policy to deter acts which are repugnant to these purposes. In the seminar's view the term "security" as used in this phrase represents the end result which the maintenance of peace is designed to achieve. Thus "security" is the ultimate end, and the maintenance of peace the most important means to achieve that end.⁷

Proposed Definition

An act of State A which is intended to and which in fact does contribute to or result in a substantial encroachment upon the independence of State B or the security of the people of State B in their right to be free from political repression is an act of aggression within the meaning of the Charter of the United Nations.

Commentary on the Definition

A. State

By the term "State" we mean a political entity which has capacity for rights and duties under international law. The United Nations is charged with the maintenance of international peace and security re-

under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of *aggressive policy* on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further *aggression* by such a state." (Emphasis in this paragraph added.)

⁶ Article 1(1). For text see *supra*, n. 5.

⁷ Goodrich and Hambro, in their commentary on the Charter, observe that formal peace alone "is not enough. Armed peace with the fear of war as the recurrent theme is not sufficient for the achievement of the purposes of the United Nations. Peace must be accompanied by a feeling of security, security from war in particular." (Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (2nd and revised edition, 1949), p. 93. The 1946 edition is to the same effect, p. 59. In saying this Goodrich and Hambro refer to Point 6 of the Atlantic Charter. (*Ibid.*) The Atlantic Charter set out "certain common principles in the national policies of their respective countries," and this "common program of purposes and principles" was subscribed or adhered to by forty-seven States in the "Declaration by United Nations" of January 1, 1942. Point 6, among other things, expressed a joint policy "to see established a peace which will afford to all nations the means of *dwelling in safety* within their own boundaries." (The Atlantic Charter and Declaration by United Nations, taken from Department of State Publication No. 2298 (Govt. Printing Off., 1945) pp. 1, 2. Emphasis added.) Again, in 1947 Secretary of State Marshall said, before the General Assembly, that: "The attitude of the United States towards the whole range of problems before the United Nations is founded on a very genuine desire to perfect the Organization so as to safeguard the security of States and the well-being of their peoples." (Official Records of the Second Session of the General Assembly, I, p. 26. U.N. Doc. A/PV.80-109 (1947).) Cf. the ends stated in the Preamble of the Charter, and the use of the phrase "conditions of stability" in Article 55. See n. 14, *infra*.

ardless of whether or not a State involved is a Member of the United Nations.⁸ It seems clear that the basic purposes of the Charter are not to be thwarted by technicalities concerning "what is a State," or "recognition." The seminar believes that the term "State" in the Charter is to be broadly construed.

B. Intended

The term "intended" is included in the definition to emphasize that the character of the act is not that of a mere tort, but that of a high crime. When such an act takes place it must have been preceded by a choice made by a responsible authority, or authorities, of State A, and the choice must have been made with the consciousness that the act will probably bring about results coming within the definition.

C. Contribute To

In particular situations more than one State may be an aggressor. The sense in which the word "contribute" is used is that of giving a substantial quantity of aid by another State whether or not such aid is given pursuant to a formal, informal, or any other type of particular international agreement between them.⁹ To illustrate: Donating a single pair of shoes would not be a "contribution" in the sense in which the term "contribute" is used, but furnishing a tank or a bomber, where such a donation is intended to aid in a "substantial encroachment," would come within our meaning of "contribute."¹⁰ It may be noted in this connection, that Article 2(5) of the Charter, which provides that all Members shall refrain from giving "assistance" to any State against which the United Nations is taking preventive or enforcement action, is not prefaced by the word "substantial." Where the quantity of aid is comparatively small, it is our view that consideration should also be given to the relation of that amount to the overall ability of the contributing State to have made a larger contribution. Substantial aid, by another State, can only be aggression where a "substantial encroachment" is also present.

⁸ Article 2(6): "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

⁹ The predominant obligation arising from international agreements of Members of the United Nations are those contained in the Charter. Article 103 provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

¹⁰ Since we are not here concerned with aid designed to prevent aggression, as regards donations to prevent aggression we observe only by way of contrast that Chief Justice Marshall's classic statement in 1819 about the American Constitution seems equally applicable to the Charter of the United Nations (the words inserted in brackets are to emphasize our point): "Let the end be legitimate, let it be within the scope of the constitution [Charter], and all means which are appropriate, which are plainly adapted to that end, which are

D. Results In

The United Nations is primarily concerned with action—with acts which produce results contrary to the purposes and principles of the Charter. “Results” are less difficult to prove than the causes thereof. The definition is, therefore, put in terms of “results.”

E. Substantial Encroachment

Although certain acts of State which result in encroachments upon the independence of other States may constitute violations of international law, not all encroachments on the independence of a State amount to aggression in the sense of the Charter. To constitute an act of aggression the Charter requires that the act be of a sinister and grave character (i.e., “substantial”)—an act having a very different quality from one violative of international law in the nature of a tort or a breach of contract which ordinarily entails only monetary reparation.¹¹

F. Independence

The term “independence” is used in its established public law sense.¹²

G. Right to be Free from Political Repression

A basic principle of the Charter is to develop respect for the “self-determination of peoples.”¹³ Article 55 recognizes that the matter of “self-determination of peoples” includes all peoples, no matter what their political status.¹⁴ The people of an established, independent

not prohibited, but consist with the letter and spirit of the constitution [Charter], are constitutional [legal].” (*McCulloch v. Maryland*, 4 Wheat. 316, 421 [1819].)

¹¹ Professor Cowles would use the phrase “gross encroachment” instead of “substantial encroachment.”

¹² The reader unfamiliar with this basic public law concept is referred to the introductory chapters of the standard works on International Law, such as Charles Cheney Hyde’s, *International Law Chiefly as Interpreted and Applied by the United States* (2d. rev. ed., 1945) and Lauterpacht’s *Oppenheim, International Law* (7th ed. 1948). Paragraphs 1 and 7 of Article 2 of the Charter may also be helpful: “1. The Organization is based on the principle of the *sovereign equality* of all its Members. * * * 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction* of any state or shall require the Members to submit such matters to settlement under the present Charter * * *.” (Emphasis added.)

¹³ Thus Article 1(2) states that one of the purposes of the United Nations is “to develop friendly relations among nations based on respect for the principle of * * * self-determination of peoples * * *.”

¹⁴ Article 55 provides that “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a.) higher standards of living, full employment, and conditions of economic and social progress and development; (b.) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c.) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

State have a right to "self-determination" equal to, if not greater than, that of colonial peoples. We have used the term "repression" instead of "self-determination" because the term "self-determination" has acquired a connotation restricting it to freedom from colonialism. Respect for the "self-determination" of all peoples seems clearly to be a part of the "security" which the United Nations is charged to guarantee. The term "repression" as used in the phrase "security of the people of State B in their right to be free from political repression" implies a threat or use of force.

Points Considered But Not Included

The more significant words and phrases considered by the seminar, but omitted from the definition, and the reasons for their omission follow:

1. War-like Action

"War-like action" was considered instead of "act" at the beginning of the definition, but was rejected because the group considered that any act having the results specified in the definition and done with the required intent is "aggression," and that "aggression" within the meaning of the Charter need not be limited to any predetermined form. Other phrases rejected on this same basis were: "Armed force," "threat of force," "economic coercion," "direct or indirect action," "in pursuit of an unlawful objective," and "conspiracy."

2. Initiated, Inspired

Though an act may appear to be that of State A, State B may have in fact determined the policy under which the act of State A was performed. It was urged by some members of the seminar that the words "initiated" or "inspired" be included in the definition to show that State B was an aggressor. After discussion, however, it was decided that mere "initiation" or "inspiration" is not enough. Relationships short of agency, assistance, or control are not, in the seminar's view, sufficient to bring an act within the Charter's meaning of "aggression."

3. Aids

The seminar considered using the term "aids" but felt that this concept was covered better by the phrase "contribute to." The words "sponsors" and "supports," were also considered in connection with this point, but were rejected for the same reason.

4. Pursuant to a National Policy

It was suggested that no act of State could be "intended" unless it was made pursuant to a national policy. However, the seminar felt that "intent" could be proved in other ways than by the establish-

ment of the existence of a national policy, and that to require a showing of a national policy in each case would involve a restriction beyond what the Charter demands.

5. Threat to the Peace. Breach of the Peace

The phrases "threat to the peace" and "breach of the peace" appear in some parts of the Charter (e.g., Articles 1(1) and 39) in association with the term "aggression." In at least one instance "aggression" appears without any reference to "threat to the peace" or "breach of the peace" (Article 53). Again, Article 51 refers to "armed attack," and Article 2(4) to the "threat or use of force." It was, at first, suggested that the phrases "threat to the peace" and "breach of the peace" be included as requisites for aggression. The seminar believes, however, that these are illustrative, rather than exhaustive, ways in which an aggression may take place.

6. Sovereign Equality, Territorial Integrity

The term "sovereign equality" (Article 2(1)) was not included because of the use of the broader term "independence." The seminar also decided not to use the phrase "territorial integrity," which appears in Article 2(4), on the ground that the territorial integrity of a State is a corollary of its "independence," and was therefore covered by the term "independence."

7. Self-Defense

The term "self-defense" was suggested for inclusion in the definition but was not adopted. We are attempting to define a high crime. Legitimate self-defense is not in any sense a crime. While an aggression, or in some cases, potential aggression, may ordinarily bring into play the right of self-defense, and while aggression and the right to self-defense therefore ordinarily have a cause and effect relationship, we are concerned only with defining aggression, not with other rights which may arise in connection therewith. (Cf. 35 Am. Jour. of Int. Law, especially at pp. 357-358 [1941].)

Dissenting Opinion of Harry F. Cunningham

I do not accept the definition of aggression developed by the majority of the Law College Seminar in International Law, for the following reasons:—

1. The definition adopted by the majority is too verbose and its very verbosity weakens it.
2. I dislike the references to "State A" and "State B" and would prefer the terms "any State" and "any other State," which are far more inclusive and far more *usual*. For example, the aggression in Korea was participated in by three States—North Korean People's Republic, China, Russia. How could these three participants be included under

the designation "State A"? Each of them would fall, naturally, within the intent of "any State."

3. There is no provision made for approval, rejection, or otherwise by the United Nations, which is the "Court of last resort" in determining that an act of aggression is such. There is no reference to efforts to arbitrate.

I submit an alternate definition as follows:

Any act of any State, without prior recourse to arbitration, which act results in a substantial encroachment upon the sovereign rights of another State or the political privileges of its people, is an act of aggression within the meaning and intent of the Charter of the United Nations, unless ruled otherwise by the required majority of an appropriate organ of the United Nations Organisation.

Comment:—The use of the term "any act" permits the inclusion of contributory as well as direct acts. The use of the term "any State" includes all participants in an aggressive act, which the use of the term "State A" cannot do.

Failure to have recourse to arbitration is in accord with the provisions and intent of the Charter of the United Nations as having an influence upon aggression.

The right of the appropriate organ (Security Council or, in case of its failure to act due to exercise of the veto, the General Assembly) to approve or otherwise, an alleged act of aggression as such, is essential, especially to satisfy the demands of the "smaller nations."

HARRY F. CUNNINGHAM