

DEFINITION OF AGGRESSION

By Elizabeth Wilmshurst

*Fellow of the Royal Institute of International Affairs at Chatham House,
Professor of International Law at University College London, United Kingdom*

Introduction

General Assembly resolution 3314 (XXIX), with the Definition of Aggression annexed to it, was adopted on 14 December 1974 after protracted intergovernmental negotiations. The Definition has scarcely ever been used for its primary purpose as a guide to the Security Council in determining aggression by States. It has now taken on a new life as a source for discussion of the definition of the individual crime of aggression within the jurisdiction of the International Criminal Court.

Crimes against Peace

Following the prosecutions for crimes against peace at the end of the second World War, the United Nations General Assembly affirmed “the principles of international law” recognised by the Charter of the Nuremberg Tribunal and the Tribunal judgment (resolution 95 (I) of 11 December 1946) and directed the International Law Commission (ILC) to formulate those principles and to prepare a code of offences against the peace and security of mankind (resolution 177 (II) of 21 November 1947). The ILC completed some draft principles which followed the Nuremberg Charter in their description of aggression and, later, a code of offences which included aggression; but neither of these documents were adopted by the General Assembly (resolution 488 (V) of 12 December 1950 and resolution 897 (IX) of 4 December 1954).

State Aggression

Separately, attempts had been made to reach international agreement on the meaning of aggression by States. One attempt was made during the negotiations in San Francisco for the drafting of the Charter of the United Nations, but proposals for this purpose were rejected. In 1950, the Union of Soviet Socialist Republics put forward to the General Assembly a proposal for a definition of aggression similar to a proposal it had made in 1933. In the context of an item entitled “Duties of States in the event of the outbreak of hostilities”, the proposal was referred to the ILC (resolution 378 B (V) of 17 November 1950). It was the year the Korean war began. The Security Council had largely failed in the role given to it in Article 39 of the Charter to “determine the existence of any threat to the peace, breach of the peace, or act of aggression”.

Early Attempts to Draft a Definition

The ILC did not reach agreement on a definition of aggression, the Special Rapporteur indeed being of the view that aggression “by its very essence, is not susceptible of definition” (A/CN.4/44, p. 69). The General Assembly looked at the question again in 1952 and set up a special committee to draft “definitions of aggression or draft statements of the notion of aggression” (resolution 688 (VII) of 20 December 1952). Neither this committee nor two subsequent ones (created by resolution 895 (IX) of 4 December 1954 and resolution 1181 (XII) of 29 November 1957) reached agreement on a definition. It required the establishment of a fourth

special committee (resolution 2330 (XXII) of 18 December 1967) and sixteen more years before a definition of aggression was finally adopted.

The protracted nature of the negotiations is explicable partly in terms of Cold War tensions. But there were also concerns that the preparation of a list of aggressive acts would inevitably be incomplete and therefore misleading. During the period when the special committees were looking at the matter, the proliferation of threats and conflicts such as the Suez crisis, the Cuban missile crisis, the conflict in the Congo, the Vietnam war and the occupations of Hungary and Czechoslovakia, gave rise to opposing notions with regard to the desirability of defining aggression. To some, a clear definition was needed more than ever, to others a definition was thought to make it more difficult to achieve peace since it could restrict the flexibility of the United Nations.

Definition of Aggression

On 14 December 1974, the General Assembly adopted by consensus resolution 3314 (XXIX) annexing the Definition of Aggression which had been adopted by the fourth special committee. The Definition begins with a broad definition of aggression, drawn largely from Article 2, paragraph 4, of the Charter (though omitting reference to threats) and then enumerates specific examples of acts of aggression. The acts set out in article 3 qualify as acts of aggression, subject to the provisions of article 2, which envisage that the Security Council may decide not to make a determination of aggression in the light of the circumstances, including the fact that the acts are not of sufficient gravity. Article 4 specifies that the list is not exhaustive and that the Security Council may determine that other acts constitute aggression. The issue of self-determination was a live one during the negotiations and it was dealt with in a saving clause in article 7.

Invasion of a State by the armed forces of another State, with or without occupation of the territory, heads the list of aggressive acts set out in article 3. Of the other acts listed, a few problems that arose in the negotiations may be mentioned. The reference to port blockade in paragraph (c) gave rise to demands from landlocked States that blockade should include denial of access to and from the sea, a problem that was resolved, not to the satisfaction of all, by including a note in the Sixth Committee's report to the General Assembly that the Definition did not justify a State in blocking access routes to the sea for landlocked countries (A/9890, para. 9). Concerns were expressed that the reference in paragraph (d) to attacks on marine fleets would include as aggression activities by coastal States to preserve fish stocks or the environment. Again the solution was to add a note stating that nothing in the Definition prejudiced the authority of a State to exercise its rights, compatibly with the Charter, within its national jurisdiction (A/9890, para. 10). Paragraph (g), relating to irregular bands or mercenaries going from one State into another, constituted one of the major difficulties in reaching consensus on the Definition. Agreement was finally reached by narrowing earlier proposals to limit the text to "sending" organized groups, rather than organising and supporting them.

Difficult compromises were necessary to reach consensus on the text. Interpretative statements to express particular interpretations of the Definition were made by Government delegations on adoption of the Definition both in the special committee and in the General Assembly.

Use of the Definition

Paragraph 4 of resolution 3314 (XXIX) drew the attention of the Security Council to the Definition and recommended that the Council “should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.” The Definition has rarely if ever been used for that purpose. It has however been referred to by the International Court of Justice (ICJ) in its consideration of unlawful use of force by States. The ICJ has decided that the provision in article 3, paragraph (g), of the Definition reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 3; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 146). However, the status in customary law of the resolution as a whole is controversial (see the view of Judge Kooijmans in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Separate Opinion*, para. 63).

The Definition has been given new life by becoming a major source for the negotiations on the definition of the crime of aggression within the jurisdiction of the International Criminal Court. The use of the Definition for the purpose of individual criminal responsibility has been controversial, since the Definition differentiates between State responsibility and individual crimes: article 5, paragraph 2, which reflects paragraph 1 of the Friendly Relations Declaration (General Assembly resolution 2625 (XXV) of 24 October 1970, annex), accords individual responsibility only regarding a “war of aggression”. As the ILC noted in its commentary on its 1994 draft Statute for an international criminal court, resolution 3314 (XXIX) “deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2, paragraph 4, of the Charter of the United Nations, that resolution offers some guidance”. The resolution now forms part of the Discussion paper proposed by the Chairman in the Special Working Group on the crime of aggression for the International Criminal Court (ICC-ASP/6/SWGCA/2).

Related materials

A. Legal instruments

London Charter of the International Military Tribunal, London, 8 August 1945.

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970.

B. Jurisprudence

International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168.

C. Documents

Proposal by the Union of Soviet Socialist Republics for a definition of aggression (A/C.1/608).

Second report of the Special Rapporteur for the draft code of offences against the peace and security of mankind entitled "The Possibility and Desirability of a Definition of Aggression" (*Yearbook of the International Law Commission, 1951*, vol. II, document A/CN.4/44).

Report of the Special Committee on the Question of Defining Aggression (A/9619 and Corr. 1).

Report of the Sixth Committee to the General Assembly (A/9890).

Report of the International Law Commission on the work of its forty-sixth session (A/49/10), p. 38, para. (6) (draft Statute for an international criminal court).

Special Working Group on the Crime of Aggression, Discussion paper on the crime of aggression proposed by the Chairman (ICC-ASP/6/SWGCA/2).

D. Doctrine

B. Broms, "The Definition of Aggression", *Recueil des Cours*, vol. 154 (I), 1977, p. 348.

B. Ferencz, *Defining International Aggression: The Search for World Peace*, vol. II, Dobbs Ferry, New York, Oceana publications, 1975.

A. Rifaat, *International Aggression*, Stockholm, Almqvist and Wiksell International, 1979.

J. Stone, "Hopes and Loopholes in the 1974 Definition of Aggression" *American Journal of International Law*, vol. 71, 1977, p 224.