Stephen M. Schwebel

Justice in International Law

Selected Writings of

STEPHEN M. SCHWEBEL

Judge of the International Court of Justice

GROTIUS PUBLICATIONS
CAMBRIDGE UNIVERSITY PRESS

Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
40 West 20th Street, New York, NY 10011–4211, USA
10 Stamford Road, Oakleigh, Victoria 3166, Australia

First published 1994

Printed in Great Britain at the University Press, Cambridge

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

Schwebel, Stephen M. (Stephen Myron), 1929–
Justice in international law: selected writings of Judge Stephen M. Schwebel.
p. cm.
Includes index.
ISBN 0 521 46284 3 (hardback)
1. International Court of Justice. 2. Arbitration, International.
3. United Nations. 4. International law. I. Title.
JX1971.6.S39 1994
341.5'2 – dc20 93-42341 CIP

ISBN 0 521 46284 3 hardback

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To my brother Jack

Since 1947 Stephen M. Schwebel has written more than 100 articles, commentaries, and book reviews in legal and other periodicals and in the press. This volume republishes thirty-six of his legal articles and commentaries of continuing interest.

The first part treats aspects of the capacity and performance of the International Court of Justice. The second addresses aspects of international arbitration. The third examines problems of the United Nations, especially of the authority of the Secretary-General, the character of the Secretariat, and financial apportionment. The fourth deals with questions of international contracts and taking of foreign property interests. The fifth discusses diverse aspects of the development of international law and particularly considers the central problem of international law, the unlawful use of force.

This collection does not include Judge Schwebel's judicial opinions, nor (with one exception) papers written in his former official capacities as a legal officer of the US Department of State or as a special rapporteur of the International Law Commission of the United Nations. Together with his unofficial writings, his judicial opinions as of July 1993 are cataloged in the list of publications with which this volume concludes.

Justice in International Law

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PREFACE

In taking up the invitation of Eli Lauterpacht, for which I am grateful, to compile a selection of my writings to be published by Grotius Publications in my sixty-fifth year, I have chosen a third of the legal articles and commentaries written since 1947 which may have a measure of continuing interest. They are republished as initially written. That is not to say that many of them would not benefit by revision, for hindsight is illuminating, particularly in a field which has developed as much as has international law in the last forty-five years. But to have brought these essays up to date would have been a time-consuming task inconsonant with more pressing demands. Thus whatever their limitations, these pieces are published essentially as they were. I do not today subscribe to all the views they express, but in the main, I do; it is chastening to acknowledge that neither the substance nor the style of my analyses has much improved over the years.

For their faithful typing onto a word processor of the considerable contents of this volume, my warm thanks to Jean van Hamel-Newall and Helen Jeffares. I wish to thank as well Robin Pirrie of Grotius Publications for able assistance in the planning of the publication of this compilation, and Mary Starkey of the Cambridge University Press and her colleagues for their exemplary editing and printing of it. The acquisition of Grotius Publications by the Cambridge University Press while this volume was in press has had the happy result that it is the first of what will be many books in the field to be published by the Cambridge University Press through its Grotius Publications division.

PART I

International Court of Justice

1

Reflections on the Role of the International Court of Justice

I greatly appreciate the privilege of giving the Jurisprudential Lecture this academic year at the University of Washington at the invitation of the *Washington Law Review*. It is a pleasure to return to this distinguished law school, which I visited years ago at the invitation of Professor Henderson. It is a particular pleasure for two reasons, apart from those of being at the University and revisiting Seattle. This occasion gives me the opportunity to see again one of my most valued former colleagues at the Office of the Legal Adviser of the Department of State, Professor Ted Stein. Professor Stein and I worked closely together in that great Office – perhaps the world's greatest office of the practice of public international law – in that happier day when the United States was plaintiff rather than defendant in the International Court of Justice – happier not of course for the imprisoned hostages; but I am sure you know what I mean when I use the word "happier."

Another reason why it is a particular pleasure to speak is that I do so under *Law Review* auspices. I wonder how many of you appreciate how uniquely and refreshingly American is the institution of the law review. I refer not to legal journals, which are widespread throughout much of the world; I speak of law reviews, produced at law schools not by faculty but by students. Law reviews are remarkable instruments of legal scholarship, of legal education, and healthily American irreverence. The law review editor does not hesitate to edit whatever and whomever he or she can get his or her hands on. It may irritate the contributor of an article or book review to have his principles and prose challenged by a youngster whom the contributor may see as more presumptuous than profound. But the process generally does both the contributor and the editor some good. In any event, it is an element in spurring the American lawyer to challenge authority, to ask questions, to demand citations, to seek the truth. I may add that I feel free to say these nice

Jurisprudential Lecture at the University of Washington, April 22, 1985. First published in *Washington Law Review*, 61, 3, p. 1061.

things about law review editors not having been one; I declined an invitation to compete for membership in the *Yale Law Journal*, for reasons that, subsequently, potential employers never found persuasive.

I would like this evening to share with you some reflections on the role of the International Court of Justice in an unjust world. You will appreciate that, while I shall try to speak the truth as I see it, I am not able to speak the whole truth: not only because I do not know it, but because of the constraints of my position and the confidentiality of aspects of the work of the Court. In particular, I shall not speak about matters which are *sub judice*, either in these remarks or in the answers to questions which some of you may wish to ask after them.

The Court is a body of high achievement and unused potential. But it is not a body of uniformly high achievement or unlimited potential. In the early years of this century, such a court was looked upon by the peace movement of that day as a means – if not *the* means – for avoiding resort to the use of force in international relations. It was thought that States should and even would submit to arbitration rather than the arbitrament of war. The Hague Peace Conferences of 1899 and 1907, which had a number of successes, particularly in codifying the law of war, succeeded in forming the Permanent Court of Arbitration. Actually, it was not a court which was permanently formed, and it arbitrated relatively infrequently. But arbitral panels drawn from the membership of the Permanent Court of Arbitration did dispose constructively of more than a score of international legal disputes, nearly all in the first three decades of this century. Nowadays, while the processes of international arbitration, and especially international commercial arbitration, go forward actively elsewhere, the main function of the Permanent Court of Arbitration lies in the role of its national groups of potential arbitrators who are the members of that Court in nominating candidates for election to the International Court of Justice. Each State Party to the Hague Convention of 1907 may nominate four persons as potential arbitrators, and these persons in turn nominate candidates of whatever nationality for election to the International Court. Where a State is not a party to the Hague Convention, it forms a comparable national group to make nominations. Judges of the Court are elected in concurrent elections of the Security Council and General Assembly.

It is interesting to recall that, in 1907, the United States took the lead at The Hague in pressing for the establishment of a true international court of justice. Agreement then proved elusive, especially on how the judges were to be elected. It was not practical to have a judge from every State, even though in 1907 there were less than fifty States, but the mechanism for selection or

election was not at hand. With the conclusion of the Covenant of the League of Nations, a mechanism was. Judges of the Permanent Court of International Justice were chosen by the concurrent election of the League Assembly and Council, thus mixing the predominant role of the smaller Powers in the Assembly with that of the larger in the Council.

In 1922, the first World Court in history came into operation, in the Peace Palace in The Hague, which a gift of Andrew Carnegie had built for the Permanent Court of Arbitration.

All too obviously, that Court did not succeed in preventing World War II or lesser wars. Nevertheless, it was regarded as a marked success, not only by international lawyers but by diplomats and politicians. For between 1922 and 1940, it successfully disposed of twenty-nine contentious cases between States, and rendered twenty-seven advisory opinions to the League of Nations (and, through it, several advisory opinions to the International Labor Organization [ILO] and a few to other international bodies). While those disputes almost invariably were not the stuff of war, they were often important, not only in the substance of the issues of which the Court's judgments disposed (many concerned the peace treaties), but because the Court's judgments, which were of high quality, contributed so significantly to the progressive development of international law. Consider the contributions of the courts in a common-law system to the development of the law. While the situation is not altogether the same in international law, there is ample room in that skeletal and primitive system of law for its development through the judicial decisions of a truly international court, representative of the principal legal systems of the world. As the late Judge Sir Hersch Lauterpacht so convincingly demonstrated in his classic study, *The Development of International Law by the International Court*,[1] that contribution has been significant indeed.

Thus, at the San Francisco Conference on International Organization at which the United Nations Charter was concluded, and in the preparatory meetings of the Committee of Jurists which prepared a revision of the Statute of the Permanent Court, there was not the slightest doubt about the utility of maintaining a world court. While it was found to be politically and legally desirable to create a new court, the International Court of Justice, its Statute was in fact a very modest revision of the Statute of the Permanent Court. Every effort was made to maintain continuity between the two Courts. It was recognized on all sides that the Permanent Court had created a heritage

[1] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958; repr. 1982).

worth preserving intact and nurturing. In this regard, attitudes towards the League of Nations and towards the World Court stood in striking contrast.

What has been the record of the International Court of Justice? In terms of cases dealt with, between the time it began functioning in April 1946 until the end of 1984, it gave forty-five judgments in contentious cases between States, and eighteen advisory opinions to the United Nations and certain of its Specialized Agencies. The number of contentious cases compares to that with which the Permanent Court dealt between the two World Wars, though the business of the Court since the mid-1960s has, until recently, been markedly less than earlier. In fact, in a world full of international legal disputes between States, too few are submitted to the Court, even if, for the moment, its docket is relatively full. Moreover, the United Nations and its Specialized Agencies have resorted to the Court for advisory opinions proportionately far less frequently than did the League and the ILO resort to the Permanent Court of International Justice in the eighteen years of its activity. It is widely agreed in the international legal community that the judgments and opinions of the Court have been sound and of high quality – though some maintain that there are a few extraordinary exceptions. The Court has been criticized for elliptical conclusions which at times are not sufficiently supported by reasons, and for insufficient citation of authority. Very recently, questions of observance of due process have been raised. But, as a whole and over the years, the Court's procedural and substantive record is very good.

A critical weakness of the World Court which has been manifest from 1922 persists. Its jurisdiction is at root optional and consensual. States must agree to bring their disputes to the Court, either when a dispute has arisen, or in advance of it. More often, after a dispute has arisen, the parties agree to bring it to the Court by concluding a special agreement to do so. This was the procedure in the *Gulf of Maine* case which Canada and the United States submitted to the Court, in which judgment was rendered last year. It is the procedure in the current case before the Court between Malta and Libya over the continental shelf boundary between them. There is nothing to stop States from submitting considerable numbers of cases in this way to the Court, apart from their apparent unwillingness to do so, about which I shall say something more in a moment.

But States may, if they wish, bind themselves in advance of when a particular dispute arises to submit disputes of that character to the Court. A large number of treaties – at the latest count, no less than 244 – provide that, if a dispute as to the treaty's interpretation or application arises, any party may submit the dispute to the International Court of Justice.

Such clauses have produced some cases: for example, the dispute between

Iran and the United States over the detention of American hostages was submitted to the Court under such treaties, and the Court sustained its jurisdiction under the multilateral Vienna Convention on Diplomatic Relations and the bilateral Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. Iran did not appear, though it challenged the Court's jurisdiction. But the treaties in which the Imperial Government of Iran had submitted to the Court's jurisdiction remained in force, and they provided a valid basis for the Court to issue not only its order of provisional measures – an interim injunction – but its judgment.

In addition to agreeing in advance of a particular dispute to submit disputes arising under a particular treaty, States may generally and even comprehensively bind themselves to the Court's compulsory jurisdiction by making a declaration under the so-called "Optional Clause" of the Court's Statute.

There is a lot of history attached to the Optional Clause, and some of it is in the making. The Statute of the Permanent Court of International Justice was drafted in 1920 by a Committee of Jurists formed by the Council of the League. It was a distinguished committee, whose distinguished secretariat was composed primarily of League Under-Secretary-General Anzilotti (later President of the Court) and Ake Hammarskjöld, later the Court's first and longest-serving Registrar, and subsequently a judge (and the eldest brother of Dag Hammarskjöld). The draft Statute as prepared by that committee provided for general compulsory jurisdiction over legal disputes arising between the States Parties to the Statute.

It also provided, incidentally, that the sole official language of the Court should be French. Balfour, in a declaration for which he is not as well known as another, raised an objection, and English became one of the two official languages of the Court, which it remains.

As a result of discussion in the League Council, and subsequently in the League Assembly, the critical draft provision for the Court's mandatory, compulsory jurisdiction was deleted, a decision which was attributed to the influence of the Great Powers. In its place was put the "Optional Clause." By its terms, States Parties to the Statute may agree – and that is their option – to submit to the Court any legal dispute which may arise in the future between them and other States reciprocally so agreeing. It soon became the practice to attach reservations to the extent of such agreement.

The Optional Clause was regarded in 1920 as a sensible and promising compromise between, on the one hand, confining the Court to jurisdiction over such disputes as the parties could agree to submit to it after a dispute has arisen, and, on the other, endowing the Court with general compulsory jurisdiction over all legal disputes between parties to the Statute.

States were progressively to adhere to the Optional Clause, it was believed, then the Court would, step by step, achieve that general compulsory jurisdiction which the League thought premature in 1920. And, in fact, in the interwar years, the Optional Clause went a long way towards achieving that goal, since the very large majority of the States then in existence adhered to it. Forty-four States at one time or another deposited declarations accepting the jurisdiction of the Permanent Court of International Justice under the Optional Clause. They included Great Britain, France, and China. They did not include the United States, which, despite a good deal of effort in various quarters, never became a party to the Statute of the Permanent Court, and they did not include the Soviet Union.

Moreover, these forty-odd adherences did not contain crippling reservations. But today the situation is radically different – if one can apply the word "radical" to so regressive a tendency. Today, only 47 of the 162 States party to the Statute of the International Court of Justice are bound at all under the Optional Clause. Only 19 of those adherences are not expressly subject either to unilateral termination by the declarant State at any time, or to modification at any time. The Soviet Union has never adhered to the Court's compulsory jurisdiction under the Optional Clause; neither China nor France currently adhere. The only Permanent Member of the Security Council party to the Optional Clause other than the United States is the United Kingdom, which has reserved "the right at any time ... and with effect from the moment of ... notification, either to add to, amend or withdraw" any of its extensive reservations, and this in a declaration which has been made "until such time as notice may be given to terminate" it.[2] Many other leading States, including Algeria, Argentina, Brazil, the Federal Republic of Germany, Italy, Poland and the other States of Eastern Europe, Senegal, and Syria, do not adhere to the Optional Clause.

Furthermore, far-reaching reservations are not merely temporal. Most notably, some would say notoriously, are self-judging reservations, of which there are about a half-dozen. The United States was the pioneer with the Connally Reservation, which withholds from the Court's compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[3] While as a matter of legal principle self-judging reservations are most objectionable, conflicting as they do with the authority of the Court under its Statute to determine its jurisdiction, in practice other reservations may have more effect in withholding disputes from the Court.

[2] International Court of Justice, *Yearbook 1983–1984*, pp. 89, 90. [3] *Ibid.*, p. 90.

These and other dolorous facts led a distinguished scholar who later became President of the Court, Sir Humphrey Waldock, to write a noted article entitled "The Decline of the Optional Clause."[4] Despite recent events on which I am not free to comment, it is not possible to conclude that that decline has been arrested. On the contrary, there are indications that it may accelerate. The Government of the United States has announced that it will examine reformulating the terms of its adherence to the Court's compulsory jurisdiction. That will be a matter of national concern, on which not only the Administration – and of course the Senate – but the bar, the academic community, and learned societies all have a contribution to make.

In sum, the Court's compulsory jurisdiction is not general, is not increasing, and is under attack insofar as it does exist. The blame for that deplorable situation lies in various quarters. The situation is not helped by the tendency of some of those who have refused to submit themselves to the Court's jurisdiction to cluck at the disadvantages and discomfiture of those who have. Moreover, some States, whose distrust of international adjudication is a matter of ideology, have strongly and rather successfully resisted writing the Court's compulsory jurisdiction into treaties concluded under the auspices of the United Nations.

The Court is confronted by another problem no less grave than the decline of the Optional Clause and resistance to other avenues of its jurisdiction: the refusal in some cases of certain States defendant to appear in Court even where the Court clearly or arguably has jurisdiction. This has happened five times in the history of the International Court of Justice. It is a development which contrasts painfully with the record of the Court between the two World Wars, when States regularly appeared to argue and invariably abided by the results. Whatever view one takes of recent developments, it may be noted that, of all the States which have been the object of a request for an order of provisional measures in the International Court of Justice, only the United States has appeared, and it has done so in two cases.

Still another, obviously fundamental, problem of the Court is that of conformity with its judgments. That too was not a problem of the Permanent Court. But it is a problem which has arisen so far no less than three times in the history of the International Court of Justice. I am speaking now not of conformity with orders of the Court for provisional measures, which are not binding upon the States to which they are addressed, but of final judgments of the Court. Again, this is a problem which shows no sign of amelioration, but rather of exacerbation.

[4] Sir Humphrey Waldock, "The Decline of the Optional Clause," *British Year Book of International Law 1955–1956* (1957), 32, p. 244.

Still another weakness of the current structure of international adjudication complements that of failure to comply with judgments of the Court. Even though under the United Nations Charter the Security Council is authorized to make recommendations or decide upon measures to be taken to give effect to a judgment of the Court, the Security Council does not appear to be seen as a reliable enforcer of the Court's judgments. Its voting to give effect to Court judgments would be subject to the limitations which govern voting upon its other substantive matters. In the event, the party in whose favor the Court has ruled has not generally had recourse to the Security Council, presumably because it has apprehended that the Council would not effectively support the Court's judgment.

Still another pervasive weakness of the structure of modern international adjudication is that States and international organizations freely resort to the Court less frequently than they did and certainly less frequently than they should. Why? That is not clear in the nature of things, but various explanations have been proffered:

- International relations are in large measure run by politicians and diplomats who like to keep their hands on the disposition or indisposition of problems; they do not want lawyers and the law telling them what they must do but prefer "to keep their options open."
- States are unwilling to lose cases. They too often are prepared to go to Court only when they believe that they will win. Thus they sacrifice their higher, long-term interest in a working system of peaceful settlement for the transient interests of a particular case.
- The content of international law is uncertain, that is to say, the law to be applied by the Court is uncertain.
- The Court is unpredictable in its application of the law.
- The United Nations (and too often its specialized agencies) act on the basis of political rather than legal considerations and wish to remain free to do so, unrestrained by the Court's advisory opinions.

All of these theories – and there are others as well – may have some basis in fact. Whatever the causes, the effects are clear. The processes of international adjudication, particularly those concentrated at its summit in the International Court of Justice, are under-used. At the same time, one must bear in mind that there are not thousands or millions of potential litigants before the Court. Only States may be parties to contentious cases, and there are some 170 States in the world.

Nevertheless, it could not be more obvious that peaceful settlement of international disputes is preferable to continuing conflict. It is equally obvious

that peaceful settlement on the basis of law builds expectations of consistency and stability in international life, and that application of the law by an impartial international court both solves particular disputes and contributes to the development of the law.

At the same time, for the Court to be seen as impartial, it must be impartial, and act impartially. That requires the most scrupulous adherence to its Rules and the most careful regard for its precedents. The structure of international adjudication is fragile. The States which have a tradition and a practice of devotion to international arbitration and adjudication are in a minority. If the impression should be given and grow that the interests of such States are expendable, that, when it comes to them, or certain of them, the Court can take liberties not earlier taken, the Court risks losing the support of those States which have created and sustained it.

I am afraid that I have spoken so far in a predominantly pessimistic way. I am sorry to say that there are in fact grounds for pessimism. But there are more promising countervailing trends as well.

In the first place, the Court is a far busier place these days than it has been for some years; its docket has been fuller the last twelve months than it has been for some twenty-five years. Second, there appears to be an increasing tendency among some of the newer States to bring cases to the Court. Third, the Court has grappled, and is soon to grapple, with new problems, such as intervention by a third State in proceedings between two other States, or interpretation or revision of a judgment already handed down. There may be room for difference of opinion about how constructively the Court has dealt with these new problems, but the fact that it is being confronted with them is – or so I am determined to think – a sign of life and vitality. And finally, there is a new departure in the practice of the Court: the constitution of a chamber of judges out of the membership of the full Court which renders a judgment in the name of the Court.

More than a decade ago, the Court, faced with the paradox that, in a world full of international legal disputes, it had relatively little business, set about revising its Rules. A primary revision was to facilitate access by States to chambers of the Court – to a group of judges less than the whole court – for a particular case. The main change, a former President of the Court wrote, was "to accord to the Parties a decisive influence in the composition of *ad hoc* Chambers."[5] This was done by introducing into the Rules of Court the provision that, where the Parties to a case have agreed upon the formation of

[5] Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," *American Journal of International Law* (1973), 67, pp. 1, 2.

a chamber to deal with a particular case, the President of the Court "shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly."[6] By the terms of the Court's Statute, a judgment given by a chamber "shall be considered as rendered by the Court."[7]

The first such chamber was constituted by the Court in response to a request of the United States and Canada in the *Gulf of Maine* case. It was not easily constituted, but constituted it was. Despite the differences in the Court about the composition of the chamber, it functioned extremely well. It rendered an important judgment determining a single, comprehensive maritime boundary, governing both the continental shelf and fishing above it, which Canada and the United States have accepted and implemented. And now a request from Mali and Upper Volta – renamed Burkina Faso – is pending before the Court for constitution of another chamber, to pass upon a land boundary dispute.

Chambers of the Court offer what could prove to be an attractive halfway house between international arbitration and adjudication. While recourse to the full court is closer to the ideal, in the real world chambers may sometimes afford States a likelier forum by permitting them a voice in the choice of judges. They thus provide that advantage of arbitration while at the same time having the advantages over arbitration of an accepted body of rules of procedure and the facilities of the Court in The Hague. Proceedings before a chamber of the Court should be less expensive for the parties than those which require forming and funding of an arbitral tribunal.

There will remain an important role for international arbitration, which the current Iran–United States Claims Tribunal, also at work in The Hague, demonstrates in dealing with some thousands of damage claims. But the chamber system may well mark a marriage between the processes of international arbitration and adjudication which holds some promise for a more effective rule of law in international life. It may offer the opportunity to States otherwise unwilling to submit disputes to the Court to make use of its facilities and possibilities. At the same time, the chamber system may perhaps present dangers of fractionalizing the Court and the development of international law. But, in my view, it presents markedly more opportunity for progress than dangers to that progress. Certainly there is nothing in the judgment of the Chamber in the *Gulf of Maine* case that suggests a regional or parochial view of international law.

[6] International Court of Justice, *Rules of Court*, Article 17, para. 2.

[7] Statute of the International Court of Justice, Article 27.

Human institutions rarely grow and prosper in an unbroken pattern of progress. It is not surprising that so frail an institution as international adjudication not only has congenital weaknesses but that it may have caught some of the diseases of its environment. We live in a world in which international law and international institutions, while enormously valuable, are nevertheless dangerously far from being as effective as they should be and need to be if this is to be a less troubled and precarious world. There is no use in pretending that we have the sort of international law we need simply because we need it. On the contrary, there is a need for realism, for sobriety, for a critical spirit – and for a constructive spirit. On the whole, the World Court has a distinguished record of achievement – even if that record is not as extensive or exemplary as one might wish. It is one of the principal tasks of the student and practitioner of international law, and, for that matter, of people the world over who are concerned with promoting a more peaceful and less lawless world, to give their critical but constructive support to the strengthening of the institutions of international adjudication, and especially the only universal such institution, the International Court of Justice.

2

Relations Between the International Court of Justice and the United Nations

The principles governing relations between the International Court of Justice and the United Nations at first sight seem clear. On reflection, and in the light of practice, they are, in a few important respects, not quite so clear.

Let us begin at the beginning, with the pertinent provisions of the United Nations Charter. Chapter XIV of the Charter is devoted to the International Court of Justice. Article 92 provides:

> The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

The first sentence of Article 92 complements Article 7 of the Charter, which establishes among "the principal organs of the United Nations ... an International Court of Justice."

What significance is to be attached to the status of the Court as the principal judicial organ of the United Nations? In particular, is the Court to be judicial, or is it to be an organ of the United Nations – two attributes which may not invariably be altogether consistent? To the extent that the Court is to be both judicial and an organ of the United Nations, how may and should these attributes be reconciled?

The second sentence of Article 92 provides a partial answer to that question in that it specifies that the Court "shall function" in accordance with its Statute which is "annexed" to the Charter, which Statute is "based upon" the Statute of the Permanent Court of International Justice and which "forms an integral part of the present Charter." The Permanent Court of International Justice (PCIJ), which, though intimately related to the League of Nations, was not an organ of it, operated as a judicial body; it did not act as an organ of

First published in *Le Droit International au Service de la Paix, de la Justice et du Développement, Mélanges Michel Virally* (1991), Paris, Editions Pedone.

an international organization responsive to its policies rather than to legal considerations. Thus that the International Court of Justice "shall" function in accordance with a Statute based upon – indeed, very closely based upon – the Statute of the Permanent Court may be read to mean that the Court shall function as a judicial organ. Yet, in contrast to the position of the PCIJ, the International Court of Justice is an organ of the United Nations; in contrast to the Covenant of the League, its Statute is part of the Charter. Thus what is of greater importance than the ambivalent precedent of the PCIJ and the Covenant is that the Court shall function in accordance with the Statute which is annexed to the Charter and which "forms an integral part" of it.

I have elsewhere maintained that "because of the meaning of the term 'integral', i.e., composed of constituent parts making a whole, it is clear" that two legal instruments which are described as integral "must be read together as the integral whole which they are proclaimed to be."[1] I there observed that my colleagues of a Chamber of the Court shared this conclusion, and indeed

> could hardly do otherwise. It [the Chamber] itself is a creature of a treaty, its Statute, which, the United Nations Charter provides, "forms an integral part of the present Charter." It would be hard to conceive of an argument that nevertheless the Statute and Charter are not to be interpreted together, as a single instrument forming an integral whole, and harder still to imagine that the Court could accept such an argument.[2]

In practice, as that eminent commentator on the Court, Shabtai Rosenne, has concluded:

> when the Charter uses the expression that the Statute is an integral part of the Charter, it intends that the Charter and the Statute are to be read as one instrument. That does not mean that there is any subordinate status in the Statute in relation to the Charter ... What it does mean, however, is that those portions of the Charter which are of general application to the Organization as a whole, and to each one of its organs individually, are applicable also to the Court. In particular, the principles and purposes for which the Organization exists apply to the Court as much as to any other organ.[3]

Dr. Rosenne supports this conclusion with his customary careful examination of the Court's jurisprudence.[4]

But while the Charter and the Statute are to be read together as one

[1] *Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989*, Dissenting Opinion of Judge Schwebel, p. 96.

[2] *Ibid.*, p. 96–97. [3] S. Rosenne, *The Law and Practice of the International Court* 1965, Vol. I, p. 68.

[4] Two interpretations of Article 92 are possible. One interpretation, stressing, as the dominant principle, the intention of the founders of the United Nations to maintain the functional continuity of the two Courts, would place the emphasis upon the essential independence of the Statute from the

instrument, the provisions of the Statute are the provisions in accordance with which the Court "shall function" (as is reiterated by Article 1 of the Statute). Article 2 of the Statute provides that:

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 9 is not inconsistent in adding that:

> not only that the persons to be elected should individually possess the qualifications required, but also in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 16 provides that: "No Member of the Court may exercise any political ... function." Article 18 provides that: "No Member of the Court can be dismissed unless, in the unanimous opinion of the other Members, he

> Charter in the same way that the old Statute was distinct from the Covenant. This point of view would regard the undoubted organic connection between the Court and the United Nations as having primarily an administrative or ministerial significance. This would mean that the governing principles of the Charter operate only to the extent that the relations of the United Nations to the Court are concerned; applying that is to say, to Chapter XIV of the Charter, but not to the working of the Court, so that the Court is not limited in its freedom of action by those provisions of the Charter which may limit the freedom of action of the other organs of the United Nations. Such an interpretation would attribute no more than formal value to the statement, appearing in the Charter but not in the Statute, that the annexed Statute forms an integral part of the Charter. It would also imply disregarding, or at least minimizing the importance of, the undoubted closer organic connection that now exists. Some support for this view can be seen in the *Corfu Channel* case (preliminary objection) where a joint separate opinion of seven out of the 15 judges of the Court declined to regard the Charter, particularly Article 36 (3), as affecting the jurisdiction of the Court according to the Statute.
>
> This however, does not seem to be the interpretation placed on these words by the majority of the judges who, after stating that the working of the Court is governed by the Statute and not by the Charter, yet gave an interpretation to the Statute and Rules of Court which would render effective certain action which had been taken by the Security Council. Later, in the *Peace Treaties* case, the Court found it necessary to deal with a preliminary objection to its competence, based on the theory that the Court, as an organ of the United Nations, is bound to observe the provisions of the Charter, including Article 2 (7) (the so-called domestic jurisdiction clause). The fact that the Court dismissed the objection is immaterial. The important thing is that the Court did not deal with that objection *a priori* by summarily dismissing it, but disposed of it only after an examination of its merits. This suggests that the organic connection of the Court with the United Nations points to a societal relationship between the two, meaning, in this context, that the problems of interpretation are to be solved on the basis that the Court exists and functions in line with the general existence and functioning of the United Nations. In the *Aerial Incident of 27 July 1955* case the Court stated as a principle that in order to interpret a provision appearing in the Statute, it should consider it "in its context and bearing in mind the general scheme of the *Charter and the Statute*". This point of view may also be observed in the attitude of the General Assembly and the Security Council, which have been careful to preserve the functional independence of the Court and have hesitated to impose upon it tasks which would be incompatible with the judicial function.
>
> (*Ibid.*, pp. 66–67; footnotes omitted.)

has ceased to fulfill the required conditions." Article 19 provides that: "The Members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." Article 20 provides that: "Every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously." Article 13 provides that the Members of the Court shall be elected for nine years and may be re-elected; and Article 32 provides that the salaries, allowances, and compensation of judges "may not be decreased" during their term of office and "shall be free of all taxation." Finally, Article 38 provides that the function of the Court is to decide "in accordance with international law" such disputes as are submitted to it and further provides that it shall in so doing apply specified sources of law (inferentially, not political or other sources of decision-making).

The foregoing provisions, taken together, establish that the International Court of Justice is – and certainly is intended to be – an independent, judicial organ, and no less a judicial organ because at the same time it is the principal judicial organ of the United Nations. In reaching its judgments and advisory opinions, it shall take account of the generally applicable provisions of the United Nations Charter, particularly its Purposes and Principles. That requirement does not detract from the Court's judicial character, not only because of the content of those Purposes and Principles (which speak, *inter alia*, of "conformity with the principles of justice and international law") but because the States and international organizations which plead before the Court in any event are obliged to take account of those Purposes and Principles. At the same time, the fact that the Court is a principal organ of the Organization may influence its readiness to participate in the work of the Organization particularly insofar as it is requested by other organs to render advisory opinions – a matter to be dealt with shortly.

Let us turn now to Article 93 of the Charter, which provides:

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
2. A State which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

These provisions are straightforward. They are no less significant, for, in contrast with the situation of the PCIJ, they assure the Court of a constituency, the membership of the United Nations, which today is virtually universal. The provisions for a non-member State becoming a party to the Court's Statute have worked smoothly.

The same cannot be said of Article 94 of the Charter, which provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

While compliance by Members of the United Nations with the Court's decisions has been general, it has not been invariable. In the two cases in which a party consequently has had recourse to the Security Council, the Council has not deemed it necessary to make recommendations or decide upon measures to be taken to give effect to the decision or judgment. In other cases in which there has been non-compliance with a judgment of the Court, the winning party has not had recourse to the Security Council, presumably in the belief that such recourse would not prove productive. In principle, Article 94 affords judgments of the Court possibilities of enforcement of great potential; in practice, that potential has yet to be realized. Given the uncertainties of international law and life, it would be unjustified to conclude that Article 94 may not assume greater practical importance than it has.

Article 95 of the Charter provides:

> Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

This Article requires no comment in the current context except to observe that the United Nations, in providing in the Third United Nations Convention on the Law of the Sea for the establishment of a Law of the Sea Tribunal, may have made provision for a court to which eventually may be removed a large part of the traditional docket of the International Court of Justice.

Finally, Article 96 of the Charter provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Article 96 is central to relations between the Court and the United Nations. It authorizes the General Assembly and Security Council to request the Court to give advisory opinions "on any legal question" – a very broad authority indeed; so broad that it has been argued that this provision would

entitle the General Assembly to serve as a conduit (though a conditional rather than a "mere" conduit) for requests to the Court from national courts to answer international legal questions arising in the course of national judicial proceedings.[5] While other organs of the United Nations and Specialized Agencies may request advisory opinions only on legal questions "arising within the scope of their activities," this limitation constrains no more than it should.

Some twenty advisory opinions have been requested of the Court by the General Assembly, the Security Council, the Economic and Social Council, and a few Specialized Agencies of the United Nations. The great majority of advisory opinions have been requested by the General Assembly, more frequently in the earlier years of the work of the Organization than in later years.

While in the era of the League of Nations, the League Council, acting under the Unanimity Rule, was the invariable source of requests for advisory opinions (or the immediate source, for it requested opinions not only on League questions, but on questions posed by the International Labor Organization (ILO) or sought on behalf of other international organizations or by States), the organs and organizations which have requested the opinion of the International Court of Justice have sometimes acted in more contentious circumstances. A majority, over the opposition not only of a minority viewpoint on the question at issue, but over the opposition of a minority to asking the Court for its opinion at all, has put a question or questions to the Court. The Court has acted independently in responding to those questions. A majority of the Court has not necessarily shared what may have appeared to be the view of a majority of the requesting organ (as is illustrated, for example, by the opinions rendered by the Court on the *Competence of the General Assembly for the Admission of a State to the United Nations*[6] and in proceedings brought to review certain judgments of the United Nations Administrative Tribunal[7]). At the same time, however clearly the position of the majority of the members of a United Nations organ on the answer to the question put might emerge from a reading of the dossier, the questions themselves have been posed in resolutions which were objectively cast. Those

[5] For an examination of the constitutionality and desirability of this proposal, see Stephen M. Schwebel, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts," *Virginia Journal of International Law* (1988), 28, 2, p. 495; and Shabtai Rosenne, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply," *ibid.*, (1989) 29, 2 p. 401, as well as the sources there cited.

[6] *ICJ Reports 1950*, p. 4.

[7] E.g., *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, ICJ Reports 1982*, p. 325.

resolutions do not presume to answer the question put to the Court. That seems elementary, not only because an answer to a legal question normally should not be sought by an organ that purports to know it but because the appearance of telling the Court what the answer is to the question put to the Court is not consonant with the judicial character and independence of the Court.

A striking departure from this practice is found in the advisory proceedings on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. The General Assembly, in requesting the Court's advisory opinion as to whether the United States was under an obligation to enter into arbitration in accordance with Section 21 of the Headquarters Agreement, affirmed the position of the Secretary-General "that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement" (resolution 42/229B). In its companion resolution 42/229A, also adopted on March 2, 1988, the General Assembly considered "that a dispute exists between the United Nations and the United States ... concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation." That is to say, the General Assembly, after appearing to answer the question on which it sought the advice of the Court, requested the Court's opinion on that very question. Thereafter, on March 23, 1988, while proceedings in the Court were pending, the General Assembly reaffirmed its answer by holding "that a dispute exists between the United Nations and the United States ... concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement ... should be set in operation ..." (resolution 42/230).[8]

What is appropriate is the practice of the Court in holding that, as the principal judicial organ of the United Nations, its reply to a request for an advisory opinion represents the Court's participation in the activities of the Organization and, in principle, should not be refused, unless there are compelling reasons for such a refusal.[9] In fact, the Court has never declined to answer a question so put to it.

So much for Chapter XIV of the Charter. There are other articles as well of the Charter that concern the Court and other articles of the Statute that give rise to relations between the United Nations and the Court.

[8] *ICJ Reports 1988*, p. 12.

[9] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, ICJ Reports 1950*, p. 71. This position has been regularly reaffirmed in subsequent opinions.

Under Chapter VI of the Charter, on the Pacific Settlement of Disputes, the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall seek a solution by various specified means, including judicial settlement. Article 36 empowers the Security Council to recommend appropriate procedures or methods of adjustment of disputes which may endanger international peace, and further provides:

> In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The Security Council has employed this authority only once, when it recommended to the Governments of the United Kingdom and Albania that they "should immediately refer the dispute to the International Court of Justice" which had arisen between them over the Corfu Channel incident.[10]

What if the Security Council does not refer a dispute to the Court but if, when a dispute is before the Council, a party to it at the same time has recourse to the Court?

In the jurisprudence of the Court, there is nothing

> irregular in the simultaneous exercise of their respective functions by the Court and the Security Council ... It is for the Court, the principal judicial organ of the United Nations, to resolve any legal question that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.[11]

This position, which was foreshadowed in the Court's treatment of a request for the indication of interim measures of protection in the *Aegean Sea Continental Shelf* case,[12] and expounded in the "Hostages Case",[13] was confirmed by the Court in *Military and Paramilitary Activities in and against Nicaragua*. The Court there held that:

> The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[14]

[10] *Corfu Channel case, Judgment on Preliminary Objection: ICJ Reports 1948*, p. 17.

[11] *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, pp. 21–22.

[12] *ICJ Reports 1976*, pp. 11–13. [13] Note 11 above.

[14] *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, ICJ Reports 1984*, p. 435.

In that case, the United States argued that, since Nicaragua charged the United States with acts of aggression in the Security Council, and charged the United States with the same acts of aggression in the Court, those charges could only be dealt with by the Security Council under Article 39 of the Charter, which provides that the Security Council shall determine the existence of any act of aggression. The Court dismissed that US contention by holding that the United States misconstrued Nicaragua's complaint as a case of armed conflict which could only be dealt with by the Security Council, whereas the Court construed Nicaragua's complaint as one demanding the peaceful settlement of a dispute: "Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement."[15] In my view, this is one of the many unpersuasive holdings of the Court in this case, for it reconstructs a precise charge of Nicaragua both in the Security Council and before the Court, namely, that the United States was engaged in acts of aggression against Nicaragua. Nevertheless, I did not find persuasive the argument of the United States on this point (however vulnerable I believe was the Court's handling of it), for other reasons set out at length elsewhere.[16] The essence of my conclusion was that, however plausible is the US argument that it was the intent of the drafters of the Charter and Statute to vest exclusively in the Security Council and not concurrently in the Court the determination of acts of aggression, the terms and *travaux préparatoires* of the Charter and Statute do not sufficiently demonstrate that that was their purpose nor do those terms accomplish that purpose.[17]

Still another function of the Court which is intertwined with the functions of the United Nations is as an, or the, authoritative interpreter of legal questions to which the provisions of the United Nations Charter may give rise. It was accepted at the San Francisco Conference on International Organization that each organ of the United Nations would interpret its own powers, and that, while the Organization's structure did not embrace a process of constitutional, judicial, review, advisory opinions could be requested of the Court should differences about interpretations of Charter provisions arise. In fact, there has been recurrent recourse to the Court to interpret salient Charter provisions.

In the first opinion requested of the Court, on *Conditions of Admission of a State to Membership in the United Nations*, the Court affirmed that, as the

[15] *Ibid.*, p. 434.

[16] *Military and Paramilitary Activities in and against Nicaragua Merits, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986*, pp. 287–293.

[17] *Ibid.*

principal judicial organ of the United Nations, it could exercise, in regard to the Charter, "a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers."[18] In its opinion in *Certain Expenses of the United Nations*, the Court, while emphasizing its discretion to give or not to give an opinion, and its authority to answer only "a legal question," held that it cannot "attribute a political character to a request which invited it to undertake an essentially juridical task, namely, the interpretation of a treaty provision."[19] The provision in that case was an article of the Charter. In that opinion, as in *Competence of the General Assembly for the Admission of a State to the United Nations*,[20] the Court did not hesitate to consider the structure of the Charter and the relations established by it between the General Assembly and the Security Council. In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, the Court acknowledged that it "does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."[21] At the same time, "in the exercise of its judicial function" and since objections had been raised to the legality of certain resolutions of United Nations organs, the Court proceeded to consider those objections before "determining any legal consequences arising from those resolutions."[22] In the same opinion, the Court gave a broad, and most important, construction to Article 25 of the Charter, which provides that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter," holding that it is not confined to decisions in regard to enforcement action but applies to the decisions of the Security Council adopted in accordance with the Charter.[23] In this and in other respects, the Court has generally interpreted the Charter in ways which enhance its reach and effectiveness and the vitality of the Organization as a whole.

[18] *ICJ Reports 1947–1948*, p. 61. [19] *ICJ Reports 1962*, p. 155. [20] *ICJ Reports 1950*, pp. 8–9.

[21] *ICJ Reports 1971*, p. 45.

[22] *Ibid.* In this connection, Judge Onyeama, in a Separate Opinion, stated:

> In exercising its functions the Court is wholly independent of the other organs of the United Nations and is in no way obliged or concerned to render a judgment or opinion which would be "politically acceptable". Its function is, in the words of Article 38 of the Statute, "to decide in accordance with international law".
>
> The Court's powers are clearly defined by the Statute, and do not include powers to review decisions of other organs of the United Nations; but when, as in the present proceedings, such decisions bear upon a case properly before the Court, and a correct judgment or opinion could not be rendered without determining the validity of such decisions, the Court could not possibly avoid such a determination without abdicating its role of a judicial organ.
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> (*Ibid.*, pp. 143–144.)

[23] *Ibid.*, p. 53.

But what has been the general rule has not been the invariable practice. While, in its opinion in *Reparation for Injuries Suffered in the Service of the United Nations*,[24] the Court in 1949 liberally construed Article 100 of the Charter,[25] in the "*Yakimetz*" case the Court in 1987 in my view otherwise treated Article 100 – and Article 101, paragraph 3 of the Charter as well – to the prejudice of the independence of the Secretariat and the Secretary-General.[26] In its contentious judgment on the merits in the contentious case of *Military and Paramilitary Activities in and against Nicaragua*,[27] the Court interpreted paramount provisions of the United Nations Charter, notably Article 2, paragraph 4, and Article 51, not, it maintained, with the purpose of construing those articles but rather in order to ascertain what is the content of customary international law governing the use of force in international relations and the exercise of self-defense. In my view, the construction of the concept and term of "armed attack" at which the Court so arrived narrowly and wrongly construes both customary international law and the content of Article 51 to the prejudice of international peace and security.[28]

> Far from contributing, as so many of the Court's judgments have, to the progressive development of the law, on this question the Court's Judgment implies a regressive development of the law which fails to take account of the realities of international relations ... the Court's Judgment on this profoundly important question may detract as much from the security of States as it does from the state of the law.[29]

At the same time, in respect of the obligation of States acting in self-defense to report to the Security Council under Article 51, the Court took an expansive view,[30] whose consistency with the Charter and customary international law may be open to question.[31]

Remaining articles of the Statute and Charter which underlie relations

[24] *ICJ Reports 1949*, pp. 183–184.

[25] The breadth of the Court's construction of Article 100 is instructive. The Court was prepared to hold, as in fact it did, that in the relatively unlikely event of an agent of the Organization being injured in the course of his duties in circumstances involving the responsibility of a State, or, rather, in the contingency of the agent's anticipating the possibility of the occurrence of such an event, his independence might be compromised unless he were able to rely upon the very limited protection afforded by the presentation of a monetary claim *post facto*, not by his State, but rather by the Organization. This attitude of the Court is of importance for its possible approach to a less indirect encroachment upon Article 100.
(S. M. Schwebel, "The International Character of the Secretariat of the United Nations," *The British Year Book of International Law*, [1953], 30, p. 82.)

[26] *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, ICJ Reports 1987*, p. 18; *Dissenting Opinion of Judge Schwebel*, pp. 118–128.

[27] *ICJ Reports 1986*, p. 14. [28] *Ibid., Dissenting Opinion of Judge Schwebel*, pp. 331–347.

[29] *Ibid.*, p. 332.

[30] *Ibid.*, pp. 121–122. [31] *Ibid., Dissenting Opinion of Judge Schwebel*, pp. 373–377.

between the United Nations and the Court may be more summarily cited. Judges of the Court are elected by the General Assembly and Security Council.[32] That that process of election has its powerful political elements is undeniable and probably inescapable. (It may be observed that the selection of judges in national political systems is not always free of political factors.) It has, however, been proposed by the *Institut de Droit International* that, rather than judges of the Court being elected to a term of nine years and eligible for re-election,[33] judges should be elected to a single term of fifteen years, and not be eligible for re-election.[34] That would be a wise revision of the Statute, were the Statute to be revised – a process which, however, might risk more than it would be likely to gain.

The budget of the Court (including the salaries and pensions of judges) is part of the regular budget of the United Nations, adopted and apportioned by the General Assembly pursuant to Article 17 of the Charter. The power of the purse is the traditional lever which an assembly presses to exercise authority over other organs. Presumably in order to forestall any such possibility, Article 32 of the Statute provides that the salaries, allowances, and compensation of judges of the Court shall be fixed by the General Assembly and "may not be decreased during the term of office." While, after a judgment of the Court unpopular in the General Assembly, some unsuitable rumblings were heard, there has never been a political eruption affecting the compensation of the Court. (At the same time, the salary of judges, established in 1946 by the General Assembly on the recommendation of the Preparatory Commission to be equivalent to that of judges of the Permanent Court in the years 1936–9, has been permitted to erode, so that, in real terms, their current compensation is about one-third of that which PCIJ judges enjoyed.)

Article 15 of the Charter provides that the General Assembly "shall receive and consider" annual and special reports from the Security Council and "reports from the other organs of the United Nations." The Court has not treated itself as bound by this provision; for its first quarter of a century, it did not transmit an annual report to the General Assembly. Beginning with the Twenty-Sixth Session of the General Assembly, the Court submitted a report covering its activities during the period from August 1, 1970 to July 31, 1971 and, since that time, it has annually submitted such reports. The General Assembly has taken note of these reports, but has neither discussed nor

[32] Articles 4–15 of the Statute. [33] Article 13 of the Statute.

[34] "With a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for 15 years and should not be re-eligible. In this event an age-limit should be laid down; it might be fixed at 75 years." (*Annuaire de l'Institut de Droit International* [1954], p. 297.)

approved them – an appropriately restrained procedure in view of the independent judicial character of the Court.

It may further be recalled that, at a period when recourse to the Court was sparse, the General Assembly invited States and the Court to submit to the Secretary-General views and suggestions concerning the role of the Court on the basis of a questionnaire to be prepared by the Secretary-General. It requested the Secretary-General to prepare a comprehensive report in the light of the opinions so expressed, which he did.[35] The result was a valuable exploration of ways and means of reviving recourse to the Court. In subsequently revising the Rules of Court, the Court gave careful attention to the views and suggestions of States. One result was the revision of the Rules to provide for the President of the Court ascertaining the views of the parties regarding the composition of a chamber for a particular case, a revision which has been productive.[36]

It may furthermore be noted that Article 21 of the Statute provides that the Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary. Thus the Registrar and Deputy-Registrar are elected by the Court, not elected by the General Assembly nor selected by the Secretary-General of the United Nations. The Registrar and the staff of the Registry are responsible to the Court, rather than to the Secretary-General or to the General Assembly. At the same time, the staff of the Registry are subject to Staff Regulations which conform as far as possible to the United Nations Staff Regulations and Rules.

The Court has played an important role in interpreting the provisions of the Charter, and of the Staff Regulations and Rules and related resolutions of the General Assembly, which govern the status and responsibilities of the Secretariat of the United Nations and of agents of the United Nations not members of the Secretariat. Such questions have arisen in the normal course of its advisory proceedings.[37] Moreover, there is a special procedure for what is, in effect, appeal on specified, restricted grounds from judgments of the United Nations Administrative Tribunal to the Court. The opinions – which have decisive force – rendered pursuant to this exceptional procedure have significantly borne on the authority of the Secretary-General and the status of the Secretariat.[38]

[35] *Review of the Role of the International Court of Justice, Report of the Secretary-General*, United Nations doc. A/8382 (September 15, 1971).

[36] Article 17 of the Rules of Court.

[37] E.g., in *Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949*, p. 174. Of related significance is the Court's opinion in *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, ICJ Reports 1954*, p. 47.

[38] See, e.g., note 26, above.

Report of the Committee on Nationalization of Property of the American Branch of the International Law Association

A Response by the Committee on the Nationalization of Property of the American Branch to the Questionnaire of the International Committee on Nationalization

Introduction

The Committee on the Nationalization of Property was created by the American Branch of the International Law Association. The American Branch requested the Committee to study the problem of nationalization of the property of aliens, as it concerns international law. The Committee is composed of lawyers whose experience, taken collectively, represents service as Government officials, teachers, and practitioners.

The members of the Committee live and work in a community whose foundations were built with capital funds from abroad. As the United States developed and industrialized, its citizens created financial resources and managerial and scientific techniques. A proportion of these funds and techniques are assets which may be used with assets of other countries to develop world trade and provide an increasing level of industrial development in other parts of the world. The assets other peoples possess include raw materials and natural resources, in many instances far beyond the foreseeable requirements of the States in which they are found. In some cases they include capital, and, in more cases, skills. The market potential of all countries of itself is an asset awaiting further development for mutual benefit.

In the ever-shrinking world community, whose population is estimated to be increasing by 70,000 per week, it is in the mutual interest of the United States and other States to maintain free association to develop the general

The Report was first published in *Proceedings and Committee Reports of the American Branch of the International Law Association 1957–1958*, p. 61. The Appendix to the Report, containing the Committee's answers to the Questionnaire of the International Committee, is omitted. James N. Hyde was Chairman of the Committee.

level of productivity. All countries will gain by the mutual development of their natural, agricultural, and industrial resources; no country can best attain these ends alone. Economic interdependence is universal and acute.

Political differences in the world are deep and complex. This fact in itself is a reason for an approach that continues to offer foreign capital and skills for creative and cooperative use in worldwide economic development. Of course no State need agree to such a joint use of respective capacities. Yet, when it does, certain obligations come into being. It is appropriate to consider what they are and how they can be determined.

In the United States, a vital proportion of the capital available for potential investment abroad is in private hands. The management of private corporations, as trustees for that broad segment of the general public who are stockholders, largely determines the disposition of such capital. Corporate management must evaluate what contribution capital sent abroad will make to the success of the enterprise, as well as the risk that the venture may be frustrated.

The Committee accordingly is concerned with the bases for a fair and continuing relationship between existing, as well as future, foreign private investment and the State which explicitly or implicitly invites its use, in combination with its own assets. It is appropriate and necessary to look to international law for the concepts and methods that will provide a framework for such a fair and continuing relationship.

The wrongful taking of alien property interests represents the frustration and failure of joint plans reaching across borders. It is the task of law to discourage the wrong, and, where it occurs, to right it.

The Law

Definitions

The problem of central concern is the taking by a State of alien interests, legal or equitable, in property and contract.

We are concerned with private interests. Foreign investment by Governments and their agencies is important. But peacetime maltreatment of public investment, in an era of invasion of private foreign property interests, has not been conspicuous.[1]

We use the word "taking" advisedly and consistently. We employ it as a substitute for the words "nationalization" and "expropriation."

To "nationalize" may carry connotations of broad social and economic

[1] For example, no loans of the International Bank for Reconstruction and Development, or of the Export-Import Bank, are known to have been repudiated.

measures designed to refashion the fundamental structure of a community. It imports a presumption of what may be a question: whether the taking is for a public purpose. The term "expropriation" is perhaps prejudicial as well, carrying as it may implications of class conflict. The word "taking" is impartial, broad, and descriptive.

Our use of the word "taking" is subject to a single reservation. A taking need not be total; title need not pass. To fall within the ambit of our analysis, a taking may well involve lesser measures which have the effect, in whole or in part, of an appropriation or destruction by the State of alien interests in property and contract. Among such measures may be sequestration, custodianship, breach by a State of a contract with an alien, arbitrary measures of taxation and exchange control, oppressive administrative proceedings, State-sponsored boycott, forced dissolution of a corporation, invasion of a company's managerial prerogatives, or compulsory sale of its stock. These examples are but illustrative of the fact that the opportunities of the State either to regulate or to abuse the rights of foreigners are manifold. We use the word "taking" with the potential of such abuse in mind.

It is with international law that we are concerned. International law, in its present state of evolution, is not substantially applicable to the treatment by a State of its own nationals. The human rights provisions of the United Nations Charter may be argued to invest the individual under international law with rights against his State, but even if this is true in the sphere of property rights we shall nevertheless consider interests of aliens alone. However, we speak of alien rights in the sense of indirect as well as direct legal rights. Thus, the interests of foreigners in a corporation cannot be disregarded by a State because that corporation is its national.

We do not deal with the law of war and its effects upon alien property and contractual interests. This is by no means to say that we regard a national proclamation of a state of emergency, or the recommendation of United Nations measures of pacific settlement, or the taking of police action within or without the United Nations, or war itself, as necessarily validating treatment of alien interests which would be otherwise unlawful.

Principles

In the Committee's view, three basic principles of international law govern the treatment of alien interests in property and contract:

(*a*) International law is supreme over municipal law.
(*b*) The taking of alien interests must be accompanied by full compensation.
(*c*) States are bound to perform their treaties with States and contracts with aliens in good faith.

Our fundamental assumption is the supremacy of international law. Thus, our approach is characterized by a recognition of the distinction between the power of States and the rights and duties of States. In the present stage of international law and life, not all that States have and exercise the *power* to do is necessarily right or creative of rights. The practice of States, a source of international law, must be approached with discrimination. The suffering of wrongs must not be confused with acquiescence in the assertion of rights. Above all, incantations of "sovereignty" must be regarded as the derision of law they so often are meant to be.

The supremacy of international law over municipal law may be summarily illustrated. Thus, the Permanent Court of International Justice held in the case of *Free Zones of Upper Savoy* that "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations ..."[2] The Court held similarly in its opinion on *Treatment of Polish Nationals in Danzig* that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law ..."[3]

The application to alien property interests of this axiom of the supremacy of international law was emphasized by the Government of the United States in its diplomatic exchange with the Government of Guatemala over the taking of United Fruit Company property:

> The Government of the United States does not controvert in the slightest the proposition that the Act of Congress of the Republic of Guatemala ... constitutes an act of sovereignty inherent in Guatemala. Every act of the Guatemalan Government constitutes a sovereign act, as do the acts of every other sovereign Government, including the acts of the Government of the United States. But to state that no sovereign act of a Government affecting foreign States or their nationals is open to discussion, or question, as to its validity under international law, because it is a sovereign act, is to say that States are not subject to international law. One has only to look at the diplomatic records of any Government over any period of time to see that such sovereign acts are constantly discussed and held up to scrutiny by other members of the family of nations with whom they treat for determination as to whether they measure up to or fall below the standards required under international law.
>
> The obligation of a State imposed by international law to pay just or fair compensation at the time of taking of property of foreigners cannot be abrogated from the international standpoint by local legislation. If the contrary were true, States seeking to avoid the necessity of making payment for property expropriated from foreign nationals could avoid all pecuniary responsibility simply by changing their local law. Every international obligation could thus be wiped off the books. But international law cannot thus be flouted. Membership in the family of nations imposes international obligations.[4]

[2] PCIJ, *Series A/B, No. 46*, p. 167 (1932). [3] PCIJ, *Series A/B, No. 44*, p. 24 (1932).

Whatever the position under municipal law, it is to the standards of international law which States, in their treatment of alien property interests, must adhere.

Yet the logical application of this root concept is far from axiomatic. In the field of private international law, its implementation is sustained by the courts and authorities of some States, denied by those of others, and ignored by still others. Some courts refuse to exercise jurisdiction to restore property and contractual rights taken in violation of international law; others do not.

In the view of the Committee, the problems of private international law posed in the Questionnaire may be met with relative simplicity, and with a complete regard for the advancement of international law and welfare, by rigorous application of the principle of the supremacy of public international law. It is, in our submission, unsound to maintain that the State is responsible under international law for the violation of alien property and contractual interests but that, under its rules of private international law which are alleged to be municipal rules alone, its courts may subvert that international law by which the State as a whole is bound. Whatever doctrinal validity the dichotomy between private international law and public international law may have, it is insufficient to overcome the needs of the international community. Public international law is not only to be described but applied. A principal forum of its application, especially in the field of alien property and contractual interests, is and should increasingly be the municipal courts of States.

Authority for this view is found not only in contemporary practice – which admittedly is in conflict – but in the principle of law which underlies it: that no legal right can spring from a wrong. Thus, where a State violates international law in its taking of alien interests, it and its successors who take with knowledge do not come into court with clean hands. They have no claim, basing it as they do upon a misuse of sovereign power, to the application on their behalf of the sovereign rights of the State which has jurisdiction over the *res*. This is so whether or not the *res* was within the territory of the taking State at the time of taking.

A second fundamental principle is that the taking of alien interests must be accompanied by full compensation. To the extent that alien interests are taken without the payment of prompt, adequate, and effective compensation, there is confiscation – public seizure of private rights which, in essence, does not

[4] *Department of State Bulletin* (September 14, 1953), 29, pp. 358, 360.

differ from that private seizure of private rights that the legal systems of all civilized societies prohibit. "No one," the United Nations Universal Declaration of Human Rights proclaims, "shall be arbitrarily deprived of his property."[5] This basic requirement – full compensation, promptly and effectively paid – has received repeated expression in legal principle and in positive law. It is linked with the principles of unjust enrichment and acquired rights. The concept of unjust enrichment is fundamental to Roman law, civil law, and is today acknowledged in Anglo-American law. It is embedded in international law, in substance and in terms.[6] In substance, it equates with "the principle of respect for vested rights" to which the Permanent Court of International Justice repeatedly lent its authority.[7]

The Committee recognizes that the taking of alien interests has not consistently been characterized by compensation which is either prompt, or adequate, or effective. But it does not see in these violations of the principle of unjust enrichment the establishment of a new principle of not-so-unjust enrichment. The arbitrary divesting of rights does not vitiate the principle of respect for vested rights. International political settlements for less than full compensation are not legal precedents that prejudice the international law rule requiring payment of full compensation.

Some argue that the "capacity" of the taking State to pay should govern not its possibility of taking but the amount of compensation due. But it is not apparent why, if the taking is proportionately large, the obligation to compensate should be disproportionately small. Such achievements as nationalization may have are too controversial to admit the assumption that a large-scale taking is necessarily a national good meriting special dispensation. Still less can the Committee see why, even if the contentious economic justification of large-scale taking were to be established, the foreign investor should bear the burden of a State's experimentation. By hypothesis, the foreigner whose presence is expressed in his property and contractual interests will be absent once his interests are taken; he will not share in the national social advantage of a large-scale taking, even assuming such advantage to exist. As against the international investor, a national taking accompanied by less than full compensation represents injustice compounded.

If a State receives a gift from the Government or the people of another State, it is entitled to treat it as such. Is it equally entitled to treat foreign

[5] Article XVII.

[6] *See*, for example, *Lena Goldfields, Ltd. Arbitration*, 36 Cornell L.Q., pp. 42, 51 (1950–1951).

[7] *See*, for example, *Case Concerning Certain German Interests in Polish Upper Silesia (Merits), PCIJ, Series A, No. 7*, pp. 21–22 (1926).

investments as gifts? The obvious answer leads to the ineluctable conclusion: if a State takes property of foreigners, it must provide fair compensation.

A standard of fairness is not beyond the reach of international legal technique. It is simpler to establish than a standard which falls short of the fair. For example, Article 6 of the Treaty of Friendship, Commerce, and Navigation between Japan and the United States provides:

> Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."[8]

It is equally axiomatic that a public taking of alien interests must be not only fully compensated but also (*a*) for a public purpose and (*b*) not based upon an arbitrary and unreasonable classification violative of fundamental human rights. Subject to the principle of respect for acquired rights, a State lawfully may reserve certain areas of a nation's economic endeavor to its nationals. But, under international law, a State may not take foreign interests as a measure of political reprisal. Nor may a State use its public power to take alien interests for private profit, or for other ends than those directly related to public purposes.

A third and fundamental principle is that States must perform their treaties with States and contracts with aliens in good faith. The principle of *pacta sunt servanda* is of the essence of the supremacy of international law. "No case is known in which any tribunal ever repudiated the rule or questioned its validity."[9] There is, in fact, no dispute over a State's being bound to carry out in good faith the obligations it assumes by treaty. These obligations embrace the field of treatment of alien property and contractual interests as well as other areas of international law. A taking in violation of a treaty, as the Permanent Court of International Justice held in the *Chorzow Factory* case, is "unlawful" and "illegal."[10]

While the legal force of a treaty restriction upon a taking by a State of alien interests is uncontested, the international legal impact of restrictions contained in contracts between States and aliens is a matter of dispute. In the view

[8] [1953] 4 *US Treaties, etc.* (II), pp. 2068–2069.

[9] "Law of Treaties," *Harvard Research in International Law, American Journal of International Law Supplements* (1935), 29, p. 977. The authorities collected by the Harvard Research in support of the rule of *pacta sunt servanda* are extensive and conclusive.

[10] *Case Concerning the Factory at Chorzow (Claim for Indemnity, Merits), PCIJ, Series A, No. 17*, p. 47 (1928). See also *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)* (above, note 7), at p. 21.

of the Committee, an approach which is both principled and progressive would admit no such dispute; the contractual obligations freely assumed by a State are no less binding than its treaty obligations. This would be true even if the following were not:

> International law today recognizes that individuals and other subjects are directly entitled to international rights ... the alien is internationally recognized as a legal person independent of his State; he is a true subject of international rights.[11]

In the case of *Losinger & Co.*, Switzerland declared: "The principle *pacta sunt servanda* ... applies not only to agreements directly concluded between States, but also to those between a State and foreigners ..."[12] Yugoslavia, its opponent, while denying any violation of that principle, maintained that the breach by a State of a contract with an alien of itself did not engage that State's international responsibility.[13] A settlement made it unnecessary for the Permanent Court to rule and, in fact, no conclusive international judgment on the question exists. Nor is a consistent pattern formed by the practice of States in other instances of dispute over the violation of contracts between States and aliens, such as the Anglo-Iranian Oil Company and Suez cases.

It is noteworthy, however, that more than one effort at codification of the law governing the treatment of alien interests has substantially viewed the breach of such contracts as a breach of international law. Thus, the Harvard Research declares:

> A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.[14]

The Bases of Discussion drawn up in 1929 by the Preparatory Committee of The Hague Conference for the Codification of International Law submitted:

> A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

[11] United Nations doc. No. A/CN.4/96, 51, 58; International Law Commission, "International Responsibility," Report by F. V. Garcia-Amador, Special Rapporteur.

[12] *PCIJ, Series C, No. 78*, p. 32 (1936); translation supplied.

It is submitted that the Swiss view is unassailable; that, as a matter of principle, there is no difference whatsoever in this respect between treaties and contracts. As a matter of practice, support for the Swiss view, while mixed, is nevertheless substantial. In the arbitration between Losinger & Co. and the Kingdom of Yugoslavia, which antedated the proceedings before the Permanent Court, the umpire forcefully upheld "the principle of fidelity to contract ... *Pacta sunt servanda*" (*ibid.*, p. 83).

[13] *Ibid.*, pp. 242, 333, 334.

[14] 23 *American Journal of International Law Supplement* (1929), 23, p. 167. See Dunn, *The Protection of Nationals* (1932), p. 166.

> It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.[15]

More recently, Professor de La Pradelle, as Rapporteur of the Institute of International Law, advanced a draft that provided:

> Nationalization ... shall respect obligations validly entered into, whether by treaty, or by contract ..."[16]

While the Hague Conference did not come to consider the former drafts, and the Institute was unable to achieve agreement upon the latter, they lend weight to the view which this Committee espouses: that the taking of alien contractual rights by a State of itself is a breach of international law.[17] Parties normally contract in the expectation of performance. When a State, through its interjection of sovereign power, steps out of the role of contractor and upsets that expectation, it violates international law.

No Government would suggest that it has a legal right to breach a loan agreement it concludes with the International Bank for Reconstruction and Development. Can it seriously be contended that a Government has the legal "right" to breach a loan agreement with the Chase Manhattan Bank? Acceptance of the argument that the former contract is intergovernmental, and consequently governed by international law, while the latter has but one Government as a party, and consequently is governed by municipal law, even if formalistically satisfying – as it is not – adds nothing to the rule of international law. It may detract from the flow of international investment.

[15] League of Nations doc. C.75.M69.1929.V., p. 33. The Bases of Discussion contain a similar clause concerning executive acts (*ibid.*, 59). What the Preparatory Committee described as "the prevalent opinion" expressed in its draft was based upon the responses of twenty-three governments to its questionnaire.

[16] *Annuaire de l'Institut de droit international 1952*, 44, Part 2, pp. 305–318; translation supplied.

[17] See *Serbian and Brazilian Loan Cases, PCIJ, Series A, Nos. 20 and 21* (1929), and comment upon by Lipstein, *The Place of the Calvo Clause in International Law, British Year Book of International Law* (1945), 22, pp. 130, 134, and *International Fisheries Co. (USA) v. United Mexican States*, 4 *Reports of International Arbitral Awards* (1931), pp. 691, 699, as well as the *El Triunfo Case (US v. El Salvador* [1901], *Foreign Relations US* (1902), pp. 838, 871; *Turnbull et al. (US v. Venezuela)*, Ralston and Doyle, *Venezuelan Arbitrations of 1903*, pp. 239, 242, 244; the *Landreau Claim (US v. Peru*, 1922), 1 *Reports of International Arbitral Awards*, pp. 349, 356, 364; the *Shufeldt Claim (US v. Guatemala*, 1930), 2 *Reports of International Arbitral Awards*, pp. 1081, 1097–1098; *The Administration of Posts and Telegraphs of the Republic of Czechoslovakia v. Radio Corporation of America* (1932), *American Journal of International Law* (1936), 30, pp. 523, 530–532, 534; *Radio Corporation of America v. The National Government of the Republic of China* (1935), 3 *Reports of International Arbitral Awards*, pp. 1623, 1627; *North American Dredging Company of Texas (USA) v. United Mexican States* (1926), 4 *Reports of International Arbitral Awards* 26, 35; *Harry H. Hughes (USA) v. United Mexican States* (1930), *ibid.*, pp. 617, 621; and Dunn, *The Protection of Nationals*, pp. 165–167.

The unsoundness of treating the legal rights arising from contracts between States and aliens as being of a lower order than those arising from agreements between Governments or their agencies merits further illustration. Afghanistan recently granted the Soviet Techno Export Organization rights to explore for oil in Afghanistan. A breach by Afghanistan of the pertinent agreement would be a breach of international law.[18] But a contract by Afghanistan with a privately owned oil company, for the same object, of the same substance, upon the same terms, breached in the same way, by the same State, would not be a breach of international law in the eyes of some formalists. In fact, some would go so far as to say that if the contract were governed by Afghanistan law and that law were altered to authorize the contract's breach, no law, international, municipal, or other, would be violated by breach.

Questionable conclusions such as these may be reached, at the price of practical deterrence of private capital investment. In the Committee's view – which has significant support in municipal law – States no less than individuals are bound by their contracts.[19] This is so even if, in a given case, a contract between a State and an alien happens to be governed by the contracting State's municipal law. But whatever differences there may be about the law relating to a State's performance of contracts with aliens, there can be no dispute about the fact that performance is in the universal interest. The interest in a maximum flow of international capital and trade is, as a matter of economic fact, and as between borrower and investor, buyer and seller, wholly mutual. International contracts are a primary means of implementing that interest. Unilateral repudiation or alteration by States of their contracts with aliens hardly promote that interest or the conclusion of contracts which is its expression.

[18] This certainly would be the case were the agreement between the Government of Afghanistan and the USSR. It probably would be the case were the agreement between the Afghanistan Government and an "independent" Soviet state agency.

[19] In *Perry v. United States*, the Supreme Court held:

> The United States are as much bound by their contracts as are individuals ... When the United States, with constitutional authority, makes contracts, has rights and incurs responsibilities similar to those of individuals who are parties to such instruments ... The [contrary] argument ... is in substance that the Government cannot by contract restrict the exercise a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty"
>
> (294 US 330, 351, 352, 353 [1934]).

In *Robertson v. Minister of Pensions*, it was similarly held:

> The next question is whether the assurance is binding upon the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, i.e., the doctrine that the Crown cannot bind itself so as to fetter its future executive action ... the Crown is bound by its express promises as much as any subject ... The defence of executive necessity is of limited scope. It only avails the Crown where there is an implied term to that effect, or that is the true meaning of the contract. ([1948] 2 All E.R. 767, 770.)

See also the multinational authorities cited by Mann, "The Law Governing State Contracts," *British Year Book of International Law* (1944), 21, pp. 11, 13–14, n. 10.

Is "nationalization" a valid legal excuse for the breach by a State of its contracts with foreigners? The Permanent Court of International Justice, in the *Chorzów Factory* case, responded negatively, where a treaty restricted a taking. The International Court of Justice has been denied opportunity to respond where a contract restricted a taking – a fact which suggests that States that have breached contracts with foreigners lack confidence in the legality of their actions. In the view of the Committee, restrictions upon the taking of alien interests may be found in a treaty; they may be expressed or implied by contract; in either case, international law requires they be respected. The breach by a State of a contract with an alien is no less illegal because it is complete. The taking of contract interests cannot be legal where the breach of contract interests is illegal.

It follows that, while the measure of compensation which conditions a State's taking of alien interests not protected by treaty or contract[20] is prompt, adequate (full), and effective compensation, the consequences flowing from a State's breach of a treaty or contract are otherwise. As the Permanent Court pointed out in the *Chorzow Factory* case, an equation between the indemnity due in a lawful taking and that due in an unlawful one would be "unjust." Rather, the Court held, the consequences of "unlawful dispossession" are to be assessed as follows:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[21]

[20] A contract may be implied as well as express. Thus, if a State invites foreign investment pursuant to the terms of a given law, its right unilateral to alter that law, in derogation of investment made in reliance upon it, is open to question. Not only may the principles set forth above govern such a situation, but the further principle of estoppel or *préclusion* may be applicable.

[21] *Chorzow Factory (Merits)* (above, note 10), p. 47. The draft submitted to the Institute of International Law provided: "Nationalization ... shall respect obligations validly entered into, whether by treaty, or by contract. Failing such respect, there will be a denial of justice giving the right not merely to payment of full compensation, but to damages of a punitive character" (*Annuaire* [see note 16]).

Thus, the remedy for breach by a State of a contract with an alien, whether designated as a breach or a taking or as expropriation or nationalization, is in the nature of specific performance. Where performance actually is no longer possible, then the foreign contractor must be placed as nearly as possible in the position he would have enjoyed absent the breach, that is to say, he is entitled to the profits he would have earned had not his contract rights been taken.

Procedures

Procedures for the application of the foregoing principles are secondary only to the principles themselves. International law is characterized by an assertion of rights coupled with an absence of remedies. The consequent fragility of international law needs no elaboration. Any effort to strengthen the rule of law must consider procedure with substance, enforcement with prescription.

The rights of aliens in property and contract traditionally have been considered – to the extent that they have been judicially considered at all – in the first instance in municipal courts, and in the second in international courts or arbitral tribunals.

Traditionally, international law, with an understandable emphasis upon the rule of exhaustion of local remedies, and an awareness of the lack of alternative judicial fora, placed principal reliance upon municipal tribunals. It was assumed that an alien investing in a country subjected himself to the protection and obligations of the law of the State in which he invested. It was assumed that not only would the alien be required to seek redress for injuries in the local courts but that justice would be done. Only where there was a "denial of justice" might international law come into play, by means of the diplomatic intervention of the State whose national the alien was.

In the traditional view, if a State were to take an alien's interests by legislative or executive action not subject to genuine judicial challenge, this of itself would constitute, as a denial of justice, a violation of international law. Since, in fact, all too often violations of alien interests by a State have been characterized by a lack of effective judicial redress, those who have denied that international law automatically is breached by the arbitrary breach by a State of its contract with an alien have nevertheless tended to affirm that such breaches in practice do violate international law.

These traditional patterns are not without merit. The local remedies rule, which never applied where local remedies did not exist, is a reasonable one. Standards of international behavior have not so far deteriorated that it may be assumed that an alien may never have his day in the court of any foreign State on terms of equality not only with that State's nationals but with the State itself.

Yet, the expanding pace of world development, the rising level of international trade, the increasing demand for foreign capital, the immensity of certain capital commitments, the growth of large international corporations, and the multiplication of sovereignties, in uneasy combination with a contradictory and costly contempt in some cases for alien property and contractual interests, have led to a search for new procedures for the lawful disposition of disputes. At the same time, the weakness of the traditional appellate recourse – that of the home State's diplomatic intervention – has become the plainer. While the United Nations Charter has imposed restrictions upon the resolution of international disputes by force, States generally have not accepted complementary procedures for the resolution of disputes through law.

Dissatisfaction with the procedures for the settlement of alien property and contractual disputes has embraced another sphere as well, that of the municipal courts of States other than the State alleged to have breached alien interests. The actions of municipal courts in dealing with such breaches are inconsistent and confused. Concepts of territoriality, act of State, sovereign immunity, and public policy have dissonantly clashed.

The Committee accordingly sees the procedural problem as threefold:

(1) A new international court of arbitration should be established, to which alien holders of property and contractual rights would have equal access with States.[22] Such a court, designed to resolve disputes between States and aliens,[23] should be a fully constituted tribunal, akin to the International Court of Justice rather than to the Permanent Court of Arbitration. It should be animated by those general principles of law recognized by civilized nations upon which the International Court of Justice itself is authorized to draw. It might embody specialized panels competent to deal with technical disputes, such as those turning upon matters of taxation or accounting or the particular techniques of an industry.

Such a court would supply the advantages of arbitration to the many alien investors whose interests are not contractual or whose contracts do not provide for *ad hoc* arbitration. The Committee recognizes the danger of undue proliferation of international machinery. But it believes that the creation of a tribunal of this kind, open to all alien investors and all States, would fulfill a need that is not otherwise met. This would be preferable, in its view, to amendment of the Statute of the International Court of Justice that would accord access to aliens.

[22] While the Committee is concerned with rights in property and contract, it does not mean to suggest that aliens other than investors should not enjoy increased international procedural status for the protection of other human rights.

[23] The field of international commercial arbitration between private parties is of course well developed.

Thus the Committee would modernize the rule of exhaustion of local remedies – a rule which, in any case, it views as procedural. The alien investor should, and in varying degrees does, have municipal judicial recourse against the violation of his rights. Where local remedies are or reasonably promise to be effective, the alien should have the option of employing them. He will tend to exercise that option to the extent that local remedies are in fact prompt and adequate. Municipal litigation generally is less expensive than international litigation. But where the State, if not through maladministration of the judicial process, then through the enactment of legislation or decree alters the municipal law which, it argues, governs the rights of the alien investor, then municipal courts provide no remedy.[24] It is in cases such as these – and there will be others – in which the alien will wish to exercise the option, with which he should be endowed, of recourse to an alternative forum of the first instance, the new international court of arbitration. The local remedies rule thus would acquire a new dimension, for the alien would be required either to exhaust municipal remedies or the remedies of the international court of arbitration before the diplomatic intervention of his State would be permissible.[25]

A new international court of arbitration finds promising precedent in the experience of *ad hoc* arbitration between States and aliens. The major international investments of the twentieth century often have carried with them provision for the constitution of arbitral tribunals. These tribunals, to which the contracting State and the contracting alien have access on a basis of equality, directly adjudicate disputes between States and aliens, by applying municipal law,[26] international law, or those general principles of law recognized by civilized nations which are a source of international law.

It is in any case clear that the law such tribunals find to be controlling cannot be municipal law as the contracting State may amend it in derogation of the rights it has accorded the investor. This is implied in the very constitution of a tribunal distinct from the State's judicial structure, and is made explicit in a number of concession agreements. It is plain that, when an alien investor enters into a contractual arrangement with a State which is interwoven with the law of that State, the parties contract under the

[24] The instances where courts are empowered to strike down the promulgations of legislature or executive are exceptional.

[25] Where the alien already enjoys the advantages of arbitration by the terms of his contract with the State, he is not bound to do more than exhaust the remedy arbitration provides. Should the State refuse to arbitrate, local remedies would thereby be exhausted, and the diplomatic intervention of the alien's State would be in order.

[26] Of the contracting State or of the contracting alien's State, or both (as in *Radio Corporation of America v. The National Government of the Republic of China* [see note 17]).

assumption that it is the law as it exists at the time of contract, and not as it may later be amended, which applies to their relations and to any judicial resolution of them.[27]

Such *ad hoc* tribunals provide not only an effective means of settlement of disputes between States and aliens but a clear-cut test of the honoring by a State of its obligations under international law. If, as in the case of Iran, the State which purports lawfully to take the property of an alien refuses to submit its action to the adjudication of the arbitral tribunal whose competence it earlier accepted, its action constitutes an undeniable denial of justice. A new international court of arbitration would embody the advantage of this test as well.

(2) The need on the inter-State level is not the creation of new machinery but the use of that which exists. The International Court of Justice and its predecessor have played an effective role in the protection of the rights of States and alien investors alike, insofar as the Court has been permitted to do so.[28] The jurisdiction actually accorded the Court has been regrettably constricted. In fact, the principal post-World War II disputes over the treatment of alien property and contractual interests have been withheld from the Court's judgment. The taking of alien interests repeatedly has been left to the arena of unsatisfactory settlement, international disturbance, or unheeded injustice. The Committee particularly regrets that the Government of the United States so far has chosen to contest the jurisdiction of the Court in the *Interhandel* Case.

The problem – fundamental to international law – of the Court's compulsory jurisdiction is substantially one in which virtually all States are guilty, and some guiltier than others. The Committee submits that the international legal character of the views, the arguments, and the proposals to be advanced at this Conference of the International Law Association should be tested against the willingness of those who advance them to have their respective States bound by the Court's effective and compulsory jurisdiction.

It has been noted that no authoritative judicial ruling exists on certain of the principal issues under discussion. The International Court of Justice has been denied more than one opportunity to render such a ruling. It is in the incontestable interest of the rule of international law that future opportunities should not be lost.

[27] This is not to say that the law-making body of a State may generally deny to subsequent legislatures the right to legislate. But it is to say that a State may bind itself not to adopt, or so apply, legislation as to violate its obligations, whether they spring from treaty or contract.

[28] Inter-State arbitration presents a promising alternative. A number of economic treaties concluded by the United States in recent years contain provision for arbitration of disputes.

(3) A third and vital forum is the municipal courts of States other than the State whose treatment of the alien's interests is challenged. In this sphere, as has been indicated above, it is the Committee's belief that it is incumbent upon municipal courts to apply public international law. Municipal courts should recognize no title as arising, and none of the effects of ownership flowing, from a taking of alien interests in violation of international law.

15. As a Committee of lawyers, dedicated to the judicial process, we place our emphasis upon judicial settlement. But we recognize that the sanctions which the effective enforcement of international law may require may be not only judicial. In fact, judicial sanctions themselves may require executory sanctions. It is accordingly submitted that measures, short of the use or threat of use of armed force, to sustain international law not only are lawful but, in certain cases, may be imperative. In the sphere of treatment of alien property and contractual rights, as throughout international life, the problem of strengthening the role and the rule of law is a principal problem of our age.

The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources

The United Nations General Assembly adopted at its Seventeenth Session a resolution which, the Delegate of Bulgaria complained, comprised "a charter of foreign investment."[1] The resolution,[2] entitled "Permanent Sovereignty over Natural Resources," is the capstone of more than ten years of consideration of the subject by the General Assembly, the Human Rights Commission, the Economic and Social Council and a special Commission on Permanent Sovereignty over Natural Resources.[3] It was adopted by a vote of eighty-seven in favor, two opposed and twelve abstentions. The United States voted with the majority; France and South Africa were the two dissenters; and the Communist bloc (including Cuba) and, for varying reasons, Ghana and Burma, abstained.

The resolution reads:

The General Assembly,

Recalling its resolution 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952,

Bearing in mind its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under

First published in *American Bar Association Journal* (May 1963), p. 463.

[1] United Nations General Assembly, Seventeenth Session, Second Committee, Provisional Summary Record of the 859th Meeting, UN doc. A/C.2/SR.859, 5.

[2] General Assembly resolution 1803 (XVII) of December 14, 1962.

[3] See Hyde, "Permanent Sovereignty over Natural Wealth and Resources," *American Journal of International Law* (1956), 50, p. 854.

international law and to the importance of encouraging international cooperation in the economic development of developing countries,

Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

Considering that it is desirable to promote international cooperation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

Considering that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connexion,

Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,

Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international cooperation in the field of economic development, particularly that of the developing countries,

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely

consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.
5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.
6. International cooperation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.
7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace.
8. Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

II

Welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;

Requests the Secretary-General to continue the study of the various aspects of permanent sovereignty over natural resources, taking into account the desire of Member States to ensure the protection of their sovereign rights while encour-

aging international cooperation in the field of economic development, and to report to the Economic and Social Council and to the General Assembly, if possible at its Eighteenth Session.

Sovereignty over Resources Is Theme of Resolution

It will be seen that much of the resolution consists of affirmation and reaffirmation of the permanent sovereignty of States over their natural wealth and resources. "The principle of the sovereign rights of nations over their own resources," the Delegate of Burma remarked, "would seem so obvious as not to require elucidation."[4] The United States, for its part, did not favor the United Nations setting about to expound the obvious. Thus it opposed the creation of the Commission on Permanent Sovereignty over Natural Resources, which was the author of the draft resolution on which the Seventeenth Session centered its debate. However, once the Commission was established, the United States participated actively as a member and played a leading role in the General Assembly's consideration of the subject. With respect to the resolution's primary theme, the United States Delegation more than once assured the Assembly that it "wholly supports every country, including our own, enjoying the full benefit of its natural resources."[5]

It was widely recognized that the importance of the resolution would lie not so much in its abstract assertions of sovereignty as in the concrete conditions laid down for the exercise of that sovereignty. Had the resolution simply consisted of recitals of sovereign rights, without due regard to sovereign obligations, the United States presumably would have opposed it as it did an earlier resolution on the subject.[6] As it was, the draft resolution proposed by the Commission did contain recognition of the obligations of States under international law in their treatment of foreign property.[7] However, there were gaps in the Commission's draft which the United States, together with the United Kingdom, sought to fill. These gaps were discussed in a report of the American Bar Association's Standing Committee on Peace and Law Through United Nations, and were the subject of a resolution adopted by the Board of Governors of that Association urging the United States Government to oppose any international declaration "dealing with the nationalization or other taking of private property ... unless it

[4] United Nations doc. A/C.2/SR.850, p. 10.

[5] United Nations General Assembly, Seventeenth Session, Provisional Verbatim Record of the 1193rd Meeting, A/PV.1193, p. 31.

[6] General Assembly resolution 626 (VII) of December 21, 1952.

[7] *Cf.* the second preambular paragraph and operative paragraph 3 of the resolution adopted, which in its references to international law is identical to the Commission's draft.

provides for non-discriminatory treatment ... and contains provision for prompt, adequate and effective compensation." They had aroused considerable concern in the international legal and business community. They were of concern to the United States Government as well.

The draft resolution was seen to be deficient in three prime respects. First, its standard of compensation for the taking of foreign property was "appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[8] In the view of the United States, appropriate compensation in accordance with international law is "prompt, adequate and effective" compensation. The United States, so interpreting the word "appropriate," proposed an amendment which, if adopted, would have made explicit the meaning which it held the resolution to contain.

Second, while the draft resolution provided that where a State authorizes the import of foreign capital "the capital imported and the earnings on that capital shall be governed by the terms thereof, by national legislation in force, and by international law,"[9] it did not expressly affirm that foreign investment agreements shall be faithfully observed. The United States proposed an amendment to that effect.

Third, the Commission's draft provided that in any case where the question of compensation for a taking of foreign property gave rise to a controversy, "national jurisdiction should be resorted to. Upon agreement by the parties concerned settlement of the dispute may be made through arbitration or international adjudication."[10] Since the United States believed that this language was open to interpretation that national jurisdiction supplies exclusive recourse for the foreign investor, which could be varied only by agreement reached after a dispute had arisen to arbitrate or internationally adjudicate that dispute, the United States further moved to preclude that interpretation.

These three deficiencies were mitigated or overcome at the General Assembly's Seventeenth Session. At the same time, two far-reaching Soviet amendments, which would have destroyed the resolution's balance by exaggerating sovereign prerogatives and asserting an "inalienable right" to "unobstructed ... expropriation"[11] were defeated. Also defeated or withdrawn were amendments running counter to those whose purpose was to remedy the draft resolution's three deficiencies and motions to refer the draft resolution to a reconstituted Commission on Permanent Sovereignty over

[8] United Nations doc. A/C.2/L. (earlier reproduced as E/3511, Annex), operative paragraph 4.

[9] *Ibid.*, operative paragraph 3.

[10] *Ibid.*, operative paragraph 4.

[11] United Nations doc. A/5344/Add. 1, p. 6.

Natural Resources. The United Kingdom, which had introduced a number of constructive amendments, withdrew them in the interest of achieving the widest measure of agreement and instead joined with the United States in proposing the two amendments discussed below. The history of a third amendment which the United States had introduced earlier to the passage on appropriate compensation is as follows.

"Prompt, Adequate and Effective Compensation"

The United States proposed that that phrase read: "the owner shall be paid appropriate – prompt, adequate and effective – compensation."[12] At the same time, Afghanistan proposed that: "the owner shall be paid adequate compensation, when and where appropriate."[13] The Soviet amendment would have inserted at the beginning of operative paragraph 4 the statement that the General Assembly:

> confirms the inalienable right of peoples and nations to the unobstructed execution of nationalization, expropriation and other essential measures aimed at protecting and strengthening their sovereignty over natural wealth and resources."[14]

In introducing the United States amendment, Ambassador Philip M. Klutznick stated that it was "designed to make explicit what is already implicit in ... operative paragraph 4. In the view of the United States, the words 'appropriate compensation' can only mean prompt, adequate and effective compensation."[15] With this, the delegate of Hungary disagreed:

> It was not correct to say that nationalization with the payment of compensation was a generally acceptable principle; the fundamental principle was that of State sovereignty. Any decision relating to whether and how much compensation should be paid was essentially an international affair of the State concerned, which therefore was the sole judge in the matter and could brook no outside interference whatsoever in the exercise of its sovereignty. The basis of any right to compensation was not some rule of international law but the relevant legislation of the State concerned ... The concept of prompt, adequate and effective compensation, which the United States wishes to impose and codify as a sort of international law, would be flagrantly unjust to emerging nations.[16]

Similar views were advanced by other Communist States. But they received no articulated support in the non-Communist world. Various countries viewed this and other United States amendments as unnecessary,

[12] *Ibid.*, p. 4. [13] *Ibid.* [14] *Ibid.*, p. 6.
[15] US Mission to the United Nations, press release No. 4091, p. 6.
[16] A/C.2/SR.846, p. 4.

while others supported what they saw as desirable clarifications of the draft resolution's existing intent. The Delegate of Madagascar, while supporting the other United States amendments, characterized the specification of "prompt, adequate and effective" as "unnecessary." He stated that "compensation could not but be adequate; as to the promptness of compensation, the very idea of international cooperation demanded that the financial situation of the State concerned should be borne in mind and that it should be given time, if necessary, to make the payment."[17] This was as far as direct criticism of the United States amendment – apart from Communist criticism – went.

All Except Soviets Withdraw Amendments

Nevertheless, there was considerable sentiment in the Committee for the withdrawal of all amendments and the adoption of the draft resolution as it stood. The United States and the United Kingdom endeavored to meet that sentiment halfway. As noted, the United Kingdom withdrew its amendments and joined the United States in a reformulation of the two amendments concerning the binding character of foreign investment agreements and recourse to arbitration; and, in the light of the discussion that had taken place, the United States withdrew its amendment specifying prompt, adequate, and effective compensation. In doing so, Ambassador Klutznick stated that the United States delegation "was confident that the expression 'appropriate compensation' in operative paragraph 4 of the draft resolution would be interpreted as meaning, under international law, prompt, adequate and effective compensation. Thus it now merely proposed, for purposes of clarification," its remaining two amendments.[18] At the same time, the Delegate of Afghanistan, "in the same spirit of compromise that had been demonstrated by the United Kingdom and United States delegations,"[19] withdrew his Delegation's amendment.

The Delegate of the Soviet Union did not evidence a like spirit. The Soviet amendment, providing for "unobstructed ... expropriation," was put to a vote, first in Committee and, having been defeated there, then in Plenary Session. In that latter, determinative test, it was rejected by forty-eight votes against, thirty-four in favor and twenty-one abstentions. Among the Delegations favoring the Soviet amendment, twenty-three were not Communist.[20] It should be noted that, after the vote in Committee on the resolution, the United States representative, Seymour M. Finger, stated that his delegation "is pleased that this Committee has reaffirmed the traditional inter-

[17] *Ibid.*, pp. 5–6. [18] A.C.2/SR.850, p. 7 (as corrected). [19] *Ibid.* [20] A.PV.1193, p. 76.

national law providing for appropriate – that is to say, prompt, adequate and effective – compensation in case of expropriation and the like."[21] No member took exception to this statement.

On the basis of this mixed but predominantly favorable record, it is submitted that the force of the United States view that appropriate compensation in accordance with international law means prompt, adequate, and effective compensation was enhanced by the General Assembly's treatment of the resolution. Moreover, the terms of that resolution – "the owner *shall* be paid appropriate compensation" – when coupled with withdrawal of the Afghan and defeat of the Soviet amendments, make it plain that payment of appropriate compensation is a matter not of discretion but of obligation.

Binding Character of Investment Agreements

The first of the two principal amendments which the United States and the United Kingdom jointly proposed was to insert after the first sentence in operative paragraph 3 a sentence providing: "Agreements freely entered into shall be faithfully observed."[22] This "generally accepted principle," Ambassador Klutznick said, which was already "implicit in operative paragraph 3,"[23] applies "alike to agreements between States, States and international organizations and States and private foreign investors."[24] It "merely reaffirmed a principle endorsed by all nations which accepted the United Nations Charter," Ambassador Schweitzer of Chile added (apparently in a reference to Article 2, paragraph 2).[25] The Delegate of Panama also approved the proposal, but suggested that it be placed at the beginning of operative paragraph 8, and worded as follows: "Agreements freely entered into by States and international organizations or States and foreign investors shall be faithfully observed."[26] The co-sponsors accepted Panama's suggestion,[27] which, Panama said, was advanced in the hope of promoting general agreement.[28] Panama withdrew its proposal, however, when it emerged that its suggestion would not achieve that result. That it would not was made clear by Iraq, which "considered that agreements between States and companies were straightforward contracts which were adequately protected by the national legislation of sovereign States and that it was therefore unnecessary

[21] US Mission to the United Nations, press release No. 4113, p. 1. [22] A/5344/Add. 1, p. 7.
[23] A/C.2/SR.851, p. 16.
[24] A/C.2/CR.850, p. 7 (as corrected).
[25] *Ibid.*, Article 2, paragraph 2, provides: "All Members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."
[26] A/C.2/SR.850, pp. 8–9. [27] *Ibid.*, p. 12. [28] A./C.2/SR.852, pp. 6–7.

to stress the need for their observance in an international instrument,"[29] and, for its own reasons, by the Soviet Union.[30] For its part, Algeria submitted an amendment (more fully discussed below) which would have inserted as a preamble:

> *Considering* that the obligations of international law cannot apply to alleged rights acquired before accession to full national sovereignty of formerly colonized countries and that, consequently, such alleged acquired rights must be subject to review as between equally sovereign States."[31]

Intensive negotiations then began between the representative of Algeria and representatives of the United States and the United Kingdom which resulted in an agreement to amend the resolution so as to make clear that it is without prejudice to questions of succession of States and Governments. As an element of that agreement, the two-Power amendment was revised to read: "Foreign investment and technical assistance agreements freely entered in to by sovereign States shall be observed in good faith."[32]

Some Members Object to US–UK Amendment

This revision did not satisfy certain Members, however, who maintained their objection to any affirmation of the binding character of agreements between States and private foreign investors. The Delegate of Lebanon, for example, declared that he "did not consider that agreements between sovereign States could be equated with agreements concluded between a Government and a domestic or foreign company. Agreements of the latter sort did exist, but they were subject to national jurisdiction and could sometimes be modified by national legislation, even in cases not involving nationalization."[33] Lebanon, joined by Syria, accordingly moved to replace the words of the US–UK amendment, "by sovereign States," with "between sovereign States."[34] "The real point at issue," the Delegate of Lebanon contended, "was that contracts entered into by sovereign States with private firms should not be subject to international jurisdiction."[35]

Taking issue with this viewpoint, the United States and the United Kingdom revised their amendment for the last time to provide: "Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith."[36] Lebanon and Syria moved to delete the words "by, or." Their motion was defeated by a vote of forty-seven to

[29] A/C.2/SR.851, p. 15. [30] *Ibid.*, pp. 17–18. [31] A/5344/Add. 1, p. 8. [32] *Ibid.*, p. 9.
[33] A/C.2/SR.856, p. 3. [34] A/5344/Add. 1, p. 11. [35] A.C.2/SR.858, p. 5.
[36] A/5344/Add. 1, p. 12.

thirty-three, with eleven abstentions.[37] The US–UK amendment was then adopted by fifty-three votes in favor, twenty-two opposed and fifteen abstentions.

Statements following the vote were as interesting as those that preceded it. On the one hand, after the resolution's adoption in Plenary Session, Iraq reiterated that it regarded "agreements signed between companies and sovereign States as simple contracts, governed and protected by domestic national laws of sovereign States." Iraq saw no reason for reference to their observance in an "international instrument."[38] On the other hand, the Delegate of Australia expressed the view in Committee that "the obligations deriving from agreements between two States were not fundamentally different from those deriving from contracts between a State and a private individual or company."[39] And the representative of the United States declared:

> My delegation is especially gratified that this Committee has affirmed the binding character of foreign investment agreements, whether these agreements are for arbitration of disputes or are of a more comprehensive character, and whether these agreements are concluded between States, or between States and international organizations, or States and private foreign investors.[40]

National and International Remedies Are Discussed

The draft resolution submitted by the Commission on Permanent Sovereignty over Natural Resources did not provide generally for the settlement of investment disputes. However, in its paragraph concerned with "nationalization, expropriation or requisitioning" it provided that: "In any case where the question of compensation gives rise to a controversy, national jurisdiction should be resorted to. Upon agreement by the parties concerned settlement of the dispute may be made through arbitration or international adjudication."[41]

This wording was seen by the United States as open to three difficulties. First, the use of the words "resorted to" might be said to import that national jurisdiction provides the only recourse of the foreign investor both in the first and last instance. It accordingly could be interpreted as precluding the exercise of diplomatic protection by the State of which the foreign investor is a national. Second, the wording of the sentence beginning "Upon agreement" could be construed as meaning that only an agreement arrived at after, and not before, a dispute had arisen for arbitration or international adjudi-

[37] *Ibid.*, p. 17. [38] A/PV.1194, p. 17. [39] A/C.2/SR.859, p. 10.
[40] Press release No. 4113, p. 12.
[41] See note 8 above.

cation of that dispute was to be implemented. Even then, the Commission's draft provided that, upon agreement, settlement of the dispute "may" be made through arbitration or international adjudication. Third, the Commission's wording did not appear to take account of a situation in which the parties had agreed to pursue arbitration or international adjudication in lieu of local remedies.

Accordingly, the United States proposed to reword the pertinent sentences to read:

> Where a question of compensation for nationalization, expropriation or requisitioning gives rise to a controversy, local remedies should first be exhausted in accordance with international law, unless the parties have agreed to international adjudication or other method of settlement.[42]

That proposal was, in the consolidated US–UK amendment, revised to provide:

> In any case where the question of compensation gives rise to a controversy, national jurisdiction should be exhausted. Where, however, there is agreement to that effect by the parties concerned, settlement of the dispute shall be made through arbitration or international adjudication.[43]

Three important amendments to the revised US–UK text were moved.

Mauritania proposed to substitute the words "should be resorted to" for "shall be exhausted."[44] That amendment narrowly failed of adoption.[45] Inclusion of provision for the exhaustion of national jurisdiction clearly indicates that the right of diplomatic recourse is preserved.

Lebanon and Syria proposed to insert after the words "there is agreement" the words "between sovereign States," and to delete "by the parties concerned."[46] Thus arbitration agreements between States and parties other than States – such as those characteristically contained in concession contracts – would have been excluded. This amendment was defeated by a vote of thirty-eight to thirty, with twenty-four abstentions. The wording finally adopted – "agreement by sovereign States and other parties concerned" – clearly embraces agreements between States, between States and international organizations, and States and private parties.

Jordan, Morocco, and Thailand proposed to amend the passage to provide: "National jurisdiction should be exhausted. However, if no settlement is

[42] A/5344/Add. 1, p. 4. The United Kingdom proposed an amendment meant to achieve similar results (*Ibid.*, p. 6).
[43] *Ibid.*, p. 7.
[44] A/PV.1193, p. 76. When this amendment was proposed in Plenary Session, the text provided "shall be exhausted."
[45] *Ibid.* [46] A/5344/Add. 1, p. 11.

reached thereunder, and there is agreement to that effect by the parties concerned."[47]

The United States and the United Kingdom were unwilling to accept this proposal, since it would have implied that an agreement to arbitrate or internationally adjudicate never could stand in lieu of local remedies, even if such substitution were the intention of the parties. At the same time, it was not the intent of the US–UK amendment necessarily to substitute arbitration or international adjudication for the pursuit of local remedies. The representative of the United States noted that, as regards international adjudication, the US–UK text envisages "the possibility of recourse to international adjudication after national jurisdiction had been exhausted."[48] Thus, in response to the views of the sponsors of the sub-amendment,[49] and of the Delegates of Malaya[50] and Ethiopia,[51] the United States and the United Kingdom revised the joint amendment so as not to prejudice the question of whether arbitration or international adjudication stand in place of local remedies. This would be determined on the facts of each case. Jordan, Morocco, and Thailand accordingly withdrew their amendment.[52] The US–UK text finally read:

> In any case where the question of compensation gives rise to a controversy, national jurisdiction shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[53]

It is important to note that the United States and the United Kingdom proposed this language on the understanding that the words "However, upon agreement" embrace agreements to arbitrate or adjudicate which antedate, as well as those which follow upon, the existence of a dispute.[54] This understanding was acknowledged by the delegate of the United Arab Republic in explaining his vote after the adoption of the resolution in committee, when he expressly stated that this passage of the resolution covered agreements which "existed."[55]

It should be added that, as suggested by the United States representative, the prescription of operative paragraph 8 that "foreign investment agreements freely entered into by, or between, sovereign States shall be observed

[47] *Ibid.*, p. 11. [48] A/C.2/SR.858, p. 5.
[49] As expressed by the Delegate of Morocco, A/C.2/SR.855, p. 21 and A/C.2/SR. 856, p. 5.
[50] A/C.2/SR.856, p. 5. [51] *Ibid.*, pp. 6–7. [52] A/5344/Add. 1, pp. 10–11.
[53] A/5344/Add. 1, pp. 11–12.
[54] The original United Kingdom amendment, which was designed to ensure that existing agreements to arbitrate or adjudicate were covered by the resolution, used the very words: "However, upon agreement . . ." A/5344/Add. 1, p. 6.
[55] A/C.2/SR.859, p. 13.

in good faith" applies as much to arbitration and adjudication agreements as to other provisions of foreign investment agreements.[56]

State Succession Problems Provoke a Compromise

The preambular paragraph proposed by Algeria, declaring that the obligations of international law "cannot apply to alleged rights acquired before accession to full sovereignty of formerly colonized countries,"[57] was not acceptable to the United States and the United Kingdom. However, those Delegations had no objection to stating that the resolution does not pass upon problems of State and governmental succession as they relate to acquired rights. Accordingly, they worked out a compromise with the Delegate of Algeria providing for the withdrawal of his amendment in return for the inclusion of what were to become preambular paragraphs 5 and 6, and the amendment of the clause on the observance of foreign investment agreements to specify agreements concluded by "sovereign States." It was clearly understood that agreements concluded by States other than sovereign States and property rights acquired under colonial rule were in no way prejudiced by passage of the resolution. As the delegate of the United States put it in proposing the revised US–UK amendments: "The text now clearly was without prejudice to any aspect of State succession and to rights acquired in former colonial territories."[58]

Soviet View of Sovereignty Is Defeated

One of the several Soviet amendments to the Commission's draft would have had the General Assembly declare that it:

> Unreservedly supports measures taken by peoples and States to reestablish or strengthen their sovereignty over natural wealth and resources, and considers inadmissible acts aimed at obstructing the creation, defense and strengthening of that sovereignty.[59]

The proposed amendment gave rise to little comment in committee. Apparently a number of members regarded it as just one more incantation of sovereignty, as one more invocation of the resolution's theme which did no harm. Others saw its terms as so extreme that they did not take the proposal seriously. To the surprise of much of the Committee, the amendment, in one

[56] See the US statement quoted above at p. 403, and note 40. [57] A/5344/Add. 1, p. 8.
[58] A/C.2/SR.854, p. 11.
[59] A/5433/Add. 1, p. 7.

of twenty-six votes in the course of an extended night session, was adopted by forty-three to thirty-two, and sixteen abstentions. Its approval led the United States and the United Kingdom to vote against the resolution as a whole in committee.

When the resolution came before the Plenary Session for definitive action, a separate vote was taken on the retention of the Soviet passage, then operative paragraph 5 of the resolution. Speaking in favor of its deletion, Ambassador Klutznick declared:

> Now putting aside operative paragraph 5, the draft resolution strikes a healthy balance between the rights and obligations of sovereignty. The exercise of sovereignty, with respect to natural resources as otherwise, requires respect for the rights of others as well as one's own rights. This the resolution recognizes, except in operative paragraph 5. That paragraph, in its own terms, its "unreserved". It does not make sense painstakingly to compose a draft resolution which sets forth the rights and obligations of States, which affirms their sovereignty and the modalities of the exercise of that sovereignty and, at the same time, declares unreserved support for measures to "re-establish or strengthen their sovereignty over natural wealth and resources".
>
> To support unreservedly "measures" may be taken to imply any measures, including measures in violation of international law, in violation of treaties, in violation of contracts, in violation of the demands of economics, in violation of the international interest, in violation of the true national interest. To support unreservedly measures to re-establish or strengthen sovereignty over natural wealth and resources is to suggest that any measures in exercise of sovereignty are legitimate in form, however illegitimate they may be in substance.[60]

The Soviet-sponsored paragraph was struck out by a vote of forty-one opposed to retention, thirty-eight in favor, and fifteen abstentions. Failing to muster a simple majority, it fell far short of the necessary two-thirds majority. It should be noted that before the resolution was voted on in Plenary Session the Assembly decided that the resolution concerned an "important question," accordingly requiring for adoption a two-thirds majority of the members present and voting.

Declaration Is Judged as Generally Favorable

There is much more in the resolution that merits comment, not all of it favorable. It should be recognized that the resolution incorporates certain passages of an autarchic and statist tenor, such as the penultimate preambular paragraph (a Soviet proposal): "*Noting* that the creation and strengthening of

[60] A/PV.1193, p. 32.

the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence."

The fourth preambular paragraph is in the same vein and from the same source. The United States voted against the inclusion of these passages.[61] While deploring their adoption, the United States Delegation viewed these and other undesirable passages of the resolution as outweighed by the resolution's positive elements.

Among those positive elements which have not been discussed above is the provision that foreign capital shall be governed by the terms of its import, by national legislation, and "by international law." As Ambassador Adlai E. Stevenson points out in a letter to the Secretary of the American Bar Association, the resolution thus "incorporates by reference the requirement of international law that the foreign capital shall not be subjected to discriminatory treatment."[62]

Also noteworthy are the profit-sharing provisions (operative paragraph 3) and the provision that a taking of private property must be for a public purpose (operative paragraph 4). The provision of the profit-sharing clause that "profits derived must be shared in the proportions freely agreed upon, in each case" is a specific application of the binding character of foreign investment agreements which the resolution more generally affirms.

Speculation on the effects of the resolution would be premature. It should be noted, however, that, while the resolution is not binding on Member States, it expresses the views of the great majority of the nations of the world. Cast in the form of a declaration, which in United Nations usage is meant to give a resolution particular weight, it represents a consensus of the economically developed and less developed countries. The fact that that consensus includes positive recognition of the obligation to pay compensation where property is taken, to observe investment agreements and agreements to arbitrate, and to abide by other requirements of international law should contribute to the enhancement of the international investment climate.

[61] A/5344/Add. 1, pp. 13–14. [62] Letter of December 21, 1962, to Joseph D. Calhoun.

Speculations on Specific Performance of a Contract between a State and a Foreign National

Under what circumstances is, or should be, specific performance available to parties to a contract between a State and a foreign national?

The answer to that question is speculative, since the law directly in point is sparse. Nevertheless, resort to municipal law sources and analogies, and consideration of such relevant international law as there is, suggests that circumstances exist, or should exist, in which the remedy for breach of a contract between a State and a foreign national is specific performance. Moreover, where the contract in dispute provides for arbitration of a quasi-international character, the case for specific performance may be strengthened. Specific performance, it will be suggested, is a remedy to be applied selectively in the application of international contracts as in other contracts. But it has, or should have, its place – a place of importance.

The Governing Law

The question of the remedies which the law affords for violation of a contract depends on what law governs the contract and upon the terms of the contract itself. Putting aside a contractual indication of remedies, we are brought to the question of what law governs contracts between States and foreign nationals. To that question there is no ready answer. The answer plainly depends upon the contract in question. Such a contract may be, and generally is, governed by the municipal law of the contracting State. It may, however, be governed by the municipal law of another State, notably that of the nationality of the foreign contractor. It may, otherwise, be governed by the shared principles of law of more than one State. Or the contract may be governed by the general principles of law – certain of those famous, not easily

fixed "general principles of law recognized by civilized nations." Or the contract may be governed by international law.

This discussion does not propose to examine the question of the proper law of a contract between a State and a foreign national. For our purposes two conclusions will suffice:

1. The proper law of such an international contract may be any of the possibilities suggested above.
2. Whatever the governing law, certain kinds of violations of such contracts give rise to State responsibility under international law.

International Wrongs and Remedies

Let us pursue the latter conclusion. There is a considerable measure of agreement that, where a State violates a contract with a foreign national in an "arbitrary" or "tortious" manner or where there has been a "denial of justice" in the courts of the respondent State in respect of an alleged breach of an international contract, the contracting State violates international law. Agreement is less widespread on what constitutes an arbitrary or tortious breach. Professors Sohn and Baxter, in their notable *Convention on the International Responsibility of States for Injuries to Aliens*, have set forth perceptive criteria for that determination.[1]

Some thirty years ago, Professor Dunn set forth a broader criterion.[2] He submitted that the meaning of the cases is that, where a State steps out of its role of commercial contractor and applies its sovereign power to upset the expectations of contractual performance which must be assumed to have motivated the parties, it incurs international responsibility. Professor Dunn's thesis has been reaffirmed and elaborated by Lowell Wadmond, in an address in London to the American Bar Association.[3] Several scholars have put forth still other, more limited interpretations of the law as to the circumstances giving rise to international responsibility.[4]

There is considerable and consequential difference of view as to what is arbitrary or tortious breach by a State of a contract with a foreign national. It is enough for the purposes of this discussion to note the wide agreement that

[1] "Convention on the International Responsibility of States for Injuries to Aliens" (Final Draft with Explanatory Notes), published in F. V. Garcia Amador, Louis B. Sohn, and R. R. Baxter, *Recent Codifications of the Law of State Responsibility for Injuries to Aliens* (1974), pp. 222–224.

[2] F. S. Dunn, *The Protection of Nationals* (1932), pp. 163–169.

[3] Republished as "The Sanctity of Contract Between a Sovereign and a Foreign National," Southwestern Legal Foundation, *Selected Readings on Protection by Law of Private Foreign Investments* (1964).

[4] See, for example, A. A. Fatouros, *Government Guarantees to Foreign Investors* (1962), p. 232 ff.

there are circumstances, in addition to that of a denial of justice, where violation of an international contract by a State will be deemed arbitrary and, accordingly, in violation of international law. That being true, the question of what remedies lie for violation of an international obligation is relevant to the subject before us, even though the proper law of the particular contract is not international law.

Specific Performance in Municipal Law

Before pursuing the question of specific performance as a remedy for the violation of an international obligation, let us glance at specific performance in municipal law. We can do no more than glance, for the subject is vast and variable. The conditions under which specific performance is afforded differ, not only with the system of law but with the type of contract involved. The principles applicable to governmental contracts may not be the same as those applied to contracts in which none of the parties has governmental character.

In Anglo-American law the limitations on according specific performance are, of course, great. The norm is damages; the exception is specific performance. Only where damages are an inadequate remedy may specific performance be granted. Thus, where there is a contract for the sale of land, either buyer or seller may secure a decree ordering specific performance. Land is assumed not to have a clearly defined market price, and each piece of land is regarded as unique. Where a contract is for the sale of goods, specific performance generally is granted only where the chattel is unique or irreplaceable. However, the Uniform Sales Act broadens the traditional rule in most states of the United States, permitting courts to direct that a contract for the sale of specific and ascertained goods shall be performed specifically, without giving the seller the option of retaining the goods on his payment of damages. It also adds to the right of the seller to win a kind of specific performance. And contracts not to compete may be enforced specifically.

Since adequacy of damages is the governing criterion, it might be supposed that, where the debtor lacks the resources to pay damages, the creditor should be awarded specific performance. In some cases courts have so held. However, the question is complex and may relate to the law concerning preferences among creditors. Where the debtor cannot pay damages, specific performance is not necessarily accorded.

The restricted role of specific performance in Anglo-American law is, of course, rooted in the historical distinctions between law and equity. While that role has logic as well as history to commend it, specific performance need not be so restricted. And in some other systems of law, it is not.

In German law, the Civil Code neither sets the money judgment for damages as the norm nor places upon the injured party the burden of establishing inadequacy of money damages, if he elects to seek specific relief. Rather, that code "asserts a precisely opposite principle – that specific performance of all obligations ... is normal and damages are to be awarded only in types of cases where specific performance is not possible or where the injured party gives notice ... of his election to take money compensation."[5]

In France, still another path has been taken. There specific performance is normal and available to enforce promises to transfer specific assets – goods as well as land – wherever execution is physically possible. The test is not the adequacy of money damages. But, where the contract is one not for the transfer of specific assets but for the doing of a specific act, the only sanction in France is a money judgment.[6]

What about contracts between Governments and their nationals? Is the remedy of specific performance accorded?

This, again, presents a large question, susceptible of much comparative research and reflection. No informed answer is proffered. It seems safe to hazard, however, that specific performance is awarded infrequently to an injured party whose grievance is against a Government or a governmental authority.[7] Governments, because they are Governments, tend, in their municipal law, to be accorded a freedom of action which that law does not grant other parties whose responsibilities are not governmental. That freedom of action could be constrained unduly by compelling Governments specifically to perform their contracts. Where the Government claims that its breach of contract with a private party is impelled by considerations of the public interest, the public interest may not, in fact, permit specific performance by the Government. This is not to say that the public interest will not require the payment of monetary compensation to the private party – for an element of the public interest is the public interest in protecting contracts. The credit of the Government is a public asset; its dissipation is a public loss. Nor does regard for the public interest equate with disregard for the private interest. A balance must be struck between the necessities of governmental freedom of action and of the maintenance of the public credit; between advancement of the public interest and respect for the private interest which has contracted with the public interest for their mutual benefit.

[5] Dawson and Harvey, *Contracts and Contract Remedies* (1959), p. 103. [6] *Ibid.*, p. 104.
[7] See J. D. B. Mitchell, *The Contracts of Public Authorities, A Comparative Study* (1954), pp. 20–21, 156, 232–233.

Both in Anglo-American and civil law, that balance appears to incline against according specific performance by the State.[8]

Specific Performance in International Law

Let us turn now to the question of the availability of specific performance as a remedy for violation of a contract between a State and a foreign national.

The Permanent Court of International Justice, in its famous holding in the case concerning the *Factory at Chorzow*, declared:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[9]

Interpreting this holding, the Committee on Nationalization of Property of the American Branch of the International Law Association states:

> Thus, the remedy for breach by a State of a contract with an alien, whether designated as a breach or a taking or as expropriation or nationalization, is in the nature of specific performance.[10]

As noted above, every violation of a contract between a State and a foreign national is not an act contrary to international law. Only those acts which are arbitrary or tortious (or involve a denial of justice) contravene international law. When such violation takes place, it may be contended that the remedy to be accorded is specific performance. And, "Where performance actually is no longer possible, then the foreign contractor must be placed as nearly as possible in the position he would have enjoyed absent the breach, that is to say, he is entitled to the profits he would have earned had not his contract rights been taken."[11] However, if the breach of contract is not arbitrary and if the proper law of the contract is not international law, the parties are remitted to such remedies as the contract's proper law may afford.

[8] *Ibid.*

[9] *Case Concerning Factory at Chorzow, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17*, p. 47.

[10] American Branch of the International Law Association, *Proceedings and Committee Reports, 1957–1958* (1958), p. 72.

[11] *Ibid.*, pp. 72–73.

Even if the *Chorzow Factory* case read, as the American Branch of the ILA reads it, as calling in the first place for specific performance of a contract between a State and a foreign national, is this proposition sound? The proposition, as interpreted in these remarks, is limited to cases of arbitrary exercise of governmental power – of intervention by the contracting State to upset the parties' expectations of performance. Now it has been noted that, in municipal law, the exercise of governmental power, at least in some cases, tends to be protected against a decree of specific performance. If this is the case, should the result differ when the State's contract is with a foreign national rather than its citizen?

The *Chorzow Factory* case, in a sense, contains an answer. But that answer is formalistic and not fully satisfying. The Court there points out that, where there is a wrong under international law involving a foreign national, "the rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage."[12]

A related consideration is that a State may not invoke its municipal law as a defense to violation of international law. As the arbitral tribunal held in the *Norwegian Shipowners Claims*:

> "Restraint of princes" ... cannot be invoked by the United States against the Kingdom of Norway in defence of the claim of Norway ... No State can exercise towards the citizens of another civilized State the "power of eminent domain" without respecting the property of such foreign citizen or without paying just compensation as determined by an impartial tribunal, if necessary.
>
> This remark applies to the contract [found to be "taken" by the United States].[13]

It is, of course, elementary that domestic exigencies do not free a State from its international obligations. More concrete distinctions between a State's contracts with its citizens and those with foreign nationals are these. Where, in contracting with its national, a State is accorded by municipal law a particular power to intervene and a peculiar immunity from imposition of a decree of specific performance, such privileges and immunities may be defended on the ground that the private contracting party, as a subject of the law of the State, will share in the public good assumed to flow from the State's action. His particular rights are prejudiced, but the public of which he

[12] See above, note 9, p. 28.

[13] Norwegian Shipowners' Claims (Norway v. United States, 1922), *United Nations Reports of International Arbitral Awards*, Vol. I, p. 338.

is a part gains, and, in the larger sense, he benefits in some measure. By hypothesis, however, the foreigner whose presence is expressed in his property or contractual interests will be absent to the extent that his interests are taken. He will not share in the national social advantage of the State's taking, assuming it to exist.[14]

The contracting foreigner admittedly may place himself within the reach of the municipal law of the contracting State by entering into a contract with it. Nevertheless, international law protects him against the arbitrary action of the foreign State. And the fact that the foreign national normally is not within the jurisdiction of the contracting State until he contracts with it suggests a further consideration: the flow of international capital will be maximized by respect for international contracts. As the General Assembly of the United Nations declared:

> Foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith.[15]

Good faith observance of international contracts imports performance of the terms of the contract by both parties. Where there is a breach of contract, the remedy to repair it may be specific performance – especially where it is the only remedy which can repair it effectively. If a State, as is sometimes the case, lacks the capacity to pay the damages it would be obliged to pay were monetary compensation required, it may be said that good faith requires the contract to be performed specifically. The considerations of creditors' preferences which support a contrary municipal rule will not tend to have comparable force in the international sphere, nor, for that matter, whenever a Government's specific performance is sought.

The foregoing considerations of equity and economic advantage suggest that the case for according specific performance may be more compelling as respects a contract between a State and a foreign national than as respects one between a State and its citizen. Admittedly, the distinctions between the cases are not conclusive. And, whatever their force, the fact that specific performance normally is not afforded against a State in the national sphere suggests that it normally will not be accorded in the international sphere. An international lawyer would not counsel his international client prudently were he to advise that specific performance is a remedy to be expected.

There is, however, a further, quite distinct consideration which strengthens the case for specific performance.

[14] See above, note 10, p. 67.

[15] United Nations General Assembly, *Official Records*: Seventeenth Session, resolution 1803 (XVII).

The Impact of Arbitration

Many contracts between States and aliens contain arbitration clauses, often providing for a kind of quasi-international arbitration. A typical clause provides that:

> If any doubt, difference or dispute shall arise between the Government and the Company concerning the interpretation or execution of this contract ... or the rights and liabilities of the parties hereunder, it shall, failing any agreement to settle it in another way, be referred ... to arbitration.[16]

Each party appoints an arbitrator. They, in turn, appoint an umpire; and, failing their agreement upon an umpire, he is appointed by the President of the International Court of Justice or other impartial authority.

Such an arbitral tribunal has no power to enforce its judgments – though its awards may be enforceable by separate municipal proceedings. It can, as easily, require or not require the parties – the Government and the foreign national – to perform specifically or to pay damages. What, in fact, do such tribunals do?

A review of arbitral awards rendered in cases between Governments and foreign nationals indicates that such arbitral tribunals tend to render awards in the nature of declaratory judgments.[17] These awards are binding and final. They say that the rights of the parties are such-and-such; that the Government has the right to this part of the seabed and the concessionaire the right to that; that the Government cannot award certain rights to a third party, since it has earlier awarded the same rights to the foreign contractor; and the like. The tribunals resolve disputes over "the interpretation or execution" of international contracts by ruling how they shall be interpreted and, in effect, how they shall be executed. The parties to such arbitrations subsequently have performed their contracts accordingly. How far removed is this process – this effective remedy – from that of specific performance? Actually, it is very close.

There are, of course, cases in which arbitral tribunals award damages. In some cases they are asked to do so. This is true particularly where the arbitration is not between the Government and the company but between the contracting Government and the Government of the State of which the

[16] Aramco Concession Agreement (1933), Article 31. Note that the Aramco Concession Agreement contains a certain contractual indication of remedies; i.e., damages payable by Aramco for breach of its obligations.

[17] See, for example, *Saudi Arabia v. Arabian American Oil Co.* (1958), *International Law Reports*, Vol. 27, p. 117; *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* (1951), 1951 *International Law Reports*, p. 144; *Petroleum Development (Qatar) Ltd. v. Ruler of Qatar* (1950), *ibid.*, p. 161.

company is a national. Why is this? Because an intergovernmental arbitration over claims arising out of a contract between a Government and a foreign national typically takes place when the contract has been ruptured gravely; when the foreign national has given up attempting to implement the contract, alleging governmental interference; when the contracting Government has declared the contract at an end, alleging default by the foreign national; and the like. By this time, the hour for specific performance usually has passed; management may have changed hands; the claims and counter-claims tend to be for damages.

This is not, however, to say that specific performance can never be the remedy in such cases. Still less is it to say that specific performance should not be the remedy in the many cases where, despite dispute, the contractual relationship is in process of daily implementation. On the contrary, specific performance may well be the remedy which is more than a cure – the remedy which can give new life to the living law of a contractual relationship.

On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law

The question of whether the breach by a State of a contract between that State or its agency and an alien is a breach of international law has long divided States and scholars. For example, in the *Ambatielos* case, the Greek Government maintained that the contract between His Majesty's Government in the United Kingdom and Mr. M.N.E. Ambatielos

> was one between a State and a foreign national, with the result that, according to the admitted principles of international law, the Government of the State incurs a direct responsibility on breach of the contract, for which the Government of the foreign national thereby injured is entitled to seek redress.[1]

Greece invoked Professor Borchard's conclusion that:

> It is a rule, which it is believed has been accepted generally, that the contracts entered into by a State with foreigners, create obligations which the State must fulfil. With reservations as to the exhaustion of local remedies it will be responsible for the non-execution towards the foreign State.[2]

These contentions were resisted by the British Government. In the *Ambatielos* proceedings, it maintained that:

> It is plain that, according to the well-settled principles of international law, the fact that one party to the contract was a Greek national and the other a department of His Majesty's Government in the United Kingdom, does not entitle the Greek Government, as is suggested in your note, to seek redress on behalf of its national on the ground of breach of contract. This question whether there was a breach of contract has been finally decided by the tribunal to which the parties agreed to refer it, and the only ground on which the Greek Government might be entitled to make diplomatic representations to His Majesty's Government would (subject always to the consideration that Monsieur Ambatielos did not make use of his

First published in P. L. Zanardi, A. Migliazza, F. Pocar, and P. Ziccardi (eds.), *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (1987).

[1] *ICJ Pleadings, Ambatielos Case* (Greece v. United Kingdom), p. 71. [2] *Ibid.*, p. 84.

right of appeal and had therefore not exhausted his legal remedies) be that the decision in question constituted a denial of justice in the sense which international law recognizes as involving the responsibility of the State concerned.[3]

The position of the British Government was more fully recalled by the late Sir Gerald Fitzmaurice (who was one of the British counsel in the arbitral proceedings to which the judgment of the International Court of Justice led) in the following terms. Sir Gerald was commenting upon passages in the opinion of Judge Sir Hersch Lauterpacht in the *Norwegian Loans* case, to one of which reference is made below. In the course of Sir Gerald's comment, he quotes from the unpublished pleadings in the arbitral (third) phase of the *Ambatielos* case, in a fashion which illuminates this paper.

(2) BREACHES OF STATE CONTRACTS ENTERED INTO WITH FOREIGNERS

It will be noticed that it is implicit in the passages cited under the preceding head that an alleged breach by a Government of a contract with a foreigner is *prima facie* a matter that raises issues under international law, and is therefore in principle a matter of international jurisdiction. However, in view of his finding on the jurisdictional aspects of the *Norwegian Loans* case, Lauterpacht was not called upon to go into the substantive question of whether the alleged breach of contract would in fact have involved a violation of international law. Therefore it would be wrong to attribute to him the view that if there is in fact a breach by a State of a contract between itself and a foreign national or corporate entity, a breach of international law is thereby *ipso facto* constituted, even in the absence of any denial of justice such as would result if, for instance, a right of action were not afforded to the foreigner in the local courts, or if, such a right being afforded, the decision were given against him on manifestly dishonest grounds.

It is clear that, *failing any denial of justice in the courts*, no breach of international law can arise from the mere breach of a contract between an individual *national* (or national entity) of the country concerned and a foreigner – or from a decision given in such a case against the foreigner (unless of course it is clearly motivated by xenophobic considerations – in which event it constitutes a denial of justice). It may be slightly less obvious that there is no breach of international law arising from the breach of contract *per se*, where the contract is between the local *Government* and a foreigner, and where a breach on the part of the Government is alleged; but, to cite from the United Kingdom counter-case in the third phase of the Ambatielos case, paragraph 269, "It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach ... but involves an obviously arbitrary or tortious element, e.g. a confiscatory breach of contract – where the true basis of the international claim is the confiscation, rather than the breach *per se*." Thus Hyde (*International Law*, 1st

[3] *Ibid.*, pp. 106–107.

ed. vol. I, p. 549), referring to the practice of the United States, says that "a breach of contract must constitute also a tort in order to be regarded as internationally illegal conduct"; and Eagleton (*The Responsibility of States in International Law*, p. 164) citing Hyde, adds: "In these cases the basis for the claim is to be found in the fact that the circumstances accompanying the breach of contract constitute in themselves internationally illegal conduct."

It may well be that had the Court found itself competent in the *Norwegian Loans* case, and had it gone on to determine the merits, Lauterpacht would have considered that a failure by a government to honor a gold clause in a contract with a foreigner involved a sufficiently tortious element to bring the case within the above-mentioned principle. But this cannot be assumed, and the matter seems sufficiently important and controversial to warrant this *caveat* against reading too much into his remarks on what was, as it then stood before him, a purely jurisdictional issue.[4]

While still other States and scholars have not accepted the position which Sir Gerald sets forth, and while State practice is unquestionably uneven, it is believed that the weight of such international judgments as have been brought to bear on the question supports his view.

One may characterize Sir Gerald's – and the British – position as the median position. At one extreme is the position espoused by Greece in the *Ambatielos* case, namely, that the breach by a State of its contract with an alien is of itself a breach of international law. That that position is not an isolated one is illustrated by the contentions which Switzerland earlier advanced before the Permanent Court of International Justice in the *Losinger & Co.* case, where it maintained that:

> The principle *pacta sunt servanda* ... must be applied not only to agreements concluded directly between States, but also to agreements between a State and an alien; precisely by reason of their international character, such agreements may become the subject of a dispute in which the State takes the place of its nationals for the purpose of securing the observance of contractual obligations existing in their favor. The principle *pacta sunt servanda* thus enables a State to resist the non-performance of conventional obligations assumed by another State in favor of its nationals.[5]

In further support of Greece's contentions, there may be cited the bases of discussion prepared by the Preparatory Committee of The Hague Codification Conference:

[4] Sir Gerald Fitzmaurice, "Hersch Lauterpacht – The Scholar as Judge," Part I, *British Year Book of International Law* (1961), 37, pp. 1, 64–65.

[5] *Losinger & Co.* case, *PCIJ, Series C, No. 78*, p. 32.

Basis of discussion No. 3

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

Basis of discussion No. 8

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.[6]

At the other extreme is the position that the breach of a contract between a State and an alien does not give rise to a violation of international law, at any rate if the contract is governed by the law of the contracting State.[7] This position perhaps is found more in what States do not say – but sometimes do – than in what they do say. The *travaux préparatoires* and terms of the United Nations General Assembly's "Charter of Economic Rights and Duties of States" provide an illustration of the current unwillingness of an apparent majority of States to recognize, at any rate in such a document adopted in such a forum, any obligations under international law arising out of contracts between States and aliens. (Yet it should be recalled that, a decade earlier, the General Assembly adopted resolution 1803 [XVII], which provides that: "Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith" – a provision that embraces contracts concluded by States with aliens.)

The median position to which the quotation of Sir Gerald Fitzmaurice gives expression has recently received considered endorsement by the American Law Institute, which, in 1986, adopted its revised *Foreign Relations Law of the United States*. Section 712 provides:

Economic Injury to Nationals of Other States

A State is responsible under international law for injury resulting from:

(1)a taking by the State of the property of a national of another State that is (*a*) not for a public purpose, or (*b*) discriminatory, or (*c*) not accompanied by provision for just compensation ...

(2) a repudiation or breach by the State of a contract with a national of another State

(*a*) where the repudiation or breach is (i) discriminatory; or (ii) motivated by other non-commercial considerations and compensatory damages are not paid; or

(*b*) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;

(3) other arbitrary or discriminatory acts or omissions by the State that impair property or other economic interests of a national of another State.

[6] League of Nations publication *V. Legal, 1929 V.3* (document C.75.M.69.1929.), pp. 33 ff. It should be noted that there was no provision on this subject in the draft approved in first reading by the Third Committee of the Conference, and that no convention on State responsibility was adopted.

[7] For an able exposition of this position, see A. A. Fatouros, *Government Guarantees to Foreign Investors* (1962).

The commentary on this section provides:

> h. *Repudiation or breach of contract by State.* A State party to a contract with a foreign national is liable for a breach of that contract under applicable national law, but not every repudiation or breach by a State of a contract with a foreign national constitutes a violation of international law. Under Subsection (2) a State is responsible under international law for such a repudiation or breach only if it is discriminatory ... or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons and the State is not prepared to pay damages. A repudiation or failure to perform is not a violation of international law under this section if it is based on a *bona fide* dispute about the obligation or its performance, if it is due to the State's inability to perform, or if the State's non-performance is motivated by commercial considerations and the State is prepared to pay damages.

It will be observed that the revised *Foreign Relations Law of the United States* does not accept the contention that the breach by a State of its contract with an alien necessarily constitutes a breach of international law – and rightly so; rightly, because such a contract is not an instrument of international law whose breach thereby gives rise to a violation of international law. But neither does it accept the position that, since a contract between a State and an alien is typically (though by no means invariably) governed by the law of that State, the State is free under international law to absolve itself of its obligations towards the alien by altering the content of the governing law or by otherwise evading the terms of its commitments. Rather, it adheres to the position, which has considerable support in doctrine and practice, that if a State repudiates or violates its obligations under a contract with a foreign national, it is responsible for such a violation "only if it" – the breach – "is discriminatory ... or if it is akin to an expropriation in that the contract is repudiated or breached for governmental rather than commercial reasons ..." An indication of doctrinal support for this position is found in the

references provided above by Sir Gerald Fitzmaurice; perhaps that support was most extensively and ably developed by the late Professor F.S. Dunn in his seminal study on *The Protection of Nationals: A Study in the Application of International Law* (1932).[8]

As observed above, a contract between a State and an alien is not an instrument of international law; it does not give rise to obligations under the law of treaties. In the words of F.K. Nielsen in *The United States of America on behalf of Singer Sewing Machine Company v. The Republic of Turkey*:

> It cannot be said that the law of nations embraces any "Law of Contracts" such as is found in the domestic jurisprudence of nations. International Law does not prescribe rules relative to the forms and legal effect of contracts ... But ... that law may be considered to be concerned with the action authorities of a Government may take with respect to contractual rights. It is believed that in the ultimate determination of responsibility under international law, application can properly be given to principles of law with respect to confiscation, and that the confiscation of the property of an alien is violative of international law. If a Government agrees to pay money for commodities and fails to make payment, the view may be taken that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated.[9]

It should be recalled that there is no more firmly established principle of international law than that a State cannot plead its national law in derogation of its international obligations. Action or inaction by a State *vis-à-vis* an alien may be perfectly lawful in terms of its municipal law, but still engage its international responsibility. There is no need to document this fundamental conclusion, which is contained and elaborated in a multiplicity of authorities. But to take one outstanding example in the codification processes of the International Law Commission of the United Nations in which Roberto Ago has played so extended and pre-eminent a part, the title, "Irrelevance of municipal law to the characterization of an act as internationally wrongful," introduced Judge Ago's draft convention on State responsibility on this point. The draft article he proposed, with the ample authority of the Permanent Court of International Justice and the International Court of

[8] See also, among other studies, R. Y. Jennings, "State Contracts in International Law," *British Year Book of International Law* (1961), 37, p. 156; K. S. Carlston, "Concession Agreements and Nationalization," *American Journal of International Law* (1958), 52, p. 260; and C. F. Amerasinghe, "State Breaches of Contract with Aliens and International Law," *ibid.*, (1964), 58, p. 881. See also Lowell Wadmond, "The Sanctity of Contract Between a Sovereign and a Foreign National," printed in The Southwestern Legal Foundation, *Selected Readings on Protection by Law of Private Foreign Investments* (1964), p. 139, especially the cases cited at p. 160, note 35.

[9] *American–Turkish Claims Settlement under the Agreement of December 24, 1923, Opinions and Report*, prepared by Fred K. Nielsen, 1937, p. 491.

Justice marshaled in its support, read: "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law."[10] The draft convention adopted by the International Law Commission provides, in Article 4:

> An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.[11]

Judge Lauterpacht's holding in his Separate Opinion in the *Norwegian Loans* case, referred to above by Fitzmaurice, bears recalling:

> The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.

In the same case, Judge Lauterpacht observed that:

> The question of the treatment by a State of the property rights of aliens – including property rights arising out of international loans – is a question of international law ... The Hague Convention of 1907 for the Pacific Settlement of International Disputes ... refers expressly, as suitable for arbitration before the Permanent Court of Arbitration, to disputes "arising from contract debts claimed from one Power by another Power as due to its nationals."[12]

Judge Lauterpacht's reference to property rights arising out of international loans applies no less to property rights arising out of international contracts at large.

Accordingly, there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a "non-commercial" act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations

[10] *Yearbook of the International Law Commission 1971*, Volume II, Part One, pp. 226, 233.

[11] *Yearbook of the International Law Commission 1973*, Volume II, p. 184.

[12] *ICJ Reports 1957*, pp. 37, 38.

of the parties, to abrogate or violate a contract with an alien, is a violation of international law.

Thus, in the *Shufeldt Claim (United States of America on behalf of P.W. Shufeldt v. The Republic of Guatemala* [1930]), the case turned on the legality under international law of Guatemala's abrogation, by legislative and executive action, of a chicle concession contract. The United States maintained that: "The arbitrary cancellation of the concession by the Government of Guatemala through legislative and executive action" fell short of "the standards required by international law."[13] It claimed that: "The property rights of the claimant were arbitrarily confiscated and destroyed by the Guatemalan Government, and that Government is bound to make compensation therefor. The obligation to make such compensation is not affected, excused or discharged by any considerations of alleged national interests motivating that Government to effect such confiscation and destruction."[14] Guatemala challenged the *locus standi* of Shufeldt, and maintained that the contract was "illegal void and a nullity *ab initio*" on various grounds of its having been contrary to the law of Guatemala; that the contract was "abrogated, cancelled and avoided under the terms thereof" by reason of the grantees failing to comply with it; and that the decree of the Guatemalan National Assembly abrogating the contract "was the constitutional act of a sovereign State ... not subject to review by any judicial authority."[15] The Arbitrator, Sir Herbert Sisnett, held that the contract had been approved by the National Assembly; that, since the Guatemalan Government had acted for six years in recognition of the validity of the contract, it was in any event precluded from denying its validity, a position which he found to be "in keeping with the principles of international law,"[16] and that

> it is perfectly competent for the Government of Guatemala to enact any decree they like and for any reasons they see fit, and such reasons are no concern of this Tribunal. But this Tribunal is only concerned where such a decree, passed even on the best of grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and can not invoke any municipal law to justify their refusal to do so.[17]

The Arbitrator further held that, if the grantees had contravened the contract, the Government took no steps then to cancel it or to refer the dispute to arbitration as the contract provided, but continued to recognize the validity of the contract and to receive benefits under it; and that in any event

[13] Department of State, *Shufeldt Claim*, Arbitration Series No. 3, 1932, 73. [14] *Ibid.*, p. 76.
[15] *Ibid.*, p. 365.
[16] *United Nations Reports of International Arbitral Awards* (UNRIAA), Volume II, pp. 1081, 1094.
[17] *Ibid.*, p. 1095.

the Government could not "set up this alleged breach as the cause of the cancellation in face of the provisions of the decree."[18] The Arbitrator further held that: "There can not be any doubt that property rights are created under and by virtue of a contract" and that Shufeldt possessed "the rights of property given to him under the contract."[19] He continued:

> The Guatemala Government contend further that the decree ... was the constitutional act of a sovereign State ... and is not subject to review by any judicial authority. This may be quite true from a national point of view but not from an international point of view, for "it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."[20]

In the light of these holdings, the Arbitrator concluded that, in these circumstances, Shufeldt had a right to pecuniary indemnification for the taking of his contractual rights.

There are a number of arbitral awards which are in accord with the conclusion for which the *Shufeldt* case is authority, namely, that the non-commercial use of sovereign authority to abrogate or violate a contract with an alien gives rise to responsibility under international law. Among such cases are *Company General of the Orinoco (France) v. Venezuela* (1905)[21]; the *George W. Hopkins* case (1926)[22]; *International Fisheries Company (USA) v. United Mexican States* (1931)[23]; *George W. Cook (USA) v. United Mexican States* (1927)[24]; *Saudi Arabia v. Arabian American Oil Company* (1958)[25]; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic* (1972)[26]; *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic* (1977)[27]; *In the Matter of Revere Copper and Brass, Inc. and the Overseas Private Investment Corporation* (1978)[28]; *Agip Company v. Popular Republic of the Congo* (1979)[29]; *Framatome et al. v. Atomic Energy Organization of Iran* (1982)[30]; *Elf Aquitaine Iran v. National Iranian Oil Company* (1982)[31]; and

[18] *Ibid.*, p. 1096. [19] *Ibid.*, p. 1097. [20] *Ibid.*, p. 1098.
[21] J. H. Ralston, *Report of the French–Venezuelan Mixed Claims Commission 1902*, pp. 244, 359–365.
[22] *UNRIAA*, Volume IV, pp. 41, 46. [23] *Ibid.*, pp. 691, 699. [24] *Ibid.*, pp. 213, 215–216.
[25] *International Law Reports*, Vol. 27, pp. 117, 168, 172, 192, 227.
[26] *International Law Reports*, Vol. 53, pp. 297, 329.
[27] *Ibid.*, pp. 389, 470–471, 473–477, 479, 480–482.
[28] *International Law Reports*, Vol. 56, pp. 258, 271–275, 282–283, 290.
[29] *International Legal Materials* (1982), Vol. 21, pp. 726, 734–737.
[30] The award was initially published under the title *Company Z and Others (Republic of Xanadu v. State Organization ABC (Republic of Utopia), Yearbook Commercial Arbitration* (1983), 7, p. 94. The award was published under its true name and in its original French in *Clunet, Journal du Droit International* (1984), p. 58.
[31] *Yearbook Commercial Arbitration* (1986), 11, p. 98.

Judge Charles N. Brower's Separate Opinion in the interlocutory award in *Sedco, Inc., and National Iranian Oil Company and Iran* (1986).[32]

While it is not practicable in this paper to comment upon all of these cases in the fashion in which pertinent passages of the arbitral award in the *Shufeldt* case have been summarized, it may be observed that, in the leading case of Saudi Arabia v. Arabian American Oil Company, the arbitral tribunal held that the concession agreement of 1933 between Saudi Arabia and Aramco was not governed by public international law. It held that it derived its judicial force from the legal system of Saudi Arabia. In the governing circumstances, it found the concession agreement to be the fundamental law of the parties, "which has the effect of conferring acquired rights."[33] It continued:

> By reason of its very sovereignty within its territorial domain, the State possesses the legal power to grant rights which it forbids itself to withdraw before the end of the Concession, with the reservation of the Clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irretractable rights. Such rights have the character of acquired rights. Should a new concession contract incompatible with the first, or a subsequent statute, abolish totally or partially that which has been granted by a "previous law or concession, this could constitute a clear infringement, by the second contract, of acquired rights or a violation, by the subsequent statute, of the principle of non-retroactivity of laws, with the only exception of rules of public policy. This is because a legal situation acquired by virtue of a previous special statute cannot be abrogated by a subsequent statute – *generalia specialibus non derogent* – unless the legislator has expressly given retroactive effect to such statute, which the State cannot do in respect of concessions, without engaging its responsibility.[34]

The particular contribution of the quoted passages of the Restatement of the *Foreign Relations Law of the United States* is that it gives specific content to the widely accepted doctrine that a State is responsible under international law if it commits not any breach, but an arbitrary breach, of a contract between that State and an alien. What is "arbitrary"? It is a breach "for governmental rather than commercial reasons." If a State, acting in a commercial capacity as any other contractor, breaches a contract with an alien, it

[32] *International Legal Materials* (1986), Vol. 25, pp. 629, 647–648. See also, for an award which affirms the principle *pacta sunt servanda* applicable to a contract which the tribunal found to run between a foreign contractor and a State, *SPP (Middle East) Limited, Southern Pacific Properties Limited and the Arab Republic of Egypt, The Egyptian General Company for Tourism and Hotels* (1983), *International Legal Materials* (1983), Vol. 22, pp. 752, 770–771, 774, 776 (annulled by the Paris Court of Appeal on another ground).

[33] *International Law Reports*, Vol. 27, p. 168. [34] *Ibid.*

does not violate international law. As it was well put in the *International Fisheries Company* case cited above:

> If every non-fulfilment of a contract on the part of a Government were to create at once the presumption of an arbitrary act, which should therefore be avoided, Governments would be in a worse situation than that of any private person, a party to any contract.[35]

At the same time, the Mexican–USA General Claims Commission in this award recognized that, where a State's cancellation of a contract was "an arbitrary act, a violation of a duty abhorrent to the contract," that "in itself might be considered a violation of some rule or principle of international law."[36]

Examples of repudiation or breach by a State of a contract with an alien for governmental rather than commercial reasons are not unusual. The salient illustration is the repudiation by a State of a contract with an alien in the course of nationalization of an industry or the taking of the particular interests of the alien. Where the State does not pay damages that compensate for the breach of the alien's contractual rights, such a breach of contract certainly gives rise to responsibility under international law. Indeed, when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.

It is recognized that this conclusion is the opposite of an approach which is currently accepted in some quarters, namely, that if a State employs its governmental authority in order to promote the national public welfare in a manner which overrides the contractual rights of an alien, the international responsibility of the State is not incurred.[37] It is believed that that approach is in error, not only for the legal reasons set out above, but because the alien, by definition, is not part of the national public whose welfare the State promotes. He is a sojourner in the community ruled by the State and, if it casts him or his rights out, then the State is obligated in equity as well as under international law to repair the resultant situation, whether by payment of compensation, restitution, or specific performance of its contract.

[35] *UNRIAA*, Volume IV, pp. 691, 700. [36] *Ibid.*, p. 699.

[37] For an excellent exposition of this viewpoint, see Oscar Schachter, *International Law in Theory and Practice, Recueil des Cours*, Volume 178 (1982–V), pp. 311–312.

The Brezhnev Doctrine Repealed and Peaceful Coexistence Enacted

One of the more striking provisions of the declaration of "Basic Principles of Mutual Relations"[1] between the United States and the Soviet Union, agreed upon in Moscow on May 29, 1972 by President Nixon and Mr. Brezhnev, is a paragraph that appears to repeal the "Brezhnev Doctrine." Even if one assumes that the declaration does not really mean what it clearly says, this provision is intriguing.

It will be recalled that, when the Soviet Union and other selected parties to the Warsaw Pact invaded Czechoslovakia in 1968, they initially claimed to have been invited in by Czechoslovak authorities. This fabricated claim was rejected in Prague by the Czechoslovak Parliament and in the United Nations Security Council by the Foreign Minister of Czechoslovakia. It took a few years before even the Prague Government installed by Moscow could bring itself publicly to support that claim.

Accordingly, the Soviet Government apparently felt driven to provide an alternative legal basis for invading Czechoslovakia (as Dr. Kissinger is reported to have noted in Moscow, the Soviet Union attaches high importance to juridical considerations). Mr. Brezhnev himself took on this not inconsiderable burden in an address in Warsaw in November 1968, the substance of which came to be known in the West as the "Brezhnev Doctrine."

Mr. Brezhnev declared that:

> The forces of imperialism and reaction seek to deprive the people now of this, now of that socialist country of their sovereign right they have gained to insure ... the well-being and happiness of the broad mass of the working people ... And when the internal and external forces hostile to socialism seek to revert the development of any socialist country toward the restoration of the capitalist order,

First published in *American Journal of International Law* (1972), 66.

[1] *Department of State Bulletin*(1972), 66, p. 898. Reprinted in *American Journal of International Law* (1972), 66, pp. 920–922; also in *International Legal Materials* (1972), 11, p. 756.

> when a threat to the cause of socialism in that country, a threat to the security of the socialist community as a whole, emerges, this is no longer only a problem of the people of that country but also a common problem ... for all socialist States.

"It goes without saying," Mr. Brezhnev continued, "that such an action as military aid to a fraternal country to cut short the threat to the socialist order is an extraordinary enforced step, it can be sparked off only by direct actions of the enemies of socialism inside the country and beyond its boundaries, actions creating a threat to the common interests of the camp of socialism."[2]

Mr. Brezhnev thus maintained that, when the Soviet Union decides that what it sees as "socialism" in what it defines as a "socialist" country is threatened by what it deems to be counter-revolution, it and the "socialist camp" are entitled to defend what he called "socialist sovereignty" by "military aid to a fraternal country" – i.e., military intervention.

In earlier days of Khrushchev's preaching of peaceful coexistence, the Soviet Union had made it plain that mere peaceful coexistence did not suffice for relations among the socialist group, which were governed by the principles of "socialist internationalism." But it is believed that the Soviet Union had not expressly asserted that it reserved the right to ensure that once a State was socialist, it must always remain so.

In view of the provisions of the United Nations Charter, this claim of Brezhnev was of course a claim for a quite special right in world affairs – the right to intervene by force to prevent the people of a "socialist" State from exercising their right of self-determination. This, despite the categorical and comprehensive injunction of the United Nations Charter 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."[3]

Now the eleventh paragraph of the Moscow declaration of basic principles has this to say about claims of special rights: "The USA and the USSR make no claim for themselves and would not recognize the claims of anyone else to any special rights or advantages in world affairs. They recognize the sovereign equality of all States."[4]

[2] Speech by Leonid Brezhnev, General Secretary of the Communist Party of the USSR, at the Fifth Congress of the Polish United Workers' Party, Warsaw, November 12, 1968, as quoted in "Czechoslovakia and the Brezhnev Doctrine," prepared for the Sub-Committee on National Security and International Operations of the Committee on Government Operations of the United States Senate, 91st Congress, 1st Session 22–23 (1969). See also the statement in *Pravda* of April 7, 1969: "Socialism and sovereignty are indivisible. Marxists–Leninists believe that when a threat arises to the revolutionary achievements of a people in any country, and thereby to its sovereignty as a socialist country ... then the socialist States' international duty is to do everything to suppress this threat" (*ibid.*, p. 8).

[3] Article 2, paragraph 4.

[4] See also the third paragraph of the declaration in which the parties pledge to "seek to promote conditions in which all countries will live in peace and security and will not be subject to outside interference in their

Accordingly, the Soviet Union seems to have renounced the Brezhnev Doctrine – the more so since it is altogether incompatible with the "sovereign equality" of one socialist (or any other kind of) State, such as Czechoslovakia, with another, such as the Soviet Union.

At the same time, Moscow may with equal reason treat this declaration as a renunciation by the United States of the Monroe Doctrine. However, the Monroe Doctrine has in any event long been superseded by the Charter of the Organization of American States, not to speak of the United Nations Charter. But, if the "aspiration" Dr. Kissinger voiced in Moscow that both parties will live up to the declaration is realized, presumably the United States will refrain from future interventions, Dominican Republic style. It may be that the Moscow declaration has accordingly been appreciatively read not only in Yugoslavia and Romania but in various Latin American capitals. To the people of Czechoslovakia, it must appear to be another heartbreaking manifestation of Great Power cynicism.

The Moscow declaration would have been startling in another respect, had it not been anticipated by the communiqué issued in Peking. As did the Peking communiqué, so does the Moscow declaration assert that there is no alternative to conducting mutual relations "on the basis of peaceful co-existence." It declares that: "Differences in ideology and in the social systems of the USA and the USSR are not obstacles to the bilateral development of normal relations based on the principles of sovereignty, equality, non-interference in internal affairs and mutual advantage."[5]

This seems harmless enough, until one recalls that, for years, and until President Nixon's Peking journey, the Government of the United States fled from endorsement of the term and the principles of "peaceful co-existence." Why? Not because the term and the principles of themselves are objectionable – in fact, they neither consequentially add to nor detract from the United Nations Charter – but because the Soviet Union had regularly, emphatically, and propagandistically given to these words a special meaning. A few quotations from official and authoritative Soviet sources may be, as Mr. Gromyko is fond of putting it, "instructive."

Peaceful coexistence, while debarring "the unleashing of a thermo-nuclear world war,"[6] is "an integral part of the revolutionary struggle against

internal affairs." "Basic Principles of Mutual Relations between the United States of America and the Union of Soviet Socialist Republics," cited note 1 above, see *American Journal of International Law* (1972), 66, p. 921.

[5] *Ibid.*

[6] *Pravda* Editorial Article of November 1, 1964, on Soviet Goals and Policies quoted in Ramundo, *Peaceful Co-existence, International Law in the Building of Communism* (1967), p. 112.

imperialism."[7] Thus, "Revolutionary national-liberation wars, like class struggle in any capitalist country, do not clash with coexistence and can be brought to success only under peaceful coexistence."[8]

As Brezhnev himself put it at the Twenty-Third Congress of the Communist Party in 1966: "There can be no peaceful coexistence where matters concern the internal processes of the class and national liberation struggle in the capitalist countries or in colonies. Peaceful coexistence is not applicable to the relations between oppressors and oppressed, between colonialists and the victims of colonial oppression."[9]

In view of statements such as these, the United States and the majority of other Members steadfastly refused in the United Nations to agree to Soviet attempts to codify the principles of peaceful coexistence as being equivalent to the fundamental principles of the United Nations Charter. And, in view of statements such as these, one cannot help but wonder why the President of the United States and his advisers have decided that, in this respect, the US Government and so many other Governments were so wrong for so many years. It may be that embracing the principles of peaceful coexistence really does add to the very great achievements of the President's summitry, but, if so, it would be instructive to find out how.

[7] Open Letter of the Central Committee of the Communist Party, quoted in Ramundo, *Peaceful Co-existence*, at 113.

[8] "Lenin's Behest: Peaceful Co-existence," *International Affairs* (1962), 4, as quoted in Ramundo, *Peaceful Co-existence*, at 116.

[9] Quoted in Ramundo, *Peaceful Co-existence*, at 116.

Aggression, Intervention, and Self-Defense in Modern International law

I

Introduction

These lectures will deal with the problems of aggression, intervention, and self-defense in modern international law in the context of the question of defining aggression. In the course of analyzing the definition of aggression, aspects of intervention and of self-defense will necessarily be considered.

The use of armed force in international relations is probably the most profound of the problems which confront mankind. Accordingly, the question of what uses of force are aggressive inevitably is of paramount importance. This is recognized on all sides. Yet the possibility, the desirability, the practicality, the efficacy, of defining aggression has provoked and provokes extreme controversy.

The problem of the definition of aggression goes back at least to 1923. The arguments then advanced in the early days of the League of Nations have continued to recur in United Nations debates as recently as March 1972. However, the same States have not always made the same arguments. The principal proponent of a definition of aggression over the years has been the Soviet Union – a fact which, for more than one reason, has not promoted the adoption of a definition. But, at times (as in 1923 and 1945), representatives of the Soviet Government have opposed adoption of any definition. The principal opponents of a definition of aggression over the years have been the United Kingdom and the United States. But, in 1945, at the Nuremberg Trials, the United States favored adopting a definition, and, in 1968, it took an unenthusiastic lead, together with the United Kingdom and four other States, in advancing a definition in the United Nations.

Lectures at The Hague Academy of International Law; first published in *Receuil des Cours – 1972 II* (1973), 136. Leiden, A. W. Sijthoff.

In these many years of recurrent efforts, repeated attempts to reach general agreement on a definition of aggression have failed. That is to say, no definition has as yet attracted the wide acceptance of the world community. However, the United Nations today appears closer to a generally accepted definition than it or the League of Nations ever was. It is especially notable that, at this juncture, nearly all States have officially declared themselves in favor of some definition or, at any rate, in favor of the principle of a definition. There is a great difference between the principle of a definition and the principles of a definition. And some States clearly see greater virtue in having a definition than others do. Nevertheless, this agreement in principle is a strikingly new development of the last four years.

Can Aggression Be Defined?

Aggression can of course be defined. The question is not whether a definition is possible, but whether a definition is desirable. A number of definitions have been submitted to League and United Nations organs over the years. Some definitions have been adopted in transient treaties to which a restricted number of States are or were parties. So clearly a definition can be devised which is or was acceptable to at least some States. And it is not impossible that, within the next year or two, the United Nations may actually succeed in adopting a definition acceptable to the community of States. But if it does, it would remain to be seen how valuable such a definition would really be.

Yet it should be noted that at times certain States, international organs, and distinguished scholars have maintained that a definition of aggression is not possible. Thus the League of Nations Permanent Advisory Commission held in 1923 that, under the conditions of modern warfare, "it would seem impossible to decide, even in theory, what constitutes a case of aggression."[1] As a successor League body more moderately put it:

> The real act of aggression may lie not so much in orders given to its troops by one of the parties as in the attitude which it adopts in the negotiations concerning the subjects of dispute. Indeed, it might be that the real aggression lies in the political policy pursued by one of the parties toward the other . . . It is clear, therefore, that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised. It is therefore clearly necessary to leave the Council [of the League] complete discretion in the matter, merely indicating that . . . various factors . . . may provide the elements of a just decision.[2]

[1] As quoted in the *Yearbook of the International Law Commission of the United Nations* (1951), 3, p. 61.

[2] Report of the Special Committee of the League of Nations Temporary Mixed Commission, as quoted *ibid*, p. 64.

At the San Francisco Conference on International Organization, the drafters of the United Nations Charter similarly declined to define aggression. They rejected a proposal to include in the Charter a list of eventualities – of acts of aggression – in response to which action by the Security Council would have been automatic, a proposal which was to have been coupled with acknowledgment of the Council's residual power to determine other cases in which it should intervene. The majority decided that a preliminary definition of aggression went beyond the possibilities of the San Francisco Conference and the purposes of the Charter. "The progress of the technique of modern warfare," it was concluded, "renders very difficult the definition of all cases of aggression ... 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 [which were] listed, automatic action by the Council might bring about a premature application of enforcement measures." Accordingly, the Committee of the San Francisco Conference concerned "decided ... to leave to the Security Council the entire decision as to what constitutes a threat to the peace, breach of the peace, or an act of aggression."[3] This decision was in accord with the Dumbarton Oaks proposals of the United States, the United Kingdom, the Soviet Union, and China, and was accepted by the Conference as a whole.

Nevertheless, in 1950, the Soviet Union proposed to the United Nations that it adopt a definition of aggression. That proposal was referred to the International Law Commission. It in turn appointed a distinguished rapporteur, Mr. Spiropoulos. He submitted a report which concluded that aggression is a "natural notion," a "concept *per se*, which is inherent to any human mind and which, as a *primary notion*, is not *susceptible of definition.*"[4]

There were, to be sure, objective criteria of aggression. One was violence; another was complicity in violence. But, Mr. Spiropoulos held:

> As regards both direct and indirect aggression, it cannot be said in advance what *degree* of violence or complicity must exist in order that one may consider itself (sic) in the presence of "aggression under international law". An answer to this question can only be given in each concrete case in conjunction with *all* constitutive elements of the concept of aggression.[5]

A second objective criterion of aggression, Mr. Spiropoulos submitted, was which party acted first. But he added – turning to a subjective criterion –

[3] *Documents of the United Nations Conference on International Organization*, 1945, Vol. 12, p. 505.
[4] *Yearbook of the International Law Commission of the United Nations* (1951), 2, p. 68.
[5] *Ibid.*

the mere fact that a State acted first does not, *per se*, constitute aggression as long as its behavior was not due to an aggressive intention. In the light of considerations such as these, Mr. Spiropoulos concluded that "the notion of aggression is a notion *per se*" which, "by its very essence, is not susceptible of definition."[6]

The Undesirability of a Definition of Aggression

Others have held that a definition, if not impossible, is certainly undesirable, perhaps even dangerous. The reasons advanced over the years, by many States and scholars in various fora, may be summarized as follows:

1. The determination of aggression rests on the facts and motives of the particular case. As Sir Gerald Fitzmaurice, now judge of the International Court of Justice, put it,

   > one and the same act may be aggression or may be the reverse if committed from different motives and in different circumstances ... An enumerated definition could ... do little more than list a number of acts which are fairly obvious cases of *aggression, if committed without adequate justification* ... The whole problem is to determine when certain acts are justified and, therefore, are not aggressive, and when they are not justified, and therefore, are aggressive ... This determination ... cannot be achieved by *a priori* rules laid down in advance.[7]

2. Not much better is a general definition, of which the following is an excellent example:

   > Aggression is the threat or use of force by a State or Government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations.[8]

   This definition, prepared but rejected by the International Law Commission of the United Nations, like other general definitions of aggression, necessarily uses terms which themselves are of uncertain meaning. For

[6] *Ibid.*, p. 69. Judge Charles De Visscher maintains: "Aggression, in the present state of international relations, is not a concept that can be enclosed in any legal definition whatever; the finding that it has occurred in any concrete case involves political and military judgments and a subjective weighing of motives that make this in each instance a strictly individual manner." (*Theory and Reality in Public International Law*, 2nd edn [1968] as translated by P.E. Corbett, p. 303). For a similar view, developed fully and brilliantly, see Stone, *Aggression and World Order* (1958), *passim*.
[7] Fitzmaurice, "The Definition of Aggression," *International & Comparative Law Quarterly* (1952), p. 140.
[8] *Yearbook of the United Nations* (1951), p. 833.

example, what is "individual or collective self-defense"? What is "a decision or recommendation by a competent organ of the United Nations"? Concepts such as "self-defense" and "competent organ" of the United Nations are in themselves complex and controversial. Accordingly, such a definition is in need of defining; it provides a solution which is transparent rather than real.

3. Admittedly no definition can be automatic in effect. It is widely assumed that the Security Council would apply a definition in the light of its appreciation of the facts of the particular case. This is now agreed alike by the proponents and opponents of a definition of aggression, though formerly the principal proponents of a definition avidly sought automaticity. But if this is so – if, particularly, the Council is free to add fresh acts *ad hoc* to discount enumerated acts in view of the facts of the case – then what is the use of a definition? For example, if a definition, such as some definitions do, purported to list the acts which, if committed first, are necessarily aggressive, and at the same time permitted the Security Council in particular cases to add other acts as constituting aggression to that list, then could not an aggressive State justify its action on the argument that it was acting in self-defense against the sort of aggressive act which the Security Council could choose to add to the list?[9]
4. Moreover,

> 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.[10]

5. This last contention is close to maintaining – as did a British Foreign Secretary – that a definition would be a "trap for the innocent" and a "signpost for the guilty."[11] With the definition in view, the cunning aggressor would so arrange things as to avoid the reach of the definition while entrapping its victim in it. The innocent, peace-loving State would tend to fall into the trap. As Sir Gerald Fitzmaurice put it: "Major

[9] See Pompe, *Aggressive War: An International Crime* (1953), pp. 91–92, and Blix, *Sovereignty, Aggression and Neutrality* (1970), p. 36.

[10] Sir Gerald Fitzmaurice, as quoted in the *Report by the Secretary-General [of the United Nations on the Question of Defining Aggression]*, General Assembly, *Official Records*: Seventh Session, Annexes, Agenda item 54, United Nations doc. of October 3, 1952, A/2211, p. 57.

[11] Sir Austen Chamberlain to the House of Commons on November 24, 1927, as quoted *ibid.*

aggressors acted from military and political motives and would not be discouraged by a definition of aggression. The Egyptian representative," he said, "thought 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."[12]

6. The lack of definition of aggression had never been felt in the history of the League of Nations or the United Nations, apart, arguably, from what was seen as the need for a definition if an international criminal court having jurisdiction over acts of aggression were to be created. As to the latter point, the International Military Tribunal at Nuremberg had operated successfully without a definition. Absence of a definition had not, for example, prevented the Council of the League from condemning Italian aggression in the Italo–Ethiopian war and Soviet aggression in the Soviet–Finnish war; it had not prevented the United Nations from condemnation of the Democratic Republic of Korea and the People's Republic of China for aggression in the Korean case.
7. There are times when the interests of peace, the cessation of hostilities will not be served by denomination of the aggressor. A definition could introduce an undesirable rigidity and automaticity into the processes of international organization.

Arguments in Favor of a Definition of Aggression

The arguments in favor of a definition are essentially these:

1. States would know what acts are aggressive, and hence unlawful and to be avoided. They accordingly would be less prone to commit aggression.
2. Knowing what aggression is by reason of its having been satisfactorily defined, States would not only not slip into its commission; they also would recognize its commission by others and be able to react accordingly. They would know when they could, and when they could not, act in legitimate self-defense. They would know when they should, and should not, apply sanctions, and to whom.

[12] *Official Records of the General Assembly*, Sixth Session, Sixth Committee, 292nd meeting, para. 45, quoted in *ibid*, p. 56.

3. A definition would assist the Security Council in making a determination of aggression; and, in view of it, the Council would be the less likely to excuse an act of aggression on political grounds. If a body such as the Security Council has complete freedom of action in its determination of an act of aggression, it is liable to take arbitrary action, responsive to political rather than legal considerations. A generally accepted definition would provide a measure of security against arbitrary determinations, especially for smaller States.
4. When charges of aggression are made, international public opinion flounders. An agreed definition would assist public appreciation of the facts, and reinforce the law with public understanding.
5. Adoption of a definition would not deprive States of the freedom of appreciation of the merits of a particular situation. No definition acts automatically. There would necessarily be an element of judgment on the part of the Security Council and of States in applying the elements of the definition to the case before it.[13] But a definition would give the Security Council and individual States valuable guidance in reacting appropriately to the international use of armed force.
6. The Nuremberg trials established that those who plan and direct aggressive war are liable to individual, criminal punishment. Yet it is contrary to the general principles of law to try persons – if not to adjudge States – for undefined crimes. If an international criminal court is to be established, if a Code of Offences Against the Peace and Security of Mankind is to be enacted, the crime of aggression must be defined.

Accommodation of Conflicting Views in the United Nations

These conflicting considerations were advanced with much spirit both in the debates of the League of Nations and, until recently, the United Nations. Despite them, however, the United Nations since 1969 has moved within striking distance of agreement upon the terms of a definition of aggression.

The primary reason for this progress – if it be progress – seems to be that both the traditional proponents and opponents of a definition now see less importance in a definition of the type currently proposed than formerly was the case. This perception, in turn, may be rooted largely in agreement that a

[13] See Lauterpacht, *Oppenheim's International Law* (1952), 7th edn., Vol. 2, p. 189, note 2, and McDougal and Feliciano, *Law and Minimum World Public Order* (1961), pp. 151–155. See also, for a recent summation of considerations favoring adoption of a definition, Ferencz, "Defining Aggression: Where It Stands and Where It's Going," *American Journal of International Law* (1972), 66, pp. 506–508.

definition will serve merely to guide the Security Council and individual States.

A definition will not be embodied in a treaty. It will be a resolution of the General Assembly of the United Nations, presumably declaratory of international law, but not lawmaking. But apart from its genus, its particular characteristics will be suggestive rather than imperative.

Thus, the three major draft definitions of aggression now before the United Nations Special Committee on the Question of Defining Aggression recognize the supervening powers of the Security Council. The draft proposal of the USSR recalls the Security Council's powers under Article 39 of the Charter, and specifies acts which, if committed first, shall be acts of armed aggression, "without prejudice to the functions and powers of the Security Council."[14] The Thirteen-Power draft of certain small and middle powers likewise recalls Article 39, and also sets out acts which, when committed first, shall constitute acts of aggression, "without prejudice to the powers and duties of the Security Council."[15] And the Six-Power draft definition proposed by Australia, Canada, Italy, Japan, the United Kingdom, and the United States also recalls Article 39, and affirms that "aggression" is a term to be applied by the Security Council "when appropriate" in the exercise of its primary responsibility for the maintenance of international peace and security under Article 24 and its functions under Article 39.[16]

Moreover, the Six-Power draft specifies that, "although the question of whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, a generally accepted definition of aggression may nevertheless provide guidance for such consideration."[17] The Thirteen-Power draft considers that, "although the question whether aggression has occurred must be determined in the circumstances of each particular case, it is nevertheless appropriate to facilitate that task by formulating certain principles for such determination."[18] The Soviet draft submits that, "although the question whether an act of aggression has been committed must be considered in the light of all the circumstances in each particular case, it is nevertheless appropriate to formulate basic principles as guidance for such determination."[19]

From these provisions, three points emerge: first, automaticity is abandoned. The idea that a definition will be mechanistically applied to certain acts, and that inevitable conclusions will follow, is gone. The particular circumstances of each case must be brought to bear in determining whether

[14] *Report of the Special Committee on the Question of Aggression, General Assembly, Official Records*: Twenty-Seventh Session, Supplement No. 19 (A/8719), p. 8.
[15] *Ibid.*, p. 10. [16] *Ibid.*, p. 11. [17] *Ibid.* [18] *Ibid.*, p. 9. [19] *Ibid.*, p. 7.

or not there has been an act of aggression. This represents a vital retreat by the principal proponents over the years of a definition of aggression.

Second, it is acknowledged on all sides that, under the régime of the United Nations Charter, it is the Security Council which shall determine the existence of an act of aggression in the light of the particular facts of the case. Inherent in this acknowledgement is the liberty of the Security Council to choose not to make a finding of aggression. The essential discretion of the Security Council is thus recognized. As that discretion is the larger, so is the importance of a definition of aggression the smaller. This too represents a marked retreat from the contentions of the traditional advocates of a definition.

Third, such definition as may be adopted will not bind the Security Council but explicitly serve as "guidance" to it. The Council will be guided but not controlled. This also lessens both the importance and the contentiousness of a definition of aggression.

Depreciation of the Importance of a Definition of Aggression

For those who have doubted the utility of a definition of aggression, this is all to the good. The complexity of a judgment that an act of aggression has occurred hopefully will be met by consideration of all of the circumstances of each particular case. The authority with which the Security Council was endowed at San Francisco to determine an act of aggression will be unimpaired. But, from the viewpoint of advocates of a definition of aggression, it should be recognized that the developments just traced reintroduce much of the element of uncertainty which a definition was supposed to dispel.

It is submitted that, on balance, this depreciation of the paramountcy of a definition of aggression is both the better part of wisdom and of the United Nations Charter. It makes sense to draft a definition which expressly recognizes that, inevitably, the facts of the particular case are critical; that judgment must be applied to the appreciation of those facts, a judgment which can be informed by, but not controlled by, a definition; and that, under the concept of the Charter, it is the Security Council which is primarily entrusted with the exercise of that judgment.

It makes equal sense to draft a definition with its purpose in view, that is to say, to guide the Security Council, rather than to bind a tribunal adjudging the guilt or innocence of an individual charged with a criminal act of aggression. The case for a definition which a tribunal would apply may be much stronger than the case for a definition to be applied by the Security

Council. But it is doubtful that the same definition would serve both purposes.

Importance of a Definition in the League of Nations Context

The importance of the discretionary authority of the Security Council emerges the more clearly when the situation under the Charter is contrasted with that which obtained under the Covenant of the League of Nations.

Under the Covenant of the League, the Members undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." Article 10 of the Covenant further 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" was to have been fulfilled. Article 16 of the Covenant placed a duty upon the individual Members of the League immediately to apply economic sanctions against a State which resorted to war in disregard of its covenants. The decision of the individual Members of the League to apply economic sanctions to the Covenant-breaker was, in principle, not conditional upon any prior decision of the Council of the League. And the Council – which was not charged with the task of determining an act of aggression – was not to decide upon the means of fulfilling the obligation to preserve League Members as against external aggression, but was charged only with advising on those means. It had the authority to recommend but not to decide.

Accordingly, when aggression occurred, the obligation of Members of the League to apply immediate, responsive sanctions arose automatically. Each Member itself carried the burden of deciding whether or not aggression had taken place.

Thus it was thought particularly important that the criteria for determining the legality or illegality of resort to war should not be open to differing legal interpretations.[20] Presumably the Members of the League needed to know what aggression was in order to know when and as against whom they were to apply sanctions.

These considerations were among those which gave the question of the

[20] See Blix, *Sovereignty*, pp. 30–31, and Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours, 1952-II*, pp. 481–484. An excellent survey of the treatment of the question of defining aggression by the League and the United Nations is contained in the previously cited *Report by the Secretary-General [of the United Nations on the Question of Defining Aggression]*, United Nations doc. A/2211. Broms, *The Definition of Aggression in the United Nations* (1968) provides a useful summary and analysis of League and United Nations consideration of the problem through 1968. Another able treatment is found in Brownlie, *International Law and the Use of Force by States* (1963), pp. 66–107, 361–383.

definition of aggression the emphasis it received in the League. Nevertheless, it should be recalled that some Members of the League gave proposals to define aggression an unenthusiastic response which the most negative of United Nations debates has never surpassed. In League days, Great Britain undoubtedly won the highest marks for a persistent and profound lack of enthusiasm for a definition. Yet, in 1923, it was not Britain but the Soviet Union which submitted the following observations on the League's Draft Treaty of Mutual Assistance:

> 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.[21]

Indeed, "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."[22]

Lesser Importance of a Definition in the United Nations

Nevertheless, if the League Covenant admitted such a diversity of view as to the need for a definition of aggression, the Charter of the United Nations presents an *a fortiori* case. This is true for three reasons.

[21] Doc. A/2211, see note 20, p. 26.

[22] The quotation is taken from the foregoing report of the Secretary-General of the United Nations, United Nations doc. A/2211, p. 24.

First, the United Nations Charter does not oblige its Members individually to appraise the actions of other States, to decide for themselves whether such States have committed aggression, and to react. Rather, under the régime of the Charter, this process of decision-making is centralized. Under Article 24, paragraph 1, United Nations Members "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." By the terms of Article 25, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Under Article 39, it is the Security Council which shall determine the existence of an act of aggression. Thus, the decision lies with the Council, which may bind all Members of the Organization to act in response to it.

Second, despite the imperative tenor of Article 39 – the Security Council "shall" determine the existence of an act of aggression – it is understood that the Council is free to decide or not to decide upon the existence of an act of aggression. As it was definitively put by the report adopted at the San Francisco Conference, it was resolved 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 the peace, a breach of the peace, or an act of aggression."[23] If the Council is accordingly entirely free to decide what constitutes an act of aggression, it necessarily is free to decide whether, in a given case, what has occurred is an act of aggression. This is particularly true in circumstances where the drafters of the Charter refused to incorporate in it a definition of what acts are acts of aggression.

Third, the régime of the United Nations Charter requires a definition of aggression less than arguably did the régime of the League Covenant because the Security Council can determine not only the existence of an act of aggression, but the existence of any threat to the peace or breach of the peace.

As the Legal Adviser of the Swedish Ministry for Foreign Affairs, Hans Blix, has concluded, because of the Security Council's authority to find either (*a*) a threat to the peace or (*b*) a breach of the peace or (*c*) an act of aggression,

> The Security Council is thus, like a policeman, given wide discretion to intervene to restore order. If the situation confronting the Council is deemed by the Council to fall into any of these three categories, it is authorized to make recommendations or to decide upon sanctions. There can hardly be any doubt that the broadest of these categories is a threat to the peace. It encompasses the two others. Thus, if the members of the Council were convinced that a situation constituted a threat to the peace but were divided as to whether it amounted to a breach of the peace or act of

[23] *Ibid.*, p. 40.

aggression, no terminological choice would actually be needed, as in either case the Council would be entitled to act. Thus, in order to function, the Council hardly needs any detailed definition of breaches of the peace or acts of aggression. Nor has it, so far, needed any definition of the category threat to the peace, if, indeed, one were at all feasible.[24]

In practice, holdings of aggression by United Nations organs have been very rare. The United Nations typically exerts its efforts towards bringing about a cease-fire once hostilities have erupted. It has not normally found it necessary or helpful to that process to designate the aggressor, if there is one.

Nevertheless, the present state of affairs is that it has been generally agreed, without much passion or conviction, that a satisfactory definition of aggression should provide the Security Council with useful guidance in the performance of its functions. When, as is not unusual, the Security Council fails to perform its functions, because of the exercise of the veto power or otherwise, a definition of aggression should provide the General Assembly and individual Members of the Organization with like guidance. And, in the time before it may be possible or politic for the Security Council to act, a definition of aggression may perhaps provide States with some sense of what acts they may legitimately take in exercise of their inherent right of self-defense. It is not seriously thought that a definition will prevent a State determined to embark on aggression from doing so; there are, indeed, flagrant cases of aggression – such, for example, as those of Hitler – where policies and practices were followed which were meant, and were sometimes proclaimed, to be aggressive.

Perhaps the most compelling reason for a definition of aggression would be its usefulness in criminal prosecutions of those charged with a "war of aggression," which the General Assembly of the United Nations has recently declared constitutes "a crime against the peace, for which there is responsibility under international law."[25]

Establishment of an international criminal court to try offences against the peace and security of mankind under an International Criminal Code has been deferred by the United Nations pending adoption of a definition of

[24] Blix, *Sovereignty*, p. 32. In support, see Stone, *Aggression*, pp. 22–23. For a contrasting view, see McDougal and Feliciano, *Public Order*, pp. 155–160. The distinguished authors maintain that the findings of a threat to the peace or breach of the peace also import characterization of coercion as permissible or impermissible. They are of the view that the clarification of "the community policies at stake in this most fundamental of all problems" cannot be escaped by "the replacement of 'aggression' with some other nonemotive words of the same level of abstraction" (at pp. 158, 159).

[25] 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).

aggression[26] – though lack of such a definition is hardly the only barrier to the creation and functioning of such a court.

II

Various Types of Approach to the Definition of Aggression

The history of the endeavor to define aggression has seen various approaches. Those approaches will now be illustrated, but not extensively analyzed, not least because both the literature and the lectures of this Academy have amply set out the history of the problem.[27]

A Procedural Definition

One approach is known as the "procedural" approach: that State is the aggressor which fails to abide by the procedures for peaceful settlement of disputes specified in a treaty. In the days of the League of Nations, this approach had considerable support, to which the terms of the Covenant conduced. The aggressor would be the State which failed to do within prescribed time-limits what the Covenant specified and the League Council recommended. The League Covenant did not designate the Covenant-breaking State expressly as the aggressor. But League Members agreed that they would not resort to war with a Member of the League which complied with an arbitral award or decision of the Permanent Court of International Justice concerning a dispute between Members of the League;[28] they further agreed that they would not go to war with any party to a dispute which complied with the recommendations of the report of the Council of the League.[29]

If any Member of the League resorted to war in disregard of Covenants such as these, it was provided that that should *ipso facto* be deemed an act of war against all other Members of the League, who undertook immediately to apply specified economic sanctions to the Covenant-breaker.[30]

The thrust of all this clearly was to treat the treaty-breaker – the State that

[26] See United Nations doc. A/2211; Stone, *Aggression*; Broms, *Definition*; Brownlie, *Use of Force*; Waldock, "Regulation"; Zourek, "La définition de l'agression et le droit international. Développements récents de la question," *Recueil des Cours, 1957-II*, pp. 759–860; and Komarnicki, "La définition de l'agresseur dans le droit international moderne," *Recueil des Cours 1949-II*, pp. 5–110.

[27] See United Nations doc. A/2211; Stone, *Aggression*; Broms, *Definition*; Brownlie, *Use of Force*; Waldock, "Regulation"; Zourek, "La définition de l'agression et le droit international. Développments récents de la question," *Recueil des Cours, 1957-II*, pp. 759–860; and Komarnicki, "La définition de l'agresseur dans de droit international moderne," *Recueil des Cours 1949-II*, pp. 5–110.

[28] Article 13, paragraph 4. [29] Article 15, paragraph 6. [30] Article 16, paragraph 1.

failed to abide by the various procedures set out in the Covenant – as the aggressor. Nevertheless, the League vigorously pursued the question of the substantive definition of aggression. While some States were content with a procedural definition, others were not, one reason being that the procedural and substantive obligations of the Covenant were not watertight. The use of force was not comprehensively regulated; and even resort to war was not absolutely prohibited. The League Council might fail to reach a report which was unanimously agreed to by the members of the Council other than the disputant States, with the result that no report would be adopted. In that case, the Members of the League reserved to themselves the right to take such action as they considered "necessary for the maintenance of right and justice."[31]

The Charter of the United Nations may similarly be said to embody a procedural approach to the definition of aggression, or, rather, the designation of the aggressor.

Article 1, paragraph 1 of the Charter provides that the first purpose of the United Nations is to maintain international peace and security, and, to that end, to take effective collective measures for the suppression of acts of aggression.

Article 2, paragraph 3 provides that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Article 2, paragraph 4 provides 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, or in any other manner inconsistent with the purposes of the United Nations. Article 2, paragraph 5 provides that all Members shall give the United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

By the terms of Article 24, the Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. Under Article 25, the Members agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Under Article 33, the parties to any dispute likely to endanger the peace shall seek a solution by various peaceful means; and the Security Council may call upon them to do so. Under Articles 36 and 37, the Security Council may recommend appropriate methods of adjustment or

[31] Article 15, paragraphs 6 and 7. See, with regard to a procedural definition of aggression, United Nations doc. A/2211, p. 73.

terms of settlement. Under Article 39, it shall determine the existence of an act of aggression. Furthermore, under Article 40, in order to prevent an aggravation of the situation, the Council may call upon the parties to comply with provisional measures. The Council "shall duly take account of failure to comply with such provisional measures." And the Security Council, pursuant to Articles 41 and 42, may impose economic and military sanctions. The action to carry out the decisions of the Security Council in this sphere shall be taken by all Members of the United Nations or some, as the Council determines; they shall be carried out directly by Members of the United Nations and through agencies of which they are members.

While none of these provisions, standing alone, provides for a procedural definition of aggression, cumulatively they lay the foundation for a procedural determination of aggression. For example, it would not be difficult, as a matter of principle, for the United Nations to resolve that States failing to comply with the provisional measures indicated by the Security Council shall be deemed aggressive.

Probably the closest approach in the United Nations to a procedural definition of aggression is represented by General Assembly resolution 378 (V), entitled, "Duties of States in the event of the outbreak of hostilities," adopted at that notable General Assembly in 1950 when the resolutions on "Uniting for peace"[32] and "Peace through deeds"[33] were also adopted. The resolution merits extended quotation:

> *The General Assembly,*
>
> *Reaffirming* the Principles embodied in the Charter, which require that the force of arms shall not be resorted to except in the common interest, and shall not be used against the territorial integrity or political independence of any State,
>
> *Desiring* to create a further obstacle to the outbreak of war, even after hostilities have started, and to facilitate the cessation of the hostilities by the action of the parties themselves, thus contributing to the peaceful settlement of disputes,
>
> 1. Recommends:
>
> (*a*) That if a State becomes engaged in armed conflict with another State or States, it takes all steps practicable in the circumstances and compatible with the right of self-defence to bring the armed conflict to an end at the earliest possible moment;
>
> (*b*) In particular, that such State shall immediately, and in any case not later than 24 hours after the outbreak of the hostilities, make a public statement wherein it will proclaim its readiness, provided that the States with which it is in conflict will do the same, to discontinue all military operations and withdraw all its military forces which have invaded the territory or territorial water of another State or crossed a demarcation line, either on

[32] Resolution 377 (V). [33] Resolution 380 (V).

terms agreed by the parties to the conflict or under conditions to be indicated to the parties by the appropriate organs of the United Nations;

(*c*) That such State immediately notify the Secretary-General, for communication to the Security Council and to the Members of the United Nations, of the statement made in accordance with the preceding subparagraph and of the circumstances in which the conflict has arisen;

(*d*) That such State, in its notification to the Secretary-General, invite the appropriate organs of the United Nations to dispatch the Peace Observation Commission to the area in which the conflict has arisen, if the Commission is not already functioning there;

(*e*) That the conduct of the States concerned in relation to the matters covered by the foregoing recommendations be taken into account in any determination of responsibility for the breach of the peace or act of aggression in the case under consideration and in all other relevant proceedings before the appropriate organs of the United Nations;

2. Determines that the provisions of the present resolution in no way impair the rights and obligations of States under the Charter of the United Nations nor the decisions or recommendations of the Security Council, the General Assembly or any other competent organ of the United Nations.

It should be noted that, by a second section of this same resolution, the General Assembly decided to refer the draft definition of aggression submitted to it in 1950 by the Soviet Union to the International Law Commission.

Subparagraph (*e*) of this resolution is of particular interest. If a State or States in conflict do not declare their readiness to discontinue military operations and withdraw all their military forces, when their opponents do so declare, then that conduct – according to this recommendation of the General Assembly – shall be "taken into account" in any determination of responsibility for an act of aggression in the case.

While, however, this is an approach towards a procedural definition of aggression, clearly it is not a realization of the concept. For the culpable conduct does not result in a determination of aggression; rather, that conduct shall merely be "taken into account" by appropriate organs of the United Nations. Moreover, the rights and obligations of the Security Council, the General Assembly, or other competent United Nations organs are in no way impaired – that is to say, the Council retains its essential discretion.

More than this, the whole history of United Nations consideration of the question of defining aggression demonstrates that a procedural definition is not deemed to be adequate by the membership at large. And in fact, at the very session of the General Assembly in which the foregoing resolution was adopted, that on "Peace through deeds" also was adopted, a resolution which contains an important substantive definition of elements of aggression.

A General Definition

A second approach is that of the general definition. An exemplar has already been quoted:

> 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.[34]

A definition of this kind has its advantages. It is short if not simple. It wisely limits itself to force – to the threat or use of force. That force may be applied in any manner, indirectly as well as directly. The weapons used are not relevant: "whatever the weapons employed." They may be applied overtly or covertly – a recognition that much aggression, particularly since the rise of modern totalitarianism, is undertaken by secret and subversive means. The threat or use of force constitutes aggression whatever its reason or purpose – an important and contentious point that apparently would eliminate the element of "aggressive intention" from the definition of aggression; any reason or purpose, that is, except (*a*) individual or collective self-defense or (*b*) in pursuance of a decision or recommendation by a competent organ of the United Nations.

These exceptions are both broad and, it is submitted, correct. But they pose two salient difficulties. The first is that, in the absence of a definition of individual or collective self-defense or other specifications which have the effect of delimiting the exercise of self-defense, the definition defines little. For, broadly construed, self-defense may permit a very wide range of actions; so wide that a definition which, without more, sets up self-defense as the legitimate use of force which, when otherwise exercised, is aggressive, really adds little to what the United Nations Charter provides. Some would say that this is just as well, on constitutional as well as political grounds. A definition should not vary the Charter or introduce undesirable limitations on the defensive use of force. The draft definitions of aggression now before the United Nations endeavor to deal with this problem in distinctive ways. That which is closest to the foregoing general definition is the Six-Power draft. The farthest is that of the Thirteen Powers. That of the Soviet Union falls in between – distinctions to be elaborated when we turn to these drafts.

The second notable difficulty posed by this general definition is the legitimization of a threat or use of force effected in pursuance of a decision or recommendation by a competent organ of the United Nations. This proviso

[34] *Yearbook of the United Nations* (1951), p. 833.

clearly is not limited to action by the Security Council. By implication, it embraces the General Assembly as well. This is, of course, a point of high interest, for, in accordance with a clause such as this, the use of force by States against another pursuant to a recommendation of the General Assembly would not be aggressive – a proviso which may be found disquieting by certain States of special unpopularity in this world, because, for example, of racial, colonial, or other policies. In their tradition of support of the General Assembly's residual authority in the sphere of the maintenance of international peace and security, it is the Six Powers, the "West," which reproduce a provision of this kind in their draft definition. Equally true to tradition, the Soviet Union would debar the General Assembly from adopting recommendations in this sphere, and would not exempt from its definition of aggression action taken in pursuance of such recommendations. What is not at all traditional is the fact that the Thirteen-Power draft would jettison the authority of the General Assembly in regard to the maintenance of international peace and security, which otherwise small and middle Powers have largely upheld.

At any rate, the course of United Nations consideration of the question of defining aggression demonstrates that a general definition is not acceptable; most Members want a good deal more.

An Enumerative Definition

Accordingly, in both the League of Nations and the United Nations, enumerative definitions have received more extended consideration.

The most famous of such definitions is that which the Soviet Union submitted to the Disarmament Conference in 1933. It merits extensive quotation:

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 international 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;
(*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.[35]

The Soviet draft was referred to a Committee under the chairmanship of Mr. Nicolas Politis. That Committee drew up an Act relating to the Definition of the Aggressor, which followed the Soviet draft in substantial measure. Its essential thrust is that the aggressor is the State which first employs force outside its territory. The Politis proposal added to the acts which, when committed first, constitute aggression:

> Provision of support to armed bands formed on 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.[36]

[35] United Nations doc. A/2211. pp. 34–35. [36] *Ibid.*, p. 35.

And otherwise the Politis report moderated and rearranged the passages of the Soviet draft concerning excuses or justifications for aggression.

Both the Soviet draft of 1933 and the Politis revision are enumerative definitions in a pure form, that is to say, they purport to set out an exhaustive list of the acts which are to be deemed aggressive. That has provoked the criticism referred to earlier, that States with aggression in mind would be tempted to tailor their plans to avoid the proscribed measures and to employ measures which the list imprudently (or designedly) omits. It should be noted that the draft definition of aggression currently submitted by the Soviet Union to the United Nations endeavors to meet this criticism, insofar as it can be met, by including the provision, in operative paragraph 3, that:

> In addition to the acts listed above, other acts by States may be deemed to constitute an act of aggression if in each specific instance they are declared to be such by a decision of the Security Council.

There were and are a good many other objections to a definition of the Soviet–Politis type, a type which advances a precise definition of aggression and rejects the idea of provocation. Since the bulk of those objections related to the draft definition which the Soviet Union now maintains in the United Nations, those criticisms will be reserved for discussion of that draft.

A proper respect for historical fact suggests, however, that one criticism which has been aired in the United Nations – and which has undoubtedly affected the climate of consideration of the question – be mentioned at this point. The Soviet Union in 1933 concluded two conventions, which reproduce almost word for word the Politis definition of aggression, with Afghanistan, Czechoslovakia, Estonia, Finland, Iran, Latvia, Poland, Rumania, Turkey, and Yugoslavia. Of these ten States, five have since been invaded by the Soviet Union; substantial portions of the territory of four of them have been incorporated into the Soviet Union; two have been annexed *in toto* by the USSR and no longer exist as independent States; one has been the object of territorial claims; another has barely escaped dismemberment when Soviet troops overstayed their permission to remain on its territory; another has been subjected at times to serious threats, and there is evidence that the Soviet Union sought to overthrow its Government; indeed, only one of the ten States with which the Soviet Union contracted in 1933 appears to have been spared from the very types of aggression which the Soviet definition interdicted.[37]

[37] See in this regard the terms of the resolution of the Assembly of the League of Nations of December 14, 1939, expelling the Soviet Union from the League because of what it denominated Soviet aggression against Finland. The Assembly referred in this connection to the Convention for the Definition of Aggression of July 3, 1933, noting transgression by the USSR of its precise terms. As quoted in United Nations doc. A/2211, p. 38.

A Combined Definition

It has been thought that the disadvantages of a general definition and of an enumerative definition, respectively, may be overcome or mitigated by a definition which combines a general with an enumerative definition. The three definitions currently under United Nations consideration are combined definitions. They contain a general statement of what constitutes aggression together with specific illustrations and limitations; and they either expressly or impliedly authorize the Security Council to add other cases of aggression to those specifically enumerated. There appears to be every likelihood that, if agreement on a definition is reached in the United Nations, it will be a combined definition. In that event, since the list of acts it sets out will not be exhaustive, the definition will necessarily not be and will not purport to be conclusive.

Case-Law Definition

A final approach has been denominated a "case-law" definition.[38] That is aggression which the qualified majority of competent international organs designates to be aggression, as, for example, in the cases of the Italian attack on Ethiopia, the Soviet attack on Finland, and the attacks by North Korea and the People's Republic of China on the Republic of Korea and United Nations forces defending it. "With precedent being added to precedent, the underlying concepts should gradually become perceptible, for, as the Rumanian statesman and lawyer, Nicolas Titulesco, stated: 'Every time a State has been declared an aggressor, a definition has been applied and it has been upheld that the facts corresponded to that definition'."[39]

Such an approach is congenial both to the common lawyer and to the international lawyer, related as it is to the processes both of creation of the common law and of customary international law.[40] But a problem with this approach is that it is so infrequently invoked. It is plain that the actual cases of aggression far outrun the enunciation of aggression or the designation of the aggressor by international organs. This is for more than one reason. The international community may well find that restoration of peace will be hindered rather than helped in a given case by an assignment of aggression. Or it may find the facts and the law so mixed, the equities so apportioned or uncertain, that a holding of aggression seems unjustified. Or it may shrink

[38] See Blix, *Sovereignty*, pp. 35–36. [39] *Ibid.*, p. 36.

[40] See, in this regard, Hazard, "Why Try Again to Define Aggression?," *American Journal of International Law* (1968), 62, pp. 701–710.

from adjudging a Great Power to be an aggressor, whatever the law and the equities involved. Or a Great Power may arbitrarily exercise its veto on its own behalf or that of an associated State. Or, when international organs do act, they may do so with manifest bias impelled by the threat of invocation of the veto or the action of a mechanical majority, or both. Holdings of aggression have been so rare that the experience of the last fifty-nine years indicates that, if a case-law approach is to be adopted, a definition of aggression will be long deferred. Some would say that, in view of the manner in which the Security Council and the General Assembly have for the most part functioned in recent years, that is just as well.

III

Problems Posed by Current United Nations Drafts

The problems posed by the draft definitions of aggression currently under consideration by the United Nations Special Committee on the Question of Defining Aggression are multiple.[41] The more salient problems will now be considered.

By What Majority Must a Definition Be Adopted?

A preliminary question is, by what kind of majority need the General Assembly adopt a definition for it to have authority in international law, or, more precisely, to render authoritative guidance to the Security Council?

It is assumed in the United Nations that a definition which will emerge, if one does, will be adopted by the General Assembly as a resolution of that body. There are of course alternative ways of proceeding. For example, a text might be adopted by the Special Committee, or, more, the General Assembly, which would be opened for signature and ratification as a treaty. As noted, definitions of aggression have been incorporated in more than one treaty.[42] A treaty would bind only those States which would ratify it; and failing virtually universal acceptance, it would not be an instrument well calculated to furnish authoritative guidance to the Security Council. Or the Security Council – the organ principally concerned – might adopt a resolution containing a definition (perhaps one earlier adopted by the General Assembly).

[41] These drafts, which are reproduced in Annex I (pp. 7–12) of the Report of the Special Committee for 1972, *Official Records of the General Assembly*: Twenty-seventh Session, Supplement No. 19 (A/8719), are printed as an annex to this chapter.

[42] See doc. A/2211, pp. 49 ff.

But the modality which appears to be accepted is that of a resolution of the General Assembly which will not make the law but declare it. By what majority need that resolution be adopted?

It might at first blush be thought that a resolution defining aggression would require a vote of two-thirds of the General Assembly for adoption, since Article 18, paragraph 2 of the Charter provides that decisions of the General Assembly on "important questions" shall be made by a two-thirds majority of the Members present and voting, and since "recommendations with respect to the maintenance of international peace and security" – as a definition of aggression would be – are specified as among such important questions. Clearly adoption of a definition of aggression would require no less than a vote of two-thirds. But would such a vote suffice?

It is submitted that it would not. For a resolution defining aggression would not, as noted, make the law, a competence which, generally speaking, the General Assembly lacks. Rather, it would be declaratory of international law: it would state what international law is. This being so, that resolution, to be authoritative, would require essential unanimity of support in the General Assembly, including the support of the Permanent Members of the Security Council.

It has been urged to the contrary in the United Nations that to require essential unanimity is to set up a requirement which the Charter itself does not lay down, and that, to require the support – or, minimally, the abstention from voting – of the five Permanent Members of the Security Council is to extend the veto from matters of security to matters of the progressive development of international law.

While these contentions have their point, it is submitted that the view which is both legally sound and politically viable is that which requires essential unanimity. For what the United Nations is endeavoring to do is to draft a definition of aggression which, when adopted by the General Assembly, will be an authoritative reflection of the views held by the international community as a whole. Since the General Assembly lacks broad lawmaking authority, it can authoritatively act in this sphere – apart from opening a treaty for signature – by a law-declaring resolution. Such a resolution, such a declaration, will have legal weight only if it is accurate. That is to say, if the General Assembly declares that the law is such-and-such because the States of the world, as represented in the General Assembly, in fact recognize the law to be such-and-such, then, as a matter of fact, that representation must be true if that statement of the purported law is to be meaningful. If it is false, the General Assembly stultifies itself.

Thus, in this case, should the General Assembly adopt a resolution which

purports to be declaratory of international legal principles, and should, for example, the sponsors of the Six-Power draft vote against that resolution, that resolution would, by definition, be legally crippled. It could not be a correct statement of principles to be taken as guidance by United Nations organs and States. For six States, representing among them a significant portion of the world's power, of economic vitality, political leadership, military strength, and legal tradition, would be saying that the guiding principles are otherwise; that the statement that they are such-and-such is in fact untrue. That would make that statement untrue; it cannot be an authoritative rendering of the pertinent legal principles if that rendering lacks the assent of those States. This would be equally true if the resolution were opposed by other consequential elements of the General Assembly's membership.

Moreover, in this case, the fact that the resolution would be opposed by two Permanent Members of the Security Council would make it an *a fortiori* case. It is simply frivolous to look to a definition of aggression to guide the Security Council above all when certain Permanent Members of the Council make it clear from the outset that they will not take guidance from a resolution which they regard as an erroneous rendering of the pertinent legal principles.[43]

What Effect Will a Definition Have on the Security Council?

Assuming that a definition is adopted by virtual unanimity by the General Assembly, what effect will it have on the Security Council? Will it be binding on the Council or will the Council, by the terms of the definition or otherwise, retain its essential discretion?

It is clear that the draft definitions now before the United Nations Special Committee indicate or assume that the Security Council will retain its essential discretion; the definition is designed to provide guidance rather than direction to the Council and to States. This is well advised, particularly in view of two provisions of the Charter: that of Article 39, providing that the Security Council shall determine the existence of an act of aggression (a proviso which must be read in the light of the discussion at San Francisco on the question of defining aggression); and Article 51, which recognizes the inherent right of individual or collective self-defense of Members until the

[43] See the statement of Stephen M. Schwebel, United States Representative to the Special Committee on the Question of Defining Aggression, July 22, 1970, Press Release USIS, Geneva, pp. 10–11. See also, Schwebel, "Law Making in the United Nations," *Federal Law Review* of the Australian National University (1970), Vol. 4, No. 1, pp. 118–119.

Security Council has taken the measures necessary to maintain international peace and security.

It is not possible to predict what effect, if any, a definition of aggression, if adopted, actually will have on the functioning of the Security Council. As has been noted, in practice the Security Council has been responsive to factors other than, or, at any rate, additional to, legal considerations. In particular, whether because of the operation of the veto or otherwise, it has sometimes acted arbitrarily, if not in its very infrequent express enunciations of aggression, then in its more frequent implied designations of the aggressor.

What Acts Shall a Definition of Aggression Embrace?

One of the most contentious areas of debate over the definition of aggression concerns the acts which a definition shall embrace. There appear to be two principal, interwoven problems: is aggression confined to the use of armed force? In any event, does it include the use of such force by indirect as well as direct means? Linked with these questions is the United Nations view of what constitutes unlawful intervention. There is also the lesser problem of whether a definition of aggression shall enumerate certain of its consequences.

Is aggression confined to the use of armed force?

The Charter of the United Nations is understandably preoccupied with the regulation of the use of armed force in international relations. Thus its Preamble recites that the peoples of the United Nations are determined to ensure, by the acceptance of principles and the institution of methods, that "armed force shall not be used, save in the common interest." The first purpose of the United Nations is to maintain international peace and security, and to that end to take effective collective measures for the suppression of acts of aggression. Article 2, paragraph 4 of the Charter governs the threat or use of force in international relations. Article 44 speaks of a Security Council decision "to use force" in terms which make it clear that that term refers to armed force. That provision is found in the Chapter of the Charter concerning action of the Security Council with respect to threats to the peace, breaches of the peace, and acts of aggression. And Article 51 provides that nothing in the Charter shall impair the inherent right of individual or collective self-defense "if an armed attack occurs against a Member of the United Nations." These provisions, and their *travaux préparatoires*, apparently have led the Six Powers to treat aggression under the United Nations Charter as necessarily involving the use of armed force. Other Members, such as Egypt, have at times taken a like approach.[44]

[44] United Nations doc. A/2211, p. 74.

The Soviet Union and the Thirteen Powers also now limit their definitions of aggression to armed force, but for other reasons. They view aggression actually as having connotations wider than the use of armed force. But they choose to limit the definitions currently being drafted by the United Nations Special Committee to "armed aggression." They see "armed aggression" as the "most serious and dangerous form of aggression" and accordingly believe it proper to concentrate on its definition at this stage.

This substantially agreed conclusion, even if springing from different roots, has had the effect of putting aside an issue which was debated at an earlier stage of United Nations consideration of the definition of aggression: whether aggression embraces acts other than those involving armed force.

In 1952, Bolivia maintained that a form of aggression was economic aggression. A definition then submitted stated that: "Also to be considered an act of aggression shall be ... unilateral action to deprive a State of economic resources derived from the fair practice of international trade."[45] Some years later, an enactment of another Government denominated the withdrawal by the United States of that Government's option to sell sugar on the United States market at preferential prices to be an act of aggression. Ideological aggression was another form of aggression complained of in the 1952 debates[46] and, on a subsequent occasion, when a Caribbean Government maintained that release of a film of a novel unfavorable to its régime constituted ideological aggression.

The 1952 Report of the Secretary-General on the definition of aggression incisively summarizes criticism of the concept of economic aggression as follows:

> 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, 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

[45] United Nations doc. A/2211, p. 74.

[46] *Ibid.* At the San Francisco Conference and subsequently, various States have submitted definitions or attributions of aggression embracing economic aggression, ideological aggression, subversion, inundation with unarmed men, and other phenomena. *Ibid.*, pp. 71–74. General Assembly resolution 2625 (XXV), in interpreting Article 2, paragraph 4 of the Charter, provides: "In accordance with the purposes and principles of the United Nations, States have a duty to refrain from propaganda for wars of aggression."

> entire structure of international society and transferring powers inherent in States to international organs.[47]

Yet the scope of what is in effect treated, if not always described, as aggression continues to pose great practical problems. The measures involving the use of force undertaken by the United States Government with the authorization of the Organization of American States in 1962 during the Cuban Missile Crisis were not in response to a use of armed force by the Soviet Union or Cuba. More recently, a State has apparently claimed that the influx of millions of largely unarmed refugees from a neighboring State was tantamount to aggression by the State whose policies forced the refugees to flee.[48] To take another recent example, the Vice-President of the International Court of Justice has denominated the continued presence of South Africa in Namibia "as aggression."[49] It should be added that, were the United Nations to apply a "procedural" definition of aggression, it would then be open to a finding of aggression even where armed force had not come into play.

In any event, though the issue has for the time being been placed aside in United Nations debates, it is by no means a simple one. It has been pointed out by perceptive commentators that the problem is really that of the intensity of coercion mounted by one State against another; and that, while armed force will normally be the most intense form of coercion, and the only form justifying armed response, other forms of coercion, such as economic coercion, could be so intense that, if they were unlawfully applied, they could amount to aggression. They accordingly would justify invocation of the powers of the Security Council to deal with acts of aggression, and might be argued to justify the use of force in self-defense as well.[50] The exceptional use of such responsive force, to be lawful, would have to be "necessary" and "proportional" to the coercion to which it is a response.

What is "intervention" in the view of the United Nations?

Before pursuing the question of whether or not all modalities of the employment of force may constitute aggression, it may at this point be useful to

[47] United Nations doc. A/1211, p. 74.

[48] See Tucker, "Reprisals and Self-Defense: The Customary Law," *American Journal of International Law* (1972), Vol. 66, pp. 588–589, and the remarks of the United Kingdom Delegate quoted in United Nations doc. A/2211, p. 72, para. 423.

[49] See the Separate Opinion of Vice-President Ammoun, in the advisory proceedings on *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), ICJ Reports 1971*, pp. 89–95. See also General Assembly resolution A/2372 (XXII) and Security Council resolution 269 (1969): the Council described continued South African occupation of Namibia as "an aggressive encroachment on the authority of the United Nations."

[50] See McDougal and Feliciano, *Public Order*, pp. 194–202; Bowett, *Self-Defence in International Law* (1958), p. 24; Tucker, "Reprisals," pp. 588–589 and 594.

consider what the scope of "intervention" is, as seen in the United Nations – if not as practiced, then as preached.

The rhetoric of the United Nations is most fully set out in the General Assembly's "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" of 1965.[51] That Declaration expresses the deep concern of the General Assembly at the increasing threat to universal peace "due to armed intervention and other direct or indirect forms of interference threatening the sovereign personality and the political independence of States." It considers "that armed intervention is synonymous with aggression" – an important holding requiring comment. It further considers that "direct intervention, subversion and all forms of indirect intervention ... constitute a violation of the Charter of the United Nations." In the light of these and other considerations, the General Assembly solemnly declared:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.
3. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.
4. The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten international peace and security.

[51] General Assembly resolution 2131 (XX). This resolution was adopted by the vote of 109 to 0, with 1 abstention (the United Kingdom). In explaining his favorable vote, the representative of the United States characterized the resolution "as a political Declaration with a vital political message, not as a declaration or elaboration of the law governing non-intervention" (*Official Records of the General Assembly*, Twentieth Session, First Committee, Verbatim Record of the 143rd meeting, A/C.1/PV.1422, p. 12). However, much of the substance of resolution 2131 (XX) is repeated in the General Assembly's "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations," resolution 2625 (XXV), which was adopted by acclamation and accepted by the General Assembly as declaratory of international law.

Other resolutions of the General Assembly that call for support of insurgents in Southern Africa are difficult to reconcile with resolution 2131 (XX). See, e.g., resolutions 2107 (XX), 2151 (XXI), and 2465 (XXIII). See also the discussion below of resolution 2625 (XXV).

5. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.
6. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

The far-reaching character of this interdiction of intervention is clear. Not only is armed intervention condemned as aggression, "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" are also condemned, though not as aggression. It may be doubted whether so sweeping an interdiction comports with the realities and current necessities of contemporary international life. Does this mean, for example, that devaluation by one State of its currency is condemned, because that threatens an economic element of another State – and devaluation may certainly threaten the exports of other States?

No State, the Declaration continues, may use any measures to coerce another State to secure advantages of any kind. Does this mean that a State acts unlawfully in severing diplomatic relations with another State in order to exert pressure upon that other State to alter policies offensive to it?

The Declaration further asserts that the practice of "any form of intervention" not only violates the spirit and letter of the Charter of the United Nations but may threaten international peace. Yet it defines intervention in such broad terms that, were those terms to be interpreted literally, it might be wondered if much of customary diplomatic intercourse would remain lawful. As Messrs. McDougal and Feliciano have pointed out, "a certain degree of coercion is inevitable in States' day-to-day interactions for values. Fundamental community policy does not seek to reach and prohibit this coercion" – at any rate, it did not before the adoption of the Assembly's Declaration – "as indeed it cannot without attempting to impose moral perfection, not to mention social stagnation, on humanity."[52]

An attempt to impose moral perfection is precisely what is suggested in the Declaration's assertion that all States shall respect the right of self-determination and independence of peoples and nations "to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms." To obviate "any" foreign pressure is to do a great

[52] McDougal and Feliciano, *Public Order*, p. 197. Views of similar substance were advanced by the United Kingdom and the United States at the First Session in Mexico City in 1964 of the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.

deal, since the mere existence of powerful foreign States may give rise to a degree of pressure upon other States. To speak of "absolute respect" for human rights and fundamental freedoms is to speak of that which exists nowhere; rights and freedoms obviously are necessarily relative, the rights and freedoms of some necessarily affecting those of others, and requiring consequent accommodation.

The appropriate course may be to take these extreme asseverations no more seriously than the Members of the United Nations demonstrate by their actions that they do, while accenting the more plausible elements of the United Nations definition of intervention. The condemnation of subversive, terrorist, or armed activities directed towards the violent overthrow of the régime of another State is sound, as are provisions debarring the use of force to deprive peoples of their national identity and asserting the inalienable right of States to choose their own political, economic, social, and cultural systems, "without interference in any form by another State." That latter provision, of course, has been flagrantly violated since 1965, not least by one of the most articulate proponents of the Declaration.

For purposes of the definition of aggression, in any event, these conclusions emerge:

1. The General Assembly has placed on record that "armed intervention is synonymous with aggression." Presumably, the phrase "armed intervention" is not synonymous with armed attack, but is suggestive of something distinct. The distinct element which the phrase "armed intervention" seems to import is armed and unlawful action within the territory or jurisdiction of another State which does not constitute an armed attack upon that State. History has known a number of cases. What many see as an outstanding example of such armed intervention took place in 1965 in the Dominican Republic, an event which appears to have been a major stimulus to the adoption by the General Assembly of its Declaration.
2. There are other forms of intervention – indeed, perhaps innumerable other forms – which also are unlawful, but which are not "synonymous with aggression." They are not synonymous because they are not armed.

Does aggression embrace the use of armed force by indirect means?

This brings us to what is probably the most vexed issue now before the United Nations in its endeavor to define aggression: does a sound definition of aggression necessarily embrace the use of armed force by indirect means?

The use of force by indirect means is to be distinguished from forms of aggression or alleged aggression not involving the use of armed force, such as

economic or ideological aggression. "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."[53] A distinct if often allied concept is covert, as contrasted with overt, armed aggression. This is aggression directly carried out by the aggressor by acts which are concealed – for example, invasion of another State by the aggressor's troops who do not wear uniforms and who infiltrate over the border rather than publicly drive across it.

The draft definitions of aggression now before the United Nations divide sharply over the issues of the treatment to be given to indirect aggression and the response which may lawfully be made to it.

The Soviet draft and the Six-Power draft both interdict indirect aggression. The Soviet draft describes "armed aggression" as "the most serious and dangerous form of aggression" – importing its support of the concept that there are forms of aggression in addition to armed aggression – and would confine a definition at this stage to armed aggression; and it proceeds to define "Armed aggression (direct or indirect)." Among the enumerations of acts of armed aggression which the Soviet draft definition sets out is: "The use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State or a reversal of policy in favor of the aggressor." This, the Soviet draft specifies, "shall be considered an act of indirect aggression."

The Six-Power draft provides that: "The term 'aggression' is applicable . . . to the use of force in international relations, overt or covert, direct or indirect, by a State against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the United Nations." It specifies that the use of force which "may" constitute aggression includes the foregoing uses effected by such means as:

> (6) Organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;
> (7) Organizing, supporting or directing violent civil strife or acts of terrorism in another State; or
> (8) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State.

[53] The quotation is from the frequently cited *Report of the Secretary-General*, United Nations doc. A/2211, p. 56. Aggression not involving the use of armed force can equally be mounted by indirect as well as direct means. See the discussion in McDougal and Feliciano, *Public Order*, which describes as "indirect aggression" exercises of coercion emphasizing political or ideological instruments, with military instruments "in a muted and background role" (pp. 190 ff.).

In vivid contrast to these two draft definitions, that advanced by the Thirteen Powers takes a very different approach. It initially equates "armed attack" with "armed aggression" and then, like the Soviet draft, states that, at this stage, it is this form of aggression which should be defined. But, unlike the Soviet and Six-Power drafts, the Thirteen-Power draft, in its general clause, does not define aggression to include indirect as well as direct uses of force. It speaks only of "the use of armed force by a State against another State." Its list of acts of aggression is conspicuous by its failure to include acts of force effected by indirect means. And that these omissions are deliberate is confirmed by a separate provision, not included among acts of aggression, specifying:

> 7. When a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter.[54]

That provision is to be read as complementary to an anterior specification that: "The inherent right of individual or collective self-defence of a State can be exercised only in the case of the occurrence of armed attack (armed aggression) by another State."

It is submitted that these provisions of the Thirteen-Power draft have scant basis in the United Nations Charter, in customary international law, in the practice of States, and in the expectations of States. The considerations which lead to these conclusions are several.

A paramount consideration is that the Charter of the United Nations makes no distinction between direct and indirect uses of force.

> The Charter speaks in Article 2, paragraph 4, of "the use of force" in international relations; it does not differentiate among the various kinds of illegal force, ascribing degrees of illegality according to the nature of the techniques of force employed. Articles 1 and 39 of the Charter speak of "aggression"; similarly, they altogether fail to differentiate among kinds of aggressions on the basis of the methods of violence which a particular aggressor may favor. There is simply no provision in the Charter, from start to finish, which suggests that a State can in any way escape or ameliorate the Charter's condemnation of illegal acts of force against another State by a judicious selection of means to its illegal ends.[55]

[54] All quotations of the draft definitions currently before the United Nations are taken from United Nations doc. A/8719, pp. 7–12. For an interpretation of these definitions which appears to find a closer correspondence on indirect aggression between the USSR and the Thirteen Powers than does this writer, see Ferencz, "Defining Aggression," p. 499. See also, Chkhikvadze and Bogdanov, "Who Is Hindering Progress in the Definition of Aggression?," *International Affairs* (October 1971), p. 26.

[55] Statement by John Lawrence Hargrove, United States Representative to the Special Committee on the Question of Defining Aggression, March 25, 1969, Press Release USUN-32 (69), p. 5. See also Broms, *Definitions*, pp. 152–153.

A second consideration is that the history of the last fifty years demonstrates that much of the violence that has afflicted the world has been of the very type which the Thirteen-Power draft would exempt from a definition of aggression: the exercise of force by one State upon another by methods other than open invasion across a frontier by a uniformed army. The most pervasive forms of modern aggression tend to be indirect ones.

A third consideration is that the General Assembly has more than once denominated as aggression the use of force by indirect as well as direct means. Thus, in its resolution entitled "Peace through deeds," the Assembly condemned 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 and solemnly reaffirmed 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 crimes against peace and security throughout the world."[56] Again, the General Assembly, in the Declaration on Non-Intervention just discussed, equated armed intervention with aggression, but it did not equate it with armed attack. The import of this distinction arguably is that armed intervention which is other than an armed attack may constitute aggression, just as armed attack may; that is to say, the use of force by indirect means (which armed intervention certainly includes) may be aggressive, just as may be the use of force by direct means. Furthermore, the General Assembly, in its landmark Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States holds, in interpreting Article 2, paragraph 4 of the Charter, that:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[57]

And, in interpreting the duty of non-intervention, the Assembly in this resolution further held:

> 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. Consequently, armed intervention and all other forms of interference or

[56] Resolution 380 (V). [57] Resolution 2625 (XXV).

attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.[58]

There is no suggestion in this resolution that these acts are less than aggressive, while acts of the same substance and effect, but involving the direct rather than the indirect use of force, are aggressive.

In this regard, it should be recalled that the International Law Commission of the United Nations has taken the position 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."[59] The Report of the Secretary-General says of this statement: "It will be noticed that the examples quoted refer to cases involving the complicity of a State in violent activities directed against another State."[60]

It should be noted that the Inter-American Treaty of Reciprocal Assistance provides that:

> If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack ... the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of aggression.[61]

The Treaty thus squarely recognized "aggression which is not an armed attack." In view of this provision of a treaty binding upon all of the Latin American States, there is room for puzzlement at the preclusive equation between armed attack and armed aggression which the Thirteen-Power draft definition contains – a definition co-sponsored by a number of States of South and Central America.

As noted earlier, the General Assembly, including all its American

[58] *Ibid.*

[59] As quoted in A/2211, p. 72. The International Law Commission thus recognized that: "Aggression in the modern world is achieved through indirect and concealed uses of force" (Waldock, "Regulation," p. 510).

[60] *Ibid.* See also pp. 63–65 and 71–73.

[61] Article 6 of the Treaty of September 2, 1947, *Treaties and Other International Acts Series (TIAS), p. 1838.*

members, has agreed that armed intervention is synonymous with aggression. Armed intervention, then, is one form of aggression. Another is armed attack, which the Thirteen-Power draft maintains equates with armed aggression. Aggression accordingly embraces at least armed attack and armed intervention. By the terms of the Inter-American Treaty of Reciprocal Assistance, there is a form of aggression "which is not an armed attack." It, presumably, is either armed intervention, or aggression by means not involving armed force, or both. If the Treaty may be understood to refer to armed intervention, it can only reasonably be understood to embrace the use of force by indirect means, since such indirection frequently is a characteristic of armed intervention. And if the Treaty refers to aggression by means not involving use of force – as it may – it surely also refers to aggression involving the use of force by indirect means insofar as it covers armed intervention.

The problem of to what responsive measures of coercion States which are the victims of aggressive uses of force exerted by indirect means may lawfully resort will be discussed at a later point. But it should now be emphasized that a number of influential States have expressed the view that aggression by indirect means presents a greater danger to national and international security these days than does aggression by direct means. Accordingly, a definition which either ignores "indirect aggression" or degrades the measures which may be taken in response to it appears to have little chance of universal acceptance. At the same time, if a definition of aggression is to be confined to the use of armed force (whether by direct or indirect means), it is important that the elements of "indirect aggression" specified actually entail the use of armed force.[62]

Are the legal consequences of aggression to be addressed in a definition?

The Soviet draft definition of aggression provides that: "No territorial gains or special advantages resulting from armed aggression shall be recognized." It further specifies that: "Armed aggression shall be an international crime against peace entailing the political and material responsibility of States and the criminal responsibility of the persons guilty of this crime." The Thirteen-Power draft contains similar provisions.

These specifications of legal consequences flowing from acts of aggression have not met with substantive opposition in United Nations debates. A number of States, however, question their inclusion, on the ground that the consequences of aggression do not logically comprise its definition. In their

[62] See in this regard, Pompe, *Aggressive War*, p. 111.

view, the task is to draft a definition of aggression, not to prepare a catalog of the results of aggression which, moreover, emphasizes certain results and excludes others. The latest round of negotiations in the United Nations suggest that a compromise of these views, inclining towards the position of the Soviet Union and the Thirteen Powers, may be found.[63]

IV

Problems Posed by Current United Nations Drafts (continued)

Is the Aggressor the State Which First Commits Specified Acts (the "Principle of Priority")?

The cornerstone of the definition of aggression which Maxim Litvinov submitted on behalf of the Soviet Union to the Disarmament Conference in 1933, of the definition which the Committee chaired by Nicolas Politis drew up that same year, of the definitions submitted to the United Nations at various stages by the USSR and more lately by the Thirteen Powers, is the principle of priority: the aggressor is the State which first employs force outside its territory. Mr. Politis put it this way:

> 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.

He added:

> Emphasis should be placed 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 ... 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 concept of aggression.[64]

[63] See United Nations doc. A/8719, p. 14; but note also p. 17.

[64] These quotations are found in United Nations doc. A/2211, pp. 60, 75.

Thus, in the Litvinov–Politis concept which finds a somewhat less categorical expression in two draft definitions of aggression currently before the United Nations, the principle of priority is critical. It draws the line between permissible self-defense and prohibited preventive war.[65]

The principle of priority is plausible. It seems reasonable that the State which first uses force should be deemed the aggressor and that the victim of that use should be permitted to act in self-defense. The principle of priority in fact does make sense – when it is applied in a sensible manner. When, however, it is invested with the determinative force with which the Litvinov–Politis approach would invest it, it is a principle which presents profound dangers. These dangers are essentially two. One is the assumption of simplicity in establishing who did what to whom first. The second is the specification of acts which shall, if committed first, be of decisive effect in determining the identity of the aggressor. In both cases, the complexity of international law and life is underestimated.

Consider what is often thought to be the easiest type of case: invasion across a frontier by uniformed armies which drive forward with great force and success. Surely, it might be thought, the essential facts of such a case are not difficult to establish; the State which acted first is plain to see.

Putting aside for the moment questions of justifiable provocation and legitimate apprehension of imminent attack, and concentrating solely on the question, is a major assault across an international frontier easily established, it is instructive to recall the history and the controversy which has surrounded the most notable such instance since World War II.

In the case of the attack upon the Republic of Korea by North Korea in 1950, the Secretary-General of the United Nations and the Security Council were authoritatively informed by a United Nations Commission which happened to be in Korea when hostilities broke out that the attack was in fact launched by North Korea. The rapid advance of North Korean forces southward lent weight to that finding. It was generally accepted by the community of States. Nevertheless, to this day, certain Members of the United Nations maintain officially and vigorously that it was the Republic of Korea which attacked rather than the Republic of Korea which was the victim of attack. The issue is not seriously in doubt, but, if United Nations Observers had not been on the scene, it might well be.

Other examples, such as the entry of forces of the Arab States on to the territory of what had been Palestine in 1948, the penetration of the territory of Arab States by forces of Israel in 1956 and 1967, and the measures taken by

[65] See Stone, *Aggression*, p. 70. At pp. 69–72, Stone sweepingly attacks the concept of priority. McDougal and Feliciano take a decidedly less critical view, *Public Order*, pp. 168–171.

forces of India against Pakistani forces in what is now Bangladesh in 1971, are less enlightening in this regard, since all these cases better illustrate the second central problem: that of determining which act is the decisive act determinative of aggression, and which acts are responsive, legitimate acts. But it is submitted that the Korean case is instructive, not least in the circumstance that it is the principal proponent of the principle of priority which refuses to accept the clearest application of that principle that has arisen since World War II.

The genuine difficulties that may arise in applying that principle in cases where the facts are not so clear, and not so authoritatively established by international authority, are obvious. Sir Gerald Fitzmaurice has remarked on one type of case: "When you get a war involving a group of States, you get a chain of events in which it is very difficult to say which action comes first, and vis-à-vis of whom."[66] It may of course be replied that, normally, and in most cases, it is not difficult to establish who attacked first, despite the customary contradictory claims of the parties to the conflict. But, even if this is granted, it hardly supports investing the principle of priority with inexorable and unvarying authority in all cases.

Much more difficult still are the problems inherent in affording decisive effect to certain acts when they are committed first, without regard to the surrounding circumstances. Consider the difficulties of applying the principle of priority in a situation like that of the "blockade" of Berlin in 1948. Would the determinative, first act of aggression have been the blockade itself? The airlift? An attempt by a British armored car to drive through barriers in East Germany? The use of force to frustrate that attempt?

The Soviet observations of 1923 stating that the entry of troops into foreign territory is not a satisfactory criterion of aggression has been quoted above.[67] At that time, a League of Nations Committee elaborated on that theme in these terms:

> 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 for such action.[68]

[66] Fitzmaurice, "Definition of Aggression," p. 140.

[67] It is set out in United Nations doc. A/2211, p. 69.

This League Committee thus maintained that, in certain, presumably exceptional, cases, anticipatory self-defense is justified. Support for that viewpoint was voiced by a representative of the United States when he declared:

> The USSR draft resolution ... 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 ... 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.[69]

In that same debate, the representative of Belgium replied to the representative of Poland as follows:

> 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.[70]

Sir Humphrey Waldock has made a further point: the principle of priority merits the less application when the real probability of collective security effectively assisting the victim of attack is slender.

> The definition [of the USSR] would be a complete "trap for the innocent" until there is much greater certainty that the forces of the international community will instantaneously spring to the aid of a threatened State, if attack occurs. The Emperor of Abyssinia lost important military advantages going to great lengths to avoid being the first to strike against one of the most calculated and obvious aggressions in history.[71]

Moreover, the dangers of the application of the principle of priority are more acute in a nuclear age, when the victim of an attack can be destroyed, or suffer unbearable casualties, at the first strike. With the refinement of the

[68] *Ibid.* [69] *Ibid.*, p. 70. [70] *Ibid.* [71] "Regulation," p. 484.

complexities of modern warfare, the obsolescence of rigid reliance on the principle of priority is ever greater.[72]

Quite apart from these determinative deficiencies, the principle of priority does not take account of frontier incidents. For example, the current Soviet draft provides that, among the acts which shall be considered an act of armed aggression if committed by a State first is "firing at the territory and population of another State." Presumably, then, when the border guards of an Eastern European State recently pursued a civilian on to the territory of Austria, firing at him and Austrian territory in the process, they were guilty of an act of aggression.

The implausibility of that conclusion might perhaps be met by adding to the criterion of first use of force the factor of aggressive intent. But neither the Soviet nor the Thirteen-Power draft include that factor, a matter to be more fully considered shortly.

Or it might be said that the discretion to be accorded the Security Council would allow it to discount frontier incidents.[73] Implying a *de minimis* clause in the definition might also deal with frontier incidents. Possibilities such as these merit consideration. Nevertheless, the risks of reliance on the principle of priority are further illustrated by the difficulties which it has in grappling with frontier incidents.

The point comes to this, that there is no substitute for judgment in the light of the facts of the case. It is not possible – or at least not always possible – reasonably to confine a determination of aggression "to the occurrence of a precisely defined act, at a particular moment, in insulation from the broader context of the relations of the States concerned."[74]

But that is not to say priority in the performance of certain acts should not be given weight by the Security Council, the General Assembly, and States in exercising the judgment they should bring to bear on the facts of a particular case. The initial commission of an act which is presumptively aggressive is an important circumstance among those circumstances in the light of which, in each particular case, a decision must be made. The principle of priority may be reasonably employed to set up a rebuttable presumption of aggression; it

[72] As O'Connell puts it: "In certain situations, to await the launching of a controlled projectile from a potentially hostile contact before exercising the right of self-defence may well be to lose the capacity of self-defence, for whoever employs his weapon first may have a pre-emptive advantage which can prove decisive." (O'Connell, "International Law and Contemporary Naval Operations," *British Year Book of International Law* [1970], p. 25). But see Farer, "Law and War," in Black and Falk (eds.), *The Future of the International Legal Order*, Vol. 3: *Conflict Management* (1971), pp. 30–42, 63–64.

[73] See the *Report of the Special Committee on the Question of Aggression*, United Nations doc. A/8719, p. 15. See also p. 14.

[74] Stone, *Aggression*, p. 71.

may not be reasonably employed to afford a determinative holding of aggression.

This indeed appears to be the direction in which United Nations discussions are moving.[75]

Must There Be Aggressive Intent to Constitute Aggression?

A notable difference in approach among the three draft definitions of aggression currently under consideration by the United Nations is that the Six-Power draft contains the element of "aggressive intent" whereas the Soviet and Thirteen-Power draft definitions do not. Paragraph IV, subparagraph A of the Six-Power draft provides that the uses of force which may constitute aggression include, "but are not necessarily limited to," a use of force in international relations by a State against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the United Nations, in order to do specified things, including the compendious object of inflicting harm or obtaining concessions of any sort.

The criticisms that have been directed to this provision are multiple. First, it has been claimed that if, in order for there to be a finding of aggression, an intent to realize an aggressive object must be shown, the burden of proof would be placed on the victim; the victim of aggression would have to prove that the apparent aggressor has aggressive intent, and meanwhile it would be helpless. Second, proof of aggressive intention – of that subjective fact – would often be impossible, or very difficult, to establish. Third, it is unthinkable that, if various acts, like the invasion of foreign territory, were committed, intention to commit aggression must also be established if there is to be a finding of aggression; commission of the acts, such as invasion, is enough. A benevolent intent coupled with commission of these acts would not suffice to absolve the actor from a charge of aggression.

The Six Powers have not dismissed this criticism but responded as follows. Under the Charter, the actual or alleged victim of aggression need not wait until the Security Council has established an act of aggression, including the intent of the actor to commit aggression, before it can defend itself; the Charter clearly provides that, until the Security Council has taken the measures necessary to maintain international peace and security, a State may exercise its inherent right of self-defense if an armed attack occurs against it. The claim that proof of objective facts such as invasion is easy and proof of

[75] See United Nations doc. 8719, pp. 16, 18, 21 and 22. See also Falk, "Quincy Wright: On Legal Tests of Aggressive War," *American Journal of International Law* (1972), 66, pp. 565–567.

subjective facts such as intent to invade is difficult is open to argument. Proof of objective facts is not necessarily easy; witness contemporary disputes over the most essential facts, such as whose army crossed a border first, or who infiltrated over a border when. Proof of intent may be more difficult still. But in certain cases, such as the invasion of the Republic of Korea, aggressive intent may be presumed from the force and eloquence of the ascertained facts. Equally, there can be cases where absence of intent can be assumed from the known facts. For example, an unarmed missile launched from the territory of State A lands on the territory of its friendly neighbor, State B. Relations between the two States are excellent; the missile carried no warhead; it lands in an uninhabited and unimportant stretch of territory. These are easy cases at the two extremes. But cannot cases in between these extremes occur in which the establishment of aggressive intent would be vital to the establishment of an act of aggression?[76]

The Six Powers further point out that, under the United Nations Charter, an illicit use of force may constitute a threat to the peace or breach of the peace without amounting to aggression. Frontier incidents are a salient illustration of this fact. Such an incident may certainly constitute a breach of the peace but, since it is not normally meant to be aggressive, it is not normally accounted as aggression. Now, if the reference in Article 39 of the Charter to an "act of aggression" is to have any meaning, it cannot be synonymous with a "threat to the peace" or "breach of the peace." In distinguishing between an act of aggression and other illicit uses of force, it is necessary that some identifiable criterion be found. They maintain that the element of intent is the only criterion which has been suggested in the fifty years in which the problem has been considered which offers a basis for making such a distinction. Moreover, if a "war of aggression constitutes a crime against the peace, for which there is responsibility under international law,"[77] it is difficult to divorce that responsibility from aggressive intent. Under the general principles of law recognized by civilized nations, intent and responsibility – at any rate, intent and the criminal responsibility which would attach to individuals – are inextricably tied together.

In the latest round of negotiations, the Six Powers have suggested that it would be sufficient if "due regard" were paid to the factors of intent they list, as well as to which State acted first.[78] It may well be that this suggestion contains the makings of a suitable compromise on these issues.

[76] See the statement of the United States Representative of July 22, 1970 (note 43), pp. 7–9.
[77] General Assembly resolution 2625 (XXV).
[78] United Nations doc. A/8719, p. 16.

Is Aggression Confined to States?

A lesser question which has embroiled the United States Special Committee on the Question of Defining Aggression is whether aggression may be perpetrated by, or upon, States alone, or by or upon entities whose statehood is challenged.

The Six-Power draft definition provides: "Any act which would constitute aggression by or against a State likewise constitutes aggression when committed by a State or other political entity delimited by international boundaries or internationally agreed lines of demarcation against any State or other political entity so delimited and not subject to its authority."

Other Members of the Committee have opposed such a provision on the grounds that the United Nations Charter refers to States, not other entities; that only States can be the victims of aggression or, presumably, its perpetrators; and that the importation of the concept of so-called "non-State entities" would be confusing and even dangerous.

However, it should be noted that the Charter speaks of "the suppression of acts of aggression" and of "an act of aggression." It does not specify "acts of aggression by States." When the Charter does speak of a State in this connection, it is of an enemy State in the very special clause which is Article 53. It is of course true that Article 2, paragraph 4 of the Charter provides that "All Members" shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of "any State." It does not speak of Members and States not recognized to be such – naturally enough. But it would be a pedantic literalism to maintain that, accordingly, an entity whose statehood is disputed is excluded from the reach of Article 2, paragraph 4. In fact, all Members of the United Nations, in a healthy rejection of undue literalism, have read "All Members" to mean "All States" in Article 2, paragraph 4.[79] There is nothing to prevent them, and everything to impel them, to interpret States as embracing entities whose statehood is disputed.

The argument that only States can be the victims or perpetrators of aggression does not withstand analysis. If an entity now situated in Africa, not recognized by any State to be a State, but under a régime actually exercising governmental authority, however unlawfully, were tomorrow to attack one of its African neighbors, would it be said that this cannot be aggression because the aggressor is not a State? If an entity which sought to break away from an African State in the course of its rebellion attacked a neighboring State sympathetic to the cause of the central Government, would it be said

[79] See General Assembly resolution 2625 (XXV): "Every State has the duty to refrain in its international relations from the threat or use of force."

that that was not aggression because the aggressor was not generally recognized, or recognized by the victim, to be a State? If a State in the Middle East, a Member of the United Nations which is widely recognized as a State, were to attack its neighbors which have not recognized it as a State, would those neighbors be estopped from alleging aggression because of their non-recognition? If a European State part of the territory of a former European State were to attack a neighboring entity which it and most other States do not yet recognize to be a State in pursuance of the so-called "revanchist" ambitions it is alleged to harbor, would it be claimed that the victim has no ground for complaint because it is a "non-State entity"?

It is difficult to see why use of the concept of non-State entities would be confusing. On the contrary, it is clarifying, for it introduces helpful precision. Far from being dangerous, it would rather be dangerous to suggest that entities whose statehood is in dispute are not covered by a definition of aggression. This is vividly demonstrated by the history of the postwar years. The two largest armed conflicts of the time have involved violation of internationally agreed lines of demarcation – and there has been no lack of charges of aggression in those conflicts. Other actual and potential conflicts have involved entities not recognized as States by all concerned, sometimes, by any concerned. To exclude this kind of conflict is to ignore both history and current events.[80]

At the most recent Session of the United Nations Special Committee, it was provisionally agreed by an informal negotiating group that: "In this definition, the term 'State' is used without prejudice to questions of recognition or to whether a State is a member of the United Nations and includes the concept of a 'group of States'."[81] It accordingly appears that the question of non-State entities is one which may be readily resolved.

V

Problems Posed by Current United Nations Drafts (continued)

What Are the Permissible Uses of Force Not Constituting Aggression Under the United Nations Charter?

We come now to the problem which, together with the question of "indirect aggression" to which it is linked, constitutes perhaps the profoundest

[80] See the statement of the United States Representative of July 22, 1970 (note 43), pp. 5–6. See also McDougal and Feliciano, *Public Order*, pp. 220–222. It should be noted that General Assembly resolution 2625 (XXV) provides that States have "the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines."

[81] United Nations doc. A/8719, p. 15.

problem of the definition of aggression: the uses of force which are permissible under the régime of the Charter of the United Nations and which, accordingly, do not constitute aggression.

Three such uses of force are generally agreed – but in such general terms as to subsume vital differences of view. Action by the United Nations in pursuance of its mandate to take effective collective measures for the suppression of acts of aggression; action by regional organizations, under specified conditions; and action in individual and collective self-defence, are universally acknowledged to be legitimate. But there is bitter dispute over which organ or organs of the United Nations may take such measures; under what conditions regional organizations may act; and over the scope of individual and collective self-defense.

Moreover, at least two other uses of force are alleged to be permitted by the Charter, but these allegations have not attracted universal acceptance, even in general terms. One is the claim that "wars of liberation" or "anti-colonial" wars are legitimate; the other is the claim that "military aid to a fraternal country to cut short the threat to socialist order" – or democratic order – is legitimate.

These agreed and alleged permissible uses of force will now be considered in turn.

Action by United Nations organs

The Six-Power draft definition provides that: "The use of force in the exercise of the inherent right of individual or collective self-defence, or pursuant to decisions of or authorization by competent United Nations organs or regional organizations consistent with the Charter of the United Nations, does not constitute aggression." This succinct statement provides a useful focus for an analysis of the question of permissible uses of force.

As readily appears, the Six-Power draft does not specify which United Nations organs are "competent." By way of contrast, the draft definition advanced by the Thirteen Powers does: its operative paragraph 2 confines the use of armed force which is not aggressive to individual or collective self-defense "or when undertaken by or under the authority of the Security Council." The draft of the Soviet Union provides that: "Nothing in the foregoing shall prevent the use of armed force in accordance with the Charter of the United Nations, including its use by dependent peoples in order to exercise their inherent right of self-determination in accordance with General Assembly resolution 1514 (XV)." It nevertheless is clear that the Soviet position coincides on this point with that which the Thirteen-Power draft expresses, for that has long been the Soviet view. Indeed a recent Soviet

elaboration of its position maintains that: "Only the Security Council has the right to use force on behalf of the United Nations to maintain or restore international peace."[82]

This is not the place to set out the conflicting arguments over the competence of the General Assembly which have raged for so long between the Soviet Union, like-minded, and one or two other States, on the one hand, and the United Nations majority, on the other. It should suffice now to recall that the International Court of Justice, in its advisory proceedings on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*,[83] noted that the responsibility conferred on the Security Council is "primary," not exclusive; that the Charter makes it abundantly clear that the General Assembly also is to be concerned with international peace and security; and that the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies, and the making of recommendations. The Court in particular held that the General Assembly is empowered, by means of recommendations to States or the Security Council or both, to organize peacekeeping operations, at the request, or with the consent, of the States concerned. There is a sphere of action under the Charter which is solely within the province of the Security Council, but it is restricted to enforcement action, a phrase which the Court appears to equate with what is stated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." Only the Security Council may order coercive action, but the General Assembly may make both general and specific recommendations, and take specific as well as general measures, relating to the maintenance and restoration of international peace.

There may be room for questioning whether this opinion of the International Court of Justice upholds the full scope of the authority which the General Assembly's resolution on "Uniting for peace" sought to find in the General Assembly. For by that resolution, the Assembly resolved "that 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 in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when

[82] *Ibid.*, p. 20. [83] *ICJ Reports 1962*, p. 151.

necessary, to maintain or restore international peace and security."[84] The Court's opinion is not definitive in this regard; it directly deals with peacekeeping operations, not with coercive operations. Yet it may arguably be open to the construction that, in its view, the General Assembly is restricted to the recommendation of measures which are not coercive – to measures which are those of "peacekeeping" rather than of "collective security." In any event, the Court indisputably holds that the General Assembly may recommend and take peacekeeping measures, that is, that it may use armed force in international relations in certain ways.

This holding of the Court, and, *a fortiori*, the terms of the General Assembly's resolution on "Uniting for Peace," squarely conflict with a definition of aggression which would limit the use of armed force consonant with the Charter to self-defense and to the authority or action of the Security Council.[85] That the Soviet Union should maintain its traditional position on this issue is no cause for surprise. That thirteen small and middle Powers, many of which on earlier occasions have upheld, both in principle and practice, the authority of the General Assembly in this sphere, should now seek so to cut back the General Assembly's powers, is both puzzling and remarkable.

The failure of the General Assembly to uphold its financial authority in 1964 and 1965 in the crisis over the application of Article 19 of the Charter in large measure resulted from the unwillingness of many small and middle Powers to defend the powers of the Assembly, the only United Nations principal organ in which they are all represented. That failure constituted a grave setback for the cause of international law, of international organization, and of the security of the small and middle Powers who above all require a vital United Nations. In that case, two Great Powers took the lead in asserting the authority of the General Assembly which too many smaller Powers deserted. In the case of the definition of aggression, once again those two Great Powers are found affirming an authority of the General Assembly which a number of (possibly unrepresentative) smaller Powers deny. One may wonder how long these two Great Powers will continue to uphold a position which, whatever its legal and political merits, may present certain dangers for their security interests, if smaller Powers who most benefit by that position demonstrate such inconsistent support for it. At any rate, for the

[84] General Assembly resolution 377 (V).

[85] The International Law Commission, in its Draft Code of Offences against the Peace and Security of Mankind, similarly excepted from the definition of aggression the use of armed force "in pursuance of a decision or recommendation by a competent organ of the United Nations" (United Nations doc. A/2211, p. 45).

purposes of the definition of aggression, it is clear that, in the short run, the differences over the authority of the General Assembly which have surfaced in that debate cannot be resolved. They can only be avoided by the use of general language which does not specify which United Nations organs are those entitled to use or authorize the use of force.

Action by regional organizations

The dispute over action by regional organizations presents certain parallels. Again, there is a history of broad construction of the authority of regional organizations in which smaller Powers took a leading role, a number of which, however, in the debates on aggression, now take a narrow construction.

The Six-Power draft would provide for the use of force pursuant to decisions of or authorization by regional organizations consistent with the Charter of the United Nations. This is general language, designed, to be sure, to preserve rather than preclude positions, but designed as well to avoid rather than provoke disputes.

The Thirteen-Power draft is more particular and provocative. "Enforcement action or any use of armed force by regional arrangements or agencies may only be resorted to if there is a decision to that effect by the Security Council acting under Article 53 of the Charter." The Soviet draft prudently says nothing more specific than: "Nothing in the foregoing shall prevent the use of armed force in accordance with the Charter of the United Nations." Insofar as it has felt obliged to particularize, the Soviet Union has proposed: "Enforcement actions under regional arrangements or by regional agencies, consistent with the purposes and principles of the United Nations, may be taken only in accordance with Article 53 of the United Nations."[86]

Article 53 substantially provides: "The Security Council shall, where appropriate, utilize ... regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

The Thirteen-Power draft thus presumes to rewrite Article 53 of the Charter, first by its insertion of the proviso that not only enforcement action but "any use of armed force" by regional agencies is governed by Article 53, and second by its specifying that such expanded uses of force may only be resorted to "if there is a decision to that effect by the Security Council." The purpose of these forthright revisions is clear: to reverse the position ex-

[86] United Nations doc. A/8719, p. 21.

pounded by the United States, with the support of the generality of its fellow members of the Organization of American States, that the action authorized by the OAS in the Cuban Missile Crisis was lawful because, among other considerations, (*a*) it was not enforcement action requiring authorization by the Security Council since enforcement action as used in the United Nations Charter and United Nations practice refers to binding, coercive measures while the measures recommended by the OAS in that crisis were not binding; and (*b*) the fact that the Security Council did not enjoin those measures may in any event be interpreted as authorization of them, authorization which can be *post facto* as well as anterior.[87]

There is ample room for difference of view on the validity of these constructions. Once again, however, what is clear is that a definition of aggression does not present a viable vehicle for resolving that difference. If a definition of aggression is to attract universal support, it will necessarily have to bury, rather than exhume and exacerbate, disputes over the extent of the authority of regional organizations and of the Security Council.

Action in individual or collective self-defense

Both the Soviet and the Six-Power drafts deal with individual or collective self-defense in general terms designed to avoid controversy over the scope of these concepts. Such modest elaboration as they have indulged in remains on a plane of generality.[88] The Thirteen-Power draft, however, specifies that: "The inherent right of individual or collective self-defence of a State can be exercised only in case of the occurrence of armed attack (armed aggression) by another State in accordance with Article 51 of the Charter." It further provides that nothing in the provision just quoted "shall be construed as entitling the State exercising a right of individual or collective self-defence ... to take any measures not reasonably proportionate to the armed attack against it." And it finally prescribes that, "when a State is a victim in its own territory of subversive and/or terrorist acts by irregular volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of self-defence against the other State under Article 51 of the Charter."

These specifications of the Thirteen-Power draft pose the following critical questions:

[87] See Chayes, "Law and the Quarantine of Cuba," *Foreign Affairs* (1963), 41, p. 550; Chayes, "The Legal Case for US Action on Cuba," *Department of State Bulletin* (1962), 47, p. 763; and Meeker, "Defensive Quarantine and the Law," *American Journal of International Law* (1963), 57, p. 515.

[88] See United Nations doc. A/8719, pp. 20, 19.

May the inherent right of individual or collective self-defense be exercised only when an armed attack has occurred or, on the contrary, is the exercise of anticipatory self-defense in appropriate circumstances lawful?
May the inherent right of individual or collective self-defense be exercised in response to the use of armed force exercised by indirect means as well as direct means?
Must measures taken in self-defense be proportionate to the acts to which they are responsive?

The further question of whether the right of self-defense may be employed against acts of alleged aggression which do not involve the use of armed force will not be considered, in the light of the general assent in the United Nations to consider within the scope of aggression only acts of armed force.

Article 51 of the Charter provides:

> 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.

A substantial number of States and a distinguished range of scholars[89] interpret Article 51 to mean that the inherent right of individual or collective self-defense may be exercised under the Charter *only* "if an armed attack occurs against a Member of the United Nations." Such an interpretation would render anticipatory self-defense unlawful, however imminent and grave the danger of aggression, and that indeed is a professed aim of the Thirteen Powers as well as some other United Nations Members. But other States – who offset those of differing views by weight if not number – interpret Article 51 in another sense, as do other distinguished scholars.[90]

The contentions of those who read Article 51 to preclude preventive action, to preclude anticipatory self-defense, are that the "ordinary meaning" of the phraseology of Article 51 so indicated; that the discussions at San

[89] Among them, Kelsen, *The Law of the United Nations* (1950), pp. 269, 787–789; Jessup, *A Modern Law of Nations* (1948), pp. 165–168; Wright, "The Prevention of Aggression," *American Journal of International Law* (1956), 50, p. 529; Pompe, *Aggressive War*, pp. 98, 100; and Brownlie, "The Use of Force in Self-Defence," *British Year Book of International Law* (1961), 27, pp. 232–247, as well as his work earlier cited note 20, pp. 275–278.

[90] Among them, Bowett, *Self-Defence*, pp. 182–199; McDougal and Feliciano, *Public Order*, pp. 231–241; and Waldock, "Regulation," pp. 500–501.

Francisco assumed that any permission for the unilateral use of force would be exceptional, and that accordingly the exception set out in Article 51 should be narrowly construed; that the particular provisions of Article 51 were meant to restrict and did restrict the right of self-defense enjoyed by States under customary international law; and that, if the Charter is to be interpreted effectively, resort to the unilateral use of force must be closely confined.

Those who maintain that Article 51 does not bar anticipatory self-defense respond that, while the "ordinary meaning" of the provision that self-defense may be exercised "if an armed attack occurs" does suggest the sense of "only if" an armed attack occurs, this is not the sole possible or plausible meaning. Article 51 does not in terms say that self-defense may be exercised only if an armed attack occurs;[91] there is room for more than one interpretation of what it does say. Dr. Bowett maintains that the reasoning of those who read Article 51 as debarring anticipatory self-defense is that "because Article 51 says nothing in the Charter forbids or prevents self-defense against an armed attack, it must therefore follow that self-defense is valid only against an armed attack – a complete *non sequitur*."[92] They point out that anticipatory self-defense was accepted in customary international law, not only in the nineteenth century as exemplified by the *Caroline*,[93] but in the twentieth century when the International Military Tribunal for the Far East held that the Netherlands, being apprised of the imminence of Japanese armed attack, had declared war against Japan in self-defense.[94] Relinquishment or restriction of a right of a State in international law – a right, moreover, described as "inherent" – is not to be presumed; the rights formerly belonging to Member States under customary international law continue except insofar as obligations inconsistent with those rights are assumed under the Charter. At the San Francisco Conference, the Committee which drew up the fundamental relevant norm – that of Article 2, paragraph 4, of the Charter – held that under it "the use of arms in legitimate self-defence remains admitted and unimpaired."[95] The purpose of Article 51 was not to restrict the right of self-defense but to ensure that regional organizations could act in self-defense under the Charter despite the operation of the veto. Moreover, that Article

[91] McDougal and Feliciano, *Public Order*, p. 237, note 261. (The distinguished authors also assail "ordinary meaning," as a satisfactory canon of treaty interpretation, at p. 234.) But see Farer, "Law and War"; and Henkin, "Force, Intervention and Neutrality in Contemporary International Law," *Proceedings of the American Society of International Law*, 1963, pp. 150–151, 168–169.

[92] Bowett, *Self-Defence*, p. 188.

[93] Moore, *Digest of International Law* (1906), 7, p. 919.

[94] *Judgment of the International Military Tribunal for the Far East, 1948*, pp. 994–995; McDougal and Feliciano, *Public Order*, pp. 231–232.

[95] United Nations Conference on International Organization, *Documents*, Vol. VI, p. 459.

51 cannot reasonably be interpreted as debarring action against a threat of armed attack is indicated by the terms of Article 2, paragraph 4, which enjoins "the threat or use of force in international relations."

As indicated earlier in quotations which have been given, some Members of the United Nations have maintained that, in certain circumstances, anticipatory self-defense may be justified. It is of interest in this regard to recall that, in 1946, the United Nations Atomic Energy Commission observed that: "In consideration of the problem of violation of the terms of the treaty or convention, it should also be borne in mind that a violation might be of so grave a character as to give rise to the inherent right of self-defence recognized in Article 51."[96] That is to say, it contemplated the exercise of self-defense in the absence of an armed attack. A more pointed and dramatic demonstration of United Nations practice is more recent: the June 1967 War. There Israel (despite initial claims to the contrary) appears initially to have attacked Egypt. The United Nations decisively rejected, both in the Security Council and the General Assembly, the most vigorous efforts to condemn Israel as the aggressor, in circumstances which suggest that many Members saw Israel's action as an exercise of legitimate, anticipatory self-defense.[97]

Perhaps the most compelling argument against reading Article 51 to debar anticipatory self-defense whatever the circumstances is that, in an age of missiles and nuclear weapons, it is an interpretation that does not comport with reality. Since a first strike can inflict appalling and perhaps decisive destruction, a State which is about to be the victim of such an attack cannot be expected to await it before acting in self-defense – if not self-preservation. At the same time, especially in this atomic age, the dangers of the exercise, not to speak of the abuse, of anticipatory self-defense – an exercise which is initially subjective – are profound.[98]

These conflicting views are substantial; there is weight on both sides. It is in any event once again clear that the grave and contentious issues surrounding the legitimacy of anticipatory self-defense will not be settled in the course of the drafting of a definition of aggression. If there is to be a generally agreed

[96] As quoted in Bowett, *Self-Defence*, p. 189.

[97] This precedent is complicated by the fact that, before the Israeli attack, President Nasser had proclaimed that passage of Israeli ships would not be permitted through the Straits of Tiran, a proclamation that was widely seen as tantamount to a blockade of Eilat. If the principle of priority in its absolute form were to have been applied in that instance, it would have entitled Israel to treat that blockade as an act of aggression to which it might lawfully respond in self-defence. For a comparison of the distinctive reactions of the United Nations to the 1956 and 1967 attacks upon Egypt, see Farer, "Law and War," pp. 64–66.

[98] See Farer's stimulating analysis, "Law and War" pp. 36–42.

definition, it will have to avoid rather than confront the scope of self-defense in this respect as in others.

Similar considerations apply to the endeavor by the Thirteen Powers to debar action in self-defense by States which are victims of subversive or terrorist acts, or both, by irregular, volunteer, or armed bands organized and supported by another State. The Thirteen Powers apparently do not construe such activities as tantamount to armed attack; they see these acts as acts of indirect rather than direct aggression; accordingly, they maintain that self-defense in response to them is unjustified.

There are two fundamental difficulties with this approach. The first is that it takes a restrictive view of the Charter which the Charter hardly requires. The second is that it conflicts with the requirements of national and international security.

Under the Charter, if armed personnel invade the territory of another State, the right of that State to defend itself does not depend on the obtrusiveness with which the invasion was carried out, or the candor which the aggressor evidenced in acknowledging his responsibility for the invasion. It is legally irrelevant whether the invasion is committed by regulars or irregulars, whether they were volunteers or draftees, whether they were highly organized as armed troops or less organized as armed bands. There is nothing in the Charter which suggests otherwise. The Charter proscribes the threat or use of armed force, without specifying the means by which that force is exerted. Even if, *arguendo*, one construes Article 51 as confining the exercise of self-defense to response to armed attack, subversive or terrorist acts carried out by irregular, volunteer, or armed bands with the organization and support of a foreign State comprehend forms of armed attack.

Moreover, the magnitude of the danger to be defended against has no necessary relationship to the openness or stealth of aggression. As the history of the Charter era painfully illustrates, the most serious threat to national well-being can be mounted by aggression which is not in the form of direct and open armed attack. It was not for nothing that the General Assembly of the United Nations has resolved, in resolution 380 (V), 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."

The fear that apparently motivates this proposal of the Thirteen Powers is that, if self-defense against indirect or covert measures of force were to be acknowledged as permissible, such self-defense would allow taking of measures which would not be proportionate to those to which they are a response. State A organizes and equips a few hundred irregulars on the

territory of State B which invade State C; should State C be entitled to strike with all its air force at the territory of State A? The Thirteen Powers say no, and in this they are right; such a massive air strike would appear to be disproportionate. But it does not follow that State C lawfully cannot take defensive measures against State A. It lawfully can act in self-defense insofar as the customary rules of necessity and proportionality permit.

The Thirteen Powers rightly specify the rule of proportionality to govern response to an armed attack (a phrase whose scope they appear to confine to open and direct attack). They do not indicate why the same rule of proportionality is not sufficient to govern response to the illicit use of armed force which is covert or indirect.[99]

"Wars of liberation" and "anti-colonial wars"

The delicate subject of "wars of liberation" and "anti-colonial wars" is hardly approached in the draft definitions of aggression now under consideration in the United Nations – wisely enough. The only hints are to be found, in the Soviet draft, in the preambular clause that: "The use of force to deprive dependent peoples of the exercise of their inherent right to self-determination ... is contrary to the Charter of the United Nations" and in the final, operative clause, which provides that: "Nothing in the foregoing shall prevent the use of armed force in accordance with the Charter of the United Nations, including its use by dependent peoples in order to exercise their inherent right of self-determination in accordance with General Assembly resolution 1514 (XV)." The Thirteen-Power draft, for its part, guardedly submits, in its final paragraph, that: "None of the preceding paragraphs may be interpreted as limiting the scope of the Charter's provisions concerning the right of peoples to self-determination, sovereignty and territorial integrity." The Six Powers maintain that these provisions are unnecessary, since nothing in their draft, at any rate, does impair the provisions of the Charter which concern the exercise of self-determination. They submit that it is for the authors of the Soviet and Thirteen-Power drafts to say whether, absent the saving clauses their drafts contain, their drafts would impair the principle of self-determination.

The issue is accordingly not very squarely or provocatively posed in the context of defining aggression. It has been confronted somewhat more directly in the General Assembly's "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States," however; and, of course, views elsewhere have been expressed about "wars of

[99] See the statement by the United States Representative of March 25, 1969 (note 55), and McDougal and Feliciano, *Public Order*, pp. 241–244.

liberation" and "anti-colonial" wars which have not attracted like unanimity.

The "Friendly Relations" Declaration is the subject of detailed consideration by two other lecturers at this session of the Academy and accordingly will not be fully discussed here. But attention should be drawn to the salient relevant provisions. The Declaration's elaboration of the principle of equal rights and self-determination of peoples expresses the view that: "Subjection of peoples to alien subjugation, domination and exploitation ... is contrary to the Charter." It provides that: "Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter."[100] The Declaration's elaboration of Article 2, paragraph 4 of the Charter has a provision conforming to the foregoing. That portion of the Declaration concludes: "Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful."[101]

The Charter does not of course inhibit the right of revolution any more than does customary international law. Any people, colonial or otherwise, may revolt without transgressing international law. These provisions of the "Friendly Relations" Declaration – which the Declaration pronounces to be principles which "constitute basic principles of international law" – are accordingly consonant to this extent with the facts of international law and life. What is a progressive development of international law is the holding that every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. The General Assembly would thereby seem to have held that a colonial Power, and indeed any State not "possessed of a Government representing the whole people belonging to the territory without distinction as to race, creed or colour," may not use force to deprive peoples of freedom and independence. Presumably, then, it is not lawful for a colonial Power to suppress anti-colonial revolution. Nor is it legal for a State to take forcible action against elements of its population set apart by race, religion, or color

[100] General Assembly resolution 2625 (XXV).

[101] *Ibid.* It should be noted that some Members of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States made far more radical proposals in respect of "self-defence against colonial domination" which were not accepted by the Committee or the General Assembly.

which deprives such peoples of their freedom and independence – a provision which has occasion for implementation in more than one part of the world.

What is even more controversial and less clear is the provision that, in their actions against and resistance to forcible action by a colonial or non-representative Government, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter. This provision appears to derogate, or could be interpreted as derogating, from the traditional rule of international law that foreign States are not entitled to render support to insurgents. That rule is under pervasive attack, both in doctrine and practice.[102] These provisions of the "Friendly Relations" Declaration may make a contribution to its revision.

It is important to note that the Declaration provides that the peoples concerned are entitled to seek and receive support "in accordance with the purposes and principles of the Charter." Those purposes and principles emphasize above all the maintenance of international peace and security and the settlement of disputes by peaceful means in conformity with the principles of justice and international law. It is accordingly submitted that support given by foreign States to insurgents in accordance with the Declaration should not include armed support. This conclusion is reinforced by the Declaration's provision that nothing in it "shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful."[103]

It will be recalled that the applicability of the Charter's restrictions on the use of force to colonial situations was debated with much vigor in the case of the forcible absorption by India of Goa in 1961. India maintained that colonialism constituted permanent aggression, to which it could lawfully react; Portugal maintained that she had been the sovereign of Goa in the eyes of international law for hundreds of years and remained so. The majority of the Security Council rejected India's claims, but the view of the majority was frustrated by the veto. India continues to hold Goa, a fact which does not seem to be actively contested, or perhaps contested at all, by other States any more, with the possible exception of Portugal.

[102] See, for example, Falk (ed.), *The International Law of Civil War* (1971); Falk, "Janus Tormented: the International Law of Internal War," in Rosenau (ed.), *International Aspects of Civil Strife* (1964), pp. 185 ff.; Falk (ed.), *The Vietnam War and International Law*, Vols. I (1968), II (1969) and III (1972); Farer, "Law and War," pp. 42–52, and Franck, "Who Killed Article 2 (4)? Or: Changing Norms Governing the Use of Force by States," *American Journal of International Law* (1970) 64, pp. 809 ff. For an especially useful and balanced survey, see also Higgins, "Internal War and International Law," in Black and Falk, *Future*, pp. 81 ff.

[103] It may be said to be further reinforced by the rejection, in the course of preparing the Declaration, of proposals designed to legitimize armed support of "self-defence against colonial domination."

Whatever the ambiguity of that precedent, it is clear that "wars of liberation" have been invoked to justify sins committed or desired, as, for example, the obviously unlawful measures pursued against Malaysia in 1964. The veto in that case once again stultified the Security Council. Any definition of aggression which can attract universal support cannot give support to so controversial and partisan a doctrine, a doctrine which is so capable of subjective molding to promote particular political ends which may have much, little, or nothing to do with advancement of the purposes and principles of the United Nations Charter.

Military aid responsive to threats to socialist or democratic order

A final alleged exception to Charter norms governing the use of force is what the General Secretary of the Communist Party of the USSR has called "military aid to a fraternal country to cut short the threat to socialist order."[104] Parallels between this claim, asserted shortly after the invasion of Czechoslovakia in 1968 by the Soviet Union and selected members of the Warsaw Pact, and justifications advanced by the United States Government after its intervention in the Dominican Republic in 1965, have been drawn.[105]

Mr. Brezhnev declared that, when forces hostile to socialism seek "to revert the development of any socialist country toward the restoration of capitalist order ... a threat to the security of the socialist community as a whole, emerges" justifying "military aid to a fraternal country to cut short the threat to the socialist order."[106]

This claim of the Soviet Union was of course a claim for a quite special right in world affairs – the right to intervene by force to prevent the people of a "socialist" State from exercising its right of self-determination. Clearly the "Brezhnev Doctrine" has no basis in the United Nations Charter, and cannot, in a definition of aggression, provide anything but an example of aggression.

It is interesting to note that the "Declaration of Basic Principles of Mutual Relations" between the United States and the USSR agreed upon in

[104] Speech by Leonid Brezhnev of November 12, 1968, quoted in "Czechoslovakia and the Brezhnev Doctrine," Subcommittee on National Security and International Operations, Committee on Government Operations, United States Senate, 1969, p. 23.

[105] See Franck, "Article 2(4)," pp. 834–835, and Farer, "Law and War," pp. 56–62.

[106] See the extended quotations set out in the source noted in note 22 above, as well as in Schwebel, "The Brezhnev Doctrine Repealed and Peaceful Co-existence Enacted," *American Journal of International Law* (1972), 66, p. 816.

It should be noted that, in the case of the invasion of Czechoslovakia in 1968, the Soviet Union invoked the justification of anticipatory self-defense which otherwise it has regularly denounced.

Moscow on May 29, 1972 by Mr. Brezhnev and President Nixon has this to say about claims of special rights: "The USA and the USSR make no claim for themselves and would not recognize the claims of anyone else to any special rights or advantages in world affairs. They recognize the sovereign equality of all States."[107] If this declaration is to be taken seriously, it constitutes a renunciation of the "Brezhnev Doctrine" – the more so since it is altogether incompatible with the sovereign equality of States. Equally, it constitutes a renunciation by the United States of any special rights of intervention in the Western Hemisphere, as, for example, in application of the Monroe Doctrine or in pursuance of more recent licence for intervention which aspects of the Dominican precedent of 1965 might be thought to afford.

What is more likely is that the Moscow declaration of May 1972 constitutes one more demonstration that there is a profound difference between what States preach and what they practice in respect of the use of force in international relations. Whether a definition of aggression will materially affect that lamentable situation is open to the gravest doubt.

DRAFT PROPOSALS BEFORE THE SPECIAL COMMITTEE

A. Draft proposal submitted by the Union of Soviet Socialist Republics (A/AC.134/L.12)

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and 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,

Noting that according to the principles of international law the planning, preparation, initiation or waging of an aggressive war is a most serious international crime,

Bearing in mind that the use of force to deprive dependent peoples of the exercise of their inherent right to self-determination in accordance with General Assembly resolution 1514 (XV) of 14 December 1960 is a denial of fundamental human rights, is contrary to the Charter of the United Nations and hinders the development of cooperation and the establishment of peace throughout the world,

Considering that the use of force by a State to encroach upon the social and political achievements of the peoples of other States is incompatible with the principle of the peaceful coexistence of States with different social systems,

Recalling also that Article 39 of the Charter states that the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security,

Believing that, although the question whether an act of aggression has been committed must

[107] *New York Times*, May 30, 1972, p. 18. In the Declaration, the parties pledge to "seek to promote conditions in which all countries will live in peace and security and will not be subject to outside interference in their internal affairs."

be considered in the light of all the circumstances in each particular case, it is nevertheless appropriate to formulate basic principles as guidance for such determination,

Convinced that the adoption of a definition of aggression would have a restraining influence on a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to stop them and would also facilitate the rendering of assistance to the victim of aggression and the protection of his lawful rights and interests,

Considering also that armed aggression is the most serious and dangerous form of aggression, being fraught, in the conditions created by the existence of nuclear weapons, with the threat of a new world conflict with all its catastrophic consequences and that this form of aggression should be defined at the present stage,

Declares that:

1. Armed aggression (direct or indirect) is the use by a State, *first*, of armed force against another State contrary to the purposes, principles and provisions of the Charter of the United Nations.
2. In accordance with and without prejudice to the functions and powers of the Security Council:

   A. Declaration of war by one State, *first*, against another State shall be considered an act of armed aggression,

   B. Any of the following acts, if committed by a State *first*, even without a declaration of war, shall be considered an act of armed aggression:

   (*a*) The use of nuclear, bacteriological or chemical weapons or any other weapons of mass destruction;

   (*b*) Bombardment of or firing at the territory and population of another State or an attack on its land, sea or air forces;

   (*c*) Invasion or attack by the armed forces of a State against the territory of another State, military occupation or annexation of the territory of another State or part thereof, or the blockade of coasts or ports.

   C. The use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State or a reversal of policy in favour of the aggressor shall be considered an act of indirect aggression.
3. In addition to the acts listed above, other acts by States may be deemed to constitute an act of aggression if in each specific instance they are declared to be such by a decision of the Security Council.
4. No territorial gains or special advantages resulting from armed aggression shall be recognized.
5. Armed aggression shall be an international crime against peace entailing the political and material responsibility of States and the criminal responsibility of the persons guilty of this crime.
6. Nothing in the foregoing shall prevent the use of armed force in accordance with the Charter of the United Nations, including its use by dependent peoples in order to exercise their inherent right of self-determination in accordance with General Assembly resolution 1514 (XV).

B. Draft proposal submitted by Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia (A/AC/134/L.16 and Adds. 1 and 2)

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to

maintain international peace and security and 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,

Convinced that armed attack (armed aggression) is the most serious and dangerous form of aggression and that it is proper at this stage to proceed to a definition of this form of aggression,

Further convinced that the adoption of a definition of aggression would serve to discourage possible aggressors and would facilitate the determination of acts of aggression,

Bearing in mind also the powers and duties of the Security Council, embodied in Article 39 of the Charter of the United Nations, to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to decide the measures to be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Considering that, although the question whether aggression has occurred must be determined in the circumstances of each particular case, it is nevertheless appropriate to facilitate that task by formulating certain principles for such determination,

Reaffirming further the duty of States under the Charter of the United Nations to settle their international disputes by pacific methods in order not to endanger international peace, security and justice,

Convinced that no considerations of whatever nature, save as stipulated in operative paragraph 3 hereof, may provide an excuse for the use of force by one State against another State,

Declares that:

1. In the performance of its function to maintain international peace and security, the United Nations only has competence to use force in conformity with the Charter;
2. For the purpose of this definition, aggression is the use of armed force by a State against another State, including its territorial waters or air space, or in any way affecting the territorial integrity, sovereignty or political independence of such State, save under the provisions of paragraph 3 hereof or when undertaken by or under the authority of the Security Council;
3. The inherent right of individual or collective self-defence of a State can be exercised only in case of the occurrence of armed attack (armed aggression) by another State in accordance with Article 51 of the Charter;
4. Enforcement action or any use of armed force by regional arrangements or agencies may only be resorted to if there is decision to that effect by the Security Council acting under Article 53 of the Charter;
5. In accordance with the foregoing and without prejudice to the powers and duties of the Security Council, as provided in the Charter, any of the following acts when committed by a State *first* against another State in violation of the Charter shall constitute acts of aggression:

   (*a*) Declaration of war by one State against another State;

   (*b*) The invasion or attack by the armed forces of a State, against the territories of another State, or any military occupation, however temporary, or any forcible annexation of the territory of another State or part thereof;

   (*c*) Bombardment by the armed forces of a State against the territory of another State, or the use of any weapons, particularly weapons of mass destruction, by a State against the territory of another State;

   (*d*) The blockade of the coasts or ports of a State by the armed forces of another State;
6. Nothing in paragraph 3 above shall be construed as entitling the State exercising a right

of individual or collective self-defence, in accordance with Article 51 of the Charter, to take *any* measures not reasonably proportionate to the armed attack against it;
7. When a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter;
8. The territory of a State is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State on any grounds whatever, and that such territorial acquisitions obtained by force shall not be recognized;
9. Armed aggression, as defined herein, and the acts enumerated above, shall constitute crimes against international peace, giving rise to international responsibility;
10. None of the preceding paragraphs may be interpreted as limiting the scope of the Charter's provisions concerning the right of peoples to self-determination, sovereignty and territorial integrity.

c. Draft proposal submitted by Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America (A/AC/134/L.17 and Adds. 1 and 2)

The General Assembly,

Conscious that a primary purpose of the United Nations is 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,

Recalling that Article 39 of the Charter of the United Nations provides that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Reaffirming that all States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Believing that, although the question of whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, a generally accepted definition of aggression may nevertheless provide guidance for such consideration,

Being of the view that such a definition of aggression may accordingly facilitate the processes of the United Nations and encourage States to fulfil in good faith their obligations under the Charter of the United Nations,

Adopts the following definition:

I. Under the Charter of the United Nations, "aggression" is a term to be applied by the Security Council when appropriate in the exercise of its primary responsibility for the maintenance of international peace and security under Article 24 and its functions under Article 39.

II. The term "aggression" is applicable, without prejudice to a finding of threat to the peace or breach of the peace, to the use of force in international relations, overt or covert, direct or indirect, by a State against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the United Nations. Any act which would constitute aggression by or against a State likewise constitutes aggression when committed by a State or other

political entity delimited by international boundaries or internationally agreed lines of demarcation against any State or other political entity so delimited and not subject to its authority.

III. The use of force in the exercise of the inherent right of individual or collective self-defence, or pursuant to decisions of or authorization by competent United Nations organs or regional organizations consistent with the Charter of the United Nations, does not constitute aggression.

IV. The uses of force which may constitute aggression include, but are not necessarily limited to, a use of force by a State as described in paragraph II

A. In order to:

(1) Diminish the territory or alter the boundaries of another State;

(2) Alter internationally agreed lines of demarcation;

(3) Disrupt or interfere with the conduct of the affairs of another State;

(4) Secure changes in the Government of another State; or

(5) Inflict harm or obtain concessions of any sort;

B. By such means as:

(1) Invasion by its armed forces of territory under the jurisdiction of another State;

(2) Use of its armed forces in another State in violation of the fundamental conditions of permission for their presence, or maintaining them there beyond the termination of permission;

(3) Bombardment by its armed forces of territory under the jurisdiction of another State;

(4) Inflicting physical destruction on another State through the use of other forms of armed force;

(5) Carrying out deliberate attacks on the armed forces, ships or aircraft of another State;

(6) Organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;

(7) Organizing, supporting or directing violent civil strife or acts of terrorism in another State; or

(8) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State.

Address and Commentary

Address

Ambassador and Mrs. Dyess, distinguished guests, it is a pleasure and honour to join in welcoming you to this reception in honour of Grotius and to welcome those who have come together in a Commemorative Colloquium in celebration of the 400th birthday of Grotius.

I wish to join forces with the Ambassador in thanking Dr. Voskuil and his colleagues of the Asser Institute, and the Grotiana Foundation, for their initiative in the organization of the Colloquium. May I also thank their colleagues in the United States who have taken a notable initiative, or series of initiatives, through the medium of the Committee to Commemorate the 400th Birthday of Hugo Grotius. Particular thanks are due to Mrs. Ruth Steinkraus Cohen, Chairman of the United Nations Association of Connecticut, who has taken the lead in the United States in organizing and directing that energetic Committee. We are delighted that she is here, as indeed she should be, and that her most distinguished collaborator in this and a thousand other good causes, Professor Myres McDougal, is with us as well. We genuinely regret that Judge Philip Jessup was not able to join both them and us.

We have heard a number of splendid and learned speeches about Grotius over the last few days, which praise and appraise that great genius and his seminal contributions to international law. I shall accordingly confine these remarks to recalling the influence which Grotius has had in the United States, a topic of special topicality not least because of the place of this reception.

In 1899, at the First Hague Peace Conference, an extraordinary ceremony took place on the Fourth of July.

In Delft, in the church that we have today visited, the whole of the Peace Conference came together for the dedication by the Chairman of the United States Delegation, Ambassador Andrew White, of a wreath in memory of

First published in *International Law and the Grotian Heritage; A Commemorative Colloquium*, T.M.C. Asser Instituut (1985), The Hague, Asser Institute.

Grotius. Ambassador White made a remarkable speech on that occasion. Allow me to quote a few passages from it, for they give an indication of the standing of Grotius in the perceptions of those who took the first modern steps that led, among other things, to the establishment of the World Court and its location in The Hague.

Of The Hague Peace Conference itself, Ambassador White said that: "For the first time in human history there are now assembled delegates with a common purpose, from all nations." That conference, he said, "has for its sole purpose, a further evolution of the principles which Grotius, first of all men, developed thoroughly and stated effectively."

Of Grotius's most notable book, Ambassador White declared that: "Of all works not claiming divine inspiration, that book ... has proved the greatest blessing to humanity" in its promotion of peace and in highlighting the horrors of war. The debt all nations owe to Grotius was particularly great in the United States: "Perhaps in no other country," White said, "has his thought penetrated more deeply and influence more strongly." White proceeded to give concrete examples of Grotius's influence, from Lieber's Code of Conduct for armies in the field, to the absence of reprisals by the United States against the Confederacy. He praised Grotius for elucidating not only what the practice of States was but what it ought to be. The first seeds of arbitration in modern thought were planted by Grotius. Arbitration was a field in which the United States together with Great Britain, had taken the lead, and which was of central concern to The Hague Peace Conference. After all this and a great deal more, Ambassador White on behalf of the people of the United States placed a tribute on Grotius's tomb with the inscription:

To the Memory of Hugo Grotius
In Reverence and Gratitude
From the United States of America
On the Occasion of the International Peace Conference
at The Hague
July 4th 1899

Let me give a second example of the influence of Grotius on American thought and American policies. You will recall that critical juncture in the history of civilization when Great Britain stood alone against Nazi Germany. It was then the declared policy of the Government of the United States to extend to Britain all aid "short of war." At the same time, it was the declared policy of the United States to avoid entry into the war as a belligerent. These policies were declared by some distinguished American international lawyers

of the day to be irreconcilable. It was asserted that, for example, international law prohibited the United States from exchanging old destroyers for bases. The then Attorney General of the United States, Robert Jackson, took counsel with a most distinguished international lawyer who later came to serve as a judge of the International Court of Justice, the then Professor H. Lauterpacht. And he produced a speech in justification of the policy of extending all aid short of war to Britain which relied on Grotius.

Attorney General Jackson recalled that it was Henry Adams who complained that Grotius was educated in one century and was living in another. He observed that all of us, even some of our international lawyers, suffer the same dislocation of ideas. "The difference is that Henry Adams recognized it." "Some of our scholarship," Jackson observed, "has not caught up with this century which, by its League of Nations Covenant with sanctions against aggressors, the Kellogg–Briand Pact for renunciation of war ... has swept away the nineteenth-century basis for contending that all wars are alike ... this adoption in our time of a discriminating attitude towards warring States is really a return to earlier and more healthy precepts." And Jackson cited the earlier distinction between just and unjust wars and the legal duty of States to discriminate against a State engaged in an unjust war – in a war undertaken without a cause recognized by international law. That duty, he said, "was voiced by Grotius, the father of modern international law ... There was, in his view, no duty of impartial treatment when one of the belligerents had resorted to war in violation of international law." Writing in 1625, he said: "It is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." And from this authority and more modern authorities Jackson built his cogent defense of the American policy of aiding Britain to defeat the most appalling aggressor of our age.

Lauterpacht later came to write one of his characteristically surpassing articles about Grotius, "The Grotian Tradition in International Law," on the 300th anniversary of his death. That article is a model of balance and insight in its appreciation of Grotius. He concludes with a summary of the principal features of the Grotian tradition in international law, which, by way of my conclusion, I would like to quote:

> They are: the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of States and individuals; the rejection of

reason of State; the distinction between just and unjust war; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress.[1]

Lauterpacht added that some of these elements of the Grotian tradition have now become part of positive law; others are still an aspiration. The inspiration to reach for Grotius's aspirations remains with this gathering, and let us hope with others the world over.

Commentary

Professor McDougal, friends: my comment is not directed to the trenchant paper of Professor Röling, but rather to those of earlier distinguished speakers this morning.

I would agree that the Grotian tradition in international law embraces the affirmation of the social nature of man, the subjection of the totality of international relations to the rule of law, and I see Grotius's exposition of idealism and progress as being in the tradition of international law. Distinguished speakers this morning have, I think, summarized those strands of the Grotian tradition in the word "interdependence" which is, in a measure, a reality today and even more an ideal and one to which I think we can all subscribe. But interdependence is a very general term. The question remains, "interdependence on what terms"? Two of our speakers, in their excellent papers, have invoked the New International Economic Order and the Charter of Economic Rights and Duties of States as Grotian examples of progressive development of interdependence. That is where I venture to differ, because I see those documents as very mixed, containing progressive elements, but regressive elements as well. The resolutions on the New International Economic Order were forced through the General Assembly in a lamentable atmosphere. They were not negotiated solutions but a partisan set of demands. Some forty States at once rose to express their reservations to resolutions which contain elements which, in my submission, are not acceptable. For example, their endorsement of cartels and condemnation of efforts of States to resist cartels is, in my view, unacceptable if the New International Economic Order is to be viewed as anything more than a one-sided "wish-list." As for the Charter of Economic Rights and Duties of States, it is not international law, and happily so, for in some respects it is sound, but in other respects, quite nationalistic and unsound. I subscribe to interdependence no

[1] H. Lauterpacht, "The Grotian Tradition in International Law," *British Year Book of International Law* (1947), 23, p. 51.

less than others but suggest that its content must be scrutinized and that uncritical invocations of the New International Economic Order, the Charter of Economic Rights and Duties of States and so on, are open to attack even when cast in Grotian terms.

The Compliance Process and the Future of International Law

The subject allotted to me by the convokers of this convocation is as difficult a subject as is known to the indisciplines of international law and relations. If the US dollar had not so depreciated, it might be termed "the sixty-four dollar question." Or, to sustain the materialistic metaphor which characterizes our society, compliance might be described as the "bottom line" in the accounting of international law.

It is obvious enough that international law is a meaningful force in the affairs of men only to the extent that men and their instruments comply with that law. Nevertheless, among international lawyers there is a certain tendency to avoid grappling with problems of compliance. Compliance sometimes appears to be assumed, or it may be treated as a problem more of politics than law. Or it is affirmed that compliance is predominant and that indeed the record of compliance with international law compares favorably with that of the domestic law of States. One way or another, the need for the international lawyer to confront the awful truths of noncompliance may be reasoned away. But diplomats, politicians, political scientists, the press, and others who handle, mishandle, manhandle, or merely interpret international relations do not fall victim to the error of discounting the importance of compliance with international law. They tend to fall into still more fundamental error. They overlook the importance of international law itself. Citing actual or alleged noncompliance with international law, they may conclude that international law does not exist, or is not "law," or at any rate does not govern the really important things that States do.

In these remarks, I shall not seek to evaluate with any specificity the extent to which States do and do not comply with international law. But I shall address the classic question of why States and other subjects of international law do comply with international law, to the extent that they do. And since

First published in *Proceedings of the American Society of International Law* (1981).

that extent clearly is not sufficient, I shall also take up the question of what may be done to improve the processes of compliance. Such prescriptions will inevitably be somewhat futuristic, and thus I shall be brought into compliance with my subject, "The Compliance Process and the Future of International Law."

Since this 75th Anniversary Convocation inherently invokes the origins of the Society, I take as my initial text the pertinent words of Elihu Root, spoken if not at the Society's first, then its second, Annual Meeting. Mr. Root could not be accused of speaking simply in the idealistic capacity of one of his capacities, namely, as President of the Society. For he also then was serving as Secretary of State. Moreover, his familiarity with the real world presumably was enhanced by service about that time as Secretary of War. Admittedly he was also to serve as the US member of the Committee of Jurists which drafted the Statute of the Permanent Court of International Justice, but that enterprise of 1920 cannot fairly be held to impeach the hardheadedness of his insights of 1908.

Before turning to the topic of his speech, "The sanction of international law," Mr. Root observed that the year which had passed since the first Annual Meeting of the Society furnished abundant proof that "it is no academic subject which we are studying, and that it is no dead language in which we speak." During that short year the Second Hague Conference had made "what may fairly be declared the greatest single advance ever made at one time in the development and acceptance of rules of international law for the Government of national conduct." Eleven of the resultant conventions had been approved by the Senate. The establishment of a general system "under which there may be impartial judgment upon the application of the rules of international law to international conduct has been advanced" by ratification of US Treaties of Arbitration with eight countries. The five Central American States had established, after "temperate and kindly discussion" in Washington, a permanent court to settle disputes among them. And the Society, in the short period of its existence, without much advertising, had expanded until there were 900 members on the rolls.[1]

Against this heartening background, Mr. Root referred initially to the striking apparent difference between municipal and international law. The domestic lawyer aims to secure a judicial judgment to be enforced by the entire power of the State over litigants subject to its jurisdiction and control. Before him lies a clear, definite conclusion of the controversy, and for the finality and effectiveness of that conclusion the sheriff and the policeman

[1] *Proceedings of the American Society of International Law* (1908), pp. 13–14.

stand always as guarantors in the last resort. But the international lawyer has apparently no objective point to which he can address his arguments, except the sense of justice of the opposing party. In the vast majority of practical questions arising under the rules of international law, there does not appear to be on the surface any reason why either party should yield against its own interest to the arguments of the other side. This apparent absence of sanction for the enforcement of the rules of international law has led great authority to deny that those rules are entitled to be called law at all.

Yet, Mr. Root continued, all the Foreign Offices of the civilized world are continually discussing with each other questions of international law, "cheerfully and hopefully marshaling facts ... presenting arguments designed to show that the rules of international law require such and such ... And in countless cases nations are yielding to such arguments and shaping their conduct against their own apparent interests ... in obedience to the rules which are shown to be applicable."[2] Why?

Root's answer is that it is a mistake to assume that the sanction which secures obedience to any law consists exclusively or chiefly of the penalties imposed by the law for its violation. Men generally refrain from crime not through fear of imprisonment but because they are unwilling to incur in the community in which they live the public condemnation which would follow a repudiation of the standard of conduct prescribed by that community for its members. The force of law is in the public opinion that prescribes it. The practical considerations which determine success or failure in life reinforce the impulse toward conformity. It is these considerations rather than the threat of the sheriff that lead men to keep their contracts. It is only for the occasional nonconformist that the policeman is kept in reserve; if the nonconformists were not occasional, the policeman would have no effect.

Root maintained that the rules of international law are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness. He refers to "a decent respect to the opinions of mankind." As the isolation of nations breaks down, a community of nations is gradually emerging, in which standards of conduct are being established, and a world-wide public opinion is holding nations to conformity with those standards. "There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct."[3] The deference which a State shows to international public opinion is in due proportion to a nation's degree of civilization. States

[2] *Ibid.*, pp. 15–16. [3] *Ibid.*, p. 18.

appreciate that nonconformity to the standard of nations means condemnation and isolation. They appreciate that it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it. The nation that has with it the moral force of the world's approval is strong.

Thus, Root concludes, the real sanction which enforces international law is the injury which inevitably follows nonconformity to public opinion. Moreover, for the occasional violent and persistent international lawbreaker, there stands behind discussion the ultimate possibility of war, as the sheriff and policeman await the occasional domestic lawbreaker. Of course, public opinion can be brought to bear upon only comparatively simple questions and clearly ascertained rights; hence the importance of arbitration and the importance of informing public opinion.

Whether Elihu Root would have spoken so optimistically in 1981 as he did in 1908 is open to question. Certainly those who have lived through the aggression and genocide of this century cannot have like confidence that some States will not subject themselves to the discredit of standing brutally on their power. Even Root's comments on the domestic effectiveness of law today seem somewhat out of date in this crime-ridden city; what he gently calls "non-conformists" are more than occasional.

Yet I have quoted Root at this length not simply out of respectful remembrance of things past in the Society's history, but because of the pertinence of his insights to present problems. In significant measure, States do comply with international law for the reasons he assigns: because States generally do feel impelled to conform to standards which are widely accepted and which are inculcated into their public opinion and leadership; because normally they wish to avoid condemnation by and isolation from other States, particularly as it may be manifested in economic as well as psychic losses; and because usually they appreciate the mutuality of the law's benefits. States understand and count upon reciprocity of obligation and of performance, both in treaty relations and in the application of customary international law. They see that it is in their self-interest to do so. Reciprocity is the norm. It is the cement that holds the structure of international law together, if not invariably then usually.

It may be added that the reasons why Governments comply with the law domestically – why, for example, the US Government complies with judgments of the Court of Claims when there is no sheriff to compel it to do so – are not very different. Governments do not respond to the law domestically because of the evils which superior authority will impose upon them if they do not. There is no superior authority. They respond because they see that it

is in their interest to respond.[4] They see that they have a greater interest in the lawful disposition of disputes than they do in imposing their will arbitrarily in every dispute. Yet this enlightened perception unfortunately is not regularly replicated on the international scene. Democratic and legally responsive Governments habitually are willing to submit their legal disputes with citizens and aliens to domestic courts, and are quite prepared to lose. They recognize that if they won all the cases, there would be no courts. But internationally these same Governments are habitually unwilling to lose. The first question a Government asks when international adjudication is considered is, will we win? If the answer is only "possibly," adjudication is normally rejected and claims of the Court's jurisdiction are resisted. Their larger interest in the promotion of the judicial settlement of international disputes is sacrificed to the perception of their immediate interests.

For more reasons than that, Root's fundamentally sound analysis is not sufficient to meet the demands of today and tomorrow for a more effective international law. In the remainder of these remarks, I shall accordingly try to set out salient ways and means by which the compliance processes of international law are being or may be strengthened.

One way is in fact indicated by Root in his reference to arbitration. Before the law can be enforced, it must be established. That is a particular problem in international law. If State A is in dispute with State B as to what the law is, and if each State takes an opposing position, it is premature to speak of enforcing the law: what the law is must first be settled. In a domestic context, courts can and do establish the law. Internationally, courts can but too often do not, essentially because they do not enjoy the compulsory jurisidiction routinely exercised by national courts.

This is not to suggest that the sole way in which the law can be established is by the processes of international adjudication and arbitration.[5] But it is the best way – provided, at any rate, that the judgments of the International Court of Justice and the awards of Arbitral Tribunals are complied with. To the extent that they are not, and to the extent that they are not enforced, a gap arises between authority and effectiveness. It is not clear that the interests of international law are served by emphasizing a conjunction between the authority to declare the law and impotence to enforce it. The remedy is not to submit fewer cases to international adjudication, but to take all feasible steps to enforce international judgments. Enforcement of judgments of the International Court of Justice is a community responsibility, as the terms of Article 94 of the United Nations Charter import. But, in the first place it is

[4] See Fisher, "Bringing Law to Bear on Governments," *Harvard Law Review* (1961),74, p. 1130.

[5] See R. Falk, *The Status of Law in International Society* (1970), pp. 332–334.

the responsibility of the State in whose favor the Court has ruled to have recourse to the Security Council. Yet we have seen in the last year a most striking example of the failure to take the most obvious, still less all feasible, steps to enforce one of the most extraordinary judgments ever rendered by the International Court of Justice.

States in the ordinary yet important run of their affairs generally observe international law. And the record of observance of the judgments of the World Court and of Arbitral Tribunals is quite good – though not good enough. But contemporary history provides painful exceptions to the predominant rule of compliance with international obligations. When those exceptions entail, as some do, the illegal use of force internationally, the whole structure of international law and life may be endangered. Controlling the use of force is the most vital test of any legal system. International law does not yet meet that test. The daily headlines so demonstrate. For this reason alone, the problem of sanctions to enforce the law must be confronted. And for this reason above all, ways and means of enhancing compliance with international law, those that involve inducements as well as penalties, demand continuing consideration. The nurturing of the processes of international compliance is of paramount importance not only because particular violations of the law may be of great, even devastating importance. It is important because expectations are the vitals of the law. "The life of the law is not logic but experience." If experience demonstrates that States may safely violate international law, its credibility suffers. States will not expect compliance by others and be the less conscientious about their own. Correspondingly, observance of the law, and enforcement of the law, will generate expectations of future compliance and will thus enhance the present effectiveness of international law.

What then is being done or can be done to enhance compliance with international law? Time does not permit me to be comprehensive even if there were more answers; but let me try to recall some primary ones.

Perhaps the most encouraging sphere of activity is in what has been called "cooperative international law."[6] States increasingly cooperate in an immense and intense range of endeavors, largely through the medium of international organizations such as the ILO, the World Bank, the International Monetary Fund, and the International Civil Aviation Organization. They materially advance their interests through these organizations. But if they fail to meet the standards of cooperative behavior which the constitutions of these organizations prescribe or their practice maintains, then they

[6] W. Friedmann, *The Changing Structure of International Law* (1964), pp. 88–95.

face the penalty of non-participation. They may lose the benefits of co-operation. Thus a State may refrain from defaulting on a loan of the World Bank – or may refrain from uncompensated expropriation of foreign investments – in the realization that otherwise its eligibility for future loans of the Bank will suffer. A State will conform to the air navigation rules and standards of the International Civil Aviation Organization to avoid being excluded from the benefits of international air travel. These examples could be multiplied. The United Nations Specialized Agencies are established by treaty. They are creatures of and creators of international law. As States habitually cooperate in the Specialized Agencies and like institutions, as they come increasingly to rely on cooperative institutional arrangements, the impulse to abide by the law, their perceived interest in abiding by the law, should continue to grow – with beneficial effects beyond the immediate sphere of the organizations and subjects concerned.

International organizations play still another role in promoting compliance with international law, "the mobilization of shame."[7] The ILO has a distinguished record of achievement in this vein. Its organized and expert scrutiny of the record of the performance of Governments in meeting their treaty obligations respecting labor standards unquestionably has a marked effect on how States behave – on how they comply with the specialized body of law which the ILO has done so much to establish.[8] Similarly, in the sphere of human rights at large, bodies such as the Inter-American Commission of Human Rights have done a great deal to bring law to bear on Governments through processes of fact-finding and influencing public and governmental opinion.

The European Community has exceptional ways and means of its own to induce compliance with the Treaty of Rome. I do not feel able to appraise that record beyond voicing the impression that the sense of community which supports the measure of integration which the European Community manifests also supports a high, though not uniform, degree of compliance.

The emphasis which is increasingly and rightly placed on multilateral means for enhancing national compliance with international law does not suggest that unilateral action is obsolete. On the contrary, particularly as long as so much of international intercourse remains in bilateral channels, possibilities of unilateral enforcement must be fully exploited.

One medium for the national application of international law is national courts. National courts should increasingly apply international law, as they often have, not only to their Governments and others incontestably subject to

[7] See S. Schwebel (ed.), *The Effectiveness of International Decisions* (1971), pp. 434–436, 447–456, 493–494.
[8] Valticos, "The International Labor Organization," in Schwebel, *International Decisions*, pp. 134–155.

their jurisdiction; they should also increasingly apply international law to foreign Governments. To the extent that that implies cutting back on sovereign immunity and cutting out the act-of-State doctrine, that is to be welcomed. Moreover, the enforcement of international judicial and arbitral judgments by national courts and other national authorities should be vigorously pursued. The increasing interdependence of the world economy furnishes opportunities for enforcement – such as the freezing of assets – which should be seized upon as circumstances may warrant. It is in the interest of enlightened Governments and their judicial and administrative instrumentalities to lend their weight to the enforcement of international obligations and judgments rather than to their avoidance.

A traditional means of enforcing international law which may be due for a revival is the use of reprisals. It is accepted that where State A materially violates a treaty with State B, State B may reciprocally withhold performance or even denounce the treaty. But where State A has violated the legal rights of State B, State B may in some circumstances go beyond that to take retaliatory action against State A which, but for the prior illegal act of State A, would be unlawful.

In its current codification of the law of State responsibility, the International Law Commission has recently given striking endorsement to the continued legality of proportionate reprisals which do not entail the use of armed force.[9] And the vitality of resort to reprisals was upheld in 1978 in the *Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France)*.[10]

Clearly there are dangers in recourse to reprisals. But the dangers of riskless violation of international law are greater. In the present parlous state of international relations, Governments cannot be expected to forgo resort to reprisals that do not involve the use of armed force. Indeed, they should explore the possibilities of widening their reach and sharpening their bite by including among the number of States that exercise reprisals not only the State immediately injured by the breach of international law but other States which, while not directly affected, have an interest in the maintenance of the integrity of the pertinent rule of international law. An informal coalition of the law abiding should be prepared first of all jointly to take measures of lawful adverse response to clear and grave violations of international law. For example, the lawbreaker can be quarantined by measures of trade restriction or diplomatic ostracism – measures which a State is free to adopt or not to

[9] United Nations General Assembly, *Official Records*, Thirty-Fourth Session, Supplement No. 10 (A/34/10), *Report of the International Law Commission on the Work of its Thirty-First Session*, pp. 311–328.
[10] *International Law Reports*, Vol. 54, pp. 337–341.

adopt. But where such measures are insufficient, then that informal coalition of law-abiding States should jointly exercise measures of reprisal against the law-breaking State. For example, where State A abets the perpetration of acts of international terrorism and hijacking, States B, C, and D might combine to cut off air travel with State A even if one or more of them are parties to valid treaties with State A providing for the maintenance of air services. The breach of such treaties would be unlawful but for the prior unlawful acts of State A in abetting terrorist activity.

Measures such as these, if imaginatively and persistently pursued, can do a great deal to bring about wider compliance with international law. But they will not of themselves be sufficient to deal with the gravest dangers to the integrity of international law and life – the use and threat of use of aggressive armed force. To the extent that measures such as those described build the law habit, enmesh States in a web of regularized intercourse, and deter them from violating less critical but still important elements of international law, to this extent these measures should also inhibit a State's resort to international aggression. But until the international community builds that much greater sense of community which is necessary to support a central enforcement authority capable of compelling States to observe international law, truly effective multilateral sanctions will remain elusive.

While the Security Council is not generally empowered to employ sanctions to maintain international law – or arguably is not – it clearly is authorized and obligated to support international law at its weakest point, in the maintenance of international peace and security. In practice, the Security Council has made significant contributions to keeping or restoring the peace, but its practice also demonstrates the gravest failures of omission and commission. To put the point more precisely, the record of the Members of the United Nations in the sphere of the Organization's supreme concern is dismal. No one, at least to my knowledge, appears to have the answer to this most profound problem of international law and relations: effectively holding States to their obligations to refrain in their international relations from the threat or use of force. While the fundamental prescriptions of the United Nations Charter appear to have a certain indeterminate but positive influence, a third and perhaps final World War seems to have been so far avoided more by the imperatives of a balance of international terror and of restraint, than by the influence of international law. Lesser wars are fought in the shadow of muscle-bound Great Powers, sometimes noticed and foreshortened by the United Nations, sometimes not.

The prescription for survival, then, appears to be this: maintenance of a sufficient balance of power to deter the outbreak of nuclear catastrophe and

meanwhile intensive cultivation of ways and means of strengthening compliance with international law. The hope is that there thus will be a longer run, and that in the course of it, much stronger international institutions supported by a much deeper sense of international community will gradually develop. If and when that day comes, satisfactory sanctions with which to support a truly effective international law should become as practicable as today they are necessary.

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