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The Legacy of the Tokyo Dissents on ‘Crimes against Peace’

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3.1 Introduction

It is widely held that the Nuremberg Tribunal had an enduring influence, whereas the Tokyo Tribunal did not. On the issue of aggression, however, the reverse is true. Nuremberg’s great innovation, crimes against peace, designed to highlight the German leaders’ assault on the world order, was almost immediately dismissed as a legal anomaly. By contrast, the debates that arose at Tokyo in relation to crimes against peace – on just and unjust wars, the scope of self-defence, and old and new forms of domination – endured for another quarter of a century. Yet it was not Tokyo’s Majority Judgment, but rather the dissents from it, that prevailed. Several judges took issue with the charge, and (after the sentences were handed down) most other jurists, including those advising the prosecuting powers, tacitly followed suit.

3.2 The Dissents on Crimes against Peace

After the conclusion of the hearings at the 1946–48 International Military Tribunal for the Far East, the majority of judges handed down a judgment proclaiming that there were ‘no more grave crimes’ than conspiring to wage and waging a war of aggression.² But three judges questioned either the validity or the handling of these charges, and filed dissenting opinions. Two of these dissents, written by the Indian and the Dutch judges, anticipated the themes that would arise in United Nations (UN) debates over the next quarter of a century about a definition of aggression.

Of the dissenters, it was Radhabinod Pal, the Indian judge, who put forward the most detailed critique of the crimes against peace charge, touching on the themes of just cause, the anti-colonial struggle, and economic and ideological aggression. His starting point was that the criminalisation of aggression was premature because it presupposed the existence of an international community capable of offering

¹ This chapter is excerpted from the book, K. Sellars, *Crimes against Peace and International Law* (Cambridge University Press, 2013).

² International Military Tribunal for the Far East (IMTFE), R. J. Pritchard (ed.), *The Tokyo Major War Crimes Trial* (124 vols., Lewiston, NY: Edwin Mellen Press, 1998), Judgment, vol. CIII, 49769.

alternatives to war as a method of resolving disputes.³ In the absence of this community, states would continue to pursue their partisan national interests by force of arms. It was therefore important to approach the idea with great caution, adhering all the while to positive law. From this standpoint, Pal thought the Allies' motives for creating the new charge was highly suspect – especially considering their own history of violence towards non-Western nations.⁴ Instead of promoting universal values, these nations were perhaps deploying it to serve their own narrow interests, such as maintaining the status quo⁵ – ‘the very *status quo*’, he added, ‘which might have been organized and hitherto maintained only by force by pure opportunist “Have and Holders”’.⁶

If this was the case, there was good reason to be concerned about the implications of the aggression charge for the ‘dominated’ (colonised) nations. He drew particular attention to the American Chief Prosecutor Robert Jackson’s statement at Nuremberg that ‘whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions’.⁷ As Pal recognised, Jackson was effectively calling for the paralysis of international affairs, and, by implication, the criminalisation of the struggle against colonialism. Pal believed that this was too high a price to pay for security, arguing that the dominated nations ‘cannot be made to submit to eternal domination only in the name of peace’.⁸ This would create a *pax injusta*, because, he noted, a considerable part of humanity faced ‘not only the menace of totalitarianism but the *actual plague* of imperialism’.⁹

When taking issue with Jackson’s desire to freeze international relations, Pal implied the need for a radical reordering of global priorities, with justice taking precedence over peace, rather than peace taking precedence over justice – the latter being the premise of the crimes against peace charge. In this respect, he departed from an amoral conception of war and peace, and embraced the concept of just cause, moving onto the same natural law terrain as the prosecution, most notably Tokyo’s Chief Prosecutor Joseph Keenan. The main disagreement between them, of course, was over the legitimacy of Japan’s wars, with Pal following the same line as the defence lawyers, and concluding that the Japanese leaders had acted in self-defence because they believed that their nation’s existence was imperilled by Chinese instability, Soviet communism and Western encirclement. He laid particular emphasis on economic or ideological aggression, and argued that in China, for example, Japan had been compelled to defend its interests against boycott movements and anti-Japanese campaigns. He thus lowered the threshold for

³ IMTFE, *supra* note 2, at Pal Dissent, vol. CV, 103. ⁴ *Ibid.*, at 70. ⁵ *Ibid.*, at 234. ⁶ *Ibid.*, at 239.

⁷ International Military Tribunal (IMT), ‘The Blue Series’, in *Trial of the Major War Criminals Before the International Military Tribunal* (42 vols., Nuremberg: IMT, 1947–49), vol. II, 149.

⁸ IMTFE, *supra* note 2, at Pal Dissent, vol. CV, 239. ⁹ *Ibid.* (emphasis in original).

legitimate self-defence from imminent *military* threat to the non-military threats posed by neighbouring states.

Following the logic of this and other approaches, Pal rejected the authority of the Tribunal *in toto*, arguing that all the charges brought against the accused were illegitimate, and that '*each and every one of the accused must be found not guilty of each and every one of the charges*'.¹⁰ This apparently confirmed the view of the Canadian judge, Stuart McDougall, that Pal had come to Tokyo with the express aim of 'torpedoing' any judgment against the defendants.¹¹

The partly dissenting Dutch judge, Bernard Röling, also took issue with the crimes against peace charge, this time from a European perspective, echoing some of the concerns raised previously by British and French legal advisers over Jackson's dynamic approach to the law at Nuremberg. Like Pal, Röling began from a positivist position, indicating that the crimes against peace charge was both retroactive and premature; it was, he wrote in 1947, an idea 'wrongly borrowed from a future stage of international relations'.¹² He maintained that the criminalisation of aggression would become meaningful only when all nations submitted to the pacific settlement of disputes, and that until such means were accepted, 'the "prohibition" of war and the declaration that war is criminal are as much use as declaring the law of gravity invalid by prohibiting the stones from falling'.¹³

It is small wonder, then, that Röling hesitated when considering the sentences to be handed out to the accused. In early 1947, he argued that trials should *not* be used to eliminate those who might endanger the future peace because that would entail 'the mixing up of justice and expediency, and would frustrate both'.¹⁴ But by late 1948, he had executed a *volte face*, claiming in his partial dissent that crimes against peace under international law could be equated to political crimes in domestic law, and that the victors of a *bellum justum* 'have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons'.¹⁵

It seems that Röling took this later position either because he was in two minds, or because he was subject to conflicting external pressures. On the one hand, he may not have wanted to set a precedent for trying heads of state for waging aggressive war. (During discussions in a 1951 UN committee, the Australian delegate W. A. Wynes observed that Röling's 'chief preoccupation throughout

¹⁰ IMTFE, *supra* note 2, at Pal Dissent, vol. CVIII, 1226 (emphasis in original).

¹¹ A. Gascoigne to E. Denning, 25 November 1948: DO 35/2938, National Archives, Kew, United Kingdom (NA).

¹² B. V. A. Röling, 'Interpretation of the Charter', c. 23 January 1947, 6: 3DRL 2481 Series 1/2/10, Webb papers, Australian War Memorial, Canberra.

¹³ *Ibid.*, at 6. ¹⁴ *Ibid.*, at 23. ¹⁵ IMTFE, *supra* note 2, at Röling Partial Dissent, vol. CIX, 46.

was the fear that an attempt might be made in the future to try a Head of State for some bogus crime, and he referred in this connection to the suggestion made during the Indonesian police action that the Queen of the Netherlands should be indicted for aggression'.¹⁶) On the other hand, he may have been pressured by the Dutch Government to avoid dissenting completely from the Tokyo Judgment – for example, the Dutch Foreign Ministry official Hendrik Boon stressed to him that a dissent would give succour to the Axis war criminals and undermine the Netherlands' policy of encouraging the furtherance of international law.¹⁷ Röling could therefore have decided to retain his arguments about the invalidity of crimes against peace while simultaneously asserting the court's authority to dispense punishment based on the charge.

The final dissenter was the French judge Henri Bernard, who disagreed, among other things, with the tribunal's handling of the crimes against peace and conspiracy charges. Bernard did not oppose the charges per se, declaring that aggressive war was, and always had been, 'a crime in the eyes of reason and universal conscience'.¹⁸ He argued, however, that natural law imposed strict conditions on the exercise of justice, and that the authors of the court would be in dereliction of their duty if they did not impose the law impartially and offer 'the maximum guarantee possible for a fair judgment'.¹⁹ The tribunal, he thought, had not met these stringent requirements. 'Essential principles, violations of which would result in most civilized nations in the nullity of the entire procedure ... were not respected,' he wrote.²⁰

In particular, he argued that the personal guilt of those on trial had not been conclusively proven with regard to crimes against peace. Did the defendants *know* that they were committing a crime during the period covered by the Indictment, when international lawyers had themselves failed to arrive at a conclusive answer? Nothing short of formal proof that they had decided that their actions were definitely criminal and had proceeded on their course nonetheless 'could dispense this doubt and permit the condemnation of the Defendants'.²¹ As for conspiracy, there was no direct proof of the alleged plot being formed 'among individuals known, on a known date, at a specific point'.²² The vagueness of the charges, the lack of clarity about individual responsibility, and other procedural defects prevented Bernard from formulating a definite opinion.²³

The dissentient process, which had begun with the questioning of the validity of the crimes against peace charge, was sustained over the next quarter of a century by

¹⁶ W. A. Wynes to External Affairs (Canberra), 'United Nations Committee on Criminal Jurisdiction', 29 September 1951, 2; A1838 A1838/1 1592/6 Part 2, National Archive of Australia, Canberra (NAA).

¹⁷ L. van Poelgeest, *The Netherlands and the Tokyo Tribunal, Part 2: Aspects of the Allied Occupation of Japan* (London: Suntory–Toyota International Centre for Economics and Related Disciplines, 1991), 38.

¹⁸ IMTFE, *supra* note 2, at Bernard Dissent, vol. CV, 10. ¹⁹ *Ibid.*, at 2. ²⁰ *Ibid.*, at 18. ²¹ *Ibid.*, at 21.

²² *Ibid.* ²³ *Ibid.*, at 22.

the politics of the Cold War. As will be recalled, the charge embodied two linked ideas: that aggression was a crime; and that individuals could be held responsible for it. The dissenters, roughly following the lines established at Tokyo, objected to either one or other of these ideas. On the one hand, those more committed to preserving the postwar status quo – mainly from the West – distanced themselves from the idea that individual leaders could be held personally responsible for the crime of aggression. Given that the world was divided into hostile camps, they argued that it was premature and counterproductive to even begin to envisage an international jurisdiction. On the other hand, those least committed to maintaining the status quo – mainly from the non-aligned world – rejected the premise that *just* wars (such as anti-colonial struggles) should be subject to the strictures against aggression. Instead, they proposed that international law, once the preserve of the oppressive imperialist powers, must now be bent to the new ends of liberation and self-determination.

Both pro-status quo dissenters and anti-status quo dissenters agreed that crimes against peace was a dead letter, and that the future lay in evolving *preventative* approaches to the problem of aggression. They spent the next quarter of a century wrangling with each other over the most effective form of prevention, with the former preferring to leave matters to the Security Council, and the latter pushing for a definition of aggression. It was not until the waxing of *détente* and the waning of anti-colonialism in the early 1970s that the two traditions reached a sort of accommodation, which was represented by the 'Definition of Aggression' annexed to 1974 General Assembly Resolution 3314. By this time, the political conditions that had given rise to the dissentient traditions had substantially changed, and Tokyo's influence faded away.

3.3 The 1950 Watershed

The demise of the old plan to codify the 'Nuremberg Principles' and the emergence of a new plan to define aggression both began in the final months of 1950 at the UN. The main sponsor of the 'Nuremberg Principles', the United States, had for domestic reasons withdrawn support for them. Consequently, when the International Law Commission submitted seven 'principles' summarising the Nuremberg Charter and Judgment to the General Assembly in December that year, the Assembly did not positively endorse them – thus leaving itself in the anomalous position of not confirming principles that it had previously 'affirmed'.²⁴ Instead, it sent the draft principles to member governments for their observations, and instructed the International Law Commission to take

²⁴ General Assembly, Formulation of the Nuremberg Principles, 12 December 1950, UN Doc. 488 (V).

account of these views when considering another initiative, the draft Code of Offences Against the Peace and Security of Mankind. Then, in 1954, the draft Code was itself shelved until such time as the Special Committee on the Question of Defining Aggression had submitted a report.²⁵

Today, some jurists cite the ‘Nuremberg Principles’ as evidence of the emergence of customary law on the criminalisation of aggression.²⁶ But jurists in the 1950s were of the view that the derailing of this project represented the *abandonment*, rather than the formation, of law on this question. In 1957, for example, some Sixth Committee delegates proposed that discussion of the draft Code be deferred, eliciting protests from Bernard Röling, now the Dutch delegate, and his colleagues. The Australian delegate, A. H. Body, reported to Canberra: ‘The Netherlands representative felt that the treatment which was being given to the Code and an International Criminal Jurisdiction was “a betrayal of the solemn promises” made in the Tokyo judgments . . . *Haiti* also deplored the lack of progress on the item dealing with the draft code and Criminal Jurisdiction, and felt that the [deferral] draft proposed by Chile, the Philippines and Spain virtually meant the burial of the subject.’²⁷ The Haitian delegate had a point: work would not resume on the draft Code for another quarter of a century.

So the ad hoc charge of crimes against peace as a component of the ‘Nuremberg Principles’ quietly expired in the bosom of the UN. Its operative life had spanned just three years, from November 1945 to November 1948 (the duration of the two tribunals) followed a few years later by a four-year afterlife in the International Law Commission. By then the political risks of trying national leaders for aggressive war – already high at Nuremberg and Tokyo – had become overwhelming. The threat of tit-for-tat prosecutions and the opposition of electorates rendered the idea unworkable. Thereafter, the focus of international law would be on the restraint of states rather than the punishment of individuals.

But while the idea of trying individuals for aggression was dying out, various ideas for preventing state aggression were brought to life, driven by states’ persistent desire for security. If the first phase of the UN – the era of collective security – had been characterised by the Security Council regulation of force and the prioritisation of global security over justice, then the second phase of its existence – the era of superpower conflict – would be defined by the breakdown of collective security and the emergence of ‘just cause’. The weakening of the UN Charter during this second phase meant that all member states now fell back on the

²⁵ General Assembly, Draft Code of Offences Against the Peace and Security of Mankind, 4 December 1954, UN Doc. 897(IX).

²⁶ Whether this UN resolution was so is a debatable point.

²⁷ Australian UN Mission to External Affairs (Canberra), 6 December 1957: A1838 A1838/274, 852/15/10/1 Temp. NAA (emphasis in original).

more traditional protections afforded by national sovereignty. At the same time, some of the less secure and smaller members began to cast around for alternative mechanisms to safeguard themselves and their interests. This resulted in a campaign for a definition of aggression that could be used as a method of determining its occurrence if, or when, the Security Council was deadlocked.

Demands for a definition of aggression dated back to the interwar years, but the Cold War-era phase of this process opened in the General Assembly's First (Political and Security) Committee on 4 November 1950. The delegates of Yugoslavia, whose nation was troubled by Moscow-backed dissident groups operating on its northeastern border, presented a 'King-of-France'²⁸ resolution proposing that a state engaged in hostilities should automatically be considered to be an aggressor unless it publicly proclaimed within twenty-four hours its readiness to issue a ceasefire, and withdrew its forces within forty-eight hours of the ceasefire.²⁹ The Western delegates agreed with the Yugoslavs' anti-Soviet intent, but took issue with its mechanical criteria for determining aggression. The Soviet and East European delegates, who also recognised the resolution's political thrust, dismissed it as unacceptable.

At that same meeting, Andrei Vishinsky, the Soviet Foreign Minister, tabled an alternative definition of aggression. This was an about-turn – Soviet delegates had opposed definition at both the San Francisco conference establishing the UN, and the London conference establishing the Nuremberg Tribunal – and it was driven by political exigencies. The previous nineteen months had seen the collapse of the collective security system and growing fears of a third world war. NATO's formation in April 1949, and its breach of the Berlin blockade a month later, had forced the Soviets onto the defensive. Under a barrage of threats from Washington, they had retrenched, and consolidated control over their sphere of influence in Eastern and Central Europe. In January 1950, they walked out of the Security Council after failing to unseat nationalist China in favour of communist China. In June, the remaining Security Council members capitalised on the Soviets' absence and dispatched a UN army to intervene in the Korean War. The Soviets then abandoned their protest and returned to the UN to veto further actions on Korea, thus immobilising the Security Council.

This deadlock prompted both the Soviet Union *and* the United States to attempt to rewrite the by now partly obsolescent UN Charter, each with the aim of strengthening their own position in the new era of superpower rivalry. On 3 November 1950, the Americans tried to bypass the veto deadlock by

²⁸ H. Phleger to H. C. Lodge, 20 January 1955: Box 22, RG84, US Mission to the UN, Central Subject Files, 1946–63, National Archives and Records Administration, MD, United States (NARA).

²⁹ Draft Resolution A/C.1/604, cited in United Nations (ed.), 'Political and Security Questions: Proposals for Strengthening Peace', in *Yearbook of the United Nations 1950* (1951), 181–220, at 206.

introducing the ‘Uniting for Peace’ resolution, which would, in the event of Security Council paralysis, pass responsibility for the determination of ‘any threat to the peace, breach of the peace, or act of aggression’ to the General Assembly.³⁰ The following day, Vishinsky – who recognised that the Security Council no longer had a monopoly on the decision-making process, and hoped to pre-empt further American initiatives – proposed his aforementioned definition of aggression as a belated bid to set the terms of the debate in the General Assembly.

Vishinsky’s definition³¹ was closely modelled on, but not identical to, the definition submitted by his predecessor, Maxim Litvinov, to the Disarmament Conference in 1933. It covered declaration of war, invasion, bombardment, naval blockade and keeping forces in another state without permission, and was advanced for much the same reason as Litvinov’s: to firm up the status quo, to circumscribe others’ right of self-defence and to deflect attacks against the Soviet Union. Both definitions emphasised that the first strike was the automatic determinant of aggression, and both were advanced in what their authors regarded as dangerous international circumstances. Indeed, the *perceived* dangers of 1950 if anything exceeded those of 1933, for while Litvinov’s definition anticipated a traditional military assault by Germany or Japan, Vishinsky’s predicted a nuclear strike by the United States. (The Soviets were deeply concerned about the Americans’ superior bomb technology and delivery systems, and had earlier proposed that the General Assembly declare that ‘the Government which will be the *first* to use the atomic weapon . . . will commit a crime against mankind and will be regarded as a war criminal’.³²)

When Vishinsky tabled his definition, some other delegates in the First Committee, and especially those from the NATO countries, responded with a predictable lack of enthusiasm. The American and Canadian representatives focused, among other things, on what the Soviet motion omitted: it did not, for example, apply to land blockades (such as the Soviet blockade of West Berlin); and it did not cover ‘indirect aggression’ (such as suspected communist subversion and fomentation of civil strife).³³ The Canadian delegate further noted that the definition offered no help in deciding who had initiated a conflict such as the Korean War, because ‘all that an aggressor would have to do to frustrate the purpose of the Soviet proposal would be to claim that the other party had attacked first, which was what North Korea had actually alleged’.³⁴ After a tense debate, the Syrian and

³⁰ General Assembly, Uniting for Peace, 3 November 1950, UN Doc. A/RES/377(V).

³¹ General Assembly, Draft Definition of Aggression, 4 November 1950, UN Doc. A/C.1/608.

³² A. Y. Vyshinsky, *For Peace and Security of the Peoples against the Threat of a New War* (London: Soviet News Booklet, 1950), 11 (emphasis added).

³³ UN, ‘Political and Security Questions’, *supra* note 29, at 211. ³⁴ *Ibid.*

Bolivian delegates proposed that the definition be transferred from the First Committee to the International Law Commission. The Eastern bloc representatives protested that the definition, being linked with the Security Council's work, was 'primarily political and not legal'.³⁵ But the Syrian–Bolivian motion was carried, and, as State Department legal adviser Herman Phleger recalled, the Soviet item was 'shunted off' to the jurists in the International Law Commission.³⁶

Despite this apparently inauspicious beginning, the idea of creating a universally accepted yardstick for state behaviour appealed to many members of the UN. A number of middling and small countries were suspicious of the motives of the most powerful states and fearful of their nuclear arsenals. They thought some good might come from creating a legal brake on aggressive war. Although the International Law Commission subsequently failed to reach agreement on whether or how aggression should be defined, the General Assembly in January 1952 nevertheless decided that it was still both 'possible and desirable' to define aggression,³⁷ and convened the first of four special committees 'on the Question of Defining Aggression'.³⁸ These debates were held intermittently between 1952 and 1974.

On almost all occasions it was the Soviets, flanked by the puppet governments in the satellite states, who led the demands for a definition of aggression – driven, as always, by their desire to maintain security within their own territory as well as elsewhere in the Eastern bloc. The definitions were therefore calibrated, first, to deal with threats emerging from within the Soviet bloc (by designating challenges to the status quo as aggression); and, second, to restrict the threat posed by the nuclear-armed Western states (by limiting pre-emptive or defensive action). They also presented their agitation for a definition in such a way as to position themselves as leaders of campaigns for peace and in support of anti-colonial struggle, which enabled them to establish common ground with smaller and newly independent states. But in reality, the Soviets' denunciations of nuclear sabre-rattling and

³⁵ *Ibid.*, at 212.

³⁶ H. Phleger to H. C. Lodge, 20 January 1955: Box 22, RG84, US Mission to the UN, Central Subject Files, 1946–63, NARA. The Soviet proposal was referred to the International Law Commission by General Assembly, Duties of States in the Event of the Outbreak of Hostilities, 17 November 1950, UN Doc. A/C.1/SR.384.

³⁷ General Assembly, Question of Defining Aggression, 31 January 1952, UN Doc. A/RES/599(VI).

³⁸ The First Committee, of 1952–54, was established by General Assembly, Question of Defining Aggression, 20 December 1952, UN Doc. A/RES/688(VII). The Second Committee, of 1954–56, was established by General Assembly, Question of Defining Aggression, 4 December 1954, UN Doc. A/RES/895(IX). The Third Committee, of 1957–67, established by General Assembly, Question of Defining Aggression, 29 November 1957, UN Doc. A/RES/1181(XII), was directed to decide 'when it shall be appropriate for the General Assembly to consider again the question of defining aggression' – it was decided in 1959, 1962, 1965 and 1967 that it was not appropriate to consider again (www.un.org/documents/ga/res/12/ares12.htm). The Fourth, and final, Committee, of 1967–74, was established by General Assembly, Need to Expedite the Drafting of a Definition of Aggression in the Light of the Present International Situation, 18 December 1967, UN Doc. A/RES/2330(XXII).

colonial oppression masked an essentially conservative approach, based on safeguarding the security of the Soviet Union and its satellites.

3.4 The Cold War Debates

On 21 November 1952, Andrei Vishinsky attended the General Assembly's Sixth (Legal) Committee, which was at the time considering a definition of aggression. His attendance was somewhat out of the ordinary – he usually sat on the First Committee – and he trailed behind him a string of curious journalists. (The presence of the press was also unusual: as the *New York Times* correspondent explained, the Sixth Committee 'usually plays to an empty house'.)³⁹ Vishinsky's two-hour speech, which endorsed the Soviet definition of aggression, reprised Litvinov's non-aggression treaties of the 1930s, and denounced 'imperialist' opponents as being afraid of the idea because they were themselves habitual aggressors – signalled the importance the Soviets attached to the issue.⁴⁰

Three days later, British delegate Gerald Fitzmaurice replied to Vishinsky. The Soviet definition, he pointed out, 'includes all those acts which the so-called Imperialist Powers are supposed to be in the habit of committing, but carefully leaves out all those acts of indirect aggression and subversion by which the Soviet Government are in the habit of carrying on their aggressive policies'.⁴¹ He added that if the proposal were adopted, 'it would constitute a perfect screen behind which the Soviet Union could continue those policies undisturbed, while attacking the actions and motives of the Western Powers'.⁴² Nor did Fitzmaurice ignore Vishinsky's remarks about Western 'imperialist aggression' – especially those relating to the policies of the 1930s. Responding to the statement that the Soviet Union had been preparing to resist German aggression while the Western powers were making common cause with Germany and Italy, he admitted that in the period between the two wars 'a number of things which are now regretted' had occurred,⁴³ but declared the Soviet actions of that same period to be no more excusable than those of Britain. Openly referring to facts that the Allied prosecuting powers had jointly tried to suppress a few years earlier at the Nuremberg Tribunal, Fitzmaurice continued:

At the time when we were making our agreement with Poland, the Soviet Union was entering into a treaty with Germany, for the purpose of making which, the late war criminal Ribbentrop went to Moscow and signed a pact with Mr Molotov. The effect of this pact was to give Germany

³⁹ 'Vishinsky Depicts Dire West Future', *New York Times* (22 November 1952), 3.

⁴⁰ Ibid., and Office of Public Information, United Nations (ed.), *UN Yearbook 1952* (New York, 1952), 785.

⁴¹ G. Fitzmaurice, 'Defining Aggression', 24 November 1952, 2: EA W2619 111/29/1 Part 1, National Archives of New Zealand, Wellington (NANZ).

⁴² Ibid. ⁴³ Ibid.

a free hand to carry out her aggression against Poland and other countries. What did the Soviet Union do next? After Hitler had invaded and occupied half Poland, the Soviet Union invaded and occupied the other half.⁴⁴

Vishinsky and Fitzmaurice's belabouring of each other for each other's nations' collusions with Hitler was telling. The European powers had still not recovered from the trauma of fascism, and their sensitivity over their discredited policies – appeasement on the part of the British, the Molotov–Ribbentrop Pact on the part of the Soviets – underlined the fact that few nations had emerged from the war with their moral credibility intact. Nazism had tarnished them all. At Nuremberg, this uncomfortable truth had been concealed in the name of Allied unity. In the years that followed, it would be exposed to the unforgiving light of the Cold War. Polemical exchanges such as these between the Western and Eastern Bloc delegates occurred intermittently throughout the 1950s and 1960s, particularly during events such as Suez, and Hungary, Cuba and Czechoslovakia.⁴⁵

Rhetorical set-pieces aside, the discussions that took place within the Sixth Committee and the various special committees 'on the Question of Defining Aggression' made serious attempts to grapple with the problem (created by the Security Council impasse) of the absence of viable international mechanisms for dealing with aggression. As during the interwar years, the smaller and vulnerable nations advocated a definition of aggression as a shield against the vicissitudes of international life, and as a tool with which to wrest power from the hands of the Big Five. The mainly Western status quo powers, led by the United States and Britain, opposed a definition in order to protect Security Council powers (set out in Charter article 39) 'to determine the existence of any threat to the peace, breach of the peace, or act of aggression'.⁴⁶ The Soviet Union, meanwhile, was in the unique position of being both a Security Council member and the self-appointed leader of the General Assembly's campaigns for disarmament and national liberation. It had little to lose and much to gain from playing it both ways, and did so to the full.

3.5 The Emergence of the Non-Aligned States

Some new voices joined the debate about aggression during the 1950s. The Cold War provided the conditions for the emergence of a non-aligned 'Third World'

⁴⁴ *Ibid.*, at 3.

⁴⁵ The comparisons with Nazism remained a standby for delegates: in a Sixth Committee discussion in 1965, for example, the Soviet delegate Morozov suggested that the American presence in South Vietnam was equivalent to the 'most sombre periods of Hitler's fascism', and the American delegate Plimpton responded by comparing Morozov with 'that former ally of the Soviet Union, Goebbels'. (Australian UN Mission (New York) to External Affairs (Canberra), 6 April 1965: ABHS 950 W5422 Box 169 111/29/1 Part 2, NANZ.)

⁴⁶ Charter of the United Nations, *Documents of the United Nations Conference on International Organization* (New York: United Nations Information Organizations, 1945–55), vol. XV, 343.

sensibility, eschewing both West and East, and this was soon evident in the debates in the UN. The traditional arguments for a definition – that it would deter aggression, enhance international law, and guide international bodies and governments contemplating military action – were reworked in line with the preoccupations of the non-aligned states. In the process, concepts such as self-help by force, economic and ideological aggression, and just and unjust wars, which had been broached earlier by Radhabinod Pal and some of the defence lawyers at the Tokyo Tribunal, were expanded upon and embellished. Nuremberg's pronouncements on aggression were beginning to recede into the distance, but Tokyo's dissenting opinions gained a new lease of life among non-aligned delegations.

In 1952, for example, the Sixth Committee session at which Fitzmaurice had exchanged views with Vishinsky was also the forum for disagreements between the British delegate and the delegates from Egypt and Iran. Fitzmaurice likened the search for a definition to a drowning man clutching at a straw even though a boat, the UN, was moored close by. 'Did anyone seriously believe that any major aggression would be prevented merely by having a definition?' he asked.⁴⁷ (Other, more sophisticated arguments were also advanced in these and future debates: that a definition would employ terms that themselves needed to be defined; that the League of Nations and the Nuremberg Tribunal had done without one; that a legal instrument was unsuited to assisting political decisions; and that a definition might undermine peace-making efforts.)⁴⁸ The delegates of Egypt and Iran were less interested in general theories, however, and more interested in specific acts of aggression committed by the British, such as the violation of treaties with, and economic exploitation of, their respective nations. Against the background of the Anglo-Egyptian dispute over the Suez Canal, the Egyptian delegate responded to British criticisms of a Soviet draft in the following terms, here quoted in a report to the Foreign Office in London:

Who . . . had violated treaties when the British fleet had bombarded Alexandria, as they had done many years ago? Certainly not Egypt. Who had violated treaties when the United Kingdom had undermined and endeavoured to destroy the whole Egyptian position in relation to the Sudan . . .? Again, certainly not Egypt. Finally, who had violated treaties in respect of the Anglo-Egyptian Treaty of 1936? Egypt had not done so. She had denounced the treaty but she had not violated it. The United Kingdom, on the other hand, had 'violated it from A to Z'.⁴⁹

In the same session, the Iranian delegate made a statement on the Anglo-Iranian oil dispute, arguing that every nation had the right to nationalise undertakings within its own territory. The British, he noted, had responded to such moves with

⁴⁷ UK Delegation (Paris) to Foreign Office (No. 141), 25 January 1952, 2: FO 371/101419, NA.

⁴⁸ Australia, 'Question of Defining Aggression: Report of the 1956 Special Committee', 17 September 1957, 1–2: EA W2619 111/29/1 Part 1, NANZ.

⁴⁹ UK Delegation (Paris) to Foreign Office (No. 140), 25 January 1952, 2: FO 371/101419, NA.

threats such as deploying a battle cruiser just outside Iranian waters and stationing a parachute regiment in the vicinity.⁵⁰ He also suggested that Britain's resistance to a definition of aggression indicated that it might advocate for small countries 'further deals of the Munich type' – another reference to the 1930s – whereas a Soviet-style definition 'might have prevented the exploitation' of small countries.⁵¹

Fitzmaurice dismissed these arguments out of hand. There was, he said, 'too much talk of exploitation' and too many attempts to 'have it both ways' by expecting economic aid while repudiating debts, expelling foreigners and appropriating foreign property.⁵² The charge of economic aggression was misplaced, because 'Economic aid was asked for and eagerly accepted at the time . . . but after the country concerned had had the benefit of it, then it ceased to be assistance and became exploitation.'⁵³ As for treaty violations, he argued, the real issue was recent conduct, some of which left much to be desired, such as Egypt's holding up of goods in the Suez Canal destined for Israel.⁵⁴ Yet Fitzmaurice's unyielding public stance masked private intimations of trouble ahead. He reported to London that the debate had shown the extent to which aggression was 'becoming involved with the anti-colonial campaign now permeating the Assembly and what an excellent platform it makes for statements on current political issues'.⁵⁵

In addition to the emergence of the non-aligned states, another perennial problem faced by delegates was how to distinguish illegitimate aggression from legitimate self-defence in the atomic era. During the interwar years, whenever restrictions on aggression were proposed, they were countered by claims to wider rights of self-defence – effectively undermining the original aim – and this process was repeated during the Cold War. As Robert Tucker noted in 1960, the American military doctrine of the period did not necessarily equate self-defence with the restoration of the status quo⁵⁶ – some newer doctrines envisaged the obliteration of the aggressor, thus altering the status quo. While the Soviets decided the matter of aggression and self-defence on purely chronological 'first strike' grounds, the West's alternative of leaving determination to the Security Council left broad grey areas. When this issue was debated in 1957, New Zealand's delegate, Quentin Quentin-Baxter, privately noted that 'unless one is prepared to swallow the Soviet principle of priority, there is no satisfactory method of drawing an abstract line of demarcation between aggression and self-defence'.⁵⁷ This problem

⁵⁰ *Ibid.*, at 3. ⁵¹ *Ibid.*

⁵² UK Delegation (Paris) to Foreign Office (No. 141), 25 January 1952, 4: FO 371/101419, NA. ⁵³ *Ibid.*

⁵⁴ *Ibid.*, at 5.

⁵⁵ G. Fitzmaurice, 'Sixth Committee: Definition of Aggression', 22 January 1952: FO 371/101419, NA.

⁵⁶ R. W. Tucker, *The Just War: A Study in Contemporary American Doctrine* (Baltimore, MD: Johns Hopkins University Press, 1960), 65.

⁵⁷ Q. Quentin-Baxter, 'United Nations General Assembly, Twelfth Session: Sixth Committee', 30 December 1957, 6: EA W2619 Acc W2619 111/29/2 Part 2, NANZ.

was especially pronounced when applied to the *threat* of aggression, which was a particular Western preoccupation.

The proponents of the ‘first strike’ could rely on a strict interpretation of Charter article 51, which stated that the right of self-defence could be exercised ‘if an armed attack occurs’ – ‘if’ being the operative word in a formula that precluded the idea that ‘defence’ could long precede attack.⁵⁸ But in the nuclear age, this might prevent a nation from defending itself, even if it were facing imminent annihilation. ‘Should a nation passively wait until the hydrogen bombs are dropped?’ asked fellow delegate Bernard Röling.⁵⁹ ‘This’, he added, ‘would amount to suicide.’⁶⁰ Quentin-Baxter agreed, writing, ‘we cannot agree that a state must for[]swear the right to use armed force in self-defence, until an armed attack has actually been sustained’.⁶¹ In the process of arguing that the first blow might not necessarily be an aggressive blow, the Western delegates tilted towards the idea that a forceful response to a less immediate threat might be a legitimate form of self-defence.

3.6 The Goa Effect

While the more powerful states had traditionally invoked self-defence as an exception to strictures against aggression, the less powerful states were about to invoke a different exception to them – that of self-determination. In 1960, sixteen newly independent African nations joined the UN, significantly boosting the collective voting power of the non-aligned states, and offering a challenge to the Western powers, who had previously been able to muster solid majorities in the General Assembly. No longer in a minority, the non-aligned states lost no time in voting through the ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ in December that year. The link between colonialism and aggression was implicit in article 1 of this Declaration, which stated that ‘alien subjugation, domination and exploitation’ was ‘an impediment to the promotion of world peace and cooperation’.⁶² Not only that, but the colonial powers, not wishing to incur opprobrium by voting against this motion, abstained, thus establishing a pattern of Third World assertiveness and First World defensiveness.

This pattern would be repeated in more dramatic form a year later, when India ejected Portugal from its colonies on the Indian subcontinent. After a long period of tension between Lisbon and New Delhi, Jawaharlal Nehru’s government finally carried out its threat to invade the Portuguese enclaves of Goa, Damão and Diu

⁵⁸ UN Charter, 344–45.

⁵⁹ B. V. A. Röling, ‘Statement’, 1 November 1957, 15: EA W2619 111/29/1 Part 1, NANZ. ⁶⁰ *Ibid.*

⁶¹ Quentin-Baxter, *supra* note 57, at 7–8: EA W2619 111/29/2 Part 2, NANZ.

⁶² General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, UN Doc. A/RES/1514(XV).

and restore them to Indian control. The military campaign, initiated on 18 December 1961, lasted barely thirty-six hours, yet the political and legal effects reverberated long after – not just because India had breached article 2(4) of the UN Charter, but, more importantly, because it had done so without suffering adverse consequences. Although the Western powers immediately sided with Portugal, their Security Council resolution calling for a ceasefire and negotiations was vetoed by the Soviet Union. They could then have taken the issue to the General Assembly but, knowing that they would be outvoted, they decided against it. As an American official confided to his Australian counterpart before the invasion: ‘military action against the Portuguese would be more likely to make Nehru a hero’ in Asia and Africa, and ‘probably only the West would regard Nehru’s halo as having fallen askew’.⁶³ These events were highly significant, because a non-aligned nation had successfully faced down a colonial power without attracting formal censure.

How did India justify the invasion? The core of the Indian argument was that colonialism was a form of aggression, and that action to eliminate it was both legitimate and necessary. This rested on several premises: that Portugal had no rightful claim to its colonies (as enunciated in the aforementioned Declaration on Colonialism); that India was exercising its right of self-defence against Portugal (belatedly, as Lisbon laid claim to Goa in 1510); and, most importantly, that it was waging a just war against Portugal. As C. S. Jha, the Indian Ambassador to the UN stated: ‘It must be realized that this is . . . a question of getting rid of the last vestiges of colonialism in India. That is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost.’⁶⁴ This appeal to transcendent justice rather than positive law carried the day. As the State Department legal advisor Stephen Schwebel noted a decade later: ‘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.’⁶⁵ But if the Indian argument invoked ‘faith’, it had legal implications nonetheless, for it assumed that anti-colonial action was exempt from the prohibition of aggression. The lesson of 1961, Schwebel argued, was that wars of liberation from Western colonialism were ‘treated by the international community as an exception from Charter prohibitions on the use of force’.⁶⁶

⁶³ Australian Embassy (Washington) to External Affairs (Canberra), 8 December 1961: A1838 A1838/2 854/10/13/33, NAA.

⁶⁴ UN Security Council, *Security Council Official Records*, 18 December 1961, UN Doc. S/PV.987, 9.

⁶⁵ S. M. Schwebel, ‘Aggression, Intervention and Self-Defence in Modern International Law’, *Recueil des Cours/ Académie de droit international*, 136 (1972-II), 411–98, at 486.

⁶⁶ S. M. Schwebel, ‘Wars of Liberation – as Fought in U.N. Organs’, in J. N. Moore (ed.), *Law and Civil War in the Modern World* (Baltimore, MD: Johns Hopkins University Press, 1974), 447.

If this were so, it mirrored the approach adopted by the founders of Nuremberg and Tokyo. Whereas the charge of crimes against peace at the postwar tribunals had been *positively* ad hoc (applying only to the leading Axis perpetrators of the Second World War), the charge of aggression in the contemporary context of the UN was *negatively* ad hoc (exempting offensive action taken to free people from colonialism). In both cases, the moral case for action against injustice was strong, but the legal case, bearing in mind the principle of the universality of international law, was not. Like Robert Jackson and Joseph Keenan before him, Jha proposed a dynamic conception of the law. 'International law is not a static institution,' he said. 'It is developing constantly. If international law would be static, it would be dead driftwood if it did not respond to the public opinion of the world. And it is responding every day, whether we like it or not.'⁶⁷ Unlike his predecessors, his aim was not to uphold the status quo, but to transform it. He consequently repudiated 'any narrow-minded, legalistic considerations . . . arising from international law as written by European law writers . . . brought up in the atmosphere of colonialism'.⁶⁸ Doctrines supporting the idea that colonial powers had rights over conquered territories in Asia and Africa were no longer acceptable, in his view: 'It is the European concept and it must die.'⁶⁹

The Western powers responded to these arguments rather tentatively. The British, for example, took a long time to grasp the implications of the non-aligned nations' interpretations of international law – a tendency exacerbated by their residual tendency to focus on Soviet doctrinal developments.⁷⁰ The events of 1961 changed that. A British Foreign Office briefing paper noted that the UN debate on Goa 'revealed with somewhat sinister clarity' some new approaches to old doctrines, which it summarised as follows:

- (i) that the occupation of any territory acquired by conquest is illegal *ab initio*, and continues to be illegal, however long the occupation lasts;
- (ii) that, in consequence of (i) above, it cannot be accepted that colonial Powers have any sovereign rights over territories which they won by conquest in Asia and Africa; . . .
- (iv) that the people in any territory thus 'illegally occupied' have always had and still have the right of rebellion against the occupying Power; and that such continued occupation constitutes provocation in response to which the use of force 'in self defence' can be justified; . . .
- (viii) that resolution 1514 . . . stating that 'immediate steps' (to implement independence) should be taken in Trust and Non-Self-Governing Territories implicitly sanctions the use of force for the recovery or liberation of such territories; . . .

⁶⁷ UN Security Council, *Security Council Official Records*, 18 December 1961, UN Doc. S/PV.988, 17.

⁶⁸ UN Security Council, *supra* note 64, at 11. ⁶⁹ *Ibid.*

⁷⁰ At the time, the Kremlin under Nikita Khrushchev was breathing new life into the concept of 'peaceful coexistence', which aroused suspicion in the West.

- (ix) that a complaint by a State that part of its territory has been illegally occupied by a colonial Power is sufficient to nullify any subsequent claim by the colonial Power in question that the disputed territory is within its jurisdiction and consequently ineligible for consideration by the United Nations.⁷¹

In short, colonialism was aggression, and any fight against it was a defensive act. The Foreign Office response to this reinterpretation of international law was, on the face of it at least, pragmatic. It advised its delegates at the UN to avoid discussion of the 'legal aspects of colonialism' – a tacit admission that its position vis-à-vis its own possessions was not unassailable – while trying to keep any discussion that did occur 'as unemotional as possible'.⁷² At the same time, it suggested that they point out the inconsistency between the UN Charter and these new legal approaches, which, while serving the short-term interests of some countries, 'could only lead to universal disrespect for international law and so to anarchy'.⁷³ This approach disguised the fact that the Foreign Office was far from sure that the Charter *would* shield them from attack on legal grounds. An official from its UN Department conceded that there had been 'anti-colonial shots which fell uncomfortably near to this mark', and that UN action (or inaction) over Goa and West New Guinea had 'lent a measure of doubt to the continuing legitimacy of colonial regimes'.⁷⁴ He acknowledged that 'it might not be possible effectively to eliminate that doubt by pointing to the relevant "colonial" chapters of the Charter', and that this situation 'could conceivably be exploited in selected cases for purposes of justifying external physical interference in colonial territories'.⁷⁵

The Cold War was an era during which belief in the efficacy of *positive* international law with respect to the use of force diminished, while claims to the natural justice of international causes flourished. On the issue of security, the UN Charter was drafted on the whole to preclude self-interested appeals to higher law, but nations consistently attempted to avoid the injunction set down by article 2(4) to refrain from the threat or use of force against another state, by invoking the justice of their own or their allies' cause. Where restrictions on the conduct of war were once countered by claims to the right of self-defence, they were now additionally countered by claims to the right of self-determination. The non-aligned states went furthest in suggesting that self-determination struggles should be exempted from prohibitions on force, but for a while, the political rhetoric was universal – the disagreements arose instead over who might exercise this right, with

⁷¹ British Foreign Office, 'Item 74: Consideration of the Principles of International Law', c. early 1962, 1–2: A1838 A1838/1 938/11 Part 4, NAA.

⁷² *Ibid.*, at 2. ⁷³ *Ibid.*

⁷⁴ R. Hamilton (London) to External Affairs (Canberra), 20 September 1962: A1838 A1838/1 938/11 Part 4, NAA.

⁷⁵ *Ibid.*

some (such as Lyndon Johnson)⁷⁶ preferring South Vietnam, and others (such as Ho Chi Minh) preferring North Vietnam. David Forsythe noted that while the non-aligned nations' appeals to a higher law of anti-colonialism 'have done much to negate the prohibitions on recourse to war and intervention found in the Charter', the West's higher law of anti-communism had also 'made its own contribution to the demise in effectiveness of these norms.'⁷⁷ This preoccupation with just cause had a distorting effect on the negotiations of the definition of aggression, because as well as debating the components of aggression, delegates were simultaneously positing just cause exemptions from it.

3.7 Debates about a Definition

Could the definition of aggression rise above the particularist demands of its various protagonists? In the UN, several resolutions addressing the question of aggression were considered in the 1960s and 1970s,⁷⁸ with the most comprehensive of these, the 'Definition of Aggression', being negotiated between 1968 and 1974.⁷⁹ This particular debate was shaped by the period of détente, and, in contrast to earlier debates, was dominated by Western attempts to prevail over the non-aligned states rather than the Soviet Bloc. (As a British official noted in 1973, 'the difference between the East Europeans and the West had not been the real problem in recent years' – rather, the difficulties had arisen 'mainly from the situation in the Middle East'.⁸⁰) Indeed, the Definition was eventually agreed upon because the West and the Soviet Bloc were able to reach an accommodation between themselves while jointly exerting pressure on the non-aligned states to abandon cherished positions.

To reach agreement, all parties had to make concessions. In the closing years of the 1960s, the United States and its closest allies finally acknowledged that demand for a definition would not go away. Instead of dismissing the idea as unworkable, as they had done previously, they decided to try to set the terms of the debate by submitting a definition themselves.⁸¹ The Soviet Union, for its part, decided to

⁷⁶ Johnson referred repeatedly to Vietnamese self-determination, stating in one of many examples: 'We believe in that right of free choice; in self-determination . . . so strongly that we are willing to go there [to Vietnam] and fight for it and die for it until that right is achieved' (L. B. Johnson, 'Remarks at Townsville Upon Departing from Australia', 23 October 1966, www.presidency.ucsb.edu).

⁷⁷ D. P. Forsythe, Review Essay, 'Law, Morality, and War after Vietnam', *World Politics*, 28 (1976), 450–72, at 455.

⁷⁸ General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc. A/RES/2625(XXV), addressed aggression in its first 'principle'.

⁷⁹ General Assembly, 'Definition of Aggression', 14 December 1974, GA Res. 3314(XXIX).

⁸⁰ J. R. Freeland (New York) to R. Martin, 15 March 1973: FCO 58/757, NA.

⁸¹ The Americans mooted this idea in May 1968, and the first joint draft definition – co-sponsored by Australia, Canada, Italy, Japan, the UK and the US – was submitted in 1969. The Australian External Affairs legal adviser Kenneth Bailey explained that the State Department wanted to adopt a more positive approach in the UN because: 'They realize that they have eff[e]ctively "lost" the Fourth [Trusteeship] Committee, though not yet the First, the Special Political, or the Sixth. They thought that if the United States found itself in the Sixth

soften its stance on the issues that had previously been central to its approach, such as 'first strike' (which in this period was dubbed 'the priority principle'). The non-aligned states, having realised that the UN resolutions voted through by impressive majorities had no legal traction if opposed by the powerful states, agreed to embark on negotiations to be concluded not by majority vote but by consensus.⁸² Ultimately, however, these concessions could not hide the fact that the three parties had fundamentally different – and irreconcilable – interests. Yet, instead of abandoning the attempt to define aggression, they incorporated these contradictory views into the Definition itself, prompting one prominent critic, Julius Stone, to entitle his 1977 book on the negotiations *Conflict Through Consensus*.

3.8 Objective and Subjective Criteria

What, according to the Definition, was aggression? Article 1 stated: 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.'⁸³ Article 3 set out a non-exhaustive list of actions that 'regardless of a declaration of war, shall . . . qualify as an act of aggression' – in summary, these were: invasion or attack; bombardment; blockade; attacks on land, sea or air forces; overstay on another state's territory; use of another state's territory for attack on a third state; and the 'sending by or on behalf of a State of armed bands'.⁸⁴

Addressing a major area of dispute between delegates, article 2 set out the criteria on which a determination of aggression could be made. This brought the proponents of the priority principle into conflict with the advocates of Security Council's power to decide the issue. The dispute went unresolved, and the article set out both views:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.⁸⁵

The priority principle was embodied in the words 'first use', but Security Council paramountcy was restored by the phrases '*prima facie* evidence' and

Committee in a purely negative dissenting role on a major issue, in company only with the little . . . group of "Anglo-Saxons", the Sixth Committee would likely be "lost" too.' (K. H. Bailey (Ottawa) to External Affairs (Canberra), 21 January 1969, 2: A1838 A1838/1 938/3 Part 6, NAA.)

⁸² W. M. Reisman, 'The Cult of Custom in the late 20th Century', *California Western International Law Journal*, 17 (1987), 133–45, at 137–38.

⁸³ 1974 GA Res. 3314, *supra* note 79. ⁸⁴ *Ibid.* ⁸⁵ *Ibid.*

‘other relevant circumstances’, which suggested that aggression could be determined by non-chronological criteria. The concluding *de minimis* clause excused the Security Council from taking action over what it deemed to be insufficiently important incidents. The American delegation was pleased with this outcome, cabling Washington that:

(a) ‘Prima facie evidence’ . . . would result from first use of force only if this use of force was in contravention of the Charter. Language thus leaves totally unaffected the typical case in which there is question as to whether there was Charter violation. (b) Even in the case of a first use of force in violation of the Charter the Security Council could refrain from making a determination of aggression, after considering the ‘other relevant circumstances’ of the case.⁸⁶

More concessions were to follow, although this time on the part of the Americans. In March 1974, Stephen Schwebel, based at the State Department, sent instructions to the American delegation in New York: ‘if, in negotiation of article 2, you find yourself unable to preserve both “in contravention of the Charter” and “including, as evidence, the purposes of the states involved”, we would prefer to relinquish the latter’.⁸⁷ He added that such compromises should not be made lightly: ‘We trust that . . . if you feel forced to relinquish one, you will succeed in extracting quid pro quo . . . One such quid would be language on indirect aggression expanded to meet our concerns; another would be cutting back on treatment in present draft of self-determination.’⁸⁸ Some non-aligned delegations did indeed hold out against the ‘in contravention’ and ‘purposes’ phrases, despite the entreaties of more accommodating colleagues. The American delegate (and Nixon adviser) John Scali reported in April 1974 that:

Soviets, other six [Western] powers and non-aligned moderates have no trouble . . . but radicals have objected to retention of ‘in contravention’. Mexico, Ecuador, Romania, Madagascar, and Spain⁸⁹ introduced counter-proposal which deleted both ‘purposes’ and ‘prima facie evidence’, thus stating flatly that first uses of force ‘shall constitute’ aggression . . . Non-aligned [moderates] Lampty (Ghana), al Qaysi (Iraq) and Sanders (Guyana) attacked radical dels as irresponsible and bent on wrecking entire draft. We watched with what we hoped was well-concealed amusement.⁹⁰

In the end, the Americans later agreed to drop ‘purposes’ while extracting their *quid pro quo* elsewhere.

⁸⁶ USUN Mission (Geneva) to State Department, ‘Definition of Aggression Committee: Priority and Intent’, 15 May 1973: 1973GENEVA02274, Access to Archives Database (NARA) (AAD). The American cables are written in telegraphese.

⁸⁷ State Department to USUN Mission (New York), ‘Definition of Aggression’, 22 March 1974: 1974STATE058128, AAD.

⁸⁸ Ibid.

⁸⁹ Spain, still led by Franco, joined the ranks of the non-aligned on the issue of aggression to strengthen its case against Britain over Gibraltar.

⁹⁰ USUN Mission (New York) to State Department, ‘Definition of Aggression’, 9 April 1974: 1974USUNN01178, AAD.

3.9 No Revival of Crimes against Peace

The guiding principles of the Definition were set out in article 5, an omnibus three-clause text covering both the causes and consequences of aggression. The legacy of Litvinov's definition could be found in the first clause, which stated: 'No consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for aggression.' Shades of Stimson's non-recognition doctrine could be found in the third clause, which stated: 'No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.' The second clause, article 5(2), was a source of disagreement between the Eastern and Western states. The Soviets, guided by the Brezhnev Doctrine prohibiting satellites from making 'aggressive' moves towards autonomy within the Eastern bloc, insisted that the Definition make reference to aggression being a crime. Britain, however, led Western opposition to this, on the grounds that it might be interpreted as the resurrection of crimes against peace.

The sixteen words in article 5(2) managed to drain all meaning from the idea that aggression was a crime, and are a testament to the linguistic artfulness of the negotiators. The clause reads:

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.⁹¹

In the first sentence, the negotiators succumbed to British insistence that the words 'war of' be inserted before the word 'aggression', thus narrowing the scope of what could be deemed 'a crime against international peace'. This proposal acquires its full significance when read in conjunction with the aforementioned article 3, which lists various *acts* of aggression – the crucial word being 'act' – such as invasion, bombardment, blockade and so on. In other words, these actions listed in article 3 were not in themselves *wars* of aggression, and consequently could not be described as 'a crime against international peace'. The French delegates were still so worried about the implicit resurrection of the idea of crimes against peace that they proposed substituting the word 'violation' for 'crime' to avoid it being associated with the Nuremberg charge.⁹² But this proved unnecessary, as the British amendment effectively demolished the idea that the clause purported to uphold.

The second sentence of article 5(2) gives rise to further deliberate ambiguity with regard to the concept of 'responsibility'. If the drafters had wished to revive crimes against peace, they would have placed the word 'personal' or 'individual' before

⁹¹ 1974 GA Resolution 3314, *supra* note 79.

⁹² USUN Mission (Geneva) to State Department, 'Definition of Aggression Committee: Legal Consequences', 18 May 1973: 1973GENEVA02372, AAD.

the word ‘responsibility’, in line with the word ‘crime’ in the first sentence. But this was precisely the thing that most delegates wished to avoid, because it would have reopened the issue of international criminal jurisdiction. The British thus pressed for the insertion of the word ‘state’ before ‘responsibility’ to negate the idea of personal liability.⁹³ Delegates compromised on the phrase ‘international responsibility’, which, while hinting at Security Council determination, was vague enough to satisfy all.

The debates over articles 2 and 5(2) suggest that the Western and Soviet delegates were perpetually at loggerheads over the priority principle and the ‘aggression is a crime’ formula. On this occasion, though, appearances were deceptive. Détente was in the air, and behind the scenes the Soviets were working with the British and the Americans to iron out problems as they emerged. On 8 March 1974, for example, during negotiations in New York, the Soviet delegate, Dmitri Kolesnik, went to lunch with the American, William ‘Tap’ Bennett. Kolesnik explained to Bennett that the Soviets ‘felt strongly about obtaining language on aggression as “a crime”’, and he cautioned the Americans against pushing the non-aligned states too hard on indirect aggression and self-determination, as it might ‘spoil what appeared to be a good chance for agreement’.⁹⁴ Bennett replied that the Americans would try to make their points as unprovocatively as they could, ‘but that we needed some progress on both these issues’.⁹⁵

Three weeks later, on 1 April, Kolesnik met John Scali and the British delegate Henry Steel at another lunch. Scali reported that ‘Kolesnick stated that before he left Moscow he had been called in by [Foreign Minister] Gromyko and told of [the] importance Gromyko attached to producing a definition’.⁹⁶ Kolesnik pointed out to Scali and Steel that he would continue to help the Western delegates, by ‘giving Arabs and Africans virtually no support in their opposition to indirect means . . . and say[ing] nothing to stimulate Africans regarding self-determination’.⁹⁷ When Steel enquired whether the Soviets absolutely required the controversial ‘aggression is a crime’ formulation, Kolesnik said that he had cabled for instructions allowing him to accept ‘wars of aggression’ – a proposal that was agreed.⁹⁸ He was obviously doing what he could to overcome difficulties with the Definition as well as satisfy his superiors, who, he said, ‘did not understand the legal issues involved’.⁹⁹ Scali and

⁹³ USUN Mission (New York) to State Department, ‘Definition of Aggression’, 6 April 1974: 1974USUNN01169, AAD.

⁹⁴ USUN Mission (New York) to State Department, ‘Definition of Aggression’, 8 March 1974: 1974USUNN00812, AAD.

⁹⁵ *Ibid.*

⁹⁶ USUN Mission (New York) to State Department, ‘Definition of Aggression – Soviet Conduct’, 1 April 1974: 1974USUNN01071, AAD.

⁹⁷ *Ibid.* ⁹⁸ *Ibid.*

⁹⁹ UK Delegation (New York) to Foreign and Commonwealth Office, date-stamped 1 April 1974: FCO 58/820, NA.

Steel nonetheless urged him to do more to wring concessions from the non-aligned states, with Scali reporting:

Deloff [Scali] and Steel both suggested to Kolesnik that while his failure actively stir up trouble on sensitive issues was positive step toward agreed definition he would also need privately press Africans and Arabs not seek too much. Kolesnik acknowledged this but said he had to be careful since Starcevic (Yugo) and others spreading rumor US and USSR had agreed on text and were now slowly jamming it down throats. Comment: we have heard same rumors and Starcevic, Teymour (Egypt), Ceauscu (Romania) main instigators . . . It clear that Kolesnik came to do a deal and he is making good faith efforts to meet our reasonable needs.¹⁰⁰

The debate over article 7 would show that these rumours about the Americans and Soviets 'slowly jamming' their own pre-agreed definition down the throats of the non-aligned nations were overstated, but not entirely without foundation.

3.10 The Self-Determination Exception

In the discussion about article 7 (the self-determination article), the non-aligned states insisted that those fighting for their own or for others' self-determination be exempt from the designation of aggression. The Western nations opposed this interpretation. The outcome appeared as follows:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.¹⁰¹

This article illustrates the differences between those who believed that dominated peoples and their foreign supporters could legitimately use armed force to bring about self-determination, and those who either did not believe this or did not wish to see it universally acknowledged. Both factions appealed to the UN Charter: the non-aligned states to article 1 (which upheld the self-determination of peoples), and the Western states to article 2(4) (which precluded the threat or use of force against the territorial integrity or political independence of any state).

On the face of it, the non-aligned states' views on self-determination appear to be well represented. The word 'struggle' apparently validated the use of force for liberationist ends (and earlier Western efforts to insert 'by all legitimate means')

¹⁰⁰ USUN Mission (New York) to State Department, 'Definition of Aggression – Soviet Conduct', 1 April 1974: 1974USUNN01071, AAD.

¹⁰¹ 1974 GA Res. 3314, *supra* note 79.

after ‘struggle’ were successfully rebuffed).¹⁰² Furthermore, the reference to article 3 suggests that invasion, bombardment, blockade and so on, were not proscribed in this struggle. More specifically, the phrase ‘seek and receive support’ appears to override article 3’s injunction against state support for rebel activities against another state. Finally, the repeated use of the word ‘right’ rebuffed those Western states that had argued that there was no ‘right’ of self-determination, merely a ‘principle’.¹⁰³ From a different perspective, however, it appears that the Western delegates secured their objectives. The word ‘struggle’ was not preceded by the word ‘armed’, although some non-aligned delegates had campaigned for this. Moreover, the Western delegates insisted in linking the article to previous prescriptions on force, which is why the UN Charter is mentioned on no fewer than three occasions. In addition, the West had demanded the insertion of the word ‘forcibly’ before the word ‘deprived’, thus denying the right of self-determination to those dominated by non-forcible means.¹⁰⁴

The negotiations over article 7 were particularly hard-fought. At first, the Western delegates attempted to exclude self-determination from the Definition altogether, and when it became apparent that the non-aligned states were not going to give way, they battled over each phrase. In April 1974, Stephen Schwebel cabled the delegates in New York to express his disquiet. ‘Despite usefulness of provisions on “forcibly deprived” and “by all legitimate means”, we remain discontent[ed] with proposed article’, he wrote, because: ‘(a) its inclusion in a definition of aggression clearly imports that “wars of liberation” are an exception from proscriptions against aggression; (b) the proposed draft cuts back on like provisions of the friendly relations definition . . . (c) acceptance of proposed text may place increased burden upon USG [US Government] efforts to exclude a like escape clause from revised conventions on law of war.’¹⁰⁵ He added: ‘Critical point is that, if we agree that revolutionary forces may receive support, we are saying in effect that what would be an aggressive act – lending such armed support – is not aggression because, in subjective judgment of some, support is being lent to a struggle in pursuit of self-determination.’¹⁰⁶

But the clashes between the Western and the non-aligned delegates masked an important fact: while all parties, with different degrees of enthusiasm, upheld the right of self-determination, none was *wholly* committed to it – not even the non-aligned states. By 1974, the decolonisation struggle was drawing to an end. Most

¹⁰² USUN Mission (New York) to State Department, ‘Definition of Aggression’, 28 March 1974: 1974USUNN01025, AAD.

¹⁰³ Brazil, ‘United Nations Special Committee on Principles of International Law’, 22 February 1966, 11: A1838 A1838/1 938/11 Part 8 Annex, NAA.

¹⁰⁴ USUN Mission (New York) to State Department, ‘Definition of Aggression’, 6 April 1974: 1974USUNN01169, AAD.

¹⁰⁵ USUN Mission (New York) to State Department, ‘Definition of Aggression’, 1 April 1974: 1974STATE065434, AAD.

¹⁰⁶ *Ibid.*

nations had already achieved their independence, and many were grappling with post-independence realities such as the agitation of minorities for self-determination within their own borders. As a result, the non-aligned states had shifted their attention to economic inequality, and narrowed their focus to the 'colonial and racist' pariahs (Portugal, South Africa and Israel), while ignoring their own secessionist imbroglios. The emphasis on 'peoples under colonial and racist régimes or other forms of alien domination'¹⁰⁷ hinted at this more limited set of priorities. The Soviet Union and its East European satellites also tacitly approved a more restricted regime, offering ready rhetorical support to struggles in southern Africa and the Middle East, but not to those within their own bloc – where they maintained a state's right to take 'police action' against dissident movements.¹⁰⁸

As for the major Western powers, they opposed neither the principle nor the practice of self-determination, provided it was in line with their own objectives – they too had their favoured national causes, such as South Korea and Israel. Yet the issue was a double-edged sword. On the one hand, they wished to promote the principle of self-determination, but, on the other, they could not countenance unruly challenges to the global status quo. They therefore tried to steer a middle course between the two. As a State Department briefing paper suggested to US delegates at the UN in 1959: 'If the subject of self-determination is considered in the General Assembly, the United States, in accord with its traditional policy, should express its full support of the principle of equal rights and self-determination of peoples and in its belief that the application of this principle should be carried out resolutely and in an orderly fashion.'¹⁰⁹ In other words, *disorderly* assertions of self-determination would not be tolerated.

Given this ambivalence on the part of most nations towards the unfettered struggle for self-determination, it is not unreasonable to assume that the stalemate embodied within article 7 suited more or less everyone. The article may have been an ugly amalgam of non-aligned, Soviet and Western preoccupations, yet equilibrium – if not actual consensus – was achieved after all. The irony of this, Inis Claude observed, was that 'the League of Nations and the United Nations invested fifty-odd years of committee work in the quest for an agreed definition of aggression and brought this effort to fruition only after the problem of defining aggression had become irrelevant, having been replaced by the problem of defining good cause'.¹¹⁰ Good cause or not, all the delegates wanted an end to the negotiations. As the American Jules Bassin wrote to the State Department in

¹⁰⁷ 1974 GA Res. 3314, *supra* note 79.

¹⁰⁸ J. Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', *American Journal of International Law*, 71 (1977), 224–46, at 233.

¹⁰⁹ US Mission to the UN, 'Draft Resolution on Self-determination', 24 July 1959: Box 58, RG84, Position Papers and Background Briefs, 1946–63, NARA.

¹¹⁰ I. L. Claude, Jr., 'Just Wars: Doctrines and Institutions', *Political Science Quarterly*, 95 (1980), 83–96, at 95.

1973: ‘We have assumed it has been clear to everyone involved in this exercise that solution to this problem is to find general formulations which are broad enough to cover the positions of both sides on various legal issues.’¹¹¹ After all, he added, everyone had an interest in ‘getting this over with’.¹¹²

The General Assembly passed Resolution 3314, with its annexed ‘Definition of Aggression’, on 14 December 1974. Though praised by the delegates, it could hardly be heralded as a breakthrough. It merely declared that certain acts might qualify as aggression, and preserved the very thing that many of the small and middling powers were most interested in usurping: the determinative power of the Security Council. Instead of being an alternative to the Security Council, the Definition was reduced to being a ‘guidance’ document – and a neglected guidance document at that.¹¹³

3.11 The Tide Ebbs on the Tokyo Dissents

Nuremberg’s central crimes against peace charge had proved to be a legal anachronism born of Allied wartime unity in the mid-1940s and killed off by superpower disunity in the early 1950s. But Tokyo’s dissentient ideas had thrived in the inhospitable environment of the Cold War. In the heyday of the non-aligned movement (which was as much a product of the era as the Soviet and Western blocs), Radhabinod Pal’s arguments for rejecting the crimes against peace charge – that the ‘havers and holders’ shaped the law to serve their own ends, and that wars of liberation were a legitimate form of self-help – were both popularised and acted upon. At the same time, Bernard Röling’s grounds for his repudiation of the charge – that international prohibition was legally unprecedented and, in the context of a divided world, premature – were also supported by Cold War liberals in the West, who turned their backs on initiatives designed to codify international criminal law. Yet these approaches to the problem of aggression, which had flourished in the unique context of the Cold War, began to wither as soon as the political climate began to change.

The period of détente exposed the fact that the non-aligned states were unable to translate numerical strength into political clout on questions of aggression and self-determination. Meanwhile, the powerful states, now more able to overlook their ideological differences on other issues, acted together to limit any damage that a definition might have inflicted on the Security Council’s prerogatives. The State Department was not entirely dissatisfied with this outcome, and informed one of its

¹¹¹ USUN Mission (Geneva) to State Department, ‘Definition of Aggression Committee’, 23 May 1973: 1973GENEVA02450, AAD.

¹¹² Ibid.

¹¹³ 1974 GA Res. 3314, *supra* note 79, recommended that the Security Council ‘should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression’.

diplomatic missions that it was 'useful' because it 'preserves Security Council discretion in making determinations of aggression, rejects theory that all first uses of force necessarily are aggression and specifically includes indirect uses of force in list of possible acts of aggression'.¹¹⁴ But many states with less of a stake in the debate would probably have agreed with the New Zealand delegate's view that the Definition was, after all was said and done, 'a very small mouse to emerge from beneath such a mountain of work'.¹¹⁵

After the negotiations, the British delegate Henry Steel exchanged letters with Roger Martin, his opposite number at the Foreign Office in London. Steel gloomily predicted that Britain's opponents in Africa and the Arab world would use the definition as 'one more rod with which our own backs, or those of our friends, may be beaten'.¹¹⁶ But Martin was more sanguine, writing: 'The package is obviously far from ideal, but I see nothing in it which is likely to give us serious trouble in the future. Indeed it remains to be seen whether the whole definition will remain a live issue or whether, given the two-edged nature of some of the provisions, the majority in the UN will only rarely have recourse to it.'¹¹⁷ Then, signing off his letter, he added, almost as an afterthought: 'We will of course be fascinated to hear any gossip from New York on what will be the next legal topic for a new Special Committee. Any bets on an International Criminal Court?'¹¹⁸

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¹¹⁷ R. Martin to H. Steel, 17 April 1974: FCO 58/820, NA. ¹¹⁸ *Ibid.*

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