

The International Politics of Aggression

An Historical Analysis

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2007**

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Thesis Abstract

This thesis examines the role played by the concept of aggression in international relations, in order to reveal fresh insight into the nature of international society. In the first chapter, the concept of aggression is located within its theoretical context, with particular reference to the writings of certain realists, liberals, and international society theorists. The following chapters then assess the significance of the concept of aggression in the practice of international relations from the early twentieth century period onwards. Thus, chapter two looks at the concept of aggression in the post-World War One Treaty of Versailles peace agreement, including its importance in the US Senate's decision not to ratify that agreement. Subsequently, chapter three examines aggression in the context of the policy-making and procedures of the League of Nations prior to World War Two. In the aftermath of this conflict, chapter four considers how the crime of aggression came to be the key charge laid against Nazi leaders at the International Military Tribunal held at Nuremberg from 1945-1946, and chapter five goes on to look at the crime of aggression's role at the International Military Tribunal for the Far East in Tokyo from 1946-1948. The re-emergence of the concept of aggression in the Charter of the United Nations, and this organisation's long struggle to 'define' aggression for the purposes of international peace and security are the focus of chapter six. The work of various UN organs towards achieving these purposes, and the part played by the concept of aggression in this work, feature in chapter seven. In chapters eight and nine, attention is turned to efforts since Nuremberg and Tokyo to entrench aggression as an offence against international criminal law, most recently at the 1998 Rome Conference on the Establishment of an International Criminal Court. The final part of the thesis makes some concluding comments concerning the value and significance of the concept of aggression in international politics today.

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Acknowledgements

There are many people I would like to thank for their contribution to the writing of this thesis. I am grateful to my supervisor, Chris Brown, for his invaluable guidance through the doctoral process, for his insights into international relations as a field of academic inquiry, and, of course, for his helpful comments on my work to date. In addition, Peter Wilson provided useful feedback on a previous version of my chapter concerning the League of Nations. An early meeting with Gerry Simpson assisted me in clarifying and strengthening my thesis plan. Derek McDougall, who offered me the opportunity to tutor in his subjects at the University of Melbourne from 1999-2000, provided the catalyst for thinking seriously about undertaking doctoral studies in international relations, and since this time, he has regularly and generously acted as a sounding-board for my ideas and other academic matters.

In 2004, I was fortunate to meet with Ben Ferencz, a former Nuremberg prosecutor and longtime advocate of strengthening resistance to aggression through law, and I am grateful to him for providing a comprehensive explanation of the many difficult issues in this area, responding patiently to my questions, and offering access to many hard-to-find documents. My trip to New York for this purpose was generously funded by the Central Research Fund of the University of London. Back in the UK, Cynthia Fairweather kindly agreed to meet with me and share her experiences as a representative of Sierra Leone at the 1998 Rome Conference.

On a more personal note, I would also like to thank Arnaud and his family for their ongoing support, patience and understanding, particularly during this last writing-up year. Last – but by no means least – I would like to extend an extra special thank you to my grandmother, Rae, and my mother, Mary-Louise, for supporting me in all possible ways throughout the many, many years of study which have culminated in this thesis. Their contribution has been my greatest source of strength throughout the doctoral process and indeed throughout my life.

PW
March 2007

List of Abbreviations

GA Res	General Assembly Resolution
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East (Tokyo)
IST	Iraqi Special Tribunal, 2004-
P5	Permanent Five member states of the UN Security Council: China, France, Russia, United Kingdom, United States
SCAP	Supreme Commander of the Allied Powers
SC Res	Security Council Resolution
UK	United Kingdom
UN	United Nations
UNCIO	United Nations Conference on International Organisation
UNWCC	United Nations War Crimes Commission
US	United States
WGCA	Working Group on the Crime of Aggression

Chapter One: The Concept of Aggression in International Relations

It will be argued in this thesis that prevailing international political conditions strongly influence how moral and legal impulses compelling the further evolution of the concept of aggression play out in practice. However, the significance of the concept of aggression in international relations cannot simply be explained by reference to power politics: it has made a positive contribution to the understanding of international relations. Before developing this argument further, it is first necessary to examine more closely what we mean by the concept of aggression.

(1) The Problem of Aggression

While 'aggression' remains a highly contested concept, with very little agreement on its definition or scope, it is possible to identify two elements of the notion which are more or less accepted as fundamental:

- (a) A *use* of international armed force; and
- (b) The *judgment* of that use as *wrong*.

Broadly, these features of the concept of aggression correspond with the general division of international conduct into processes of coercion and processes of decision as developed by McDougal and Feliciano¹. We shall now look at each of these aspects in turn.

(a) A Use of International Armed Force

The level of anarchy present in the international sphere makes it unsurprising that states use varying degrees of coercion, or force, in their relations with one another. With no mechanisms for the promulgation of international legislation, no centralised international law enforcement agency or compulsory jurisdiction for

¹ Myres S McDougal and Florentino P Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961). The view of law as a social process developed by McDougal was later discussed and partially endorsed in Hedley Bull's *The Anarchical Society* (London: Macmillan, 1977), pp127-128.

the adjudication of international disputes, self-help remains one of the most effective means available to states for the defence or assertion of their rights and interests. In practice, most states have at their disposal a range of tools for exerting force over others, which fall into one of four categories: diplomatic, ideological, economic and military². However, stronger states, with greater material resources, are likely to succeed more frequently in asserting their rights and interests by recourse to these tools than weaker states, with fewer material resources.

What types of force are relevant where aggression is concerned? As we shall see, much time and effort has been devoted to answering this question, with little resulting consensus. As regards military, or armed, force – the most serious form of coercion – a majority would accept instances of invasion, annexation or occupation of a state by another state, as circumstances which, at first instance, would strongly support a determination of aggression. However, beyond this extreme, it is not possible to generalize. Less grave uses of armed force, such as border skirmishes, may or may not be considered as aggression. Moreover, many states have sought to promote the ideas of ‘economic aggression’ and, especially during the Cold War, ‘ideological aggression’, but these have not attracted the same level of diplomatic support as a notion of aggression which targets military actions. Thus, a minimum precondition of aggression is a use of armed force across state boundaries.

(b) The Judgment of A Use of International Armed Force as Wrong

However, the concept of aggression denotes more than just the existence of a particular use of international armed force; it simultaneously labels such use as *wrong*. Hence, this aspect of the concept of aggression is about assigning responsibility for deeds done, meting out punishment, and/or creating an effective deterrent, all of which raise moral and legal issues.

² McDougal et al, *Law and Minimum World Public Order*, p28.

It is this moral and legal element in the concept of aggression which is the most problematic, as it rests on a number of assumptions about international life which are by no means settled. Firstly, the concept of aggression makes an assumption about *international standards*: by denouncing particular, international acts, it implies that standards of international conduct exist which are universally, or near-universally, recognized by states as authoritative. This assumption leads to a second: that some *international authorities* exist which can act as final arbiter of such standards, putting an end to incessant debate about them through binding interpretation, enforcement, amendment and reconciliation. A third assumption made by the concept of aggression concerns the *moral value of peace*. By condemning, at minimum, the most grave military actions a state can carry out in the international arena, the concept of aggression necessarily asserts that peace is a morally good thing. Although not a faulty assertion in itself, in practice it leads to the inescapable conclusion that the *status quo* immediately prior to the allegedly aggressive act holds positive moral value, a much more contentious proposition. By contrast, the mere existence of a use of international armed force – the first precondition of aggression – says little about the moral value or otherwise of the pre-existing *status quo*. Fourthly, the concept of aggression makes an assumption about the existence of *international rules of procedure*: it assumes that in certain circumstances, some states are entitled to judge, while other states are entitled to be judged.

Before examining what theories of world politics have to say about aggression, certain observations about its two fundamental elements are worth noting. Firstly, important level of analysis issues are raised by the two elements, both individually and in combination. In relation to the first element, reference to a use of *international* armed force presupposes a state-centric approach to aggression, but what about the situation where a non-state actor located in state X occupies part of the territory of state Y, for example? Could this equally qualify as aggression? On occasion, the armed activities of non-state actors have been denounced at the international level as aggression³; however, this has been a rare occurrence. More

³ See, for example, SC Res 496 of 15 December 1981 and SC Res 507 of 28 May 1982, both condemning “mercenary aggression” committed against the Seychelles.

frequently, aggression relates to state conduct as and between themselves, and this remains the predominant focus of this thesis.

In relation to the second element, the level of analysis problem concerns whether it is to the state or to the individual that moral and/or legal responsibility for aggression can and should be attributed. This question represents another theme running through international discussions about aggression, and forms part of the wider, continuing debate about agency in international relations⁴. Though occasional suggestions to develop the concept of aggression as a *state* offence contrary to international criminal law have been identified⁵, the most significant developments in this context have been achieved in relation to *individual* criminal responsibility for aggression. Thus, in the chapters dealing with the prosecution of aggression as an international crime at Nuremberg and Tokyo, it has been necessary to examine both state and individual conduct in assessing the significance of the concept of aggression in world affairs.

Reconciling this tension between, on the one hand, aggression as a particular military act by a state against international order, and, on the other, aggression as an act committed by an individual in breach of international criminal law, remains one of the basic challenges posed to the further evolution of the concept. Current efforts towards this goal are examined in more detail in the postscript to this thesis. For the moment, it is sufficient simply to be aware of this tension at the heart of the concept of aggression.

(2) The Concept of Aggression in International Theory

Already, our discussion of the problem of aggression has raised a number of issues around which theories of world politics have developed. From the discussions above, it is also evident that insights from international law will also

⁴ On this debate, see, for example, Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics and International Affairs* 15 (2001), pp67-85; Chris Brown, 'Moral Agency and International Society', *Ethics and International Affairs* 15 (2001), pp87-98; and Barry Buzan, 'The Level-of-Analysis Problem in International Relations Reconsidered', in Ken Booth and Steve Smith (eds), *International Relations Theory Today* (Cambridge: Polity, 1995).

⁵ In particular, see chapter eight of this thesis.

have an important part to play in assessing the significance of the concept of aggression in international relations. We will now turn to the political and legal literature in order to gain a better understanding of the role of aggression in international theory.

(a) Liberalism

Although liberal thought in the context of international relations has developed in a range of different directions, and contains within itself many variations of view, it is possible to identify certain major themes which unify this perspective. In particular, liberals assume that progress is inevitable and consider realism, discussed below, a dangerous and inaccurate interpretation of world affairs. Realism's state-centric approach to international relations is an especially prominent focus of criticism for liberals, who often argue that an analogy can be drawn between the relationship between individuals within a state on the one hand, and relations between states on the other⁶. A central concern of liberal thought is the eradication of anarchy in the international sphere in favour of the rule of law; to this end, the following main themes have evolved:

- (i) that the best way to secure world peace is through the global proliferation of democratic institutions;
- (ii) that cooperation, based on the harmony of interests⁷ between states, in international relations is a more significant factor than competition;
- (iii) that dispute resolution among states can be achieved through recognized judicial procedures; and
- (iv) that international security can only be assured through collective measures that overcome the balance of power and the need to resort to self-help.

⁶ Frequently referred to as the 'domestic analogy'. For further discussion of the domestic analogy in international relations theory, see Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge: Cambridge University Press, 1989).

⁷ The "natural harmony of interests" among states is a phrase used in Norman Angell's work, *The Great Illusion* (London: Heinemann, 1910).

This fourth theme is especially relevant, as it is within the context of efforts during World War One to develop for the future an international collective security scheme that the concept of aggression first emerged in modern times. The aim of collective security was a general agreement among participating states to take united action against any state which threatened the independence or integrity of any of the participants. The rationale behind collective security was that ‘aggression’ by one or more states was both the precursor and cause of war; thus, if states could agree to cooperate in confronting all instances of aggression - and this agreement was supported by disarmament, the growth of international political institutions and the achievement of other liberal goals - then war would be eliminated from international relations. As a consequence, aggression formed both the practical target, and the triggering mechanism of communal response under collective security arrangements. From the liberal perspective, therefore, once states had agreed to the establishment of a collective security regime, the maintenance of international security was simply a matter of participants recognizing aggression as it arose in practice and responding accordingly. Any difficulty experienced in recognizing aggression could be easily overcome through the development of international rules and procedures, such as an international definition of aggression.

Liberal thinking generally was particularly popular in the interwar period, capturing the imagination of academics, politicians, philosophers, and ordinary people alike⁸. One commentator who devoted much time to the pursuit of effective collective security through the development of international procedures for recognizing aggression was Quincy Wright. In 1935 he advocated a test of aggression based on a state’s lack of compliance with international dispute settlement procedures, irrespective of the merits of the conflict. As long as his test was applied quickly after the outbreak of hostilities, Wright argued that the test was not “contrary to justice or impracticable”, but in fact “necessary”⁹.

⁸ For instance, see RH Tawney, *Equality* (London: Allen and Unwin, 1931); JS Bury, *The Idea of Progress* (New York: Dover Publications Inc, 1955; first published 1920); Leonard Hobhouse, *The Elements of Social Justice* (London: Allen and Unwin, 1922) and *Social Development* (London: Allen and Unwin, 1924); and John Dewey, *Liberalism and Social Action* (New York: Putnam, 1935).

⁹ Wright’s response to criticism from Hersch Lauterpacht in *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p82, quoted in Quincy Wright, ‘The

Rather, it was through rapid application of the test that “substantial justice”¹⁰ between the parties could be achieved.

More than twenty years later, Wright’s view had changed somewhat. Certainly, he maintained his view that a “definition of aggression is clearly vital to this objective of eliminating war, both legally and materially”¹¹. In addition, he continued to oppose self-help and the balance of power as means of achieving international security, contending that many states are unable to obtain even average levels of security by these methods, “at least without costs which will seriously impair their economic and social progress”¹². However, now apparently more sensitive to criticisms of his test of aggression on justice grounds, Wright argued that aggression was a rule of order, not a principle of justice¹³. He pointed out that from League discussions about aggression onwards, it had generally been acknowledged that the prohibition of the use of military force must be categorized as a rule of order, separate from the merits of an international dispute, and so:

“The effort to identify aggression with ‘unjust war’...is quite contrary to the conception of aggression used in League of Nations and United Nations discussions. It would mark the abandonment of the efforts to prevent hostilities by law...”¹⁴

From this perspective, then, the overriding purpose of the concept of aggression was to help abolish war from the international stage, thereby contributing to the

Concept of Aggression in International Law’ *American Journal of International Law* 29 (1935), pp373-395.

¹⁰ Wright, ‘The Concept of Aggression in International Law’, p393.

¹¹ Quincy Wright, *The Role of International Law in the Elimination of War* (Manchester: Manchester Uni Press, 1961), p59.

¹² Quincy Wright, ‘The Prevention of Aggression’ *American Journal of International Law* 50 (1956), pp514-532, at p519.

¹³ Wright, *The Role of International Law in the Elimination of War*, p64.

¹⁴ Wright, *The Role of International Law in the Elimination of War*, p65. Subsequently, Yoram Dinstein too has argued that there is no room for the resurrection of ‘just war’ considerations in relation to the UN Charter or its notion of aggression, a view which he points out has been endorsed by Judge Schwebel in his dissenting opinion in the *Nicaragua (Merits)* case: Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2005), pp89-90. However, Dinstein also refers to article 43 of the UN Charter – the essential collective security provision, which creates an obligation on members to negotiate special agreements to make their armed forces available to the Security Council for the maintenance of peace and security. He concedes that while this provision continues to lay dormant, states must rely on their own resources to counteract unlawful uses of force, and therefore self-help remains today the primary form of international redress: p255.

achievement of international peace. This, and not the pursuit of justice *per se*, was the most important priority in the international sphere.

(b) Realism

While, like liberalism, realism is by no means a homogeneous world view, its characteristic features were set out at length by Morgenthau in his classic work on international relations¹⁵. He argued, *inter alia*, that the rules governing politics originate from human nature, that a state's national interest is best defined in terms of power, and that this interest fluctuates in meaning. According to realists then, all international politics is about a struggle for power among states.

Of particular relevance to the concept of aggression, Morgenthau contended that while realism "is aware of the moral significance of political action"¹⁶, it rejects the idea that universal moral principles in the abstract can themselves be applied to state conduct. Instead, he claimed that "they must be filtered through the concrete circumstances of time and place"¹⁷. Although individuals are morally entitled to make their own sacrifices in defence of their moral principles, states do not have the same right to allow their moral disapproval of particular conduct to "get in the way of successful political action, itself inspired by the moral principle of national survival"¹⁸. Prudence – defined as "consideration of the political consequences of seemingly moral action"¹⁹ – is the ultimate value in international politics.

In addition, Morgenthau claimed, realism views international politics as an autonomous, clearly defined field, entirely distinct from other research fields. He identified two consequences of this approach: (1) realists do not equate the moral

¹⁵ Hans Morgenthau, *Politics Among Nations* (New York: Knopf, 1956; first published 1948).

¹⁶ ¹⁷ ¹⁸ ¹⁹ Morgenthau, *Politics Among Nations*, p9. The point Morgenthau seems to be making here is that states are not *entitled* to prioritise their opposition to an issue – based on their own indigenous moral values - at the expense of political conduct in pursuit of national survival – perhaps the only objective common to all states in international politics. Implicitly, this acknowledges that states have the capacity for moral approval or disapproval of the actions of other states. However, later, Morgenthau dismisses this possibility: "...a moral rule of conduct requires an individual conscience from which it emanates, and there is no individual conscience from which what we call the international morality of Great Britain or of any other nation could emanate": p225.

aims of a specific state with the moral principles ruling the universe; and (2) realists subordinate non-political “standards of thought”²⁰ to the political in their analysis, at the same time as rejecting outright the imposition by other fields of their non-political standards on the political realm. In this latter regard, the “legalistic-moralistic”²¹ approach to international politics is a notable offender: “to know that nations are subject to the moral law is one thing, while to pretend to know with certainty what is good and evil in the relations among nations is quite another”²².

Though adamant about keeping international political thought free from incursion by other, non-political disciplines, Morgenthau did acknowledge the historical existence of an international society of states, within which international morality had operated²³. Within this society, international morality had provided an “effective system of restraints”²⁴. However, he argues that the shift from aristocratic government to “the democratic selection and responsibility of government officials”²⁵ transformed “international morality as a system of moral restraints from a reality to a mere figure of speech”²⁶. Further, Morgenthau contended that nationalism ushered in “morally self-sufficient national communities”²⁷, thus ending international society. These events have fundamentally altered the relationship between universal moral principles and national moral values in two ways. Firstly, they have “weakened, to the point of ineffectiveness, the universal, supranational moral rules of conduct, which before the age of nationalism had imposed a system – however precarious and wide-meshed – of limitations upon the foreign policies of individual nations”²⁸. Secondly, they have “greatly strengthened the tendency of individual nations to endow their particular national systems of ethics with universal validity”²⁹.

This latter observation was central to Carr’s critique of interwar liberalism, or ‘utopianism’, and its supposedly universal standards³⁰. Similarly to Morgenthau, Carr argued that these standards were not universal at all but merely the

²⁰ ²¹ ²² Morgenthau, *Politics Among Nations*, p10-11.

²³ ²⁴ ²⁵ ²⁶ Morgenthau, *Politics Among Nations*, pp224-226.

²⁷ ²⁸ ²⁹ Morgenthau, *Politics Among Nations*, p228.

³⁰ See EH Carr, *The Twenty Years Crisis* (London: Macmillan and Co., 1939).

“unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time”³¹. Carr contended “slogans like ‘collective security’ and ‘resistance to aggression’ serve the same purpose of proclaiming an identity of interest between the dominant group and the world as a whole in the maintenance of peace”³². It was impossible for utopians to escape this “identity of interest”³³, and hence no objective, universal standard of international conduct could be achieved; the application of so-called ‘universal’ principles in practice would simply reveal themselves as “transparent disguises of selfish vested interests”³⁴. Consequently, Carr’s stark and scathing analysis on this front refuted *a priori* the possibility of the existence of an international society³⁵ – a concession that even Morgenthau had made. To Carr then, the concept of aggression was little more than a ruse by those powers most favoured by the *status quo* – relying on the international promotion of peace as a moral value – to delegitimise conduct most threatening to that *status quo*, thereby protecting their vital interests.

The characterization put forward by Morgenthau of world politics as an eternal battle for power among states clearly forms the foundation of Stone’s works on international aggression. In accordance with realist theory, and writing just after the General Assembly passed its own resolution defining aggression³⁶, Stone claimed that the concept of aggression acts simply as a tool of political warfare among states³⁷. He flatly denied the ‘need’ for a definition of aggression for the purpose of maintaining international order effectively, and countered that, in fact, a definition of aggression is unviable, unacceptable to states and in any case undesirable, for a great number of reasons. Stone’s argument directly attacks many of the assumptions about world politics underlying the concept of aggression identified above.

³¹ ³³ ³⁴ EH Carr, *The Twenty Years' Crisis* (Hampshire: Palgrave, 2001; with a new introduction by Michael Cox), p80.

³² EH Carr, *The Twenty Years' Crisis* (2001 edition), p76.

³⁵ See Michael Cox, 'Introduction', in EH Carr, *The Twenty Years' Crisis* (2001 edition), p xiv.

³⁶ see GA Res 3314 of 14 December 1974. Hereafter the General Assembly Definition of Aggression.

³⁷ Julius Stone, *Conflict Through Consensus* (Baltimore: The Johns Hopkins University Press, 1977), pp123-152.

In relation to the assumption about universal standards, Stone claimed that while each state continues to pursue its own vested interests, it will seek to protect these by branding as 'aggression' conduct which threatens them. The heterogeneity of states ensures that differences in both the substance and priority of their vested interests emerge. Thus, disagreement ensues as to what conduct constitutes aggression, as each state seeks to assert, and attract support for, a universally-recognised concept which reflects its own preferences, in order to gain and maintain advantage over other states. As a result, the international debates about aggression directly reflect the rivalry between the most and least powerful states in international politics; they are not genuine attempts to reach by consensus an internationally authoritative concept of aggression to act as the triggering mechanism in a fully-functional collective security system. Consequently, in Stone's view, the real standards used by states to evaluate the various draft definitions of aggression are:

- (i) "whether the proposed definition would stigmatise as aggression, action which that state may in some yet unforeseen but not unforeseeable future circumstances feel justified and even compelled to take; and
- (ii) whether the indirect effect of the definition is such as to grant an excessive licence for illegal and predatory activities by other states, by condemning as 'aggression' the only kind of vindication of violated rights which may in fact be available."³⁸

The relatively high level of uncertainty in the international arena over the longer term means that states have a strong incentive to safeguard their freedom of action by ensuring maximum flexibility for themselves in any universally-endorsed definition of aggression. As a result, draft 'definitions' of aggression merely preserve within their own terms differences of views among states. This allows sufficient ambiguity of language that political arguments about aggression can continue to be fought under the cloak of legal conflicts of interpretation. Thus, states remain free to unilaterally accuse each other of aggression, which they

³⁸ Julius Stone, *Aggression and World Order* (London: Stevens and Sons Ltd, 1958), pp106-107.

usually do in an attempt to harness the emotive value of this term³⁹ and gain political support for their cause both domestically and abroad. Just as Morgenthau had dismissed modern references to international morality as a “figure of speech”, Stone described the General Assembly Definition of Aggression as a “verbal tour de force”, rather than “ a miraculous conversion of strategic political and economic conflicts into a harmonious consensus”⁴⁰.

Lastly, Stone raised challenges to another two of the concept of aggression’s founding assumptions – namely, the existence of international authorities to uphold supposedly universal standards of state conduct, and the moral value of peace. He emphasized that:

“the international community lacks any collective means of vindication of violated legal rights, as well as any collective means of legislative adjustment of new conflicting claims, or even of existing legal rights.”⁴¹

On this basis, Stone pointed out that an internationally-endorsed definition of aggression would protect indefinitely existing injustices from redress. Such a definition could not be expected to perform tasks normally undertaken at the domestic level by comprehensive and sophisticated bodies of constitutional and criminal law, simply because these have not sufficiently developed in the international sphere⁴².

In a similar vein, Babic argued that the crime of aggression really amounts to a crime against defeat, and thus its nature is political, not legal or moral⁴³. To him, the cost of incorporating the concept of aggression into international law is the loss of the concept of war, which is unwarranted in the absence of a world state⁴⁴. In Babic’s view, the concept of aggression reduces war to a type of police

³⁹ Stone did not deny the emotional, symbolic appeal of the concept of aggression, but doubted that this appeal on its own could compel the operation of an effective collective security system with ‘aggression’ as the trigger.

⁴⁰ Stone, *Conflict Through Consensus*, p19.

⁴¹ Stone, *Aggression and World Order*, p53.

⁴² Stone, *Conflict Through Consensus*, pp157-158.

⁴³ J Babic, ‘War Crimes: Moral, Legal, or Simply Political?’ in A Jokic (ed), *War Crimes and Collective Wrongdoing* (Oxford: Blackwell Publishers Ltd, 2001), pp57-71 at p63.

⁴⁴ Babic, ‘War Crimes: Moral, Legal, or Simply Political?’, p64.

measure, with the moral correctness or incorrectness of each side already decided before military action takes place; Babic refers to this as the “right of victory”⁴⁵. By contrast, the traditional rules of warfare dictate that adversaries entering war must accept the outcome as just. The only basis in support of a ‘right of victory’ is naked power, and thus the subjective and prior determination of which side is entitled to the right of victory – necessarily assumed by the introduction of the concept of aggression into international law - ensures that crimes against peace remain a political tool used by the powerful, without moral or legal resonance⁴⁶.

From the realist perspective, therefore, the concept of aggression holds no intrinsic value of its own, but simply represents yet another topic in relation to which states compete to assert their vital interests, defined in terms of power.

(c) International Society

While Morgenthau argued that international society was destroyed by the advent of nationalism, a third approach to world politics asserts that international society still exists today, and is worthy of academic attention in and of itself. It is contended that international society did not disappear at the end of the nineteenth century, but merely changed from a European international society into a worldwide international society with its European origins intact⁴⁷. Hence, the social context in which the state operates forms the primary research focus of this approach.

According to Wight, international society represents the “most comprehensive form of society on earth”⁴⁸, and possesses four idiosyncracies:

⁴⁵ Babic, 'War Crimes: Moral, Legal, or Simply Political?', p63.

⁴⁶ However, it appears that Babic acknowledges the law plays some role in the regulation of war: “starting a war is, from the perspective of the status quo ante, a violation of the established state and therefore a violation of international contract”: p63.

⁴⁷ See Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Clarendon, 1984) and Adam Watson, *The Evolution of International Society* (London: Routledge, 1992).

⁴⁸ Martin Wight, *Power Politics* (Leicester: Leicester University Press, 1999; first published 1946; revised and expanded edition published 1978 and edited by Hedley Bull and Carsten Holbraad), p106.

- (1) It is a unique entity, with its “prime and immediate” membership being comprised of states, which themselves are societies, though of a more developed kind;
- (2) As a result of (1), membership of international society is always small, compared with the populations of most states;
- (3) As a result of (2), there is great diversity among member states on virtually all of their features, such as geography, population, and resource. “There is no average state.”⁴⁹
- (4) Generally, members of international society are immortal. Occasionally, states implode, explode or quietly cease to exist, but more often than not they survive longer than individuals do.

A consequence of (4), Wight continued, is that international society will be looser than a national society. Thus, international society – as a society of immortals – “cannot easily coerce a recalcitrant member if consensus breaks down, and it cannot ask of its members the self-sacrifice which states in certain circumstances ask of individuals”⁵⁰. Similarly, international society will not be able to “attribute moral responsibility to its members in the same way as it can to individuals”⁵¹. Wight contended that there are “moral difficulties”⁵² with assigning responsibility to states, because such assignment produces suffering on the part of the “passive majority”⁵³ of individuals for the conduct of the “criminal minority”⁵⁴. From these comments, we can infer just how ‘loose’ Wight believed international society to be. He was skeptical of international society’s capacity for combatting recalcitrance, such as aggression, where political consensus was absent. Further, while implicitly acknowledging the theoretical possibility of international society holding a state responsible for aggression, Wight did not believe this could be done easily, or that the way individuals were held morally responsible offered much guidance on this matter.

Against this ‘looseness’ of international society, what is perhaps most interesting is Wight’s recognition of that society’s ability to assign moral responsibility to

⁴⁹ Wight, *Power Politics*, p107.

⁵⁰ ⁵¹ ⁵² ⁵³ ⁵⁴ Wight, *Power Politics*, p107. From the context, it seems clear that “criminal minority” denoted those individuals in serious breach of moral, rather than legal, standards of conduct.

individuals at all. This statement is hard to reconcile with Wight's view of international law, though it does reveal the importance he placed on the moral element within international society. To Wight, although international law provided the best proof of the existence of international society, he claimed that states, not individuals, are the subject of international law, and that the aim of international law is "to define the rights and duties of one state, acting on behalf of its nationals, towards other states"⁵⁵. Despite the significance of international law as an indicator of international society, Wight openly admitted the former's limitations: without international legislation, most international law is comprised of treaties; only states can enforce international law in the absence of an international executive; and the lack of international judiciary with compulsory jurisdiction⁵⁶. These constraints add support to Wight's argument about the relative 'looseness' of international society, though at the same time they suggest Wight was only too aware of the pitfalls of relying too heavily on international law as evidence of his own argument.

Legal considerations aside, it is clear that Wight viewed moral values as an important feature of any properly functioning international society. He blamed a lack of "moral solidarity"⁵⁷ for the failure of the League of Nations. In addition, he rejected the argument that the moral significance of the Nuremberg verdict was entirely destroyed by the fact that it was imposed by the victorious powers on the vanquished, stating that "such a judgement ignores the part played by political power in the development of law and freedom"⁵⁸. Aggression was the key charge against the top Nazis at the Nuremberg trial. It is apparent then, that Wight fully appreciated the significance of political factors in light of international society's unique characteristics and the resultant limitations of international law, but nevertheless upheld the importance of international morality within these parameters. This suggests that the mere fact of political influence in the development of the concept of aggression should not, by definition, invalidate any

⁵⁵ ⁵⁶ Wight, *Power Politics*, pp108-109.

⁵⁷ Wight, *Power Politics*, p110.

⁵⁸ Wight, *Power Politics*, p111. In support of this statement, Wight cited the Magna Carta, which "was imposed by a rebellious baronage to codify their own interests", and the liberation of slaves in the slave-owning states of the US as an act of war by the anti-slavery states.

contribution made by this concept to international law and/or morality⁵⁹. Rather, any assessment of such contribution will depend on the degree and substance of political influence.

Bull further developed Wight's thoughts on international society. According to Bull, international society

“exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.”⁶⁰

This definition is derived from Bull's observation that there are three specific aims which are recognised by all societies and are reflected in their practices: (1) the safeguarding of life to some degree against physically injurious, or fatal, violence; (2) the maxim *pacta sunt servanda* – that promises or agreements made will be honoured; and (3) the possession of material goods will remain secure in some measure, without constant and unlimited challenge. All of these goals Bull described as “elementary”, namely, without them, no form of society whatsoever can be said to exist; “primary” in that all other goals of society are contingent, to a certain extent, on the achievement of these; and “universal”, that is all “actual” societies seem to take these goals into consideration. In addition to these goals, Bull recognised a further three objectives pertaining specifically to the international society of states: (4) the maintenance of the international system⁶¹ and the society of states; (5) the preservation of the independence or external sovereignty of individual states; and (6) peace⁶². Five “institutions” of international society – the causes of international order - are identified by Bull: the balance of power, international law, diplomacy, the great powers and war⁶³.

⁵⁹ In a similar vein, Chris Brown has argued as regards the pursuit of national foreign policy there is no “sound ethical reason why states should be required to neglect their own interests in the interests of the common good”: see ‘On Morality, Self-Interest and Foreign Policy’, *Government and Opposition* 37 (2002), pp173-189.

⁶⁰ Bull, *The Anarchical Society*, p13.

⁶¹ Bull indicates an ‘international system’ is created “when two or more states have sufficient contact between them, and have sufficient impact on one another’s decisions, to cause them to behave – at least in some measure – as parts of a whole.”: p9-10.

⁶² Bull, *The Anarchical Society*, pp16-18.

⁶³ Bull, *The Anarchical Society*, pxiv.

His comments about the first two of these are of particular relevance in relation to the concept of aggression.

While acknowledging the useful functions both the balance of power⁶⁴ and international law⁶⁵ contribute to international order, Bull outlined a number of limitations which constrain the contribution made by international law. Apart from pointing out that international law is neither a necessary or sufficient condition of international order, Bull argued that on occasion, international law can impede measures to preserve a balance of power which are considered necessary for the maintenance of international order. The issue of whether, or how, to respond to aggression is one of the examples Bull used to illustrate this clash of institutions. On the one hand, international law may clearly prohibit the waging of aggressive war; on the other, there may be reasons to do with the distribution of power on the world stage which encourage members of international society not to enforce such a law. The 1935 Italian invasion of Ethiopia and the 1939 Soviet invasion of Finland are both occasions on which the balance of power and international law came into direct conflict with one another, and in each instance, balance of power considerations ultimately triumphed in the calculations of the strongest member states. Although efforts have been made to overcome this clash of priorities – for instance, by incorporating balance of power considerations into international law, or conversely by keeping balance of power issues distinct from the operation of international law – this conflict remains a major limitation of international law⁶⁶.

Thus, according to Bull, the problem of aggression cannot be fully addressed within the parameters of international law, because in the event that aggression occurs, and international law and the balance of power collide, it is inevitable the tenets of international law will be made subordinate to the response dictated by the balance of power. There is such an “intimate connection between the effectiveness of international law in international society and the functioning of

⁶⁴ See discussion in Bull, *The Anarchical Society*, pp106-112.

⁶⁵ see discussion in Bull, *The Anarchical Society*, pp140-142

⁶⁶ Subsequently, Dunne has argued that outlawing aggression is an example of international society’s “constraining” element: see ‘International Society – Theoretical Promises Fulfilled?’, *Cooperation and Conflict* 30 (1995), pp125-154.

the balance of power’ that it is only if the latter allows states to defend at least some of their rights when they are breached that regard for international law can be preserved at all⁶⁷.

The conclusion that resolution of the problem of aggression falls largely outside what can be achieved by international law also suggests Bull was less optimistic than Wight about the moral relevance of developing a concept of aggression in international law⁶⁸. However, Bull does not entirely overlook moral factors in his analysis: to promote the legitimacy of the special position the great powers enjoy in international society, he argues that the great powers must attempt “to avoid being responsible for conspicuously disorderly acts themselves”, and “to satisfy some of the demands for just change being expressed in the world”⁶⁹. Hence, Bull was sensitive to the challenges presented by the conflict between some of the aims of international society, such as the maintenance of each state’s external sovereignty on the one hand and the objective of peace on the other. He also understood the difficulty of achieving more extensively these aims in a world where self-help remained a key means of recourse available to states, and the value of ‘peace’ in practice was indistinguishable from a moral endorsement of the *status quo*. Thus, from the perspective of international society, shared moral values among states remain important, within the constraints of international political conditions. However, both Bull and Carr seem to suggest that the concept of aggression falls somewhere near the boundary between the two. While

⁶⁷ Bull, *The Anarchical Society*, pp131-132.

⁶⁸ Although Bull’s definition of international society contains reference to ‘common values’, very little of his 1977 work discusses this idea. Greater focus is placed on the ‘common interests’ among states - for instance, see pp66-67 - with no indication of how he intends the two terms to differ.

⁶⁹ Bull, *The Anarchical Society*, pp228-229. In a departure from his demolition of ‘universal’ standards and therefore the entire basis upon which Wight and Bull developed their theories of international society, Carr acknowledges the existence of international morality, and his conclusions and prescriptions on this issue are very similar to those of Wight and Bull: “Any international moral order must rely on some hegemony of power. But this hegemony, like the supremacy of a ruling class within the state, is itself a challenge to those who do not share it; and it must, if it is to survive, contain an element of give and take, of self-sacrifice on the part of those who have, which will render it tolerable to the other members of the world community. It is through this process of give and take, of willingness not to insist on all the prerogatives of power, that morality finds its surest foothold in international – and perhaps also in national – politics.”: Carr, *The Twenty Years’ Crisis* (2001 edition), pp151-152. On the interplay of both realist and utopian elements in Carr’s writing, see Michael Cox’s ‘Introduction’, in that volume, and Ken Booth, ‘Security in Anarchy: Utopian Realism in Theory and Practice’ *International Affairs* 67 (1991), pp527-545.

Bull's analysis suggests the further moral and legal development of the concept of aggression is likely to be compromised through a 'clash' with balance of power priorities, Wight upholds the role of politics generally in driving this development.

World politics as an international society of states informed Ferencz's approach to the concept of aggression, which upheld the international roles of morality and law, and the importance of universal moral standards of state conduct. While it is conceded that a lack of widespread agreement as to the content and operation of these standards leaves states open to the accusation that they are merely paying cheap lip service to altruistic aims at the expense of real action, Ferencz would argue that even lip service is demonstrative of, and contributes to, the ongoing relevance of moral considerations in the international sphere. Thus, the concept of aggression is important for its moral, emotional and hortatory value, and especially as a vehicle for promoting global social objectives.

However, this view is subject to a caveat: according to Ferencz, the significance of international morality is vindicated only if the political progress achieved by the concept of aggression in terms of promoting state restraint was followed by a broader movement towards the goals of social justice, peace and security. If the concept of aggression was used exclusively by the great powers to entrench the *status quo*, it would be, at most, "a very fragile shield"⁷⁰. Ferencz cautioned that "unless change by non-violent means is made possible, change by violent means will be made inevitable"⁷¹.

Although Ferencz is quick to recognise the weaknesses inherent in the General Assembly's Definition of Aggression, its value emanates less from its actual content and more as a symbol of broad-based, international consensus not to passively accept ongoing war-mongering. For Ferencz, the fact that this definition emerged from the General Assembly, with its universal state representation and equality of voting, imbued it with a high level of legitimacy, thus further highlighting the strength of this consensus. Consequently, to Ferencz, the General Assembly's Definition of Aggression represented:

^{70 71} Benjamin B Ferencz, *Defining International Aggression* (New York: Oceana Publications Inc, 1975), vol 2, p52.

“a visible reaffirmation of the indomitable hope and determination that there must be legal limits to the use of armed force, and that the existing international anarchy must be brought to an end.”⁷²

Since this time, however, Ferencz has noted a breakdown of consensus in the context of aggression as a crime against peace, it no longer being possible to assume the approach to aggression adopted in the Nuremberg Charter attracts widespread international support⁷³.

Some sense of international society is also evident in Broms' 1968 work on defining aggression⁷⁴. Deftly, Broms avoided discussing the basic, political issue – namely, the purpose of, or rationale for, a definition of aggression – instead concentrating on outlining his own definition prescriptions. However, these prescriptions are not simply flights of fancy on Broms' part; he does acknowledge to some extent the constraints of international political conditions. Thus, for example, he noted that the main prerequisite of any definition of aggression was acceptance of it by the P5 powers. This justified a definition which strongly reflected the wishes of these states⁷⁵. As a consequence, Broms advocated the limitation of the definition of aggression to armed activities in light of substantial Anglo-American resistance to anything broader in scope at the time of writing. Broms' prescriptions attempt to forge the middle ground between balance of power priorities and international law, which Bull was so sceptical about in the context of aggression. Despite the difficulties posed by this task, Broms remained committed to its completion:

⁷² Ferencz, *Defining International Aggression*, vol 2, p53.

⁷³ Benjamin B Ferencz, 'Can Aggression Be Deterred By Law?' *Pace International Law Review* 11 (1999), pp341-360 at pp349-350. More recently, Dinstein too acknowledged some ongoing disagreement about the crime of aggression, although he still maintained its solid status in international law, on the basis of a series of General Assembly resolutions and associated efforts by the International Law Commission: “the criminality of aggressive war has entrenched itself in an impregnable position in contemporary international law. It is true that the full consequences of this criminality are not always agreed upon...But it cannot be denied that responsibility for international crimes, as distinct from responsibility for ordinary breaches of international law, entails the punishment of individuals.”: Dinstein, *War, Aggression and Self-Defence*, p113.

⁷⁴ Bengt Broms, *The Definition of Aggression in the United Nations* (Turku: Turun Yliopisto, 1968).

⁷⁵ Broms, *The Definition of Aggression in the United Nations*, p157.

“So much work has already been done by the various organs and suborgans of the United Nations, not to mention the organs and suborgans of the League of Nations, that to abandon this question now, when there is apparently a slightly better understanding among the members of the United Nations and especially among the permanent members of the Security Council, would be a great pity.”⁷⁶

A less optimistic view is taken by Antonopoulos, though some sense of international society is implicit to his discussion of aggression as a crime against peace. According to him, ‘aggression’ is only useful as a basic classification device, not as a notion in and of itself:

“What really matters is the unlawfulness of the use of force and its magnitude, not by reference to an abstract concept of aggression, but to fact and legal evaluation on the basis of the current state of the law regarding the use of force by states. This is possible only if aggression is viewed as a generic term connoting unlawful use of force, and not as an abstract concept having a life of its own, which presupposes by definition the unlawfulness of a use of force as if every controversy surrounding the use of force by states has been resolved.”⁷⁷

Antonopoulos noted that states continue to search for a universally acceptable definition of aggression, as confirmed by the wording of article 5(2) of the Rome Statute⁷⁸. He argued that this preoccupation with defining aggression delays further the possibility of future prosecutions of crimes against peace, and serves the purpose of obscuring from superficial view the very real hesitancy of states to

⁷⁶ Broms, *The Definition of Aggression in the United Nations*, p156. It is perhaps because of this steadfast commitment in the face of great political obstacles that Broms was later appointed as chair of UN efforts to define aggression in 1973-1974, immediately prior to the adoption of the General Assembly’s Definition of Aggression.

⁷⁷ Constantine Antonopoulos, ‘Whatever Happened to Crimes Against Peace?’ *Journal of Conflict and Security Law* 6 (2001), p47. Pompe has argued that it is wrong to claim the non-existence of the concept of aggression “For the concept of aggression was transferred from the field of particular conventions to that of general international law at the moment an international organ was given the power to designate a State as aggressor, with legal consequences for the whole society of States”: CA Pompe, *Aggressive War an International Crime* (The Hague: Martinus Nijhoff, 1953), p71.

⁷⁸ Article 5(2) reads: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”: The 1998 Rome Statute of the International Criminal Court, available online <www.un.org/law/icc/statute/romefra.htm>

subject their resorts to interstate force to judicial inquiry⁷⁹. For the purposes of prosecuting aggression as a crime against peace, therefore, the crucial requirement is a decision as to whether or not the use of force in question is lawful, not a definition of aggression beyond that which appears in the Nuremberg Charter. Unfortunately, however, there are some serious difficulties with this line of argument⁸⁰.

(3) Conclusion

In this chapter, the concept of aggression in international relations has been examined in its theoretical context. Two essential features of aggression were identified and discussed: (1) the use of international armed force; and (2) the judgment of that use as wrong. The implications of these features were then explored through the lens of three approaches to international theory: (1) liberalism; (2) realism; and (3) international society. It was found that in modern international relations, the concept of aggression originated from developments in liberal thought, which prioritised the abolition of war through a collective security system designed to combat 'aggression'. By contrast, realism denied the concept of aggression any special status; like all other issue-areas in international relations, it was simply another subject in relation to which each state could compete with others in an effort to ensure its vital, national interests were maximally asserted. Meanwhile, international society theorists developed a middle path between liberalism and realism, acknowledging the limitations imposed by political factors in the international sphere, yet at the same time upholding the relevance of international law and morality within those limitations. It was demonstrated that although the analyses presented by Wight and Bull

⁷⁹ Antonopoulos, 'Whatever Happened to Crimes Against Peace?' , p62.

⁸⁰ The main difficulty with Antonopoulos' argument is that it does not actually advance very far the literature on aggression. Even if we accept his contention that aggression is best considered as a category term for unlawful uses of force, the vital decision about the legality or otherwise of a particular use of armed force raises all the same controversial assumptions as when aggression is approached as a concept – for instance, the existence of universal legal standards of state conduct, international authorities with binding power to develop and enforce these standards, and the moral value of peace. When Antonopoulos refers to "fact and legal evaluation", he overlooks the extent to which, at the international level, these are themselves influenced by political considerations. Antonopoulos' perspective is important, however, in terms of the overall argument of the thesis: it demonstrates how transforming an unresolved international political debate into a question of international law contributes little, if anything, to the resolution of that debate.

suggest that both recognised the high degree to which the concept of aggression was held hostage to international political conditions, some disagreement existed between them as to consequences of this. By examining the concept of aggression in practice and assessing its significance, this thesis will reveal further insight into the relative persuasiveness of these three approaches as explanations of international relations.

Chapter Two: Aggression in the post-World War One Settlement

The concept of aggression arose in the post-World War One settlement as part of Woodrow Wilson's dream of establishing a global collective security system, which would displace traditional power politics and alliance-building in favour of a universal peace enforcement body founded upon shared moral values. However, despite Wilson's charismatic leadership and popularity with peoples in many nations, his vision was not shared by: (1) some within his own administration; (2) foreign governments, that were still smarting from their own experience of World War One; or (3) the US Senate. The influence of this opposition in the drafting and ratification of the League Covenant, in article 231 of the Treaty of Versailles concerning reparations, and in articles 227-230 proposing a trial of Kaiser Wilhelm and other German nationals overwhelmed Wilson's original aim of an entity incorporating a positive, mutual guarantee among signatories to defend each other against aggression. The result was the creation and operation of a post-World War One international security system which reflected the immediate political priorities of the major European powers to a far greater extent than Wilson's expansive, international moral aspirations. In particular, the concept of aggression's role both at the centre of the new international security system and at the heart of the punitive peace terms imposed upon Germany demonstrated the degree to which the traditional, diplomatic tools of alliances and balance of power co-existed with Wilson's new approach to international security.

(1) Aggression and the League of Nations: Article 10 of the Covenant

(a) Pre-Paris Drafts: 1914-1918

The concept of aggression originated at the US Presidential level in relation to efforts to organize international politics in the post-World War One period according to a collective security model. In December 1914, Colonel House, confidant of President Wilson, approached him with a proposal for an agreement between the US and the

states of South America, the substance of which was summarized by the President as follows:

“1st. Mutual guarantees of political independence under republican form of government and mutual guarantees of territorial integrity.

2nd. Mutual agreements that the Government of each of the contracting parties acquire complete control within its jurisdiction of the manufacture and sale of munitions of war.”¹

House argued that, if successful, this type of accord could also act as a model for the nations of Europe once the war ended. However, Wilson quickly saw its potential for securing not just a European peace but a global one, so that during his re-election campaign of 1916, he announced that “the world has a right to be free from every disturbance of its peace that has its origins in aggression and disregard of the rights of peoples and nations”². In January 1918, Wilson publicized his plan for postwar settlement: the Fourteen Points. It was the last of these points which captured Wilson’s vision of postwar international security:

“14. The formation of a general association of nations under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity for large and small states alike.”³

Thus, with states committing themselves to act jointly in defence of one another's political independence and territorial integrity, war could be averted and the old *realpolitik* system would be overcome. This approach rested on the assumption that all participants accepted peace – and the particular distribution of power upon which it was made manifest – as a moral value. This shared moral outlook meant that challenges to peace would be identifiable by all participants, who would collectively mount a full, final and punitive response. Of course, for a security system in which peace was ascribed moral value to work, some method of peaceful change would

¹ Charles Seymour, *Intimate Papers of Colonel House* (London: Ernest Benn Ltd, 1926), vol 1, p216.

² Address to American League to Enforce Peace of May 27, 1916, quoted in Bruce Williams, *State Security and the League of Nations* (Baltimore: Johns Hopkins Press, 1927), p70.

³ Martin Griffiths, *Fifty Key Thinkers in International Relations* (London: Routledge, 2000), p97.

have to be permitted, and it was this aspect of collective security which Wilson focussed upon in the lead-up to the Paris Peace Conference.

However, Wilson's desire for a collective security system was not universally embraced amongst his American advisers. From his Fourteen Points speech up until his arrival in Paris almost a year later, Wilson's own, verbose version of what was to become article 10 of the League Covenant - the crux of the new collective security system - had not changed:

“The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.”⁴

The many difficulties raised by such a detailed and unconventional provision were not lost on some of those within Wilson's government. Robert Lansing, the Secretary of State, urged Wilson on January 7, 1919, to adopt a negative form of guarantee, arguing that most states favoured an agreement of “self-denying character”⁵ than binding themselves to a vague duty to act in the future. He also noted that anti-League interests would exploit a positive guarantee, especially in the US, by questioning its consistency with the US Constitution's allocation of war-making powers, the Monroe Doctrine and the traditional American foreign policy of isolationism, thus helping to undermine American support for the League. David Hunter Miller, Legal Adviser to the American Peace Commission, initially backed

⁴ David Hunter Miller, *The Drafting of the Covenant* (New York: GP Putnam's Sons, 1928), vol 2, p70.

⁵ Miller, *The Drafting of the Covenant*, vol 1, p30.

Lansing's view, but became more apathetic as time passed, probably in response to Wilson's insistence on positive guarantees⁶.

It was against this background of discussions that by January 20, 1919, Wilson had incorporated the words "as against external aggression" into the second line of his draft article, after the words "territorial integrity", on the suggestion of General Tasker Bliss. From Bliss' military perspective, it was important to clarify the nature of the guarantees being entered into, and more specifically to stipulate that member obligations among members extended to aggression from non-domestic sources only. Wilson himself also recognized the necessity of preserving the rights of each people within a state to revolt against their own government⁷, and hence he included the Bliss amendment.

It is important to note that Wilson's focus was to create a living institution with the scope to address all international threats to the peace; he placed little value on the consideration of legal technicalities, and therefore concerns about the vagueness of the meaning of 'aggression' or the very wide scope of the obligations being created were of little consequence to him⁸. From Wilson's perspective, an international system that recognized the moral value of peace would have no difficulty recognizing

⁶ Miller, *The Drafting of the Covenant*, vol 1, pp30-33. In his account, Miller claims to have had an equivocal attitude to article 10 at the time of the events. Miller's apparent equivocation can be contrasted with the position taken by Lansing, who was increasingly left out as his opposition to Wilson's objectives and methods became more frequent and rabid: see Lansing's account for a scathing attack on Wilson and the record of the deterioration of their relationship: Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin, 1921). However, certain of Lansing's claims have been subject to challenge on the basis that many of the memoranda supposedly comprising his diary may in fact have been written later in time: see Arthur S Link (ed), *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966), vol 54, p4.

⁷ Link, *The Papers of Woodrow Wilson*, vol 55, p319. This interpretation – namely, that League assistance could not be sought by a member to "suppress a national movement within its boundaries" – is supported by Frederick Whelen, *The Covenant Explained, For Speakers and Study Circles* (London: League of Nations Union, 1935), p62.

⁸ Lansing claimed that Wilson announced during a meeting of the American delegation to the Peace Conference: "I don't want lawyers drafting this treaty" (Link, *The Papers of Woodrow Wilson*, vol 54, p4); however this claim is dubious for the reasons detailed in footnote six of this chapter. Nevertheless, Lamont's observation of Wilson's intolerance of technicalities in the context of reparations lends support to this view: see TW Lamont, 'Reparations', in Edward Mandell House and Charles S Seymour (eds), *What Really Happened at Paris* (London: Hodder and Stoughton, 1921), pp259-290.

aggression in practice, and unlike narrower terms such as ‘armed attack’, or ‘armed hostilities’, ‘aggression’ was sufficiently flexible to move with the times, capturing innovative ways of destroying a state’s political independence or territorial integrity. As a Covenant term, ‘aggression’ had the added advantage of currency in everyday language, important to Wilson for a number of reasons. Firstly, it reflected his high level of popularity amongst peoples worldwide, and Wilson’s eagerness to achieve a “people’s peace”⁹. Secondly, its incorporation at the heart of the Covenant helped to communicate reassurance to the public that its hopes for a new international security system to prevent another World War One had been accomplished. Thirdly, identifying ‘aggression’ as the main target of League action acted as an invitation to the public to participate in world affairs: it brought the burgeoning, political watchdog power exercised by public opinion to bear upon one of the most prized and jealously guarded decision-making powers traditionally reserved to a tiny minority within the realm of high politics¹⁰.

Since the Fourteen Points speech, Britain too had been drafting plans for implementing Wilson’s goal. The Phillimore Plan of March 1918¹¹, the Smuts Plan of December 1918¹² and the Cecil Plan of January 14, 1919¹³ all reflected the British preference for a negatively-framed guarantee: namely, a promise by League

⁹ Remarks to Working Women in Paris of January 15, 1919, quoted in Link, *The Papers of Woodrow Wilson*, vol 54, p273. Indeed, Herbert Hoover observed that “when Mr Wilson arrived in Europe, he was almost believed in as the Second Messiah by the common people of every nation”: Herbert Hoover, *America’s First Crusade* (New York: Charles Scribner’s Sons, 1942), p9. Wilson’s tremendous popularity with ordinary folk can be compared with his lack of rapport with their leaders, which has been described thus: “his presumption of superior knowledge and divine guidance often outraged those who had to do business with him”: George Scott, *The Rise and Fall of the League of Nations* (London: Hutchinson, 1973), p39. This view is supported by the writing of Harold Nicolson - at the time, a junior member of the British delegation to the Paris Peace Conference - who wrote, in relation to Wilson’s negotiations with Italy concerning the peace settlement, “It was his early shambling over the Italian question that convinced us that Woodrow Wilson was not a great or potent man...”: Harold Nicolson, *Peacemaking 1919* (London: Constable, 1934), p184.

¹⁰ Wilson explicitly acknowledged in the lead-up to the Covenant “we are depending primarily and chiefly upon one great force, and that is the moral force of the public opinion of the world...” Miller, *The Drafting of the Covenant*, vol 2, p562.

¹¹ Reproduced in Miller, *The Drafting of the Covenant*, vol 2, pp3-6. The Right Hon. Sir Walter GF Phillimore served as a Lord Justice of Appeal from 1913 to 1916.

¹² Reproduced in Miller, *The Drafting of the Covenant*, vol 2, pp23-60. General Jan Christiaan Smuts served on the British War Cabinet from 1917 to 1919.

¹³ Reproduced in Miller, *The Drafting of the Covenant*, vol 2, pp61-64. Lord Robert Cecil served as the chief British negotiator for a League of Nations at the Paris Peace Conference.

members *not* to start a war: (1) without first submitting the dispute to the prescribed settlement procedure, and (2) against any member that complied with the result of this procedure. Only in the event that a member breached this undertaking did the other states accept the active obligation to take all measures appropriate for restraining that member. The situation where the procedure produced no result was left open, and thus presumably the path to war also. This approach was a significant departure from the Wilsonian preference of a system of positive guarantees, and remained a source of tension between the British and American delegations from the commencement of negotiations in Paris onwards.

In the face of Wilson's insistence on the establishment of positive guarantees to tackle aggression as the foundation of the League system, it is not surprising that Britain eventually changed strategy and released a new proposal, replacing Wilson's guarantees with the undertaking:

“to respect the territorial integrity of all States members of the League, and to protect them from foreign aggression, and they agree to prevent any attempts by other States forcibly to alter the territorial settlement existing at the date of, or established by, the present treaties of peace.”¹⁴

A few days later, Miller was sent to meet with Cecil in order to agree to a joint Anglo-American draft, which produced in its first sentence virtually the first part of what became article 10:

“The High Contracting Powers undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all States members of the League...”¹⁵

The rest of the provision from this draft, which attempted to reconcile with this duty the issues of self-determination and peaceful change, was later abandoned¹⁶. This

¹⁴ Miller, *The Drafting of the Covenant*, vol 2, p106.

¹⁵ Miller, *The Drafting of the Covenant*, vol 1, p71.

¹⁶ The rest of the provision of the Cecil-Miller draft had read: “If at any time it should appear that any feature of the settlement made by this covenant and by the present treaties of peace no longer conforms

sentence from the Cecil-Miller draft was later incorporated into the Hurst¹⁷-Miller draft of February 1, 1919, which was subsequently chosen as the basis upon which discussions of the League of Nations Commission would occur¹⁸. Hence, prior to Paris, Wilson's vision of positive obligations to combat aggression remained largely in tact.

(b) The Paris Peace Negotiations, 18 January 1919-21 January 1920

British unease with the radical Wilsonian vision of combatting every aggression affecting the territorial integrity or political independence of League members did not wane at Paris. Although Cecil's own draft of January 20 referred to 'aggression', it is evident that its meaning continued to worry him deeply throughout the Commission's discussions. Miller reported that Cecil believed the article 10 obligation extended to war "if it means anything", and "that things are being put in [to article 10] which cannot be carried out literally and in all respects"¹⁹. In fact, according to Miller, Cecil still opposed creating positive obligations in principle, and wished article 10 as drafted to be struck out entirely²⁰. Britain was supported in this view by Canada and Australia, both of which feared greatly being dragged into another European war²¹.

to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties any modification which it may think necessary. If such recommendation is not accepted by the parties affected, the States, members of the League, shall cease to be under any obligation in respect of the subject matter of such recommendation. [In considering any such modification the League shall take into account changes in the present conditions and aspirations of peoples or present social and political relations, pursuant to the principle, which the High Contracting Powers accept without reservation, that Governments derive their just powers from the consent of the governed.": Miller, *The Drafting of the Covenant*, vol 2, p134.

¹⁷ Cecil Hurst was a British legal adviser at the Paris Peace Conference.

¹⁸ See the minutes of the first meeting of the Commission in Miller, *The Drafting of the Covenant*, vol 2, pp231-255. The League of Nations Commission was established January 25, 1919 by plenary session of the Paris Peace Conference. The Commission was composed of two representatives from each of the five great powers – that is, the US, British Empire, France, Italy and Japan - and five representatives chosen by the lesser Allies – namely, Belgium, Brazil, China, Portugal and Serbia: George W Egerton, *Great Britain and the Creation of the League of Nations* (London: Scholar Press, 1979), p111.

¹⁹ Miller, *The Drafting of the Covenant*, vol 1, pp168-169.

²⁰ Miller, *The Drafting of the Covenant*, vol 1, p169.

²¹ Miller, *The Drafting of the Covenant*, vol 1, p281; text of the Borden memorandum and Hughes critique, pp354-368. This was the beginning of Canada's campaign to demolish article 10 entirely: see below. The high number of casualties lost by Canada and Australia in World War One explained to a great extent their reluctance to commit to an international guarantee against aggression: according

However, knowing that complete abolition of the article was a political impossibility, Cecil settled for proposing, on behalf of Britain, the omission of “and preserve as against external aggression” from the text, in an attempt to limit the scope of the obligation being undertaken. To abide by the minimal, vague requirement to *respect* the political independence and territorial integrity of members was one thing; to agree to *preserve* these *against external aggression* – an explicit, active, open-ended duty – was quite another. In light of Britain’s status as a great power, it was aware that the cost of any collective anti-aggression response would fall disproportionately on its shoulders, and hence it was loath to commit itself to a broad-ranging obligation to act in uncertain and potentially unforeseeable future conditions. When it became evident that Britain would not achieve its proposed amendment, Cecil later sought to further qualify article 10 by suggesting the addition of a clause permitting the intermittent revision of treaties – a provision enabling peaceful change in international relationships to occur. However, Cecil later conceded that this would not only undermine the duty to preserve, but also the basic ‘respect’ obligation, hence the peaceful change provision was incorporated elsewhere in the Covenant²².

By contrast, France proposed to omit article 10’s reference to territorial integrity and existing political independence, thus widening the obligation of state parties to act in relation to *all* external aggression. The development of article 10 thus far was viewed by France as much too weak, and it fought hard for a more powerful League. According to the French view, this League would include an international general staff to consider military and naval questions, with a rapid reaction force at its

to one source, each country lost just under 50% and 65% respectively of the total number of soldiers they mobilised: Lt the Honourable Staniforth Smith, *Australian Campaigns in the Great War* (Melbourne: Macmillan, 1919). For further details of Canadian and Australian objections, see Egerton, *Great Britain and the Creation of the League of Nations*, p145-147. The UK remained staunchly opposed in principle to the notion of general guarantees throughout the League negotiations: Frederick S Northedge, *The League of Nations Its Life and Times 1920-1946* (Leicester: Leicester University Press, 1986), p20.

²² Article 19 provided that “The Assembly may from time to time advise the reconsideration by Members of the League of Treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.” Text available online <<http://www.yale.edu/lawweb/avalon/leagcov.htm#art19>>

disposal comprised from the armed forces of members. In light of France's experience of World War One, it sought from the Covenant the very strongest and most extensive guarantees possible, especially if, as Wilson intended, the League was to supersede alliances as the traditional means of regulating the balance of power. Failing the achievement of ironclad security guarantees in the League Covenant, France would have preferred to abandon the League altogether and return to conventional security measures employed at the conclusion of wars: namely, the imposition of a punitive peace on the vanquished, and a new round of alliance building²³.

The American position was predictable. Wilson strongly supported collective security, maintaining the importance of article 10 on the basis that "there must be a provision that we mean business and not only discussion. This idea, not necessarily these words, is the key to the whole Covenant."²⁴ He wanted to ensure that the League, from its commencement, was "more than an influential debating society"²⁵. To overcome the divergence between the expansive French approach to the League and the conservative British approach, Wilson suggested the addition of the second part of article 10: "In case of any such aggression the Executive Council shall advise the plan and the means by which this obligation shall be fulfilled." This reassured the British that the Council – on which Britain would hold a permanent seat – would in practice control League responses to any alleged aggression, thus qualifying to a significant extent the broad, abstract and positive undertaking Wilson required. This addition also carried implications of the institutionalization of international military decision-making and cooperation which the French favoured, and for these reasons the suggestion was acceptable to both Britain and France, and thus was adopted²⁶.

²³ In fact, the traditional approach to security based on alliance building remained privately the preference of some French negotiators, such as Clemenceau, the French Premier, who announced on December 29, 1918, that "there is an old system which appears to be discredited today, but to which...I am still faithful. Here in this system of alliance...is the thought which will guide me at the conference": Thomas J Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order*. (New York: Oxford University Press, 1992), p198.

²⁴ Miller, *The Drafting of the Covenant*, vol 1, p168.

²⁵ Williams, *State Security and the League of Nations*, p76.

²⁶ On the French desire for a strong provision: see Alfred E Zimmern, *The League of Nations and the Rule of Law 1918-1935* (London: Macmillan, 1939), p247.

The remaining drafting changes were largely cosmetic. Thus, by February 14, 1919 the day Wilson left Europe to consult members of the legislative bodies in the US about the Covenant, article 10 read:

“The High Contracting Parties undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all States members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Executive Council shall advise upon the means by which this obligation shall be fulfilled.”²⁷

Although discussions about article 10 continued on Wilson’s return to Europe on March 14, it is largely this text which was finally adopted into the Treaty of Versailles and agreed by the Allied and Associated Powers and Germany on 28 June 1919. Throughout the Paris negotiations and in the League provisions of the Treaty of Versailles, then, the drafting of the ‘guarantee’ against aggression in article 10 of the League Covenant revealed the tension between the pursuit of political self-interest by the major European states in the aftermath of devastating conflict, and the aim of avoiding another world war through the establishment of a new, morally-driven security system.

(c) Wilson, Article 10 and The Fight for Ratification

The significance and operation of article 10 were central in the battle to secure US ratification of the Treaty of Versailles. Confusion reigned over the article; however, once the status of the Monroe Doctrine with respect to the Covenant had been clarified²⁸, two issues remained: (1) the interrelationship between the Covenant and the war-making power of Congress; and (2) the degree to which article 10 froze the

²⁷ Miller, *The Drafting of the Covenant*, vol 2, p330.

²⁸ In article 21 of the Covenant, the effect of ‘regional understandings’ such as the Monroe Doctrine was expressly preserved. Text available online <<http://www.yale.edu/lawweb/avalon/leagcov.htm#art21>>.

1919 political and territorial *status quo*, endorsing it with uniform legitimacy worldwide.

In response to the first concern, Wilson emphasised the “new role and...new responsibility”²⁹ of the US created out of World War One, and the moral character of article 10. “All the ideals of American history”³⁰ militated against the US continuing in its isolationist foreign policy. To the Senate Foreign Relations Committee on August 19, 1919, Wilson reaffirmed that in the event of an external aggression, the US retained veto power over any decision by the Council to advise members as to their obligations. Thus, the significance of article 10 was ethical: it formed “a very grave and solemn moral obligation”, but not a legal one, and hence was “binding in conscience only, not in law”³¹. On questioning, Wilson reiterated that the article represented “an attitude of comradeship and protection among the members of the League, which in its very nature is moral and not legal”³². According to Wilson, if an obvious breach of article 10 occurred, such as an uncontested invasion, the only legal duty which would arise on the part of a member would be to apply the “automatic punishments of the Covenant”³³. There would be no immediate legal obligation to wage war, though Wilson conceded, depending on the circumstances, there might be “a very strong moral obligation”³⁴. Wilson’s efforts to focus on the moral value of article 10 and play down its legal effect did not impress the Committee on Foreign Relations, which stipulated in its report to the Senate:

“Under no circumstances must there be any legal or moral obligation upon the United States to enter into war or to send its army and navy

²⁹ Knock, *To End All Wars*, p251.

³⁰ Knock, *To End All Wars*, p261. In Wilson’s view, the US was a participant “whether we would or not, in the life of the world. The interests of all the nations are our own also. We are partners with the rest. What affects mankind is inevitably our affair...”: James Walker, *State Morality and A League of Nations* (London: TF Unwin Ltd, 1919), p42.

³¹ Williams, *State Security and the League of Nations*, p76.

³² Williams, *State Security and the League of Nations*, p77.

³³ Williams, *State Security and the League of Nations*, p77.

³⁴ Williams, *State Security and the League of Nations*, p77. Contrary to Wilson, Williams argues that article 10 did create a legal obligation, despite a lack of specified sanction in the Covenant; if the presence or absence of a sanction determined the issue, this would “set up a criterion of legality which would deny the quality of law to practically the whole body of customary and conventional rules which govern the relations of states”: pp85-6.

abroad or without the unfettered action of Congress to impose economic boycotts on other countries...nor can any opportunity of charging the United States with bad faith be permitted..."³⁵

In relation to the reverse situation – the power of the League to curb unilateral US action – Wilson was more realistic: the League would, to a certain extent, infringe the sovereignty of the US, but the requirement that League decisions be unanimous meant the US could prevent any action being taken against itself. In any case, the Council only had the power to advise; it was up to individual states to decide whether or how to implement Council decisions. Thus, US actions would in all likelihood remain free from interference. However, the mere possibility of interference from non-American sources in US foreign affairs was seized upon by staunch opponents of the League, such as Senator Henry Cabot Lodge, and exploited to great effect³⁶.

The second concern also generated much public debate. Some viewed article 10 as cementing for all time the mistakes contained in the peace treaty, thereby requiring the US to guarantee indefinitely an unjust and unstable settlement³⁷. Others viewed article 10 as a form of validation of those empires already in existence. Certain commentators also pointed out the inconsistency between the new rules accepted as the *modus operandi* of the League, and the way in which the post-World War One peace settlement itself had been achieved via recourse to old-style diplomacy³⁸. In defence of the article, Wilson noted the protection it offered to small states, and the restraints it placed on the more powerful. Without article 10,

“we have guaranteed that any imperialistic enterprise may revive, we have guaranteed that there is no barrier to the ambition of nations [including the United States] that have the power to dominate, we have

³⁵ Williams, *State Security and the League of Nations*, pp78-79.

³⁶ Lodge described article 10 as a “very perilous promise”: Link, *The Papers of Woodrow Wilson*, vol 55, p312.

³⁷ Knock, *To End All Wars*, pp253-254. Thus, a journalist for *Dial*, the left-wing liberal fortnightly publication, wrote that article 10 was dangerous because it appeared “in effect to validate existing empires”: p253.

³⁸ see the comments of Oswald Garrison Villard, editor of *Nation*, in Knock, *To End All Wars*, p253-254.

abdicated the whole position of right and substituted the principle of might.”³⁹

Despite Wilson’s responses to the concerns raised in relation to article 10, it remained the main target of League opponents, and played a leading role in the Senate’s rejection of the Covenant, and consequently also the Treaty of Versailles, on November 19, 1919⁴⁰. Thus, Wilson’s efforts to establish a values-based collective security regime targetting aggression to replace conventional means of promoting international security were ultimately undermined from within. Though the values underpinning Wilson’s vision were broadly American in origin, these were made subordinate to American domestic concerns about the political impact of Wilson’s system on US foreign policy decision-making, therefore preventing the US from joining the League. Hence, the League was robbed of its most powerful potential ally in the development of its new approach to international security.

(2) Aggression and the End of World War One: Article 231 of the Treaty of Versailles

The conflict between old-style diplomatic practices and the new, morally-driven approach to security was also evident in the reparations provisions of the Treaty of Versailles. That Germany had to pay something to fix the damage resulting from four years of industrialized warfare was beyond question, even to the Germans themselves. However, the differences in Allied views on what this liability entailed in practical terms were so profound that they threatened to destroy altogether Allied cooperation in the peacemaking process. Despite Wilson’s warning to delegates at the Peace Conference “that it was impossible with one foot in the Old Order and the other in the New to arrive anywhere”, this tension remained⁴¹. It was in these circumstances that a compromise was brokered, with the concept of aggression being

³⁹ Knock, *To End All Wars*, pp261-262.

⁴⁰The Covenant was defeated in the Senate by 38 votes to 53: see Henry C Lodge, *The Senate and the League of Nations* (New York: C Scribner’s Sons, 1925).

⁴¹Georg Schwarzenberger, *The League of Nations and World Order* (London: Constable and Co, 1936), p46.

used to justify the wholesale assignment of moral responsibility for World War One to Germany, and consequently, an accompanying degree of economic responsibility.

Possibly the most profound argument among the Allies concerned whether Germany should be compelled to pay reparations for civilian damage, or an indemnity, which would include reparations and a portion of the Allies' war costs. Informed by both legal advice and League aspirations, the American view favoured reparations only: the US interpretation of the pre-armistice agreement of November 5 1918 signed between the Allies and Germany precluded compensation for anything other than civilian damage. Indeed, Wilson argued in response to the inclusion of war costs that it "is clearly inconsistent with what we deliberately led the enemy to expect and cannot now honorably alter simply because we have the power"⁴².

However, Britain, France and their associated allies had other ideas, which reflected their own bitter experiences of World War One and their desire to 'make Germany pay'. This was evident from the pre-Armistice agreement onwards, when Britain suggested that reference to German 'invasion' should be replaced by 'aggression', so that Britain, as an uninvaded ally, might secure its own compensation claim, as well as that of its Dominions⁴³. Despite the terms of this earlier agreement limiting German liability to civilian damage, Britain, and every other non-American delegation to the Peace Conference promptly submitted a claim for the reimbursement of all their war costs⁴⁴. Britain was under particular pressure to do so: the Prime Minister, David Lloyd George, had just been re-elected on a platform which had exploited very successfully the desire of the British public and some

⁴²House and Seymour, *What Really Happened at Paris*, p270. For a view of the general approach of the American Delegation to the issue of reparations, see Philip M Burnett, *Reparation at the Paris Peace Conference From the Standpoint of the American Delegation* (New York: Columbia University Press, 1940, 2 vols).

⁴³ Howard Elcock, *Portrait of a Decision: the Council of Four and the Treaty of Versailles* (London: Eyre Methuen, 1972), p34.

⁴⁴ These claims were partly made out of necessity: the US insisted that its Allies repay the loans they obtained from the US to finance their war efforts, and without some substantial contribution from Germany on top of its repayments for material damage, these debts would have crippled the economies of Britain and France, while leaving the German economy relatively unburdened: see Manfred F Boemeke (ed), *The Treaty of Versailles: A Reassessment After 75 Years* (New York: Cambridge University Press, 1998), p224.

newspaper owners to enforce a punitive settlement on Germany⁴⁵. In addition, the inflammatory remarks of Australian Prime Minister Billy Hughes, who insisted upon an indemnity, added to the pressure on Lloyd George to push for the recompense of war costs in full. Once Lloyd George adopted this view at the Conference, public expectations in Britain were raised even higher, placing the Prime Minister in a very difficult position when it became clear that Britain would receive nowhere near her entire war costs in repayment, which exceeded those of France⁴⁶.

Only France was more adamant than Britain that Germany must repay on the basis of an indemnity policy. Having experienced the most direct damage during the war⁴⁷, and still feeling vulnerable, the French had an obvious interest in ensuring that the payment of reparations was sufficiently onerous to keep Germany economically weak for some time. It was also convenient for France to support the maximum reimbursement, even in the knowledge that Germany would not be able to pay it, in the hope of forcing the other Allies to shoulder some of the burden. France favoured the continuation of economic cooperation among the Allies in peacetime and saw this strategy as a way of getting its wish⁴⁸.

By the time of Wilson's departure from Europe on February 14, 1919, it was evident that no consensus as to the final figure Germany should pay would be reached among the great powers. Whereas the US suggested the total sum should be £4.4 billion, Britain argued for £24 billion and France preferred £44 billion⁴⁹. Of course, further exacerbating the difficulty of determining an amount was the fact that at the time of these negotiations, there was simply no way of knowing accurately (1) the extent and

⁴⁵ In one of his election speeches, Lloyd George had declared "we shall go through these Germans' pockets...": Karl F Nowak (translated by Norman Thomas and EW Dickes), *Versailles* (London: Victor Gollancz Ltd, 1928), p145.

⁴⁶ Margaret O Macmillan, *Peacemakers* (London: John Murray, 2003), p202.

⁴⁷ Macmillan, *Peacemakers*, p192.

⁴⁸ Macmillan, *Peacemakers*, p194. Later, in an effort to reduce the UK's share of German payments, and in response to the need for US support to ensure French security priorities were achieved, France argued that costs resulting from direct damage only should be paid: pp202-203. For the role of various French newspapers in pushing for maximum reparations from Germany, see George B Noble, *Policies and Options at Paris, 1919* (New York: Macmillan, 1935), p188-192.

⁴⁹ Macmillan, *Peacemakers*, p195.

value of the damage caused by Germany; and (2) the capacity of Germany to pay for it⁵⁰. The fear of potential consequences if the figure set for repayment by Germany was either too low or too high also played on the minds of the Allies, and influenced their numbers accordingly.

The solution to this impasse was crafted by John Foster Dulles of the American delegation. His idea was to draft a provision stating Germany's responsibility in theory for the whole cost of the war, but reducing its actual liability to an amount that it was able to pay. Thus, similarly to the way in which Wilson would later seek to distinguish between moral and legal obligations created by the League in his submissions to the Senate's Committee on Foreign Relations, Germany's obligations were also neatly separated into moral and legal categories. Dulles' proposal was readily supported by Lloyd George, and article 231 was drawn up and subsequently approved on 7 April as follows:

“Article 231. The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.”⁵¹

Thus, it was the labelling of Germany's conduct in World War One as aggression – the same term used to describe the target conduct and triggering mechanism of the new League collective security system – that justified the punitive measures imposed on Germany by the Allies as part of the peace agreement. While this move assuaged the immediate diplomatic tensions among the Allies, the topic of reparations remained difficult over the longer term⁵².

⁵⁰ Indeed, Temperley claims that the question of Germany's capacity to pay reparations attracted possibly the widest range of views of any subject discussed at the Conference: Harold WV Temperley, *A History of the Peace Conference of Paris* (London: Henry Fraude, 1920), vol 2, p49.

⁵¹ Allied and Associated Powers (1914-1920), *The Treaties of Peace 1919-1923* (New York: Carnegie Endowment for International Peace, 1924), vol 1, p123.

⁵² In the end, it was agreed that Germany would pay £1 billion to the inter-Allied Reparation Commission by May 1921, and that this Commission would then determine how much, when, and at what interest levels Germany would pay, up to a maximum of thirty years.

German reaction to the Treaty of Versailles' reparations provisions was very hostile. Having accepted in principle its financial obligations to compensate for some damage – namely that inflicted upon France and Belgium⁵³ - Germany now found itself lumped with the entire moral blame for the war. Worse, no final payment figure had been included in the Treaty, and the Germans consequently complained of being forced to sign a “blank cheque”⁵⁴. Nevertheless, Germany had little choice but to accept the Treaty terms as proposed, not least because the complex series of interwoven Allied compromises embodied in the draft left limited scope for German input, without destroying altogether the Conference's hard-won achievements⁵⁵. The fact that Germany was kept out of the League system until 1926 also ensured it could not, in the interim, appeal directly to this body to seek variation of the Treaty's terms.

When 1921 came, the Commission set the total amount at £6.6 billion, but in practice, clever drafting and finance arrangements ensured that Germany was bound to pay under half this sum⁵⁶. Though Germany received credit for payments already made, and its payment schedule was revised in its favour a number of times, it continued to oppose bitterly the reparations scheme, and frequently defaulted on payments. That German ‘aggression’ was not merely a political mistake but also somehow morally aberrant behaviour in a way that the previous war-mongering of other powers had not been, was a proposition rejected outright by German opinion. This opposition was masterfully exploited by Hitler and contributed greatly to Nazism's initial rise to power⁵⁷. Other developments also raised doubts about Germany's identification in the Treaty of Versailles as sole aggressor responsible for World War One, such as the publication of Keynes' work⁵⁸ and of previously classified documents which pointed to the responsibility of the prior governments of Russia and Austria-Hungary, arms

⁵³ Boemeke, *Treaty of Versailles*, p226.

⁵⁴ Macmillan, *Peacemakers*, p192.

⁵⁵ Boemeke, *Treaty of Versailles*, p242.

⁵⁶ Macmillan, *Peacemakers*, p490.

⁵⁷ Arnold J Toynbee, “The Main Features in the Landscape”, in Lord Riddell (ed), *The Treaty of Versailles and After* (London: George Allen and Unwin Ltd, 1935), p55.

⁵⁸ John M Keynes, *The Economic Consequences of the Peace* (London: Macmillan, 1919).

manufacturers or capitalism⁵⁹. Thus although by 1932, Germany may have paid only about £1.1 billion reparations in total, events impacting on international political conditions meant that none of the Allies was willing any longer to exercise its enforcement powers under the Treaty in order to compel Germany to pay more. Changing perceptions of the reparations clauses, and the emergence of more pressing political priorities, such as the rise of fascism in Italy and Germany and bolshevism in Russia, overtook the ongoing implementation of the reparations provisions, which were concerned with assigning moral and legal responsibility for political events now long since past⁶⁰.

(3) Aggression and Articles 227-230 of the Treaty of Versailles

Further evidence of the extent to which the promotion of international moral values is constrained by prevailing international political circumstances is apparent in articles 227-230 of the Treaty of Versailles. As part of the Allies' punitive peace terms, in article 227, they stated their intention to try Kaiser Wilhelm, the German head of state during World War One, for "a supreme offence against international morality and the sanctity of treaties"⁶¹. The tribunal established for this purpose would be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality"⁶². Further provisions in the Treaty of Versailles compelled Germany: (1) to accept the right of the Allies to prosecute in military tribunals German nationals alleged to have violated the laws and customs of war or to have committed crimes against Allied

⁵⁹ Macmillan, *Peacemakers*, p489.

⁶⁰ On the impact of the Bolshevik revolution in Wilson's thinking at the time of the peace settlement, see N Gordon Levin, *Woodrow Wilson and World Politics* (Oxford: Oxford University Press, 1968), pp129-153.

⁶¹ Allied and Associated Powers (1914-1920), *The Treaties of Peace, 1919-1923*, vol 1, p121.

⁶² Allied and Associated Powers (1914-1920), *The Treaties of Peace, 1919-1923*, vol 1, p121.

nationals⁶³; (2) to surrender German nationals requested by the Allies⁶⁴; and (3) to provide all necessary documentation in these matters⁶⁵.

Article 227 was included in the Treaty of Versailles as a result of the findings of the Commission on Responsibilities, a fifteen-member panel established in January 1919 by the Paris Peace Conference to inquire into the origins of World War One. The Commission concluded that the German government assisted Austria-Hungary to initiate war against Serbia, and that Kaiser Wilhelm acted either as the leader of the German government at the relevant time, or as the government itself. It further concluded that by Germany's breach of Belgian neutrality, Germany had provoked Britain to enter into World War One⁶⁶. Once again, it was Britain and France that were most in favour of punishing Germany by trying Kaiser Wilhelm; Wilson, the US members of the Commission and Japan all opposed the idea. Nevertheless, Wilson attempted a draft of article 227 which included an explicit statement that the offence Kaiser Wilhelm was being charged with was not criminal. However, this was later excluded, probably on the suggestion of Lloyd George, Britain's prime minister⁶⁷.

The degree to which the Allies had overestimated the force of international morality in international relations was confirmed when they took steps to enforce article 227. Kaiser Wilhelm had already escaped to the Netherlands, a neutral state not party to the Treaty of Versailles, by the time the latter was signed; thus, in January 1920, the Supreme Council issued to the Netherlands a formal demand for Kaiser Wilhelm. The demand implored the Dutch Government to fulfill its:

⁶³ See articles 228 and 229 in Allied and Associated Powers (1914-1920), *The Treaties of Peace, 1919-1923*, vol 1, pp121-122.

⁶⁴ See second paragraph of article 228 in Allied and Associated Powers (1914-1920), *The Treaties of Peace, 1919-1923*, vol 1, pp121-122.

⁶⁵ Article 230 in *The Treaties of Peace, 1919-1923*, vol 1, p122. Although not specifically referring to aggression, these provisions were the precursor to efforts in the aftermath of World War Two to prosecute Japanese and German leaders for the *crime* of aggression; by its terms, article 227 essentially acknowledged that Kaiser Wilhelm's offence was of a moral nature, not recognized in either international law or criminal law.

⁶⁶ JB Scott, 'The Trial of the Kaiser', in House and Seymour, *What Really Happened at Paris*, pp235-236.

⁶⁷ Scott, 'The Trial of the Kaiser', p237.

“duty to insure the execution of Article 227 without allowing themselves to be stopped by arguments, because it is not a question of a public accusation with juridical character as regards its basis, but an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognized in public law.”⁶⁸

In response, the Dutch Government refused to surrender Kaiser Wilhelm, arguing that it was bound by no international duty to do so, and that Dutch tradition “has made this country always a ground of refuge for the vanquished in international conflicts”⁶⁹. Further correspondence between the Dutch authorities and the twenty-six member Council of Ambassadors, which was charged with implementing the terms of the Treaty of Versailles, took place in February and March 1920 without resolution, and Kaiser Wilhelm enjoyed the protection afforded to him by the Dutch Government for the rest of his life⁷⁰. Thus, the power of international morality was proven to be of little consequence outside that group of states which shared the values it promotes.

The enforcement of articles 228-230 of the Treaty of Versailles experienced a similar fate. At the beginning of February 1920, the Council of Ambassadors identified 900 Germany nationals it wished to prosecute, and presented their names to the president of the German peace delegation in Paris⁷¹. However, Germany later advised that on political and economic grounds, it could not surrender these nationals in accordance with Allied demands, but would be willing to prosecute the 900 before a German court at Leipzig. The Allies accepted this proposal, on the proviso that if they felt that justice had not been served by the Leipzig court, they could establish their own tribunals for trying the German nationals. In the end, only a tiny fraction of this 900

⁶⁸ Scott, ‘The Trial of the Kaiser’, p243.

⁶⁹ Scott, ‘The Trial of the Kaiser’, p244.

⁷⁰ Kaiser Wilhelm died in 1941.

⁷¹ Geo. Gordon Battle, ‘The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes’ *Virginia Law Review*, 8 (1921), p5.

were tried by a German high court, and these were either acquitted or only very lightly punished⁷².

(4) Conclusion

This chapter demonstrated that from the earliest days of the Paris Peace Conference onwards, the post-World War One settlement contained within its terms a strong tension between the Wilsonian ideal of a new international collective security system and traditional security measures aimed at regulating the balance of power, such as alliance-building. As a consequence of this tension, it was revealed that the concept of aggression was used in two different ways: (1) to describe the conduct specifically targetted by the new collective security obligations; and (2) to describe the conduct of Germany in World War One, this latter description acting to justify the punitive terms of the Treaty of Versailles. Thus, the concept of aggression itself exemplified the co-existence of the two competing approaches to international security. However, skepticism about the new collective security model on the part of the major European powers and the failure of the US to ratify the Treaty of Versailles meant that conventional balance of power methods remained the primary means of pursuing international security. Hence, the significant role envisaged for international morality under the collective security model did not eventuate, and instead the impact of moral values was limited by changing political conditions, as fluctuating reactions to articles 231 and 227-230 showed. Nonetheless, the way in which the concept of aggression was used at this time highlighted the strength of reactions to World War One, and the lengths some were prepared to go to in order to avoid such a conflict again.

⁷² Claud Mullins, *The Leipzig Trials* (London: HF and G Witherby, 1922).

Chapter Three: Aggression at the League, 1920-1940

Although the post-World War One settlement had demonstrated the ongoing significance of traditional security methods in the political calculations of the major powers – at the expense of Wilson’s morally-driven collective security model – the tension between these two approaches continued, as the concept of aggression in League policy-making and practice reveals. As long as states insisted upon conventional means of ensuring their own security, collective security would not work, and it was this growing realisation which generated initial efforts within the League to amend the concept of aggression featured in the Covenant. However, these efforts achieved little, and the main result was conflict which was either not prevented or resolved effectively by the League, or simply not addressed within League auspices at all. Yet this is not the entire story: on certain occasions, the concept of aggression under article 10 of the Covenant was invoked and conflict successfully resolved. We now turn to League policy-making and practice to examine further the role of the concept of aggression.

(1) Canadian Attempts to Amend Article 10

The obligation to combat aggression, at the heart of the League Covenant, was not even universally supported among those states that became members of the League. Canada was deeply concerned about the endurance of article 10 despite its protests during the peace negotiations, and proposed the provision be struck out altogether during the first and second assemblies of the League. Canadian opposition revisited criticisms raised during the US ratification debate. The basis premise of article 10 came under direct attack, Canada taking issue in particular with the assumptions that: (a) all existing territorial boundaries were just and expedient; (b) these boundaries would continue permanently to be just and expedient; and (c) the Signatories to the Covenant held themselves responsible for these boundaries¹. In light of the dynamism of international conditions, Canada argued it was not possible to determine

¹ Miller, *The Drafting of the Covenant*, vol 1, p358.

if a given frontier would always conform with the needs of justice, and consequently Canada did not wish to be called upon to defend a potentially unjust state of affairs. Canada also claimed that, if Wilson had been correct and League members were legally free to ignore the advice of the Council as to how to fulfil the obligations created by article 10, the provision was worthless in reality anyway, which was sufficient reason for members seeking to rely upon article 10 for protection, as well as for members providing that protection, to complain².

In response to these concerns, the First Committee of the League drafted a report reiterating that article 10 does not cement the existing territorial *status quo* for all time, but merely delegitimises acts of external aggression as a way of changing territorial integrity and political independence³. Other members favouring a strong League insisted that article 10 was the foundation of the Covenant, and they simply would not entertain the possibility of its exclusion.

However, this did not satisfy Canada, which was still anxious to avoid any commitments which might oblige it to participate in another World War One⁴. By the fourth League Assembly of 1923, accepting that its chances of getting article 10 severed from the Covenant were slim, Canada altered course, suggesting an ‘interpretive resolution’ in order to clarify the scope of article 10. The two main points Canada wished to make explicit were: (1) that the Council, when advising the application of military measures under article 10, would be bound to consider the “geographical situation and the special conditions of each State”⁵; and (2) that each member retained the power to determine to what extent it must use its armed forces in conformity with this obligation. Although, as Walters argues, each of these conditions were implicit in the drafting of article 10 anyway, it had been politically expedient not to acknowledge them expressly, in order to reassure those states most

² World Peace Foundation, *Second Yearbook of the League of Nations: Record of 1921* (Boston, 1922), p195.

³ World Peace Foundation, *Second Yearbook of the League of Nations: Record of 1921*, p196.

⁴ For details of the high proportion of Canadian World War One casualties, see footnote 21 in chapter two of this thesis, p37.

⁵ World Peace Foundation, *Fourth Yearbook of the League of Nations: Record of 1923* (Boston, 1924), p86.

in need of international security guarantees⁶. In the final result, the interpretive resolution was not adopted as a consequence of the single negative vote of Persia, though the resolution attracted support from twenty-eight other powers excluding Canada⁷. However, the Canadian campaign had brought the attention of League members and public opinion to the League's operating assumptions, which continued in force implicitly despite the outcome of the vote.

The widespread awareness of the fact that each League member was ultimately free to decide how to respond to the advice of the Council in the event of an external aggression, which was produced by the Canadian campaign, reinforced the great extent to which traditional security perspectives informed and shaped state practice within the League system. The realisation that the obligations created in relation to aggression under article 10 were not as iron-clad as they first appeared led to a reconsideration of other Covenant provisions and how they might be strengthened. Through this process, another weakness of the Covenant was identified.

(2) The 'Gap' in the Covenant

Certain League members now noted publicly that even if articles 11-16 of the Covenant were strictly adhered to, war was still a legal possibility⁸. The questions

⁶ Francis P Walters, *History of the League of Nations* (Oxford: Oxford University Press, 1952), p259.

⁷ By the end of 1923, there were 54 League member states.

⁸ Article 11 of the League Covenant read as follows: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council. It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends". Article 12 provided that "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council. In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute": *The Treaties of Peace, 1919-1923*, both p14. The text of articles 13-16 is available online <<http://www.yale.edu/lawweb/avalon/leagcov.htm>>. War would still be legal in the event of no award or report being agreed, for instance: see Northedge, *League of Nations: Its Life and Times 1920-1946*, p28.

were raised: how was this 'gap' reconcilable with the undertaking in article 10, and what measures could be taken to eradicate the 'gap', thereby strengthening international security?

In response to these questions – and further proof of the League's subordination to traditional power politics - efforts both inside and outside the League were made to achieve this heightened security. Within the League, the Treaty of Mutual Guarantee and Geneva Protocol never made it past the draft stage, and it was against this backdrop that League attention shifted back to the Covenant, and the issue of defining aggression arose⁹. Noting the great difficulty of gaining unanimous support for any definition of aggression, the League's Committee on Arbitration and Security concluded in 1928 that “any attempt to lay down rigid or absolute criteria in advance for determining an aggressor would be unlikely in existing circumstances to lead to any practical result”¹⁰. Nevertheless, the report of the second session of the Committee identified certain acts, drawn from earlier agreements, which could be classified as acts of aggression in certain circumstances. Two suggestions about *how* to decide whether or not aggression had taken place were also made by the Committee: (1) determination by unanimous vote of the Council, not counting the votes of the belligerent parties, as per the Locarno Treaty system¹¹; and (2) determination as per the Geneva Protocol system, which presumed any state engaged in hostilities was an aggressor. However, the Committee also acknowledged serious objections to both of these approaches¹². The failure of League attempts to broker

⁹ The 1923 Treaty of Mutual Guarantee, which pledged immediate and effective aid to any attacked signatory from all other signatories of the same region, was condemned by the Soviet Union, US, Germany, the European neutrals, and Britain and its Dominions. France, Poland, Czechoslovakia, Belgium, the Baltic states and Finland all supported this Treaty. The 1924 Geneva Protocol, which created a rebuttable presumption that in the event of hostilities, any state is an aggressor (article 10), was opposed by the League's most important member, Britain.

¹⁰ *League of Nations Official Journal* 9 (1928), p671. The year before, Sir Austen Chamberlain, British Foreign Secretary, had expressed in the House of Commons concern that any listed criteria of aggression would create “a trap for the innocent and a signpost to the guilty”: as quoted in Stone, *Aggression and World Order*, p36.

¹¹ The Locarno Treaty is discussed in further detail below.

¹² *League of Nations Official Journal* 9 (1928), p666. This Committee was also responsible for the drafting of the Treaty to Improve the Means of Preventing War (1931) and the Convention on Financial Assistance to a Victim of Aggression (1930), both of which were approved by the Assembly, but which did not enter into force.

new international security assurances and the dead-end it reached in relation to defining aggression led to the abandonment in 1928 of efforts to bridge the ‘gap’ in the Covenant. The League’s focus on ‘defining’ aggression implicitly confirmed the failure of collective security in practice – the concept of aggression was no longer an abstract, universal, unifying, moral notion upon which the maintenance of international security could be assured; it now apparently required ‘definition’ to achieve more effectively its purpose.

(3) The 1933 Soviet Draft Definition of the Aggressor

Efforts to define aggression were revived in 1933, with the submission by the Soviet Union of a Draft Definition of the Aggressor¹³. The Soviet definition listed five acts, the initial commission of which would make any state the aggressor; it expressly rejected any form of political, strategic and economic justifications for the five aggressive acts listed; and it reiterated the right of a threatened state to resort to “diplomatic or other means” for the solution of the conflict, including military measures short of crossing international boundaries. Consideration of this draft definition, along with a Belgian proposal concerning the fact-finding process in the case of aggression, was delegated to the Committee on Security Questions, which produced the Politis Report of May 1933. Ultimately, despite amendments to the Soviet draft, it did not attract sufficient support and was therefore not finalised¹⁴.

This is not surprising, as by 1933 political conditions had shifted once again. By this date, the unwillingness of important League members to address many serious conflicts was very evident from experience¹⁵, and it was equally clear that no definition of aggression – even if consensus around a definition was possible – would overcome this problem on its own. In fact, the Soviet Union’s Draft Definition of the

¹³ League Document Conf.D/C.G.38, reproduced in Ferencz, *Defining International Aggression*, vol 1, pp202-203.

¹⁴ While on the one hand, the Soviet draft was supported by France and China, on the other, Britain, Germany, Hungary, Italy, Spain and Switzerland preferred a more flexible definition which would allow all the relevant circumstances in a particular incident to be considered.

¹⁵ This theme is explored in greater detail in the next section.

Aggressor is better interpreted as a reaction to these changed political circumstances of the 1930s. In particular, the departure of Germany and Japan from the League in 1933 motivated the Soviet Union to submit its Draft Definition of the Aggressor and join the League, so that it would have a basis upon which to call for assistance in the event of German or Japanese attack¹⁶.

(4) International Security Agreements Made Outside the League

The signing of security treaties outside the League merely underscored how far short of collective security the League fell in practice. The 1925 signing of the Locarno Pacts between Germany, France, Belgium, Britain, Italy, Poland and Czechoslovakia was a significant example. According to this treaty, Germany, France and Belgium agreed to view existing boundaries and the demilitarized Rhineland zone as inviolable, and to not attack, invade or resort to war against one another in any circumstance. Britain and Italy, as guarantors of the agreement, were to help any victim state at once in the event of breach. Four arbitration conventions were included in the pacts, and any party which refused to surrender to arbitration, or to abide by the arbitral award recommended in accordance with these procedures, would be considered the aggressor.

The Locarno Pacts undermined League procedures greatly by providing an alternative international forum for discussion and dispute settlement among the important Locarno states. These states no longer had much incentive to use the League, which could only operate with the agreement of a much larger group of nations. Locarno also provided its signatories with a good cover for meeting exclusively and privately to discuss matters of concern, the scope of which extended in practice to include issues properly within the League's jurisdiction. Hence, as early as five years after its establishment, the League had in practice been downgraded to the "influential

¹⁶ Walters, *History of the League of Nations*, p579. Although the Soviet Union had already instigated pacts of non-aggression with all of her neighbours, none of these obliged the parties to help each other fight aggression from a third party. See the text of these treaties of non-aggression between the Soviet Union and Afghanistan, Finland, Poland, and Estonia, as well as similar security agreements with other states, in MM Litvinov, *Against Aggression* (London, 1939), p144-.

debating society”¹⁷ Wilson had feared; the damaging effect of these private “Locarno Tea Parties”¹⁸ is revealed in the next section.

(5) Aggression and League Practice

Further confirmation of the continuing significance of traditional security thinking based on balance of power considerations is evident from League practice. However, this practice also shows that, in certain circumstances, the League’s obligations to combat aggression did operate effectively, though not necessarily in the way League drafters had intended. The following examples illustrate the nature and extent of the contribution to the maintenance of international security made by the concept of aggression.

(a) Successful Applications of Article 10

(i) Greece-Bulgaria Dispute, 1925

Article 10 was first applied successfully in 1925 to a dispute occurring along the frontier between Greece and Bulgaria. In October of that year, following the Greek invasion of Bulgaria, the latter requested on the basis of articles 10 and 11 that the Secretary-General convene immediately a meeting of the Council. Greece denied any aggressive intent, claiming it was compelled to act in defence of its border populations, which were constantly under threat from Bulgarian gangs¹⁹. The next day, the Acting President of the Council issued a telegram to the Greek and Bulgarian governments reminding them of their obligations under article 12 of the Covenant, and urging them to refrain from any further military actions and to return to their respective frontiers pending consideration of the situation by the Council. Three days later, the Council met and placed a time limit of 60 hours on both of the parties to

¹⁷ See footnote 25 in chapter 2 of this thesis, p39.

¹⁸ Walters, *History of the League of Nations*, p341.

¹⁹ World Peace Foundation, *Sixth Yearbook of the League of Nations: Record of 1925* (Boston, 1926), p1708.

bring effect to the Acting President's suggested actions. The Council also requested that France, Britain and Italy send representatives to the area to observe and report once these actions had been completed. By October 29, the Council was informed that both sides had complied with the Acting President's request, and the Council then appointed a Commission of Inquiry to go to site of the incident and investigate its causes. The Commission later concluded in December 1925 that responsibility for the initial incident was shared, and it recommended that Greece pay Bulgaria £45,000 for its losses, a figure which took into account the death of a Greek officer during the skirmish. Once again Greece and Bulgaria complied promptly with the Commission's findings and the dispute was settled.

A more obvious, textbook example of collective security in practice is difficult to imagine. The crossing of a border by armed forces without the prior consent of the relevant state was exactly the type of action caught by 'external aggression' under article 10. Thus, immediate Council response was the obvious requirement, the complication of considering the Greek defence argument unnecessary at this stage. Once the situation had stabilised, then the Commission of Inquiry turned to consider the merits of each side's claims, which is evident in its final conclusion that both states were responsible.

Crucially, League action in this case was made possible because the vital interests of the great powers were not involved; there were no powerful political factors constraining the League in the carrying out of its functions. Without such barriers, the unhindered Council performed its duties effectively, and Greece and Bulgaria had little choice but to follow the Council's recommendations.

(ii) Ethiopia vs British-Italian Agreement, 1926

One of the more unique situations in which the League was approached on the basis of article 10 concerned an agreement between Italy and Britain to support each other in their efforts to promote their economic interests in Ethiopia. Prior to the

agreement, Britain had attempted to negotiate directly with Ethiopia for permission to build a dam in Lake Tsana, but these negotiations had not been concluded. In exchange for Italian backing of this objective, Britain agreed to assist Italy to obtain its own concessions from Ethiopia, which included the grant to Italy of a zone of exclusive economic influence in the west of Ethiopia²⁰.

In June 1926, both Italy and Britain communicated these terms to the Regent of Ethiopia, who promptly forwarded the correspondence and his own letter of protest to the Secretary-General and requested all documents be circulated to League members for their consideration. The Regent interpreted the agreement as a bilateral pact to exert pressure upon Ethiopia in the event that it denied the economic concessions sought, and claimed that this comprised an indirect threat to Ethiopia's territorial integrity and political independence, thus breaching article 10.

Before the Regent had an opportunity to respond to the Secretary-General's inquiry as to whether Ethiopia wished to place the issue on the agenda of the next Council meeting, Britain and Italy sent letters to the Secretary-General disavowing any ill intentions on their part, maintaining that the agreement was only binding between themselves, and upholding the freedom of Ethiopia to make its own decisions. The issue was thus resolved through the good offices of the League before it reached the Council stage.

What is striking about the Ethiopian-British-Italian case is that the Regent of Ethiopia sought to classify as aggression conduct differing greatly from that originally intended by Covenant drafters. Here, no armed hostilities had broken out, nor did there seem any imminent prospect that they would. The aggression complained of was conceived in purely economic and political, not military, terms: the coordination of the strategies of two great powers in their own best interests in order to influence the foreign policies of a weaker power. Why did Britain and Italy back down from their original position, before the Ethiopian situation ever made it on to the Council

²⁰ Walter R Sharp, *Contemporary International Politics* (New York: Rinehart and Co, 1940), p619.

agenda? Ultimately, the political cost to Britain and Italy in terms of embarrassment, damage to reputation and the potential loss of public support for any League system at all in the event of obvious great power bullying outweighed the marginal benefits conferred by the agreement, and thus it was shelved - at least publicly. On this occasion, it was more prudent for Britain and Italy to support the League system in which they enjoyed prominent positions by distancing themselves from an agreement which was inconsistent with League values, than to insist on their own immediate, narrowly-framed self-interest, which might irreparably damage that system.

This scenario revealed how League obligations could be used by smaller powers to defend their own interests against major powers on moral grounds. Though the conduct of Britain and Italy did not constitute aggression as initially envisaged at the creation of the League, it was contrary to the spirit of state equality and cooperation in which the League was established, with the major powers playing a significant role in this establishment. Hence, proof that two of the major powers did not consider themselves bound to act in accordance with values underpinning international standards of their own making was a serious embarrassment, which could undermine confidence in the League system and thus threaten international security. With little to gain from upholding the agreement, Britain and Italy publicly sought to explain their actions in terms consistent with League principles. Ethiopia had successfully used article 10 and the League system to raise awareness of its plight and exert moral pressure on Britain and Italy to back down. However, there would be other occasions when such a strategy would be less successful, most notably when the political costs for the major powers were higher.

(b) Unsuccessful Applications of Article 10

(i) Manchuria 1931-1933

In September 1931, Japanese forces left their posts along the Southern Manchurian railway zone and occupied the Chinese cities of Mukden, Antung and other locations.

China was quick to denounce Japanese actions as aggressive, and formally invoked article 11 of the Covenant in its appeal to the League. Japan argued that the Chinese army had attacked the railway zone, and that Japanese measures were merely by way of response to ensure the safety of the lives and property of Japanese nationals. Although the Council adopted a resolution requesting Japan to withdraw and China to assume responsibility for the safety of the Japanese during this process, a Commission of Inquiry was not sent at this stage. Despite support for a commission from the UK and China, the US viewed direct negotiation between Japan and China as the preferred method of settling the dispute. Hence, in an effort not to isolate the US after the advent of its more cooperative approach to the League since 1928, the Council refrained from sending a commission.

By early October, Japan had bombed the city of Chinchow and there appeared to be few signs that Japan would comply with the Council's September resolution. At the following Council meeting, the US sent a representative, but their role was limited to listening to the Council's discussions as they related to the provisions of the Kellogg-Briand Pact²¹. A second resolution was instigated at the end of October requesting the completion of the Japanese withdrawal within three weeks, followed by the resumption of direct negotiations, but Japan voted against this resolution, and because of the unanimity rule concerning article 11, the resolution was of no legal effect²². Although the major powers were in a position to refute this legal interpretation, each was preoccupied with problems closer to home²³, and the smaller powers were left impotent without major power leadership.

²¹ The signatories of the 1928 Kellogg-Briand Pact, which included the US, agreed in article 1 to renounce war as an instrument of national policy in their relations with one another. John Lewis Gaddis has described the American public of the interwar period as suffering from "a kind of moral anaesthesia in international affairs": 'Order versus Justice: An American Foreign Policy Dilemma', in Rosemary Foot, John Lewis Gaddis and Andrew Hurrell (eds), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2002), p158.

²² Sharp, *Contemporary International Politics*, p576.

²³ For instance, at this time, the UK was struggling with the effects of the global economic depression – September 20, 2 days after Manchurian affair erupted, the UK went off the gold standard: Northedge, *League of Nations Its Life and Times 1920-1946*, p140. Similar economic shocks were experienced in Germany and France: Northedge, *League of Nations Its Life and Times 1920-1946*, p141.

During November and December 1931, the situation deteriorated further, while the League struggled to harness the political will necessary to address the situation and keep pace of events: by the end of February 1932, Japan had three provinces of China under direct Japanese control. Out of desperation, and following the expansion of fighting to Shanghai, on January 29, China requested the application of article 10 to the dispute²⁴. Japan contended that aggression under article 10 occurred only when a member “intends to occupy the territory of another Power with the determination to remain there...when there is permanent occupation with clearly indicated territorial designs”²⁵. Japan sought to argue on the basis of necessity that her actions did not amount to aggression: once the safety of Japanese nationals had been ensured and the possibility of Chinese attack of the railway zone thwarted, Japan would withdraw.

In an attempt to circumvent the paralysis of the Council, the dispute was referred to the Assembly. It was in this forum that public opinion in favour of China began to mobilise, which was China’s primary aim in seeking Assembly involvement. By September 1932, the report of a Commission of Inquiry largely vindicated the Chinese version of events, and the Assembly adopted a series of recommendations for settling the dispute in accordance with this report. Moreover, the US endorsed the Assembly’s conclusions. In the face of such opposition, Japan chose to withdraw from the League in March 1933. By May of that year, both sides had signed a truce which kept the peace between them until 1937.

However, in July 1937, a new outbreak of hostilities near Beijing reignited the Sino-Japanese conflict. China initially approached the signatories of the nine-power Treaty of 1922, which laid down the principle of respect for the *status quo* in China, but a conference of the parties did not result in any action. Thus, in 1938, China appealed to the League for sanctions to be applied against Japan in accordance with article 16. Though the Council determined that members were entitled to apply the

²⁴ In its application, China also referred to Covenant article 15.

²⁵ World Peace Foundation, *League of Nations Official Journal* 13 (1932), p344.

measures stipulated under article 16, in practice this had little effect. By this time, inconsistent application of the obligations under the Covenant was commonplace: Germany and Italy had already been successful in Spain²⁶ and Czechoslovakia, and the most powerful League members were even less prepared to fulfil the duty of combatting Japan. Hence, the great powers' preoccupation with their own vital interests prevented the League from performing its article 10 obligation under the Covenant in relation to the Japanese invasion of China²⁷.

(ii) Italo-Ethiopian Dispute 1935-1936

Lessons for potential aggressors from the Sino-Japanese dispute were not lost on Italy. An incident between Italian and Ethiopian armed forces broke out on December 5, 1934 at Wal-Wal, which Ethiopia requested the Secretary-General bring to the Council's attention. By January 15, 1935 Ethiopia had put in a formal request for the dispute to be included on the Council's agenda. However, Italy convinced the Council and Ethiopia to accept postponement of League discussion in relation to the dispute on the basis that Italy would settle it in accordance with an existing agreement between the two states²⁸. Despite consistent appeals by Ethiopia to the Council to take up the dispute in the months that followed, it was not until September 1935, when Ethiopia exhorted the Council to exercise its powers under Covenant articles 10 and 15 that the Council included the dispute on its agenda.

²⁶ German and Italian assistance to the Spanish rebels during the Spanish War - which commenced in July 1936 - was the substance of an appeal by Spain to the League. Though Spain put forward the case that this amounted to a new kind of aggression that needed to be dealt with under the Covenant accordingly, the ongoing concern of Britain and France not to provoke an open conflict with the Axis powers compelled the former to use their positions of power to discourage League action on the Spanish question. When the issue was finally examined by the Assembly, the response to Spain's wish to be declared a victim of foreign aggression was a proposed resolution that unless all foreign combatants were withdrawn from the conflict immediately and completely, League members would consider abandoning their policy of non-intervention. However, this resolution was defeated; no further League action was able to be taken and the Axis powers were free to continue their activities in Spain.

²⁷ Despite this failure to act, the League did continue to provide technical assistance to China, particularly in relation to the prevention of epidemics among refugees fleeing from the dispute: Walters, *The League of Nations Its Life and Times 1920-1946*, p738.

²⁸ Namely, the 1928 Treaty of Amity, Conciliation and Arbitration between Italy and Ethiopia: see Alfred Zimmermann, 'The League's Handling of the Italo-Abyssinian Dispute', *International Affairs* 14 (1935), pp751-768, at p752.

During the intervening period, Italy had ample opportunity to maximize the delay of League procedures so that its preparations for war could progress. Its main strategy for achieving this was to appear to pursue peaceful options via diplomatic channels outside the League. Britain and France cooperated with Italy in this endeavour because they were relying on Italian support to assist them in combating the increasing threat posed by Nazism. In addition, as a consequence of the intimacy and conviviality of the Locarno power meetings, it seemed appropriate to all three powers to arrive at a solution among themselves, seeking League endorsement for this solution after the fact, rather than using the League from the outset²⁹. Thus, at the Stresa Conference, Britain and France agreed not to promote the Ethiopian request within the League, leaving the issue of Italy's African aims undiscussed, in exchange for Italian backing of Anglo-French ideas for peace in Europe and the continuing obligations of the Locarno treaty³⁰. Britain and France made further attempts themselves to resolve Italy's territorial designs in Africa, but to no avail.

By September, Italy had changed tactics: it now argued that Ethiopia was not entitled to be considered a member of the League at all on the basis of its behaviour and features of its internal regime. It was now too late for Italy to withdraw from its plans, and for the Council to prevent the imminent conflict. On October 3, Italy invaded Ethiopia; four days later, the Council concluded that Italy had resorted to war in violation of article 12, and sanctions were applied under article 16 on November 18.

However, the ongoing Anglo-French priority of keeping potential allies close in the face of rising Nazism meant that the proposals put forward by Britain and France to the League's Sanctions Committee were designed not to provoke from Italy serious retaliatory measures. For this reason also, France indulged Italian bullying by securing a two week postponement of the Sanctions Committee, which provided Italy

²⁹ Walters, *The League of Nations Its Life and Times 1920-1946*, p628.

³⁰ Walters, *The League of Nations Its Life and Times 1920-1946*, p632.

with some much needed respite. When the Sanctions Committee finally met on December 12, the proposal of Britain and France offered Italy an exchange of territories, a zone of economic expansion and settlement in resolution of the dispute with Ethiopia. This proposal was strongly rejected by public opinion in the UK, US and smaller states; but as a new peace initiative requiring consideration by Italy and Ethiopia, it prevented further discussion in the Sanctions Committee of the extension of sanctions to crucial commodities such as oil.

In the early months of 1936, Italy continued its invasion, until it agreed with Ethiopia on March 3 to reopen negotiations at the request of the Council. However, Hitler's rejection of the Locarno Treaty and remilitarization of the Rhineland on March 7 provided Britain and France with even greater reason to be lenient towards Italy. From the Anglo-French perspective, it was now more important than ever to retain Italian goodwill, in order to encourage Italy to enforce the Locarno obligations against Germany. Italy used its membership of the League as a vehicle for wooing Anglo-French support and to secure further delays until its armed forces were victorious and officially annexed Ethiopia on May 9. The League eventually abandoned its failed sanctions the following month, and passed a resolution requesting members to forward to the organization their conclusions from this situation with the aim of improving the application of the Covenant's provisions. Throughout this episode, and up until the Italian withdrawal from the League in December 1937, the coming European conflict with Hitler preoccupied Britain and France and, given their status as important League members, influenced the way in which League procedures were invoked against Italy. League obligations, therefore, proved useless in terms of maintaining international security in circumstances where they conflicted with the balance of power considerations of the major powers. On these occasions, the Italo-Ethiopian dispute demonstrated that to the extent League procedures were applied to such conflicts at all, *how* they were applied would strongly reflect the same balance of power considerations in any case.

(c) Disputes Where Article 10 Was Not Applied by the League

In addition to the abovementioned disputes, certain conflicts were either dealt with by the League in a piecemeal way, or not addressed under League provisions at all, again as a consequence of great power vital interests and balance of power considerations. For instance, when Poland seized the traditional Lithuanian capital of Vilna in 1920, the Council called on the former to cease breaching her obligations under the Covenant, and recommended that the Vilna residents themselves should decide whether to be part of Poland or Lithuania. Despite the agreement to preliminary peace terms, fighting continued, and it was not until seven years later that the Council succeeded in terminating the state of war. The special relationship with France enjoyed by Poland worked to the latter's advantage by blocking any possible Council military action in response to the occupation of Vilna³¹.

Similarly, when Turkey invaded Armenia in the same year, the lack of interest on the part of League members, especially Britain and France, in committing military assistance to the conflict meant that the League had to decline the Supreme Council of the Allied Power's request to accept a mandate over Armenia³². Although the Assembly brokered an agreement reducing arms to the area, by the time any assistance was able to be given, Armenia no longer existed. Armenia's location along the Soviet Union's border and the preoccupation of the stronger members of the League with the challenges posed by the immediate post-WW1 settlement resulted in the loss of Armenia to the Soviet Union.

³¹ Charles K Webster, *The League of Nations in Theory and Practice* (London: Allen and Unwin, 1933), p165. Other allies also wished not to weaken Poland as a bulwark against Russia.

³² Later, WL Westermann, of the American Peace Commission to Paris, seemed to express regret that the US too had refused to accept a mandate over Armenia: "...The history of the Russian advance over Trans-Caucasia in the nineteenth century and the geographic position of Armenia marks it as a legitimate sphere of Russian influence. Turkish Armenia lies in the pathway of Slavic Russian expansion. Soviet Russia now controls Russian Armenia. I hold no brief for Bolshevism, but we might as well be honest and face facts. Bolshevist Russia has done that thing which we have refused to do – gone in and protected the Armenians. It seems obvious to me that the Armenian question must be looked at primarily in connection with the Russian problem...": 'The Armenian Problem and the Disruption of Turkey', in House and Seymour, *What Really Happened at Paris*, p468.

In addition, the 1923 French seizure of mines and factories in the Ruhr region of Germany as a form of guarantee for the payment of reparations may also have been pursued under article 10. In fact, Council intervention was desired by a broad base of members, but was scuppered by France's resolute will to have its way on this issue. Thus, in this case the determination of just one great power was sufficient to prevent a security issue of critical importance to all being considered by the Council.

Finland did not even bother to refer to article 10 in its 1939 appeal to the League about an unexpected attack by the Soviet Union, citing articles 11 and 15 instead. Nevertheless, by resolution, the Assembly declared that:

“by the aggression which it has committed against Finland, the Union of Soviet Socialist Republics has failed to observe not only its special political agreements with Finland but also article 12 of the Covenant of the League of Nations and the Pact of Paris”³³.

As a result, the League formally excluded the Soviet Union from the League under article 16. This was the strongest and most significant response the League made against aggression, though in terms of both the broader strategic context and the League's international status, it was a case of too little, too late.

Perhaps the greatest example highlighting the degree to which balance of power considerations remained predominant in the security calculations of the major powers, reducing the League to a vehicle for pursuing these broader aims, was the reaction to growing German aggression from 1933 onwards. Having withdrawn Germany from the League in this year, Hitler pursued rearmament at an alarming pace, culminating initially in the remilitarization of the Rhineland in breach of the Locarno Pacts, and followed by the annexation of Austria in March 1938. No action was taken in response to these serious violations of the League Covenant; it was only when Hitler's demands for Czechoslovakia became increasingly insistent that Britain, France, Italy and Germany met in September 1938 and agreed to partition the

³³ World Peace Foundation, *League of Nations Official Journal* 20 (1939), p540. .

Sudeten area in Germany's favour. However, this meeting did not take place at the League, but rather at Munich, behind closed doors, during which time the League and its other members were reduced to the role of mere spectators. War was looming, and in light of the failure of these negotiations, and the mixed track record of the League, more and more League members affirmed publicly their absolute freedom to decide how to respond to international military conflict³⁴. Despite the Munich agreement, in March 1939, Germany occupied Bohemia, and by September of that year, when Germany attacked Poland, the stage was set for the onset of World War Two.

(6) Conclusion

This chapter examined the concept of aggression in two aspects of the League's work: (1) its policy-making; and (2) its practical management of international conflict. In relation to the first aspect, it was shown that continuing concerns in the early League years about the nature of the obligations created by the Covenant produced two different reactions: firstly, from Canada, a proposal to abolish the undertaking to combat aggression contained in article 10; and secondly, from League members with powerful neighbours, proposals to 'define' aggression in order to reinforce the League's international security procedures. Both of these reactions demonstrated that the confidence placed by the League founders in the apparently morally unifying concept of aggression as a trigger for collective security measures was misplaced. Paradoxically, these League discussions about aggression underscored how little international moral consensus existed on this topic, and thus how fragile the League system was, especially when competing with the vital interests of the great powers, both individually and collectively.

This latter observation was confirmed in our examination of League practice. When the great powers were preoccupied with their own immediate problems – especially if these concerned physical security – the application of the League obligation to combat aggression was likely to reflect this preoccupation, as the conflicts between

³⁴ Walters, *The League of Nations Its Life and Times 1920-1946*, p778.

China and Japan (1931-1933) and Italy and Ethiopia (1935-1936) attested. In addition, if a vital alliance or interest of one of the great powers could be damaged by the application of League procedures, this was sufficient to prevent or postpone the situation from being brought before the League, as demonstrated by the 1920 Polish seizure of Vilna and the 1923 French seizure of German mines. However, outside these circumstances, it was also found that the League obligation to combat aggression was effectively fulfilled on at least two occasions: (1) in relation to the 1925 dispute between Greece and Bulgaria; and (2) in relation to the 1926 Ethiopian reaction to the British-Italian economic agreement. These two examples show that international law and international morality – as incorporated in the concept of aggression contained in article 10 of the League Covenant – can and do play a significant role in international relations.

Chapter Four: The Crime of Aggression at Nuremberg and **Subsequent Trials**

The concept of aggression re-emerged internationally in the closing days of World War Two as the Allies considered what to do with the growing number of captured German elites. Although powerful forces within the US administration argued in favour of punitive peace terms, including the summary execution of top German leaders as they were captured, the US ultimately chose to promote a less harsh peace settlement, which would subject German elites to a largely independent, criminal trial process. This time, international political conditions favoured the further evolution of the concept of aggression: with few political alternatives available, Allied agreement to a trial was eventually achieved, though the UK, France and Soviet Union all pointed out the legal weaknesses of the American plan. From this point onwards, the case against the German elites unfolded largely the way US prosecutors wanted it to – which meant conspiracy and the ‘crime’ of aggression were the central charges laid against the Germans. These charges made it possible to link the top-level Nuremberg defendants to particular German World War Two activities on the ground, and hence they were of crucial significance on this occasion.

While it might be tempting to conclude, on this basis, that the prosecution of aggression at Nuremberg was just another component of the US’ post-war German occupation policy – and as such, a crude example of “victors’ justice” – such a conclusion ignores the extent to which the majority of the International Military Tribunal (IMT) judges rejected the arguments of American prosecutors, instead issuing a relatively conservative judgment. Thus, it is argued that the prosecution of aggression at Nuremberg is significant as a first attempt to hold individuals of high-ranking state office criminally responsible for misdeeds negatively impacting upon international security.

(1) The End of World War Two in Europe and the Problem of the Top-Ranking Nazis

In 1944-1945, the issue of working out what to do with the surviving members of the Nazi leadership regime was gaining priority within US policymaking circles, as concerns mounted over the possibility that, as World War Two came to an end, Nazi leaders might flee Germany and seek political asylum in a neutral state¹. Ways of resolving this issue strongly reflected the respective preferences of different actors within the US administration for the type of peace to be pursued in Germany, both as part of the strategy for ending World War Two and for the post-war settlement. Two divergent schools of thought emerged.

One school, led by US Secretary of Treasury, Henry Morgenthau Jr, supported the idea of using approaching military units to execute summarily top Nazi officials. On this view, any of the Allied powers would be entitled, on meeting any member of a pre-arranged list of high-ranking Nazis and on confirmation of their identity, to kill them immediately. Ultimate decision-making authority in relation to this task would rest with individual, Allied military commanders; they would retain full discretion as to the means of identity confirmation, as well as the timing and method of execution in accordance with the military practices of their own particular state. This approach, which emerged in September 1944, was promoted as part of a program which aimed to destroy completely Germany's future ability to wage war, and to establish a general international deterrent via the imposition of a harsh punishment. Other components of this program included a rigorous agenda of German deindustrialisation and pastoralisation, with the intention of leaving that state economically powerless; the purging of Nazis from German institutions; and the use of extensive detention powers to apprehend all members of organizations such as the SS and others in business, law and education². The Morgenthau plan was so

¹ As Kaiser Wilhelm had done successfully in 1918: see Bradley F Smith, *The Road to Nuremberg* (London: Andre Deutsch, 1981), p19.

² Bradley F Smith (ed), *The American Road to Nuremberg: the Documentary Record 1944-1945* (Stanford: Hoover Institution Press, 1982), p7.

thorough and severe that it even contemplated the removal from Germany of Hitler Youth members and other children exposed to Nazism³. Morgenthau thought a more lenient occupation policy than his would not only be unjust, but might also enable Germany to instigate another phase of expansionism and atrocities⁴.

A second view, developed by Secretary of War, Henry Stimson, later emerged, urging on political and moral grounds a fair trial for those within the Nazi leadership. To Stimson, depriving Germany of the means of achieving economic prosperity “would be just such a crime as the Germans themselves hoped to perpetuate upon their victims – it would be a crime against civilization itself”⁵. Worse, Stimson believed the strongly punitive economic basis of the Morgenthau Plan would cripple the German economy at a time of already great disruption to European markets generally, thus generating a catalyst for future war⁶. Stimson’s call for a more moderate Allied reaction appealed to military leaders, who knew that a successful, final advance would crucially depend on the maintenance of stability and order in the territory already overrun by the Allies – a condition which would be entirely undermined by arrests on a massive scale and destruction of economic capacity⁷. In Stimson’s view, only great power support for the rule of law buttressed by the force of concerned public opinion could reduce or end aggression for good. A trial of the leading Nazis would not only provide a mechanism by which convicted Nazi elites could be punished, but would also create an important educational record from which future generations could learn, thus making possible the avoidance of subsequent large-scale international conflicts⁸. Eventually, the Stimson view prevailed and became official US policy, with President Truman coming out strongly in favour of an international trial procedure after his appointment to office in April 1945.

³ Smith, *The Road to Nuremberg*, p23.

⁴ Smith, *The Road to Nuremberg*, pp22-23.

⁵ Whitney R Harris, *Tyranny on Trial* (Dallas: Southern Methodist University Press, 1954), p 8.

⁶ Smith, *The Road to Nuremberg*, pp37-38.

⁷ Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2001), p88.

⁸ Maguire, *Law and War*, p93.

However, Allied support for a trial of the top Nazis was by no means assured. In fact, Churchill and Roosevelt had already accepted a summary of the Morgenthau Plan's recommendations in Quebec on 15 September 1944⁹. Complicating the matter further, a third view had emerged: the British Lord Chancellor, Lord Simon, cognizant of the political and legal difficulties presented by the proposed trial of the top Nazis, instead had promoted a 'political' execution of these men along similar lines to those used by the British government against Napoleon in 1815. According to this approach, decision-making authority concerning the fate of German elites resided with the Allied political leaders collectively, usual diplomatic practices of negotiation and consensus-building being used to determine the nature of the decision taken. Simon had been promoting this view for more than two years, and Churchill himself had been supporting this position in cabinet for over a year.

British opposition to a trial remained steadfast, despite a failed attempt to come to an Anglo-American compromise - namely, a perfunctory 'arraignment' procedure, which would see the leading Nazis indicted before an Allied tribunal, a quick ruling on the charges made, and an appropriate punishment decided. Even this modest proposal attracted savage criticism within the British camp. Critics argued that a pseudo-trial along these lines would please no-one, and through the blurring of "political and judicial jurisdiction", Britain would be on the receiving end of "the worst of both worlds"¹⁰. On this basis, British cabinet members rejected the proposal, formally communicating to the US on 12 April 1945 that Britain would not accept a trial or hearing for Hitler and his colleagues, favouring a "political disposition" instead¹¹.

In light of British opposition to a trial, Stalin's pro-trial stance provided the American proposal with welcome support. At the meeting of the US, UK and Soviet Union at

⁹ Maguire, *Law and War*, p89. Indeed, Churchill has been reported to have commented in October 1944 that "I'd like sixty or seventy of the people around Hitler shot without any trial, but I am against shooting all the German General Staff...": see Drexel A Sprecher, *Inside the Nuremberg Tribunal* (Lanham: University Press of America Inc, 1999), vol 1, p28.

¹⁰ Smith, *The Road to Nuremberg*, 186.

¹¹ Smith, *The Road to Nuremberg*, 188.

Yalta in February 1945, Stalin had repeated his view that “the grand criminals should be tried before being shot”¹². Though far from what the US had in mind in terms of how the trial procedure would function, at least this statement indicated backing in principle for some sort of judicial process to be incorporated into Allied plans for the top Nazis. When it became known to the US in April that France was also in favour of a trial procedure¹³, it was clear that staunch British opposition to the use of legal mechanisms for dealing with the top Nazis could be routed by the US, and that a trial could proceed. Hence, general agreement among the foreign ministers of the UK, Soviet Union and France to a trial by international military tribunal of the top Nazis was secured by the US in May 1945, at the United Nations Conference on International Organisation (UNCIO) held at San Francisco¹⁴. The American vision of a moderate peace settlement incorporating the rule of law had won its first major victory.

(2) The Political and Legal Challenges Presented by the Prosecution of the Crime of Aggression

How to bring together the realities of Nazi war-mongering, the substance of relevant international law on the topic of armed conflict and the wish to prosecute individuals criminally for the excesses of Nazism was a pre-occupation of pro-trial policy advisers from the outset. Worldwide horror at the systematic slaughter carried out by the Nazis produced an overwhelming sense that violation of some moral code had occurred, but beyond this instinctive response, there were no easy answers. While ‘aggression’ in abstract terms might have been recognized by League members in 1919 as a wrong committed against any one of them in relation to which they agreed to come to each other’s aid, the League record itself had demonstrated that in

¹² Ann Tusa and John Tusa, *The Nuremberg Trial* (London: Macmillan, 1984), p63. This tallies with Churchill’s opinion of Russian preferences in October 1944: “...Russia [could] do what she likes by force, but she would like sanction at the Peace Conference that her action was just and correct”: Sprecher, *Inside the Nuremberg Tribunal*, vol 1, p28.

¹³ Donald Bloxham, ‘The Trial That Never Was’: Why There Was No Second International Trial of Major War Criminals at Nuremberg’ *History* 87 (2002), pp41-60, at p42.

¹⁴ Harris, *Tyranny on Trial*, pp10-11. The role of the concept of aggression at the UNCIO is further examined in chapter six of this thesis.

practice, collective measures to counteract aggression could not be relied upon in all circumstances. For this reason, difficult questions might re-emerge if the Allies sought to prosecute German conduct as 'aggression'. Compounding this difficulty was the fact that the US actually wanted to go much further than this, resting its case against German elites on the twin assumptions that: (a) aggression amounted to an international crime pre-WW2; and (b) aggression was an international crime giving rise to individual criminal responsibility. The role of these two assumptions at the cornerstone of the American case against the top Nazis generated much debate within the US administration and later among the Allies.

(a) The US and the Crime of Aggression

In November 1944, it was ongoing consideration within the United Nations War Crimes Commission (UNWCC)¹⁵ of whether or not aggressive war was a crime which accelerated decisions at the higher tiers of the US government about which crimes would be prosecuted at the IMT. The State and War Departments were still debating these topics when the American member of the Commission approached Stimson for instructions in relation to a proposal tabled at the Commission which urged a United Nations declaration as to the criminality of aggressive war¹⁶. Critics of the proposal to prosecute aggressive war as a crime demolished this idea on legal grounds; however, they failed to provide any adequate solution to the underlying political problem: namely, how to reconcile public expectations of a strong and united Allied stance against the Nazi regime with no apparent political, legal or moral foundation upon which to distinguish Allied conduct from German conduct in World War Two.

¹⁵ The establishment of the UNWCC was suggested by Churchill to Roosevelt in June 1942 in response to demands from the governments-in-exile, and growing British public interest, to take concrete action in relation to war crimes. It ran from January 1944 until March 1948, collecting evidence of war crimes, and was comprised of seventeen founding Allied nations, excluding the Soviet Union: see Arieh J Kochavi, 'Britain and the Establishment of the United Nations War Crimes Commission', *The English Historical Review* 107 (1992), pp323-349.

¹⁶ Smith, *The Road to Nuremberg*, p92.

For example, no action was taken by any of the World War Two Allied powers in response to Germany's remilitarization of the Rhineland in 1933 – although a breach of the Locarno Pacts – or in relation to the 1938 Anschluss. When finally compelled to act, appeasement in the form of the Munich Agreement rather than resistance was the initial chosen policy of the UK and France, thus preventing the Allies from arguing the high moral ground in support of the claim that the prohibition of aggression was taken very seriously after World War One. Moreover, legal argument about Germany acting in breach of Covenant obligations would be shaky at best, given that Germany had withdrawn from the League in 1933, before many of her worst excesses took place. Lieutenant Freeman, one of the Department of War's top legal advisers, summed up the difficulty when he indicated that if the UNWCC supported the idea that aggressive war was criminal, it would damage its reputation within the legal community; yet if international public opinion learned the Allies failed to hold the top Nazis criminally responsible for the war, it would be outraged¹⁷.

The intransigence of this problem provided some leeway for Stimson and his supporters to further endorse the criminal prosecution of aggressive war through legal innovation. However, deadlock continued, and it appeared towards the end of 1944 that, as a result of this thorny challenge, the Nuremberg trial plan in its entirety would have to be abandoned. It was only further outrage within US policy-making circles at the killing of seventy American prisoners near Malmedy, Belgium, on 17 December, which provided the necessary political and moral impetus to promote consensus around a trial, founded upon the premise that aggressive war was a crime¹⁸.

By 3 January 1945, and in response to pressure from the American UNWCC representative for some clear instructions, Roosevelt personally indicated that he favoured charging the top Nazis with “waging aggressive and unprovoked warfare in violation of the Kellogg Pact”¹⁹, and that this might be used in combination with a conspiracy charge. In late January, a draft memorandum endorsed by the War, State

¹⁷ Smith, *The Road to Nuremberg*, pp104-105.

¹⁸ Maguire, *Law and War*, pp95-96.

¹⁹ Maguire, *Law and War*, p96.

and Justice Departments was forwarded to the President, in which conventional war crimes took centre stage and the charge of waging a war of aggression was only mentioned in passing²⁰. However, with the advent of the Truman presidency, and the subsequent choice of Robert Jackson as chief US war crimes prosecutor in May 1945, aggression became the key charge. Jackson's position, combined with his deep conviction that the charge of aggression was the heart of the case against the leading members of the Nazi regime, ensured the prominence of this charge was resurrected and reiterated in virtually every Allied public pronouncement on war crimes policy produced from May 1945 until the close of the Nuremberg trial in 1946²¹. For Jackson, all Nazi crimes derived first and foremost from the crime of aggression, and thus its inclusion and definition within the document establishing the IMT was vital.

(b) The Other Allied Powers and the Crime of Aggression

However, Jackson's preference for the criminal prosecution of aggressive war was not immediately supported by the other allies. At meetings of the London Conference which ran from 26 June 1945, the UK, Soviet Union, and France raised many of the same objections to the criminality of aggression which had been played out earlier within US bureaucratic circles. Thus, although Britain had finally accepted in principle the US draft proposal concerning the trial of the top Nazis, Britain continued to refer to the lack of established sanction for the crime of aggression as a major setback²². In addition, though the French conceded the crime of aggression was "morally and politically desirable"²³, they rejected its legality. France reiterated with approval a statement by Professor Trainin, one of the Soviet

²⁰ Smith, *The Road to Nuremberg*, p145.

²¹ Smith, *The Road to Nuremberg*, p215.

²² see the comments of Sir David Maxwell-Fyfe in 'Minutes of Conference Session of July 19, 1945', in Department of State Publication 3080, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials : London, 1945* (Washington: Government Printing Office, 1949), available online <www.yale.edu/lawweb/avalon/imt/jackson/jack37.htm>

²³ see the comments of Professor Gros in 'Minutes of Conference Session of July 19, 1945', *Report of Robert H Jackson*.

Union's leading legal scholars present at the Conference: "the effort to make war of aggression a crime is still tentative"²⁴.

In an attempt to overcome these objections, at a meeting of the London Conference on 19 July, 1945, the US tabled a proposal defining aggression which it suggested be included in what was to become the Nuremberg Charter. It was in relation to this proposal that major great power differences over the purposes of a trial process for the top Nazis really came to a head. The US proposal drew heavily on the 1933 draft definition proposed by the Soviet Union under League auspices and the treaties of non-aggression between the Soviet Union and her neighbours agreed in 1931-1932²⁵. The US did not wish to "litigate the cause of the war"²⁶ and in its view the incorporation of a definition of aggression into the Nuremberg Charter would help to avoid this outcome. From the American perspective,

"We either have to define [aggression] now, in which case it will end argument at the trial, or define it at the trial, in which case it will be the subject of an argument in which the Germans will participate; and it seems to me that it is much better that we face it now and preclude all of that argument."²⁷

The UK backed the American proposal to include a definition of aggression in the Nuremberg Charter, on the basis that without one, "we are rather opening the door for trouble"²⁸. The British explained that the Conference only had three options where the Nuremberg Charter was concerned: (1) to omit aggression altogether from the charges, which was unappealing "because it is the essence of our complaint against the Germans"²⁹; (2) to include aggression undefined, which would mean enduring political debate at the trial about what is aggression; or (3) to define aggression.

²⁴ Tusa, *The Nuremberg Trial*, p81.

²⁵ See chapter three of this thesis.

²⁶ See the comments of Mr Justice Jackson in 'Minutes of Conference Session of July 19, 1945', *Report of Robert H Jackson*.

²⁷ See Jackson's comments in 'Minutes of Conference Session of July 19, 1945', *Report of Robert H Jackson*.

²⁸ ²⁹ See Maxwell-Fyfe's comments in 'Minutes of Conference Session of July 19, 1945', *Report of Robert H Jackson*.

By contrast, the Soviet Union argued that neither the London Conference nor the IMT was competent to define aggression, and that instead, this was a task falling within the remit of the UN organization. The purpose of the IMT was to “determine the measure of guilt of each particular person and mete out the necessary punishment”³⁰ only; Allied statements during World War Two such as the Moscow and Yalta Declarations³¹ had already established that Nazi leaders were criminals, and so questions about the causes and motivations for the war would simply not be raised or entertained before the IMT. Even if the London Conference did define aggression, in the Soviet opinion, it would not be binding on the top Nazis³².

Like the Soviet Union, France did not favour the London Conference defining aggression; it preferred the question of aggression to be left to the judges themselves, relying on prior international documents on aggression to guide their conclusions. France argued that with or without a definition of aggression, political controversy would arise, and that public opinion would have difficulty with a Nuremberg Charter definition that had the effect of excluding a potential defence³³.

In response, the US held fast to its view that either the London Conference or the IMT would have to define aggression, and sought to distance this task from the general question of defining aggression as a matter of future policy for the UN organization. In Jackson's view, “political definition seems to me much more difficult than juridical definition”³⁴. Moreover, if the Soviet view was correct, and the criminality of aggression by the Nazi leaders had already been established by

³⁰ see the comments of General Nikitchenko in ‘Minutes of Conference Session of July 19, 1945’, *Report of Robert H Jackson*.

³¹ The Moscow Declaration was made in November 1943 and the Yalta Declaration in February 1945. Both published in Senate Committee on Foreign Relations and the Department of State, *A Decade of American Foreign Policy: Basic Documents, 1941-1949* (Washington: GPO, 1950), available online <www.yale.edu/lawweb/avalon/wwii/moscow.htm> and <www.yale.edu/lawweb/avalon/wwii/yalta.htm> respectively.

³² See Nitkichenko’s comments in ‘Minutes of Conference Session of July 19, 1945’, *Report of Robert H Jackson*.

³³ View expressed by Professor Gros in ‘Minutes of Conference Session of July 19, 1945’, *Report of Robert H Jackson*.

³⁴ Jackson’s comment, in ‘Minutes of Conference Session of July 19, 1945’, *Report of Robert H Jackson*.

previous Allied political decree, Jackson did not see the point of a trial process at all. The meeting adjourned without resolution. The following day, the Soviet delegation pulled out of the agreed plan to visit Nuremberg with the other delegations to assess its suitability as a location for the IMT.

Final consensus on the charge of aggression emerged almost three weeks later, with the signing on 8 August 1945 of the London Agreement creating the International Military Tribunal and incorporating the Nuremberg Charter. From these documents, it is evident that little real progress was made towards common agreement about this charge. Ongoing French and Soviet concerns over the uncertainty of international law and the lack of precedent for such a tribunal meant that the Nuremberg Charter omitted any reference to the legal foundations of the charges. Hence, the law on aggressive war, even post-Charter, remained an open question. Despite Anglo-American attempts to include a definition of aggression in the Nuremberg Charter, Franco-Soviet concerns also ensured that this did not occur. The limitation of the charge to “the European Axis countries” stayed in at Soviet insistence³⁵. A further Soviet victory was the renaming of the charge of aggression as a ‘Crime Against Peace’, a phrase originally used by Professor Trainin. Thus, aggression was to be prosecuted under Charter law according to the following:

“Article 6. (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;...”³⁶

³⁵ see first paragraph of article 6 of the ‘Charter of the International Military Tribunal’, in *Trial of The Major War Criminals before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1947), vol 1, p11. The desire to restrict the crime of aggression to the Axis powers only can be explained by reference to Soviet sensitivities in relation to its own World War Two conduct, which included the violation of its non-aggression pact with Poland, and its invasion of Finland, both in 1939: see George A Finch, ‘The Nuremberg Trial and International Law’, *American Journal of International Law* 41 (1947), pp27-28. Concern over Soviet conduct in relation to Poland and Finland during the war also led the major powers to prohibit the Nuremberg defendants from using the *tu quoque* defence - namely, defending one’s own conduct on the ground that the accuser is guilty of the same conduct: see Joseph E Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994), pp35-36.

³⁶ article 6 of the ‘Charter of the International Military Tribunal’, *Trial of The Major War Criminals*, vol 1, p11.

Despite significant misgivings from the other Allied powers, the US had succeeded in retaining the crime of aggression as the key charge against the top-ranking Nazis.

(3) The Crime of Aggression at the IMT

With the foundations of the IMT thus laid, the case against the Nuremberg defendants was largely structured by American prosecutors, who sought to prove the existence of a conspiracy to commit aggression, war crimes and crimes against humanity³⁷. Adding ‘conspiracy’ to the crux of the claim against the Nuremberg defendants caused its own problems, because while conspiracy was a reasonably well-developed concept in American law, its meaning in British law was much more limited, and in French and Soviet law it was entirely unknown³⁸. This fact helped to determine among the great powers how to divide responsibility for presenting the prosecution’s case: at the Trial, the US dealt with the conspiracy charge; the UK handled the aggression charge; France managed war crimes and crimes against humanity in Western Europe; and the Soviet Union was responsible for war crimes and crimes against humanity in Eastern Europe³⁹. In practice, American responsibility for the all-encompassing conspiracy charge meant that US prosecutors exercised a high degree of control over how material was presented to the IMT and enjoyed the strategic advantage of introducing this material first, before other Allied prosecutors had an opportunity. Reflecting the significance of the charge of conspiracy in the prosecution's case, all twenty-two defendants were indicted under this head; sixteen were charged with aggression; eighteen were charged with war crimes, and eighteen with crimes against humanity⁴⁰.

³⁷ see count 1 of the indictment in *Trial of The Major War Criminals*, vol 1, p29.

³⁸ Hans Ehard described conspiracy as a concept “not...familiar to continental law”: see ‘The Nuremberg Trial Against the Major War Criminals and International Law’, *American Journal of International Law* 43 (1949), pp223-245, at p226.

³⁹ Sprecher, *Inside the Nuremberg Trial*, vol 1, p97.

⁴⁰ For further details of charges and convictions, see appendix one to this thesis.

The strong American influence over the structure and content of the prosecution's case did not extend to the IMT bench, which proceeded cautiously. In accordance with the strict terms of the Nuremberg Charter, the IMT considered the allegation of conspiracy in relation to the aggression charge only, rejecting the US prosecution's attempt to have conspiracy recognized as an over-arching, stand-alone offence incorporating aggression, war crimes and crimes against humanity. The IMT further limited its consideration of the aggression charges by focusing on whether or not the defendants played a role in relation to a war or wars of aggression; the alternative ground of a "war in violation of international treaties..." was left unconsidered⁴¹.

Having decided that aggression was committed against twelve states, the IMT then considered very carefully the individual criminal liability of each defendant for this offence. The IMT restricted quite substantially the timing and scope of conduct amounting to the crime of aggression, and as a consequence, four of the sixteen defendants charged with this crime were acquitted of it⁴². Thus, although Schacht and Von Papen had been very active in top Nazi circles from at least 1933 onwards, both with roles in the Anschluss, the fact that they began to lose their influence soon after this event was an influential factor in their acquittal⁴³. Similarly, Speer's contribution to the German war effort as head of the arms industry from 1942 was not sufficient to prove him guilty of aggression, as Hitler's aggressive wars were already well under way by the time Speer accepted this position, and his contribution in this role only helped Germany "in the same way that other productive enterprises aid in the waging of war"⁴⁴. In Von Papen's case, though he committed "offences against

⁴¹ Although no separate findings about war in violation of international treaties were made by the IMT, in considering whether aggression had taken place, the IMT took into account various post-World War One treaties, such as the Kellogg-Briand Pact, and draft documents such as the 1923 Treaty of Mutual Assistance and the 1924 Geneva Protocol, to establish the status of international law concerning aggression at the relevant time: see 'Judgment', *Trial of The Major War Criminals*, vol 1, pp218-224.

⁴² The four defendants acquitted of aggression were Schacht, Sauckel, Von Papen and Speer. Both Sauckel and Speer were found guilty of war crimes and crimes against humanity; as Schacht and Von Papen had not been charged with these offences, they went free at the end of the Trial, along with Fritzsche.

⁴³ Von Papen retired soon after the Anschluss and Schacht was arrested by the Gestapo and placed in a concentration camp in 1944.

⁴⁴ 'Judgment', *Trial of The Major War Criminals*, vol 1, p330.

political morality” such as “intrigue and bullying”⁴⁵ to help to achieve the Anschluss, these were not made criminal by the Charter and hence could not establish guilt for a crime of aggression. Finally, the IMT also accepted evidence from the defendants about their activities in opposition to Hitler and his war plans, and about their motivations compelling their participation in Hitler’s regime. These factors were also relevant in the acquittal of Schacht and Von Papen⁴⁶.

This conservative approach to the crime of aggression was also reflected in the IMT’s sentencing. Of the twelve men out of sixteen convicted of aggression, eight were sentenced to death⁴⁷, three to life imprisonment⁴⁸, one to fifteen years’ jail⁴⁹ and one to ten years’ jail⁵⁰. All twelve men sentenced to death received convictions for war crimes and/or crimes against humanity, thus reflecting the stronger, pre-World War Two legal basis underpinning these crimes. This result prevailed, despite the IMT’s statement in its judgment that:

“To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁵¹

In addition, it is apparent that the majority IMT judgment was more than just a judicial rubber-stamp of US political priorities if it is compared with the minority

⁴⁵ ‘Judgment’, *Trial of The Major War Criminals*, vol 1, p327.

⁴⁶ Thus, the Tribunal took into consideration the fact that from 1936, Schacht opposed for economic reasons the vigorous arms stockpiling policies pursued by Hitler. Schacht’s rejection of the Nazi regime grew, and eventually led him to participate in two plans to remove Hitler from power. The Tribunal accepted Schacht’s claim that he wanted to “build up a strong and independent Germany which would carry out a foreign policy which would command respect on an equal basis with other European countries”. The Tribunal reconfirmed that rearmament itself was not a crime under the Charter, but if shown to have been accomplished in pursuit of the Nazi plan to wage wars of aggression, it would be sufficient to result in a conviction: ‘Judgment’, *Trial of The Major War Criminals*, vol 1, p309. Similarly, in relation to Schacht, the Tribunal pointed out Von Papen’s opposition to certain of the Nazi regime’s policies.

⁴⁷ These included Goering, Von Ribbentrop, Keitel, Rosenberg, Frick, Jodl, Seyss-Inquart and Bormann. Bormann was tried *in absentia*, presumed dead. A few hours before he was scheduled to be hanged, Goering suicided in custody.

⁴⁸ Namely, Hess, Funk and Raeder.

⁴⁹ That is, Von Neurath.

⁵⁰ Namely, Doenitz.

⁵¹ ‘Judgment’, *Trial of The Major War Criminals*, vol 1, p186.

IMT judgment entered by the Soviet judge. In accordance with the Soviet view expressed during Allied negotiations that Nazi leaders had already been declared criminal prior to the Nuremberg Trial, the Soviet judge rejected the acquittals of Schacht, Von Papen and Fritzsche, and argued in favour of the death penalty for Hess. In light of the evidence tendered at trial relating to Schacht and Von Papen's acts of opposition to Nazism, it seems clear that, unlike the majority judges, the Soviet judge was intent on convicting all the Nuremberg defendants without discrimination. Hence, the conservatism inherent in the majority IMT judgment suggests that the way in which the crime of aggression was developed at Nuremberg was not simply a product of the strong political forces compelling its prosecution, but also revealed the influence of sound legal principles and reasoning.

(4) Criticisms of the Nuremberg Trial

This conclusion has been attacked by political and legal commentators alike, who emphasise the weaknesses of the Nuremberg Trial to suggest that it was an unwise political decision, and/or an unfair example of "victors' justice". However, these criticisms demonstrate little appreciation of the international political conditions existing at the end of World War Two, or, as Wight argued, the important role of political power in the evolution of law⁵². In this section, some of the main criticisms of Nuremberg will be outlined, and responses made to them.

(a) Political Criticisms of the Nuremberg Trial

Certain critics justify the rejection of the Nuremberg Trial on policy grounds. They argue that the Nuremberg Trial could become a *political* precedent for victorious powers wishing to prosecute the vanquished. In this way, the Nuremberg Trial could encourage, or at least rationalise, the commission of injustices in the future.

⁵² See p22 of this thesis.

Another political objection questions the wisdom of the Nuremberg Trial from the perspective of international order. Schick argues that the London Agreement was made by the Allies contrary to state practice and the generally accepted tenets of international law. To him, this indicates a basic lack of understanding for the fact that it is the principles of non-intervention and sovereignty which allow and ensure peaceful coexistence among independent states in the first place⁵³. The implication made by Schick is that by creating the IMT, the Allies helped to undermine the constitutive rules of international society.

In relation to these objections, any potential injustice or damage perpetrated by the Nuremberg Trial needs to be assessed in context. The immediate problem the Allies faced as World War Two came to a close was what to do with the top Nazis. The only options available were to: (1) execute them on the spot; (2) jail them indefinitely without trial; (3) subject them to a trial process; (4) send them into exile or (5) free them. Exile of Napoleon had not prevented him from re-emerging as a political threat to Europe in 1815 and international public opinion combined with the threat of Nazism reviving meant Nazi leaders could not be freed. Similarly, jailing them indefinitely without trial would create further political problems for the Allies by providing inspiration to Nazi revivalists during the Allied occupation of Germany. Hence, in reality, the only actual possibilities were to execute the top Nazis immediately or to hold a trial⁵⁴.

The future possibility of injustice being caused by subsequent Nuremberg-style trials thus needs to be weighed against the very real political risk that the appearance of injustice posed to the Allied occupation and post-war normalization of Germany. Moreover, from the perspective of the leading Nazis – and keeping in mind that three of them were cleared of all charges at the Nuremberg Trial – it provided a much higher level of fairness than summary justice would have achieved. The full range of

⁵³ FB Schick, 'The Nuremberg Trial and the International Law of the Future', *American Journal of International Law* 41 (1947), pp770-794, at pp778-779.

⁵⁴ The way in which Nazism had infiltrated all facets of German society, especially all tiers of government, meant that in practice, a trial of Nazi elites by a newly-formed German government was a long term prospect at best.

procedural guarantees afforded most defendants in modern liberal democratic courts may not have been available to the German defendants, but they had the benefit of many fundamental ones – for instance, the choice of legal counsel; translation of all documents and proceedings, notice periods, even an opportunity at the close of their case to address the Tribunal personally and without challenge from the prosecution⁵⁵.

In addition, while it is true that the principles of non-intervention and sovereignty are two of the basic rules underpinning international society, it must be kept in mind that it was flagrant breaches of these principles by the Axis powers which ignited World War Two in the first place. Axis contravention of these principles compelled the Allies to enter into the war, and, after the war had ended, to punish those responsible for these breaches. Had the Allies not acted in the way that they did in response to these obvious, serious and consecutive breaches, the principles of non-intervention and sovereignty may never have regained international acceptance, thus potentially hindering the emergence of any form of international society. In fact, the importance placed by judges on the fundamental rules of international society is apparent from the case of *United States of America v Ernst von Weizsacker et al*⁵⁶. In this case, the principle of *pacta sunt servanda*⁵⁷ provided the justification for rejecting German claims of self-defence against the punitive provisions of the Treaty of Versailles. The Tribunal concluded Germany's claim to self-defence was lost when it assured Austria, Czechoslovakia, France and Poland by treaty it had no territorial claims, and then violated the terms of that agreement. The Tribunal pointed out that strong policy considerations supported this conclusion: if Germany's conduct after these

⁵⁵ see article 16, 'Charter of the International Military Tribunal', *Trial of The Major War Criminals*, vol 1, p14. Against these extensive protections, defence counsel objected to the IMT's more relaxed rules of evidence, which permitted draft and unsigned documents to be considered by the Tribunal, such as the documents recording the four key secret conferences which weighed heavily in the IMT's judgment. However, the Tribunal overruled these defence objections, pointing out that despite the form of these documents, the defence did not deny their basic authenticity: 'Judgment', *Trial of The Major War Criminals*, vol 1, p188.

⁵⁶ otherwise known as the *Ministries* case. This trial was held pursuant to Control Council Law #10 which established a common legal basis for the prosecution of lesser alleged war criminals throughout the various occupation zones of Germany: see 'Control Council Law No. 10' in Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council law No. 10*. (Washington: GPO, 1949), available online <www.yale.edu/lawweb/avalon/imt/imt10.htm>.

⁵⁷ Identified by Bull as one of the three aims of all societies: see p23 of this thesis.

agreements was excused, this would be tantamount to saying that “no treaty and no assurance by Germany is binding and that the pledged word of Germany is valueless”⁵⁸.

(b) Legal Criticisms of the Nuremberg Trial

As foreshadowed in discussions within the US administration and among the Big Four in the lead-up to the Nuremberg Trial, one of the first legal objections raised concerns the status of aggressive war immediately prior to the start of World War Two. Even if it is accepted that the Kellogg-Briand Pact of 1928 made aggressive war illegal, it does not necessarily follow that the Pact simultaneously made it criminal. No international agreement criminalizing wars of aggression was in force in 1939, and therefore on the basis of the *nullum crimen sine lege*⁵⁹ principle, the Allies were not legally entitled to prosecute the top Nazis for aggression. This argument claims it was unjust to subject Nazi leaders to a legal principle and process which were both so manifestly *ex post facto*⁶⁰.

Developed further, this objection adds that even if the improbable was accepted as true – namely, aggressive war was a crime in 1939 –no law at that time provided for the prosecution of *individuals* accused of its commission. For the establishment of the IMT to confer jurisdiction over the defendants, it would need to be shown that Germany consented to this jurisdiction by treaty, or that this was permitted by customary international law existing in 1939. Neither of these can be demonstrated, and thus no jurisdiction over these defendants could be legally conferred.

In addition, no entity such as the IMT or a permanent international criminal court existed in 1939 which might have prosecuted individuals for crimes against peace.

⁵⁸ United Nations, *Historical Review of Developments Relating to Aggression* (New York: United Nations, 2003), p59.

⁵⁹ Namely, the principle that there is no crime except in accordance with law.

⁶⁰ Scharf traces the origins of the *ex post facto* criticism to Ohio Senator Robert Taft in 1946, but claims the criticism gained significant public attention when Taft's speech was reprinted in John F Kennedy's 1956 book, *Profiles of Courage*: see Michael P Scharf, 'Have We Really Learned the Lessons of Nuremberg?', *Military Law Review* 149 (1995), pp65-71, at p67.

Hence, the decision to go ahead with a criminal trial of the leading Nazis, on the basis of the Allies' view that Germany had resorted to an illegal war, was purely a political decision of the Allies as victors. As long as the right to make these key decisions is reserved to the victorious powers, whatever verdict results "will constitute a legally problematical and politically hazardous act"⁶¹.

Further objections cite the procedural aspects of the Nuremberg Charter and Trial to support the conclusion that it amounted to unfair "victors' justice". There are an almost infinite number of facts relied upon under in support of this contention. For instance, article 3 of the Charter prohibited both prosecuting and defence counsel from challenging the Tribunal or its members. In addition, article 10 permitted individuals to be brought to trial merely on proof of membership of a group or organization declared criminal by the Tribunal. Despite being called an *International Military Tribunal*, no judges from neutral states, let alone from the Axis powers, were on the bench. The Tribunal's historical interpretation was not impartial, in that it accepted draft, non-binding international documents as good evidence of the principle that aggressive war was considered a crime prior to 1939. Finally, the lack of incorporation of the lessons drawn from Nuremberg in the other constitutive documents of the post-war international order – such as the UN Charter and the ICJ Statute – indicate an unwillingness to apply these lessons universally. All of these factors, it is argued, confirm the view that unfair "victor's justice" prevailed at Nuremberg.

In the context of a sophisticated, highly-developed domestic legal order, these criticisms would be serious indeed; however, as raised in the context of the international arena of the 1930s and 1940s, they lack resonance. In the international sphere, both political and legal authority are still highly decentralised, international organisation is rudimentary, and international enforcement mechanisms are weak. It is precisely these circumstances in the aftermath of widespread conflict which provoked the predominant political actor, the US, to push for the establishment of the

⁶¹ Schick, 'The Nuremberg Trial and the International Law of the Future', p783.

IMT. In light of the elementary nature of both the content and enforcement of international law at this time, it is counterproductive to attack an innovation designed to address this problem on the basis that it itself does not conform with legal principles more appropriate to a well-established legal system. For instance, the principles of *nullum crimen sine lege*, *nullum poena sine lege* and the rule against *ex post facto* laws became part of the law of domestic societies at a comparatively late stage of development⁶². Similarly, to expect international defendants to be afforded the same range of procedural guarantees, as those enjoyed by defendants in many Western liberal democracies is another misapplication of the domestic analogy to international affairs. Hence, these criticisms can be refuted on the basis that the standard by which they measure the legal weaknesses of the Nuremberg Trial ignores the unique conditions of the international arena.

(5) Conclusion

The way in which the concept of aggression featured in the Nuremberg Trial provides significant insight into how political and moral forces can combine to compel the development of law in the international sphere. The problem of what to do with the Nazi elite in the closing days of World War Two and public outcry at Germany's World War Two conduct were both strong political factors pushing the Allied powers to come up with a plan which would support Allied occupation policy while at the same time morally condemning Germany's wartime purposes and the means it used to achieve these purposes. Achieving this latter objective would be particularly difficult for the Allies, as there were few grounds upon which to distinguish German means and ends from the conduct of other states – including the Allies – on previous occasions⁶³. At US insistence, the prosecution of German elites for the crime of

⁶² Thus, it is Paul Johann Anselm Ritter von Feuerbach's Bavarian Code of 1813 which is usually credited as the source of the present-day version of these principles: see Jerome Hall, 'Nulla Poena Sine Lege', *The Yale Law Journal* 47 (1937), pp165-193 at p169; (Unnamed Author), 'The Use of Analogy in Criminal Law', *Columbia Law Review* 47 (1947), pp613-629 at p614; and Paul Weidenbaum, 'Liberal Thought and Undefined Crimes', *Journal of Comparative Legislation and International Law* 19 (1937), pp90-97 at p91.

⁶³ How this consideration would play out in the context of the Nuremberg Trial was of concern within the US administration; in a cable to senior members of his Department of War in April 1945, Secretary

aggression became the basis upon which these political purposes were achieved, and hence this crime made an important political contribution in the aftermath of World War Two in Europe.

However, it was demonstrated that the crime of aggression at Nuremberg was more than an expedient US response to extreme political conditions: it also represented a genuine watershed in the development of international law. The crime of aggression was the vehicle through which the conduct of the Nazi elite in their policy- and decision-making could be linked with wartime events at the grassroots level. The Charter had explicitly rejected legal counterarguments based on the 'act of state', or 'superior orders' doctrines⁶⁴, thus affirming that individuals at both the highest and lowest ends of the policy creation and implementation process could be held criminally liable for Charter crimes. Yet how were prosecutors to bring together the decisions and acts of Germany's political and military leaders with the steps taken by the soldier, policeman or other official on the ground in pursuit of the leadership's objectives? A way had to be found to form a link between the two if the prosecution's case was to succeed. Normal legal methods of establishing a 'chain of causation' were of little use, considering the extraordinarily complex range of important events spanning many years and numerous states which led to the outcome of Germany's aggressive wars⁶⁵. In legal terms, the crime of aggression made possible the conviction of Hess, who played a very significant role at the highest echelon of regime leadership, though his individual acts were political rather than

Stimson referred to "the possibility that the defence may assert vigorously the existence of wrongs by other nations against Germany and make reference to historic instances of nations which have used aggressive action as an instrument of national policy": paraphrased telegram from Henry Stimson to John McCloy, John Weir and R A Cutter dated April 1945, available online <www.trumanlibrary.org/whistlestop/study_collections/nuremberg>.

⁶⁴ see articles 7 and 8 of 'Charter of the International Military Tribunal', *Trial of The Major War Criminals*, vol 1, p12.

⁶⁵ For an account of the difficulties of imputing knowledge of ground-level activities to Nazi leaders in subsequent Nuremberg proceedings, see Henry T King, Jr, 'The Nuremberg Context From the Eyes of a Participant', *Military Law Review* 149 (1995), pp37-47, at p40.

military in nature⁶⁶. Without prosecution of the crime of aggression, Hess would have walked free.

Commentators who view the Nuremberg Trial – and in particular, the crime of aggression – in exclusively political terms forget the high degree of independence demonstrated in the IMT's majority judgment. In addition, it was shown that many of those who criticise Nuremberg on political or legal grounds misinterpret the international context in which states operate. Hence, the Nuremberg example indicates that where international political conditions are favourable, the concept of aggression can make an important contribution within international relations.

⁶⁶ On the importance of prosecuting non-military Nazi leaders, Maxwell-Fyfe remarked: "...What is in my mind is getting a man like Ribbentrop or Ley. It would be a great pity if we failed to get Ribbentrop or Ley or Streicher. Now I want words that will leave no doubt that men who have originated the plan or taken part in the early stages of the plan are going to be within the jurisdiction of the Tribunal. I do not want any argument that Ribbentrop did not direct the preparation because he merely was overborne by Hitler, or any nonsense of that kind.": see 'Minutes of Conference Session of July 19, 1945', *Report of Robert H Jackson*.

Chapter Five: The Crime of Aggression at the Tokyo Trial

In the last chapter, it was shown how strongly favourable international political conditions and moral outrage at the events of World War Two led to the prosecution of German elites for the crime of aggression at Nuremberg. It was also argued that the way in which the crime of aggression was developed in the majority IMT judgment demonstrated that the crime was not simply a political tool wielded by the most powerful states, but represented a significant contribution to the evolution of international law. In this way, political and moral priorities united to advance successfully the role of law in international affairs.

By contrast, in this chapter, it is argued that the prosecution of the crime of aggression at Tokyo was not as strongly supported by favourable political conditions or legal foundations, and thus more closely resembled an exercise in unfair “victors’ justice” than the Nuremberg Trial. As a consequence, if Nuremberg demonstrated the possibilities presented by an international crime of aggression, then Tokyo revealed its constraints. Three major differences in the Tokyo context are responsible for this outcome: (1) the political decision to exclude Emperor Hirohito entirely from the trial of major war criminals before the International Military Tribunal for the Far East (IMTFE); (2) the lack of probative evidence concerning the conduct of Japan’s leaders before and during World War Two; and (3) the circumstances of Japanese involvement in World War Two. Before developing these arguments further however, it is necessary first to look more closely at the way in which the Pacific War ended, and how this differed from the final moments of the European War.

(1) The End of World War Two in the Asia-Pacific and the Establishment of the IMTFE

As in the European theatre, the Allies issued general policy statements during the Pacific War concerning how they planned to deal with Japanese war criminals, leaving the details to be ironed out once surrender and occupation ensued. Hence, the

Cairo Declaration of December 1, 1943¹, issued by the US, UK and China declared that “the Three Great Allies are fighting this war to restrain and punish the aggression of Japan”. Similarly, paragraph ten of the Potsdam Declaration of July 26, 1945² indicated that “...stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners...”, and called for Japan’s unconditional surrender.

However, the different circumstances surrounding the end of World War Two in Europe as compared with World War Two in the Asia-Pacific resulted in the prosecution of top elites for war crimes becoming a much more central issue in the Japanese surrender than in its German predecessor. By the date of German surrender on May 7, 1945, the Allies had already taken *de facto* occupation of much of Germany, Soviet troops had entered Berlin, and Hitler, Germany’s dictatorial leader and ultimate mastermind of that country’s warmongering, had committed suicide³. Others amongst those who had been part of Hitler’s inner circle had either fled, also killed themselves, or joined Admiral Doenitz in the establishment of a new government at Flensburg with the aim of postponing surrender as long as possible so that German military and civilians in the East could be saved from Soviet forces. In short, by this time the German cause had revealed itself as well and truly hopeless, and Doenitz’s government had no real choice but to accept the Allies’ demand for unconditional surrender.

By contrast, although the outlook was pretty grim for Japan by the time of the Potsdam Declaration, it still had a real choice whether to surrender or to continue to fight. Allied forces had not yet reached Japan – in fact, Japanese forces still controlled Korea and Manchuria, much of China, and virtually the whole of Southeast Asia. Japanese war-making capacity still existed, which included two and a half million combat-ready troops, nine thousand military aircraft, and ample kamikaze

¹ Cairo Declaration of 1 December 1943, available online <www.yale.edu/lawweb/avalon/wwii/cairo.htm>.

² Potsdam Declaration of 26 July 1945, available online <www.ibiblio.org/hyperwar/PTO/Dip/Potsdam.html>.

³ Tusa, *The Nuremberg Trial*, pp33-35.

volunteers⁴. Although discussions in the Japanese Supreme Council for the Direction of the War about how to respond to the Potsdam Declaration revealed divisions on whether to start negotiating a peace agreement or to fight to the death, on one issue all were united: that the Emperor, who in formal terms was the supreme authority in Japan, must not be subjected to prosecution for war crimes. It was this implication of the Declaration which was most important to the members of this Council and reflected Hirohito's divine status within Japanese society⁵. In light of the Allies' arrests of high-ranking Nazis in the weeks following German surrender, members of the Council had good reason to suspect the Allies had a similar fate in mind for them and their Emperor. In the end, no Japanese response to the Declaration was made until after the Allied use of atomic weapons against Hiroshima and Nagasaki on August 6 and 9 respectively.

The vital significance of the fate of the Emperor in Japanese calculations at this time is reflected in the response eventually made: on August 10, Japan conditionally accepted the Declaration's terms, "with the understanding that the said declaration [of acceptance] does not comprise any demand which prejudices the prerogatives of His Majesty as Sovereign Ruler", and a request that this qualification be expressly acknowledged by the Allies⁶. The Allied reply stipulated that the Emperor would be subject to the authority of the Supreme Commander of the Allied Powers⁷, General MacArthur; outlined what the Emperor would be required to do to effect the surrender; and simply stated that "the ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people"⁸. On this basis, Japan communicated its final acceptance on August 14, and signed the instrument of surrender on September 2.

⁴ Arnold C Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: Quill, 1987), pp34-35.

⁵ Ben-Ami Shillony, *Politics and Culture in Wartime Japan* (Oxford: Clarendon Press, 1981), p174.

⁶ Japanese Qualified Acceptance of the Potsdam Declaration of August 10, 1945, available online <www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A1.html#A1a>. It is important to keep in mind that at this time, the fact that the Allies had just exhausted their atomic arsenal was secret: Brackman, *The Other Nuremberg*, p36.

⁷ Hereafter SCAP.

⁸ Reply by Secretary of State to Japanese Qualified Acceptance of August 11, 1945, available online <www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A1.html#A1b>.

Once surrender had officially taken place, the task of occupation began. Confirming the implication from earlier Allied correspondence that the Emperor would not be treated as a common war crimes suspect, the US interdepartmental committee responsible for occupation policy directed MacArthur in September to take no action against the Emperor, despite some opposition from other Allies⁹. However, personal impunity for the Emperor did not extend to his intimates or other members of the royal household, with MacArthur ordering the arrest of Kido, the Emperor's chief adviser, and two princes towards the end of 1945. The Japanese government failed to secure a delay of the arrest of Prince Nashimoto; two days after the arrest order concerning Prince Konoye¹⁰ and Kido, the Emperor volunteered himself for trial "as the one to bear the sole responsibility for every political and military decision made and action taken by my people in the conduct of the war"¹¹. However, in light of MacArthur's existing instructions not to arrest the Emperor, nothing came of this rather astonishing offer. While Kido was later taken into custody and prosecuted by the IMTFE, Prince Konoye preferred suicide to trial¹². The way in which the Emperor's fate was interwoven with the peace terms, and the decision not to prosecute him, would complicate greatly efforts to hold elites criminally responsible for aggression, which is discussed in detail below.

It was not just the choice of who to arrest that strongly reflected US political preferences – the question of what to do with them was also determined to a very great extent by American priorities. Thus, General Douglas MacArthur proclaimed the creation of the IMTFE on January 19, 1946, approving its functions, jurisdiction and constitution the same day. As a SCAP initiative, the IMTFE was controlled more directly by US interests than the IMT at Nuremberg. While at Nuremberg, decisions

⁹ Australia and the Soviet Union were particularly keen to indict the Emperor : Brackman, *The Other Nuremberg*, p47.

¹⁰ Apart from his royal status, Prince Konoye had twice been Prime Minister of Japan: he first served in this role from 1937-1939 and subsequently from July 1940-October 1941: National Diet Library of Japan, *Historical Figures*. 2003-2004, available online <www.ndl.go.jp/constitution/e/etc/figures.html>.

¹¹ Brackman, *The Other Nuremberg*, p50.

¹² Prince Nashimoto was later released without charge in April 1946.

concerning judicial appointments were made at the highest tiers of government by the US, UK, Soviet Union and France, with the judges themselves electing a president from among their number, at Tokyo, it was MacArthur who exercised both these powers. MacArthur also retained the right to review the sentences imposed by the IMTFE and reduce them if necessary, a power without parallel at Nuremberg¹³.

By all measures, the Tokyo Trial took on mammoth proportions compared to its Nuremberg counterpart. From indictment to judgment, the Nuremberg process had lasted just under a year; the Tokyo Trial went on for just over two and a half years. The sheer number of people present in the courtroom at any one time was greatly expanded at Tokyo on account of eleven powers being entitled to appoint associate prosecuting counsel¹⁴ and the use of both Japanese and American defence counsel in the proceedings. Relaxed rules of evidence and the burden of translation at Tokyo exponentially increased the amount of paper required to service the Trial: for its duration, the Trial took up one quarter of the Occupation Forces' total paper supply, and at one point, more paper had to be flown in from the US exclusively to meet the Tribunal's requirements¹⁵. Reflecting this greater complexity, one concurring opinion, two dissenting opinions and three separate opinions were recorded in addition to the majority judgment.

Hence, from the closing days of World War Two in the Asia-Pacific onwards, it was evident that the circumstances in which the Pacific War would end were very different from those in Europe. In particular, the high importance Japanese leaders placed on the sovereign immunity of the Emperor, in conjunction with the formal responsibility assumed by the US for every aspect of Japanese surrender and

¹³ Article 26 of the Nuremberg Charter states: "The judgment of the Tribunal as to the guilt or the innocence of any defendant shall...be final and not subject to review": see 'Charter of the International Military Tribunal', *Trial of the Major War Criminals*, vol 1, p16.

¹⁴ That is, the nine Allied states who were signatory to the surrender document – namely the US, UK, China, Soviet Union, Australia, Canada, France, the Netherlands and New Zealand - plus the Philippines and India: John A Appleman, *Military Tribunals and International Crimes* (Indianapolis: The Bobbs-Merrill Company, 1954), p239.

¹⁵ R John Pritchard, 'The International Military Tribunal for the Far East and its Contemporary Resonances', *Military Law Review* 149 (1995), pp25-35, at pp26-27.

occupation, were calculations unique to the Pacific War which impacted directly on the decision whether or not to prosecute the crime of aggression at Tokyo, and if so, how to prosecute it.

(2) The Decision Not to Prosecute Emperor Hirohito

While the decision not to prosecute the Emperor, or even compel him to testify as a witness, was explicable according to a variety of political explanations¹⁶, this decision significantly eroded arguments in support of the prosecution of Japanese defendants for the crime of aggression. Emperor Hirohito had been the Japanese head of state at all material times before and during World War Two; in strictly formal terms, he had been Hitler's equal. Moreover, the extreme turbulence experienced in Japanese politics before and during the war meant that Hirohito was virtually the only constant position-holder throughout this period of interest, and thus he was uniquely situated to give evidence about the protagonists of, and the events leading up to, Japanese involvement in World War Two¹⁷. If the purpose of the crime of aggression was to hold individual leaders to account for their contribution to the waging of aggressive war, it was difficult to justify Hirohito's immunity from prosecution, especially in light of his status as ultimate commander of Japan's combined armed forces¹⁸. Even if it was true that in practice, Hirohito's authority was significantly fettered by custom and that therefore he was more like a figurehead, one would expect this to be reflected in the outcome of the trial process; this claim does not, on its own, justify no prosecution of the Emperor at all. While Hirohito

¹⁶ The official reason for not prosecuting the Emperor was that he was a mere figurehead, and therefore he could not be held responsible for his role in the Pacific War. Piccigallo claims that the decision not to prosecute the Emperor was actually an astute political move, as the plan was to use existing forms of government in Japan to implement US occupation policy. There were also concerns that any attempt, whether real or illusory, to abolish the Emperor could incite chaos, violence and administrative collapse in Japan, which would also hinder occupation policy: Philip R Piccigallo, *The Japanese on Trial* (Austin: University of Texas Press, 1979), p16-17; and Timothy P Maga, *Judgment at Tokyo* (Lexington: University Press of Kentucky, 2001), p35-39.

¹⁷ Indeed, the value of evidence about political affairs from imperial titleholders was not entirely excluded by the Tokyo Trial: Henry P'u Yi, the ex-Emperor of China, was a key witness for the prosecution in its case concerning Japanese activities in Manchuria: Brackman, *The Other Nuremberg*, pp155-156.

¹⁸ This position was conferred on the Emperor under Japan's 1889 Constitution: Shillony, *Politics and Culture in Wartime Japan*, p36.

enjoyed immunity from prosecution, on what basis could any of his own ministers or other subordinates be prosecuted for the so-called 'leadership' crime of aggression?

Though this contention could be used to challenge the trial of any of the Tokyo defendants for the crime of aggression, it was an especially powerful argument in relation to Kido. From 1930 onwards, Kido was a top official in the Japanese imperial court, and from 1940 he became Hirohito's closest adviser¹⁹. Other than brief periods as Minister of Education (1937), Welfare (1938) and Home Affairs (1939), Kido's exclusive responsibilities were to Hirohito. If Hirohito was immune from prosecution, it is very difficult to understand how his most senior adviser could simultaneously be convicted of the crime of aggression against four states by the IMTFE – yet this was precisely the outcome of the Tokyo judgment.

Thus, the significance of Hirohito's future in the Japanese decision to surrender, and the SCAP decision not to prosecute him, were both important political factors which eroded any arguments in favour of a trial of the remaining Japanese leaders for the crime of aggression. Such problems were entirely avoided at Nuremberg as a consequence of Hitler's suicide. The difficulties caused by the lack of justification for proceeding with a trial of Japanese leaders for the crime of aggression in light of Hirohito's immunity was noted by both President Webb and Judge Bernard in their separate opinions within the Tokyo judgment²⁰.

(3) Evidence and the Crime of Aggression

Another condition of the Japanese surrender which undermined rationales in favour of prosecuting the Japanese defendants for the crime of aggression was a relative lack of probative evidence on which to build a case against them. In the German context,

¹⁹ James TC Liu, 'The Tokyo Trial: Source Materials', *Far Eastern Survey* 17 (1948), pp168-170.

²⁰ 'The Separate Opinion of the President of the Tribunal (Sir William Flood Webb), the Member for Australia', pp18-21, and 'The Dissenting Opinion of the Member for France (Henri Bernard)', p22, reproduced in R John Pritchard (ed), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East* (New York: The Edwin Mellen Press, 1998), vol 109 and vol 105 respectively.

orders from Berlin to destroy archives as Allied forces entered Germany were largely ignored, and thus the overwhelming bulk of the archives remained intact, providing the Allies with, quite literally, tonnes of documents outlining in great detail the plans, practices, participants and policies within the Nazi regime²¹. The comprehensiveness and very high quality of this documentation provided an excellent evidentiary basis upon which to proceed with a criminal prosecution of aggression against the Nuremberg defendants; there were plenty of ‘smoking guns’ with their fingerprints all over them.

At Tokyo, however, the documentary evidence was not of the same standard: many Japanese had in fact destroyed, changed, or hidden incriminating evidence, or falsified records, immediately preceding the American landing²². Indeed, with a twelve day interval between the Allied acceptance of Japan’s surrender and the arrival in Tokyo of the first party of Americans, there was ample opportunity to destroy the most damning evidence: Brackman reports that among those documents destroyed at this time were the transcripts of all imperial conferences, all the records of the Supreme Council for the Direction of the War, all the deliberations of the Cabinet and Privy Council, all files on prisoners of war, all orders and plans concerning the attack on the Philippines and Southeast Asia, and all the documents in relation to the Manchurian and Chinese campaigns²³. The evidence which remained was either of lesser importance or of more questionable reliability²⁴. Consequently, the prosecution’s case largely relied on the diary of Kido, who had voluntarily surrendered it to the Allies²⁵. As a result of this reduction in the qualitative standard of evidence, the very complete picture of events achieved at Nuremberg was not

²¹ Why the archives were not obliterated in accordance with official orders is discussed in Tusa, *The Nuremberg Trial*, pp96-97.

²² Peter Lowe, ‘The Tokyo Trial of Japanese Leaders, 1946-1948’, in RA Melikan (ed), *Domestic and International Trials 1700-2000* (Manchester: Manchester University Press, 2003), pp137-156, at p142.

²³ Brackman, *The Other Nuremberg*, p40.

²⁴ Thus, Nobutaka’s volume translates notes of various Liaison and Imperial Conferences taken for Army use: see Ike Nobutaka, *Japan’s Decision For War* (California: Stanford University Press, 1967). Nobutaka indicates that the records used in this volume were discovered in the Military History Archives of the Japanese Defense Agency (at xiii). It is unclear whether these records were discovered in time for the Tokyo Trial.

²⁵ Solis Horwitz, ‘The Tokyo Trial’, *International Conciliation* 28 (1950), pp473-584, at p494.

possible at Tokyo, resulting in many gaps concerning issues crucial to the case, such as the relationship between different political factions within the government at certain times and how powers were divided and exercised among important individuals. In these circumstances, it is difficult to see how a trial of Japanese leaders for the crime of aggression could be pursued without either substantial risk of reducing normal thresholds of criminal responsibility to virtually nil – in effect creating a ‘guilty until proven innocent’ principle - or acquittals on a large scale²⁶. Yet another significant obstacle arising out of the unique context of the Pacific War discouraged the prosecution of Japanese elites for the crime of aggression.

(4) The Crime of Aggression and the Circumstances of Japanese Involvement in WW2

A third factor problematising the decision to try Japanese leaders for the crime of aggression was the difference between Japanese and German conduct itself in relation to World War Two. What facts could be adduced at Tokyo in light of the evidentiary challenges already mentioned suggested that no easy analogy between the German and Japanese roles in World War Two could be made out. The general history of Germany immediately prior to, during, and after World War Two is reasonably straightforward and very familiar: the Nazi Party, with Hitler as its dictatorial leader at all material times, successfully seized power at an early stage, organised and controlled German domestic life according to Nazism’s ideological aims, and in pursuit of these aims, from 1938 to 1945 it embarked upon the gradual German conquest of Europe via a program of false assurances, invasion and annexation.

Conversely, the history of Japan reveals broad support at all levels for the pursuit of Japanese regional domination, but significant differences of view as to how to

²⁶ By contrast, Tokyo prosecutors had ample evidence from survivors and eyewitnesses to sustain charges of conventional war crimes and crimes against humanity against those Japanese who were at the scene of the alleged crime. This is reflected in the prosecution’s summation at trial: over one-third of its general discussion of all the charges concerns war crimes and crimes against humanity, though these accounted for only three of the fifty-five charges in total made against the defendants: see R John Pritchard and Sonia M Zaide, *Tokyo War Crimes Trial Index and Guide* (New York: Garland, 1987), vol 3, pp1025-1057.

achieve this. A bitter struggle ensued in leadership circles between a faction which supported wholeheartedly the use of force and Japan's formal alignment with Germany and Italy to attain this objective, and others who advocated different, less immediately confrontational approaches. This struggle was enabled by a political system which encouraged power rivalries between different organs of government by assigning to each of them an exclusive sphere of authority, and making them and cabinet ministers directly answerable to the Emperor, not the Prime Minister²⁷. While this separation of powers was designed to restrain any one organ of government from gaining too much political clout, it also meant that it was very difficult to pinpoint from among these organs which individual or individuals exercised actual decision-making authority for Japan on a particular issue at a specific point in time. For instance, despite the extensive powers invested in the Emperor under the 1889 Constitution, tradition dictated that he rarely meddled in politics or administration. Instead, the Emperor was expected to endorse the collective advice of cabinet and military heads on matters of policy²⁸. Formal imperial statements were in fact drawn up by the cabinet or military and had to receive initial approval from another body, the Privy Council, before the Emperor signed them. Similarly, in relation to the appointment of senior officials, Hirohito was supposed to act according to the wishes of yet another set of advisers. However, in other ways, he was able to exercise great influence by using occasions on which he met with senior officials or military chiefs to question them, issue general guidelines, and express his own opinion about their work. In addition, when his advisers were divided, Hirohito would personally intervene to decide the issue²⁹. Clearly then, identifying responsible individuals and groups within the Tokyo regime was always going to be a much more difficult task than in a centralized dictatorship like Nazi Germany.

In addition, a procedural rule insisting upon unanimity of cabinet decisions or in the event of disagreement, the formation of a new cabinet, also had an impact during this

²⁷ On the role of the Meiji Constitution in prewar Japan, see Takafusa Nakamura, *A History of Showa Japan 1926-1989* (Tokyo: University of Tokyo Press, 1998), pp2-4.

²⁸ Shillony, *Politics and Culture of Wartime Japan*, p37.

²⁹ Shillony, *Politics and Culture of Wartime Japan*, pp37-38.

struggle, and resulted in fifteen different Japanese cabinets in seventeen years. This constant political volatility meant that, unlike the German scenario, no clear pattern or system of conduct could be discerned which encompassed all the alleged counts of Japanese aggression; opportunism provided a better explanation of Japanese acts during this period than ideology. Apart from general economic motivations, Japan's hostile actions in China in 1931 had few obvious connections in terms of actors, methods or immediate objectives with, for example, the attack on Pearl Harbour ten years later. This procedural rule also complicated substantially efforts to ascertain the degree to which each defendant was individually responsible for the decisions of the group. For example, what degree of responsibility, if any, would an individual merely acquiescing in a decision to proceed with war face, as opposed to an individual who actively supported this decision? Were an individual's intentions relevant? Were the prevailing political circumstances relevant, and if so, how could these be taken into account in the judicial determination as to whether or not an individual was criminally responsible for aggression? These difficult questions were evaded at Nuremberg, where Nazi Germany's totalitarian political structure and strong evidence of how, and by whom, political powers were exercised made the task of tribunal adjudication comparatively easy.

Eventually, through the use of intimidation tactics, deception and even assassination, Japan's militaristic faction gained the upper hand over its uncoordinated opponents and in effect exercised a controlling influence over the government of Japan, though many ostensibly important positions remained occupied by those outside, or unsympathetic to, this faction. Even in relation to this faction, there was no evidence of a 'conspiracy'³⁰ in the Nuremberg sense: initially, individuals, usually of lesser ranking, who supported the use of force in the advancement of Japan's goal either acted alone or in small groups, simply exploiting as much as possible their existing official positions to achieve the hostile engagement of the Japanese military in

³⁰In accordance with the view expressed in the Nuremberg Charter and judgment, conspiracy is considered here as part of, and not a separate offence from, the crime of aggression: 'Judgment', *Trial of the Major War Criminals*, p224.

China³¹. While top elites may have acquiesced in, or at least failed to prevent these actions, few of them could properly be accused of the same type or level of positive acts in pursuit of warmongering for which the Nazi leaders were convicted. In short, the facts could not be easily moulded to the crime of aggression category prosecuted and developed at Nuremberg. Hence, even if evidence of the German standard was available in the Tokyo case, it was likely that a tribunal would come under heavy pressure to either throw out the case against Japanese leaders, or return many 'not guilty' verdicts on the basis of different facts.

The combination of the prior political decision not to prosecute the Emperor, patchy evidence and circumstances significantly different from the German situation were political conditions so detrimental to any possible rationale in favour of the prosecution of Japanese leaders for the crime of aggression, that they should have been sufficient to reject this possibility outright. While an argument was made at Nuremberg that the blatant wars of conquest embarked upon by Germany were classifiable under this heading on the basis of pre-war efforts to criminalise aggression and outlaw war "as an instrument of national policy"³², it was a much greater leap to suggest that Japan's pursuit of regional domination by a range of means, many of which fell short of wars of conquest, also constituted crimes of aggression. Whereas it could reasonably be argued that moral outrage at the horrors of World War One had brought the acceptability of wars of conquest to an end, to the

³¹ The activities of Itagaki, Oshima and Shiratori are instructive on this point. Itagaki was held by the Tokyo Tribunal to have orchestrated the Mukden Incident of 1931 as an excuse for Japanese military response, and to have suppressed efforts to prevent such a response to that incident, though at the time he only held the rank of colonel: Pritchard, *The Tokyo Major War Crimes Trial*, p49,796. Similarly, as military attaché in the Japanese Embassy at Berlin, Oshima was convicted on the basis that he used this position to bypass the Japanese ambassador and to negotiate directly with von Ribbentrop in an effort to effect a full military alliance between Japan and Germany: Pritchard, *The Tokyo Major War Crimes Trial*, p49,823. Shiratori, who was the Japanese ambassador to Rome from 1938, was convicted on similar grounds to Oshima, except the target of Shiratori's efforts was Italy, not Germany: Pritchard, *The Tokyo Major War Crimes Trial*, p49,836. The significant role of middle management as the instigator of policy and in decision-making generally in Japan during this period and today is discussed in Nakamura, *A History of Showa Japan 1926-1989*, pp252-253.

³² See article 1 of the Kellogg-Briand Pact of 27 August 1928, available online <www.yale.edu/lawweb/avalon/imt/kbpact.htm>. This argument remains the Nuremberg Trial's single most important target of criticism. For a critical view of the Nuremberg Trial generally, see Franz B Schick, 'Crimes Against Peace', *Journal of Criminal Law and Criminology* 38 (1948), pp445-465.

extent that Japan achieved its objective by means other than wars of conquest, such as duress, treaty, installation of puppet regime and similar, no possible case could be made. On the contrary, a state's pursuit of its economic goals by these means was a relatively regular feature of international relations. Put simply, whether because of the immunity of the Emperor, a lack of probative evidence necessary for a legal case or different facts, the Tokyo scenario was ill-suited for a Nuremberg-style trial of its vanquished leaders for the crime of aggression.

(5) The Crime of Aggression in the Tokyo Judgment

In these less favourable political conditions, it is unsurprising that the Tokyo judgment followed the prosecution's case much more closely than the Nuremberg judgment did. With an even less secure political, moral and legal foundation than that supporting the prosecution of German leaders for aggression at Nuremberg, the Tokyo Tribunal had few guidelines on which to draw in coming to its conclusions. This left the Tokyo Tribunal only with initial, American political preferences in favour of prosecuting Japanese leaders for aggression, and hence it is these which are expressed to a very large extent in the Tokyo judgment. By contrast, the relatively stronger basis underpinning the Nuremberg prosecution ensured a more independent Tribunal and hence a judgment which did more than merely confirm the charges against the defendants. This distinction between the judgments is demonstrated in a number of ways.

For instance, the notion of conspiracy upheld by the Tokyo judgment, as compared to that supported by the Nuremberg judgment, reveals the ongoing impact during the Tokyo Trial of the extremely weak legal basis on which it was founded. At Nuremberg, it will be recalled from chapter four that the IMT rejected the prosecution's attempt to have conspiracy recognised as a stand-alone international crime, and adhered strictly to the terms of the Nuremberg Charter, under which conspiracy was relevant in relation to the crime of aggression only³³. The same

³³ See p83 of this thesis.

conservatism was not evident in the Tokyo judgment. There, prosecutors went even further than their Nuremberg counterparts, not just separating out the conspiracy charge, but expressing it in language radically different from that used in the Tokyo Charter, which largely followed the Nuremberg provision³⁴. Hence, all of the Tokyo defendants were charged with an ongoing conspiracy between 1928 and 1945, the aim of which was:

“that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon, and for that purpose should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose.”³⁵

Apart from reading down the geographical boundaries of this charge³⁶, and despite its expansive terms, which brought into question whether what was being alleged even fell within the ambit of the crime of aggression as stipulated by the Tokyo Charter, the Tokyo Tribunal upheld this charge. It made this decision based on far less probative evidence than that relied upon at Nuremberg³⁷. Worse, the wide scope of this charge and its vague language simultaneously broadened the range of persons likely to be found liable, and made it much more difficult for them to defeat this charge. As a result, twenty-three of the twenty-five Tokyo defendants against whom

³⁴ Article 5(a) of the Tokyo Charter of 19 January 1946 defined crimes against peace as “namely, the planning, preparation, initiation or waging of a **declared or undeclared** war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” (emphasis added); available online <www.yale.edu/lawweb/avalon/imtfech.htm>.

³⁵ Reproduced in United Nations, *Historical Review of Developments Relating to Aggression*, p87.

³⁶ That is, to include East Asia, the Western and South-western Pacific Ocean and the Indian Ocean, and certain islands in these oceans only: ‘Tokyo Judgment’ (1949), p1137, available online <www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-9.html>.

³⁷ Whereas at Nuremberg, special importance was assigned to the records of the four secret conferences mentioned above to prove a conspiracy existed among eight of the defendants, it was Okawa’s public statements in favour of the extension of Japanese territory to continental Asia and of Japanese domination of other areas, combined with the support this idea attracted from “a party of military men” and “other civilian supporters” which proved the Japanese conspiracy, according to the Tokyo Tribunal: ‘Tokyo Judgment’, p1138.

a judgment was entered³⁸ were found guilty of conspiracy. Moreover, two of these were convicted of conspiracy despite being acquitted of waging aggressive war, suggesting a reversal of the Nuremberg conclusion – namely, that conspiracy *was* a stand-alone crime in international law, though few, if any, references could be used in support of this claim. The Tokyo Tribunal’s acceptance of the prosecution’s broad conspiracy claim also made it easier to implicate the Tokyo defendants in the waging of aggressive war, and thus twenty-two of them were convicted of this charge.

Another indication that political considerations were paramount in the Tokyo judgment was the fact that only one defendant at Tokyo was acquitted of all aggression charges made against him³⁹. Though this is not necessarily proof of a politically controlled tribunal, in light of the legal flaws undermining the Tokyo Trial from the start, several acquittals on aggression would have been a reasonable prediction had general legal principles prevailed in the judgment. By comparison, at Nuremberg, ten defendants were acquitted of aggression charges⁴⁰.

There are many other procedural features of the Tokyo Trial which suggest that its outcome was largely a foregone conclusion once the American decision to proceed with prosecution had been made. Some of these include the wording of the Tokyo Charter compared with its Nuremberg counterpart⁴¹; partiality on the part of some of

³⁸ Though there were originally twenty-eight Tokyo defendants, Matsuoka and Nagano died at trial and Okawa was committed. For further details of the charges and convictions at the Tokyo Trial, see appendix two of this thesis.

³⁹ Namely, Matsui. However, Matsui was sentenced to death for his failure to prevent breaches of the laws of war concerning POWs and civilians: see Horwitz, ‘The Tokyo Trial’, p584.

⁴⁰ Bormann, Kaltenbrunner, Frank, Streicher, Von Schirach and Fritzsche were acquitted of conspiracy and not charged with waging aggressive war; and Schacht, Sauckel, Von Papen and Speer were acquitted of both conspiracy and waging aggressive war.

⁴¹ One of the more worrying differences concerned each Tribunal’s powers with respect to jurisdiction. Article six of the Nuremberg Charter indicates that its tribunal “shall have the power **to try and punish persons who...committed any of the following crimes**”(emphasis added). By contrast, article five of the Tokyo Charter states its tribunal “shall have the power **to try and punish Far Eastern war criminals who...are charged with offences which include Crimes Against Peace**”(emphasis added). It is possible that the latter provision is simply an example of exceptionally poor drafting, but in light of the Tokyo Trial’s other numerous features reflecting an overwhelming political bias, this provision does leave open the conclusion that the Tokyo defendants were already considered criminal and therefore punishable *at the time of being charged* rather than on conviction at the end of a trial process.

the judges⁴²; the change in evidence admissibility rules half way through the Tokyo Trial, which disproportionately disadvantaged the defence; the Tokyo Tribunal's insistence that defence evidence in mitigation of sentence be submitted before its verdict was even released; and the absence of certain judges for periods of time without provision of an alternate⁴³.

However, perhaps the ultimate indication of the supreme role of political imperatives at the heavy expense of legal principles in the Tokyo case was the fact that not one of the eighteen Japanese defendants sentenced to imprisonment served the full term of his sentence. While four died in prison⁴⁴, fourteen were paroled in the 1950s⁴⁵. Of these fourteen, thirteen had originally been given life sentences. Shigemitsu, who was sentenced to seven years' imprisonment, was the first to be released in 1950, and four years later, he re-assumed his position as Foreign Minister of Japan. In contrast, at Nuremberg, four of the seven defendants served their full sentence⁴⁶. The mass release of Japanese defendants might be explained as a response to recognition of the significant and numerous factors originally militating against the decision to prosecute Japanese leaders for aggression, which subsequently coloured the process and outcome of the Tokyo Trial, or as a response to changed political conditions. Either way, this action seriously undercuts the view expressed in the Nuremberg judgment, that initiation of a war of aggression constitutes "the supreme international

⁴² Aside from the issue that no neutral nations were represented on the Tokyo bench, three judges had prior experiences linked to the issues before the Tokyo Tribunal which made their appointment theoretically challengeable on grounds of partiality. While the Australian judge had previously investigated Japanese atrocities in New Guinea, and the second American judge had advised Roosevelt on responsibility for the Pearl Harbour attack, perhaps the most serious challenge available to the defence was against the Philippine judge, who had survived the Bataan death march - a specific subject of the Tokyo proceedings. After the defence challenged the Australian judge's qualifications, the Tribunal indicated that no objections to any of the judges would be entertained, on the basis that no provision for review existed in the Tokyo Charter: see Richard H Minear, *Victors' Justice: the Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), pp81-83.

⁴³ For further discussion of these points, see Pritchard, 'The International Military Tribunal for the Far East and its Contemporary Resonances', pp25-35.

⁴⁴ That is, Koiso, Shiratori, Togo and Umezu.

⁴⁵ These fourteen included Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Minami, Oka, Oshima, Sato, Shigemitsu, Shimada, and Suzuki.

⁴⁶ namely, Hess, Doenitz, Von Schirach and Speer. Funk, Von Neurath and Raeder were released in the mid-1950s on grounds of ill health: Arie Kochavi, *Prelude to Nuremberg* (Chapel Hill: UNC Press, 1998), p245.

crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole”⁴⁷. From this, it is apparent that the crime of aggression at the Tokyo Trial simply provided a rationale for effectively ousting Japanese elites from power during the US occupation of Japan.

(6) Conclusion

The Tokyo Trial can be interpreted as a cautionary tale about the limitations on what legal mechanisms can achieve in the international arena when pursued out of narrow, political self-interest despite factual circumstances which defy legal classification. While at Nuremberg, the decision in favour of prosecuting the crime of aggression was facilitated by Hitler’s suicide, high quality documentary evidence and a reasonably clear case history revealing a series of wars of conquest planned and implemented from the highest levels of government authority, the absence of these facilitating factors in the Tokyo circumstances militated strongly against the criminal prosecution of aggression there. Despite these major obstacles, and in accordance with political priorities, the decision was made to proceed with the Tokyo Trial and the prosecution of aggression. However, the impact of these obstacles continued to be significant, resulting in a judgment and verdict that was much more questionable than the Nuremberg outcome. These weaknesses were exacerbated by a range of procedural problems with the Tokyo Trial which unfairly helped the prosecution’s argument and hence further demonstrated the centrality of political objectives at Tokyo. As a result, with little guidance from the law, it was reasonably predictable that the majority of judges at Tokyo would affirm the prosecution’s case to a very great extent⁴⁸.

Over and above anything else, the decision to proceed with a trial of the Japanese defendants for aggression was dictated by the requirements of the American

⁴⁷ ‘Judgment’, *The Trial of the Major War Criminals*, p186.

⁴⁸ However, the minority judges were far more critical of the prosecution’s case. The Member for India, Judge Pal, was particularly strident in his opposition to the conclusions of the majority, entering a 1200 page opinion which refuted virtually every point made in the majority’s judgment: see Pritchard, *The Tokyo Major War Crimes Trial*, vols 106-108.

occupation force, led by the SCAP. This decision was not altered even though it became apparent that such a trial would be beset by overwhelming legal problems of a kind unknown at Nuremberg. In this way, the prosecution of the crime of aggression at the IMTFE and the Tokyo Trial's outcome are much more obvious exercises of naked political power than the Nuremberg experience. While Nuremberg provides positive proof of what the concept of aggression can achieve when supported by favourable political, moral and legal conditions, Tokyo reminds us of how easily the concept can be used to justify unfair "victors' justice" in pursuit of political goals which supersede all other considerations.

Chapter Six: Defining Aggression and the UN, 1944-1974

In chapter three, it was demonstrated how the desire to strengthen League procedures led to efforts to 'define' aggression as contained in the main collective security provision of the League Covenant, article 10. Despite these efforts, no consensus on a definition of aggression emerged at this time, and the League was eventually destroyed by the onset of World War Two.

In the post-World War Two era, defining the concept of aggression re-emerged in the context of negotiations prior to the creation of the UN Charter, and again once the UN organisation had been established. However, the political backdrop of the Cold War conflict between the superpowers prevented any progress on this topic. While UN committees consistently approached the task of defining aggression as a matter of law, the disputes played out in these committees strongly reflected the greater political conflict between the US and the Soviet Union, as well as their respective allies. The history of the concept of aggression in the UN period once again highlights the significance of favourable political conditions to the further development of this concept in international relations. Before examining the concept of aggression in the Charter period, it is important first to understand how the notion came to be included in the UN Charter.

(1) Aggression in the United Nations Charter

(a) Pre-Dumbarton Oaks Conference

Planning for the maintenance of peace and security post-World War Two via a form of international organization commenced soon after hostilities began in 1939, and again was largely spearheaded by the US. While the first State Department committee assigned to this task was established at the beginning of 1940¹, its efforts

¹ Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the UN* (New Haven: Yale University Press, 1997), p44.

were soon interrupted by the more immediate challenges posed by Hitler's march across Europe. Subsequent planning attempts met with the same fate until December 1943, when the Department's Informal Political Agenda Group was officially charged with this duty.

It was this group which examined all the major issues concerning postwar security and drew up comprehensive drafts for an international organization, which were then forwarded to the President for his consideration and comment. Like Wilson, Roosevelt preferred an international organization of universal reach, rather than one comprised of a system of bilateral alliances or regional groupings²; however, he was also keen to avoid comparisons between the new organisation and the failed League of Nations, or characterisations of the new organisation as some form of world superstate. Thus, he supported a decentralized organization in which security decisions would be made collectively by the US, UK, China and the Soviet Union on a 'unanimity with abstention' basis³. Roosevelt communicated these views and his general approval of the group's proposals to the Department in February 1944; a more detailed draft was then produced, which laid the foundations of the Department's submission to the Dumbarton Oaks conferences. This submission became the unofficial working document of those conferences⁴.

On the other side of the Atlantic, the UK turned its attention in a serious way to postwar planning in autumn 1942. However, real progress was slow until August 1943, because of major differences of view between the Foreign Office and the Prime

² John G Ruggie, 'Third Try at World Order? America and Multilateralism After the Cold War', *Political Science Quarterly* 109 (1994), pp553-570, at p555.

³ Robert C Hilderbrand, *Dumbarton Oaks* (Chapel Hill: University of North Carolina Press, 1990), p35. 'Unanimity with abstention' meant that great power unanimity was required for a decision to be validly made, but any of the great powers could choose to abstain from voting, which would not impact upon the outcome of the vote. Only a negative vote by one or more of the great powers could prevent a decision from being made. For further discussion of the American position in relation to voting procedures, see Thomas M Campbell, 'US Motives in the Veto Power', *International Organization* 28 (1974), pp557-560; and by the same author, 'Nationalism in America's UN Policy 1944-1945', *International Organization* 27 (1973), pp25-44.

⁴ Hilderbrand, *Dumbarton Oaks*, p71. Eagleton claims the early delivery of the US plan to the three other governments in July 1944, its "constitutional form" and greater detail were the reasons why it became the working document at Dumbarton Oaks: see Clyde Eagleton, 'The Charter Adopted at San Francisco', *American Political Science Review* 39 (1945), pp934-942, at pp934-935.

Minister about the new international organization. While the Foreign Office supported Roosevelt's plan for a universal organization in which the Big Four held a controlling interest, Churchill vigorously defended a regionally-organised structure, and saw little merit for the UK in the universalist, Big Four plan. For Churchill, Europe, her recovery, and the containment of the Soviet Union were the central concerns, and these priorities should have been strongly reflected in British proposals for the postwar international organization⁵. Finally at the Quebec Conference in August 1943, Churchill reluctantly accepted Roosevelt's proposal for a universal security organization, thus clearing the way for more comprehensive British plans to be drawn up. By April 1944, a British interdepartmental committee had drafted five memoranda outlining the preferred contours of the new organisation from the British perspective.

The second memorandum, known as Memorandum B on peace and security, skilfully relied on the perceived drafting errors of the League Covenant to argue forcefully the British position. As in the negotiations leading up to the establishment of the League, the UK opposed any undertaking to guarantee members' 'territorial integrity' or 'political independence', for the reason that such a guarantee would make the new organization vulnerable to allegations of preserving the *status quo* and making peaceful change of borders impossible. The difficulty of defining 'political independence' was also raised as a reason not to make it the subject of a guarantee. In a similar vein, the UK opposed any reference to 'justice' in dispute settlement, as a consequence of its "ambiguous legalistic implications"⁶ and out of recognition that, in certain circumstances, maintaining peace may mean some members must bear lesser injustices.

The UK view was also highly skeptical of any attempt to use the term 'aggression' in relation to the new organisation. Memorandum B pressed the position that making the punishment of aggression the foundation for League action under article 10 of the

⁵ Hoopes, *FDR and the Creation of the UN*, pp69-70.

⁶ Hilderbrand, *Dumbarton Oaks*, p50.

Covenant had been a grave error. This stipulation meant too much League time had been wasted trying to define aggression in light of each set of circumstances coming before the League, which had aided aggressors by delaying the League's response to their acts⁷. Yet it was also probable that a strict definition of aggression would also impede the new organization in the fulfillment of its peace and security functions. Consequently, with regard to the constitutional documents of the new organization, the UK rejected the inclusion of a list of circumstances amounting to aggression in relation to which the new organisation would act. Rather, it preferred to afford the new Council a high level of discretion on this issue, empowering it to act "in accordance with the principles and objects of the Organisation"⁸.

By contrast, the Soviet perspective viewed aggression – more specifically, the prospect of revived German aggression, and ways of preventing this possibility – as the *raison d'être* of the new postwar organization. On this basis, Stalin, like Churchill, initially favoured some form of regional organization for Europe, though he too eventually came to support Roosevelt's worldwide aspirations. Beyond these very vague indicators, specific Soviet ambitions for the new organization at this time were opaque⁹. However it was clear that the Soviet Union was preoccupied with how the new organisation would serve its own security interests; other proposed features of the new organization – such as an economic and social council and an international court of justice – were of little importance in Soviet eyes¹⁰.

(b) Dumbarton Oaks Conference, August-October 1944

These initial views were further developed and argued out at Dumbarton Oaks. In the first and most important round, with the US, UK and Soviet Union in attendance, the

⁷ Kelsen supported the exclusion of the term 'aggression' from the UN Charter on similar grounds. In his view, aggression was a "military-technical" term rather than a legal term, which could "hardly be defined in a way satisfactory for legal purposes": H Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals', *American Journal of International Law* 39 (1945) pp45-83, at p74.

⁸ Hilderbrand, *Dumbarton Oaks*, p50.

⁹ Hilderbrand, *Dumbarton Oaks*, pp46-7.

¹⁰ Hoopes, *FDR and the Creation of the UN*, pp142-3.

difference between British and Soviet views on the relevance of the concept of aggression in the new organization became even sharper. In accordance with the Soviet view that the primary purpose of the Security Council was to keep aggression in check, it insisted that the term be expressly included in the Charter provisions dealing with the scope of the Council's powers¹¹. The Soviet delegation reasoned that the term 'aggression' had gained in prevalence in the preceding years, which justified an explicit reference in the new organisation's constitution – especially when it had been the major Allied powers themselves which had spurred on this growing prevalence¹². Further, the Soviet Union failed to see how peacekeeping could take place unless based on the fundamental aim of punishing aggressors. It envisaged the Security Council as the institutionalized version of the wartime alliance between the Soviet Union, US and UK, which would use its superior military power to combat future aggressors as it had done against Nazi Germany¹³.

In response, the UK largely reiterated the reasons outlined in Memorandum B for omitting the term 'aggression'. The League's history of time-wasting and failure caused by placing the concept of aggression at the heart of its security provisions could only be overcome by abandoning the concept altogether and instead substituting more practical terminology, such as 'breach of the peace'. On this point, the UK had the support of the US, which viewed the phrase 'act of aggression' as overloaded with moral implications¹⁴. In a shift away from its prior role promoting the concept of aggression for the purposes of international security and prosecuting war-mongering state leaders, the US now preferred the abandonment of 'aggression' in favour of less morally charged language like 'breach of the peace', which it felt

¹¹ Edwin Borchard, 'The Dumbarton Oaks Conference', *American Journal of International Law* 39 (1945), pp97-101, at p98.

¹² For instance, see Agreement Between the Governments of the United Kingdom and the United States of America on the Principles Applying to Mutual Aid in the Prosecution of the War Against Aggression (the Lend-Lease Agreement) of 23 February, 1942, available online <www.yale.edu/lawweb/avalon/decade/decade04.htm>; the Moscow Declaration of November 1943, signed by the US, UK, Soviet Union and China, where reference is made to the "menace of aggression": see footnote 31 of chapter four of this thesis (p80); and the Cairo Declaration of December 1, 1943, signed by US, UK and China, which refers to the "aggression of Japan": see footnote 1 of chapter five of this thesis (p94).

¹³ Hilderbrand, *Dumbarton Oaks*, pp137-138.

¹⁴ Hilderbrand, *Dumbarton Oaks*, p138.

would in any case still capture conduct falling within the ‘aggression’ category¹⁵. Despite the best arguments of the US and UK, the Soviet Union refused to yield on the importance of incorporating the concept of aggression into the constitution of the new organisation. Thus, the compromise formula empowering the Security Council with respect to a “threat to the peace, breach of the peace or act of aggression” was agreed upon, and formed part of the Dumbarton Oaks Proposals, which were later used as the basis of discussions at San Francisco¹⁶.

On the related issue of whether to include a definition of aggression in the new organisation’s charter, the British position easily triumphed. The great technological advances in warfare experienced in the first part of the twentieth century, coupled with the uncertainty of not knowing how warfare might develop in the future, highlighted the need for the Security Council to be able to exercise its full powers unencumbered by definitions or other potential fetters¹⁷. Whether convinced by these arguments, or merely eager to protect their own freedom of action, the Americans and Soviets agreed with the British to exclude a definition of aggression from the final text of the Dumbarton Oaks Proposals¹⁸.

¹⁵ The US position at this time against including a statement about aggression in the UN Charter is difficult to reconcile with its signing of the Act of Chapultepec only a month prior to the commencement of the San Francisco Conference. This regional treaty declared “That every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American state, shall...be considered as an act of aggression against the other states which sign this Act. In any case invasion by armed forces of one state into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression” [emphasis added]. See George A Finch, ‘The United Nations Charter’, *American Journal of International Law* 39 (1945), pp541-546, at p543.

¹⁶ This formula featured in two different sections of the Proposals. It first appeared in Chapter I, which dealt with the purposes of the organisation, as follows: “The purposes of the Organisation should be: 1. To maintain international peace and security; and to that end to take effective collective measures for prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace...”. It also appeared under Chapter VIII Section B: “2. In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make recommendations or decide upon the measures to be taken to maintain or restore peace and security”: text available online, <www.ibiblio.org/pha/policy/1944/441007a.html>. The San Francisco conference in the next section.

¹⁷ Hilderbrand, *Dumbarton Oaks*, p138.

¹⁸ At the second round of meetings at Dumbarton Oaks between the US, UK and China, the latter delegation reintroduced the suggestion that a definition of aggression be included in the Dumbarton Oaks Proposals. China argued that such definition would expedite Security Council action, promote confidence in the new organization, enable public opinion to identify an aggressor quickly and act as a deterrent to potential aggressors. China thought that some statement of examples of aggression would

(c) United Nations Conference on International Organisation, San Francisco, April-June 1945

At San Francisco, where fifty governments met to discuss the Dumbarton Oaks Proposals for the new international organisation, the issue of defining aggression in the Charter was again raised. Many delegations, particularly from among the smaller states, were extremely reluctant to leave the Security Council with the broad, sweeping discretionary powers it enjoyed under the Proposals¹⁹. The smaller powers feared the great powers might use such a provision to justify action in circumstances more politically expedient for them than strictly international security-threatening.

To this end, draft amendments to the Proposals from Bolivia and the Philippines were circulated on May 5, both of which included definitions of aggression²⁰. At the May 18 meeting of Committee III/3, which was addressing the new organisation's enforcement arrangements, these states jointly proposed a motion compelling immediate Security Council intervention in the event of at least one of the

suffice as an indicator of that term's meaning; a full definition was not necessary. However, having already addressed this issue with the Soviets, the UK and US evidently were able to persuade China that it would be better to leave to the Security Council the discretion to decide on an *ad hoc* basis what conduct amounted to aggression, and no alterations to the Proposals were made.

¹⁹ Leland M Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (Boston: World Peace Foundation, 1949), p263.

²⁰ Bolivia's proposed definition read as follows: "A state shall be designated an aggressor if it has committed any of the following acts to the detriment of another state. (a) Invasion of another state's territory by armed forces. (b) Declaration of war. (c) Attack by land, sea, or air forces, with or without declaration of war, on another state's territory, shipping or aircraft. (d) Support given to armed bands for the purpose of invasion. (e) Intervention in another state's internal or foreign affairs. (f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement. (g) Refusal to comply with a judicial decision lawfully pronounced by an International Court." The proposed definition submitted by the Philippines provided: "Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts: (1) To declare war against another nation; (2) To invade or attack, with or without declaration of war, the territory, public vessel, or public aircraft of another nation; (3) To subject another nation to naval, land or air blockade; and (4) To interfere with the internal affairs of another nation by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation". Both proposed definitions reproduced in *United Nations Conference on International Organization Documents* (London: United Nations Information Organisation, 1945), vol 3, p585 and p538 respectively.

circumstances specified in the Bolivian amendment actually taking place²¹. This motion attracted support from a range of small and middle powers, including Uruguay, Mexico, Colombia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico and New Zealand. Delegates from these states reiterated similar arguments in favour of definition to those presented by China at Dumbarton Oaks – namely, (1) it was preferable to know in advance what acts comprised aggression and hence would attract sanctions; (2) the Security Council would be aided in its work by the incorporation of a list of specified aggressive acts into the Charter; and (3) the list did not have to be exclusive, and thus the Security Council would still be able to act in situations falling outside the scope of the list.

In an effort to resolve the crucial problem of enforcement, which had also plagued the League, this group of states further argued the Charter should make explicit that the occurrence of any of the circumstances contained in the Bolivian list should give rise to *automatic* Council action. This would provide assurance that the Council would indeed act in the listed situations. Specifying circumstances in the Charter where action would be automatic was also crucial if the Council's voting procedure was going to allow just one veto from any of the permanent members to paralyse it. At least the first three circumstances in the Bolivian list were uncontroversial, in terms of requiring enforcement action in response; moreover, it was the collective view of the supporting states that "the Organisation must bind itself to oppose lawless force by lawful force in certain cases where action should be obligatory"²².

Opposition to the motion was expressed by a diverse collection of small states and great powers, namely Czechoslovakia, the Netherlands, Norway, Paraguay, South Africa, the UK and the US. They countered that it was not possible to stipulate all acts that comprised aggression, and even if a non-exhaustive list format was accepted, that could promote the exclusion of unlisted acts from Council consideration²³. The

²¹ *United Nations Conference on International Organization Documents*, vol 12, p341.

²² *United Nations Conference on International Organization Documents*, vol 12, p342.

²³ William TR Fox, 'Collective Enforcement of Peace and Security', *American Political Science Review* 39 (1945), pp970-981, at p973.

difficulties of defining aggression ahead of time were also raised; by contrast, identifying an aggressive act after its occurrence would be “simple”²⁴. Automatic Council action was unwise and potentially hazardous because it might compel premature enforcement action. In relation to the substance of the Bolivian list, opponents argued that any act classified as aggression could also be considered a “legitimate act of self-defence”²⁵ in certain circumstances; and that some of the terms in the Bolivian list, such as “intervention”, would themselves require further definition. For these reasons, it was safer to empower the Council with full discretion to decide when aggression had occurred.

At the next meeting of Committee III/3, the fate of the Bolivian/Philippines motion, and with it the issue of defining aggression in the Charter, was sealed: on this occasion, France and the Soviet Union, amongst others, also stated their opposition to the motion. Thus, with four of the great powers having registered their disapproval, it was unsurprising that the motion was defeated by a vote of 22 to 12²⁶. Subsequently, the issue of aggression was not brought up again at San Francisco. Thus, the Dumbarton Oaks approach - which expressly included aggression within the remit of the Security Council’s powers in response to Soviet views of the punitive role of the new organisation, and yet left this term undefined by agreement of the great powers – was adopted into the final text of the UN Charter²⁷. By including references to aggression in the UN Charter without any further detail, the great powers had ensured they retained ultimate discretion in relation to international security matters.

(2) Defining Aggression at the United Nations

In the early UN period, it soon became evident that military action would be authorised very exceptionally by the Security Council as a consequence of growing Cold War tensions. As the split intensified between the Soviet Union and its allies on

²⁴ *United Nations Conference on International Organization Documents*, vol 12, p342.

²⁵ *United Nations Conference on International Organization Documents*, vol 12, p342.

²⁶ *United Nations Conference on International Organization Documents*, vol 12, p349.

²⁷ See articles 1(1) and 39 of the UN Charter: available online, <www.un.org/aboutun/charter>.

the one side, and the US and its allies on the other, the likelihood increased of one of the P5 states exercising its veto power in the Security Council in pursuit of its priorities with respect to this broader conflict, thus reducing even further the probability that any given situation requiring Security Council response would actually receive one. Impotence in the Security Council caused by Cold War divisions started to encourage states with complaints concerning international security to go to the General Assembly instead. The complaints raised in the General Assembly of “threats to the political independence and territorial integrity” of Greece²⁸, of China²⁹, and of “hostile activities” in Yugoslavia³⁰ are cases in point.

It was against the backdrop of Cold War paralysis in the Security Council that in 1950 the General Assembly referred to the International Law Commission for its consideration the “Duties of States in the event of Outbreak of Hostilities”³¹. Inevitably, albeit indirectly, examination of this topic raised once again the prospect of defining aggression. By 1952, the Secretary-General had produced a comprehensive report outlining the arguments for and against defining aggression by international agreement. Although these arguments were largely irreconcilable with one another, each relying on a vision of international relations which strongly conflicted with the perspective underpinning the other side³², the General Assembly decided that same year to convene a special committee to consider the issue of defining aggression, in association with a possible code of international criminal offences against the peace and security of mankind³³.

If the pro-definition camp was correct, the practical effects of a definition of aggression – for instance, providing states with guidance on prohibited behaviour and

²⁸ See GA Res 193 (III) of 27 November 1948.

²⁹ See GA Res 292 (IV) of 8 December 1949.

³⁰ See GA Res 509 (VI) of 14 December 1951.

³¹ see GA Res 378 (V) of 17 November 1950.

³² For instance, pro-definition states argued that a definition was necessary, while anti-definition states claimed it was not; the former further argued that a definition was in any case desirable, whereas the latter provided reasons it was not.

³³ See GA Res 688 (VII) of 20 December 1952. Discussion of the related topic concerning international criminal jurisdiction will be developed in chapter seven.

the limits of self-defence; educating and empowering public opinion; and assisting the international organs responsible for making determinations – might help to overcome the significant political obstacles preventing the Security Council from fulfilling consistently and in all respects its peace and security duties. For this important reason, a definition of aggression was considered by the General Assembly to be worth pursuing, even if initial indicators of the success of this task were less than promising. It was thought that if the lawyers could define aggression successfully, the political stagnation on international security matters provoked by the Cold War might be circumvented.

In total, the General Assembly convened four committees to define aggression in the lead-up to the General Assembly's Definition of Aggression of 1974. Although the four committees throughout their deliberations continued to approach the issue of defining aggression as a legal exercise, the influence of political considerations in the committees' meetings was strong and constant, with views often split down Cold War lines. Thus, the more the committees doggedly pursued attempts to paper over political divisions by negotiating a supposedly legally binding definition of aggression, ironically the more they highlighted the political differences that existed. Finally, after a significant verbal confrontation between the US and Soviet Union at the 1968 meeting of the fourth committee, the enduring political nature of the problem of defining aggression was noted, clearing the way for the very fragile consensus underpinning the General Assembly Definition of Aggression to be brokered. It is to the deliberations of these committees that we now turn.

(a) 1953 Report of the Special Committee on the Question of Defining Aggression³⁴

From this report, it is clear that very little agreement existed about any aspect of the task of defining aggression, and that the positions taken by delegates on these issues were strongly influenced by Cold War considerations. While France, the UK and the Netherlands favoured a narrowly-construed definition of aggression informed by the

³⁴ A/2638, reproduced in Ferencz, *Defining International Aggression*, vol 2, pp187-201.

Charter obligation to refrain from the threat or use of force and the right of self-defence, other states, including the Soviet Union, Poland, Mexico, Bolivia, and Iran argued in favour of a definition which was not restricted to issues of armed force but also took into account the Charter principles of sovereign equality³⁵, non-intervention³⁶, equal rights and self-determination³⁷. The Soviet Union, Bolivia and Iran were joined by Syria and the Dominican Republic in the view that certain economic conduct fell within the scope of the Charter meaning of aggression, while the UK and Brazil contended that it did not. In support of the latter state, the US noted that “serious consequences might result from extending the idea of aggression”, which included a weakening of the concept as a whole³⁸. The Soviet Union and others also advocated including acts of an ideological nature in the definition, such as the encouragement of “war propaganda”³⁹. This again was opposed by two leading members of the Western bloc, the US and UK.

Even the form a definition of aggression should take provoked controversy. Three possible kinds of definition – general, enumerative, or a combination of both – were identified. While those in favour of a general definition argued it would provide sufficient flexibility to address unforeseen circumstances and would contribute to the evolution of international law, critics like Poland argued a general definition would be futile in the absence of a statement of elements constituting aggression, because making a determination in accordance with a general definition would require protracted discussions, thus impeding a timely UN response if indeed aggression had been committed. Those such as the Soviet Union and Poland who supported an enumerative definition – namely, a list of condemned acts – believed this would make the determination of aggression easier by placing the burden of proof on the alleged aggressor, rather than on the victim. However, critics like the UK and China⁴⁰ opposed this approach on the basis that it would make more problematic the

³⁵ art 2(1) of the UN Charter.

³⁶ art 2(7) of the UN Charter.

³⁷ art 1(2) of the UN Charter.

³⁸ Ferencz, *Defining International Aggression*, vol 2, p195.

³⁹ Ferencz, *Defining International Aggression*, vol 2, p199.

⁴⁰ During this time, China was represented at the UN by the Republic of China. The People's Republic of China was recognised by the UN as the legitimate government of China in 1971.

restoration of peace; it would make determinations of aggression automatic; and it would help would-be aggressors to avoid a determination against them simply by engaging in conduct outside the scope of the definition. A definition which combined a general statement and a list of acts was viewed by supporters as embodying the merits of both approaches, while opponents contended it would simply unite the defects of the two approaches.

The effect of a definition of aggression was perhaps the most contentious issue in this and subsequent committee meetings; disagreement was so entrenched that delegates were forced merely to repeat the same views stated by the Secretary-General in his report of the year before. Thus, proponents of definition, such as the Soviet Union, Iran, Syria, Poland, Bolivia and Mexico claimed it would contribute to the evolution of international law; provide guidance to international organs, facilitating less subjective decision-making; educate public opinion and discourage potential aggressors. Opponents of definition⁴¹, responded that it would not deter potential aggressors, it would only encourage them to adopt different techniques; it would impede international organs in their assigned task of determining the aggressor; and history had shown that a definition was both unnecessary and virtually impossible to reach through consensus. Norway pointed out that the real difficulty of judging whether aggression had taken place or not was a result of the difficulty of discovering the facts in a given situation of high conflict. The existence or otherwise of a definition of aggression was a secondary matter; a definition would only be of use provided preliminary agreement on the facts existed⁴². Thus, in practice, it was not whether a specific act was aggressive or not that divided opinion among states – rather, it was whether that act had in fact taken place.

Some committee members emphasized that a definition would exert immense moral authority over those bodies exercising international peace and security functions,

⁴¹ The 1953 Report does not identify specifically which states opposed a definition of aggression; however, excluding the supporters of a definition, the remaining committee members represented the following states: Brazil, China, Dominican Republic, Netherlands, Norway, Pakistan, the US and UK. It can be surmised that these latter two states at least were firmly opposed to a definition.

⁴² Ferencz, *Defining International Aggression*, vol 2, p197.

while the Dominican Republic argued that a definition, if adopted as part of a General Assembly resolution, might become recognized as a general principle of international law, in which case its effect would be “questionable”⁴³ – that is, more significant than a purely moral obligation. Other states, such as Poland, tried to shut down any future discussion on the effect of definition by arguing that General Assembly resolutions 599⁴⁴ and 688⁴⁵ had settled the matter - in favour of definition – for good.

(b) 1956 Report of the Special Committee on the Question of Defining Aggression⁴⁶

In 1954, the original special committee of fifteen members was expanded to nineteen members, and in General Assembly resolutions 897(IX)⁴⁷ and 898(IX)⁴⁸, work towards the Draft Code of Offences Against the Peace and Security of Mankind and the establishment of an international criminal court was suspended until the special committee on defining aggression had submitted its report⁴⁹. The 1956 Report reveals little progress on the substance, purpose and effect of a definition of aggression since 1953.

Once again, the content of a definition was hotly debated, with positions on various proposals being largely determined according to Soviet or Western bloc membership. Seven draft proposals in total were submitted to the 1956 Committee by the Soviet Union and her friends and allies, including Paraguay, Iran, Panama, China, Iraq, Mexico, the Dominican Republic and Peru. The US expressly criticized six of these drafts⁵⁰. The UK joined the US in criticizing four of these, and formally associated

⁴³ Ferencz, *Defining International Aggression*, vol 2, p198.

⁴⁴ Of 31 January 1952. In its preamble, this resolution stated “considering that...it is nevertheless possible and desirable...to define aggression by reference to the elements which constitute it”.

⁴⁵ Of 20 December 1952. This resolution referred to “the need for a detailed study of (a) the various forms of aggression...” (emphasis added).

⁴⁶ A/3574, reproduced in Ferencz, *Defining International Aggression*, vol 2, pp215-247.

⁴⁷ Of 4 December 1954.

⁴⁸ Of 14 December 1954.

⁴⁹ As a result of the longstanding difficulties each successive special committee had defining aggression, the impact of GA Res 897(IX) and 898(IX) was to postpone work on these related topics indefinitely. As shall be revealed below, the impact of this postponement played an important role in the development of the General Assembly Definition of Aggression.

⁵⁰ The seventh draft was not the subject of comprehensive discussion.

itself with American criticisms in relation to the Soviet draft. In particular, the centrality of the priority principle – namely, the state who first commits any act listed as prohibited should be declared “the attacker” – in the Soviet draft attracted serious opposition from the US, the UK and the Netherlands. By contrast, Soviet bloc members Poland and Czechoslovakia, as well as firm Soviet friend Syria, spoke in favour of the Soviet draft⁵¹. While states such as Yugoslavia⁵² expressed their opposition to the inclusion of notions of economic, ideological or indirect⁵³ aggression in a definition, others including the Soviet Union, Paraguay, Iran, and China still pushed for the same.

As in 1953, the basic issue of what a definition of aggression would achieve – described quaintly in UN documents as “the possibility and desirability of a definition”⁵⁴ – remained controversial. While states including the Soviet Union, Czechoslovakia, Iraq, Poland, the Netherlands, Mexico, Syria, Paraguay and Peru felt that a definition was possible and desirable for international peace and security purposes, others lamented the fact that any definition would not be binding, and therefore would, at best, provide guidance. For this latter reason, certain delegates continued to argue that a definition would, in reality, be useless. This discussion also raised the issue of which international bodies were meant to be guided by a definition. While some states such as the Soviet Union contended that any definition was for use by the Security Council only in the performance of its peace and security functions, others claimed on the basis of GA resolution 377A (V)⁵⁵ that in certain

⁵¹ Ferencz, *Defining International Aggression*, vol 2, p231.

⁵² Other than Yugoslavia, the 1956 Report does not identify opponents of a definition of aggression which extends to economic, ideological or indirect means, merely indicating that their numbers are substantial: Ferencz, *Defining International Aggression*, vol 2, p222.

⁵³ that is, subversive activities such as fomenting civil strife in foreign nations and assisting armed bands.

⁵⁴ Ferencz, *Defining International Aggression*, vol 2, p225.

⁵⁵ Under GA Res 377A (V) of 3 November 1950, also referred to as the Uniting for Peace resolution, the General Assembly conferred upon itself the power to make “appropriate recommendations to Members for collective measures”, in the event that the Security Council fails to perform its functions where “there appears to be a threat to the peace, breach of the peace, or act of aggression” as a consequence of a lack of P5 unanimity. Originally passed in order to enable UN action during the Suez Crisis, to which the UK and France were parties, GA Res 377A has subsequently been used as a basis for calling emergency special sessions of the General Assembly in response to outbreaks of international hostilities: see chapter seven of this thesis for further details.

circumstances, the General Assembly might also be empowered to determine the aggressor⁵⁶.

Further, extended debate on the definition's effect merely reinforced the same old intractable divisions described in the Secretary-General's 1952 report⁵⁷. Thus, China doubted the utility of a definition in an international community "where everyone freely carried arms, everyone freely produced arms, where no police force or courts with compulsory powers existed"⁵⁸; the US cited the "mischief and confusion"⁵⁹ that a definition could bring to the fulfillment of the UN's peace and security functions; and the UK restated that a definition might in fact encourage a potential aggressor by de-emphasising the significance of acts falling outside the definition's scope. In response to this latter concern, "almost all"⁶⁰ committee members agreed that the Security Council should retain and exercise its freedom to identify as aggression acts not specifically enumerated in the definition, in appropriate circumstances. However, the Netherlands and Norway questioned the extent to which a definition could perform its apparent guidance role if a provision to this effect was incorporated into the definition⁶¹. Despite this view, states such as Syria, Yugoslavia and Peru continued to argue respectively that it was desirable to bind the Security Council, at least morally, to identify aggression when the definition's listed acts occurred; that a definition would make a significant contribution to the maintenance of peace and security; and although it was probable that any definition would display some flaws, "a legislator should not insist on formulating only perfect rules"⁶².

⁵⁶ This conclusion is left open in the draft definitions forwarded to the 1956 Committee by Paraguay, Iran, Panama, and Mexico, which do not specify the Security Council but merely refer to the "competent organ of the United Nations": Ferencz, *Defining International Aggression*, vol 2, pp245-246.

⁵⁷ Indeed, the US representative, pointed out "the artificial and insubstantial character of the impression that a large measure of agreement existed in the United Nations on the possibility of drafting an acceptable definition of aggression", where in his view there was only "fundamental and irreconcilable differences": Ferencz, *Defining International Aggression*, vol 2, p1225.

⁵⁸ Ferencz, *Defining International Aggression*, vol 2, p226.

⁵⁹ Ferencz, *Defining International Aggression*, vol 2, p226.

⁶⁰ Ferencz, *Defining International Aggression*, vol 2, p228.

⁶¹ Ferencz, *Defining International Aggression*, vol 2, p228.

⁶² Ferencz, *Defining International Aggression*, vol 2, p226.

In light of the continuing and irresolvable differences of opinion symptomatic of the broader Cold War conflict which were expressed in the 1956 report, the General Assembly decided in 1957 to postpone consideration of the question of defining aggression for two years, at which time a third special committee would be convened⁶³. In 1959, this third committee of twenty-one members met; with Cold War tensions still operating, political differences continued to make defining aggression impossible, and the third committee adjourned until 1962. Again for this reason, the third committee adjourned its deliberations two more times, thus suspending further work until 1967. In that year, a Soviet request to the General Assembly about the “Need to Expedite the drafting of a definition of aggression in the light of the present international situation”⁶⁴ resulted in the establishment of yet another special committee, this time of 35 members, which commenced work in 1968.

(c) Work of the Special Committee on the Question of Defining Aggression from 1968 onwards⁶⁵

By 1968, the international political climate had shifted away from the intense acrimony which typified the early years of the Cold War, towards a slightly more conciliatory environment. The Sino-Soviet split from the late 1960s onwards diverted the attention of China and the Soviet Union from attacking US interests, and simultaneously presented the US with new opportunities to further its political leverage over one, or possibly both, powers⁶⁶. In addition, by this time both the Soviet Union and the US began to feel the heavy economic strain of their global competition, in particular with respect to the nuclear arms race and the Vietnam War respectively, and hence they also had a clear financial interest in achieving a form of *rapprochement*. In these relatively less confrontational conditions, the chance to

⁶³ See GA Res 1181 (XII) of 29 November 1957.

⁶⁴ Ferencz, *Defining International Aggression*, vol 2, p275.

⁶⁵ The reports of the Special Committee from 1968-1973 are reproduced in Ferencz, Ferencz, *Defining International Aggression*, vol 2, pp280-319, 326-364, 372-438, 446-484, 493-509, and 519-539.

⁶⁶ Raymond L. Garthodd, *Detente and Confrontation: American-Soviet Relations from Nixon to Reagan* (Washington DC: Brookings Institute, 1994).

make some progress towards a definition of aggression was grasped by the General Assembly.

However, the warming of relations between the superpowers would take a few years yet, as the 1968 Committee meeting attested. This first opportunity to meet to define aggression after a twelve year hiatus proved to be explosive by UN standards. While discussing the perennial issue of what would be achieved in international peace and security terms by a definition of aggression, and after the same old pro-definition argument about guidance “for Member States and the United Nations”⁶⁷ had been reiterated, the Soviet Union used the occasion to declare unilaterally that the US had committed aggression in Vietnam, a view backed up by Algeria, Bulgaria, Romania and Syria. Not content to stop there, the Soviet Union added that the US had also committed other acts of aggression in Latin America, Cuba, Panama and the Dominican Republic. In response, the US indicated that in relation to the Vietnam conflict it was only North Vietnam and its supporters that were the aggressors. Further, the US reminded the Soviet Union it occupied “the almost unique position among world Powers of having been formally judged an aggressor by a world body”, and pointed out that “the Hungarian people must draw cold comfort from the pious declaration of the Government of the Soviet Union that no State could invade another State”⁶⁸.

This exchange illustrated very clearly how irrelevant a definition of aggression was for the maintenance of international security in political circumstances where the great powers were locked in battle among themselves. This point was not lost on certain members of the committee: the 1968 Report indicates that doubts were expressed by certain states concerning the value of a definition, with some of them still questioning “the advisability of defining aggression at all”⁶⁹ just five years before GA Res 3314. Finally, it was this latter group which succinctly identified the true source of the problem lurking beneath efforts to define aggression:

⁶⁷ Ferencz, *Defining International Aggression*, vol 2, p292.

⁶⁸ Ferencz, *Defining International Aggression*, vol 2, pp294-295.

⁶⁹ Ferencz, *Defining International Aggression*, vol 2, p298.

“The main thing needed to deter or suppress aggression was not to have a definition, but to ensure that the system of collective security would be applied and until now it was not the absence of a definition of aggression which had hampered the organs of the United Nations in their efforts to maintain peace and security. Success or failure had depended on the willingness, or lack of willingness, of States Members to respect their Charter obligations. Consequently there was the danger that a definition would create an illusion of accomplishment when none in fact had been made”.⁷⁰

The implication of this apparently long-forgotten insight – that no development of international law, such as a definition of aggression, could successfully conquer international political conditions in which the great powers were each competing for world supremacy - dealt a serious blow to the pro-definition camp. Being compelled to concede that even with a definition of aggression, Charter obligations in relation to international security were unlikely to be enforced in light of the superpower global competition meant that pro-definition states had no option but to return to their original, rather weak starting point: that a definition could still act as a useful, non-binding guide to decision-making bodies.

Following these events, it is unsurprising that the three draft proposals which dominated the attention of the 1969 Committee reaffirmed the non-binding nature of a definition of aggression vis-à-vis the Security Council’s powers⁷¹. With this agreed, the other issues raised by the task of defining aggression seemed to fade into insignificance. If, in the prevailing Cold War climate, a definition could at best only guide the Security Council in its peace and security functions, neither restricting the Security Council’s discretion to those acts listed in a definition, nor compelling the Security Council to determine aggression when any of the listed acts occurred, then

⁷⁰ Ferencz, *Defining International Aggression*, vol 2, p298.

⁷¹ See paragraphs 2 and 3 of the Soviet draft (Ferencz, *Defining International Aggression*, vol 2, pp330-1) and paragraph 5 of the Thirteen Power draft submitted by Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia (Ferencz, *Defining International Aggression*, vol 2, p332). While these two drafts explicitly referred to the non-binding nature of a definition, the Six Power draft submitted by Australia, Canada, Italy, Japan, the US and UK simply stated that “... ‘aggression’ is a term to be applied by the Security Council when appropriate...”: Ferencz, *Defining International Aggression*, vol 2, p333.

neither the task of defining aggression, nor any particular definition, were any longer of crucial importance for international security. This growing realization during the Committee's 1970-1972 sessions facilitated compromise among the states, later making possible the adoption of the General Assembly Definition of Aggression in 1974.

If, by 1968 onwards, it was recognised that inhospitable Cold War conditions limited what a definition of aggression could achieve, why did the Committee continue with its deliberations until 1974, when the General Assembly Definition of Aggression was adopted? The answer to this question lies in the General Assembly's 1954 decision to postpone work on the related questions of the Draft Code of Offences against the Peace and Security of Mankind, and on the international criminal court, until a definition of aggression was accomplished. The desire to reopen these other issues thus provided strong motivation for a definition of aggression, separate from arguments about the inherent value of such a definition itself. Hence, at the 1973 meeting of one of the UN's subsidiary organs, where the Committee's incomplete draft definition was discussed, a view stressing the importance of reaching consensus on a definition of aggression was stated thus:

“a modest compromise now was more important than continuous deliberations on a more comprehensive definition; a limited consensus could clear the way for continuing efforts to codify and progressively develop international law in some important fields...”⁷²

The significance of this motivation over and above the substance of a definition of aggression is apparent in the text of the General Assembly Definition of Aggression, which simply preserved in its text many of the outstanding differences of view generated by conflicting political ideologies which were expressed during the deliberations of the UN committees since the early 1950s. Thus, in the General Assembly Definition of Aggression, the status of 'economic' and 'ideological' aggression is left open, and references supporting both the narrow and wide

⁷² Ferencz, *Defining International Aggression*, vol 2, p545.

constructions of the Charter meaning of aggression were included⁷³. These kind of loopholes reveal that the General Assembly 'Definition' of Aggression in fact defines very little; instead, this resolution demonstrates the continuation of Cold War political divisions during and after its adoption. Consequently, the thirty-year UN effort to define aggression has shown how powerless developments of international law for maintaining international security are in the face of great power struggles which threaten the prevailing balance of power.

(3) Conclusion

This chapter demonstrated how, in the aftermath of World War Two, the concept of aggression re-emerged during UN Charter negotiations and later in discussions within the UN organisation itself. Despite strong British and American opposition to any reference to aggression in the UN Charter in light of the League experience, aggression was included alongside 'threat to the peace' and 'breach of the peace' in the final Charter draft at Soviet insistence.

Although the great powers succeeded in preventing any 'definition' of aggression from being included in the Charter, this topic was revived by the UN in the early 1950s in response to Security Council paralysis caused by the Cold War. Rather than helping to ease these international political tensions, however, it was shown how the efforts of the four consecutive committees to define aggression themselves revealed the ongoing impact of the Cold War conflict. Legal arguments about the content, form and purpose of a definition of aggression played out in these committees actually masked deeper political discord reflective of the Cold War divide, as dramatic outbursts from the Soviet Union and the US in the 1968 committee meeting attested. These political tensions were also reflected in the terms of the 1974 Definition, which was agreed more out of a desire to reopen discussions postponed until aggression was defined than by any new international political consensus. Thus,

⁷³ Contrast preambular paragraph 2 of the General Assembly Definition of Aggression, which refers to the enforcement provisions in the UN Charter, and article 7, which upholds the right to self-determination.

UN attempts to define aggression for the purpose of international security exposed the high degree to which international law mechanisms are constrained by, and are reflective of, the existing balance of power.

Chapter Seven: Aggression at the UN, 1945-

The last chapter contended that General Assembly efforts to 'define' aggression for international security purposes, and ILC attempts to further entrench the crime of aggression into international law both demonstrated the high degree to which the concept of aggression is influenced and constrained by international political conditions. In this chapter, the historical record of the Security Council, General Assembly and International Court of Justice is examined to reveal both (1) the extent to which, and (2) how, the concept of aggression has featured in the activities of these bodies. It is argued that the Security Council's record with respect to the concept of aggression also provides strong evidence that unfavourable international political conditions have significantly hampered the performance of the Security Council's peace and security duties, producing an incongruous array of Security Council resolutions.

In light of these difficulties, the General Assembly has adopted its own resolutions identifying aggression on certain occasions; however, these resolutions are of hortatory value at best, in light of the Security Council's exclusive enforcement powers under the UN Charter. Since 1991, the concept of aggression has disappeared almost entirely from the Security Council's and General Assembly's vocabulary, both of these bodies tending to describe incidents involving the use of armed force as 'threats to international peace and security'. Finally, the International Court of Justice has also occasionally considered the concept of aggression in its jurisprudence, though it too has demonstrated great reluctance to rule that aggression has occurred, even when confronted with a serious instance of international hostilities. These findings lend further support to the claim that the operation and development of the current international legal order is more likely to reflect the endurance of certain key political challenges in international relations rather than resolve them.

(1) Security Council

Despite its power to make determinations as to the existence of a threat to the peace, breach of the peace, or act of aggression under article 39 of the UN Charter, the Security Council very infrequently exercised this power between 1945 and 1990. Cold War competition obstructed consensus in the Security Council on how best to address challenges to international peace and security. In fact, Cold War considerations dominated political activities to such an extent during this time that the Security Council only managed to authorize full-scale peace enforcement action – the most serious Security Council response available – on two occasions: in Korea in 1950, and in Kuwait in 1990. Significantly, the Soviet Union was absent from the Security Council during the vote on Resolution 82, which, despite its title¹, determined that the armed attack by which North Korea commenced war against the Republic of Korea was a breach of the peace. Similarly, it was only at the tail end of the Cold War, when US-Soviet tensions had relaxed somewhat, that Resolution 660² was made possible. But even then, Soviet insistence that the concept of aggression be excluded from this resolution resulted in another determination “that there exists a breach of international peace and security”³. With top-end peace enforcement action authorized by the Security Council for breaches of the peace resulting in regional wars, it is perhaps no surprise that the Security Council has never in its history used its powers under Charter article 39 to determine the existence of aggression.

On this basis, if the Security Council made no reference to aggression or aggressive activities in any of its resolutions, this might suggest that in the post-Charter period, the concept of aggression has never played any political role in international relations, having been supplanted by the categories of ‘threat to the peace’ and ‘breach of the peace’ for the purposes of maintaining international order. However, on several occasions, the Security Council has complicated matters by

¹ SC Res 82 of 25 June 1950 was entitled ‘Complaint of Aggression upon the Republic of Korea’.

² Of 2 August 1990.

³ Christopher Greenwood, ‘New World Order or Old? The Invasion of Kuwait and the Rule of Law’, *Modern Law Review* 55 (1992), pp153-178 at p159.

describing and *denouncing* an incident as aggressive, though stopping short of a formal *determination* to this effect. The cases of South Africa, Southern Rhodesia and Israel are especially relevant on this point.

From the early 1960s through to the mid-1980s, South Africa was the subject of many Security Council resolutions for its conduct in relation to Angola, Zambia, Lesotho, Botswana and Namibia. On multiple occasions, the Security Council “strongly condemn[ed]” South Africa for:

- (a) its “aggression”⁴, its “latest premeditated and unprovoked aggression”⁵, and finally its “continued, intensified and unprovoked acts of aggression”⁶ against Angola⁷;
- (b) its “continued collusion...in repeated acts of aggression” against Zambia⁸;
- (c) its “premeditated aggressive act” against Lesotho⁹;
- (d) its “recent unprovoked and unwarranted military attack on the capital of Botswana as an act of aggression”¹⁰; and
- (e) its “utilization of the Territory of Namibia as a springboard for acts of aggression and destabilization of Angola”¹¹.

Despite these acknowledgements of the aggressive nature of South African actions - and with the exception of the largely unsuccessful arms embargo established by Security Council resolution 418 of 1977¹² - the Security Council did little more in these resolutions than demand that South Africa desist from its aggressive conduct, and ask other states to help the victims of the aggression. By deliberately refraining

⁴ see SC Res 387 of 31 March 1976, and SC Res 454 of 2 November 1979.

⁵ SC Res 574 of 7 October 1985.

⁶ SC Res 577 of 6 December 1985.

⁷ SC Res 574 of 7 October 1985.

⁸ SC Res 455 of 23 November 1979.

⁹ SC Res 527 of 15 December 1982.

¹⁰ SC Res 568 of 21 June 1985.

¹¹ SC Res 602 of 25 November 1987.

¹² The embargo's lack of success can be implied from SC Res 574 of 7 October 1985, in which the Security Council reiterated its call to states to “implement fully” the arms embargo first made mandatory eight years earlier.

from making a formal determination about South African conduct, yet at the same time expressly criticising South Africa's aggressions in its resolutions, the Security Council brought to the world's attention its impotence as the main entity for ensuring international peace and security in the context of an enduring, all-encompassing great power conflict.

Similarly, without formally determining that aggression had been committed, the Security Council was still condemning the ongoing "provocative and aggressive acts" of Southern Rhodesia against Mozambique¹³ and the former's "continued, intensified and unprovoked acts of aggression" against Zambia¹⁴ ten years after comprehensive sanctions against Southern Rhodesia had first been introduced. Once again, in 1985, the Security Council condemned Israel's "act of armed aggression", and even went so far as to acknowledge Tunisia's right to reparations from Israel for its raid of PLO headquarters, yet still failed to make a formal determination that aggression had taken place¹⁵. Further examples also exist of the Security Council invoking the notion of aggression for basic 'naming and shaming' purposes while at the same time ignoring the opportunity to make a formal finding of its existence¹⁶.

Taken together, these examples reinforce the blunt observation made at the 1968 Special Committee on the Question of Defining Aggression: that it is the lack of political will, not perceived difficulties with the concept of aggression itself, which is the real issue preventing the Charter security regime from functioning as designed¹⁷. Until this underlying problem is addressed, the concept of aggression is destined to be used as a term of moral censure at most by the Security Council, other bodies and individual states alike.

¹³ SC Res 386 of 17 March 1976 and SC Res 411 of 30 June 1977.

¹⁴ SC Res 455 of 23 November 1979.

¹⁵ SC Res 573 of 4 October 1985.

¹⁶ For instance, the Security Council also condemned "the act of armed aggression" committed against Benin (SC Res 405 of 14 April 1977) and the "mercenary aggression" against the Seychelles (SC Res 496 of 15 December 1981 and SC Res 507 of 28 May 1982), without explicitly identifying the state from which such conduct originated, let alone making a determination under article 39.

¹⁷ This observation is discussed in chapter 6 of this thesis (p128-129).

However, there is reason to believe that even in relation to this limited use, the concept of aggression in the context of international relations is waning. While the end of the Cold War has facilitated the emergence of a revived UN, including a Security Council which more frequently exercises its powers under article 39, at the same time, the Security Council has shifted even further away from the concept of aggression. Virtually all situations subject to a Security Council determination since 1991 have been classified in the ‘threat to the peace’ category. Thus, events arising out of the implosion of the former Yugoslavia¹⁸; civil wars in Sierra Leone¹⁹, Angola²⁰, Liberia²¹, and Haiti²²; mutinies in Central African Republic²³ and Ivory Coast²⁴; the failure of the Taliban in Afghanistan to “respond to the demands of” Security Resolution 1214 of 1998²⁵; and the “magnitude of the human tragedy”²⁶ resulting from conflict within Somalia’s borders have all been held by the Security Council to constitute, or to continue to constitute, “a threat to international peace and security”. In none of these resolutions has the Security Council described or denounced the acts committed in terms of aggression. To the extent that historical record is any guide, the Security Council’s practice during the Cold War of classifying even invasions as ‘breaches of the peace’, combined with its post-Cold War tendency to expand the ‘threat to the peace’ category to encompass all unconventional challenges to international peace and security, would strongly suggest the concept of aggression plays an insignificant role in relation to the maintenance of international security.

¹⁸ See, for example, SC Res 1088 of 12 December 1996, SC Res 1575 of 22 November 2004, and SC Res 1639 of 21 November 2005 on Bosnia and Herzegovina; SC Res 1079 of 15 November 1996, and SC Res 1120 of 14 July 1997 on Croatia; and SC Res 1244 of 10 June 1999 on Kosovo.

¹⁹ SC Res 1132 of 8 October 1997.

²⁰ SC Res 1374 of 19 October 2001.

²¹ SC Res 788 of 19 November 1992.

²² SC Res 1529 of 29 February 2004.

²³ SC Res 1125 of 6 August 1997 and SC Res 1136 of 6 November 1997.

²⁴ SC Res 1464 of 4 February 2003.

²⁵ SC Res 1267 of 15 October 1999 and SC Res 1333 of 19 December 2000.

²⁶ SC Res 794 of 3 December 1992.

(2) General Assembly

These difficulties in the Security Council have been mirrored in the General Assembly, whether in its emergency special sessions, its general special sessions, or its ordinary meetings. Under the Uniting for Peace Resolution²⁷, nine emergency special sessions of the General Assembly were called by the Security Council during the Cold War to address urgent problems of international peace and security in relation to which the proper course of action could not be agreed²⁸. What is striking about these emergency special sessions is the degree to which the General Assembly, like the Security Council, refrained from identifying international conflicts as aggression, despite the General Assembly's more representative composition and formal equality of voting, regardless of the gravity of the situations being addressed. Thus, the General Assembly made no mention of aggression in relation to the 1956 Suez Crisis²⁹, the Soviet invasion of Hungary the same year³⁰, the 1967 Six Day War³¹, or the 1980 Soviet invasion of Afghanistan³². Only three of the ten situations dealt with by the General Assembly in its emergency special sessions refer to aggression at all, and these all took place in the 1980s, as the Cold War was coming to an end³³.

Similarly, the General Assembly has echoed condemnations of aggression first made by the Security Council. Nine years after the Security Council first decided South Africa's continued occupation of Namibia was "an aggressive encroachment on the

²⁷ GA Res 377 of 3 November 1950.

²⁸ In addition, one emergency session, dealing with the Six Day War of 1967, was convened on the basis of a letter from the Soviet Union under rule 20 of the General Assembly's rules of procedure.

²⁹ 1st Emergency Special Session of the GA: held 7-10 Nov, 1956: see GA Res 997-1003 (ES-I)

³⁰ 2nd Emergency Special Session of the GA: held 4-10 Nov, 1956: see GA Res 1004-1005 (ES-II)

³¹ 5th Emergency Special Session of the GA: held 17 June-18 September 1967: see GA Res 2252-2257 (ES-V)

³² 6th Emergency Special Session of the GA: held 10-14 January, 1980: see GA Res ES-6/2.

³³ The General Assembly's three emergency special sessions referring to aggression were: (1) its seventh session in 1982, in which the General Assembly indicated it was "deeply alarmed at the explosive situation in the Middle East resulting from the Israeli aggression against the sovereign state of Lebanon and the Palestinian people, which poses a threat to international peace and security" (see GA Res ES-7/7); (2) its eighth session in 1981 on Namibia; and (3) its ninth session in 1982 concerning the Israeli administration and occupation of the Golan Heights. The latter two emergency special sessions are discussed below.

authority of the United Nations”³⁴, the General Assembly in 1978 described the South African annexation of Walvis Bay as “an act of aggression against the Namibian people”, and indicated that “South Africa’s illegal occupation of Namibia constitutes a continued act of aggression”³⁵. Moreover, the General Assembly condemned South Africa’s aggression against Angola, among other states, in 1988, yet South African aggression towards Angola had already been denounced by the Security Council in 1976³⁶. While the great powers remained divided on the issue of whether or not to respond to South Africa with military enforcement action, the General Assembly’s resolutions added moral support at most to the existing resolutions of the Security Council on these occasions³⁷.

The value of the General Assembly’s resolutions as a form of moral support is one thing; their worth as tools of moral suasion for compelling Security Council action where great power consensus is absent is quite another. On occasions where the General Assembly has been first to condemn aggressive activities, the Security Council has not followed suit with corresponding action. For example, while the General Assembly criticized “acts of aggression” taking place in Central America in 1983, the Security Council made no determination about these events at all³⁸.

The Security Council has not even acted on General Assembly decisions about international security specifically referred to that body by the Security Council itself

³⁴ SC Res 269 of 12 August 1969.

³⁵ GA Res S-9/2 at paragraphs 10, 11 and 12 respectively. However, it should be noted that the General Assembly generally and somewhat pre-emptively stated that it “considers that any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression” (GA Res 1889 of 6 November 1963) and “considers further that any attempt to annex a part or the whole of Territory of South West Africa constitutes an act of aggression” (GA Res 2074 of 17 December 1965).

³⁶ See GA Res 43/26 and SC Res 387 of 1976 respectively.

³⁷ Where the Security Council can agree on what action to take, it is even less clear what value statements about aggression emanating from the General Assembly hold. Hence, what motivated the General Assembly’s finding that “the Central People’s Government of People’s Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea” more than seven months after the Security Council had determined a breach of the peace had occurred, and almost four months after US forces crossed the 38th parallel, is uncertain.

³⁸ Compare SC Res 530 of 19 May 1983 with GA Res 38/10 of 11 November 1983. However, despite the General Assembly’s strong language in this resolution, it did not explicitly identify which state or states were the culprit/s.

as a consequence of great power disagreement. Thus, while the General Assembly declared at its eighth emergency special session in 1981 “that the illegal occupation of Namibia by South Africa together with the repeated acts of aggression committed by South Africa against neighbouring states constitute a breach of international peace and security”, Cold War conflict between the great powers left the General Assembly re-declaring South Africa’s conduct as aggression under the terms of the General Assembly Definition of Aggression a further six times, up until 1988³⁹. In addition, the General Assembly’s conclusion at its ninth emergency special session in 1982 that:

“Israel’s decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Syrian Golan Heights constitutes an act of aggression under the provisions of article 39 of the Charter of the United Nations and [the General Assembly Definition of Aggression]”,

was similarly ignored by the Security Council, though the General Assembly condemned and re-declared this act of aggression every year for seven consecutive years⁴⁰. Despite the General Assembly’s best efforts, at no stage did the Security Council make a formal determination that aggression existed in either of these cases. Constant mention of the General Assembly Definition of Aggression in that body’s resolutions appears not to have made any difference either. From this, it would seem that the General Assembly’s greater willingness to invoke the concept of aggression has exercised minimal moral force over the Security Council’s hesitancy to do the same.

While in the post-Cold War period, the Security Council seems to have abandoned altogether any references to the concept of aggression in the performance of its peace and security functions, opting instead to respond to new challenges by interpreting

³⁹ See GA Res 37/233 of 20 December 1982; GA Res 38/36 of 1 December 1983; GA Res 39/50 of 12 December 1984; GA Res 40/97 of 13 December 1985; GA Res 42/14 of 6 November 1987; GA Res 43/26 of 17 November 1988.

⁴⁰ See GA Res 39/146 of 14 December 1984; GA Res 40/168 of 16 December 1985; GA Res 41/162 of 4 December 1986; GA Res 42/209 of 11 December 1987; GA Res 43/54 of 6 December 1988; GA Res 44/40 of 4 December 1989 and GA Res 45/83 of 13 December 1990.

widely what is meant by a ‘threat to international peace and security’, the General Assembly continued to hold on to the notion of aggression, at least until 1994, while at the same time adopting the Security Council’s new approach. Thus, the General Assembly referred to “the aggression against the territory of the Republic of Bosnia and Herzegovina, which constitutes a threat to international peace and security” in 1992⁴¹ and “the continued aggression against Bosnia and Herzegovina” in 1994⁴². It was also in 1994 that the General Assembly noticeably dropped any references to Israeli aggression or GA Res 3314 from its resolutions in relation to the Golan Heights⁴³. Since 1994, the situation in the Golan Heights appears to have been downgraded even further by the General Assembly, which last year “determine[d] once more that the continued occupation of the Syrian Golan and its de facto annexation constitute a stumbling block in the way of achieving a just, comprehensive and lasting peace in the region”⁴⁴. The ways in which the General Assembly has addressed other situations since 1994 also suggest that the concept of aggression has now disappeared entirely from its resolution vocabulary⁴⁵.

(3) The International Court of Justice

The record of the International Court of Justice also reflects the limitations of UN organs where entrenched political problems are concerned. On the one hand, the requirement that the express consent of both sides to a dispute is given before the ICJ can carry out its adjudication functions addresses the problem of law enforcement in

⁴¹ GA Res 46/242 of 25 August 1992. Also note GA Res 47/121 of 18 December 1992 and Res 48/88 of 20 December 1993 which include references to “aggressive acts” and the “continuation of aggression” respectively.

⁴² GA Res 49/10 of 3 November 1994.

⁴³ See GA Res 49/87 and GA Res 49/88, both of 16 December 1994.

⁴⁴ GA Res 60/40 of 1 December 2005.

⁴⁵ See for example GA Res 50/159 of 28 February 1996, in which the General Assembly “condemns all those from within and outside [Burundi] who are attacking innocent populations, arming extremists, heedlessly violating human rights and seriously undermining national peace and security”; GA Res 59/32 of 31 January 2005, in which the General Assembly “reiterates its determination that any actions taken by Israel to impose its laws, jurisdiction and administration on the Holy City of Jerusalem are illegal and therefore null and void and have no validity whatsoever”; and GA Res 53/203A-B of 12 February 1999 in which the General Assembly “condemns the fact that foreign military support to the Afghan parties continued unabated through 1998 and calls upon all States strictly to refrain from any outside interference [in Afghanistan] and immediately to end...the presence and involvement of any foreign military, paramilitary or secret service personnel”.

the international arena, by increasing the likelihood that implementation of those decisions will take place. However, on the other hand, this condition also restricts greatly the range of disputes heard by the ICJ in practice, meaning that where relations between states have deteriorated to the degree that allegations of aggression are involved, it is unlikely that all parties will consent to the ICJ's adjudication of the dispute. Even where consent of the parties is granted, the outcome of ICJ proceedings is often strongly influenced by external political considerations, reflected in the discontinuance notices filed with the agreement of the parties on the basis that the issues have subsequently been resolved out of court⁴⁶.

As a consequence of ICJ rules and practice, then, it is unsurprising that it has only been confronted with arguments explicitly concerning aggression on two occasions. The ICJ has dealt with these contentions very cautiously. In the *Nicaragua (Admissability)* case⁴⁷, the US argued that Nicaragua's application to the ICJ was inadmissible on the grounds that the crux of Nicaragua's claim was that:

"the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council"⁴⁸.

However, the ICJ rejected this argument, on the basis that it was evident the situation "demand[ed] the peaceful settlement of disputes"⁴⁹, did not concern a continuing

⁴⁶ See, for example the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, (*Libyan Arab Jamahiriya v United States*)(1992-2003) cases, which were discontinued at the request of Libya, the UK and the US; and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)* (1989-1996), which was discontinued at the request of Iran and the US. Further details are available online, <www.icj-cij.org/icjwww/idecisions.htm>.

⁴⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*(1984-1991), available online <www.icj-cij.org/icjwww/idecisions.htm>.

⁴⁸ as summarised by the ICJ in its judgment on admissibility (hereinafter 'Admissability Judgment'), p431, paragraph 89: see <www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>.

⁴⁹ 'Admissability Judgment', p434, paragraph 94: available online, <www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>.

armed conflict between Nicaragua and the US, and was hence properly brought before the ICJ.

As Nicaragua had not expressly alleged aggression in its application, in *Nicaragua (Merits)*⁵⁰ the ICJ was able to avoid to a great extent making any important rulings in this area. Instead, it focussed on what was meant by an "armed attack". In deciding the scope of "armed attack", the ICJ indicated that art 3(g) of the General Assembly Definition of Aggression reflected the position of customary international law⁵¹. By narrowly restricting its ruling to this specific provision, it has been suggested the ICJ has thrown doubt on the status of the rest of the General Assembly Definition of Aggression.

By contrast, in *Armed Activities on the Territory of the Congo*⁵², the Congo asked the ICJ to declare *inter alia* that Uganda was "guilty of an act of aggression within the meaning of article 1 of [the General Assembly Definition of Aggression]...contrary to article 2 paragraph 4 of the United Nations Charter"⁵³. This was top of the Congo's list of requests to the ICJ, and in light of the seriousness of the events being adjudicated⁵⁴, was a vital part of the Congo's application. The ICJ substantially upheld the Congo's claim, but did so in its own terms: "the unlawful military intervention by Uganda was of such a magnitude and duration that the Court

⁵⁰ See footnote 47 of this chapter.

⁵¹ 'Merits Judgment', p103, paragraph 195: available online, <www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>. Article 3 states: "Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of art 2, qualify as an act of aggression....(g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

⁵² (*Democratic Republic of the Congo v Uganda*)(1999-2005), available online <www.icj-cij.org/icjwww/idocuments/ico/icoapplication/ico_application_19990623.pdf>.

⁵³ see 'Application Instituting Proceedings' of 23 June 1999, p17, available online <www.icj-cij.org/icjwww/idocket/ico/icoapplication/ico_application_19990623.pdf>.

⁵⁴ In his declaration, Judge Koroma points out that the events forming the subject of the case cost three to four million lives ('Declaration of Judge Koroma', paragraph 1), and Judge Simma emphasises that during the events in question, Uganda controlled Congolese territory the size of Germany: ('Separate Opinion of Judge Simma', paragraph 2), available online <www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

considers it to be a grave violation of the prohibition on the use of force expressed in article 2, paragraph 4, of the Charter"⁵⁵.

This was as close as the ICJ got to *considering* the extent to which Uganda's actions amounted to aggression, let alone to making a finding that Uganda had committed such aggression. Given the Congo's multiple requests throughout the proceedings for a declaration in relation to aggression, the ICJ's evasion of this important question can only be explained by reference to political sensitivities concerning the Security Council and its own record with respect to determinations of aggression. Had the ICJ explicitly made a finding of aggression, this would have brought more public attention to the political problem of inconsistent great power compliance with international obligations, an outcome the ICJ was apparently eager to avoid, despite the demands of its own judicial role.

Yet by avoiding altogether the issue of aggression in the circumstances presented by this case, the ICJ derogated from its own duties, and revealed the high degree to which this formally independent legal body can be influenced by grave political considerations. This point was not lost on two of the judges presiding over this case. Hence, in his separate opinion, Judge Elaraby outlined a range of factors pertaining to this case which:

"require[d] the Court to adhere to its judicial responsibility to adjudicate on a normative basis...the Court should...have embarked on a determination as to whether the egregious use of force by Uganda falls within the customary rule of international law as embodied in [the General Assembly Definition of Aggression]"⁵⁶.

⁵⁵ Judgment of 19 December 2005', paragraph 165, available online, <www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

⁵⁶ 'Separate Opinion of Judge Elaraby', paragraph 17, available online, <www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

By normal judicial standards, Judge Elaraby's conclusion was outspoken: "I am unable, however, to appreciate any compelling reason for the Court to refrain from finding that Uganda's actions did indeed amount to aggression"⁵⁷.

By comparison, Judge Simma's separate opinion made Judge Elaraby look restrained:

"...So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in Corfu Channel, Nicaragua, or Oil Platforms, border on the insignificant...

The Council will have had its own - political - reasons for refraining from such a determination [ie that the Ugandan invasion constituted an act of aggression]. But the Court, as the principal **judicial** organ of the United Nations, does not have to follow that course. Its very *raison d'être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!...

By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of 'aggression', the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations."⁵⁸

Thus, even within the ICJ, it seems the impact of international political conditions has triumphed, at least for the moment, over the further development of the concept of aggression.

⁵⁷ 'Separate Opinion of Judge Elaraby', paragraph 20.

⁵⁸ 'Separate Opinion of Judge Simma', paragraphs 2, 3 and 15 respectively. Emphasis in original. The Democratic Republic of the Congo also filed separate applications similarly requesting declarations that Burundi and Rwanda had committed "acts of armed aggression" against it, but these proceedings were later discontinued: see Press Release 2001/2 of 1 February 2001, available online <www.icj-cij.org/icjwww/idocket/icb/icbframe.htm>. The Congo later sought to make a fresh application against Rwanda on 28 May 2002, but the ICJ ruled on 3 February 2006 it had no jurisdiction to hear the matter on the basis that Rwanda had not consented to the proceedings: see Press Release 2006/4, available online <www.icj-cij.org/icjwww/idocket/icrw/icrwframe.htm>.

(4) Conclusion

The approaches in practice adopted by the Security Council, General Assembly and International Court of Justice to the concept of aggression since 1945 confirm our findings from chapter six – namely, that great power disagreement arising out of the Cold War conflict has prevented to a great extent the concept of aggression from assuming a central role in the maintenance of international peace and security. While up until 1990 the Security Council and General Assembly on occasion referred to instances of aggression in their resolutions, the Security Council has never made a formal determination to this effect, and thus the concept has never formed the basis of UN action to restore order. Instead, the concept has acted as an indicator of the Security Council's and/or General Assembly's moral condemnation of a situation, though this in itself has not translated into UN remedial action in the face of strong political forces militating against this option. With minimal evidence to suggest the concept of aggression plays any positive, tangible part in the maintenance of international peace and security – and in light of the controversies associated with the General Assembly's attempts to define the notion – it is perhaps not surprising that in the post-Cold War period, the concept of aggression has quietly vanished from Security Council and General Assembly resolutions. This political shift away from the concept of aggression has even infiltrated the UN's judicial organ, as the majority judgment in the ICJ's *Armed Activities on the Territory of the Congo* case demonstrates. However, this infiltration has not gone unnoticed or unopposed, as the opinions of Elaraby and Simma JJ reveal. While certain members of the ICJ continue to resist the extinction of the concept of aggression, we can expect the clash between great power political interests and the legal *status quo* to continue on the international stage.

Chapter Eight: The Crime of Aggression and the UN, 1946-1998

Like the General Assembly's attempts to define aggression which culminated in the General Assembly Definition of Aggression, its efforts to develop this notion as an international *crime* also strongly reflect the influence of changing international political conditions. Initial General Assembly efforts – prompted by Security Council inaction as a consequence of the Cold War - focussed on moving beyond the Nuremberg and Tokyo precedents to establish aggression as a *state* crime. For this reason, further progress on this task was postponed until the outcome of the General Assembly's attempts to define aggression. As the Cold War intensified in the 1950s, however, it became evident that establishing aggression as a state crime would be a political impossibility, and thus, the International Law Commission (ILC) shifted its emphasis back to individual criminal responsibility for aggression. Despite this shift, the influence of the General Assembly Definition of Aggression and continuing preoccupation with defining aggression have lingered on in an international criminal law context, disguising the underlying, central political question: namely, whether or not the crime of aggression *should* be prosecuted at all. Since the end of the Cold War, it is this unresolved political issue which has been at the heart of discussions about the crime of aggression, it being no longer possible to assume on the basis of the Nuremberg and Tokyo precedents that a great power consensus supporting the prosecution of the crime of aggression still exists. Like General Assembly efforts to define aggression, the history of the crime of aggression in the UN era demonstrates the extent to which international legal initiatives are constrained by the vital interests of the great powers.

(1) Aggression as a Crime: 1946-1954

The crime of aggression was considered initially by the General Assembly in relation to two separate, but related, topics: (a) the codification of international law; and (b) an international criminal jurisdiction. The thrust of debates on these topics during this period concerned aggression as a state crime, with individual

criminal responsibility as a secondary consideration. It is to these debates that we now turn.

(a) The Codification of International Law

In an effort to contribute to the further development of international law, in 1947 the General Assembly directed the ILC to extrapolate the relevant tenets of international law from the Nuremberg Charter and judgment, and to draft a code of offences against the peace and security of mankind¹. The ILC held its first session in 1949; the following year, the Special Rapporteur for this topic submitted his report on a draft code. Even at this stage, it was evident that insistence on defining aggression was futile. Quoting Soviet objections to the American proposal to insert a definition of aggression into the Nuremberg Charter in 1945², the Special Rapporteur reasoned as follows:

“ ‘When people speak about aggression, they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time’...For the[se] reasons...we suggest that the International Law Commission abstain from any attempt at defining the notion of ‘aggression’. **Such an attempt would prove be a pure waste of time.**”³

In addition, the Nuremberg and Tokyo precedents themselves demonstrated that, for the purposes of individual criminal responsibility, a definition of aggression was unnecessary; there, a general statement of an individual’s culpability was all that was used. While the ILC thus refrained from attempts to define aggression exhaustively in its 1951 Draft Code⁴, its provisions setting out liability for aggression went far beyond the Nuremberg and Tokyo Charters, expressing responsibility in terms of state, rather than individual, conduct:

¹ See GA Res 177 of 21 November 1947. Hereafter referred to as Draft Code. Although the title of the 1951 Draft Code refers to “offences” rather than “crimes”, the difference is cosmetic rather than substantive, as the commentaries to the 1951 Draft Code – which refer to crimes – makes clear. The Draft Code was renamed the Draft Code of Crimes Against the Peace and Security of Mankind in 1987.

² See chapter four of this thesis, p80.

³ ‘Report by J. Spiropoulos, Special Rapporteur’ (A/CN.4/25), *Yearbook of the International Law Commission* (1950), vol 2, p262. Emphasis added.

⁴ The ILC also produced a draft code in 1954. The only difference between the 1951 and 1954 drafts was the addition of crimes against UN personnel within the ambit of the latter.

“The following acts are offences against the peace and security of mankind:

- (1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.
- (2) Any threat by the authorities of a State to resort to any act of aggression against another State...”⁵

The intention of the ILC was to criminalise every act of aggression committed by a state⁶, thus endorsing a conclusion that the judges at Nuremberg were careful to avoid – namely, that states *themselves* were capable of, and could be held responsible for, committing international crimes. The 1951 Draft Code did recognise the criminal responsibility of individuals “acting on behalf of the State”, and suggested in certain circumstances such responsibility might also extend to private individuals.

This explicit extension to states of criminal responsibility for aggression was not the only massive leap since Nuremberg. Whereas in the Nuremberg Charter, the major war criminals were charged with, *inter alia*, “initiation or waging a war of aggression”, the 1951 Draft Code criminalized all “acts of aggression”, thereby including within its scope conduct not limited to the use of armed force, and deliberately reiterating the language used in the UN Charter’s provision relating to the Security Council’s role⁷. Again, at Nuremberg, judges were circumspect on the issue of non-military aggression, stopping short of finding aggression against Austria and Czechoslovakia where no armed resistance to German occupation arose⁸. Hence, the 1951 Draft Code incorporated into its terms controversial

⁵ ‘Report of the International Law Commission to the General Assembly’ (A/1858), *Yearbook of the International Law Commission* (1951), vol 2, p135. The threat of aggression was also included in the 1954 draft as a separate offence, but was later dropped: see below.

⁶ ‘Report of the International Law Commission to the General Assembly’ (A/1858), *ILC Yearbook* (1951), p135.

⁷ ‘Report of the International Law Commission to the General Assembly’ (A/1858), *ILC Yearbook* (1951), p135. Note the Security Council’s powers under article 39 of the UN Charter, to “determine the existence of any threat to the peace, breach of the peace, or act of aggression...”.

⁸ In relation to Austria, the judgment simply concluded that “the methods employed to achieve the object were those of an aggressor”, and that “a calculated design to resort to force” was behind the

inferences deliberately left vague by the Nuremberg judges. In particular, the 1951 Draft Code's focus on state acts later caused significant and unnecessary difficulties, as revealed below.

(b) International Criminal Jurisdiction

This emphasis on state criminality rather than individual criminal responsibility for aggression was also evident in relation to the topic of an international criminal jurisdiction, and was perhaps even more controversial than in the context of a draft code. Nowhere in the UN Charter was the future prosecution of international crimes mentioned; the sole judicial body the Charter expressly recognized was the International Court of Justice, a court which could rule only on interstate disputes, and only with state consent⁹. In fact, under the Charter, the exclusive entity with supranational powers was the Security Council, and these powers were only exercisable in very limited, and serious, circumstances – that is, for the maintenance or restoration of international order¹⁰.

In 1948, the General Assembly called upon the ILC to:

“study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”¹¹.

The 1950 report of the Special Rapporteur for this issue outlined ten general principles upon which international criminal jurisdiction could be established¹².

seizure of Czechoslovakia: see ‘Judgment’, *Trial of the Major War Criminals*, p194 and p196 respectively.

⁹ see article 34(1) of the Statute of the International Court of Justice, available online <www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm#CHAPTER_II>.

¹⁰ see chapter VII of the UN Charter.

¹¹ GA Res 260 B of 9 December 1948.

¹² Many of these principles are recognizable in the statutes governing the international criminal tribunals for the Former Yugoslavia and Rwanda, as well as the International Criminal Court. For instance, note principle (10), “that defendants appearing before the international judicial organ shall have all the guarantees necessary for their defence and that hearings shall be public”; and principle (6), “that the judges of the Criminal Court or Chamber be jurists of high qualifications...chosen without distinction as to nationality”: ‘Report by Ricardo J. Alfaro, Special Rapporteur’ (A/CN.4/15*), *Yearbook of the International Law Commission*. (1950), vol 2, p17.

While on the one hand, the Special Rapporteur recommended that the power to initiate international criminal proceedings reside solely with the Security Council¹³, on the other, he also advised that international criminal jurisdiction should be exercised over *states and* individuals – a clear indication of the supranational character of the international criminal law which the proposed international judicial organ would apply¹⁴. The political implications of extending both the subject-matter and parties over which supranational powers could apply were unlikely to attract state consensus in normal circumstances, let alone as the Cold War was intensifying between the superpowers, less than ten years since the establishment of the UN organisation. As a result, the reference to international criminal jurisdiction over states was soon dropped, and the 1953 Draft Statute for an International Criminal Court applied expressly to natural persons¹⁵.

Even with the controversial question of state criminal responsibility sidestepped, other overwhelming difficulties remained. The problem of what types of conduct should be prosecuted by an international criminal court was ever present; the 1953 Draft Statute got around this by conferring jurisdiction simply over “crimes generally recognized under international law”¹⁶, apparently leaving it to a future international criminal court itself to decide what this meant. Similarly to General Assembly efforts to define aggression for international security purposes, the fundamental challenges faced by the prospect of an international criminal court were political. This became evident at the meeting of the 1953 Committee for an International Criminal Jurisdiction, where vastly contrasting differences of opinion were expressed. Extended debate took place on such basic political questions as the appropriateness of an international criminal jurisdiction in light of the existing state of international law and international relations; the relationship between the administration of international criminal justice and the maintenance

¹³See principle (9), ‘Report by Ricardo J. Alfaro, Special Rapporteur’ (A/CN.4/15*), *ILC Yearbook* (1950), p17. However, the Special Rapporteur thought in appropriate circumstances the Security Council might authorise a state to commence proceedings directly.

¹⁴ See principle (3) ‘Report by Ricardo J. Alfaro, Special Rapporteur’ (A/CN.4/15*), *ILC Yearbook* (1950), p17.

¹⁵ See ‘Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953’ (A/2645), *General Assembly Official Records* Ninth Session, Supplement No. 12, p23.

¹⁶ ‘Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953’ (A/2645), *GAOR* (9th Sess.), p23.

of peace; the purpose of an international criminal court; the relationship between an international criminal court and the UN; and the standards to which a proposed international criminal court would need to live up to. While the UN report about the meeting of the 1953 committee carefully avoided associating individual ILC members with particular positions in relation to these questions, the high level of disagreement is apparent¹⁷.

This lack of consensus was reflected in the 1953 Draft Statute, where several provisions in fact incorporated a choice between two possible alternatives. Thus, each of articles 7, 8, 9 and 11 concerning the procedure for electing judges listed two different alternatives, and article 29 presented options on which entities should be entitled to exercise powers related to the initiation of proceedings. This high level of political disagreement underpinning these ostensibly legal questions meant that the Committee was unable to decide even whether it was possible, practicable and desirable to create an organised international criminal jurisdiction, let alone determine the details of such a jurisdiction. Despite this significant obstacle, the members of the Committee concluded that:

"...on the basis of the preparatory studies made by the General Assembly and both the Special Committees on International Criminal Jurisdiction the moment had come for the General Assembly to decide what, if any, further steps should be taken toward the establishment of an international criminal court."¹⁸

While efforts to produce the Draft Code had been linked by the General Assembly in 1950¹⁹ to the Soviet Union's proposal to define aggression, it was in 1954 that these two issues, as well as the Draft Statute, were expressly brought into relationship with one another by two General Assembly resolutions. Given that both the 1954 Draft Code and the question of defining aggression sought to target

¹⁷ Thus, on virtually all of these issues, the Report indicated that "some members" took one view, while "other members" took another. ILC members of the 1953 Committee came from the following states: Argentina, Australia, Belgium, China, Denmark, Egypt, France, Israel, Netherlands, Panama, Peru, Philippines, UK, US, Venezuela and Yugoslavia. Officially, ILC members act in their own private capacity, not as representatives of their home states. However, the reluctance of the Report to reveal the views of these individuals demonstrates, in reality, the strongly political nature of these positions.

¹⁸ 'Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953' (A/2645), *GAOR* (9th Sess.), p22.

¹⁹ See GA Res 378B of 17 November 1950.

state acts, in GA Res 897²⁰, it was decided to delay further consideration of the 1954 Draft Code until the special committee on defining aggression – originally set up by the General Assembly in 1952 – had completed its work. Similarly, in GA Res 898²¹, consideration of the 1953 Draft Statute was postponed until the special committee on defining aggression had finalized its report, and the General Assembly once again took up consideration of the 1954 Draft Code. However, because it took so long for the special committees on defining aggression to finish their work, the effect of these postponements was to shut off discussions about aggression as an international crime and about an international criminal court for at least twenty years. Thus, early UN efforts in relation to the crime of aggression had experienced a rocky start, and as a consequence of an inhospitable political climate, were abandoned indefinitely only four years after they had begun.

As demonstrated in chapter six, it was dissatisfaction with this indefinite postponement, rather than any sudden achievement of consensus on the substance of the definition of aggression after years of wrangling, that mainly motivated the adoption of the General Assembly Definition of Aggression²². Without any accompanying work on the crime of aggression in the intervening period, it is not surprising that the criminality of aggression received only a token acknowledgement in the General Assembly Definition of Aggression, with article 5 simply providing that “a war of aggression is a crime against international peace” and “aggression gives rise to international responsibility”. In any case, as discussions evolved in the special committees tasked with defining aggression, it was clear that committee members mainly considered their work in peace and security terms, criminal responsibility for aggression being incidental to this. As a result, over this period discussions about the crime of aggression suffered a double disadvantage: not only were they delayed by twenty years, but once the General Assembly Definition of Aggression was finally adopted in 1974, it was far from evident what its relevance was in an international criminal context. This

²⁰ Of 4 December 1954.

²¹ Of 14 December 1954.

²² See p130 of this thesis.

confusion persisted, and unnecessarily hampered renewed efforts from the 1980s onwards in relation to the 1954 Draft Code.

(2) Aggression as a Crime: 1981-1996

(a) The Draft Code

After a 27-year hiatus on the topic, it was not until 1981, as the Cold War entered its final years and seven years after the General Assembly Definition of Aggression, that the General Assembly invited the ILC to resume its activities with respect to producing a new Draft Code²³. A Special Rapporteur was appointed, who generated nine reports on the topic between 1983 and 1991²⁴. Making up for lost time, the Special Rapporteur in his second report recommended that the offences listed in the 1954 Draft Code, including aggression, should remain. He also noted that certain delegations favoured the addition of economic aggression as a specific offence, though he acknowledged the difficulties with this proposal, and suggested it was a turn of phrase “more suited to political than legal parlance”²⁵.

In 1986, the Special Rapporteur’s report included provisional articles for an updated Draft Code. Despite the only very tenuous link between the 1974 Definition and the crime of aggression, preoccupation with this relationship now infected the ILC's efforts to produce a Draft Code. Consequently, article 11 of the 1986 Draft Code detailed word for word many of the paragraphs comprising the General Assembly Definition of Aggression. In fact, the only sections of the General Assembly Definition of Aggression that were excluded from the 1986 Draft Code concerned evidence and interpretation, omitted on the basis that these

²³ See GA Res 36/106 of 10 December 1981.

²⁴ See Adriaan Bos, ‘The Experience of the Preparatory Committee’, in Mauro Politi and Guiseppe Nesi (eds), *The Rome Statute of the International Criminal Court* (Aldershot: Ashgate, 2001), p21.

²⁵ Dodou Thiam, ‘Second Report on the Draft Code of Offences Against the Peace and Security of Mankind’ (A/CN.4/377*), *Yearbook of the International Law Commission* (1984), vol 2, p100.

were “matters within the competence of the judge”²⁶. The crime of aggression was now defined in the 1986 Draft Code as:

“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”,

and the series of qualifying acts from the General Assembly Definition of Aggression was listed. This resolution, aimed at states, was imported into the Draft Code despite its provision limiting responsibility to "any person who commits an offence against the peace and security of mankind"²⁷.

The General Assembly Definition of Aggression also featured in the 1988 Draft Code. Worse, the Special Rapporteur at this time sought to broaden the range of potential acts which could be classified as aggression by including the words ‘in particular’ at the start of the list of acts taken from the General Assembly Definition of Aggression, though this idea also provoked disagreement. With the Cold War coming to an end at this time, it is unsurprising that ILC members from great power states such as the US, France, China and the Soviet Union, among others, all opposed the addition of ‘in particular’, while members from smaller powers such as Bahrain, Brazil, and Mexico supported it²⁸. In an attempt to unite the General Assembly Definition of Aggression with individual criminal responsibility, an article was proposed that “any individual to whom acts constituting aggression are attributed under this Code shall be liable to be tried and punished for a crime against peace”. On its face, this statement seemed to be self-evident, in light of the Nuremberg precedent. Yet to some, it had no place in the Draft Code on the basis that it was redundant, vague or dangerous. Finally, in an effort to avoid the political storm provoked by the prospect of an international

²⁶ Dodou Thiam, ‘Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind’ (A/CN.4/398), *Yearbook of the International Law Commission* (1986), vol 2, p84. Article 5 of the General Assembly Definition of Aggression, which referred to “international responsibility” and described a war of aggression as a crime, was excluded on the grounds that this was precisely the subject of the present draft.

²⁷ Emphasis added. see Thiam, ‘Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind’, *ILC Yearbook* (1986), p82.

²⁸ ‘Summary Records of the Meetings of the Fortieth Session: 2085th Meeting’, *Yearbook of the International Law Commission* (1988), vol 1, pp291-299.

criminal court, the 1988 report included a proposal that “any determination by the Security Council as to the existence of an act of aggression is binding on national courts”, though a divergence of views even on this more conservative idea existed. Once again, discord surrounding essentially political issues such as whether or not to establish an international criminal court and the relationship between political and legal organs in determining the existence of a crime of aggression were noted on the record, leaving them intact for future meetings.

While the General Assembly Definition of Aggression remained in the Draft Code, very little progress was made on these matters; trying to join state and individual responsibility in abstract terms was proving impossible. In 1991, the member from France expressed his total opposition to the inclusion of the General Assembly Definition of Aggression in the Draft Code, and suggested the only way forward was for the Draft Code:

“to indicate that aggression constituted in itself a crime against the peace and security of mankind, with the consequences defined under the Code, and to leave it to the courts which had jurisdiction, in other words, to domestic courts or to a future international criminal court, to decide, in the light of the facts of the case and in accordance with general principles of international law, whether aggression had occurred and to draw the appropriate conclusions.”²⁹

In other words, he advocated a return to the Nuremberg approach. However, this view failed to gain favour, and the General Assembly Definition of Aggression survived in the Draft Code.

It was not until 1995 that the stranglehold of the General Assembly Definition of Aggression over the Draft Code eased. On the advice of the Special Rapporteur, the General Assembly Definition of Aggression’s list of acts qualifying as aggression was omitted altogether from the Draft Code, a consequence of the great amount of criticism this list - and attempts to recast it - had attracted. The introductory statement from the General Assembly Definition of Aggression was

²⁹ ‘Summary Records of the Meetings of the Forty-Third Session: 2237th Meeting’, *Yearbook of the International Law Commission* (1991), vol 1, p200.

also expressly rejected in favour of wording that more accurately reflected article 2(4) of the UN Charter. Nevertheless, opinion remained divided: reasons given for opposing this newly redrafted provision included its reference to the phrase 'in any other manner inconsistent with the Charter of the United Nations', which some felt would itself result in many controversies; the lack of distinction between major and minor uses of force; and the provision being "too close"³⁰ to the text of article 2(4) of the UN Charter. Others appeared willing to tolerate the redrafted provision only on the basis that any other formulation attracting consensus might take years; that the provision was viewed as merely a "first stage"³¹; and because "it was pointless to devote too much attention to the problem of aggression, which could never be solved"³². Tellingly, no member spoke in full support of the redrafted provision.

Finally, the last remaining trace of influence from the General Assembly Definition of Aggression - namely, the apparent need for a paragraph 'defining' aggression - was knocked out of the Draft Code in 1996, when the provisions on aggression were compressed into one article simply outlining in general terms the basis of individual responsibility for aggression:

"an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".³³

Via a very circuitous route, drafters had finally achieved their original purpose: that is, setting down the conditions in which individual responsibility for the crime of aggression would arise. Early efforts to advance too far and too fast the scope of the crime of aggression as the Security Council stagnated due to growing Cold War tensions had completely overtaken the ILC's work on the Draft Code. The 1996 Draft Code thus represented the completion of a full circle: the

³⁰ The Italian ILC member, 'Summary Records of the Meetings of the Forty-Seventh Session: 2408th Meeting', *Yearbook of the International Law Commission* (1995), vol 1, p203.

³¹ The Sri Lankan ILC member, 'Summary Records of the Meetings of the Forty-Seventh Session: 2408th Meeting', *ILC Yearbook* (1995), p210.

³² The Moroccan ILC member, 'Summary Records of the Meetings of the Forty-Seventh Session: 2408th Meeting', *ILC Yearbook* (1995), p211.

³³ Article 16 of the 1996 Draft Code, available online <www.un.org/law/ilc>.

emphasis on criminal responsibility for state acts in the 1950s as the Cold War intensified, had, towards the end of the Cold War, eventually given way to individual criminal responsibility for international crimes, as per the Nuremberg precedent of 1946. The General Assembly brought the final Draft Code of 1996 to the attention of the Preparatory Committee on the Establishment of an International Criminal Court; since this time, no further steps to bring the 1996 Draft Code into force have been taken³⁴.

(b) The Draft Statute

Meanwhile, when the ILC's work towards the creation of an international criminal court revived, debates from the 1950s concerning whether or not aggression should fall within the jurisdiction of an international criminal court were also reopened. In response to a General Assembly request in 1989, the Special Rapporteur for the Draft Code included consideration of the establishment of an international criminal court in his report from 1990 onwards³⁵. Reflecting fluctuations in international political conditions resulting from the end of the Cold War, the question of which crimes to include within the jurisdiction of an international criminal court received varied responses in the early 1990s. While in 1990, the Special Rapporteur envisaged that this question would be determined primarily by reference to a finalised Code of Crimes against the Peace and Security of Mankind, by 1992, he was proposing exclusive and compulsory jurisdiction over five listed crimes - none of which included aggression - plus jurisdiction over other crimes on the basis of consent from particular states with an interest in the matter³⁶. However, just a year later, the Special Rapporteur once again suggested the jurisdiction of an international criminal court remain contingent on the "adoption of a criminal code"; in the absence of such a code, the

³⁴ Conspiracy, which had been such an important part of the prosecution of aggression at Nuremberg and Tokyo, was not expressly mentioned in the final Draft Code with regard to the crime of aggression, though it did apply in relation to the other crimes: see article 2(3)(e) of the 1996 Draft Code.

³⁵ See GA Res 44/39 of 4 December 1989.

³⁶ The five listed crimes were genocide; systematic or mass violations of human rights; apartheid; illicit international trafficking in drugs; and seizure of aircraft and kidnapping of diplomats or internationally protected persons: 'Draft Code of Crimes Against the Peace and Security of Mankind: Report of the Working Group on the Question of an International Criminal Jurisdiction' (A/CN.4/L.471), *Yearbook of the International Law Commission* (1992), vol 2, p61.

ambit of an international criminal court would be determined by special agreements between state parties or by a unilateral state declaration³⁷.

In 1994, the ILC adopted a Draft Statute, and recommended to the General Assembly that it organise an international conference at which this draft might be considered. The 1994 Draft Statute conferred jurisdiction to an international criminal court over aggression, genocide, crimes against humanity, war crimes, and serious crimes established by treaty³⁸. The inclusion of the crime of aggression was explained by the ILC in its commentary to this provision, in the following terms:

"...a court must, at the present time, be in a better position to define the customary law crime of aggression than was the Nuremberg Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nuremberg."³⁹

However, the ILC also noted "the difficulties of definition and application"⁴⁰, and, in light of the Security Council's peace and security duties, suggested that some stipulation be included permitting prosecution by an international criminal court of the crime of aggression only after the Security Council had determined that the relevant state committed an act of aggression⁴¹. 'Defining' aggression was thus resurrected in relation to the establishment of an international criminal court.

In accordance with the ILC's recommendation, the General Assembly agreed to establish an *ad hoc* committee to meet in 1995 to consider the 1994 Draft Statute⁴². While the *ad hoc* committee could agree in principle to the inclusion of genocide, war crimes and crimes against humanity within the jurisdiction of an

³⁷ Dodou Thiam, 'Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind' (A/CN.4/449), *Yearbook of the International Law Commission* (1993), vol 2, pp115-116.

³⁸ see article 20 of the 1994 Draft Statute for an International Criminal Court, available online <untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf>.

³⁹ 'Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994' (A/49/10), *Yearbook of the International Law Commission* (1994), vol 2, pp38-39.

⁴⁰ 'Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994', *ILC Yearbook* (1994), p39.

⁴¹ A provision to this effect was included in article 23(2) of the 1994 Draft Statute.

⁴² see GA Res 49/53 of 9 December 1995.

international criminal court, no consensus on including the crime of aggression was achieved. By 1995, the “international crimes generally recognized” in the 1953 Draft Statute evidently did not cover the crime of aggression. Just as the legal dead end of ‘defining’ aggression had swamped efforts in relation to the Draft Code, the advantages or difficulties of a definition of aggression were now being cited by states to support their respective political positions on whether or not an international criminal court should exercise jurisdiction over the crime of aggression. Thus, those advocating prosecution of the crime of aggression by an international criminal court justified their view by reference to the Nuremberg Charter, the General Assembly Definition of Aggression, the 1996 Draft Code and other draft documents, implying that these might provide assistance in ‘defining’ aggression for the purposes of individual criminal responsibility.

By contrast, those wanting the crime of aggression excluded from the jurisdiction of an international criminal court argued that a definition of aggression would take too long and cause lengthy delays to the establishment of an international criminal court. They also claimed a definition would have to address excuses and defences such as humanitarian intervention and self-defence. Both the Nuremberg Charter and the General Assembly Definition of Aggression were rejected outright as unhelpful in this context. The old issue about the relationship between the UN – in particular, the Security Council – and an international criminal court was also cited as a rationale for excluding aggression from its jurisdiction. Hence, arguments over a definition of aggression were just the latest peripheral, legal debates concealing the true source of difficulty: a lack of political consensus, especially among the great powers, in support of a permanent, international judicial organ with jurisdiction over the crime of aggression.

This firmly entrenched lack of political consensus was only confirmed by the Preparatory Committee for the Establishment of an International Criminal Court between 1996-1998. While the same types of arguments as advanced in the *ad hoc* committee were put forward by supporters and opponents alike, a third position also emerged at this time: certain states now claimed to support in theory the inclusion of aggression within the jurisdiction of an international criminal court, but only on the conditions that “general agreement could be reached on its

definition and on the appropriate balance of the respective roles and functions of the Court and the Security Council, without delaying the establishment of the Court”⁴³.

With the formation of this third group, attention once again focussed upon ‘defining’ aggression. Coalitions began forming around the various precedents in existence, including the Nuremberg Charter, the General Assembly Definition of Aggression, and the 1996 Draft Code. Proposals for defining aggression for Statute purposes were put forward based on these precedents, and the tired legal arguments over whether a ‘general’ or enumerative definition was better, and whether or not a proposed enumeration should be exhaustive, were resurrected⁴⁴. For each group in favour of one proposal, there were multiple factions ready to point out that proposal’s failings. Thus, the Nuremberg Charter’s provision on aggression was considered by opponents as either too imprecise, too limited or too obsolete, while the General Assembly Definition of Aggression was attacked for not addressing *de minimis* considerations or potential defences⁴⁵. Other delegations refused to be drawn into this interminable debate, denying the need for a definition of aggression, and arguing in favour of a provision in the Statute reserving the Security Council’s powers to determine whether a situation constituted aggression or not. As always, the fundamental issues debated in the Preparatory Committee concerning whether or not to include aggression in the statute establishing an international criminal court, its ‘definition’ if included and what its inclusion would mean for the relationship between the Security Council and an international criminal court formed “an essentially political judgment question which is so far not entirely resolved”⁴⁶. Without such resolution, no amount of legal paper-shuffling would achieve very much.

⁴³ ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (A/51/22), *General Assembly Official Records* (51st Sess.)(1996), p18.

⁴⁴ For the text of these proposals, see ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (A/51/22), *GAOR* (51st Sess.), p58-.

⁴⁵ *De minimis* considerations reflect the views held by some that only certain situations of sufficient gravity qualify as aggression. For contrasting views, see ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (A/51/22), *GAOR* (51st Sess.), p19.

⁴⁶ M Cherif Bassiouni, ‘Observations Concerning the 1997-1998 Preparatory Committee’s Work’, in *Nouvelles Etudes Penales* 13 (1997), p24. Chicago: International Human Rights Law Institute.

This was confirmed by the text of the Draft Statute produced by the Preparatory Committee in 1998, immediately prior to the Rome Conference. Although the Preparatory Committee's proposal listed three different alternative options on the crime of aggression, from the outset it stated that while "a large number of delegations" favoured aggression's inclusion in the Statute, the listing of these three options was "without prejudice to a final decision" on the crime's inclusion⁴⁷. Without even basic political agreement on whether or not to include aggression, setting out three possible alternatives for its inclusion was premature. Nevertheless, option one outlined in broad terms the prohibited conduct; option two combined a short statement of the conditions attracting liability with the list of qualifying acts from the General Assembly Definition of Aggression; and option three stipulated a more qualified version of option one, with the significant proviso that jurisdiction over aggression was subject to Security Council determination "regarding the act of a State"⁴⁸. In line with UN drafting procedure, square brackets surrounded amendments or additions still the subject of debate; tellingly, virtually all of the text contained in these three options fell within square brackets, just a few months before the Rome Conference would be convened⁴⁹. By contrast, other crimes within the Preparatory Committee's draft, such as genocide, war crimes, and crimes against humanity, not only attracted broad-based political support in terms of their inclusion in the statute, but as a consequence of the jurisprudence emanating from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, they also benefited from substantial clarification with regards to their substance. A lack of political consensus about subjecting acts comprising the

⁴⁷ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (A/CONF.183/2/Add.1) of 14 April 1998, p12, available online <www.un.org/icc/prepcom.htm>.

⁴⁸ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (A/CONF.183/2/Add.1)(1998), p14.

⁴⁹ For instance, option 1 read as follows: "[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]: (a) planning, (b) preparing, (c) ordering, (d) initiating, or (e) carrying out [an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]" For the text of the other two options, see 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (A/CONF.183/2/Add.1)(1998), pp13-14.

crime of aggression to international adjudication procedures remained the foremost obstacle confronting the inclusion of the crime of aggression within the jurisdiction of an international criminal court.

(3) United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998

The experience of the Ad Hoc Committee and the Preparatory Committee with respect to the crime of aggression was simply a taste of things to come at the Rome Conference, which demonstrated even more clearly the extent to which the international political landscape had changed since the end of the Cold War. Broadly speaking, political affiliations at Rome were split three ways, into: (1) the P5 states; (2) the ‘Like-Minded Group’, an association of small and middle powers who strongly supported the establishment of an international criminal court, though their views differed on detail; and (3) the Non-Aligned Movement. In relation to the crime of aggression specifically, at least 32⁵⁰ small and middle powers expressed their unconditional support for the inclusion of aggression in the ICC Statute during the opening plenary meetings; and another 30⁵¹ states, including Russia, offered their conditional support, – the two most common provisos predictably being the drafting of a ‘precise’ definition of aggression, and sorting out the relationship between the Security Council and an international criminal court. This split was further complicated by the deafening silence of 45⁵² states, including France and the UK⁵³, that made no mention of the crime of

⁵⁰ These states included: Egypt, Republic of Korea, Slovenia, Czech Republic, Lithuania, Philippines, Albania, Germany, Austria, FYR Macedonia, Namibia, Afghanistan, Italy, Slovakia, Tajikistan, Guinea, Zambia, Azerbaijan, Lebanon, Bulgaria, Greece, Gabon, Madagascar, Qatar, Cape Verde, Niger, Vietnam, Jordan, Georgia, Cyprus, Angola, Uganda: *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records (Rome, 15 June-17 July 1998)* (New York: United Nations, 2002), vol 2, pp64-121.

⁵¹ These states were: Japan, Sweden, Kazakhstan, Latvia, Armenia, Syria, Portugal, Sierra Leone, Mozambique, Brunei, Hungary, Iran, Cuba, Poland, Estonia, Moldova, Belgium, Ireland, Netherlands, Paraguay, Mexico, Oman, Nigeria, Trinidad and Tobago, Denmark, Malta, Russia, Belarus, Bahrain, and Ecuador: *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, pp64-121.

⁵² These states were: Norway, Venezuela, Lesotho, Holy See, Indonesia, Algeria, Ivory Coast, Tanzania, Peru, Kenya, Costa Rica, Andorra, Singapore, Burkina Faso, Croatia, UK, Finland, Nepal, Sudan, Thailand, Malawi, Bosnia and Herzegovina, Haiti, Iraq, Monaco, Australia, Canada, Romania, Kyrgyzstan, Pakistan, Senegal, Colombia, Ghana, Chile, Luxembourg, France, Argentina, Rwanda, Switzerland, Malaysia, Samoa, Democratic Republic of Congo, Uruguay, and

aggression at all in their opening statements, and another 5⁵⁴ powers, including the US, which expressed their complete opposition to the crime of aggression within the scope of an international criminal court. With this level of division, the prospect of the Rome Conference, at the end of its three week duration, producing a generally accepted way forward for empowering an international criminal court with respect to the crime of aggression was remote indeed.

At Rome, more thorough discussions on the Preparatory Committee's proposals ensued, but without any real progress. During the course of these discussions during 18-19 June, it became evident that many delegations preferred option 3 out of the three Preparatory Committee's proposals, which made an international criminal court's jurisdiction over aggression contingent upon a Security Council determination; combined with those who were willing to consider this option as an alternative to their own first preference, this group was significant in number. However, even among those delegations claiming to support this option, very few were prepared to accept it as is, without any modifications; their support for option 3 was as a "working basis"⁵⁵ only, and they continued to attempt to redraft option 3 in accordance with their own political preferences. Even the key feature of option 3 – namely, its dependence on a prior Security Council determination – was not immune from challenge, with states including Non-Aligned Movement members Angola, North Korea, and Cuba, as well as Ukraine⁵⁶, opposing a decisive role for the Security Council in this context, with global leaders such as Japan, Russia, France and the UK insisting on the same. Hence, the appearance of even limited consensus around option 3 was in fact chimerical.

Another faction – mainly comprised of Middle Eastern states – which expressed support for the inclusion of aggression in principle, felt that none of the three

Botswana: *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, pp64-121.

⁵³ During the Conference, France and the UK became associated generally with the Like-Minded Group of states, though on certain issues they continued to side with other P5 states. Most members of the European Union belonged to the Like-Minded Group.

⁵⁴ See the statements of representatives from India, US, Morocco, Turkey and Israel.

⁵⁵ See the remarks of the representatives for Trinidad and Tobago, and Italy: *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p175 and p178 respectively.

⁵⁶ Ukraine holds observer status within the Non-Aligned Movement.

options presented by the Preparatory Committee were adequate, and that something closer to the General Assembly Definition of Aggression was required. Others again expressed their opposition to including aggression on any basis, and were joined by a few states who were now openly doubtful about whether the issues raised by the prospect of including the crime of aggression within an international criminal court's jurisdiction could be resolved at Rome⁵⁷. Thus, detailed consideration of the crime of aggression simply splintered even further the original political divisions expressed at the start of the Conference.

Between 20 June-5 July, the Rome Conference moved on to consider other issues concerning an international criminal court generally, such as questions of standing and other jurisdictional concerns. During this period, three proposals concerning the crime of aggression were distributed, including one from the Middle East grouping mentioned above. However, none of these were included in the Conference Bureau Discussion Paper of 6 July, which included 2 options only: (1) to accept the Preparatory Committee's option 3 as drafted, or (2) to include no provision on aggression at all⁵⁸. With time running short, some progress towards consensus – or at least a reduction in the various positions taken - was needed, when discussions on aggression resumed on 8 July; however, presentation of these alternatives at this juncture of the Conference merely divided opinions further. While a few delegations were prepared to accept option (1) as currently drafted, others continued to claim their support of this option as simply a “reference point” for further discussions⁵⁹.

In their responses to the two straightforward choices summarised in the Conference Bureau Discussion Paper, significantly the vast majority of

⁵⁷ For instance, see the statement of the Norwegian representative that “he was not persuaded that a consensus on [the question of the Security Council] was possible at the current stage” (p172); and of the Mexican representative who “doubted whether the problems [associated with jurisdiction over the crime of aggression] could be solved” (p175).

⁵⁸ Even at this late stage, the Bureau was still acknowledging that “discussions are still ongoing as to the inclusion of the crime of aggression and on the definition.” The Bureau also suggested that continuing interest in reviving the 1974 Definition might somehow be accommodated in the ‘definition’: see ‘Bureau Discussion Paper’ (A/CONF.183.C.1/L.53), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p204.

⁵⁹ See the statement of the Maltese representative in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p290.

delegations made no reference to either option, merely reiterating the vague and often repeated statement, that the inclusion of the crime of aggression in the Statute must be conditional upon (a) an ‘acceptable’ definition of aggression; and/or (b) agreement as to the relationship between the Security Council and the international criminal court. Interestingly, India - which from the beginning had expressed its thinly-veiled opposition to the inclusion of aggression – ostensibly became part of this group of ‘in theory’ supporters, now claiming aggression should “in principle” be included in the Statute, “if properly defined”⁶⁰. Another group of states was even less specific: they simply indicated their ongoing support for the inclusion of the crime of aggression, without making any attempt to address the concerns of other delegations. Within this latter group, however, two states were brave enough to point out the real source of the problem underpinning the crime of aggression: Azerbaijan and Ethiopia both highlighted the role of political calculations in resolving the aggression debate⁶¹.

By this point, the earlier murmurs expressing doubt as to whether consensus could be reached concerning the crime of aggression had turned into a chorus. States from the Like-Minded Group started to find reasons to exclude the crime of aggression, including a lack of time to address the issues of definition and the Security Council’s role⁶²; the possible risk these unresolved issues posed to the outcome of the Conference⁶³; and that exclusion was the only “realistic alternative” if all of the elements of option (1) could not be agreed upon⁶⁴. By contrast, Syria asked aloud why the 1 July proposal it and other Middle Eastern states had submitted had not been included in the Bureau’s discussion paper, and suggested fresh amendments with regard to the preconditions for the international criminal court’s exercise of jurisdiction. Exclusionists now also sought to express

⁶⁰ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p279. Note at the end of the conference, India was one of just seven states to vote against the Statute: www.un.org/law/icc/statute/iccq&a.htm.

⁶¹ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p271 and p288 respectively. Denmark also came close to making the same point when it declared that “to claim that aggression could not be included in the Statute because it had not been defined was unacceptable”: p286.

⁶² Sweden (p270), Norway (p271) and Australia (p273) made this comment.

⁶³ This point was raised by Samoa, p279.

⁶⁴ The UK came to this conclusion, p272.

their opposition in terms of the lack of progress on the crime's definition and the Security Council's role in relation to it.

Reflecting this ongoing diversity of opinion, the Bureau released a second proposal on the 10 July, setting a deadline for the development of "generally accepted" provisions about aggression of 13 July⁶⁵. If none were forthcoming, the Bureau proposed to exclude aggression from the Statute, instead addressing this crime "in some other manner, for example, by a Protocol or review conference"⁶⁶. From this point, the focus of meetings of the Committee of the Whole shifted away from the secondary issues of definition and the ICC-Security Council relationship back to the basic concern: whether or not to include the crime of aggression in the statute establishing an international criminal court.

Early on 13 July, several delegations once again spoke in favour of including the crime of aggression, with influential Syria threatening to "reconsider its position with regard to the Statute as a whole" if aggression was excluded from the Statute⁶⁷. At the same meeting, Iran, speaking on behalf of the Non-Aligned Movement, also expressed its disappointment that the latest Bureau proposal contained no substantive provision relating to aggression. Later in the day, Egypt explicitly tied its position with respect to the ICC-Security Council relationship generally to a package of its preferred proposals, indicating it was willing to reconsider its view of the former on the condition that, *inter alia*, the crime of aggression was included in the Statute. Most of Egypt's wishes were accommodated in the final document⁶⁸. Certain delegations advocated it would be preferable to defer consideration of the crime of aggression until sometime

⁶⁵ 'Bureau Proposal' (A/CONF.183/C.1/L.59), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p212.

⁶⁶ 'Bureau Proposal' (A/CONF.183/C.1/L.59), article 5.

⁶⁷ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p322.

⁶⁸ Thus, in terms of the Security Council's powers of suspending an investigation or prosecution, a time limit was fixed and it was stipulated that such a request from the Security Council must take the form of a resolution, in accordance with Egypt's wishes. In addition, the crime of aggression was included in the Statute, another key wish of Egypt. However, its other requests – namely, that a role for the General Assembly equal to that of the Security Council be conferred, and that the Court be empowered with the right to request the Security Council to examine a situation of aggression if the Security Council had not done so itself, did not feature in the final document.

after the Conference⁶⁹. Echoing Ethiopia and Azerbaijan, a few Non-Aligned Movement member delegations underscored that greater political support would overcome the problems related to the inclusion of the crime of aggression⁷⁰. The Bureau's deadline of 13 July – the last day on which the crime of aggression was discussed by the Committee of the Whole – came and went, with no resolution of the matter.

The following day, the Non-Aligned Movement submitted a new proposal, which sought to reconcile these perspectives. It proposed to add aggression as a crime within the international criminal court's jurisdiction, but to postpone this entity's exercise of jurisdiction over this crime pending: (1) elaboration by the proposed, post-Conference Preparatory Commission of the definition and elements of the crime of aggression; and (2) the Preparatory Commission's recommendation that these be adopted by the Assembly of State Parties. Although the wording differs, it is clear from the substance of this proposal that it is the predecessor to article 5(2) of the Rome Statute, which was signed by 120 states just three days later, on 17 July 1998⁷¹.

(4) Conclusion

UN efforts in relation to the crime of aggression confirm our conclusion from chapter six – namely, the great extent to which prevailing international political conditions are expressed through the evolution of international law, rather than overcome by it. In the early UN years, the ILC aspired to extend responsibility for the crime of aggression to states, building on the Nuremberg and Tokyo precedents. However, the division among the great powers caused by the Cold War made progress politically impossible, and the ILC's work on this topic was shelved in 1953, as the Cold War deepened. It was only after the General

⁶⁹ For example, see the comments of Norway (p344), Congo (p344), Andorra (p347), and Slovakia (p347).

⁷⁰ For instance, see the remarks of Mozambique (p341), Algeria (p337) and Tanzania (p339).

⁷¹ Article 5(2) of the Rome Statute reads: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

Assembly Definition of Aggression was adopted, and the Cold War entered its final decade that the ILC resumed its work in relation to the crime of aggression. Despite the earlier difficulties raised by the prospect of state responsibility for the crime of aggression, this issue re-emerged indirectly as the ILC unhelpfully contemplated the relationship between the General Assembly Definition of Aggression and the crime of aggression for ten years from 1986 onwards. In 1996, the ILC finally discarded the issue of state responsibility and concentrated on individual responsibility for the crime of aggression.

The end of the Cold War and the new international political conditions it created also permitted the related topic of an international criminal court to be reopened by the ILC, within which context the crime of aggression was again reconsidered. While the post-Cold War political climate now revealed significant support for the establishment of an international criminal court, which prompted the creation of two UN committees in the mid-1990s to discuss proposals in detail, the inclusion of the crime of aggression within the jurisdiction of an international criminal court continued to provoke controversy. As in the negotiations leading to the adoption of the General Assembly Definition of Aggression, arguments among states centred around the legal task of 'defining' aggression, such arguments concealing the real split of political perspectives in relation to the crime of aggression.

By the time of the Rome Conference in 1998, a three-way split of post-Cold War political affiliations was very evident, with the P5 states, the 'Like-Minded Group', and the Non-Aligned Movement forming the major state groupings on international criminal law issues. Negotiations at Rome revealed that while the Non-Aligned Movement strongly supported the inclusion of the crime of aggression within the jurisdiction on an international criminal court, the US strongly opposed it, with other states conditionally supporting inclusion if a 'definition' of the crime of aggression was agreed, and the relationship between the Security Council and an international criminal court was clarified. This lack of political consensus was reflected in the Rome Statute, where the crime of aggression was included, though the International Criminal Court is prohibited from exercising its jurisdiction over this crime until these conditions are satisfied. Thus, the Rome Conference demonstrates that, even in the different political

conditions of the post-Cold War era, the issue of the crime of aggression remains very strongly influenced by the prevailing international political landscape.

Postscript

The high level of political controversy surrounding the crime of aggression, as examined in chapter eight, has only intensified since 1998. While a vast array of proposals for a new provision on the crime of aggression have been received, discussed and suggested by the Special Working Group on the Crime of Aggression (WGCA) in the lead-up to the Rome Statute's first review conference in 2009, fundamental political questions requiring resolution as a precondition of a new provision remain undecided. For instance, at the WGCA's informal meeting in June 2005, it was noted that no agreement was reached on the crucial issue of which entity or entities should be empowered to make a prior determination that an act of aggression had occurred, hence triggering the ICC's jurisdiction with respect to the crime of aggression. Some delegates favoured the view that the Security Council enjoyed exclusive competence to make such a determination, while others argued that this competence could also be exercised by other bodies such as the General Assembly or the International Court of Justice. A third view maintained that such a determination should be left to the ICC itself¹. In addition, how to reconcile a prior determination that an *act* of aggression had occurred with the rights of a defendant accused of the *crime* of aggression² also proved contentious, as did the issue of the extent to which any new provision should depart from the Nuremberg text³. If these ongoing differences among the sixty-six states participating in the June 2005 meeting of the WGCA are anything to go by, it is highly improbable that a new provision on the crime of aggression will be adopted at the review conference, where one hundred states are likely to be represented⁴.

¹ 'Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, US from 13 to 15 June, 2005' (ICC-ASP/4/32), pp367-369, available online <www.icc-cpi.int/asp/aspaggression.html>. Hereafter 'Informal Inter-sessional Meeting (2005)'.

² 'Informal Inter-Sessional Meeting (2005)', pp366-367.

³ 'Informal Inter-Sessional Meeting (2005)', p369.

⁴ As of 1 January 2006, 100 states had become parties to the Rome Statute: <www.icc-cpi.int/asp/statesparties.html>. This conclusion is confirmed by the outcome of the June 2006 meeting of the WGCA, where representatives from seventy-seven states met and major differences of view on the same issues from the June 2005 meeting persisted: see 'Report of the Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, 8-11 June 2006' (ICC-ASP/5/SWGCA/INF.1), available online <www.icc-cpi.int/asp/aspaggression.html>.

Other recent political developments also do not bode well for the exercise of ICC jurisdiction over the crime of aggression becoming a reality in the short to medium term. Although the US expressed its opposition to the inclusion of the crime of aggression in the Rome Statute from the first days of the 1998 Conference⁵, American hostility towards article 5(2)(d) of the Rome Statute, and the ICC more generally, has turned into profound and undisguised rancour since this time. Apart from the Bush administration's "unsigned" of the Rome Statute in 2002⁶, the passage of the American Servicemembers' Protection Act - which leaves open the possibility that the US may choose to invade the Netherlands in order to release any American citizen that might be held by the ICC - demonstrates the lengths to which the US is prepared to go in order to undermine the Court's functioning⁷. In light of the US's pre-eminent position on the world stage, and its unrivalled military presence in all corners of the globe, the impact of this intensely anti-ICC stance cannot be ignored, and, if continued, is likely to make efforts to bring the crime of aggression within the ICC's operational jurisdiction very difficult indeed.

Certain incidents in criminal law have also struck a blow against present attempts to strengthen the crime of aggression as an important feature of international relations and international law. For example, in 2003, the Iraqi Special Tribunal (IST) was empowered by statute to try, *inter alia*, "The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country..."⁸ - an offence which clearly falls within the

⁵ At the fifth plenary meeting of the Rome Conference on 17 June 1998, a US delegate stated: "...The jurisdiction of the Court must extend to internal armed conflicts and crimes against humanity, including rape and other grave sexual violence. The Court must have a clear, precise and well-established understanding of what conduct constituted a crime. At the same time, acts not clearly criminalised under international law should be excluded from the definition. **It was, therefore, premature to attempt to define a crime of aggression in terms of individual criminal responsibility.** Vague formulas that left the Court to decide on the fundamental parameters of crimes should be avoided...": see *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records*, vol 2, p80. Emphasis added.

⁶ 'US Renounces World Court Treaty', May 6 2002, available online <news.bbc.co.uk/2/hi/americas/1970312.stm>.

⁷ See 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002), s 2008, reproduced at <www.globalsolutions.org/programs/law_justice/icc/aspa/aspatext.html>.

⁸ See article 14(c) of the Statute of the Iraqi Special Tribunal, available online:

Nuremberg parameters of the crime of aggression, and yet no reference to aggression was made in this statute. Hence, an opportunity to further develop in explicit terms the jurisprudence concerning the crime of aggression was missed. Moreover, despite the IST's jurisdiction over this aggression-type offence, to date no effort has been made to indict any of the defendants under this head in relation to the 1990 Iraqi invasion of Kuwait, and there appears to be no plans to do so in the future. The standing of the international crime of aggression in domestic law was further eroded in the House of Lords case of *R v Jones; R v Milling; R v Olditch; R v Pritchard; R v Richards; Ayliffe v Director of Public Prosecutions; Swain v Director of Public Prosecutions*⁹, in which it was decided that the crime of aggression was not capable of constituting a 'crime' under s3 of the Criminal Law Act 1967 (UK), or an 'offence' within the meaning of s68(2) of the Criminal Justice and Public Order Act 1994 (UK)¹⁰. Combined, these developments suggest that, in the short- to medium-term, the favourable international political conditions necessary for the prosecution of the crime of aggression to take place are, at best, a remote possibility.

<www.cpa-iraq.org/human_rights/Statute.htm>.

⁹ [2006] UKHL 16.

¹⁰ The defendants – peace protesters - had sought to defend their actions against British military bases on the eve of the Iraq war on the grounds that they were intended to prevent the crime of unlawfully going to war: Jean-Yves Gilg, 'International Aggression Not a Crime', *Solicitors Journal* 150 (31 March 2006), p374.

Conclusion

In this thesis, it was argued that prevailing international political conditions strongly influence how moral and legal impulses compelling the further development of the concept of aggression play out in practice. However, it was also demonstrated that the way in which the concept of aggression featured in international affairs was not solely a reflection of existing political realities, but on occasion made an important, practical contribution to international relations. In the final chapter of this thesis, the significance of the concept of aggression for the theory and practice of international relations is examined.

(1) The Relationship between the Balance of Power and Law in International Society

In chapter one, Bull's view of international society was developed and discussed. It was found that while Bull acknowledged the roles of both the balance of power and international law in the unique conditions of international society, he argued that these "institutions" sometimes came into conflict. Instead of contributing to international order, occasionally international law actually impeded it by hampering measures aimed at reinforcing the balance of power, Bull claimed. The issue of how to respond to aggressive war was one example of the collision between the balance of power and international law. Although resolution of the clash between balance of power and international law had been attempted through different means, Bull still considered these types of conflict a major limitation of international law at time of writing, in 1977. Thus, in the event of conflict, balance of power considerations would take priority over international law.

The study of the concept of aggression undertaken in this thesis provides strong evidence in support of Bull's claims, and of their ongoing relevance today. For instance, in chapter two it was demonstrated that the preoccupation of the major European Allies with preventing a re-emergent and belligerent Germany in the aftermath of World War One led to punitive peace terms entirely at odds with the objectives of the new, liberal, and values-based system of international security

established in the same peace agreement. This inherent contradiction – and the continuing operation of balance of power calculations among the great powers at the expense of international law – was illustrated vividly at the League, covered in chapter three. There, it was demonstrated that aggressors Japan and Italy successfully avoided effective League military response to their actions as a consequence of an Anglo-French desire to retain them as potential allies in the face of the growing threat posed by Nazi Germany. In chapter seven, it was shown that the impact of the Cold War conflict between the superpowers prevented the UN Security Council from ever making a determination about the existence of an act of aggression, even when confronted with the onset of a regional war. From this chapter also, the refusal of the majority of ICJ members to consider the question of whether Uganda had committed aggression in the recent *Armed Activities on the Territory of the Congo* case provided another dramatic instance of the subordination – this time, by a prominent section of the international legal community itself - of international legal procedure to great power sensitivities. Thus, the intermittent clash between the balance of power and international law identified by Bull appears to be as evident today as it was thirty years ago.

Each of these examples have demonstrated how the balance of power can prevent the concept of aggression from contributing to efforts to maintain international security through international law. Further, they have also revealed the great extent to which the content of discussions and efforts at the international level in relation to the concept of aggression actually *reflect* that same balance of power. For instance, in chapter six, international legal activism in the form of UN efforts to ‘define’ aggression during the Cold War conflict not only showed that international law was ill-prepared to replace the balance of power as an “institution” of international society, but also provided an opportunity for Cold War tensions themselves to be played out under the rubric of legal argument. Thus, for instance, pro-Soviet or Third World states argued in favour of recognizing ‘economic’ and ‘ideological’ aggression, while pro-Western states insisted the concept of aggression be limited to military matters. A similar lesson about the degree to which the balance of power is reflected in and through international law can be drawn from another example of international legal

activism – namely, the unsuccessful attempts up until now to further entrench the crime of aggression into international law, as examined in chapter eight. This example, extending across the Cold War and post-Cold War eras, shows that Bull’s insights are not limited to the specific circumstances of the Cold War conflict, but are applicable more generally. The way in which the process and substance of international law reflect prevailing international political conditions, as highlighted by these efforts to advance the concept of aggression, provides some explanation why it is not easy for international society to either coerce or attribute moral responsibility to an unruly member, as observed by Wight¹.

(2) Morality, Law and International Society

On the basis of our conclusions from the previous section, one might be forgiven for thinking that it is realists, rather than international society theorists, who provide the best explanation of the concept of aggression in international relations. If it is accepted that the balance of power always wins against international law in the event of conflict, and if international law itself mirrors to a great extent existing international political conditions, then on these grounds could it not be argued that international relations is nothing more than power politics in action? Having revealed the practical and important role of morality and law in international relations, this thesis rejects this argument. With the support of favourable international political conditions, international morality and international law can and do play a significant role in international affairs – a role that cannot be explained by reference to power politics alone.

Far from just a “mere figure of speech”², as Morgenthau claimed, international morality was shown to exert some influence over states and their behaviour, for a variety of reasons. The very fact that the concept of aggression – with its strongly moral overtones – has remained a topic of debate attracting scarce international resources since the last days of World War One itself suggests that the issue of moral standards in the conduct of international affairs continues to be relevant. In addition, there is some evidence that states themselves consider international

¹ See p21 of this thesis.

² See p16 of this thesis.

morality important for reasons to do with their international reputation. For instance, in chapter two, it was noted that the US Senate's rejection of the Treaty of Versailles was phrased in the following terms:

“Under no circumstances must there be any legal or moral obligation upon the United States to enter into war... nor can any opportunity of charging the United States with bad faith be permitted...”³

From this excerpt, it is clear that by rejecting the Treaty of Versailles, the US Senate not only sought to free the US government of any potential international legal obligations to combat aggression established by the League Covenant, but also sought to avoid possible future damage to its international standing.

Concern about how their conduct would be judged in the ‘court of public opinion’ also explained why, at the League, major powers Britain and Italy sought to distance themselves publicly from the overt pressure they applied to Ethiopia through their communications about coordinating their economic leverage in their own best interests, as examined in chapter three. From a power politics perspective, Britain and Italy were strong enough to sustain or intensify their coercion indefinitely against weak Ethiopia through a range of means. Instead, Britain and Italy talked down the significance of their coordination plan to the League, before the League could take the matter any further. In 1926, any suggestion that two important League members themselves did not act in accordance with the values and spirit of the League would have damaged the public view of that organization – and its transgressors - considerably. Thus, Britain and Italy abandoned their economic coordination plan.

This situation also provided practical illustration of a point made by Carr and Bull about international morality. In chapter one, it was noted that both of these theorists argued that to promote the survival of a particular international moral order, those powers which benefit most from that order must respond positively to some of the fair demands from those powers which benefit least⁴. In Carr's

³ See p41-42 of this thesis.

⁴ See p25 of this thesis, especially footnote 69 on this page.

words, “self-sacrifice” or a “willingness not to insist on all the prerogatives of power” is needed on the part of the great powers if some form of international morality is to flourish. Britain and Italy’s response to Ethiopia’s appeal to the League can be interpreted as one such example of their “self-sacrifice” in support of the international moral order created by the League. The collective decision in 1998 to include a provision about the crime of aggression in the Rome Statute at the strong insistence of the state members of the Non-Aligned Movement might also be interpreted as the acceptance of a fair demand. Hence, on each occasion, the importance of international moral values as a rationale underpinning a particular international order was recognized through the response of the majority of states most advantaged by that order.

The significance of international moral values is particularly evident in the aftermath of cataclysmic events, such as World War One and World War Two. Drawing on worldwide moral revulsion to the excesses of World War One, Wilson strongly advocated a joint *moral* commitment to combat aggression by member states – not necessarily a legal duty – as the foundation for a new international system of collective security, as demonstrated in chapter two. While collective security failed in practice, moral distinctions once again took centre stage at the conclusion of World War Two. Once again, the Allied Powers had the choice of establishing peace in Germany on punitive terms – which would mean summary justice for the Nazi elite – or on a more morally sound basis. Yet another punitive peace might lead to World War Three; in any case, international outrage at Hitler’s ‘Final Solution’ and the limited ability of international law to prevent war – as exemplified by the 1928 Kellogg-Briand Pact and the 1938 Munich Pact – placed significant pressure on the Allied Powers to distinguish their own conduct in World War Two from Germany’s. This could only be done by reference to moral considerations, and in this way, the concept of aggression as an international crime giving rise to individual responsibility – as part of the prosecution of top-ranking Nazis at Nuremberg discussed in chapter four – became a key element of practical response to prediction-defying misdeeds which, even in the extreme conditions of war, were morally offensive in terms of both gravity and scale. Thus, while the momentum created by public moral indignation to World War One was not sufficient to establish the strong international moral

order envisaged by Wilson, worldwide moral outrage at the atrocities of World War Two did provide the impetus necessary to propel the further development of international legal rules and procedures for dealing with the Nazi elite. Nuremberg hence provides a relevant example of how international morality – backed by favourable political conditions – can make a positive contribution to the evolution of international law.

While the Nuremberg example revealed what it is possible to achieve when international morality converges with law and politics in international relations, the Tokyo Trial demonstrated that, even when the “hegemony of power”⁵ which is a prerequisite of an international moral order exists, problems can arise. In chapter five, it was shown that despite strong, American leadership in the occupation of Japan, the moral, legal and political context supporting arguments in favour of the prosecution of the Japanese elite for the crime of aggression was much weaker than in the German situation. Nevertheless, the need to purge wartime leaders other than the Emperor from the top tiers of Japanese government in aid of the occupation of Japan dictated the establishment of the IMTFE, which, in its majority judgment, contributed little to the promotion of international morality and law, instead simply confirming the charges laid against the defendants. The important, supporting role played by international morality in relation to the Nuremberg Trial, and its notable subordination to more immediate, political motivations at the Tokyo Trial, perhaps goes some way to explaining why most Germans today regard the Nuremberg Trial as fair⁶, while in Japan, at least ten of the Tokyo defendants convicted of the crime of aggression are included on the list of ‘divine spirits’ revered at Yasukuni Shrine by five million Japanese visitors a year⁷.

⁵ see footnote 69 of chapter one of this thesis, (p25).

⁶ The results of secret polls conducted by the US and released in 2002 revealed that the majority of Germans felt this way from the 1970s: see ‘Germany Marks Nuremberg Tribunals’, 20 November 2005, available online < news.bbc.co.uk/2/hi/europe/4453790.stm>. Strong and vocal German support for the inclusion of the crime of aggression in the Rome Statute at the 1998 Rome Conference also suggests that Germany upholds the validity of the Nuremberg Trial.

⁷ The twelve defendants mentioned here include the seven sentenced to death by the IMTFE. One prominent and regular visitor to the Yasukuni Shrine has been former Japanese Prime Minister Junichiro Koizumi, who went to Yasukuni annually for the duration of his time in office. See Anthony Faiola, ‘Japan Honours War Dead and Opens Neighbor’s Wounds’, 23 April 2005, available online < www.washingtonpost.com/wp-dyn/articles/A10450-2005Apr22.html>; and ‘Japan PM Visits Yasukuni Shrine’, 17 October 2005, available online:

It might be argued that the majority of these illustrations of the practical relevance of morality in international affairs are quite dated, thus begging the question of whether international morality continues to play an important role today. Certainly, the way in which the concept of aggression has twice taken on central importance at the end of one international order and the start of another lends substantial support to the idea that one of the functions of international morality is to justify the existence of a particular form of international order. It may be that at times of international disorder – for instance, at the end of worldwide conflict – the entire point of international morality is to provide, in circumstances where little else may remain, a set of principles around which a new international order can emerge. In this case, what are we to make of the fact that since at least the mid-1990s, the concept of aggression seems to have disappeared completely from the vocabulary of Security Council and General Assembly resolutions, while it continues to attract mixed views in the context of the International Criminal Court?

This development would suggest that the declining relevance of the concept of aggression for international peace and security purposes over the course of the twentieth century, as mapped in this thesis, has now diminished to zero. Instead, as demonstrated in chapter seven, the variety of post-Cold War matters in relation to which the Security Council has acted are usually described as ‘threats’ to international security, a term which plays down the moral reprehensibility of the originator of the threat, and in relation to which the type of international response is left more open. This is markedly different from the record of the Security Council and General Assembly during the Cold War period, when UN action rarely took place, though condemnations of aggressive conduct in the strongest terms by these bodies were quite frequent. The current disappearance of the concept of aggression from the international security context might also be suggestive of a heightened awareness in the Security Council and General Assembly of the controversies associated with many of the assumptions upon which this concept relies, that were identified in chapter one – such as the moral

< news.bbc.co.uk/2/hi/asia-pacific/4348280.stm>.

value of peace; and the authority of the UN and its rules of procedure in interpreting and enforcing international standards of conduct⁸. Indeed, such disappearance might be indicative of a broader, post-Cold War shift in international moral values themselves, the new contours of which are not yet settled⁹.

At the same time as the Security Council and General Assembly entirely abandon strong, overt moral judgments about states and their military activities, this development also signals a political shift since Nuremberg on the issue of assigning individual criminal responsibility for the commission of grave military acts against other states. In particular, the complete US rejection of empowering the International Criminal Court to adjudicate the crime of aggression is a major obstacle, given the US' pre-eminent international political position and the fact that it has, by far, more military forces deployed worldwide than any other state. Nonetheless, as shown in chapter eight, by 1998 the vast majority of small- and medium-sized states had no objections in theory to the exercise of jurisdiction by the International Criminal Court over the crime of aggression. This support helps to sustain the ongoing efforts by international criminal lawyers to empower the International Criminal Court with this jurisdiction in practice, which were examined in the postscript to the thesis. The International Criminal Court's growing track record in relation to prosecuting genocide, war crimes and crimes against humanity; recent signs that the official US attitude to the International Criminal Court generally might be softening¹⁰; and new Security Council

⁸ Indeed, Adam Roberts, among others, has argued that "sooner or later the UN will have to address the difficult conundrum of its own democratic deficit": 'Order/Justice Issues at the United Nations', in Foot et al, *Order and Justice in International Relations*, p79.

⁹ Supporting this suggestion is the debate which has raged most recently from the 1990s onwards about the so-called 'doctrine' of humanitarian intervention. Nicholas J Wheeler and Tim Dunne have argued that the extent to which states collectively regard humanitarian intervention as a legitimate practice is a "key test" of their solidarity: 'Hedley Bull's Pluralism of the Intellect and Solidarism of the Will', *International Affairs* 72 (1996), pp91-107. For a further discussion of humanitarian intervention more generally, see, by the same authors, 'East Timor and the New Humanitarian Interventionism' *International Affairs* 77 (2001), pp805-828 and by Wheeler, 'Pluralist and Solidarist Conceptions of International Society: Bull and Vincent of Humanitarian Intervention' *Millennium* 21(1992), pp463-489.

¹⁰ Jess Bravin, 'US Warm to Hague Tribunal', 14 June 2006, *Wall Street Journal*, available online, <www.globalpolicy.org/intljustice/icc/2006/0614warm.htm>; 'Four Years Later, US Sees International Criminal Court in Better Light', 27 December 2006, available online: <www.iht.com/articles/ap/2006/12/28/america/NA_GEN_US_International_Criminal_Court.php>

willingness to use its peace and security powers to target specific individuals¹¹ might also help to create the favourable international political conditions necessary for making this goal a reality. As demonstrated throughout this thesis, it is only these conditions, supported by strong moral and/or legal arguments, which make possible the further evolution of the concept of aggression in international relations.

¹¹ See, for example, SC Res 1735 of 22 December 2006, which imposes financial sanctions on Al-Qaeda, Usama Bin Laden and individuals and entities associated with them. As of 12 December 2006, the list of individuals and entities on this sanctions list ran to 45 pages long: available online, <www.un.org/docs/sc/committees/1267/pdflist.pdf>.

Appendix One: Results of the Nuremberg Judgment, 1946

Name/Count .	C1	C2	C3	C4	Sentence
Goering	G	G	G	G	Death
Hess	G	G	I	I	Life
Bormann	I	-	G	G	Death
Von Ribbentrop	G	G	G	G	Death
Keitel	G	G	G	G	Death
Kaltenbrunner	I	-	G	G	Death
Rosenberg	G	G	G	G	Death
Frank	I	-	G	G	Death
Frick	I	G	G	G	Death
Streicher	I	-	-	G	Death
Funk	I	G	G	G	Life
Schacht	I	I	-	-	Not guilty
Doenitz	I	G	G	-	10 years
Raeder	G	G	G	-	Life
Von Schirach	I	-	-	G	20 years
Sauckel	I	I	G	G	Death
Jodl	G	G	G	G	Death
Von Papen	I	I	-	-	Not guilty
Seyss-Inquart	I	G	G	G	Death
Speer	I	I	G	G	20 years
Von Neurath	G	G	G	G	15 years.
Fritzsche	I	-	I	I	Not guilty

Count One: participation in the formulation or execution of a common plan or conspiracy to commit crimes against peace, war crimes and crimes against humanity

Count Two: participation in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.

Count Three: commission of war crimes.

Count Four: commission of crimes against humanity.

G = guilty; I = acquitted; - = not charged with this count

Compiled From: *Trial of the Major War Criminals* (Nuremberg: Germany, 1947).

Appendix Two : Results of the Tokyo Judgment, 1948

Count 1: All defendants participated in the formation or execution of a common plan or conspiracy between 1 January 1928 and 2 September 1945 to secure for Japan the military, naval, political and economic domination of the Asia-Pacific, and for that purpose they conspired that Japan should wage wars of aggression, and wars in violation of international law, treaties, agreements, and assurances, against any country which might oppose that purpose.

Count 54: Some or all of the accused ordered, authorized and permitted the commission of Conventional War Crimes.

Count 55: Some or all of the accused failed to take adequate steps to secure the observance, and prevent breaches, of conventions and laws of war in respect of prisoners of war and civilian internees.

Some or all of the accused participated in waging wars of aggression and wars in violation of international law, treaties, agreements, and assurances against:

Count 27: China between 18 September 1931 and 2 September 1945;

Count 29: US between 7 December 1941 and 2 September 1945;

Count 31: British Commonwealth between 7 December 1941 and 2 September 1945;

Count 32: Netherlands between 7 December 1941 and 2 September 1945;

Count 33: Araki, Dohihara, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Muto, Nagano, Shigemitsu and Tojo waged such a war against France on or after 22 September 1940;

Count 35: Araki, Dohihara, Hata, Hiranuma, Hirota, Hoshino, Itagaki, Kido, Matsuoka, Matsui, Shigemitsu, Suzuki and Togo waged such a war against the Soviet Union during the summer of 1938;

Count 36: Araki, Dohihara, Hata, Hiranuma, Itagaki, Kido, Koiso, Matsui, Matsuoka, Muto, Suzuki, Togo, Tojo and Umezumi waged such a war against Mongolia and the Soviet Union during the summer of 1939.

Appendix Two : Results of the Tokyo Judgment, 1948

Names/Counts	C1	C 27	C 29	C 31	C 32	C 33	C 35	C 36	C 54	C 55	Sentence
Araki	G	G	I	I	I	I	I	I	I	I	Life: Paroled 1955
Doihara	G	G	G	G	G	I	G	G	G	O	Death
Hashimoto	G	G	I	I	I	-	-	-	I	I	Life: Paroled 1954
Hata	G	G	G	G	G	-	I	I	I	G	Life: Paroled 1954
Hiranuma	G	G	G	G	G	I	I	G	I	I	Life: Paroled 1951
Hirota	G	G	I	I	I	I	I	-	I	G	Death
Hoshino	G	G	G	G	G	I	I	-	I	I	Life: Paroled 1955
Itagaki	G	G	G	G	G	I	G	G	G	O	Death
Kaya	G	G	G	G	G	-	-	-	I	I	Life: Paroled 1955
Kido	G	G	G	G	G	I	I	I	I	I	Life: Paroled 1955
Kimura	G	G	G	G	G	-	-	-	G	G	Death
Koiso	G	G	G	G	G	-	-	I	I	G	Life
Matsui	I	I	I	I	I	-	I	I	I	G	Death
Matsuoka											Died of tuberculosis early in trial
Minami	G	G	I	I	I	-	-	-	I	I	Life: Paroled 1954
Muto	G	G	G	G	G	I	-	I	G	G	Death
Nagano											Died of natural causes during the trial
Oka	G	G	G	G	G	-	-	-	I	I	Life: Paroled 1954
Okawa											Sent to psychiatric ward on 1 st day of trial; freed 1948
Oshima	G	I	I	I	I	-	-	-	I	I	Life: Paroled 1955
Sato	G	G	G	G	G	-	-	-	I	I	Life: Paroled 1956
Shigemitsu	I	G	G	G	G	G	I		I	G	7 yrs: Paroled 1950; appointed foreign minister 1954
Shimada	G	G	G	G	G	-	-	-	I	I	Life: Paroled 1955
Shiratori	G	I	I	I	I	-	-	-	-	-	Life

Appendix Two : Results of the Tokyo Judgment, 1948

Suzuki	G	G	G	G	G	-	I	I	I	I	Life: Paroled 1955
Togo	G	G	G	G	G	-	-	I	I	I	20 years; died 1949
Tojo	G	G	G	G	G	G	-	I	G	O	Death
Umezu	G	G	G	G	G	-	-	I	I	I	Life

G = guilty; I = acquitted; - = not charged with this count; O = charged but no finding made by the Tribunal on this count.

Compiled From: Brackman, AC, *The Other Nuremberg* (New York: Quill, 1987) and Horwitz, S, 'The Tokyo Trial', *International Conciliation* 28 (1950).

Bibliography

Books, Articles, and Edited Collections:

Angell, N, *The Great Illusion* (London: Heinemann, 1910).

Antonopoulos, C, 'Whatever Happened to Crimes Against Peace?' *Journal of Conflict and Security Law* 6 (2001).

Appleman, JA, *Military Tribunals and International Crimes* (Indianapolis: The Bobbs-Merrill Company, 1954).

Babic, J, 'War Crimes: Moral, Legal, or Simply Political?' in A Jokic (ed), *War Crimes and Collective Wrongdoing* (Oxford: Blackwell Publishers Ltd, 2001).

Bassiouni, MC, 'Observations Concerning the 1997-1998 Preparatory Committee's Work', in *Nouvelles Etudes Penales* 13 (1997), p24.

Battle, GG, 'The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes' *Virginia Law Review* 8 (1921).

Bloxham, D, 'The Trial That Never Was': Why There Was No Second International Trial of Major War Criminals at Nuremberg' *History* 87 (2002), pp41-60.

Boemeke, MF (ed), *The Treaty of Versailles: A Reassessment After 75 Years* (New York: Cambridge University Press, 1998).

Booth, K, 'Security in Anarchy: Utopian Realism in Theory and Practice' *International Affairs* 67 (1991).

Borchard, E, 'The Dumbarton Oaks Conference', *American Journal of International Law* 39 (1945), pp97-101.

Bos, A, 'The Experience of the Preparatory Committee', in Mauro Politi and Guiseppe Nesi (eds), *The Rome Statute of the International Criminal Court* (Aldershot: Ashgate, 2001).

Brackman, AC, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: Quill, 1987).

Bravin, J, 'US Warm to Hague Tribunal', 14 June 2006, *Wall Street Journal*, available online <www.globalpolicy.org/intljustice/icc/2006/0614warm.htm>.

Broms, B, *The Definition of Aggression in the United Nations* (Turku: Turun Yliopisto, 1968).

Brown, C, 'Moral Agency and International Society', *Ethics and International Affairs* 15 (2001).

- Brown, C, 'On Morality, Self-Interest and Foreign Policy', *Government and Opposition* 37 (2002).
- Bull, H, *The Anarchical Society* (London: Macmillan, 1977).
- Bull, H, and Watson, A (eds), *The Expansion of International Society* (Oxford: Clarendon, 1984).
- Burnett, PM, *Reparation at the Paris Peace Conference From the Standpoint of the American Delegation* (New York: Columbia University Press, 1940)(2 vols).
- Bury, JS, *The Idea of Progress* (New York: Dover Publications Inc, 1955; first published 1920).
- Buzan, B, 'The Level-of-Analysis Problem in International Relations Reconsidered', in K Booth and S Smith (eds), *International Relations Theory Today* (Cambridge: Polity, 1995).
- Campbell, TM, 'Nationalism in America's UN Policy 1944-1945', *International Organization* 27 (1973), pp25-44.
- Campbell, TM, 'US Motives in the Veto Power', *International Organization* 28 (1974), pp557-560.
- Carr, EH, *The Twenty Years Crisis* (London: Macmillan and Co., 1939).
- Carr, EH, *The Twenty Years' Crisis* (Hampshire: Palgrave, 2001; with a new introduction by Michael Cox).
- Dewey, J, *Liberalism and Social Action* (New York: Putnam, 1935).
- Dinstein, Y, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2005).
- Dunne, T, 'International Society – Theoretical Promises Fulfilled?', *Cooperation and Conflict* 30 (1995).
- Eagleton, C, 'The Charter Adopted at San Francisco', *American Political Science Review* 39 (1945), pp934-942.
- Egerton, GW, *Great Britain and the Creation of the League of Nations* (London: Scholar Press, 1979).
- Ehard, H, 'The Nuremberg Trial Against the Major War Criminals and International Law', *American Journal of International Law* 43 (1949), pp223-245.
- Elcock, H, *Portrait of a Decision: the Council of Four and the Treaty of Versailles* (London: Eyre Methuen, 1972).

Erskine, T, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics and International Affairs* 15 (2001).

Faiola, A, 'Japan Honours War Dead and Opens Neighbor's Wounds', 23 April 2005, available online < www.washingtonpost.com/wp-dyn/articles/A10450-2005Apr22.html>.

Ferencz, BB, *Defining International Aggression* (New York: Oceana Publications Inc, 1975) (2 vols).

Ferencz, BB, 'Can Aggression Be Deterred By Law?' *Pace International Law Review* 11 (1999).

Finch, GA, 'The United Nations Charter', *American Journal of International Law* 39 (1945), pp541-546.

Finch, GA, 'The Nuremberg Trial and International Law', *American Journal of International Law* 41 (1947).

Fox, WTR, 'Collective Enforcement of Peace and Security', *American Political Science Review* 39 (1945), pp970-981.

Gaddis, JL, 'Order versus Justice: An American Foreign Policy Dilemma', in R Foot, JL Gaddis and A Hurrell, *Order and Justice in International Relations* (Oxford: Oxford University Press, 2002).

Garthodd, RL, *Detente and Confrontation: American-Soviet Relations from Nixon to Reagan* (Washington DC: Brookings Institute, 1994).

Gilg, J-Y, 'International Aggression Not a Crime', *Solicitors Journal* 150 (31 March 2006), p374.

Goodrich, LM, and Hambro, E, *Charter of the United Nations: Commentary and Documents* (Boston: World Peace Foundation, 1949).

Greenwood, C, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', *Modern Law Review* 55 (1992), pp153-178.

Griffiths, M, *Fifty Key Thinkers in International Relations* (London: Routledge, 2000).

Hall, J, 'Nulla Poena Sine Lege', *The Yale Law Journal* 47 (1937), pp165-193.

Harris, WR, *Tyranny on Trial* (Dallas: Southern Methodist University Press, 1954).

Hilderbrand, RC, *Dumbarton Oaks* (Chapel Hill: University of North Carolina Press, 1990).

Hobhouse, L, *The Elements of Social Justice* (London: Allen and Unwin, 1922).

- Hobhouse, L, *Social Development* (London: Allen and Unwin, 1924).
- Hoopes, T, and Brinkley, D, *FDR and the Creation of the UN* (New Haven: Yale University Press, 1997), p44.
- Hoover, H, *America's First Crusade* (New York: Charles Scribner's Sons, 1942).
- Horwitz, S, 'The Tokyo Trial', *International Conciliation* 28 (1950), pp473-584.
- Kelsen, H, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals', *American Journal of International Law* 39 (1945) pp45-83.
- Keynes, JM, *The Economic Consequences of the Peace* (London: Macmillan, 1919).
- King Jr, HT, 'The Nuremberg Context From the Eyes of a Participant', *Military Law Review* 149 (1995), pp37-47, at p40.
- Knock, TJ, *To End All Wars: Woodrow Wilson and the Quest for a New World Order*. (New York: Oxford University Press, 1992).
- Kochavi, AJ, 'Britain and the Establishment of the United Nations War Crimes Commission', *The English Historical Review* 107 (1992), pp323-349.
- Kochavi, A, *Prelude to Nuremberg* (Chapel Hill: UNC Press, 1998).
- Lamont, TW, 'Reparations', in EM House and CS Seymour (eds), *What Really Happened at Paris* (London: Hodder and Stoughton, 1921).
- Lansing, R, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin, 1921).
- Lauterpacht, H, in *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933).
- Levin, NG, *Woodrow Wilson and World Politics* (Oxford: Oxford University Press, 1968).
- Link, AS (ed), *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966).
- Litvinov, MM, *Against Aggression* (London, 1939).
- Liu, JTC, 'The Tokyo Trial: Source Materials', *Far Eastern Survey* 17 (1948).
- Lodge, HC, *The Senate and the League of Nations* (New York: C Scribner's Sons, 1925).

Lowe, P, 'The Tokyo Trial of Japanese Leaders, 1946-1948', in RA Melikan (ed), *Domestic and International Trials 1700-2000* (Manchester: Manchester University Press, 2003), pp137-156.

Macmillan, MO, *Peacemakers* (London: John Murray, 2003).

Maga, TP, *Judgment at Tokyo* (Lexington: University Press of Kentucky, 2001).

Maguire, P, *Law and War: An American Story* (New York: Columbia University Press, 2001).

McDougal, MS and Feliciano, FP, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961).

Miller, DH, *The Drafting of the Covenant* (New York: GP Putnam's Sons, 1928).
Minear, RH, *Victors' Justice: the Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971).

Morgenthau, H, *Politics Among Nations* (New York: Knopf, 1956).

Mullins, C, *The Leipzig Trials* (London: HF and G Witherby, 1922).

Nakamura, T, *A History of Showa Japan 1926-1989* (Tokyo: University of Tokyo Press, 1998).

Nicolson, H, *Peacemaking 1919* (London: Constable, 1934).

Noble, GB, *Policies and Options at Paris, 1919* (New York: Macmillan, 1935).

Nobutaka, I, *Japan's Decision For War* (California: Stanford University Press, 1967).

Northedge, FS, *The League of Nations Its Life and Times 1920-1946* (Leicester: Leicester University Press, 1986).

Nowak, KF, *Versailles* (London: Victor Gollancz Ltd, 1928; translated by N Thomas and EW Dickes).

Persico, JE, *Nuremberg: Infamy on Trial* (New York: Viking, 1994).

Piccigallo, PR, *The Japanese on Trial* (Austin: University of Texas Press, 1979).

Pompe, CA, *Aggressive War an International Crime* (The Hague: Martinus Nijhoff, 1953).

Pritchard, RJ, 'The International Military Tribunal for the Far East and its Contemporary Resonances', *Military Law Review* 149 (1995), pp25-35.

Pritchard RJ (ed), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East* (New York: The Edwin Mellen Press, 1998).

Pritchard, RJ and Zaide, SM, *Tokyo War Crimes Trial Index and Guide* (New York: Garland, 1987).

Roberts, A, 'Order/Justice Issues at the United Nations', in R Foot, JL Gaddis and A Hurrell, *Order and Justice in International Relations* (Oxford: Oxford University Press, 2002).

Ruggie, JG, 'Third Try at World Order? America and Multilateralism After the Cold War', *Political Science Quarterly* 109 (1994), pp553-570.

Scharf, MP, 'Have We Really Learned the Lessons of Nuremberg?', *Military Law Review* 149 (1995), pp65-71.

Schick, FB, 'The Nuremberg Trial and the International Law of the Future', *American Journal of International Law* 41 (1947), pp770-794.

Schick, FB, 'Crimes Against Peace', *Journal of Criminal Law and Criminology* 38 (1948), pp445-465.

Schwarzenberger, G, *The League of Nations and World Order* (London: Constable and Co, 1936).

Scott, G, *The Rise and Fall of the League of Nations* (London: Hutchinson, 1973).

Scott, JB, 'The Trial of the Kaiser', in EM House and CS Seymour, *What Really Happened at Paris* (London: Hodder and Stoughton, 1921).

Seymour, C, *Intimate Papers of Colonel House* (London: Ernest Benn Ltd, 1926).

Sharp, WR, *Contemporary International Politics* (New York: Rinehart and Co, 1940).

Shillony, BA, *Politics and Culture in Wartime Japan* (Oxford: Clarendon Press, 1981).

Smith, BF, *The Road to Nuremberg* (London: Andre Deutsch, 1981).

Smith, BF (ed), *The American Road to Nuremberg: the Documentary Record 1944-1945* (Stanford: Hoover Institution Press, 1982).

Smith, Lt the Honourable Staniforth, *Australian Campaigns in the Great War* (Melbourne: Macmillan, 1919).

Sprecher, DA, *Inside the Nuremberg Tribunal* (Lanham: University Press of America Inc, 1999).

Stone, J, *Aggression and World Order* (London: Stevens and Sons Ltd, 1958).

Stone, J, *Conflict Through Consensus* (Baltimore: The Johns Hopkins University Press, 1977).

Suganami, H, *The Domestic Analogy and World Order Proposals* (Cambridge: Cambridge University Press, 1989).

Tawney, RH, *Equality* (London: Allen and Unwin, 1931).

Temperley, HWV, *A History of the Peace Conference of Paris* (London: Henry Fraude, 1920).

Toynbee, AJ, "The Main Features in the Landscape", in Lord Riddell (ed), *The Treaty of Versailles and After* (London: George Allen and Unwin Ltd, 1935).

Tusa, A and J, *The Nuremberg Trial* (London: Macmillan, 1984).

(Unnamed Author), 'The Use of Analogy in Criminal Law', *Columbia Law Review* 47 (1947), pp613-629.

(Unnamed Author), 'US Renounces World Court Treaty', May 6 2002, available online <news.bbc.co.uk/2/hi/americas/1970312.stm>.

(Unnamed Author), 'Japan PM Visits Yasukuni Shrine', 17 October 2005, available online: <news.bbc.co.uk/2/hi/asia-pacific/4348280.stm>.

(Unnamed Author), 'Germany Marks Nuremberg Tribunals', 20 November 2005, available online <news.bbc.co.uk/2/hi/europe/4453790.stm>.

(Unnamed Author), 'Four Years Later, US Sees International Criminal Court in Better Light', 27 December 2006, available online: <www.iht.com/articles/ap/2006/12/28/america/NA_GEN_US_International_Criminal_Court.php>

Walker, J, *State Morality and A League of Nations* (London: TF Unwin Ltd, 1919).

Walters, FP, *History of the League of Nations* (Oxford: Oxford University Press, 1952).

Watson, A, *The Evolution of International Society* (London: Routledge, 1992).

Webster, CK, *The League of Nations in Theory and Practice* (London: Allen and Unwin, 1933).

Weidenbaum, P, 'Liberal Thought and Undefined Crimes', *Journal of Comparative Legislation and International Law* 19 (1937), pp90-97.

Westermann, WL, 'The Armenian Problem and the Disruption of Turkey', in EM House and CS Seymour, *What Really Happened at Paris* (London: Hodder and Stoughton, 1921).

Wheeler, NJ, 'Pluralist and Solidarist Conceptions of International Society: Bull and Vincent of Humanitarian Intervention' *Millennium* 21(1992), pp463-489.

Wheeler, NJ, and Dunne, T, 'Hedley Bull's Pluralism of the Intellect and Solidarism of the Will', *International Affairs* 72 (1996), pp91-107.

Wheeler, NJ, and Dunne, T, 'East Timor and the New Humanitarian Interventionism' *International Affairs* 77 (2001), pp805-828.

Whelen, F, *The Covenant Explained, For Speakers and Study Circles* (London: League of Nations Union, 1935).

Wight, M, *Power Politics* (Leicester: Leicester University Press, 1999; revised and expanded edition published 1978 and edited by Hedley Bull and Carsten Holbraad).

Williams, B, *State Security and the League of Nations* (Baltimore: Johns Hopkins Press, 1927).

Wright, Q, 'The Concept of Aggression in International Law' *American Journal of International Law* 29 (1935).

Wright, Q, 'The Prevention of Aggression' *American Journal of International Law* 50 (1956).

Wright, Q, *The Role of International Law in the Elimination of War* (Manchester: Manchester Uni Press, 1961).

Zimmern, A, 'The League's Handling of the Italo-Abyssinian Dispute', *International Affairs* 14 (1935).

Zimmern, AE, *The League of Nations and the Rule of Law 1918-1935* (London: Macmillan, 1939).

Primary Source Materials

2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002) at s2008 of the American Servicemembers' Protection Act, Public Law 107-206, <www.globalsolutions.org/programs/law_justice/icc/aspa/aspatext.html>.

Agreement Between the Governments of the United Kingdom and the United States of America on the Principles Applying to Mutual Aid in the Prosecution of

the War Against Aggression' (the Lend-Lease Agreement)(1942), in Senate Committee on Foreign Relations and the Department of State, *A Decade of American Foreign Policy: Basic Documents, 1941-1949* (Washington: Government Printing Office, 1950), available online <www.yale.edu/lawweb/avalon/decade/decade04.htm>.

Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) (1989-1996), *ICJ Reports 1989*, available online <www.icj-cij.org/icjwww/idecisions.htm>.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (1999-2005), available online <www.icj-cij.org/icjwww/idecisions.htm>.

'Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda): the Court finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo' (2006/4) [ICJ Press Release], available online <www.icj-cij.org/icjwww/idocket/icrw/icrwframe.htm>.

'Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) and (Democratic Republic of the Congo v. Rwanda): The two cases are removed from the List at the request of the Democratic Republic of the Congo' (2001/2) [ICJ Press Release], available online <www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-02_CB_CoRw_20010201.htm>

Cairo Declaration of 1 December 1943, available online <www.yale.edu/lawweb/avalon/wwii/cairo.htm>.

Charter of the International Military Tribunal of 8 August 1945, in *Trial of The Major War Criminals before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1947), vol 1.

Control Council Law No. 10 of 20 December 1945, in Taylor, T, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council law No. 10* (Washington: GPO, 1949), available online <www.yale.edu/lawweb/avalon/imt/imt10.htm>.

Dissenting Opinion of the Member for France (Henri Bernard) of November 1948, in Pritchard, JR (ed), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East* (New York: The Edwin Mellen Press, 1998), vol 105.

Draft Code of Crimes Against the Peace and Security of Mankind: Report of the Working Group on the Question of an International Criminal Jurisdiction (A/CN.4/L.471) *Yearbook of the International Law Commission* (1992) (New York: United Nations), vol 2.

Draft Code of Crimes Against the Peace and Security of Mankind (1996),
<untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf>

Draft Statute for an International Criminal Court (1994),
<untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf>

Dumbarton Oaks Proposals, in *Pillars of Peace: Documents Pertaining to American Interest in Establishing a Lasting World Peace* (Pennsylvania: Army Information School Book Department, 1946), available online
<www.ibiblio.org/pha/policy/1944/441007a.html>.

'Indictment', in *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1947), vol 1.

Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, US from 13 to 15 June, 2005 (ICC-ASP/4/32) (New York: United Nations), available online <www.icc-cpi.int/asp/aspaggression.html>.

International Criminal Court, 'Some Questions and Answers', (New York: United Nations Department of Public Information, 1998),
<www.un.org/law/icc/statute/iccq&a.htm>.

International Criminal Court, 'The State Parties to the Rome Statute', <www.icc-cpi.int/asp/statesparties.html>.

Japanese Qualified Acceptance of the Potsdam Declaration of 10 August 1945,
<www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A1.html#A1a>.

'Judgment', in *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1947), vol 1.

Kellogg-Briand Pact of 27 August 1928, available online
<www.yale.edu/lawweb/avalon/imt/kbpact.htm>.

Covenant of the League of Nations of 28 June 1919, available online
<www.yale.edu/lawweb/avalon/leagcov.htm>.

League of Nations Official Journal (Geneva: The League), vols 1928(9), 1932(13), and 1939(20).

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)(1984-1991), 'Admissibility' in *ICJ Reports 1984* and 'Merits' in *ICJ Reports 1986*, available online, <www.icj-cij.org/icjwww/idecisions.htm>.

Moscow Declaration of November 1943, in Senate Committee on Foreign Relations and the Department of State, *A Decade of American Foreign Policy:*

Basic Documents, 1941-1949 (Washington: Government Printing Office, 1950), available online <www.yale.edu/lawweb/avalon/wwii/moscow.htm>.

National Diet Library of Japan, *Historical Figures: 2003-2004*, <www.ndl.go.jp/constitution/e/etc/figures.html>.

Paraphrase of telegram from Henry Stimson to John McCloy, John Weir, and R.A. Cutter of April 1945, War Crimes File, Rosenman Papers, Harry S. Truman Presidential Museum & Library, available online <www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents>.

Potsdam Declaration of 26 July 1945, available online <www.ibiblio.org/hyperwar/PTO/Dip/Potsdam.html>.

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), (Libyan Arab Jamahiriya v United States)(1992-2003), available online <www.icj-cij.org/icjwww/idecisions.htm>.

R v Jones; R v Milling; R v Olditch; R v Pritchard; R v Richards; Ayliffe v Director of Public Prosecutions; Swain v Director of Public Prosecutions [2006] UKHL 16.

Reply by Secretary of State to Japanese Qualified Acceptance of 11 August 1945, <www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A1.html#A1b>.

Report by J. Spiropoulos, Special Rapporteur (A/CN.4/25), *Yearbook of the International Law Commission* (1950) (New York: United Nations), vol 2.

Report by Ricardo J. Alfaro, Special Rapporteur (A/CN.4/15*), *Yearbook of the International Law Commission* (1950) (New York: United Nations), vol 2.

Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials : London, 1945 (Department of State Publication 3080) (Washington: GPO, 1949), <www.yale.edu/lawweb/avalon/imt/jackson/jack37.htm>.

Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953 (A/2645), *General Assembly Official Records* Ninth Session, Supplement No. 12, (New York: United Nations).

Report of the Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, 8-11 June 2006 (ICC-ASP/5/SWGCA/INF.1) (New York: United Nations), available online <www.icc-cpi.int/asp/aspaggression.html>.

Report of the International Law Commission to the General Assembly (A/1858), *Yearbook of the International Law Commission* (1951) (New York: United Nations), vol 2.

Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994 (A/49/10), *Yearbook of the International Law Commission* (1994) (New York: United Nations), vol 2.

Report of the Preparatory Committee on the Establishment of an International Criminal Court (A/51/22) (New York: United Nations, 1996).

Report of the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1), (New York: United Nations, 1998), available online <www.un.org/icc/prepcom.htm>.

Report of the Special Committee on the Question of Defining Aggression (A/2638), in Ferencz, BB, *Defining International Aggression* (New York: Oceana Publications, 1975), vol 2.

Rome Statute of the International Criminal Court (1998), available online <www.un.org/law/icc/statute/rome fra.htm>.

Separate Opinion of the President of the Tribunal (Sir William Flood Webb), the Member for Australia of November 1948, in Pritchard, JR. (ed), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East* (New York: The Edwin Mellen Press, 1998), vol 109.

Statute of the International Court of Justice (1945), <www.icj-cij.org/icjwww/ibasicdocuments/ibasic text/ibasic statute.htm#CHAPTER_II>.

Statute of the Iraqi Special Tribunal (2002), available online <www.cpa-iraq.org/human_rights/Statute.htm>.

Summary Records of the Meetings of the Fortieth Session: 2085th Meeting, *Yearbook of the International Law Commission* (1988) (New York: United Nations), vol 1.

Summary Records of the Meetings of the Forty-Third Session: 2237th Meeting, *Yearbook of the International Law Commission* (1991) (New York: United Nations), vol 1.

Summary Records of the Meetings of the Forty-Seventh Session: 2408th Meeting, *Yearbook of the International Law Commission* (1995) (New York: United Nations), vol 1.

Thiam, D, 'Second Report on the Draft Code of Offences Against the Peace and Security of Mankind' (A/CN.4/377*), *Yearbook of the International Law Commission* (1984) (New York: United Nations), vol 2.

Thiam, D, 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind' (A/CN.4/398), *Yearbook of the International Law Commission* (1986) (New York: United Nations), vol 2.

Thiam, D, 'Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind' (A/CN.4/449), *Yearbook of the International Law Commission* (1993) (New York: United Nations), vol 2.

Tokyo Charter of 19 January 1946, *A Decade of American Foreign Policy: Basic Documents, 1941-1949*. 1950. Senate Committee on Foreign Relations and the Department of State. Washington: Government Printing Office, available online <www.yale.edu/lawweb/avalon/imtfech.htm>.

Tokyo Judgment (1948), available online <www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-9.html>.

Treaties of Peace 1919-1923, (New York: Carnegie Endowment for International Peace, 1924).

Treaty of Amity, Conciliation and Arbitration of 2 August 1928. *League of Nations Treaty Series*, vol XCIV.

United Nations Conference on International Organization Documents, (London: United Nations Information Organisation, 1945).

United Nations Charter of 26 June 1945, available online <www.un.org/aboutun/charter>.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records (Rome, 15 June-17 July 1998), (New York: United Nations, 2002).

United Nations, *Historical Review of Developments Relating to Aggression* (PCNICC/2002/WGCA/L.1)(New York: United Nations, 2003).

United Nations, List of Individuals and Entities Associated with the Taliban, Usama Bin Laden and Al-Qaeda Currently Subject to Financial Sanctions, available online <www.un.org/docs/sc/committees/1267/pdflist.pdf>.

World Peace Foundation, *Second Yearbook of the League of Nations: Record of 1921* (Boston: 1922).

World Peace Foundation, *Fourth Yearbook of the League of Nations: Record of 1923* (Boston, 1924).

World Peace Foundation, *Sixth Yearbook of the League of Nations: Record of 1925*. (Boston: 1926).

Yalta Declaration of February 1945, in Senate Committee on Foreign Relations and the Department of State, *A Decade of American Foreign Policy: Basic Documents, 1941-1949* (Washington: GPO, 1950), available online <www.yale.edu/lawweb/avalon/wwii/yalta.htm>.

Security Council Resolutions: www.un.org/Docs/sc/unsc_resolutions.html

SC Res 82 of 25 June 1950	SC Res 660 of 2 August 1990
SC Res 269 of 12 August 1969	SC Res 788 of 19 November 1992
SC Res 386 of 17 March 1976	SC Res 794 of 3 December 1992
SC Res 387 of 31 March 1976	SC Res 1079 of 15 November 1996
SC Res 405 of 14 April 1977	SC Res 1088 of 12 December 1996
SC Res 411 of 30 June 1977	SC Res 1120 of 14 July 1997
SC Res 454 of 2 November 1979	SC Res 1125 of 6 August 1997
SC Res 455 of 23 November 1979	SC Res 1132 of 8 October 1997
SC Res 496 of 15 December 1981	SC Res 1136 of 6 November 1997
SC Res 507 of 28 May 1982	SC Res 1244 of 10 June 1999
SC Res 527 of 15 December 1982	SC Res 1267 of 15 October 1999
SC Res 530 of 19 May 1983	SC Res 1333 of 19 December 2000
SC Res 568 of 21 June 1985	SC Res 1374 of 19 October 2001
SC Res 573 of 4 October 1985	SC Res 1464 of 4 February 2003
SC Res 574 of 7 October 1985	SC Res 1529 of 29 February 2004
SC Res 577 of 6 December 1985	SC Res 1575 of 22 November 2004
SC Res 602 of 25 November 1987	SC Res 1639 of 21 November 2005

General Assembly Resolutions: www.un.org/documents/resga.htm

GA Res 177 of 21 November 1947	GA Res 40/97 of 13 December 1985
GA Res 193 of 27 November 1948	GA Res 40/168 of 16 December 1985
GA Res 260 of 9 December 1948	GA Res 41/162 of 4 December 1986
GA Res 292 of 8 December 1949	GA Res 42/14 of 6 November 1987
GA Res 378 of 17 November 1950	GA Res 42/209 of 11 December 1987
GA Res 377A of 3 November 1950	GA Res 43/26 of 17 November 1988
GA Res 509 of 14 December 1951	GA Res 43/54 of 6 December 1988
GA Res 599 of 31 January 1952	GA Res 44/39 of 4 December 1989
GA Res 688 of 20 December 1952	GA Res 44/40 of 4 December 1989
GA Res 897 of 4 December 1954	GA Res 45/83 of 13 December 1990
GA Res 898 of 14 December 1954	GA Res 46/242 of 25 August 1992
GA Res 1181 of 29 November 1957	GA Res 47/121 of 18 December 1992
GA Res 1889 of 6 November 1963	GA Res 48/88 of 20 December 1993
GA Res 2074 of 17 December 1965	GA Res 49/10 of 3 November 1994
GA Res 269 of 12 August 1969	GA Res 49/87 of 16 December 1994
GA Res 3314 of 14 December 1974	GA Res 49/88 of 16 December 1994
GA Res 36/106 of 10 December 1981	GA Res 49/53 of 9 December 1995
GA Res 37/233 of 20 December 1982	GA Res 50/159 of 28 February 1996
GA Res 38/10 of 11 November 1983	GA Res 53/203 of 12 February 1999
GA Res 38/36 of 1 December 1983	GA Res 59/32 of 31 January 2005
GA Res 39/50 of 12 December 1984	GA Res 60/40 of 10 February 2006
GA Res 39/146 of 14 December 1984	

Resolutions Resulting from Special Sessions of the General Assembly

GA Res S-9/2 of 24 April-3 May 1978

Resolutions Resulting from Emergency Special Sessions of the General Assembly

GA Res 997-1003 (ES-I) of 7-10 November 1956

GA Res 1004-1005 (ES-II) of 4-10 November 1956

GA Res 2252-2257 (ES-V) of 17 June-18 September 1967

GA Res ES-6/2 of 10-14 January 1980