

PEACE AND SECURITY BY LAW

PROPOSAL FOR AMENDMENT OF THE DEFINITION OF AGGRESSION IN INTERNATIONAL LAW

By
Nimrod Ovadia

When I have whetted
my glittering sword,
and have set my hand
to judgment

(Deuteronomy 32:41)



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*“When I have whetted my glittering sword, and
have set my hand to judgment”*

DEUTERONOMY 32:41

Authorised by J.C. Israel
The President — Mr. Eli Feldman

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WE BELIEVE

*That faith in God gives meaning and purpose
to human life,*

That the brotherhood of man transcends
the sovereignty of nations,

That economic justice can best be won by
free men through free enterprise,

*That government should be of laws rather
than of men,*

That earth's great treasure lies in human
personality,

And that service to humanity is the best
work of life.

CONTENTS

I	<i>Introduction</i>	1
A	The Development of International Law in the 20th Century	3
B	The Lessons of History	9
C	The Essence of Surprise in the Time Factor	16
D	Who Fears International Law and its Implications?	32
E	How Surprises Happen	35
F	Greater Security and a Smaller Budget	39
G	The “Webster Rule” — The Precedent at the Nuremberg Trials	42
H	International Security and Peace by Law — Begun by Moses	52
S	<i>Summary</i>	58

Introduction

The finest experts in the world have addressed the problem of how to define the term "aggression" between nations, in order to establish the "right of self-defense" of the victim state to attack the aggressor state. The importance of the term "aggression" as a guideline for national leaders was underlined by the UN General Assembly in its resolution of 14.12.74 (during submission of the findings of the UN Special Committee for the Definition of Aggression), as follows:

"In view of the fact that aggression is the most dangerous and serious manifestation... threatening... international conflict and other catastrophic consequences, it is therefore important that the highest priority be assigned to the definition of aggression".

This article will show that the existence of a Lacuna in the International Law, since Litvinov agreement in 1933, and the definition by the UN Special Committee from 14.12.74 had failed to remove the obstacles, and caused unexpected military events, and did not contribute to the

peace in the world. Due to this deficient definition Israel and Egypt had suffered in June 1967 and October 1973, and Kuwait in 1990.

History shows that definitions of aggression were drafted with obscure terminology (blanket terms) which caused leaders to grope like the blind in the dark. Once the present definition is presented within the framework of a physical model, the lacunae of the definition will become visible. These lacunae have caused all the military surprises of the 20th century. The proposed amendment of the definition will eliminate the lacunae in the stages of threat of aggression, depending on the time required by the target of the aggression to prepare to deal with it in the threat stage, instead of when the act of military aggression is already being carried out. Furthermore at times, it may be too late to save the victim, and the damage can be irreversable (800 burning oil wells in Kuwait, and heavy casualties).

SECTION A

The Development of International Law in the 20th Century¹

In 1907, a series of international conventions were signed in The Hague. One of these conventions² specified that *an act of aggression may not be launched without prior express warning in the form of a reasoned declaration of war or an ultimatum*. The Convention did not define aggression substantively, but merely specified a procedural rule to the effect that an aggressor must give notice and prior warning.

The 1907 Convention actually gave an advantage to those who did not follow this procedure, because it allowed the aggressor to surprise the victim and thus win an easy victory (e.g. the Germans outflanked the French Maginot Line by quickly capturing Belgium in World War II).

After World War I, the League of Nations was established. Article 10 of its Charter of 1919 stated that the countries

undertook to honor the territorial integrity of member countries and to protect them from external aggression³.

In 1928, an international treaty called the Kellogg-Briand Pact⁴ was signed, which firmly prohibited any aggression by countries. However, this treaty once again failed to define aggression, nor did it impose any sanction on whoever violated it⁵. This treaty remains valid to this very day. By World War II, it had been signed by 63 countries, and today numerous new countries continue to sign it.

Between the two World Wars, a somewhat different definition of aggression was included in Article E(1) of the League of Nations Charter:

"An act will be deemed aggression if all the member states unanimously resolve that it is aggression".

The Charter provided that a resolution that a country is aggressive would entitle member nations to take joint action against the aggressor. This is another international law which fails to define aggression in a way which would allow for prior knowledge. Instead, it defines it procedurally only, according to the democratic votes

(which may even be arbitrary) of all the member countries. Mere procedural definition has allowed the whims of the voting countries to decide what constitutes aggression *differently at different times*, and differently for each incident. The nations once again failed to determine *a priori* what aggression is.

The consequences of these definitions soon became evident. On the eve of World War II, Germany annexed Czechoslovakia and Poland, Japan continued its conquest of Indochina and Italy invaded Ethiopia. When the League of Nations was asked whether aggression had taken place, the Axis countries (Germany, Japan and Italy) voted that their actions did not constitute aggression. This allowed the Axis countries to continue their invasions without sanction by the League of Nations. In fact, none of the Axis countries actually violated the Charter, yet the obscure definition resulted in another world war.

When World War II ended, the UN attempted to prevent military surprises by granting recognition to the following:

1. Countries were permitted to take action within the framework of the individual right of self-defense. Thus each nation was recognized as having a "natural right of self-defense", to attack the aggressor in order to defend itself. This right was embodied in Article 51 of the UN Charter.
2. Recognition was also granted to the right of self-defense in the face of a "threat". The term "threat" is important in order to define or understand aggression. The term "threat" may be compared to an attempt to commit an offense under criminal law, according to which an attempted crime is also punishable. The prohibition of threats appears in Article 2(4) of the UN Charter.
3. Recognition was granted to the right of nations to join one another in collective regional treaties and to attack any aggressor attacking any one of them, within the framework of the right of self-defense in accordance with Article 52 of the Charter.

All of the above imposed more severe international sanctions against aggressors than had been in the past. Recognition was granted to the right of military sanctions, even during the attempt (threat) stage. This encouraged

regional peace between nations, but not between alliances!!!

In accordance with Article 52 of the Charter, in 1949 the North Atlantic Treaty Organization (NATO) was established; the Warsaw Pact was established in 1956; and since then other defense alliances have been established in South America, Africa and in other parts of the world. The alliances which followed World War II reinstated the situation that had prevailed prior to World War I. Despite the fact that Nato and the Warsaw Pact moved closer to one another during the term of Soviet President Gorbachev, the fundamental principle guiding the world today is still dangerous. According to this principle, (mutual defense) any conflict between two member countries of the two big alliances may embroil most of the world in a nuclear catastrophe.

Another consequence of this legal situation is that two or more countries within the same alliance may attack one another, while no country within that alliance, or another alliance may interfere legally. Examples of this are the Russian invasion of Hungary in 1956 and of Czechoslovakia in 1968. Similarly, Middle East countries bound by small regional treaties between two or three

countries, are actually in danger of attack by one of the countries to which they tied their fate within the same strategic cooperation agreement.

SECTION B

The Lessons of History

It has been argued that history proves that governments cannot rely on pacts and treaties, all of which have ended in war. However, if we will look closely we will find that the treaties were not actually violated. The members of the League of Nations knew what aggression was, even without a unanimous resolution, so they were to blame for not having defined aggression a priori and for having left it to their whims, which ultimately worked against them.

Our lesson from history does not suggest a vote of non-confidence in international law, rather the contrary: we must amend international law to make it less obscure and more meaningful and visible.

Positive moves in this direction are evident in the substantive definitions included in other international treaties, which have become a part of customary International Law. For example we have the definition of aggression by Russia in agreement with ten neighboring

countries (hereafter refer to as Litvinov treaties, or London conventions defining aggression.)

Article 2 of the Litvinov treaties provided that⁶:

An aggressor in an international conflict... will be deemed any country which is the first to commit any of the following acts:

1. Declaration of war on another country;
2. Invasion by armed forces, even without a declaration of war, of the territory of another country (hereafter referred to as "land invasion");
3. Attack by armed infantry forces... even without a declaration of war, on the land, ships or aircraft of another country (hereafter referred to as "land bombardment");
4. Attack by armed... naval forces... even without a declaration of war, on the land, ships or aircraft of another country (hereafter referred to as "landing from the sea");
5. Attack by armed... air forces... even without a declaration of war, on the land, ships or aircraft of

another country (hereafter referred to as "aerial bombardment");

6. Naval blockade of the coast or ports of another country (hereafter referred to as "naval blockade");

7. Aid to armed gangs formed in the territory of another country which invades another country; or refusal notwithstanding of demands by the country subject to the attack, to take all possible measures in its territory to deny those gangs any aid and defense (hereinafter "aid to gangs or failure to prevent them").

Any of the above incidents accorded the injured party the right of self-defense. The Litvinov treaties became the cornerstone of the customary international law, or a form of the defining "aggression". On the basis of this definition, Israel determined the "red lines" of the Israel Defense Forces (IDF).

Litvinov agreements became part of the customary law in the world.

Israel complied with the Litvinov definition of aggression in the Six Day War (1967) and in the Yom Kippur War (1973). In the first instance Israel took Egypt by surprise

and in the second instance Egypt and Syria took Israel by surprise, but both times it complied with the legal provisions, as follows:

- a. In the Six Day War (1967), Israel attacked Egypt after it was accorded the right to self-defense by virtue of two conditions: a *declaration* of war by Nasser and a *naval blockade* of the Tiran Straits (see Articles 1 and 6 of the previous definition --- supra).
- b. In the Yom Kippur War (1973), Israel responded only after Egypt and Syria attacked simultaneously on four fronts and with great force, i.e. *land bombardment*, *aerial bombardment*, *landing from the sea* and land invasion of the territory of Israel (see Articles 2, 3, 4 and 5 of the definition --- supra).

Israel's unique status in the Middle East gave the leaders of the great powers little rest during the period from 1967 to 1973. The Middle East was called a "keg of gunpowder".

The great powers were caught in a bind when Israel attacked the Arab countries by surprise, but it was impossible to denounce Israel because it had complied with public international law. Accordingly, the international law had to be amended.

Immediately following the Six Day War (in December 1967), the UN Special Committee for the Definition of Aggression was established. However, the Committee took too long to do its job and its findings were only submitted in 1974, after another war in the Middle East (the Yom Kippur War of October 1973).

The conclusions of the UN Committee are similar to the Litvinov definition of aggression, with the following minor changes:

Deleted:

1. The requirement of a declaration of war.

Retained:

2. Land invasion or forced annexation of territory.
3. Land bombardment.
4. Naval blockade.
5. Landing from the sea.
6. Aerial bombardment.
7. Landing from the air.

All of the above items concern attack by armed forces in general, on land, naval or air forces or against a naval fleet or fleet of aircraft of the forces of another country.

Added:

8. Use of armed forces of one country, located in the territory of another country with the consent of the host country, contrary to the conditions under which this is allowed in the treaty, or expansion of their presence in the territory in excess of that defined in the treaty.
9. Permitting another country to bring forces into its territory and under the supervision of the latter, in order to commit aggressive acts against a third country.
10. Sending armed gangs or groups or mercenaries or aliens or illegals by or with the protection of a country, who commit aggressive acts against a country which constitute acts as aforesaid, or substantive involvement therein⁷.

As stated earlier, each of these items constitutes an act of aggression and accords the injured country the right to

self-defense.

In 1975, Israel fixed the new red lines of the IDF according to the definition of aggression of December 1974. Since 1975 Israel began its involvement in Lebanon (see article 10 of the new definition-supra).

SECTION C

The Essence of Surprise in the Time Factor

The surprise factor is critical to every army. For example, destroying aircraft in a surprise raid while they are still on the ground may decide the outcome of the battle. The same is true if tanks and half-tracks are captured by the attacker while still in storage or if convoys of troops are wiped out while on the way to their point of departure, which may seal the fate of the entire campaign. This is what happened to the Egyptian army in the Six Day War of 1967 and what happened to the major US force in the Pacific at Pearl Harbor in December 1941, and in many other battles since time immemorial.

As a rule, few rulers and militarists fully realized that the essence of military force and surprise is time and is not the number of troops or tanks. The time factor has been exploited since olden times for the victory by the few against the many. For example, after the conquest of Hay, five kings gathered to fight Joshua Ben-Nun in the

Hebron area, with a large military force. The Bible tells us what happened:

"And Joshua came upon them suddenly, after marching all the night from Gilgal and he struck them"

(Joshua 10:9).

In other words, his quick move through the night gave Joshua the element of surprise and secured his victory. Later, Joshua did the same with the ten kings who gathered at Mei Marom, despite their many chariots and riders. Joshua had only a handful of soldiers⁸; he did not need masses of chariots and riders. Rather, he attacked the enemy with infantry only, taking them by surprise, as he was told to do so by God:

"at this time tomorrow I shall deliver them to Israel all dead men; you need only hamstring their horses and burn their chariots"

(Joshua 11:6).

In other words: go immediately, no later than tomorrow, to their military warehouses and destroy their "tanks", before their troops have a chance to mount them.

In every surprise attack, time is of the essence ("essence" as defined by Spinoza in "Ethics"). In other words, time is vital and sufficient for surprise in battle.

We will now analyze the time allowed by each article of the Litvinov definition, showing how the history of mankind in the 20th century complied with this legal system, the essence of which is the time factor.

In physics, time (t) is measured by velocity (V) and distance (S), in the form of S/t .

Let's return to the existing definitions of aggression and analyze the situation until 1974 and subsequently.

The Historical and Legal Situation Until 1974

Both definitions of aggression, Litvinov's until 1974 and the UN's after 1974, consist of a list of items which have no logical connection with one another (I would call them "shopping lists"). From now on we will analyze these definitions, from the point of view of the time dimension, which is our concern that it incorporates the

surprise factor in aggression. To measure the response time of the aggressor, we only need to determine two relevant elements --- *speed* and *distance*. *Speed* (or velocity) is determined by the type of military technology, and the reference point for determining distance to commencement of the act of aggression is determined by the stages needed by the military force to carry out the attack.

Velocity (V): As military technology developed, big differences have evolved between the speeds of different land, naval and aerial weaponry. Therefore, we must consider each military technology (land, naval or air) as representing a different speed. In regard to aerial weaponry, we must also distinguish between conventional and non-conventional weapons (hereinafter "con" and "non-con").

Distance (S): An attacking army must travel a certain distance before it can launch an attack. Since we are concerned with a legal definition, the stages in launching an attack will be determined according to the stages of criminal acts, as follows:

1. The intent stage (in the "cognitive" context, by a verbal expression of thought).
2. The attempt stage (which in criminal law is similar to the threat stage in Article 2(4) of the UN Charter), where only certain components of the offense are committed or armaments are prepared.
3. The actual offense itself (where the attacker commits all the components of the offense).

The following table shows the response times of the attacking army, according to the following dimensions, along horizontal and vertical axes:

- a. *Velocity* --- by military technology (the vertical axis):
Land, Naval, Air, Con and Non-con.
- b. *Distance* --- according to the stages of criminal offenses (the horizontal axis): *Intentions, Attempt (threat) and the Offense.*

The legality of the military surprises which occurred around the world in the 20th century is clearly evident from the following table, particularly following Litvinov's detailed definition of aggression (see above)⁹. In other words, wherever there is a lacuna (absence of legal

provisions) on the horizontal axis of distance, there is the military surprises. *The unregulated horizontal axes are in the land and air, so that is where all of the military surprises occurred in the last century.* However, no military surprises occurred from the sea. The conclusion is that all countries are exposed to the same legal system and to the same lacunae in international law.

We will now analyze the above table:

(a) Regarding naval technology, in comparison with other means, the following facts should be noted:

Air and land technology developed very rapidly, particularly after World War II (aircraft and tanks). On the other hand, naval technology (ships and marine craft) was familiar to the great powers of past generations. It slowly, together with the development of maritime law. Over the years, maritime law developed and was regulated by conflicts between naval powers, such as Spain, England, Portugal and Russia. Therefore, maritime law has now reached a stage of maturity which allows nations to prevent sudden attacks against themselves from the sea.

VELOCITY	D I S T A N C E			Consequences of the Definition: Lessons from the History of Mankind in the 20th Century
	1 INTENTION	2 ATTEMPT (THREAT)	3 OFFENSE	
Example of murder	"I'll kill you"	Attacker walking around with a weapon in his hand	Stabbing/ Shooting	
B E T W E E N S E A L A N D A I R C O N	Sea	Naval Blockade Regulated Area	Landing from the Sea	No military surprises
	Land	~Unregulated~ ~~ A r e a ~~	Land bombardment and invasion	Germany into Poland - 1939 Russia into Hungary - 1956 Israel into Egypt - 1967 Russia into Czech. - 1968 Egypt into Israel - 1973 Iraq into Kuwait - 1990
	Air Con	~Unregulated~ ~~ A r e a ~~	Aerial bombardment	Japan against USA at Pearl Harbor - 1941 Israel against Egypt - 1967
Air Non-Con			Aerial Bombardment	USA against Japan (Hiroshima and Nagasaki) - 1945

Velocity/Distance table

For example, the Litvinov definition of 1933 specified that a naval blockade of beaches and ports accords the

attacked nation the right to attack. In other words, as early as the stage of concentration of forces (the threat or attempt stage), even before the actual attack, the threatened side may launch a counter-attack.

Similarly, international law determined that every country is entitled to specify its own territorial waters as it sees fit, within the range of three to twelve miles. All of these definitions in maritime law allow peace-seeking countries to fix a response time which will allow them to prepare for an actual attack while the attempt (threat) stage is still in progress, and even to launch a pre-emptive strike on its own terms, at its own convenience.

The fast paced development of military technology on land (e.g. tanks and the replacement of horses by motorized vehicles) and in the air (aircraft and missiles) in the 20th century accelerated the pace of development of international law; consequently, the response time of attack weapons on land and in the air has been reduced, and has been properly defined, to allow threatened countries to take preventive action or carry out pre-emptive strikes, while the threat stage is still in progress.

Thus military technology on land and in the air broke down the borders of time response (by land and air forces) between countries.

Whereas in the distant past, for thousands of years, borders were drawn between countries in terms of territory only, in view of the technological developments of the 20th century, borders should also be determined in the dimension of time. Only this can prevent military surprises, and only this can provide international law the ability to ensure world peace and security.

(b) Regarding "star wars" and other technologies:

The great powers are aware of how hard it is to find definitions which will prevent nuclear conflict, and they have made considerable efforts to reach agreements to reduce nuclear proliferation.

Nevertheless, the powers have enormously invested in the development of state-of-the-art technologies to give them an advantage over the enemy in terms of time, in the attempt and threat stages. To do this, the USA has begun to change over to the development of a new higher speed field which makes it possible to position giant nuclear missile warning and launch systems in outer space (called "star wars"). In this way, the USA is seeking to create an immediate threat against the Soviet Union, which will not be able to defend itself or make legal claims of violation of treaties. The development of highly

sophisticated technology which has not yet been covered by international agreements still makes it possible to threaten other countries, without them having any opportunity for self-defense.

Whenever a new technology is developed (such as star wars, new ballistic missiles, anti-missile missiles, new laser technology, or chemical and biological weapons), the powers attempt to include it in additional talks and new agreements. All of these agreements are doomed to failure, because they do not define aggression, once and for all, according to the essence of surprise as explained (depending on the response time required by the victim of the attack). Therefore, to save the enormous sums spent by the nations to develop weapons (which consistently reduce the response time of the attacker relative to the attacked), international law should be amended so as to oblige all nations to honor the response time of the attacked nation and to prevent, once and for all, the development of new weapons every day.

It is noted that despite all the nuclear arms reduction treaties, whoever attacks first will be the winner of the entire war.

The Historical And Legal Situation Since 1974

Analysis of the definition of the UN Special Commission, shows that though the definition made only a few amendments, each of them bears the seeds of trouble for future generations:

1. The article marked Article 8 above of the Commission's definition (originally Article E) provides that any expansion of the presence of forces in a certain area beyond that defined in the agreement is considered aggression. This article is just and proper, because it protects the sovereignty of nations against surprise attack by the Trojan horse method.
2. In the preamble to Article 3 of the definition, the Commission annulled the declaration of war and provided that even without a declaration, in the event of one of the conditions (invasion, landing, bombardment, etc.), the attacked nation may attack the aggressor, by virtue of its right of self-defense. In other words, the preamble to the article which defines cases of aggression annulled any sanction, or right to sanction, due to intent only, which corresponds to the spirit of criminal law.

However, since the Commission was operating without guidelines, it repeated a similar error in Article 9 (originally Article F), adding that allowing a third country to position troops in its territory *for the purpose of* attacking another country constitutes aggression.

Israel is presently preparing itself for, among other things, eventuality that Jordan will allow Iraq to position forces in its territory *for the purpose of attacking Israel*. These preparations do not guarantee effective protection, because the definition mentions "allowing" the positioning of troops, not the actual positioning of troops. Furthermore, according to the definition of the UN Special Commission, the country which allowed the positioning of troops in its territory must also have had the *intent* ("for the purpose of") of allowing an attack from its territory (and the mere physical positioning of the forces is insufficient to establish such intent). This definition is deficient and may cause two scenarios in which Israel would become involved in superfluous wars, either through inaction or through a hyperactive reaction, and in both instances this would not be advantageous from Israel's point of view:

First Scenario: Jordan allows Iraq to bring in troops for the purpose of "joint exercises", denying any intent to attack Israel. Israel will not be able to attack first, even if the exercise is held on the Israeli border with large forces. This scenario is slowly moving closer to reality. In 1989, a combined Iraqi-Jordanian flight wing was positioned in Jordan, and it conducts exercises in the Jordan Valley. This flight wing can be used against Israel's nuclear reactor in Dimona leaving Israel with no a priori defense in case of such an attack. In such a case, Israel will apparently have no cause to launch a counterstrike on Iraq to prevent a serious tragedy.

***Second Scenario:** Jordan allows Iraq to position troops in its territory, but Iraq postpones the actual sending of troops. Israel launches a war against Jordan without any actual threatening act by Jordan against Israel.*

These two scenarios show the failure of the prevailing definition to prevent an actual attack, but they reveal how that definition serves to inspire the possibility of an unjustified war.

3. The Commission added an article which allows nations to attack by virtue of their right of self-

defense in the event of mercenaries, bands or other armed groups carrying out acts which constitute one of the acts listed previously.

This article (mercenaries and bands) causes excessive involvement by victim countries in the affairs of other countries, such as Israel's involvement in Lebanon in 1982.

Israel's policy did not change following the change of government from the Labor Party to the Likud in 1977. Israeli governments have always followed the same approach: the good fence, Haddad's army (later named the South Lebanese Army), the security zone, the Litani campaign of 1978 and the Peace for Galilee War of 1982. All of the above were unlimited actions (as distinguished from retaliatory actions) but included control of foreign territory for extended periods (although with certain limits, following the signing of the strategic cooperation agreement between Syria and Lebanon).

4. Finally, according to the language of the definition of aggression of the UN Special Commission of 1974, and according to the sanctions imposed by the UN Charter on aggression, each country is under an

obligation to protect itself and ally itself with other countries in order to better defend itself against attack. In other words, the various nations are not all responsible for one another, and the burden of defending an attacked country rests on that country alone. Therefore, the elimination of aggression from the world must solve at least two major types of problems:

One problem is that if a country is attacked and captured within a few hours by another, without having had any strategic defense agreement with another country, then no other country will be obliged to join it in battle and restore the former situation (i.e. to snatch the victim from the aggressor's claws).

The other problem is that if the attacker and the attacked countries, and only them, have a strategic cooperation agreement, even then the victim may not always be able to prevail over the aggressor. A relevant case in point is the signing of a strategic cooperation agreement with the puppet government of Kuwait, immediately after its capture by Iraq (in 1990).

Only if international economic interests are at risk by the invasion (Kuwaiti oil) will it be sufficient to motivate enough countries to organize and take action against the

aggressor (Saddam Hussein, the President of Iraq). The question is what would happen if Israel were to be invaded in a Kuwait-style surprise attack (in the absence of a strategic cooperation pact with the USA)? Would any country in the world miss Israel and demand that it be reinstated? Probably not. Israel has no oil or other resources which may affect the economy of the world. The Resolution of the UN Security Council about reinstating Kuwait, has happened only once in the history of the U.N. and I don't think that Israel can be restored so quickly as Kuwait. These facts should inspire other countries to wonder about their fate and demand that international law be amended, before they suffer a worse fate than Kuwait.

This situation may be exploited by aggressors for combination moves of the following type: attack the target country, establish a puppet government and sign a strategic cooperation agreement with it. This is actually what Iraq did to Kuwait in August 1990. Only the resolution of the UN Security Council changed the rules of the game and forced Saddam Hussein to withdraw from Kuwait by International force.

The definition of the UN Special Commission has remained in effect since 1974 with no change.

SECTION D

Who Fears International Law and its Implications?

In some countries and societies, people mistrust the ability of international law to give them strength and security. In many countries there is a lack of communication between the army and the political level. In some cases, the Chief of Staff knows that he must launch a counterstrike in order to prevent a serious tragedy (Major-General David Elazar in October 1973), but the political level is forced by its knowledge of international law to forbid it, in fear of a suit in the International Court for an act considered to be a "crime against humanity".

Every act of aggression is a "crime against humanity" (a concept coined by the lawyer Lauterprecht after World War II at the Nuremberg trials). Today, this concept underlies international relations and offers the victims of aggression the right to attack the aggressor by virtue of its "natural right of self-defense" (as per the UN Charter).

Anyone who belittles the International Court should realize that after World War II, lawsuits for the violation of international law became a reality.

Action was taken as early as post World War I to bring Kaiser Wilhelm II to justice for having caused the Great War. In the Versailles treaty of 1919, the Kaiser was charged with the offense of what was called "a supreme violation of international morality *and the sanctity of treaties*". The international morality of the sanctity of treaties has been of religious significance since the middle ages^{[10](#)}.

In the Geneva Convention on the Peaceful Resolution of International Conflicts, which was drafted by the League of Nations in 1924, the preamble expressly states:

"A war of aggression constitutes... an international crime".

The implementation of criminal law in international law occurred only after World War II, in the constitution of the International Military Tribunal which was annexed to the London Treaty of 1945. The London constitution

was adopted by the four great powers: the USA, the Soviet Union, Britain and France. The Nuremberg Tribunal's judgment ruled that modern international law considers a war of aggression a serious crime¹¹.

It is even more serious according to customary international law, and the Nuremberg Tribunal described it as follows:

*"Crimes under international law are committed by persons and not by legal entities, and only by punishing the individual who commits such crimes is it possible to enforce the provisions of international law"*¹².

In view of all of the above, no one should ignore international law, and every head of every state should be concerned, if not for his people, then at least his very head.

SECTION E

How surprises happen

We will now present two examples that will explain the absence of time in making a military surprises:

(1) The Israeli Intelligence reported to the Chief of Staff and the politicians long before the outset of the Yom Kippur War (1973) about the time factor.^{[11](#)}

11. International Military Tribunal, Nuremberg, Judgment, 10c. cit. 217-221.

12. See Dinstein, Y., *The Laws of Warfare*, Tel Aviv University Faculty of Law Publications, 1983, p. 56.

Some six months before the Yom Kippur War, Intelligence reported that Egypt's response time is 36 hours, in response to an outright attack by crossing the Canal. Three months before the War, a motorized division moved from the Cairo area to the Canal and joined one of the armies. Intelligence reported a response time of 12 hours, which was the time the Egyptians

needed to move to the front, cross the Canal and make full contact with Israeli forces in the Sinai.

When the large Egyptian military exercise began, Intelligence reported that Egypt needed only six hours to make full contact with Israeli forces. This later become four hours and finally one hour, and even *30 minutes of response time!!!* This means that within half an hour the entire Egyptian Army would be able to cross the Canal with full force. We will now demonstrate what a response time of 30 minutes actually means:

All command posts are manned, all motorized vehicles are fully equipped, fuelled and armed. The troops are in the vehicles and the army bridge building brigades divisions are ready at the waterline, have finished assembling the bridging sections and have laid them along the Canal. At this point, all that remains to be done is to lay the bridges across the Canal and order troops to run across and take up position on the other side, a distance of one or two hundred meters.

As we have seen, the IDF did not respond, despite the unequivocal and immediate threat it faced.^{[12](#)}

Before the Yom Kippur War, the cabinet of Israel met for three consecutive days, to discuss the question of what the Egyptians and Syrians were planning to do, but by then the war had already broken out.

The Major General David Elazar wanted to attack Egypt as early as the threat stage, but the government would not allow him to do so. About two weeks before the War began, Moshe Dayan travelled to the Golan Heights and declared to the press that he was warning the Syrians in view of their threatening preparations, but to no avail.

(2) A similar process occurred in the USA prior to the Japanese attack on Pearl Harbor. During World War II, before the Japanese attack, difficult and prolonged negotiations were conducted by Japan and the USA. The Japanese government, led by Prime Minister Konoyo, negotiated with the Roosevelt government in regard to Japan's activities in Indochina and the Pacific. In November 1941, the US submitted the Hull memorandum (named for the Secretary of State) to Japan. The memorandum was interpreted as a hardline position and as an ultimatum to the Japanese: withdraw from Indochina and South China (Manchuria) and do not make pacts which may endanger peace in the Pacific.

The US waited for Japan's reply to the Hull Memorandum. Meanwhile, Prime Minister Konuyō resigned, to be replaced by Tōgō (the former Minister of War).

On December 6, 1941, Japan sent a message to its embassy in Washington, which was to have been delivered to the US government at one o'clock. However, the message was delayed, and in the meantime the Japanese bombers had already taken off from their carriers to attack Pearl Harbor. The message was, "Chances of continuing the negotiations, if any, are slim". All the while, the Americans continued to await Japan's reply, and their intelligence estimates ruled out any chance of an attack, despite the threat posed by the Japanese aircraft carriers to Pearl Harbor. Waiting for the Japanese message led the military to be put on hold, because they believed that the Japanese were interested in negotiations rather than war. Reliance on *intentions and thoughts* which are obscure cost the Americans thousands of men and the destruction of its entire military infrastructure in the Pacific theater.

SECTION F

Greater security and a smaller budget

To prevent surprises since 1970 Israel use a model called the "safety valve", defined as follows: National service in the IDF will be three years. The soldiers doing their national service, plus a fixed annual quota of reserves, would form a large mass of soldiers on constant alert. They would stop any surprise attack for a period of 24 hours until the other IDF reserve forces organize themselves and arrive at the battlefield. Reinforced by the reserves, IDF would repel the enemy. Since then, the IDF has grown to five divisions.

The "safety valve" model failed to prove itself in the Yom Kippur War (1973). On the one hand, the "valve" forces were unable to hold out for 24 hours, and on the other hand the call-up and transportation of the reserves to the front took 48 hours instead of 24 hours as planned. Because of this, IDF military planners sought to improve the model by extending national service to three and a half or even four years, so that bigger numbers of soldiers

would hold out for a longer period in the face of a surprise attack.

Israel's defense model is based on troops and fortifications (e.g. the Bar-Lev Line fortifications and the masses of troops in the "safety valve", who are actually "cannon fodder". This *mass* (m) is planned to be *converted to a reaction time of 24 hours, which is an impossible mission. Similarly, the Sinai territory*, which is described as "strategic depth", is intended to be *converted to time* to allow the IDF to organize itself. In other words, *the distance (S in physics) will become time (t)*, which we'll see is also an impossible mission. In practice, we have seen that time is time and it is impossible to convert distance to time or mass to time.

In order to ensure the crucial factor for defense (the time factor), all nations must amend the definition of aggression under international law, to make it correspond to the various response times of their military in all its branches (land, sea and air). If a country, *maintains its warning time* (response time to defend itself), *no country in the world will be able to surprise it, and it will have the best possible defense in the world, at a far cheaper cost than now exists.*

There is no doubt that the proposal to organize any army in a way which will allow it to attack first, without waiting for an attack by the enemy (which may be very destructive) will be welcomed by military leaders. The advantage of this model to all nations is obvious: the armed forces will be able to choose the most convenient battlefield, the most convenient time and means to achieve the goal by using a method which it has already practised. Furthermore, the armed forces will no longer have to fortify its defense lines (which cost the taxpayer a fortune each time the army moves), because the battle would in all cases be shifted to the enemy's territory, *at the right time*.

The question arises whether there is any legal precedent in international law to support this approach. The answer is yes. It was first applied in the Nuremberg Trials. Hereafter it will be called the "Webster rule".

SECTION G

The "Webster Rule" --- The Precedent at the Nuremberg Trials

After World War II, the Nuremberg Tribunal adopted a legal rule which we will call the "Webster rule". This refers to a letter written by John Webster¹³, US Secretary of State at the time, to the British government, in regard to the sinking of the *Caroline* by British forces¹⁴, because the ship had delivered American arms to rebels in Canada. According to the letter, Webster was ready to accept Britain's argument that it had acted in self-defense in view of the threat, if it was actually an "immediate and decisive threat". Secretary of State Webster's statement in the letter was adopted after World War II as a legal rule in Germany's trial for having invaded Norway¹⁵. Germany argued in its defense that it had invaded Norway in a pre-emptive move because it feared that the Allies would invade Norway and use it as a base to invade Germany, so it had only reacted to the threat when it invaded Norway ahead of the Allies.

The Nuremberg Tribunal ruled that a country may indeed attack another country, not only following an actual attack, but also in response to a threat. However, the test of "threat" must be '*immediate and decisive*', and *the test must be objective*, not subjective. The Tribunal added that *the yardstick for measuring an "immediate threat"* should be such as *"to prevent even a moment of consideration, but requiring immediate action to frustrate the threat"*. In other words, according to the Webster rule, the main test of a threat is the factor of immediacy (the time factor), which should be calculated on the basis of the response time required to defend the threatened nation.

The Webster rule is buttressed by Article 2(4) of the UN Charter, which recognizes the natural right of nations to defend themselves against threats. This becomes essential for the peace of nations in view of our physical model for explaining military surprises --- as described in the chart.

Therefore, according to the legal precedents, (shown in the chart) all nations will now be able to draft a law of defense, according to which their response times in all military branches (which may be referred to as "*red lines*") will allow for each to attack first. The response

times should be measured as the difference between two points in time: from the moment the provocation is detected by the intelligence forces to the moment the forces (including the reserves) are in position at the front and ready to move out to blunt the attack, or to attack first in order to effectively frustrate the attack while it is still in the threat stage. This measured and defined time is the borderline of an effective threat. It is measurable: any army, which practices emergency call-ups, knows exactly how much time it needs to organize itself in the face of a threat.

On the basis of the time that is measured, we will compare the enemy's position --- his response time *to attack* in each branch of his forces --- to defenders response time *to defend itself* in each of its forces. In any case where the movement of the enemy's forces will give them a time advantage (i.e. reduced response time) to attack, before the defender is able to effectively respond itself --- this will be considered to be an *objective* immediate and decisive threat! Only objective measurement of time in each branch of the forces can serve as an objective indicator of threats.

From the psychophysical point of view, the Webster rule creates a "stimulus-response" model (*not* a "stimulus --- *thought* --- response" model). The Nuremberg Tribunal's approach rules out the need of the political level for time to think about the enemy's intentions. The threat is objectively caused by the position of the enemy forces, and there is no need to ponder what the enemy's intentions are (because intentions are not visible, whereas forces are). This happens because the terminology which must be used to describe intentions must become as obscure, or if you will, as invisible as are intentions. Whereas forces in the field provide what can be defined in visible terms.

The "red lines" which are based on the Webster rule should actually be public knowledge. However, it is surprising how many countries conceal this information, as if it were a secret. This situation is analogous to someone who conceals the fence around his home but hits any passer-by who happens to trespass on his property. This phenomenon shows only how firmly entrenched sacred cows and preconceptions have become, hiding behind the mask of secrecy and national secrecy.

If Israel had relied on the Webster rule precedent, it would have been able to prevent the surprise attack against it in the Yom Kippur War (1973), by launching a pre-emptive strike against the Egyptian and Syrian forces. That Syria should be allowed to conduct military exercises alongside the Israeli border and that Egypt should be allowed to practise crossing the Canal on the Canal itself -- under the noses of Israeli forces --- is inconceivable. If they really want to conduct exercises, let them do it on the Nile as many times as they want, but Israel should by no means allow forces to conduct exercises right under its nose, for there is no doubt that any such exercise constitutes an objective, immediate and decisive threat.

Similarly, it is intolerable that a country, Iraq for example, should be allowed to concentrate its forces along the Kuwait's or Saudi borders. According to the method described herein such concentration of forces would itself be considered aggression entitling the threatened country to prevent attack, even during the immediate and decisive threat stage, according to objective parameters of the response times of the various forces.

In addition to this the U.N. can intervene at this stage and demand the withdrawal of the forces.

Our basic argument is that historical mishaps occur because of the obscure words that are used in the International Law. Assessments which talk of a "high probability" or "low probability" of war, "threat", "aggression", etc., are all terms which fail to describe to anyone, including the leaders themselves, what they are actually witnessing.

In view of all the above, it is proposed that the red lines of every country should be redefined in accordance with physically observable parameters. This means having a fixed time, (as well as fixed borders). By this I mean that each army of each country will measure its response time for effectively defending itself by each of the major military technologies.

For example, for every army we propose the following:

1. **Sea** --- How much time is needed from the moment information is received from naval intelligence until the Navy moves warships from the ports to a given distance, effective for defense purposes.
2. **Land** --- How much time is needed to transmit information by the intelligence network from the

collection points, through all the ranks, until reserves are called up and move into position on the front.

3. **Air (Con)** --- How much time is needed from the moment of detection by radar of a massive conventional attack by the enemy air force until an effective number of aircraft are scrambled to intercept them. It is also necessary to measure the time needed to prepare for civil defense against such an attack and to determine the longer of the two as the response time in regard to air attacks.

4. **Air (Non-Con)** --- How much time is needed to scramble aircraft to intercept a non-conventional attack, in order to shoot down aircraft carrying nuclear, bacteriological or chemical weapons, before they reach their targets --- as well as the response time of missiles to intercept missiles carrying nuclear, bacteriological or chemical warheads, and the time needed to prepare civil defense against such an attack.

These measured times of each branch of the armed forces, plus 10 percent (to allow for a margin of error) should be the red lines of every country as measured by that country. These times would be made public by

notifying the UN, and they would be made known to all neighboring countries to ensure that they be aware of and comply with them.

If a member country of the UN disputes the validity or accuracy of the measurement, the UN will be able to verify the true response times of the army of that country, by observing a public call-up exercise. This will preclude any possible subsequent argument that these response times do not conform to an objective definition of an immediate and decisive threat, in accordance with the Webster rule.

Any country which crosses these red lines will run the risk of a counter-attack within the framework of the natural right of the threatened country to self-defense. The threatened country will have to call up its forces and attack at the first opportunity. This sanction will leave no doubt in the minds of the enemy that no country will never be surprised again.

The physical model of response times will reduce national service in Israel (and probably in other countries in the world.)

Defense according to the time dimension does not require large expenditures during times of reduced tension, but only a single outlay at the critical point in time. The only continuing expense is for the maintenance of intelligence and small armed forces for ongoing defense against small-scale penetrations, which need not exceed one infantry unit along borders. The function of intelligence will be to notify the political level of the enemy's response times, and the function of the General Staff will be to compare the response time to that of the enemy and to take action accordingly¹⁶.

Just as any country is entitled to fix the border of its territorial waters as it sees fit, so too can every country unilaterally fix its response time as its border. Also, the UN must give this amendment legal authority and accept it as a new definition of aggression.

In view of all the aforesaid, every peace-seeking country should enact legislation incorporating the following:

- A publicly declared definition of the red lines of its armed forces, as the basis of international relations between the country and its neighbors.

- An obligation to sue ministers and heads of state in the country's supreme court in regard to all aspects of foreign affairs and defense. This legislation will revoke the judgment of the king, that is in force in many countries, which has been adopted by many judges, as a prejudice, according to which foreign affairs and defense are not judicable.

The proposed legislation will enhance the national consensus and the unity of nations in times of crisis. Making peace and ensuring security is an objectively difficult task, not only in Israel, but around the world. Peace can only be achieved by means of the law, by defining the important terms such as "threat", "aggression", "likelihood of war" and "right of self-defense", by means of meaningful words and deleting obscure words from the law.

All we can say is to repeat what we have already said: the essence of surprise is time, and by definition there can be no surprise (and surprise cannot be perceived) without the time factor; (as Spinoza defined in "essence" in his book "Ethics").

SECTION H

International Security and Peace by Law --- begun by Moses

Politicians, and certainly laymen, believe that there is no connection between law and security. To them, the law is a game designed only to satisfy UN members, to *appear to be right* and not to actually be right. Therefore, most of the leaders in the world don't allow judges to guide them in time of war. For example: prolonged discussions of the Israeli cabinet prior to the Yom Kippur War, not a single lawyer was present to support Chief of Staff David Elazar's request to attack first and to find a suitable legal precedent which would allow the IDF to attack first¹⁷. It was only after the War was over that the people of Israel asked Judge Agranat, (then President of the Supreme Court), to head a commission of inquiry into the causes of the failure in October 1973.

In the past, most studies of the subject of military surprises have focused on the surprise factor from the strategic, military or intelligence aspect, on the human

factor which caused the mistaken assessment. I am not aware of any academic study which attempts to explain the military surprise factor by means of a combination of international law and a strategic approach to the surprise factor. Many books have been written in Israel on the surprise of the Yom Kippur War, as well as in the USA on the surprise at Pearl Harbor.

1. Moses is the first who realised that winning and surprises at war are an outcome of justice and law, as revealed in the song of Moses:

"He is the Rock, his work is perfect: for all his ways are judgment..." (Deuteronomy 32:4)

In other words, the key to understanding everything which is happening around you, both your successes and your failures, is the law or the judgment.

Further on we read:

"For they are a nation void of counsel, neither is there any understanding in them. If only they had the wisdom to understand this and give thought to their end. How could one man pursue a thousand of them, how could two

put ten thousand to flight, if their Rock had not sold them to their enemies, if the Lord had not handed them over. " (ibid. , verse 28-30)

In other words, there is a legal system of God according to which a single soldier can vanquish a thousand people. This method is based only on the law.

Moses also said:

"When I have whetted my glittering sword, and have set my hand to judgment, I will then punish my adversaries and take vengeance on my enemies...

(ibid., verse 41-42)

In other words, only by reliance on the law does the biggest army in the world find its power. The law is even stronger than the sword.

2. Joshua Ben-Nun in his battles to conquer the Land of Israel, created practical tests to determine success. In his military considerations, Joshua did not rely on strategic depth, fortifications, or masses of troops.

God directed him to use the time factor to launch a surprise pre-emptive strike. This allowed him to vanquish much stronger forces, deploying only a small infantry force against the armies of several kings who had banded together against him, and who were armed with mounted troops, chariots and horses (*Joshua X 11*).

3. During the period of the Judges, Barak Ben-Avinoam refused to go to war against the King of Canaan, unless the *Judge Deborah* were to order him to do so. She created a practical legal test, to ensure the victory of the Israelites over Cicero. It was only under the leadership of the Judge Deborah that Barak Ben-Avinoam, with a small infantry unit, vanquished Sesera and his 900 iron chariots (*Judges IV*).

Sisera was unable to understand how he and his whole army had lost the battle, despite their superior military strength, with chariots and mounted troops.

4. The prophets of the Israelites knew that international law would evolve and that it must

develop in the future in such a way that would not allow nations to exist unless they recognize it and comply with it.

Only by depressing acting of trying to make an aggression from the very beginning, all nations will be setteled down as says by Isaiah:

"...and they shall beat their swords into plowshares and their spears into pruning hooks: neither shall they learn war any more". (Isaiah 2:4)

5. Our statements concerning the need to promote and develop public international law for the welfare of mankind and international peace are compatible with the views of Mahatma K. Ghandi, who himself was the victim of extensive violence and who therefore sought peace between all men:

"The means are like the seed, and the tree is like the ends; and there is a non-violent connection between the means and the ends; just as there is such a connection between the seed and the tree".

As far as we are concerned, the means of bombs, tanks and missiles will give birth to the tree called war.

However, if we want to grow a tree of peace and security at once for all nations, then only the seed of law and justice --- can bring about peace with security for all of mankind.

Summary

1. **D**ue to Israel's isolation in the Middle East as well as lacunae in public international law, Israel has been forced to be a test case of the international law regarding the definition of aggression. Israel suffer wars which ultimately threatened not only its own security but that of the entire world. The obscure definitions in international law are still a threat to international peace and result in military surprises in the land and the air. These lacunae have not yet been rectified.
2. Public international law lagged behind technological developments in the 20th century. Technology is continuing to develop at great speed even now. Therefore, the lacunae in international law must be rectified, by fixing borders between countries on the basis of the dimension of time, in addition to the dimension of territory; the definition of aggression must be amended accordingly.
3. The definition of aggression should be absolute and a priori and not retroactive and after the fact. It should

not be based on a democratic decision which may be changed from one case to another by the superpowers or at the whim of various countries as their own needs change, but on a uniform definition using meaningful words that allow everyone to see aggression before it happens.

4. The judgment of the King is still valid in the modern world. This is what made the precedent of the "injudicability of foreign affairs". The precedent of the injudicability of ministers of foreign affairs and defense (as well as heads of government) continue the judgment of the King, and promoted the prejudice that foreign affairs and defense are secret. The new Law that is offered here is demanding that every country should reveal its secret cards, for its own sake.
5. The nations and their leaders must respect public international law, not only to appear just, but also *to be just and strong*. Justice in public international law is the strength and intelligence of every society, every nation, every leader and every country.

Notes

1. It is not our intention to review the development of international law in detail, nor can we do so within our limited scope. We will therefore examine several major points chosen to show the general trend of developments. For a detailed description, see Dinstein Y., *The Laws of Warfare*, Tel Aviv University Faculty of Law Publications, 1983. ↩
2. The Third Hague Convention of 1907. ↩
3. The original version of the Charter appears in the *American Journal of International Law*, Supp., 128 (1919). The amended version of the Charter appears in *Basic Documents of the United Nations* 277 (ed. by Sohn) 1956. ↩
4. Named for the US Secretary of State, Kellogg, and the French Foreign Minister, Briand. ↩
5. General Pact for the Renunciation of War (Kellogg-Briand Pact of Paris), 1928, 22 *American Journal of International Law*, Supp., 171 (1928). ↩
6. See London Conventions Defining Aggression, 27 *American Journal of International Law*, Supp., 192-195, 1933; and Dinstein Y., *Laws of Warfare*, Tel Aviv University Faculty of Law Publications, 1983, p. 68. Originally, the definition itself, in Articles 3, 4 and 5, are actually a single article. The division into articles (land, sea and air) was made in order to make it easier to understand what follows, in view of the nature of the deficiency of international law and our proposal for its amendment. ↩

7. From Article 3 of Resolution No. 3314 of the General Assembly of the UN of December 14, 1974, from Djonovitch D.J., United Nations Resolutions, General Assembly, Vol. 15, 1974-76, Oceana Publications Inc., N.Y. 1984, pp. 392-394. ↩
8. Note that according to Moses' rules of warfare (Deuteronomy XX: 1-9), military service was not compulsory for all. Many had only to declare themselves afraid of war and to return home. Therefore, a small force was able to gain victory over bigger armies, due to the commitment of the troops. Today, only few states allow it to thier citizens. ↩
9. Article 7 of the Litvinov definition was not included, because it cannot explain military surprises based on the aid of armed gangs. The activities of armed gangs are limited in scope and they cannot surprise a whole country which has organized land, sea and air forces. At best, Article 7 may be included within the limited framework of reprisals. ↩
10. See Dinstein, Y., *The Laws of Warfare*, Tel Aviv University Faculty of Law Publications, 1983, p. 55. ↩
11. Zvi Lanir, *The Basic Surprise --- Intelligence in Crisis, Red Lines* United Kibbutz Publishing, Tel Aviv University Center for Strategic Studies, 1983.

See also Ezer Weizmann, *Reach for the Sky*, p. 313, and U. Avneir, *Flaming Skies, the Air Force in the Yom Kippur War*, Tel Aviv, 1975, pp. 61-62.

↩

12. Zvi Lanir, 1983, pp. 24, 28. ↩
13. 29 British and Foreign State Papers 1129, 1138 (Webster to Fox) 1840-1841. ↩
14. Caroline is the name of an American ship which during the Mackenzie rebellion of 1837 helped Canadian rebels fight against British rule. ↩
15. International Military Tribunal, Nuremberg, Judgment, 10c. cit. 205. ↩
16. Some people may argue that it is desirable to leave the "safety valve" intact in any case, so that if a surprise happens after all, the IDF should not be left in the field with only a skeleton force. This argument shows that these people do not really understand the essence and have no experience in logical thinking. A series of ideas "pop up" in their heads "suddenly" and "take them by surprise". ↩
17. The distinction between law and defense took root in Israel by means of the import of a series of legal precedents from the traditional English "King's Law" and from other legal systems, according to which the president or prime minister, like the king of olden times, is above the law. This is a consequence of the perpetuation of the judgement of the King in many countries which still consider themselves to be democracies and enlightened, even in this modern era. This situation became entrenched in many countries following legal precedents arising from royal ordinances dating from the Middle Ages. It is nothing other than a sacred cow, a prejudice, whose time has come to be slaughtered. ↩



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