# Chapter 12
# The Law of Armed Conflict

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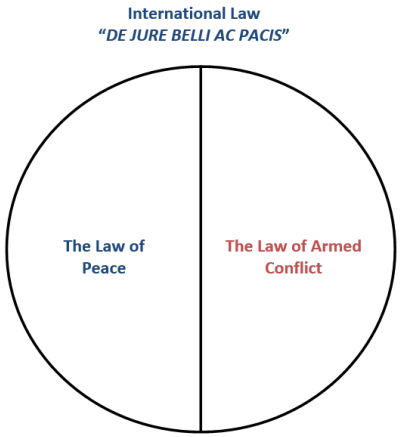
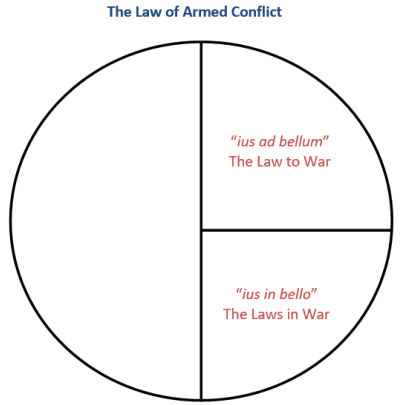


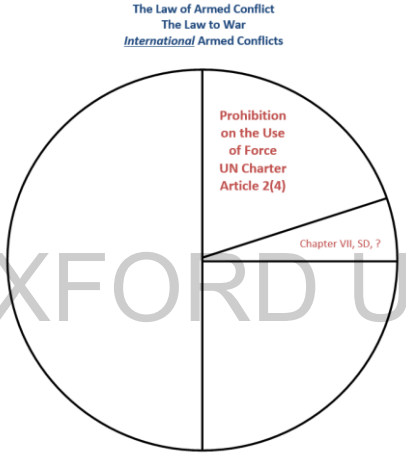


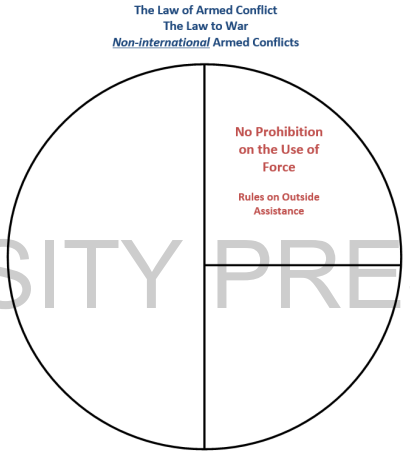



# The international law of armed conflict

**Topics to be covered**

- Introduction
- A brief **history** of the development of international law in relation to armed conflict and an introduction to some technical terminology
- *Ius ad bellum* – rules and principles of international law
- *Ius in bello* – rules and principles of international law





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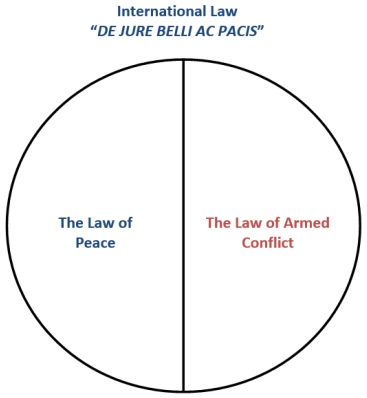



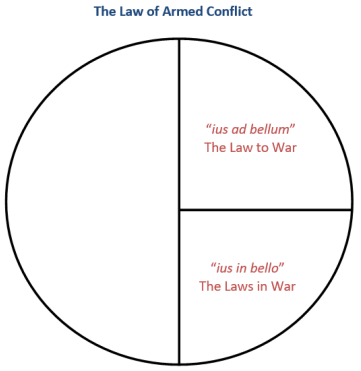


# The international law of armed conflict

## Introduction

- Historically, international law has been divided into rules and principles at times of **peace** and rules *and* principles applicable during **armed conflict**
- Despite the common assumption that warfare involves unregulated violence, rules of international law applicable to armed conflict have been developing for centuries (for example, the treaties of Westphalia of 1648 included provisions on recourse to armed conflict)
- The 2 world wars in the 20th Century led to States attempting to expand regulation of armed conflict
- In addition to the distinction between peace and armed conflict, States have also used international law to distinguish between the rules regulating **when** a State may lawfully use armed force (or the "*ius ad bellum*") and international legal rules regulating **how** armed force may be used during an armed conflict ("*ius in bello*"). These two bodies of rules have been kept separate by States. For example, the legality of a State's decision to go to war ("*ius as bellum*") does not alter that States obligations regarding how it actually uses armed force ("*ius in bello*")

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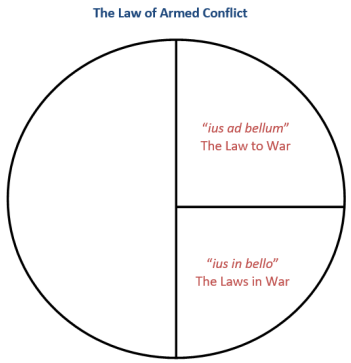
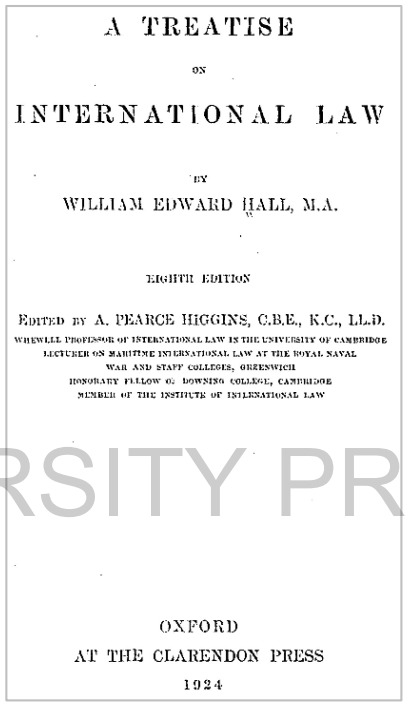



# *Ius ad bellum* - A brief history


- During the ascendancy of **natural law theory** among international lawyers, the distinction between just and unjust wars was generally recognised. According to natural law theorists, it was lawful for a State to use armed force against another State in order to vindicate the injured State's legal rights in cases of serious violations of international law. Natural law theory, however, did not compel the "injured" State to consent to independent third party adjudication of the alleged serious violation of international law being invoked to demonstrate the "justness" of the State's recourse to armed force
- With the rise of **legal positivism** in the context of international law, a more permissive approach was taken. State practice, according to positivist theorists, did not support the existence of an international legal prohibition on the use of armed force by States



A TREATISE

ON

INTERNATIONAL LAW

BY

WILLIAM EDWARD HALL, M.A.

EIGHTH EDITION

EDITED BY A. PEARCE HIGGINS, C.B.E., K.C., LL.D.

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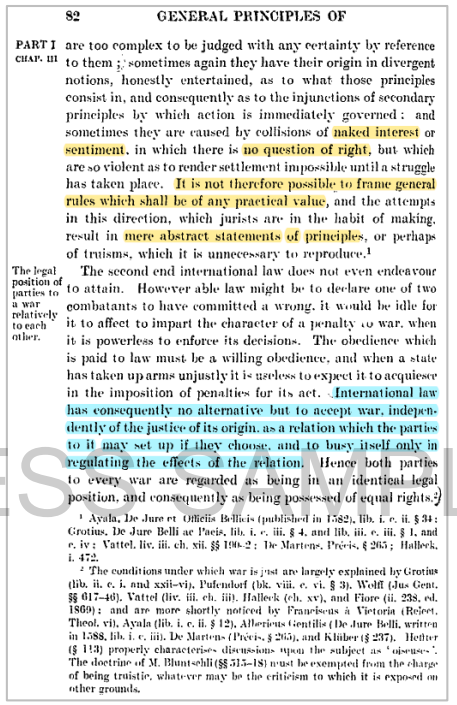

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are too complex to be judged with any certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed: and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not therefore possible to frame general rules which shall be of any practical value, and the attempts in this direction, which jurists are in the habit of making, result in mere abstract statements of principles, or perhaps of truisms, which it is unnecessary to reproduce.[1]

The legal position of parties to a war relatively to each other.

The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions. The obedience which is paid to law must be a willing obedience, and when a state has taken up arms unjustly it is useless to expect it to acquiesce in the imposition of penalties for its act. International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights.[2]

[1] Ayala, De Jure et Officiis Bellicis (published in 1582), lib. i. c. ii. § 34; Grotius, De Jure Belli ac Pacis, lib. i. c. iii. § 4, and lib. iii. c. iii. § 1, and c. iv; Vattel, liv. iii. ch. xii. §§ 190-2; De Martens, Précis, § 265; Halleck, i. 472.

[2] The conditions under which war is just are largely explained by Grotius (lib. ii. c. i. and xxii–vi), Pufendorf (bk. viii. c. vi. § 3), Wolff (Jus Gent. §§ 617–46), Vattel (liv. iii. ch. iii), Halleck (ch. xv), and Fiore (ii. 238, ed. 1869); and are more shortly noticed by Franciscus à Victoria (Relect. Theol. vi), Ayala (lib. i. c. ii. § 12), Albericus Gentilis (De Jure Belli, written in 1588, lib. i. c. iii), De Martens (Précis, § 265), and Klüber (§ 237). Heffter (§ 113) properly characterises discussions upon the subject as 'oiseuses'. The doctrine of M. Bluntschli (§§ 513–18) must be exempted from the charge of being truistic, whatever may be the criticism to which it is exposed on other grounds.

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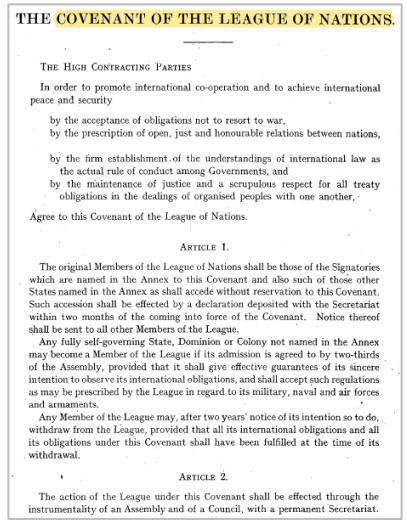
# *Ius ad bellum* - A brief history

- One consequence of such permissive approaches under international law to uses of force by States was bloodletting and carnage of the **First World War**. The drafters of the **League of Nations Covenant** attempted to subject State recourse to armed force through the Covenant (following a pattern similar to that followed, unsuccessfully, by the drafters of the treaties of Westphalia). Article 12 of the League of Nations Covenant required State parties to follow certain procedures *before* resorting to "war"



THE COVENANT OF THE LEAGUE OF NATIONS.

THE HIGH CONTRACTING PARTIES

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

ARTICLE 1.

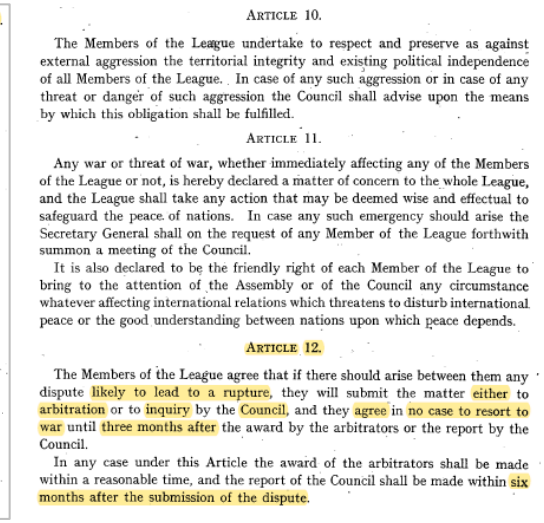
The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ARTICLE 2.

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.



ARTICLE 10.

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE 11.

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.

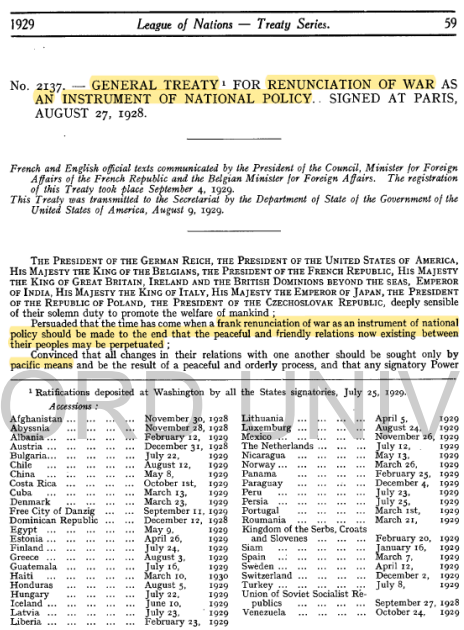
It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12.

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.

- It was not until 1928 that States finally agreed by treaty to prohibit "recourse to war for the solution of international controversies". The **Pact of Paris, 1928**, however, was not understood to prohibit a State's recourse to force in self-defence



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No. 2137. — GENERAL TREATY [1] FOR RENUNCIATION OF WAR AS AN INSTRUMENT OF NATIONAL POLICY. SIGNED AT PARIS, AUGUST 27, 1928.

*French and English official texts communicated by the President of the Council, Minister for Foreign Affairs of the French Republic and the Belgian Minister for Foreign Affairs. The registration of this Treaty took place September 4, 1929.*
*This Treaty was transmitted to the Secretariat by the Department of State of the Government of the United States of America, August 9, 1929.*

THE PRESIDENT OF THE GERMAN REICH, THE PRESIDENT OF THE UNITED STATES OF AMERICA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF POLAND, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, deeply sensible of their solemn duty to promote the welfare of mankind ;

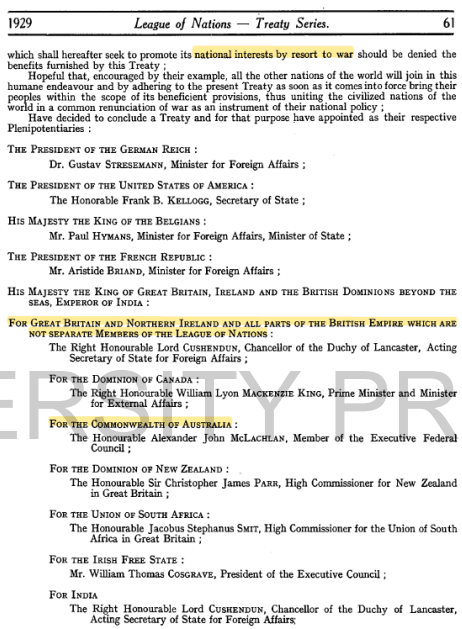
Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated ;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power

[1] Ratifications deposited at Washington by all the States signatories, July 25, 1929.

*Accessions :*

| | | | |
|---|---|---|---|
| Afghanistan | November 30, 1928 | Lithuania | April 5, 1929 |
| Abyssinia | November 28, 1928 | Luxemburg | August 24, 1929 |
| Albania | February 12, 1929 | Mexico | November 26, 1929 |
| Austria | December 31, 1928 | The Netherlands | July 12, 1929 |
| Bulgaria | July 22, 1929 | Nicaragua | May 13, 1929 |
| Chile | August 12, 1929 | Norway | March 26, 1929 |
| China | May 8, 1929 | Panama | February 25, 1929 |
| Costa Rica | October 1st, 1929 | Paraguay | December 4, 1929 |
| Cuba | March 13, 1929 | Peru | July 23, 1929 |
| Denmark | March 23, 1929 | Persia | July 25, 1929 |
| Free City of Danzig | September 11, 1929 | Portugal | March 1st, 1929 |
| Dominican Republic | December 12, 1928 | Roumania | March 21, 1929 |
| Egypt | May 9, 1929 | Kingdom of the Serbs, Croats and Slovenes | February 20, 1929 |
| Estonia | April 26, 1929 | Siam | January 16, 1929 |
| Finland | July 24, 1929 | Spain | March 7, 1929 |
| Greece | August 3, 1929 | Sweden | April 12, 1929 |
| Guatemala | July 16, 1929 | Switzerland | December 2, 1929 |
| Haiti | March 10, 1930 | Turkey | July 8, 1929 |
| Honduras | August 5, 1929 | Union of Soviet Socialist Republics | September 27, 1928 |
| Hungary | July 22, 1929 | Venezuela | October 24, 1929 |
| Iceland | June 10, 1929 | | |
| Latvia | July 23, 1929 | | |
| Liberia | February 23, 1929 | | |



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which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty ;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavour and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficient provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy ;

Have decided to conclude a Treaty and for that purpose have appointed as their respective Plenipotentiaries :

THE PRESIDENT OF THE GERMAN REICH :
Dr. Gustav STRESEMANN, Minister for Foreign Affairs ;

THE PRESIDENT OF THE UNITED STATES OF AMERICA :
The Honorable Frank B. KELLOGG, Secretary of State ;

HIS MAJESTY THE KING OF THE BELGIANS :
Mr. Paul HYMANS, Minister for Foreign Affairs, Minister of State ;

THE PRESIDENT OF THE FRENCH REPUBLIC :
Mr. Aristide BRIAND, Minister for Foreign Affairs ;

HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA :

FOR GREAT BRITAIN AND NORTHERN IRELAND AND ALL PARTS OF THE BRITISH EMPIRE WHICH ARE NOT SEPARATE MEMBERS OF THE LEAGUE OF NATIONS :
The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs ;

FOR THE DOMINION OF CANADA :
The Right Honourable William Lyon MACKENZIE KING, Prime Minister and Minister for External Affairs ;

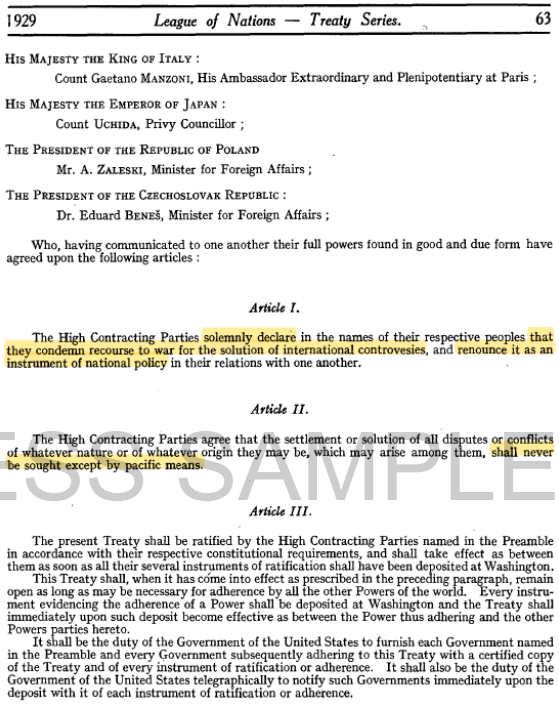
FOR THE COMMONWEALTH OF AUSTRALIA :
The Honourable Alexander John McLACHLAN, Member of the Executive Federal Council ;

FOR THE DOMINION OF NEW ZEALAND :
The Honourable Sir Christopher James PARR, High Commissioner for New Zealand in Great Britain ;

FOR THE UNION OF SOUTH AFRICA :
The Honourable Jacobus Stephanus SMIT, High Commissioner for the Union of South Africa in Great Britain ;

FOR THE IRISH FREE STATE :
Mr. William Thomas COSGRAVE, President of the Executive Council ;

FOR INDIA
The Right Honourable Lord CUSHENDUN, Chancellor of the Duchy of Lancaster, Acting Secretary of State for Foreign Affairs;



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HIS MAJESTY THE KING OF ITALY :
Count Gaetano MANZONI, His Ambassador Extraordinary and Plenipotentiary at Paris ;

HIS MAJESTY THE EMPEROR OF JAPAN :
Count UCHIDA, Privy Councillor ;

THE PRESIDENT OF THE REPUBLIC OF POLAND
Mr. A. ZALESKI, Minister for Foreign Affairs ;

THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC :
Dr. Eduard BENEŠ, Minister for Foreign Affairs ;

Who, having communicated to one another their full powers found in good and due form have agreed upon the following articles :

*Article I.*

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controvesies, and renounce it as an instrument of national policy in their relations with one another.

*Article II.*

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

*Article III.*

The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence.

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# *Ius ad bellum* - A brief history

- The failure of the League of Nations to prevent the outbreak of World War II, which involved even greater bloodshed and carnage than the First World War, prompted the drafters of the *UN Charter* to further strengthen the international legal mechanisms to be applied in cases of unlawful uses of armed force. The *UN Charter* follows the pattern of most national legal systems regarding the use of force. Force is authorised in the common interest, with individuals only able to lawfully use force in self-defence

CHAPTER I

PURPOSES AND PRINCIPLES

*Article 1*

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

*Article 2*

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

*Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

*Article 40*

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

*Article 41*

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

CHARTER OF THE UNITED NATIONS

SAN FRANCISCO · 1945

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

*Article 42*

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Article 51*

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

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- Recall also that the *Pact of Paris*, 1928, was invoked by the International Military Tribunal at Nuremberg in its judgment regarding the leaders of Nazi Germany

# "Force", "war", "armed conflict", "aggression" and "armed attack"?

- Article I of the *Pact of Paris, 1928*, refers to "**war**" (Article 11 of the *League of Nations Covenant* also refers to "war"). Article 2(4) of the *UN Charter* refers to "**force**" used by States. "War" is a legal status formally declared by States. Declarations of war have legal consequences under the international legal rules regarding belligerency and neutrality and States are sometimes reluctant to declare "war" despite being involved in an armed conflict with another State. The word "force" rather than "war" in the *UN Charter* avoids this issue
- Article 2(4) of the *UN Charter* also prohibits **threats** of force by States
- The ICJ in its 1986 *Nicaragua merits* judgment also distinguished "force" for the purposes of the prohibition in Article 2(4) of the *UN Charter* from an "**armed attack**" for the purposes of self-defence under Article 51 of the *UN Charter*. "Force" prohibited under Article 2(4) includes "mere frontier incident[s]" involving small numbers of military personnel or irregular forces which would not constitute an "armed attack" for the purposes of Article 51, which the ICJ referred to as the "most grave form[]" of the use of force

*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits, Judgment* [1986] ICJ Reports 14, [191]-[195]:



Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> . . . . . .
>
> States have a duty to refrain from acts of reprisal involving the use of force.
>
> . . . . . .
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."



Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that :

> "nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "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" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

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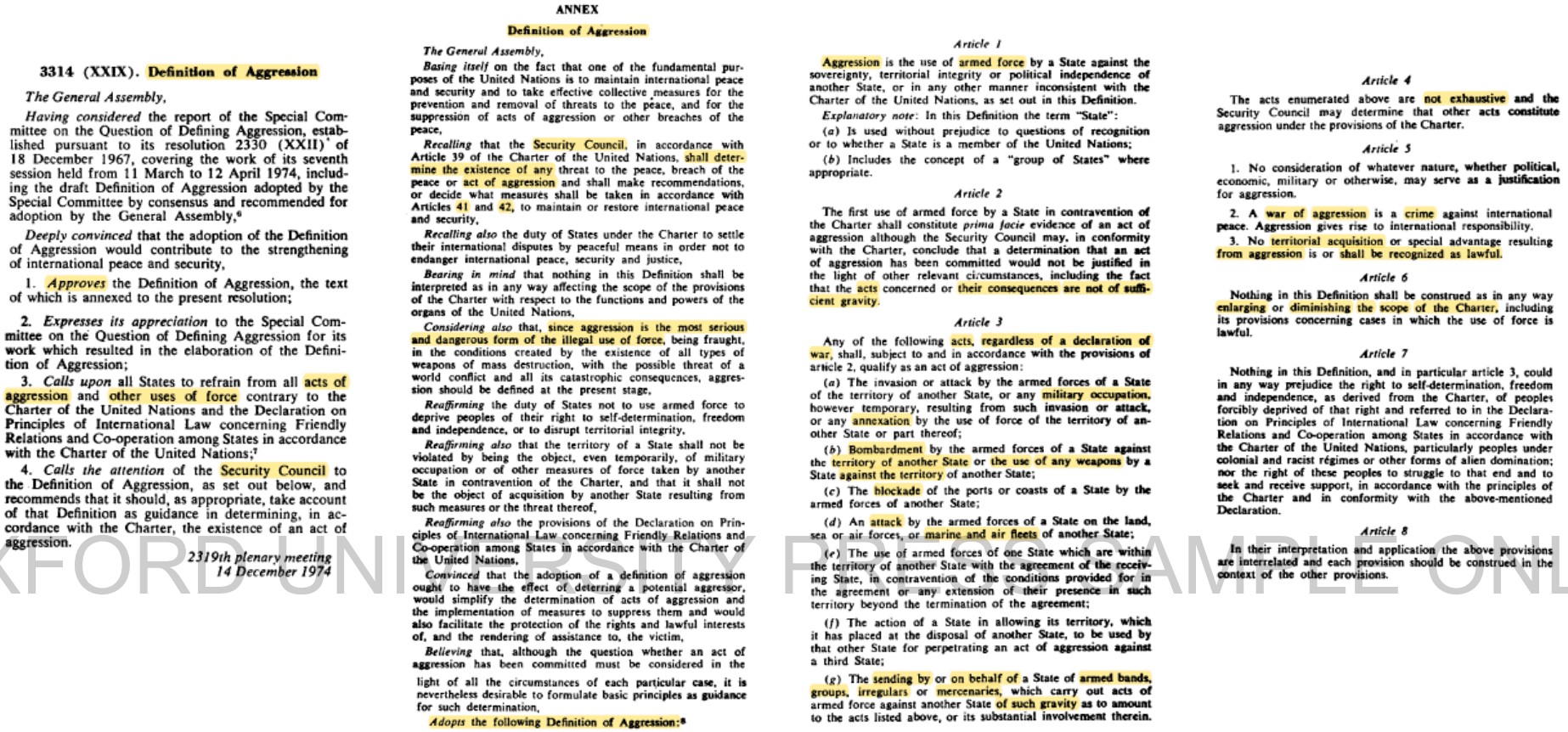
# "Force", "war", "armed conflict", "aggression" and "armed attack"?

To add to the complexity of the terminology, international legal instruments also refer to "**aggression**". Recall the "crime of aggression" (defined in Article 8 *bis* of the *Rome Statute*) in respect of which the International Criminal Court exercises criminal jurisdiction over natural persons. The UN General Assembly by resolution 3314 (XXIX) in 1974 approved a "definition of aggression" which appears intended to assist the Security Council when exercising its powers under Chapter VII of the *UN Charter*. The resolution was adopted by the member States of the UN by consensus. Acts of aggression set out in [3] of the definition encompass the less grave uses of force prohibited by Article 2(4) of the *UN Charter* but which may not rise to the level of an "armed attack" for the purposes of Article 51 of the *UN Charter*



3314 (XXIX). Definition of Aggression

*The General Assembly,*

*Having considered* the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330 (XXII)[5] of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,[6]

*Deeply convinced* that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. *Approves* the Definition of Aggression, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;

3. *Calls upon* all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;[7]

4. *Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

*2319th plenary meeting*
*14 December 1974*

ANNEX

Definition of Aggression

*The General Assembly,*

*Basing itself* on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

*Recalling* that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

*Recalling also* the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

*Bearing in mind* that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

*Considering also* that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

*Reaffirming* the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

*Reaffirming also* that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

*Reaffirming also* the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

*Convinced* that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

*Believing* that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

*Adopts* the following Definition of Aggression:[8]

*Article 1*

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

*Explanatory note:* In this Definition the term "State":

(*a*) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(*b*) Includes the concept of a "group of States" where appropriate.

*Article 2*

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

*Article 3*

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(*a*) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(*b*) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(*c*) The blockade of the ports or coasts of a State by the armed forces of another State;

(*d*) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(*e*) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(*f*) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(*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.

*Article 4*

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

*Article 5*

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

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

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

*Article 6*

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

*Article 7*

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

*Article 8*

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

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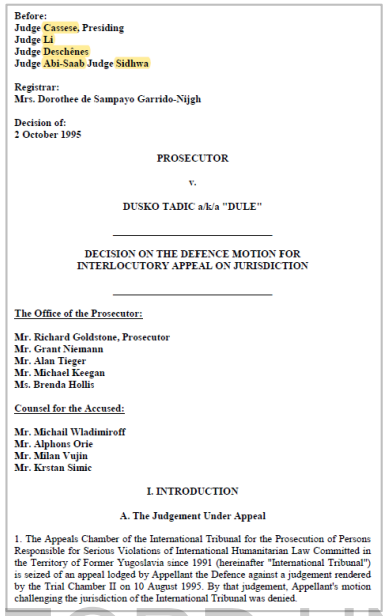
# "Force", "war", "armed conflict", "aggression" and "armed attack"?

- "**Armed conflict**" is an important term for the purposes of the "***ius in bello***" in which the international legal rules that apply vary depending on whether the armed conflict is of an **international** or a **non-international** character. The ICTY in the *Tadić case* set out the basic legal test that is applied to determine whether an "armed conflict" exists and **international humanitarian law** (IHL - which makes up most of the legal rules and principles of the *ius in bello*) applies. Article 8(2)(f) of the Rome Statute's definition of "**war crimes**" applies the language used by the ICTY in the *Tadić case*
- "**Force**" for the purposes of Article 2(4) of the *UN Charter* overlaps with the requirements for an "**armed conflict**" which determine the application of rules of IHL, but the focus of Article 2(4) is on force used by States



Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . . ] to all persons *affected* by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states

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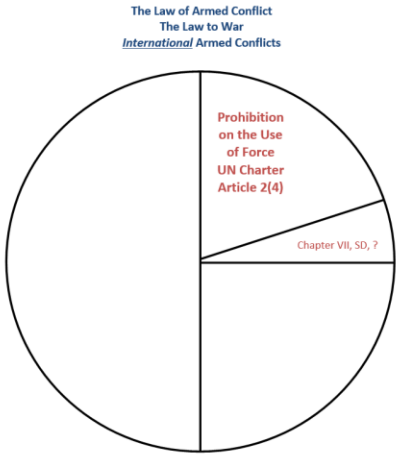
# *Ius ad bellum* – rules and principles of international law

- In relation to the **prohibitions in Article 2(4) of the *UN Charter***
  - The prohibition of **threats** of force between States in Article 2(4) does not appear to be breached by maintaining armed forces at high levels of readiness
  - "**Force**" prohibited by Article 2(4) encompasses the use of **weapons** by military personnel. It also appears to encompass certain forms of non-kinetic activity, for example, computer hacking, where the consequences are comparable to kinetic uses of force
  - "**Force**" prohibited by Article 2(4) does not appear to extend to **economic pressure** applied by a State although economic pressure may violate other rules of international law
  - The words "against the **territorial integrity** or **political independence** of any **State** or in any other manner inconsistent with the **purposes of the United Nations**" have not been interpreted as words of limitation




***Article 2***

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

- In relation to **authorisation of force** by the **UN Security Council** under **Chapter VII** of the **UN Charter**
  - The standing UN forces anticipated under Article 43 of the *Charter* were never established
  - Instead, the Security Council has authorised States to use force on behalf of the UN. One possible source of this implied power of authorisation is **Article 42** of the *UN Charter*
  - Controversies have arisen in relation to Security Council resolutions in respect of Kosovo and Iraq as to whether uses of force require express authorisation is required or whether a Security Council resolution could **implicitly** authorise force. In relation to the **interpretation** of Security Council resolutions, the rules of treaty interpretation do not directly apply as a resolution adopted by the Security Council is a unilateral action by the Security Council and not an agreement between States. Nonetheless, the ICJ in the *Namibia Advisory Opinion* (1971) and *the Kosovo Advisory Opinion* (2010) accepted that the rules of treaty interpretation could apply *mutatis mutandis* (ie with necessary adjustments) to Security Council resolutions

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# *Ius ad bellum* – rules and principles of international law

- In relation to **self-defence** under Article 51 of the *UN Charter*, the text of the Article raises various issues
  - "[I]nherent right" – an apparent reference to a pre-existing customary right of self-defence
  - "[I]ndividual or collective" – allies are permitted to use force in support of a State that is the victim of an armed attack
  - "[A]rmed attack" – as already noted, not all uses of force prohibited under Article 2(4) of the Charter will be of a gravity that constitutes an armed attack for the purposes of Article 51
  - "[O]ccurs" – Article 51 appears to require that an armed attack have occurred or be under way. Customary international law permitted States to use force in anticipatory self-defence when an armed attack was imminent

*Article 51*

**Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.**

- **Customary self-defence** – the ICJ in it 1986 *Nicaragua merits decision* recognised that self-defence continued to exist at customary international law despite the negotiation and entry into force of the *UN Charter*

*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) Merits, Judgment* [1986] ICJ Reports 14, [176]:

94 MILITARY AND PARAMILITARY ACTIVITIES (JUDGMENT)

the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this

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