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Declared and Undeclared Wars

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Abstract: Occasionally, people characterise foreign military interventions as "undeclared wars". It is not entirely clear what is the meaning and value of such a qualification, but it seems that they want to add an extra weight to their condemnation. Still, does it have legal significance? At times, international law demanded that States issued a declaration of war before the commencement of hostilities but the obligation was mostly ignored for varied reasons. Notably, between two world wars, States avoided certain legal obligations (e.g. the prohibition to use war, the rules of warfare) by not declaring or otherwise recognising a state of war. After the Second World War, considering the earlier abuses, States redesigned the international legal regulations in a way that the declaration of war became practically irrelevant when it comes to the legality or illegality of the use of armed force, or to the application of law.

Keywords: armed conflict, use of force, declaration of war, ultimatum

Introduction

Numerous commentators have concluded that Russia is waging an "undeclared war" in Ukraine. The incorporation of Crimea into Russia and the involvement of Russia in the armed conflict in Eastern Ukraine do not conform with international law, but does it make a difference whether Russia has declared war or not? This issue is not unique to the conflict in Ukraine as similar statements have been made in connection with other situations involving covert military interferences by foreign states. It seems that when people want to emphasise that a particular use of a country's armed forces is treacherous or troublesome, they add the "undeclared" qualification. Also, this echoes the conviction that there must be some degree of chivalry and honesty as far as international relations are concerned even when States resort to armed force. These views have valid historical roots as the declaration of war was previously obligatory under international law for the sake of clarity and predictability. Following the 4th Hague Convention in 1907 either of the opposing States were required to communicate serious disagreements that may lead to war, unless the opposing State makes certain concessions (conditional declaration of war) or declares that hostilities will commence in the future (actual declaration of war). Such a gentlemanly approach had its reasons and usefulness at the time but was later misused, i.e. the existence of war in the technical sense and the applicability of relevant legal rules became dependent on the willingness of States to formally acknowledge the state of war. Eventually, the declaration of war lost its practical and legal meaning. After the Second World War, the international legal regulation moved away from the subjective approach to war (it is war if all States declare it is war) to the objective approach to war (it is war if there is actual fighting between States, regardless of how they qualify the situation). As a result, the system became resistant to previous formalistic manipulations and nowadays, it is essentially irrelevant whether declared or undeclared wars are being dealt with.

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This article takes a retrospective approach to explain the legal implications of the declaration of war and how they have changed since the beginning of the twentieth century. Interestingly, it was never entirely clear what was the purpose and effect of the declaration of war, and whether a war was illegal without a declaration of war. The first chapter looks briefly at the concept of war and earlier practices of declaring war in the world of bipolar international law. The second chapter analyses the period from the Second Hague Peace Conference in 1907 until the Second World War when the subjective approach to war dominated and the declaration of war had practical and legal significances. The third chapter examines the switch to the objective approach to war in the Charter of the United Nations in 1945 and the Geneva Conventions in 1949, and the simultaneous decline of the declaration of war. These documents adopted, respectively, the more pragmatic and inclusive terms of "force" and "armed conflict" instead of the formalistic and limited term of "war" in the context of international law.

The Concept of War

Traditionally, international law recognised two possible conditions between States, i.e. the state of peace and the state of war, and consisted of two distinctive legal regimes respectively, i.e. the law of peace and the law of war. The factual and legal world views were bipolar in both a sharp and simplistic manner. In 1625, the renowned Dutch legal scholar Hugo Grotius wrote in his aptly titled book "On the Law of War and Peace" that no intermediate state exists between war and peace (Grotius, 1625). The law of war was applicable in the period between the opening of hostilities and the restoration of peace. Such an understanding was almost universally accepted for centuries before and after its proclamation, and was not challenged until the twentieth century.

Logically, when States transitioned from peace to war, they became subject to a completely different legal regime (McNair and Watts, 1966). In the nineteenth century, the applicable international legal rules changed considerably in three ways due to the state of war (Greenwood, 1987). Firstly, the laws of war became applicable to govern the conduct of hostilities between the belligerents, e.g. the right to establish a maritime blockade in order to disrupt the adversary's commerce. Secondly, the non-hostile relations between the belligerents were affected, e.g. the validity and application of treaties or the termination of diplomatic relations. Thirdly, the relations between the belligerents and other States became subject to the laws of neutrality, e.g. the prohibition to interfere with neutral vessels. These limited examples demonstrate that war had significant legal and practical implications both internationally and domestically.

When considering the above-mentioned consequences of war, it is reasonable to assume that what constitutes war, and when war begins and ends are clearly understood. However, international law does not outline a binding definition of war even though there have been many treaties and concepts specifically linked to war, e.g. a condition that a particular treaty applies in a time of war. Instead of a universal legal definition, various scholarly attempts exist to explain the concept of war based on state practices (Detter, 2014). These definitions explain why and how war is waged, but rarely address the question of when war actually exists. For example, Carl von Clausewitz explained that "war is thus an act of force to compel our enemy to do our will" (why) and "war is merely the continuation of policy by other means" (how), but did not provide criteria to assess when war begins and ends (when) (von Clausewitz, 1976).

Probably the most often quoted definition by a legal scholar originates from Lassa Oppenheim who described war as a "contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases" (Oppenheim, 1906). This definition sheds some light on the temporal scope of war. He believed that actual hostilities between the armed forces of States were necessary for the existence of war. In his opinion, unilateral acts of force by the armed forces of a State against another State cannot be classified as war, although they may cause the outbreak of war, e.g. an occupation of a part of a foreign territory is illegal but does not amount to war so long as it does not meet armed resistance. Hence, the annexation of Crimea is not war in his eyes

because Ukraine did not use armed force to prevent the occupation of the peninsula. Oppenheim stressed that "war is a fact recognised, and with regard to many points regulated, but not established by International Law", which means that the existence of war is first and foremost a question of fact.

Although scholars had different opinions about the concept of war, there was little uncertainty about whether the state of war existed in reality. However, what was the role of the declaration of war in terms of the existence of war? Grotius claimed that such a declaration was a prerequisite for the existence of war. His rule was intended to preclude treacherous attacks and to make sure that the opposite State had a chance to respond to the declaration of war or, at least, to prepare some defence. Yet, later, he divided wars into declared wars (lawful) and undeclared wars (not necessarily unlawful). This approach demonstrates that the lawfulness of war was not associated with the declaration of war and that the latter was not actually indispensable for the existence of war (Grotius, 1625).

In spite of the influence of Grotius, by the eighteenth century, it was accepted in practice and in research that war may begin and often did begin without a formal declaration. In other words, there was no general legal obligation to declare war (Detter, 2014). The declaration of war became a chivalry act that was usually skipped because it deprived a State of the advantage of surprise or States had already exchanged demands and all parties understood what was coming. Despite a rather common perception, the eighteenth and nineteenth centuries were characterised by disregard for the practice of issuing declarations (Eagleton, 1938). When the British officer John Frederick Maurice was tasked to analyse the state practice related to declaring war, he was able to identify, to his surprise, "less than ten instances" where war had been formally declared from 1700 to 1870 (Maurice, 1883).

Notwithstanding the legal status of the declaration of war during that period, it did serve two purposes when issued. Firstly, the conditional declaration of war was a warning and gave the opposite State an opportunity to make certain concessions in order to avoid war. Secondly, the actual declaration of war established the state of war in the legal sense, and erased all doubts about the status of affairs between States and the applicable legal regime.

The Prime Time of the Declaration of War

The idea of a formal and obligatory declaration of war was revived by scholars at the turn of the nineteenth and twentieth centuries due to the development of modern weaponry which allowed the execution of hostilities with greater speed and more devastating results. It became a matter of interest for States after the outbreak of the Russo-Japanese War in 1904. The Japanese torpedo boats attacked Russian warships before a declaration of war was delivered to Russia (a similar scenario was repeated when Japan attacked Pearl Harbor in 1941). Such a treacherous act was met with widespread disapproval and accelerated the movement towards the adoption of some up-to-date written rules on the commencement of war (Schindler and Toman, 2004).

In 1907, following instigation by the United States President Theodore Roosevelt the States convened for the Second Hague Peace Conference (the conference was supposed to have already taken place in 1904 but was postponed because of the Russo-Japanese War) and adopted 14 conventions dealing with various aspects of the conduct of hostilities. The Hague Convention (III) relative to the Opening of Hostilities provided that "the contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war" (Article 1). Some argued that the convention represented an emerging customary norm (Eagleton, 1938), but most likely, it was not a codification, but a development of international law (Greenwood, 1987). Nevertheless, this convention was the renaissance of the declaration of war and largely shaped our continued understanding of the declaration of war.

Several observations can be made about Article 1. First, it is clear that hostilities may not begin before a previous and explicit warning is given in two possible forms, but there is nothing concerning the interval

between the warning and the beginning of hostilities. At the conference, a Dutch general proposed that hostilities should not commence until 24 hours has lapsed from the time when a declaration of war had been received by the prospective adversary, but his proposal was defeated (Higgins, 1909). As no one insisted on a meaningful interval over the years that followed, it must be concluded that the declaration of war was considered a formality which did not deny the advantage of surprise. However, a conditional declaration of war (ultimatum) must contain a specific deadline in order to give the opposite State a chance to accept or reject the demands. Secondly, both forms of the declaration of war should inform the opposite State of reasons why war will or may begin. Whether such reasons give useful insight or practical values is questionable. Thirdly, the provision does not require any particular form of the declaration of war. Obviously, it must be issued by a competent organ of state and must be communicated unequivocally to the opposite State. In the case of *Dalmia Cement Ltd.* v. *National Bank of Pakistan*, the arbitrator found that a radio broadcast where the Pakistani President told the people that their country was at war with India did not amount to a declaration of war as the radio broadcast was not directed at the Indian government. Indeed, war is such a serious matter that the existence of war should not be implied lightly. Equally, there are no standard wordings or elements for the declaration of war. Fourthly, the provision does not explain whether and how the State must act when its ultimatum is rejected. For the sake of clarity, the State should take a position either by saying that it will not follow the path of war or by confirming that the States are now at war. For example, when Serbia rejected the ultimatum of the Austro-Hungarian Empire, the latter made its position known with a separate formal declaration (Naval War College, 1918):

> The Royal Serbian Government having failed to give a satisfactory reply to the note which was handed to it by the Austro-Hungarian minister in Belgrade on July 23, 1914, the Imperial and Royal Government is compelled to protect its own rights and interests by a recourse to armed force.
>
> Austria-Hungary, therefore, considered herself from then onwards to be in a state of war with Serbia.

A declaration of war is a unilateral act. At the conference, the Chinese delegation inquired "whether a declaration of war can be considered by the State toward which it is directed as a unilateral act and whether the latter can regard it as null and void?" (Eagleton, 1938). They did not receive an answer, but both the earlier and subsequent state practices indicated that the opposite State could do very little, i.e. the state of war comes into existence if one State seeks war. In 1813, a British court concluded that "a declaration of war by one country was not a mere challenge to be accepted or refused by the other" (Kelsen, 1954). Interestingly, the declaration of war creates a state of war even in the absence of any actual hostilities, e.g. a number of Latin American States were at war with Germany during both world wars but no fighting took place (Briggs, 1952).

Following the Hague Convention (III) and relevant state practice, two schools of thought emerged (Greenwood, 1987). Advocates of the subjective approach maintained that the decisive consideration was the intention of the States involved in hostilities, i.e. the state of war existed only if at least one State chose to recognise the situation as war in some way (McNair, 1925). Supporters of the objective approach believed in the objective criteria of war, and considered factual circumstances decisive instead of subjective and usually as biased political positions of States (Borchard, 1933). Both sides had significant flaws. The subjective advocates made the existence of war dependent on the whim of States, and helped to create an artificial division between the factual and legal state of war. The objective supporters suffered from a problem that has haunted and still haunts different areas of international law, i.e. the difficulty or impossibility of drawing up a universally accepted definition of war. As the search for a generic definition of terrorism remains fruitless, so did the search for the objective criteria of war, i.e. there is no general agreement among States regarding the definition of war. Eventually, the subjective approach to war prevailed which meant that by 1919, a state of war commenced when at least one State considered the situation a state of war either by declaring war or by otherwise recognising such a condition between relevant States, and ended with a peace treaty (Dinstein, 2012).

The flaws of the subjective approach to war became more apparent and open to abuse in the light of the Covenant of the League of Nations in 1919 and the General Treaty for Renunciation

of War as an Instrument of National Policy (better known as the Kellogg-Briand Pact of 1928). After the First World War, States hoped to prohibit the resort to war but as the peace talks continued, it became clear that this was too idealistic a vision. In the end, States managed to set procedural limits on the commencement of war, i.e. they committed to using certain peaceful procedures to settle their differences and, if disagreeing with the outcome, not to resort to war before three months has passed since the end of the chosen procedure (Article 12). If a State satisfied all conditions set in the Covenant of the League of Nations, it was legally free to go to war against another State, provided it respected other rules concerning hostilities, including the Hague Convention (III). This solution was dissatisfactory for many States and the Kellogg-Briand Pact imposed further restrictions. States condemned "recourse to war for the solution of international controversies" and renounced war as an "instrument of national policy in their relations with one another" (Article I).

In the 1920s and especially in the 1930s, there were numerous occasions where States avoided the obligations laid down by these and other treaties by refusing to declare war or otherwise recognise the existence of a state of war (Brownlie, 1963). In September 1931, Japan began the invasion of Manchuria, a region of China. What followed were years of hostilities but neither China nor Japan declared war, broke off diplomatic relations or requested third-party States to observe neutrality (however, China did declare war on Japan in the context of the Second World War in December 1941). Japan claimed that the rules of warfare did not apply because such rules apply only during war which did not exist. Later, Japan disputed that it could not commit crimes of war because they are violations of the rules of warfare. The League of Nations accepted that neither Japan nor China had resorted to war and therefore, no violation of the obligation to exhaust the methods of peaceful settlement of dispute before going to war had been made.

So, how did States qualify their "not war" situations? They were somewhat imaginative, e.g. Japan referred to its invasion of Manchuria as an "incident" and in 1936, when Italy annexed Abyssinia, Mussolini described the undertaking as an "expedition" (Schrijver 2015).

The Council of the League of Nations allowed the subjective approach to war to prevail with a few exceptions, e.g. the annexation of Abyssinia by Italy was qualified as a resort to war by the Council even though both States denied that a state of war existed between them. The Council's tactics were foremost pragmatic because States did not want to recognise that the existing international legal and structural systems were inadequate, e.g. the League of Nations was supposed to take countermeasures when a state of war existed, but in reality, it lacked the necessary mechanisms, which meant that it was convenient to agree that there was no war. As a result, war became very formalistic and technical in nature, dependent on the caprices of States, and usually disconnected from reality.

In summary, it provided a decisive difference from the perspective of international law whether declared or undeclared wars were being discussed, e.g. whether and to what extent certain rules were applicable or collective measures were usable depended on the technical qualification of the situation.

The Alignment of the Factual and Legal Realities

During the Second World War, States declared war more extensively compared to previous decades. However, after the war, the declaration of war became a rarity due to the fundamental overhaul of the legal regulation concerning the use of force in international relations. No doubt that States understood during the inter-war period that they had engaged in legal deception when they refused to recognise a factual state of war also as a legal state of war. As a result of the Second World War and the changes in the international community, States were forced to re-evaluate their practices. Subsequently, the objective approach to war underwent a revival and deeds as opposed to declarations became the decisive factor.

The League of Nations was replaced by the United Nations, and the constitutive instrument of the new international organisation also addressed matters of violence with regard to inter-State relations. Article 2(4) of the Charter of the United Nations states that:

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

The wording of this provision is undoubtedly a considerable improvement in comparison with Article I of the Kellogg-Briand Pact because it is "force", not "war" that is prohibited. Every resort to war involves the use of force, but not vice versa. States deliberately adopted a new term, namely "force", that encompasses both classical war and other forms of inter-State force "short of war" (Schachter, 1982). The prevailing, and without a doubt correct, view is that in this context the term "force" is limited to armed force and does not include, for example, political or economic coercion (Värk, 2013). The prohibition is not limited to the use of force, but covers also the threat of force in order to minimise possible loopholes (Stürchler, 2007).

The term "force" is not bound to some formalistic criteria and in order to assess whether there has been a use of force, the facts on the ground have to be identified and examined. This makes the system quite fool-proof and States cannot ignore their obligations under international law by devising ingenious political and legal metaphors. Also, it means that States cannot disconnect the factual and legal realities, i.e. the legal state of war is possible without actual fighting, but there cannot be any use of force in the legal sense without the actual use of force.

Does it make a difference whether or not States declare war under contemporary international law? The short answer is no. As already explained, the new system was designed with the intention of eliminating the abuses and peculiarities that came with the existence or absence of a declaration of war shaped by the subjective approach to war. It would be strange if the declaration of war had a purpose once more. It is plausible to argue that the intentional and explicit establishment of a state of war with a declaration of war is altogether incompatible with the Charter of the United Nations (Greenwood, 1987). If this argument is followed further, declared wars can be described as even more unlawful due to the state of mind. It is worth mentioning that the influential commentary of the Charter of the United Nations edited by Bruno Simma does not even mention a declaration of war when discussing the prohibition of the use of force (Dörr & Randelzhofer, 2012).

Moreover, contemporary international law is no longer divided sharply between the law of peace and the law of war as described above. When hostilities break out, the switch in legal regime is not as extensive as it was previously, and it is definitely not dependent on whether or not the situation is characterised as war. For example, according to the Geneva Conventions (1949) "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (Common Article 2). In addition to classical war, these conventions adopted a new term, namely "armed conflict" that refers to factual hostilities on the grounds of "short of war" (a situation that does not qualify as war in the technical sense as discussed in the previous chapters, but is war in the light of facts). Hence, States cannot evade the rules of warfare by not declaring war (like Japan did during the Manchuria invasion).

Conclusion

Occasionally, people characterise foreign military interventions as "undeclared wars". It is not entirely clear what is the meaning and value of such a qualification, but it seems that they want to add an extra weight to their condemnation. Still, is it of legal significance? The practice of declaring war goes back to the times of ancient civilisations but rules, scholarship and state practices have been both diverse and confusing. The declaration of war was foremost associated with the chivalry conduct of war and not necessarily demanded by law. In the eighteenth and nineteenth centuries, States had no obligation to declare war and they mostly refrained from issuing a prior declaration of war. Due to the changes in political and military affairs, States decided in 1907 that war should not commence without previous and explicit warning in the form of a (conditional) declaration of war. The practical function of the declaration of war was to establish a state of war so that States knew the status of affairs

and the applicable legal regime. War became very technical and often did not reflect the reality, i.e. war began with a declaration of war and ended with the conclusion of a peace treaty regardless of whether there were actual hostilities. Increasingly, States denied the existence of a state of war to escape the rules applicable during war. As a result, it mattered whether it was a declared or undeclared war. Contemporary rules, enshrined in the Charter of the United Nations, took a different approach by paying attention to the reality on the ground and adopting new, more inclusive terms. It prohibits the use of force in general and whether or not there was a declaration of war does not affect the scope or applicability of that prohibition. Equally, the rules of warfare become applicable once hostilities have begun regardless of how States decide to characterise the situation. In conclusion, nowadays, there is no significant legal reason to differentiate between declared and undeclared wars.

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