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LAWS3483 – WAR LAW: USE OF FORCE AND INTERNATIONAL HUMANITARIAN LAW – EXAM NOTES

I USE OF FORCE

1 History of the legality/illegality of war

Definitions of war:

- '*War is the 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, 1905, *International Law*.
- '*War is a state or condition of affairs, not a mere series of acts of force*': McNair, 1925, 'The Legal Meaning of War, and the Relation of War to Reprisals'.
- '*War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which is comprehensive on the part of at least one Belligerent Party*': Dinstein, 2011, *War, Aggression and Self-defence*.
- '*War is…a sustained struggle by armed force of certain intensity between States, or groups of a certain size, consisting of individuals who are armed*…': Detter, 2013, *The Law of War*.

'Just War':

- Ancient Greece and Rome: a body of priests, *fetiales,* would certify whether formal and substative grounds existed for '*bellum justum*' in Ancient Rome.
- Early Christian ideas: St Augustine (354-430) revived *bellum justum,* maintaining that war was not sinful if waged for a just cause, with the right intention and on the authority of a *princeps*.

- Balthazar Ayala (C16th Spain): '*a war publicly and lawfully waged by those who have the right of waging war*'. That is, a public declaration by a sovereign and observance of the laws of war.
- St Augustine's view was adopted and developed in the Middle Ages by St Thomas Aquinas and St Raymond of Pennaforte i.e. that war must be '*just*' regarding those who wage it, its object, its case, intention and authority. '*Justice*' legitimised otherwise criminal acts, and conferred legal benefits e.g. spoils of war.
    - Theologians also determined that a war could not be '*just*' for both sides. But by the late Middle Ages a war waged by the *authority of a prince* was ***presumed just***. Thus, for theologians, a war *could be just for both sides*.
- Grotius (1583-1645): sought to limit war by requiring a *lawful case* i.e. defence, recovery of property, punishment.
- Peace of Westphalia 1648 to end the Thirty Years War: rise of state sovereignty – the '*reason of state*' began to predominate.
- Van Martens (1788): '*Nothing short of the violation of a perfect right…can justify the undertaking of a war. On the other hand, every such violation, when proved, and when amicable means have been tried in vain, or when it is evident that it would be useless to try such means, justifies the injured party in resorting to arms*.'
- W.E. Hall (1904): '…it would be idle for [international law] to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions … **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 possessed of equal rights.'
    - Reflects the view in the 19th century that a state's right to go to war and obtain territory by right of conquest was *unlimited*. Many regarded this as subject only to morality and policy; or as a means of change to evolve international society. War was seen as litigation; a means of redress, absent a system of international justice and sanctions.
    - But by the end of the C19th, there was a developing feeling that war was a last resort to be avoided. Brownlie (1963) wrote: '*In state practice this sometimes appeared as a substantial though perhaps somewhat formal qualification of the*

right to resort to war.' His view was that the use of force was always very narrow and constrained, and that the right to self-defence was also narrow. He said that C19th States were surprisingly anxious to justify any use of force, curious given the absence of a prohibition on force under international law. They used terms like '*self help*', '*self preservation*' or '*necessity*' – but there was no analysis of the terminology.

- Thus, war was legal, but measures short of war had legal constraints in order to avoid an all-out war e.g. reprisals, blockades, some intervention – but CIL on this point was uncertain.

- Hague Peace Conference of 1899 (26 States) convened by Czar Nicolas II of Russia '*with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments*.' No disarmament was achieved, but a lot of treaties were concluded.
  - A second Conference in 1907 had 44 states represented with plenty more agreements. A third Conference was planned but WWI broke out.
    - The 1899 *Convention for the Pacific Settlement of International Sisputes* (replaced in 1907) was important because there was no international method of dispute resolution. This culminated, eventually, in the establishment of the Permanent Court of Arbitration.
- 1907 *Hague Convention Relative to the Opening of Hostilities* art 1: '*The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war*.'

Covenant of the League of Nations 1919, arts 10-16: War was only *limited*, not altogether prohibited (e.g. the '*cooling off*' period required). War was still lawful where, for example, the Council report was not adopted unanimously; time limited for awards/judicial decisions were not met; and the Member did not comply with the award. Measures short of war were not affected; and war with non-Members was not affected.

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.

Article 13

The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

Article 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a ***Permanent Court of International Justice***. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Article 15

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations

regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the representatives of one or more of the parties to the dispute.

Article 16

Should any Member of the League *resort to war* in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have *committed an act of war against all other Members of the League*, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they *will mutually support one another in the financial and economic measures which are taken under this Article*, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will *take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League*.

Any Member of the League which has *violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council* concurred in by the representatives of all the other Members of the League represented thereon.

Further attempts to limit war:

- 1923: *Draft Treaty of Mutual Assistance*: the parties agreed that '*aggressive war is an international crime and…undertake that no one of them will be guilty of its commission*.'
- 1924: *Geneva Protocol for the Pacific Settlement of International Disputes* would have abolished the general right to go to war (in art 2) – war was only permitted to *resist aggression or when authorised by the League Council or Assembly*.
    - But neither was adopted.
- 1928: *General Act of Arbitration for the Pacific Settlement of International Disputes* – required submissions of disputes to conciliation, judicial settlement or arbitration. Only 22 parties including Australia; still in force!
- *General Treaty for the Renunciation of War 1928* (*'Kellogg-Briand Pact'*) – still in force, now 70 parties; entered into force on 24 July 1929 with 46 parties. Ultimately not that effective (Manchuria, 1931; Abyssinia, 1934; China, 1937; Finland, 1939; Poland, 1939); and no changes to the right of self-defence; armed force short of war etc.:

> **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 controversies*, 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.

By 1939: Brownlie (1963) suggests that by this time the use of force (not only war) otherwise than in self-defence was illegal at customary international law also. But the position is unclear.

- The IMT in Nuremberg (1946) confirmed that the Pact did outlaw aggressive war – but the position is unclear when the outlawing occurred, it at all.

2 Scope and Content of the Prohibition of the Use of Force

UN Charter art 2(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.

- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 168: art 2(4) is '*a cornerstone of the UN Charter*'.
- **Exceptions to the prohibition**:
    - Self-defence under art 51 ('*if an armed attack occurs*')
    - Collective security under Ch VII (if the SC determines there is a '*threat to the peace, breach of the peace, or act of aggression*').
- ***Elements of art 2(4)***:
    - '*in their international relations'* i.e. Only interstate (not intrastate) force is covered.
    - *'against…any state*': universal application, *not just between members*.
    - *'force'* not *'war'*: broader than the Kellogg-Briand Pact – covers war and measures short of war.
    - *'against the territorial integrity or political independence of any state*': similar words to the League of Nations Charter – these words were added by Australia (Doc Evatt) at San Francisco in 1945 to protect small nations.
        - Important for interpretation: if you dissect art 2(4), then you could argue that where no territory is permanently lost (e.g. against aircraft or ships only; or, more controversially, to rescue nationals abroad – like Entebbe (1976); or, more controversial still, *humanitarian intervention* i.e. the purpose is *just* to solve the immediate humanitarian crisis). Occasionally, also the 'right reasons' e.g. enforcing democracy or intervention in support of self-determination. The latter is less relevant now, but important in colonial states.

- Others read art 2(4) to make it ***as comprehensive as possible*** e.g. Brownlie who said that the words '*epitomize the total of legal rights*' of a state. The *travaux préparatoires* say that the provision was clearly designed to *preserve the status quo* i.e. prevent *change of territorial integrity or political independence by use or threat of force*.
- *Corfu Channel case* (1949): The wider meaning was apparently supported by the ICJ, akin to trespass? The straits in Albanian waters are also international. The UK sent naval ships through the straits and one hit a mine, killing sailors. The British then swept the area and did another patrol. Was Albania responsible for the mines and should they pay compensation? And was the UK responsible for violating Albania's sovereignty by not just following the right of passage expeditiously, but also minesweeping and searching for evidence? The UK said there was no force used against the *territorial integrity or political independence*, all they did was minesweep. In finding a violation, the ICJ said this could not be accepted because it would mean that *more powerful states could do as they liked in smaller, less powerful states*.
- But cf *Nuclear Weapons* (1996): There, the question was put whether the mere possession of nuclear weapons was a '*threat of force*' under art 2(4). The ICJ held that this depended upon whether this would be *'directed against the territorial integrity or political independence of a State*'.

- '*…in any other manner inconsistent with the Purposes of the UN*': in any case, the strongest argument in any event is that the last phrase is a catch-all. This phrase helps to confirm the wider interpretation of the provision.