

The Use of Force, the Law of Armed Conflict, and the International Law Relating to the War in Ukraine

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The UN Charter and the prohibition on the use of force

- Art. 2(4) Charter prohibits the use, or threat, of force by states:
 - **“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”**
- Art. 2(4) is “a cornerstone of the United Nations Charter” – *Armed Activities (DRC v Uganda)* (2005) para. 148

Exceptions to Article 2(4)

- Exceptions to the prohibition
 - Self-defence under art. 51
 - Collective security under Chapter VII

What is prohibited?

- Relevant UN Charter articles use different terms:
 - *Art. 2(4) – prohibition of “the use of force”*
 - *Art. 51 – self-defence against “an armed attack”*
 - *Art. 39 – Security Council may determine there has been a “threat to the peace, breach of the peace, or act of aggression”*
- None of these terms is defined in the Charter

What is “the use of force”?

- The use, by one state against another, of armed force (not political or economic pressure) – including:
- Direct armed force – eg invasion, missile attack, laying mines
- Indirect armed force – eg:
 - sending “armed bands” into another state’s territory – *Nicaragua (1986)*, paras. 195, 247
 - “actively extending military, logistic, economic and financial support to irregular forces” – *Armed Activities 2005 (DRC v Uganda)* paras. 161-165
 - providing weapons, logistical or other support to armed insurgents in another state – *Nicaragua (1986)*, paras. 195, 205, 247, 251
 - but not “mere supply of funds” to irregular forces – *Nicaragua (1986)*, para. 228

Customary international law

- The prohibition in art. 2(4) is not only treaty (conventional) law but also customary international law (CIL)
 - ICJ in *Nicaragua* case 1986 (para. 188)

Humanitarian Intervention

- Meaning:
 - in the past, has sometimes been used to describe the protection of a state's nationals abroad
 - protection of nationals abroad more usually seen as an aspect of self-defence
- Meaning here is:
 - the use of armed force by a state or states
 - in the territory of another state
 - with the object of protecting human rights
 - without the permission of the state within whose territory force is applied
 - and without the approval of the SC
- So prima facie:
 - contrary to art. 2(4)
 - and contrary to the principle of non-intervention, eg in Declaration on Friendly Relations 1970 (GA Res 2625):
 - “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”

Use of force for the protection of nationals abroad

- The Entebbe Incident



International Armed Conflict

- Common Article 2 of the Four Geneva Conventions
 - “ in addition to the provisions which shall be implemented in peacetime, the present convention 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 a state of war is not recognised by one of them...”

Tadić definition of an (international) armed conflict

- "an armed conflict exists whenever there is a resort to armed force between States".

- A declaration of war is not required
 - shift away from reliance on subjective interpretation of events (Japanese bombing of Manchuria 1931)
- Declared wars covered – even where there are no hostilities (belligerent occupation; declared wars by Sth American nations in WW2 though no active hostilities)
- Duration of fighting is not relevant
- Casualty numbers are not relevant
- A minimum threshold re: hostilities may be required, eg, beyond a border skirmish (traditionally called ‘armed conflicts falling short of war’)

The Fundamental Principles of IHL

- Current approach of IHL: balance between humanitarian objectives and military necessity
- These principles form the core ideology of modern IHL and can be found in almost all the substantive rules regarding armed conflict. These fundamental principles are:
 - The principle of distinction
 - The prohibition on attacking those *hors de combat*)(*out of combat*)
 - The prohibition on inflicting unnecessary suffering
 - The principle of military necessity
 - The principle of proportionality

Principle of Distinction

- **The distinction between civilians and combatants** (persons who take direct part in hostilities, such as members of armed forces)
 - The principle of distinction requires that belligerents distinguish between military objectives and civilian persons and/or objects at all times, and limit attacks to military objectives only.



Prohibition on Attacking Those *Hors de Combat*

- **The prohibition on attacking persons no longer taking active part in hostilities** (known as *hors de combat* in French, which means ‘out of combat’)
 - Persons who do not, or no longer taking direct part in hostilities are known as *hors de combat*, and are immune from being directly targeted.

Prohibition on Unnecessary Suffering or Superfluous Injury

- **The prohibition on inflicting unnecessary suffering or superfluous injury**
 - Parties to the conflict should not use means or methods of warfare that result in superfluous injury or unnecessary suffering; that is, any injury greater than that strictly necessary to achieve the military objectives, which uselessly aggravate the suffering of wounded personnel, or otherwise render their death inevitable.

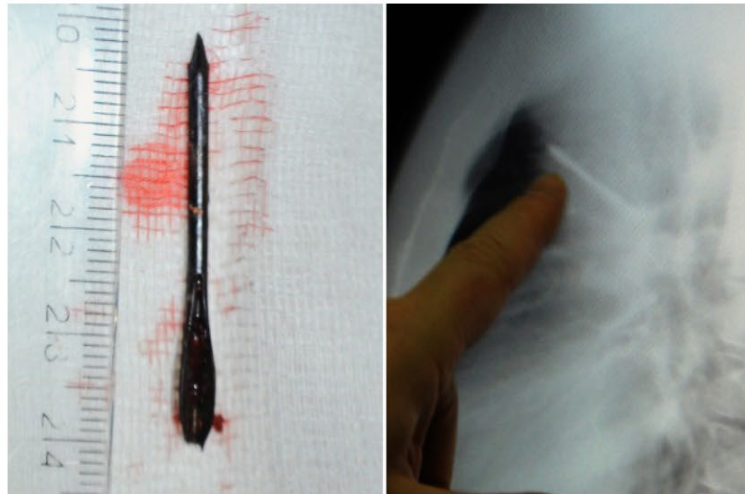


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25 April 2022 • 5:54 pm

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Necessity

- **The principle of necessity**
 - The principle of necessity requires that the parties to the conflict only adopt the measures necessary to weaken the enemy and achieve their surrender; it is not necessary to bring about total destruction of the enemy, its armed forces, or its property.

Proportionality

– The principle of proportionality

- Proportionality means that any military measures taken by parties to the conflict must be proportionate; the military advantage obtained by a particular operation must outweigh the damage caused to civilians and civilian objects; this principle is more often understood in the negative; that an attack will be considered disproportionate if it is expected to or does cause incidental loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.