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The War Power and the Law of War: Theory and Realism

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THE WAR POWER AND THE LAW OF WAR: THEORY AND REALISM

M. CHERIF BASSIOUNI*

THE military activities of the United States abroad take a variety of forms. The power to commit military forces abroad and the extent of their involvement arise from different sources of the constitutional authority. Congress has the power to declare war, but the President has the duty to conduct it.¹ The President's duty, as Commander-in-Chief, allows him to effectuate military dispositions which include such preparations and defense against threat of war as he sees fit in the best national interest, even though such measures occur before Congress declares its intentions with respect to such dispositions² The President also conducts foreign affairs and directs foreign commerce,³ sometimes requiring varying forms of military commitment, which, if by treaty, must subsequently be ratified by the Senate.⁴ The

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¹ U.S. CONST., ART. I, § 8; The Federalist No. 69 (*Hamilton*); and *Fleming v. Page*, 9 How. 602, 614-618 (1850), wherein Chief Justice Taney said for the Court: "His (the President's) duty and his power are purely military. As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. . . . But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question."

² Compare *Bas v. Tingy*, 4 U. S. (4 Dall.) 37 (1800) and *Gray v. United States*, 21 Ct. Cl. 340 (1886). See also, *United States v. Bancroft*, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953), on the Korean conflict. Also, *Luftig v. McNamara*, 373 F.2d 664 (D. C. Cir. 1967) cert. denied, 389 U.S. 934 (1967) (dissenting opinion).

³ U.S. CONST., ART. I, § 8, Cl. 3; Bassiouni and Landau, *Presidential Discretion in Foreign Trade and Its Effect on East-West Trade*, 14 WAYNE L. REV. 2, 494-505 (1968).

⁴ *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Missouri v. Holland*, 252 U.S. 416 (1920); *Asakur v. Seattle*, 265 U.S. 332 (1924); McCLEURE, *INTERNATIONAL EXECUTIVE AGREEMENTS*, chs. 1 and 2 (1941); Henkin, *The Treaty Makers and the Law Makers: The*

interrelationship and interdependence of these aspects of constitutional and governmental power usually operate in the functional context of existing international conditions which are largely, if not exclusively, the product of executive decisions. These powers, *i.e.*, war by congressional declaration, conduct of military operations by the President as Commander-in-Chief, foreign commerce and foreign relations by the President and treaties negotiated by the President with the advise and consent of the Senate, are graded in terms of constitutional priority. The executive responsibility, however, rests with the President, whose policies and commitments, made by the office holder himself or his predecessor, will always precede in time Congressional action, invariably shaping the outcome of Congress' decisions. The effect of these aforementioned interrelated powers operates, in fact, by means of checks and balances vesting primary responsibility with the President. These interrelated powers are less apt to produce a division of authority or a chain of command but rather create a conglomeration of varying powers which functionally merge in the President and allow him the broadest latitude.⁵

A distinction exists between the transfer of authority from Congress to the President in terms of delegation of Congressional powers and the extent of Presidential discretion as to the specific powers of the Presidency conferred by the Constitution, while a functional distinction also lies as to the inherent powers of the President in the manifestation of the nation's sovereignty. Presidential action, regardless of his constitutional source of authority resulting in military involvement abroad, notwithstanding its label (war or otherwise), involves a question of foreign affairs and international law. Mr. Justice Sutherland, in *United States v. Curtiss-Wright Corp.*,⁶ expressed this interrelationship and its effect in these terms:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . , Congressional legislation which is to be made effective through negotiations and inquiry within the international field, must often accord to the

Law of the Land and Foreign Relations, 107 U. PA. L. REV. 903 (1959); and BASSIOUNI AND LANDAU, *supra* note 31, at 497.

⁵ PRITCHETT, *THE AMERICAN CONSTITUTION* 344-354 (1959).

⁶ 299 U.S. 304 (1936).

President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.⁷

The war power has been the subject of great constitutional debates. Hamilton's theory⁸ was that it is an aggregate of powers granted Congress by the Constitution in Article I, section 8, clauses 11 to 14. Contrasting that theory is that war is an attribute of sovereignty.⁹ Hence, it is waged or declared by virtue of the nation's sovereignty. The President is the nation's spokesman and his authority to bind the nation under international law as to matters of inherent sovereignty cannot be limited by a municipal law or constitutional authority.¹⁰ To hold otherwise would result in a system whereby the interested nation or the world community could challenge the President in his constitutional authority to act on behalf of the United States, and that can hardly be envisioned. The President's responsibility under constitutional law is internal, and his power to act on behalf of the nation emanates from notions of sovereignty under international law and not from a constitutional grant of specific power or limitations thereto.

Insofar as the internal relationship between the President and Congress, the former is entrusted with the conduct of war, the latter with its declaration.¹¹ However, the power to declare and wage war is an exercise of sovereignty binding the nation to the state of war, which, if it exists, is no longer a matter of internal law but of international law.¹² Whether or not the President may have exceeded his constitutional authority to wage war without a congressional declaration of war is immaterial under international law; and his conduct, when coupled with actual military operations, creates a new international status which binds the nation to its legal consequences. The constitutionality

⁷ *Id.* at 319-322; also Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L. J.* 467 (1946).

⁸ The Federalist, No. 23 (*Hamilton*).

⁹ *Penhallow v. Doane*, 3 U.S. (3 Dall.) 53 (1795); *See*, Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); and Chief Justice Chase in *Ex Parte Milligan*, 4 Wall. 2, 139 (1866); and *Lichter v. United States*, 334 U.S. 742 (1948).

¹⁰ CORWIN, *THE PRESIDENT: OFFICE AND POWERS*, 130-139 (4th Rev. Ed. 1957).

¹¹ *Supra* notes 1 and 2.

¹² CORWIN, *supra* note 10; and McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 *AM. J. INT. L.* 63 (1955), and the Prize Cases, 67 U.S. (2 Black) 635 (1862).

of Presidential authority will not affect the legal status of the nation's responsibility in international law.¹³ The realization that war is an international status because it is an act of sovereignty brought about the constitutional theory that the war power is inherent in the federal government, complete and undivided.¹⁴

A distinction could be made between declaring war and waging war, not only in terms of the theoretical constitutional differences, but in terms of changing by Congressional declaration the state of peace into war as well as the Presidential reaction as Commander-in-Chief to an undeclared state of war, and to the need for preservation of American national interests, lives and property.¹⁵ Wars of aggression are theoretically illegal under international law, and the United Nations Charter permits acts of war only when performed in self-defense.¹⁶

¹³ For what constitutes illegal conduct under international law, see Bassiouni, *The Nationalization of the Suez Canal and the Illicit Act in International Law*, 14 DE PAUL L. REV. 258-263 (1965).

¹⁴ See, Chief Justice White in *Northern Pac. Ry. Co. v. North Dakota*, 250 U.S. 135, 149 (1919), Chief Justice Hughes in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), *U.S. v. Curtis Wright Corp.*, 299 U.S. 304 (1936).

¹⁵ Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1787-1790 (1968).

¹⁶ U.N. CHARTER art. 1, para. 1 states:

"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. . . ." The Charter also provides in art. 2 para. 3 that: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." This provision is not an absolute restriction against the use of force. Although Article 2 (para. 4) provides 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 Preamble of the Charter expressly provides for the use of armed force "in the common interest."

Article 51 states:

"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."

Article 52(1) states:

"Nothing in the present Charter precludes the existing of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

A declaration of war in the traditional sense may today imply aggression even if preventively defensive, while reacting to what is loosely termed as aggression implies defensive measures even if followed by aggressive counter defensive action. To distinguish between them involves considerations which in the modern context transcends legal doctrine. The President, as Commander-in-Chief, will be the first to react to aggression;¹⁷ if he fails, Congress may declare war and thereby order him to wage it; but if he wages it without congressional approval, the latter's recourse is to refuse its declaration and hold the Presidential conduct as unconstitutional, with all its possible consequence; even though by that time the nation will be implicated in war and legally answerable before the world community. The President can exercise, therefore, the unwritten power of the *fait accompli*.¹⁸

See also, LEAGUE OF NATIONS COVENANT art. 16; BISHOP, INTERNATIONAL LAW 756 (1962); and the *Kellogg-Briand Pact*, 46 Stat. 2343; and 2 OPPENHEIM, INTERNATIONAL LAW, §§ 528-529. (6th ed., Lauterprecht, 1944).

¹⁷ Prize Cases, 67 U.S. (2 Black) 635, 668-670 (1863), speaking for the majority of the Court, Justice Grier said:

"If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other.' The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized 'a state of war as existing by the act of the Republic of Mexico.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress. This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. . . . Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as well compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."

¹⁸ With reference to the Viet Nam issue, see, 112 CONG. REC. 2666, 2672 (1966) (Lawyers Comm. on American Policy Toward Vietnam, American Policy Vis-à-Vis Vietnam, Memorandum of Law). Cf., *id.* at 369, Letter to President Johnson signed by 27 professors of International Law, including this author and read into the Congressional Record by Senator Russell. See also, U.S. DEPT. OF STATE, THE LEGALITY OF UNITED

War in the United States has a dual significance, one for purposes of constitutional law and one under international law.¹⁹ As early as 1866, the Court in *Ex Parte Milligan* distinguished between a foreign invasion of the United States, a foreign theater of war wherein the United States was a party, and a civil war.²⁰ The result of such distinction imparted the criterion for jurisdiction: military jurisdiction under the Constitution applies to time of war and peace but is delineated by statute, foreign theaters of war fall under international law implemented by decisions of the President as Commander-in-Chief and as the spokesman of a sovereign nation; and, invasion of United States territory or insurrection will depend upon the continued existence of the local courts and their ability to function. Constitutionally, authority in the first jurisdictional category rests with Congress; in the second, with the President and the military government he may establish with possible participation by Congress; and the third, whenever normal courts are not in operation, and then martial law may be declared by the President and Congress, (and the governor of the state in local insurrections only). These distinctions become significant to determine the application and extent of Congressional and Presidential powers abroad and in the United States. They will depend largely upon a balance of the exigencies of the times in terms of what is needed for the theater of military operations and for what will be construed as necessary and proper, and incidental to the conduct of war.²¹ Internal emergency measures may, and have in the past, affected not only personal rights but a variety of economic activities which

STATES PARTICIPATION IN THE DEFENSE OF VIET-NAM, 54 DEPT. STATE BULL. 474, 488 (1966), reprinted in *Symposium—Legality of United States Participation in the Viet Nam Conflict*, 75 YALE L. J. 1084, 1085 (1966).

¹⁹ *Supra*, notes 15, at 1771-1805, and 17; McDougal and Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L. J. 771 (1958); KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* (1956), 2 HYDE, *INTERNATIONAL LAW 1654-1698* (2d ed. 1945), 2 OPPENHELM, *INTERNATIONAL LAW*, ch. 2 (6th ed. Lauterpecht, 1944); 7 MOORE, *INTERNATIONAL LAW* 154 (1906); HACKSWORTH, *INTERNATIONAL LAW* 147-170 (1943).

²⁰ *Supra* note 9.

²¹ CORWIN, *CONSTITUTION OF THE UNITED STATES* 244, 245 (1963); Vanderbilt, *War Powers and Their Administration*, 1942 ANNUAL SURVEY OF AMERICAN LAW 106, N.Y.U. (1942). See also, *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COL. L. REV. 359 (1947); *Yakus v. U.S.*, 321 U.S. 414 (1944). On limitation of presidential power, see, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and Freund, *The Year of the Steel Case*, 66 HARV. L. REV. 89 (1952).

become subject to special Presidential and Congressional regulations not otherwise permissible in time of peace.²² Governmental decisions which control economic aspects of the war and its related facets are conducted by Congress directly, by Congressional delegation of power to the President, or by inherent Presidential power either pursuant to his Commander-in-Chief power or by authority deriving from the declaration of a state of emergency.²³ Under conditions of national emergency, which are vaguely and ambiguously defined, patriotic fervor and exalted nationalism make it difficult to voice moderation and impractical if not impossible to raise questions as to the limitations of such powers. When the emergency passes, the need for more perspicuous guidelines as to the extent of these powers becomes compelling, particularly when hasty decisions urged by the passion of the time remain a stark reminder of immoderation and unfairness.²⁴ One such guideline may be found in the distinctions which emerged from *Milligan*²⁵ and reaffirmed in *Ex Parte Quirin*;²⁶ its true significance is not in what it said but in what it implied: war is not a concept with a fixed meaning applicable uniformly throughout the law but a reality with a variable content and applicable to shifting theaters of operations.

Military or policing activities, conducted within the territorial confines of the United States, raise only questions of domestic law, unless a foreign invasion takes place. Military activities abroad, while they are subject to constitutional limitations, are concurrently a question of international law.²⁷ The conduct of war abroad, jurisdiction over foreign occupied territory, citizens of the occupied areas, aliens in the United States who are citizens of enemy countries, and combatants are subject to international law.²⁸ To the extent that United States troops violate international law, they are also subject to its sanctions, as was established in the London Treaty, and the

²² *Id.*; and *Korematsu v. U.S.*, 323 U.S. 214 (1944).

²³ CORWIN and Vanderbilt, *supra* note 21.

²⁴ *Supra* note 22, and *Korematsu v. U.S.*, 323 U.S. 214 (1944).

²⁵ *Ex Parte Milligan*, *supra* note 9.

²⁶ 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946) (upholding validity of military tribunals under war power).

²⁷ *Supra* note 9, and *infra* note 28 and 32.

²⁸ McDUGAL AND FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, ch. 7 (1960); BISHOP, *supra* note 16, at 798-815; and ORFIELD AND RE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 981-989, 1020-1041 (2d rev. ed. 1965).

Nuremberg and Tokyo trials.²⁹ The United States Supreme Court in *Ex Parte Quirin*³⁰ held that:

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing 'the crime of piracy, as defined by the law of nations' is an appropriate exercise of its constitutional authority . . . since it has adopted by reference the sufficiently precise definition of international law Similarly, by the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commission,' Congress has incorporated by reference . . . all offenses which are defined as such by the law of war³¹

In this case, the Supreme Court used international law to define a war crime, finding the implied authority in the 15th Article of War.

The practice of other nations confirmed that the principle applied in this case had been adopted by other states. Several war crimes trials took place in the Soviet Union toward the end of the war. While none of these trials were international in character, they became precedents to the International Military Tribunal (Nuremberg) and the Tokyo War Crimes Trials in the sense that they applied the principle of individual responsibility under international law and rejected the absolute defense of superior order and act of state when the act violated fundamental laws of war and humanity.³²

There is no exact precedent for the International Military Tribunal at Nuremberg or the Tokyo Trials; nevertheless, it is evident that

²⁹ The London Treaty, 59 Stat. 1544 (1945), T.S. No. 279 (effective 1945).

³⁰ *Ex Parte Quirin* supra note 26.

³¹ *Ex Parte Quirin* supra note 26, at 29-30.

³² E.g., OPPENHEIM, 2 INTERNATIONAL LAW (7th ed.; WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1960); CREEL, WAR CRIMINALS AND PUNISHMENT (London, 1945); Biddle, *The Nuremberg Trial*, 33 VIRGINIA L. REV. 679 (1947); Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT. L. 20 (1947); GLUOCK, WAR CRIMINALS (1944); Note, 46 CORNELL L. REV. 326 (1960); Spurlock, *The Yokohama War Crimes Trials*, 36 A.B.A.J. 387 (1950); Cowles, *Trial of War Criminals by Military Tribunals*, 30 A.B.A.J. 330 (1944). See also, the Charter of the International Military Tribunal, Aug. 8, 1945, art. 8, 59 Stat. 1544 (1945), E.A.S. 472 (effective 1945). Article 8 expressly rejected the plea of superior orders as an absolute defense. It provided, as follows: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Irresistible fear of immediate and extreme consequences in case of disobedience is a consideration properly to be taken into account as a mitigating factor in the matter of superior orders, no such circumstances exist in the case of commanding officers at the highest level of the military hierarchy.

the development of international law in the last fifty years provided many of the prerequisites for the action taken by the Allies at the London Conference of 1945. The idea of an international tribunal was clearly contained in the punitive provisions of the Versailles Peace Treaty. The principle of individual responsibility for violations of the laws of war had been accepted in the First World War, and was extended to other crimes in the period between the two world wars.³³ At issue remains, among others, the degree of adherence by municipal law to international law.

Violations of international law including piracy, felonies on the high seas, and "offenses against the Law of Nations" is recognized under Article IX of the Constitution as subject to federal jurisdiction and congressional power to regulate it. Even during the constitutional debates, it was found that the Law of Nations had a sufficiently defined content as to the meaning of piracy.³⁴ Later *Ex Parte Quirin*³⁵ found the Law of Nations sufficiently clear on the laws of war and offenses against them.

It was noted by Professors Orfield and Re that:

When issues of International Law are involved, local courts in most states regularly apply rules of International Law. But if there is a conflict with National Law, they are less frequently applied. In this connection one of the chief jurisprudential problems of International Law arises. Those who take the position that International Law and Local Law are two separate systems are said to adopt the 'dualist' theory. Those who regard them as parts of the same legal systems follow the 'monist' theory. . . .³⁶ It has been asserted that rules of International Law are applied in courts of the United States for five reasons: (1) International Law developed from Natural Law and the courts must apply Natural Law; (2) the provisions of the Constitution concerning treaties and the power of Congress to

³³ *Supra* note 29.

³⁴ 1 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 226 (1866), wherein the "Law of Nations" was understood as representing the contemporary standards of international law. It was held that its definition of piracy was adequate and it was adopted in U.S. municipal law in *U.S. v. Smith*, 5 Wheat. 153 (1820), *The Marianna Flora*, 11 Wheat. 1 (1826); *U.S. v. Brig Malek Abhel*, 2 How. 209 (1844).

³⁵ *Ex Parte Quirin*, *supra* note 26, at 27-28, wherein the Court stated that Congress under the Articles of War "has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the laws of war, are cognizable by such tribunals."

³⁶ See, Kelsen, *GENERAL THEORY OF LAW AND THE STATE* 328-388 (1945); OPPENHEIM, 1 *INTERNATIONAL LAW* 35-39 (8th ed., 1955); ROSS, *TEXTBOOK OF INTERNATIONAL LAW* 59-73 (1947); Borchart, *Relation between International Law and Municipal Law*, 27 *VA. L. REV.* 137 (1940); Starke, *Monism and Dualism*, 17 *BRIT. YB. INT'L L.* 66 (1936).

punish crimes against International Law; (3) International Law was a part of the Common Law of England, and thus became part of American Law; (4) admission into the family of nations requires the acknowledgement of the binding force of International Law; and (5) there is an international obligation to apply International Law in certain types of cases, such as prize cases.³⁷

The implications which arise from a condition of war will range from applicability of laws of warfare under international law to measures of internal law authorized by the war powers or national emergency. The most certain and immediate consequence will be the application, to United States military personnel, of the war provisions in the Uniform Code of Military Justice (hereinafter UCMJ).

The armed forces are restricted in their conduct in war by international laws as well as military regulations. Conflicts between international law and municipal law in terms of jurisdiction over war crimes are resolved in favor of the former. It was held in the *S. S. Lotus* case³⁸ (*France v. Turkey*) decided by the Permanent Court of International Justice in 1927 that in criminal cases municipal jurisdiction applies generally until and unless such jurisdiction comes into conflict with a principle of international law, in which case the latter will prevail.

The imposition of international sanctions for violations of the Laws of War and Warfare embodied in "war crimes," "crimes against humanity," "crimes against peace," and "genocide" establishes the principle of individual responsibility and bars the absolute defense of

³⁷ ORFIELD AND RE, *supra* note 28, at 27-28; and see, Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932). See also, HACKWORTH, 1 DIGEST OF INTERNATIONAL LAW 24-39 (1940); WRIGHT, THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES (1916); Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 792 (1952, 1953); Hyde, *The Supreme Court of the United States as an Expositor of International Law*, 18 BRIT. YB. INT'L L. 1 (1937). In *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), the court suggested that in a case not otherwise depending on federal law the immunity of a diplomat is to be regarded as conferred by state rather than federal law, hence the federal court should be guided by the interpretations of international law made by the courts of the state in which it sits. Compare, Jessup, *The Doctrine of Erie Railroad v. Tomkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939); Recent Cases, 62 HARV. L. REV. 701 (1949) and 33 MINN. L. REV. 540 (1949). See, however, BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE (1966), conflicts between Soviet Municipal Law and International Law are resolved in favor of the former.

³⁸ P. C. I. J., Ser. A., No. 10 (1927). See, e.g., Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177; MUELLER AND WICE, INTERNATIONAL CRIMINAL LAW, chs. 1 and 3 (1965).

act of state and that of superior orders.³⁹ It is generally accepted that whenever conflict exists by reason that municipal law, or governmental orders command the performance of conduct violative of the international laws of war, the latter is held applicable and imposes individual responsibility notwithstanding the former. Beyond specific restrictions of international law, municipal law applies.⁴⁰

What constitutes a state of war and what internal municipal laws or regulations apply in this case are solely a matter of domestic law and subject only to constitutional limitations. In *United States v. Anderson*,⁴¹ the United States Court of Military Appeals (hereinafter USCMA) held that by reason of the Viet Nam military involvement the United States was in a "time of war"⁴² for purposes of application of UCMJ provisions. Any interpretation of UCMJ war provisions does not have to be based on a congressional declaration of war because "time of war" is essentially an "overt confrontation of arms between opposing powers."⁴³ Reviewing the SEATO Treaty⁴⁴ and the

³⁹ After World War II the concept of war crimes was expanded under the Moscow Declaration of October 30, 1943, the London Treaty of 1945 and the International Military Tribunal at Nuremberg, to include:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder; ill treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. The United Nations General Assembly in the Resolution of December 11, 1946, denounced genocide as a war crime. It was defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

⁴⁰ *Supra* notes 32 and 39.

⁴¹ 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

⁴² *Id.* at 589, 38 C.M.R. at 387.

⁴³ *U.S. v. Ayers*, 4 U.S.C.M.A. 220, 227, 15 C.M.R. 220 (1953).

⁴⁴ South-East Asia Collective Defense Treaty, 60 U.S.T. 81, T.I.A.S. 3170 (1954).

Gulf of Tonkin resolution,⁴⁵ the majority opinion of Chief Judge Quinn concluded that it "precipitated a state of armed conflict between the United States and North Viet Nam . . . (and) When a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."⁴⁶ The legal basis for Chief Judge Quinn's conclusion that the "state of hostilities is expressly recognized"⁴⁷ is hardly sustainable. Neither SEATO, Tonkin, nor military appropriation warrants such a legal determination, even though, in fact, a military confrontation exists. Judge Kilday's concurring opinion de-emphasized the legal significance of declaring war by reviewing the United States military history and concluded that a state of war is a factual contention by and between sovereign nations engaging in material hostilities. Where such a real determination is made, the query should not be whether Congress explicitly declared the state of war but whether it has not expressed itself contrary to it or is opposed to the *fait accompli*. Where Congress implicitly and tacitly recognized the existence of warring conditions, the courts should not look for technical niceties to apply the wartime provisions of the UCMJ to military personnel. Judges Kilday and Ferguson rejected Chief Judge Quinn's contention that the Tonkin resolution has the character of an express declaration of war but agree that war is a flexible state of fact not necessarily related to its constitutional meaning which is intended for different purposes.⁴⁸

Contemporary realities of world affairs present a varying framework of differing consequences as to war and its ramifications. Cold war contentions, propaganda wars and instruments of massive destruction cause conventional military activities to become a limited safety valve with narrow objectives and a restricted theater of operations with controlled military technological means.⁴⁹ The effect of outlawing wars of aggression in itself limits the scope of war and causes

Note that no mention of the Geneva accords of 1954 is made in the case, *see* HULL AND NOVOGRAD, *LAW AND VIET NAM* (1968).

⁴⁵ S. REP. NO. 1329, 88th Cong. 2d Sess. — (1964); and 88-408, 88th Cong. 2d Sess., 78 Stat. 384 (1964); and *supra* note 18; and U.S. v. Wise, 370 U.S. 405 (1962).

⁴⁶ U.S. v. Wise, *supra* note 45, at 590.

⁴⁷ U.S. v. Wise, *supra* note 45, at 590.

⁴⁸ U.S. v. Wise, *supra* note 45, at 590-544.

⁴⁹ McDougal and Feliciano, *supra* note 28.

its terminology to be altered.⁵⁰ These and other practical and legal considerations from control of nuclear weapons to disarmament are reasons enough to avoid the hard and final consequences of formal declarations of war and their potential sequels. The analysis of what constitutes war becomes a qualitative evaluation and not a quantitative one, and activities and means short of war will be broadened in concept but limited in scope. The modern concept of war must be devoid of a fixed meaning bearing potentially disastrous consequences. It should be based on a factual reality with a variable content including shifting theaters of confrontation and contentions limited in their area, scope, and the right of additional third parties to intervene. The acceptance of such a concept in United States military law would avoid legal extrapolations from indications, or lack of it, of congressional intent; and while broadening the base of what constitutes "time of war," it limits its scope and extent for its applicability to the military (and for international and political purposes).

To label the Viet Nam contention a war based on international commitments and congressional approval means that all war time provisions apply to all those subject to military jurisdiction wherever they may be and whatever they may do regardless of any relationship to the actual theater of military operations. It may even become the basis of international cognizance of the judicially declared condition which could conflict with United States foreign policy and official pronouncements. If the USCMA finds express congressional approval of the war and then recognizes its *de jure*, it seems hardly feasible for our officials to deny it for international purposes. The SEATO Treaty may authorize the President to dispatch troops to a signatory state including South Viet Nam—the Gulf of Tonkin resolution authorizes him to use defensive measures to protect United States lives where they are lawfully permitted to be and acts of aggression by other nations against the United States warrant defensive action. However, the interpretation and extent of any of these conditions and their implications are matters of international law first even though concurrently raising constitutional issues of proper power and extent of authority.⁵¹ For a military court to enter its findings based upon a construction of the aforementioned international com-

⁵⁰ *Supra* note 17.

⁵¹ See e.g., *Symposium—Legality of United States Participation in the Viet Nam Conflict*, 75 *YALE L.J.* 1084 (1966); Partan, *Legal Aspects of the Vietnam Conflict*, 46

mitments of the United States without resort to international law is to construe our municipal jurisprudence superior to international law and allows the court to take a political *parti pris*.

To reach the conclusion that the Viet Nam contention is a de facto war and that such a military confrontation warrants the applicability of UCMJ provisions of "time of war" does not require any international basis. A de facto military contention does not have to be a war within the meaning of the Constitution or in international law to authorize the application of war time provisions to military personnel actually engaged in the theater of operations. To avoid the apparent conflict between the need for different treatment of some military personnel at some times and in certain theaters and the established meaning of war in a constitutional and international law sense would require only a different meaning to be given to "time of war" in the UCMJ.

The *Anderson*⁵² decision raises constitutional questions which the three opinions have not resolved. The hasty conclusions of that case will open a whole set of areas of questioning, the least of which is not individual standing to question the validity of the Court's conclusions on those premises which heretofore had been avoided. It can hardly be argued now that SEATO and the Gulf of Tonkin Resolution are not justiciable because they are political in nature, for the Court has relied upon them and its conclusion has raised questions of the legality of the war under international and constitutional law, in spite of the fact that it purported to resolve them.⁵³

B. U. L. REV. 281 (1966); Comment, *The United States in Vietnam: A Case Study in the Law of Intervention*, 50 CALIF. L. REV. 515 (1962). Wright, *Legal Aspects of the Viet Nam Situation*, 60 AM. J. INT'L L. 750, 768 (1966), ("[t]he issue seems unimportant in view of the broad Constitutional powers of the President to use armed force without Congressional support or declaration of war"). Compare, Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1091-93 (1967), with Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L. J. 1122, 1154 (1966).

⁵² *Supra* note 41, 38 C. M. R. (1968).

⁵³ See, *Mora v. McNamara*, 389 U.S. 934 (1967); *Luftig v. McNamara*, *supra* note 2. Questions as to the legality of calling up reserves is now pending also.

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