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Chapter 1

Definitions: What Is a Declaration of War?

A DECLARATION is a performative speech act. It is the public announcement of a decision or a determination. It specifies the reasons for or the causes of the decision and the proposed response or solution:

I [President George W. Bush] have determined that the damage in certain areas of the State of Louisiana, resulting from Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Louisiana (Congressional Research Service 2005, 8).

A DECLARATION OF WAR¹ is a performative speech act. It is the public announcement of a decision or determination to go to war. It states the *casus belli* by 1) INDICTING and 2) DENOUNCING the gravamina, *i.e.*, the reasons for or the causes of the decision, and 3) states the proposed PEACE TERMS / WAR AIMS. When the question of war or peace is raised in a society, a declaration of war is the affirmative answer.

The only fully open and determined declaration in American history is the *Declaration of Independence*, found in Appendix A.

THE POWER TO DECLARE WAR, therefore, resides in the taking of the decision. It does not reside in making the public announcement.

Optimally, this power is exercised by a substantively legitimate declarer of war in due form, that is, in an open and determined declaration (See below LEGITIMATE-ILLEGITIMATE DECLARATIONS OF WAR and THE FORM AND CONTENT.).

Although desuetude, the international law explaining an optimal exercise of the power to declare war is Article I of Hague Convention III of 1907, *Relative to the Opening of Hostilities*, "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."

However, most wars in the past five thousand years have not been declared by a substantively legitimate declarer of war in due form. Rather, conventionally legitimate or simply illegitimate declarers have initiated these wars with FUNCTIONALLY EQUIVALENT SPEECH ACTS.

A FUNCTIONALLY EQUIVALENT SPEECH ACT is usually a military "order" from the nation's war leader, combined with a "public announcement" (See below FUNCTIONALLY EQUIVALENT SPEECH ACTS, AUTHORIZATIONS, and AN AUTHORIZATION TO USE MILITARY FORCE (AUMF)).

A DECLARATION OF WAR² is a performative speech act that, *retrospectively*, articulates the *casus belli* in terms of "a History of repeated injuries and Usurpations."

The grievances so listed, along with the proposed peace term / war aims, determine or justify the war in the eyes of the declarer, if not the world. The gravamina listed may be indicted either *conditionally* or *absolutely* (See below.).

A DECLARATION OF WAR³ is a performative speech act that, *prospectively*, enacts the transformation of the state and condition of peace into the state and condition of war, either *conditionally* or *absolutely*.

To clearly and unequivocally effect this transformation, the declaration must be open and determined in due form, in accordance with Hague Convention III. If not determined, the war has no visible, no official cause or justification, as was the case during the American Revolution before 4 July 1776.

If not open, no one can be sure that the decision was taken by a legitimate public authority. As Jean-Jacques Rousseau observed, "The foreigner, whether king, individual, or people, who robs, kills or detains the subjects, without declaring war on the prince, is not an enemy, but a brigand" (Rousseau 1950, p. 10).

The declaration must also be open so that the world--one's own people, the enemy's people and government, and the populations and governments of neutral powers--may know of the transformation from peace to war.

This knowledge is necessary so that all three groups can make the necessary changes in their relationships and behavior to conform to the laws of war, which have now been invoked.

A DECLARATION OF WAR⁴ is a performative speech act that is *sui generis*. It is neither an executive nor a legislative act. As James Madison explains in his 1793 *Helvidius* paper:

A declaration that there shall be war, is not an extension of laws: it does not suppose pre-existing laws to be executed: it is [also] not, in any respect, an act merely executive. It is, on the contrary, one of the most deliberate acts that can be performed: and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war; and of *enacting*, as a *rule for an executive*, as *new code* [the Laws of War] adapted to the relations between the society and its foreign enemy. In like manner, a conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace (1900-10, 6:145).

A DECLARATION OF WAR⁵ is a performative speech act that, like all performative speech acts, possesses the quality of *transmissible authority*.

Thus, the originating speech act initiates a seemingly endless chain reaction. Subordinate speakers / actors, responding to the authority transmitted to them by the originating performative speech act, now speak performatively to accomplish the menu of subsequent tasks required to effect the intention of the original speech act in the world (Austin 1946. See also Scarry 2014, 45-7.).

This process of *transmissible authority* is well illustrate in the concluding paragraph of the English declaration of war against France for the War of the League of Augsburg, 1688-1697, known in North America as King William's War:

Hereby Willing and Requiring Our General of Our Forces, Our Commissioners for Executing the Office of High Admiral, Our Lieutenants of Our several Counties, Governours of Our Forts and Garisons, and all other Officers and Soldiers under them, by Sea and Land, to do, and execute all acts of Hostility in the Prosecution of this War against the French King [Louis XIV], his Vassals and Subjects, and to oppose their Attempts." At Hampton-Court, William and Mary, 7 May 1689 (Brigham 1968 (1911), 147-50. Full text in Appendix B).

THE FORM AND CONTENT of declarations of war may be either *conditional* or *absolute*.

THE CONTENT of both a *conditional* and an *absolute* declaration of war must include at a minimum 1) the *grievances* that have caused the conflict and 2) the preferred *remedies* that will restore peace in the peace terms/war aims.

THE FORM of a well-drafted *conditional* declaration of war goes beyond the minimal content. It includes 1) an INDICTMENT, 2) a DENUNCIATION, and 3) a CONDITIONAL DECLARATION OF THE PREFERRED PEACE TERMS/WAR AIMS.

No well-drafted *conditional* declarations exist in American history. A good example, however, is found in Livy:

. . .whereas Perseus, son of Philip, King of Macedonia, contrary to the treaty made with his father Philip and renewed with himself after the death of his father, had invaded allies of the Roman people, had devastated their land and seized their cities, and whereas he had entered on plans for preparing war against the Roman people, and had assembled arms, soldiers and fleet for the said purpose, resolved that, unless he offered satisfaction in these matters, war against him be undertaken (1919, XLII, xxx, 10-11).

THE FORM of a well-drafted *absolute* declaration of war goes beyond the minimal content. It includes 1) an INDICTMENT, 2) a DENUNCIATION, 3) a DECLARATION OF THE PREFERRED PEACE TERMS/WAR AIMS, and 4) an ABSOLUTE DECLARATION OF WAR.

The *Declaration of Independence* is the only well-drafted *absolute* declaration of war in American history.

LEGITIMATE DECLARATIONS OF WAR are well-drafted documents made by a LEGITIMATE PUBLIC AUTHORITY that exercises both its power to take the decision and its power to make the public announcement.

Legitimacy may be either *conventional*, as is the case with kings, emperors, presidents, prime ministers, and other leaders of the nation's military means; or it may be *substantive*, as is the case when a non-executive, non-legislative body declares war. Examples of non-executive bodies that possessed the capacity to declare war are the Athenian Ecclesia, the Senate of the Early Roman Republic, and revolutionary assemblies, such as the English Long Parliament, 1640, the Second Continental Congress, 1776, or the French National Assembly, 1793.

Legitimate declarations of war occur most infrequently in world history. The only example in American history is the *Declaration of Independence*.

ILLEGITIMATE DECLARATIONS OF WAR are 1) poorly drafted declarations made by a legitimate public authority or 2) declarations made by an illegitimate authority. An illegitimate declarer of war may or may not make the public announcement.

Illegitimate declarations of war occur most frequently in world history.

The intersection of legitimate and illegitimate declarations of war result in four cases that may be classified under of two main heads:

A. When a LEGITIMATE PUBLIC AUTHORITY Exercises the Power to Declare War:

1. The legitimate public authority both takes the decision and makes the public announcement.

This is the optimal case. It has occurred only once in American history, in 1776 when the Second Continental Congress drafted, debated, amended, and voted the *Declaration of Independence*.

2. The legitimate public authority takes the decision, but does not make the public announcement.

This case is possible, but no documented examples have been discovered.

B. When an ILLEGITIMATE AUTHORITY Exercises the Power to Declare War:

1. The illegitimate authority takes the decision and makes the public announcement.

This is the most frequent case over the past five thousand years because most nations have been ruled by kings or emperors without legislatures during most of recorded history. It is the very definition of the royal prerogative to wage war. It is the conventional foundation of the president's power to wage presidential war.

2. The illegitimate authority takes the decision, but does not make the public announcement.

This is a modern, recent case, made possible by the development of constitutional monarchies wherein the king rules in conjunction with a

legislature. It is also a very infrequent case. It has occurred only four times in American history, for the War of 1812, the Spanish-American War, 1898, and for World Wars I and II.

FUNCTIONALLY EQUIVALENT SPEECH ACTS are performative speech acts that enact a virtually identical material effect in the world by means of alternate words.

As noted above and explained more fully just below, a simulacrum of war (*i.e.*, an imperfect war / "armed conflict") is normally enacted by the nation's war leader issuing a military "order" and making a "public announcement" of his order. The resulting material effect in the world is virtually indistinguishable from an officially declared war.

An AUTHORIZATION is a performative speech act. It, first, *reaffirms* the decision-making power of another in a defined functional area. It, second, *acknowledges* a specific decision already made by the empowered other in its defined functional area. It, third, *approves* the decision that the empowered other has already made.

The need to seek an authorization certainly affects the empowered other's decision-making.

AN AUTHORIZATION TO USE MILITARY FORCE (AUMF) is essentially a legislative veto and is, therefore, presumed to be unconstitutional (*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983)). It is a recent post-World War II innovation.

First, it *reaffirms* the president's inherent royal prerogative to decide to go to war.

Second, it *acknowledges* a specific decision to go to war that he has already made.

Third, it *approves* of his decision to go to war.

Fourth, it *operates* as FUNCTIONALLY EQUIVALENT to a constitutionally mandated congressional declaration of war.

The need to seek "an authorization to use military force" certainly affects the war leader's decision-making. It requires him to coopt any political opposition to his decision so as to ensure passage of the "authorization" in his legislature. This requirement to coopt any opposition is said to restrain the scope of the executive's decisions to go to war.

And, finally, "an authorization to use military force" is not among the enumerated powers granted by the Constitution to the Congress.

DESCRIPTIVE TERMINOLOGY: Because declarations of war are performative speech acts, they are best described in the traditional manner of Roman law. The current positive terminology is inadequate to describe declarative speech acts.

Traditionally, legitimate declarations of war made by a conventionally legitimate declarer--a king or emperor--were described as PERFECT DECLARATIONS. Illegitimate declarations were described as IMPERFECT DECLARATIONS. The adjectives, PERFECT / IMPERFECT, described the quality of the declarative speech act, the enacting ceremony.

As legitimate and illegitimate declarations were traditionally described as either PERFECT or IMPERFECT, so wars were likewise described as either PERFECT WARS or IMPERFECT WARS. The perfection (*i.e.*, legitimacy) or imperfection (*i.e.*, illegitimacy) of the initiating declarative speech act traditionally determined the perfection (*i.e.*, legitimacy) or imperfection (*i.e.*, illegitimacy) of the material consequences of the declaration, the war.

Under pressure from positivistic legal theories during the late nineteenth and early twentieth centuries, the traditional descriptive terms for the legitimacy of the declaration of war-- PERFECT and IMPERFECT --were replaced by "declared" and "undeclared," while the material effects of legitimate and illegitimate declarations were replaced with "war," for legitimately declared wars, and "armed conflict," for illegitimately declared wars.

Interestingly, this positive terminology means that no "wars" have been fought since World War II, the last "declared war" in world history, according to positivistic legal theories. Still, two hundred and forty-four "armed conflicts" have occurred between 1946 and 2009 (Harbom and Wallenstein 2010, 501). From this positivistic perspective, the goal of the United Nations Charter "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" has been fulfilled. Semantically, at least.

A MONARCHY is an elegantly unified governing regime.

A MONARCHY exists when all governmental functions are enacted or discharged by means of the necessary, but not the sufficient, performative speech acts of a single person, the MONARCH.

That is, when the performative speech acts of a single person are the necessary, but not the sufficient, condition for the discharge or enactment of all governmental functions, such a regime is a MONARCHY.

A REPUBLIC is an inelegant divided governing regime.

A REPUBLIC exists when governmental functions are enacted or discharged by means of the necessary, but not the sufficient, performative speech acts of some mixture of individuals and collective bodies.

More broadly, the collective bodies speak performatively to enact policy ends, while the individuals speak performatively to enact the policy means enacted by the collective bodies. In this cooperative manner, both the ends and means of policy come into being, are known, and achieved.

In addition, other governmental functions, such as the interpretation and adjudication of laws, are also enacted performatively by a certain mix of collective and individual speakers.

The *constitution* of a REPUBLIC requires the matching of a certain number of governmental functions with a well-defined array of collective and individual speakers, that is, office holders duty bound to speak in their constitutionally defined roles or functional areas.

A CONSTITUTIONAL MONARCHY is the modern type of REPUBLIC.

The *constitutional* part of a CONSTITUTIONAL MONARCHY exists when:

- 1) a collective body speaks performatively to enact the ends of domestic policy, that is, a collective body speaks performatively to enact municipal law,
- 2) an hereditary or elected individual speaks performatively to enact or execute the means of the domestic policies enacted by the collective body, *i.e.*, to execute municipal law,
- 3) a collective body speaks performatively to adjudicate disputes between the enactor of domestic policy ends and the enactor of the domestic policy means.

The *monarchial* part of a CONSTITUTIONAL MONARCHY exists when the executive of the domestic policy means also:

- 1) commands the nation's military means in an additional role as the NATION'S WAR LEADER, and
- 2) determines, decides, and declares the nation's foreign policy, including answering the question of war or peace.

The NATION'S WAR LEADER is he who commands the military means of the nation.

Logically, the nation's war leader should be styled with a military title, such as king, emperor, commander-in-chief, and similar titles in other languages. But, more recently, with the development of dual-hatted executives in constitutional monarchies, the nation's war leader is now styled with a primarily non-military title, such as president, prime minister, chancellor, and similar titles in other languages.

Yet, he who commands the nation's military means is the nation's war leader, whatsoever his title may be. Civilian control of the nation's military cannot be achieved by addressing he who commands the military means of the nation with a non-military title.

TYRANNY, according to Aristotle, is the corrupted and deformed form of monarchy or "kingship":

Deviations from the constitutions mentioned [above] are tyranny corresponding to kingship, oligarchy to aristocracy, and democracy to constitutional government [*πολιτείας (politeias)*]; for tyranny is monarchy ruling in the interest of the monarch, oligarchy government in the interest of the rich, democracy government in the interest of the poor, and none of these forms governs with regard to the profit of the community (Aristotle 1944, 1279b).

Being the realist that he was, Aristotle found nothing objectionable to the rule of either the one, or the few, or the many as long as the rulers were virtuous and ruled for "the profit of the community." It was only the corrupt, self-interested forms to which he objected--tyranny, oligarchy, and democracy. Aristotle's emphasis on the need for virtue in rulers is undoubtedly salutary.

Two thousand years later, on Friday, 17 August 1787, near the lunch break, Pierce Butler of South Carolina rose in the Federal Convention in Philadelphia. He rose in order to object to vesting the power "To make war" in the legislature. Rather, "He

was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." The virtue of the presidents, Butler implicitly argued, would always protect the nation from tyranny.

Shortly after Butler spoke, James Madison of Virginia and Elbridge Gerry of Massachusetts introduced an amendment, "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Gerry then commented, "[I] never expected to hear in a republic a motion to empower the Executive alone to declare war" (Madison 1966, 476). Somewhat later, in *Federalist No. 51*, Madison opined that, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." In 1848, more than a decade before he became president and changed his mind, Abraham Lincoln appeared to share Gerry and Madison's skepticism about the virtues of rule by a one, "Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object" (1907, 1:111-2).

In the absence of a congressional capacity "to declare war," the institutional checks and balances implied in the Constitution's separation of powers with regard to war are rendered null and void. This means that the difference between presidential tyranny and presidential "kingship" rests solely on the personal virtues of the president, as Aristotle and Pierce Butler well knew. As a result, wars initiated by virtuous presidents for "the profit of the community" are not examples of tyranny, whereas wars initiated by unvirtuous presidents for "the interest of the monarch" are examples of tyranny.