Norms Connected with the Use of Force and Unilateral Acts of States

9.1 Introductory Remarks

I’ve already referred to catalogues of unilateral acts (legal transactions of international law) as comprising certain acts connected with the use of force.\(^1\) E. von Waldkirch could serve as an extreme in this respect. His presentation (one of the first in history) of unilateral acts of states in international law limits itself to two examples of such acts: declaration of war and declaration of neutrality.\(^2\) Obviously both are related to a use of force. One cannot get rid of the impression that while the earlier legal literature paid almost no attention to unilateral acts taken together (as a group category), some unilateral acts connected with war were at the very centre of attention. This relates first of all to declarations of war, and to a lesser extent to declarations of neutrality.\(^3\) Hence there can be no doubt about the need to extend the search for unilateral acts of states to the norms connected with the use of force (i.e. *ius contra bellum* and *ius in bello*).

From the outset it must be stressed that the present chapter is not aimed at questioning or weakening the prohibition of the use of force. No sentence and no word of the present work has this intention. If the UN Charter is not dwelt upon, it is mainly due to its multilateral character. The present remarks are also not aimed to revive the old terminology – referring mainly to war instead of armed conflict. The relationship between war *sensu stricto* and an armed conflict is less important for the present work. The remarks concerning war will be applied (at least to certain extent) to an armed conflict and even to examples of the use of force which are qualified neither as war nor as an armed conflict.

9.2 War and Unilateral Acts of States

The very question whether war is a unilateral act within the understanding adopted in this work might seem to be odd. It is obvious that the ontological

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\(^1\) Vide: Chapter 3.


\(^3\) Vide: *infra*. 
status of war is different and one cannot even see the slightest similarity between war and a unilateral act. T. Funck-Brentano and A. Sorel, for example, call war a ‘political act’.\(^4\) Even in trying to adopt that terminology it is obvious that war is not an act of one state, but of at least two. In addition the essence of a war could be hardly expressed in one word, and if so it is doubtful that the word ‘act’ would really be the proper one. However, it is worthwhile here to cite an original opinion of J. Hatschek. He defines war as a ‘sum of transactions of international law and, what’s more, unilateral legal transactions (einseitigen Rechtsgeschäften)’\(^5\).

A sum of unilateral transactions does not have to be itself a unilateral transaction. In addition, it’s very difficult to understand Hatschek’s opinion – both when analysed in abstracto as well as in the context of other views of that author. Interestingly enough, he excludes the thesis according to which war is legal relationship (Rechtszustand) between enemies. According to him, it is only such a relationship between the belligerent states and neutrals.\(^6\) In fact this would suggest the impossibility of the very existence of humanitarian law, which rests on the premise that some legal rules bind the parties to a conflict in their mutual relations. That is why the conception of J. Hatschek must be approached with the utmost scepticism.

Other authors have attempted to define war as well. Some definitions seem to be of importance for the present work.\(^7\) One should add that it is easier to find such attempts in the older literature, which is why references to works from the end of the 19th century and the beginning of the 20th century will dominate here. For example, E. von Waldkirch writes that war is not only a factual relationship, as it is regulated by many norms of international law.\(^8\) On the other hand, according to him calling war a legal proceeding (Rechtsverfahren) or process of international law (der völkerrechtliche Prozess)

\(^5\) J. Hatschek, Völkerrecht als System rechtlich bedeutsamer Staatsakte, Leipzig 1923, p. 290. Hatschek disputes the view of Pufendorf and Kant, for whom war is a treaty, that is a bilateral legal relationship.
\(^6\) J. Hatschek, op. cit., p. 288.
\(^7\) What remains outside the scope of our interest is whether a war without actual fighting is possible. This question is answered in a positive way, see e.g.: S. Hurwitz, Was Denmark at War?, Nordisk Tidsskrift Int. Ret, 1945, p. 51. Another aspect outside the scope of our interest here is the understanding of the word ‘war’ in the domestic law of a given state. For more on the combination of these two perspectives (of international and of domestic law), see: G.G. Phillimore, What is a State of War in Law, J. Soc. Comp. Legis, 1902, pp. 128–134.
\(^8\) E. von Waldkirch, p. 335.