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# Why Declarations of War Matter

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The *Washington Post* recently ran a story entitled "Would declaring 'war' on ISIS make victory more certain—or would it even matter?"[1] Among other things, it stated that today, "[m]ost legal scholars find a war declaration irrelevant." Maybe so, but I'm not one of them.

One scholar was quoted as saying that "[d]eclaring war does not serve any real function under modern international law, and it is not required as a matter of U.S. constitutional practice in order to wage war." Another argued that a formal declaration of war (against the Islamic State, anyway) would "look silly" when we are already using robust military force to combat terrorist activity.

Regardless of whether a declaration of war is appropriate in this case, I believe the legal (and the political) impact of declaring war is still much more significant—and nuanced—than these scholars suggest.

It is true that, for a variety of reasons, declarations of war have largely fallen into disuse since World War II. Part of the reason may be that following the introduction of nuclear weapons, major interstate war has all but disappeared.[2] Moreover, the establishment of the United Nations (UN) largely obviates the need for individual nations to declare war. Other than acts of immediate self-defense in conformance with the UN Charter,[3] it is the collective action of the Security Council, rather than the individual acts of states, that ordinarily authorizes "the use of force to maintain or restore international peace and security."[4]

That said, I disagree with the argument that simply because declarations of war are rarely used they are, *ipso facto*, "irrelevant." Would anyone say nuclear weapons are "irrelevant" simply because they have not been used in seventy years?

A 2014 Congressional Research Service (CRS) report, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications" says "declarations of war may have become anachronistic in contemporary international law,"[5] but also concedes that "[s]tates likely still retain a right to issue declarations of war, at least in exercising the right of self-defense; and such a declaration seemingly would still automatically create a state of war."[6]

The right of states to issue declarations of war is important because the existence or non-existence of a "state of war" determines whether or not a law of war regime[7] operates. In the absence of a state of war, international human rights law[8] (much like civilian criminal law) applies to the conduct of state and non-state actors. The laws of war and international human rights law are separate legal architectures,[9] and the latter could hamper a nation's ability to conduct operations against an insurgency or terrorist organization[10] since it carries greater restrictions on, for example, the use of lethal force.

What is required for a law of war regime to apply? Common Article 2 of the Geneva Conventions says that it applies "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 the state of war is not recognized by one of them."[11] Most traditional interpretations of the phrase "other armed conflicts" in Common Article 2 insist that an *international* armed conflict (i.e., between two or more nations) arises when there is "[a]ny kind of use of arms between two States."[12]

However, a *non-international* armed conflict (i.e., between a state and an organized armed group of non-state actors) that would justify the application of a law of war regime only comes into existence when hostilities reach a certain level of intensity.[13] In other words, not all violent incidents necessarily trigger the existence of an "armed conflict" in the absence of a formal declaration.

Why? For one, a government might use limited force against an armed rebel group to restore domestic stability without becoming party to an ongoing armed conflict or creating a state of civil war. Additionally, in the 1986 International Court of Justice[14] decision *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, otherwise known as *Nicaragua v. United States of America*,[15] the Court distinguished an "armed attack" from a "mere frontier incident,"[16] which lacks sufficient scale and effects to be classified as an "armed attack" and thereby justify the use of force in self-defense under Article 51 of the UN Charter.[17]

Notwithstanding those interpretations of Common Article 2 that would find that "any" use of force between nation states automatically creates an international armed conflict governed by a law of war regime, I believe that the better view today is that a clash between nations that is insufficiently egregious to warrant an Article 51 self-defense response (such as a "mere frontier incident"), is likewise inadequate to create a state of war. This may be one the reason why a U.S. government spokesman made a point of insisting that "we're not at war with Iran",[18] and that therefore the Geneva conventions did not apply when U.S, sailors were captured in January of 2016 by Iranian forces. This position remained unchanged even though a subsequent U.S. Navy investigation showed that the capture was effectuated by the threat of force, and was in violation of international law.[19]

Accordingly, I would argue that a declaration of war—even one based on a level of violence at the "mere frontier incident" level—would trigger the application of the

Geneva Conventions under circumstances where they would not necessarily apply in the absence of such a declaration. That is surely so with respect to non-international armed conflicts, and likely so with respect to classic international armed conflicts.

In other words, by automatically establishing a state of war, perhaps in circumstances where the level of violence would not otherwise create it, a declaration of war could control the timing of the application of the laws of war and influence other aspects of international law, including neutrality law. Depending on the circumstances, this ability could be quite significant from a strategic and tactical perspective.

As for domestic law, the CRS report noted above lists scores of legal authorities that are activated by a declaration of war. It is accurate to say that in many (but not all) cases they can also "be triggered by a declaration of national emergency or simply by the existence of a state of war." But "[i]n contrast, no standby authorities appear to be triggered automatically by an authorization for the use of force . . . ." For example, the 2001 Authorization for Use of Military Force does not necessarily activate all legal authorities that would exist in a state of formally declared war.[20]

Regarding use-of-force authorizations, the CRS report also points out:

> In the modern era authorizations have sometimes been quite broad; and some have, arguably, been equivalent in scope to a declaration of war. But the domestic legal consequences that flow from such authorizations still are substantially more limited than those that would flow from a declaration of war.[21]

Beyond the activation of standby authorities existing in statute, a declaration of war may also influence how the courts adjudicate national security issues, particularly questions related to the President's Commander-in-Chief authority pursuant to Article II of the Constitution.[22] The scope of presidential authority was discussed in the seminal 1800 case of *Bas v. Tingy*[23] in which, as the CRS report notes, the Supreme Court "drew a distinction between general, or perfect, war and limited, or imperfect, war, and understood a declaration of war under Article I, § 8, of the Constitution to commit the nation to a general war."[24] A "general war" would allow for a wider range of presidential authorities in furtherance of the war effort.[25]

The concept of a "general war" resulting from a formal declaration can still play an important role in a more modern context. Consider the landmark 1952 Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[26] In *Youngstown*, the Court struck down President Harry Truman's effort during the Korean War to seize steel mills beset by strikes when he believed it was necessary to get them back into production in the interests of national security. The Court held that absent clear statutory or Constitutional authority, the power to seize the mills was, under the facts, beyond unilateral presidential power, despite the ongoing hostilities in Korea.

Did the fact that there was no declaration of war for the Korean conflict matter in this decision? It seems so. In his book on the Supreme Court,[27] Justice William Rehnquist[28]—a Supreme Court clerk at the time *Youngstown* was decided—points out that unlike the approach at the start of U.S. involvement in World War II, "Truman and his top advisors deliberately refrained from asking Congress for a declaration of war" for the Korean conflict. In fact, Truman explicitly denied that the U.S. was "at war,"[29] instead characterizing the conflict as a "police action."[30] The uncertainty as to the exact implications of this "police action" being conducted in Korea under UN auspices[31] contrasted markedly with the clarity of the 1941 declaration of war against Japan, in which Roosevelt proclaimed that "we will not only defend ourselves to the uttermost but will make it very certain that this form of treachery shall never again endanger us."[32]

Moreover, by the spring of 1952, Rehnquist explains, "the Korean conflict appeared to be pretty much a stalemate; the result was an erosion of public willingness to sacrifice." He suggests that the relative ambiguity of the "objectives and strategy in Korea" helped produce a situation where the domestic burdens (such as the draft and price controls) willingly undertaken during World War II, "were tolerated less resolutely and with considerably more grumbling during the Korean conflict." Of particular interest is this passage:

> I think that if the steel seizure had taken place during the Second World War, the government probably would have won the case under the constitutional grant of war power to the president . . . .[33]

Thus, where there is a declaration of war, we may find that the Court is more deferential to Presidential actions, even if not explicitly backed by law or by clear Article II authority. Could we not expect the Court to be cognizant of the political intangibles a declaration of war produces? In 2011, George Friedman[34] articulated what a declaration of war uniquely achieves:

> First, it holds both Congress and the president equally responsible for the decision, and does so unambiguously. Second, it affirms to the people that their lives have now changed and that they will be bearing burdens. Third, it gives the president the political and moral authority he needs to wage war on their behalf and forces everyone to share in the moral responsibility of war. And finally, by submitting it to a political process, many wars might be avoided . . . . A declaration of war both frees and restrains the president, as it was meant to do.[35]

As Friedman indicates, a declaration of war can serve to focus the nation on a conflict, and energize the citizenry towards winning it. That kind of overt national commitment could strengthen military morale, which many believe is flagging today.[36] Indeed, the absence of a declaration of war is one reason a servicemember deployed to battle the Islamic State filed a lawsuit asking for an adjudication of the lawfulness of the military effort.[37] Having troops in the field uncertain about the legality of their actions is plainly inimical to the kind of morale and discipline that facilitates military success.

Furthermore, there is the issue of Congress's institutional responsibilities as to considering war declarations. Representative Adam Schiff[38] recently said that the "biggest failure of Congress" of the last several years has been "the failure for Congress to live up to its responsibility of declaring war or not declaring war."[39] According to Schiff, this failure sets a "terrible precedent by letting this war go on without any real debate over it."[40]

Internationally, it is hard to imagine that in the real world a formal declaration of war by a superpower like the United States would be considered "irrelevant" as the *Post* article suggests most legal scholars believe. Indeed, the fact that such a declaration is rare these days might signal to friend and foe alike a renewed and reinforced commitment to a particular conflict. In the real world, it could be quite significant.

And the significance would not necessarily be limited to a war declaration by a superpower. Consider that if in the aftermath of the Philippines' Permanent Court of

Arbitration victory (which included the holding that China "violated the Philippines' sovereign rights in its exclusive economic zone"[41]), the Philippines declared war on China. Would that be "irrelevant" to the U.S. or the international community?

None of this is meant to necessarily advocate or support a declaration of war against the Islamic State or any other actor at this time, as it may be that the U.S. can protect its interests without doing so. I can certainly imagine circumstances where a declaration of war, even if factually supportable, would be counterproductive.

For example, in responding to a 2014 *New York Times* editorial castigating Congress for its willingness to "abdicate one of its most consequential powers: the authority to declare war" in the conflict against the Islamic State, Notre Dame Professor Tanisha Fazal[42] offered a thoughtful rationale for not doing so:

> A major reason states do not declare war upon non-state actors is because doing so would accord these actors the very legitimacy, rights and status that states are fighting to keep them from gaining. We observe this most easily in civil wars, where rebel groups might declare war upon states, but states tend not to reciprocate, instead labeling rebels as criminals or terrorists.[43]

Obviously, a decision to declare of war is complicated one, and should be made only after very careful consideration of all the intended and unintended consequences. My point, however, is simply to show that deeming all declarations of war as "irrelevant" goes too far, and represents a troubling oversimplification of their actual meaning and effect from both a legal and political perspective.

*The views expressed in this article are those of the author and do not represent the institutional position of the U.S. government, Duke Law School, or the* Harvard National Security Journal.

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